

CHAPTER 10

GUARANTEE AND INDEMNITY

1 Prefatory

1.1 Guarantee and indemnity are technical matters which are difficult to explain in simple terms but are naturally of great concern to any administrator contemplating the introduction of registration of title. What do they mean in theory and, more important, what will they involve in practice? If the State introduces registration of title, will it find that it has assumed a responsibility which it cannot effectively undertake? Worse still, will it then be liable to pay huge sums in compensation for mistakes?

1.2 *Guarantee*, at least, would appear to be vital to the system, for it is the fact that entry in the register is proof positive of title which distinguishes registration of title from other systems of land record. The State warrants that the register is conclusive and that the title shown in it is 'absolute' or 'indefeasible' or 'unimpeachable' (though, as we presently explain, this quality is necessarily subject to certain limitations). Registration, in fact, secures the registered proprietor in his ownership of the registered land, and "to secure in (the possession of anything)" is one of the ways in which the Shorter Oxford English Dictionary defines 'guarantee'.

1.3 The word 'guarantee', however, is not generally used in registration statutes because, in its strictly legal sense, guaranty or guarantee¹ has the narrow meaning of a collateral promise to answer for the debt, default or miscarriage of *another* person, as distinguished from an original and direct contract for the promisor's own act. Thus it is axiomatic that a person cannot guarantee the performance of his own obligations, and therefore it is customary to provide in registration statutes that the State will make good any loss which is incurred by reason of some act, omission or mistake in the operation of the register; that is, the State undertakes an original and independent obligation or *indemnity*; it undertakes to pay compensation if the operation of the register causes loss. It does not explicitly 'guarantee' the title, any more than it explicitly guarantees the boundary in the Torrens statutes, as we have already mentioned in Chapter 8². This play on words is the more confusing, not to say irritating, since the whole objective of the exercise can be said to be 'guarantee of title', an expression not confined to laymen but used frequently, for example, in the 1857 Report, than which there can scarcely be a more august precedent. Nevertheless the conclusiveness of the register is effectively achieved in registration statutes without using the word 'guarantee', as we will now explain.

¹ Strictly speaking, a guarantor makes a guaranty to a guarantee, but colloquially 'guarantee' is generally used instead of 'guaranty' for 'an undertaking to be responsible for etc.'

² See 8.6.1

2 Conclusiveness of the register

2.1 The owner of a right in land is principally concerned to see that he has security and certainty; he wants to be sure that his right is readily ascertainable, that it will be safeguarded by the State, through judicial processes, against all corners, and that it is unassailable, even by the State itself, except under some power authorized by the law. This objective has been achieved in many registration statutes by means of two fundamental provisions:

- (1) that the title of the registered owner is as stated on the register, and
- (2) that no claim inconsistent with the register will be enforced against the registered owner; his rights are not liable to be defeated (i.e. they are 'indefeasible') except as provided by the statute.

Thus the warranty of title given by the statutory conclusiveness of the register operates both *affirmatively* and *negatively*.

2.2 *Affirmatively*, registration vests in the person registered the ownership or other interest which is particularized. The effect is to remove all uncertainty. The register, and the register alone, proves the right and who exercises it in respect of what land. It should be noted that this vesting provision goes further than merely to declare an existing title good; it positively confers the title stated, notwithstanding that, but for registration, the registered owner might have had no title at all.

2.3 *Negatively*, the statute warrants that the title is not affected by anything not shown on the register. It is not only unnecessary but also impossible to establish a right in the land by other means, such as custom or oral evidence or the production of documents of title. In English law, this has the very important effect that the bona fide purchaser of registered land is protected against the operation of 'the equitable doctrine of constructive notice'.³ He is safe from 'equitable interests' that do not appear on the register.

3 Qualifications on conclusiveness

3.1 It is obvious, however, that the conclusiveness of the register cannot be wholly absolute. For example, the mere fact that land happens to be registered will not protect it from the power (sometimes called 'eminent domain') which all Governments must have to acquire land compulsorily should it be needed for some purpose sanctioned by law. This is a cloud overhanging all landowners everywhere, registered and unregistered alike. Nor can registration relieve land from its liability to tax or rates, with the ultimate sanction that it may be sold for failure to pay. Again, it is impossible to alter the register the very moment a proprietor dies and, since a dead person cannot own land (or anything else), the register no longer-reveals the literal truth.

3.2 We can consider the qualifications on conclusiveness under three headings: (1) overriding interests, (2) voluntary conveyance, and (3) rectification.

(1) OVERRIDING INTERESTS

³ See 6.3.2

3.3 As we explained in Chapter 2⁴ there are certain interests which it is impossible or impracticable to record on the register but which nevertheless must retain their validity and effect they therefore 'override' the register. They are exceptions to the rule that only a registered right in land is enforceable, and they should be clearly set out in any statute governing registration of title (though unfortunately this is by no means always done). Before a dealing is effected on the strength of the register, the list of these exceptions must be carefully studied to see what action must be taken to discover anything that may be material to the title or to the enjoyment of the land but does not appear on the register. In fact, in England, overriding interests are regarded as being of such importance that a complete list of them is printed on every land certificate.' A typical list of overriding interests appears in Book 2.⁵

3.4 In any case, however, before a transaction can be safely effected, it is always necessary to inspect the land, for only inspection can reveal, for example, interests established by long possession, or those of a short-term tenant. This is not just a drawback of registration of title. Inspection is just as necessary in unregistered conveyancing, since interests like these would not, of course, be revealed merely by an examination of the title deeds. The plain fact is that when dealing in land it simply is not possible wholly to dispense with physical inspection of the property, though it has sometimes been unwisely supposed that registration of title can be an effective substitute.

(2) VOLUNTARY CONVEYANCE (i.e. a conveyance for no consideration)

3.5 A second qualification on the conclusiveness of the register in the English system is the provision⁶ that a person who acquires an interest in land without valuable consideration (a 'volunteer' as the lawyers call him) takes it subject to all rights and interests whether registered or not subject to which it was held by the person from whom it was acquired, though a bona fide purchaser from such a person will obtain a title free from all unregistered rights and interests (always excepting, of course, overriding interests). There is no need to treat the volunteer differently from the way in which the English system treats him, but it will save legal arguments if the point is made quite clear, as it is in the Kenya Registered Land Act discussed in Book 2. Baalman similarly made express provision in the ordinance he drafted for Singapore in 1956, commenting as follows:

"The Torrens system of land registration is predominantly a purchaser's system. Its aim is to facilitate the transfer of land as a commercial commodity by removing most of the risks of financial loss which beset purchasers under the general law. As a transferee who does not give value for his land is not exposed to this risk, there is no need to protect him. But the Torrens statutes have not always said so in plain words; in many of them it has simply

⁴ See 2.5.1

⁵ See 22.2.III.s30

⁶ Land Registration Act 1925 ss20(4) and 23(5)

been left to necessary implication. While the Courts have consistently drawn that implication, this Ordinance ... relieves them of the necessity to do so."⁷

(3) RECTIFICATION

3.6 The most important qualification on the conclusiveness of the register, however, arises from the fact that since the register is administered by human beings, it is necessarily subject to human frailty. It must be anticipated that mistakes will be made; also that fraud will be committed. It would be palpably wrong if the system were so inflexible that a title gained by fraud could not be restored to the person defrauded provided that could be done without adversely affecting an innocent third party. Again, it would not be merely wrong but manifestly absurd were it impossible to correct the register if, for instance, two different persons were by mistake each registered as the sole owner of the same piece of land, for there is no magic whereby both of them can have it. There can really be no doubt that machinery must be provided to enable the register to be rectified. Indeed, "no provisions in the Land Registration Act are more vital than those relating to rectification of the register and the provision of indemnity for error. The working practicability of the system depends largely upon them."⁸ Yet the 1862 Act in England made no such provision, it apparently being presumed that the stringent examination required by that Act before registering a title would preclude mistake, and it was not until 1897 that full power of rectification was given to the court in the Act which, by introducing compulsion, at last began to make the system work.

3.7 Recent registration statutes (at least those cast in the mould we recommend) provide that the register may be rectified:

- (1) by the Registrar, of his own motion, in minor matters which do not prejudice anybody and, in other matters, with the agreement of every person affected; or
- (2) by the court where it is satisfied that any registration has been obtained, made or omitted by mistake or fraud.

But in Torrens circles, although provision was made for compensation, the failure to deal specifically with rectification of the register still causes doubt and excites discussion. For example in the Torrens Act of New Zealand "the limits of the Registrar's powers of correction under s. 81 remain shrouded in the mist of uncertainty"⁹ and resolution of this uncertainty is one of the amendments advocated by Professor Whalan in an essay written to commemorate the hundredth anniversary of the passing of the Land Transfer Act 1870.¹⁰

⁷ Baalman *Singapore* 86 (Singapore Land Titles Ordinance 1956 s28 makes the estate of the registered proprietor paramount and subsection (3) reads: "Nothing in this section shall confer on a proprietor *claiming otherwise than as a purchaser* any better title than was held by his immediate predecessor." Our italics)

⁸ Stewart-Wallace *Land Registration* 44

⁹ G W Hinde 'Indefeasibility of Title since *Frazer v. Walker*' in *The New Zealand Torrens System Centennial Essays* (Wellington 1971) 69

¹⁰ Douglas J Whalan 'The Torrens System in New Zealand - Present Problems and Future Possibilities' in *The New Zealand Torrens System Centennial Essays* (Wellington 1971) 278

3.8 The question of whether rectification should be allowed in respect of first registration is discussed at length in Chapter 15¹¹ since it is bound up with the process of systematic adjudication. All that we need say here is that as the purpose of adjudication is to establish finality, it can be argued that if first registration is so arranged that there is full opportunity for competing claims to be properly ventilated and determined, then the final decisions, after a suitable period for appeal, should not be liable to be upset. The counter argument is that the best of systems can go awry - the need for a power to rectify at all is, of course, the best support for this proposition - and that it would be as wrong to exclude first registration from that power as it would be to exclude subsequent registration. Provided that due regard is paid to the principle underlying the limitation of actions that there must come a time when stale suits can no longer be entertained, it seems only sensible to allow a court to put right what can be shown to be wrong if that can be done without adversely affecting any innocent third party.

3.9 There is, however, one vital restriction on the power to rectify. If registration of title is to confer that complete security and certainty which is its principal merit, then it must be provided that no rectification can be allowed against a bona fide purchaser for value who is in possession and had no knowledge of the omission, fraud or mistake upon which the claim for rectification is based. This is what gives registration of title its great advantage over any insurance scheme, such as those operated by the American title guarantee companies. Under an insurance scheme a bona fide purchaser in possession may receive compensation for the land he loses as a result of a judgment against him, but only a State system of registration of title can ensure that he actually retains the land itself. Thus the English system provides that the register shall not be rectified so as to affect the title of the bona fide purchaser who is in possession, but adds the qualification "unless the immediate disposition to him was void".¹² In that case, however, he would be entitled to pecuniary compensation for his loss. This raises the whole question of indemnity and the money payable by the State as compensation to a person who suffers a loss which, but for the fact of registration, he would not have incurred. It is its liability on this score that particularly worries any administration which is proposing to introduce registration of title.

4 Compensation

4.1 The case for providing compensation for an innocent person who suffers loss because of the effect of registration would appear at first sight to be just as incontestable as the case for allowing rectification. In registered conveyancing the transfer and vesting of ownership are effected not by the execution of the instrument of transfer or other act of the owner but by the State through its officer, the Registrar. It is registration which is the operative act. Anybody who is thereby deprived of an interest which otherwise he would have had must be entitled to compensation from public funds. This is the 'insurance

¹¹ See 15.7.11-13

¹² Land Registration Act 1925 s82(3)(b)

principle', the third of Ruoff's three fundamental principles with which, he suggested, registration of title must accord.¹³

4.2 The Torrens system recognized from the outset that compensation might be required, and provision was made for the establishment of an assurance fund in the first Act in South Australia in 1858; one half-penny in the pound (approximately one-fifth of 1%) on the value of the land was levied on all land brought under the Act. In England, however, it was not until compulsory registration was introduced in 1897 that an insurance fund was established to meet claims for indemnity; it was provided that this fund should be built up by annual allocations to it of a proportion of the receipts from land registration fees. Claims against the fund were few and small, and by 1930 it amounted to more than half a million pounds. In 1936 it was, except for £100,000, surrendered to the Treasury, with the proviso that should more than £100,000 be required the deficiency would be made good out of the Consolidated Fund.¹⁴

4.3 In Australia, writing in 1927, Kerr said, "The highest tribute that could be paid to the success of the Torrens system is the infrequency of claims on the Assurance Fund",¹⁵ and many such funds have been closed because of their 'indecent solvency' (as Baalman called it),¹⁶ it being provided that any compensation required should be found out of general revenue. The latest figures from New South Wales are that up to 1939 slightly less than £A211000 had been paid out of the fund. Since then three payments have been made (as acts of grace and not as a result of court action): £A 108 in 1942, £A 61 in 1949, and \$A 12,800, the last being the cost of paying out a mortgage given after title acquired by forgery, thus once again highlighting this danger to the system.

4.4 Regrettably, however, we must dispel the common euphoric assumption that assurance funds never run into difficulty. Two cases from the United States fairly curdle the blood. In California in 1918, a Mr and Mrs Gill bought land on the strength of a Torrens certificate showing a clear title, but found that it had originally been obtained without disclosing a mortgage for \$55,000 on the property. The mortgagees sued to foreclose and judgment was given in their favour. The property was sold to satisfy the judgment. There appeared to be no doubt that the Gills were entitled to recover their loss from the insurance fund, but it was not until 1937, after some nineteen years of costly litigation with numerous trials, appeals and retrials, in which the Attorney-General of the State interposed every conceivable objection, that the Gills finally obtained a judgment for \$48,000, only to find that the fund amounted to just over \$39,000, and so, when they had taken it all, more than

¹³ See 2.6.12

¹⁴ Between 1 July 1958 and 31 March 1972 (nearly 14 years) £49,351 was paid on 294 claims, an average of £168 per claim, set against a current *annual* revenue of about £12m, and an *annual* handling of 225,000 applications for first registration, 1,400,000 dealings, and 1,470,000 official searches and office copies.

¹⁵ Kerr *Australian Lands Titles* 498

¹⁶ Baalman *New South Wales* 56

\$8,000 still remained unpaid.¹⁷ We will let the stark figures of the second case speak for themselves. In Nebraska in 1929 there was only \$182 in the assurance fund to satisfy a judgment against it of \$19,890.¹⁸ An assurance fund which is dependent solely on the contributions made to it on registration is obviously very vulnerable before it has had time to build up, and this will be a long process where registration is dependent on voluntary application.

4.5 The Californian case also illustrates the quite repulsive tenacity with which some jurisdictions are prepared to resist even valid claims upon the fund. There is another shameful example of this from Cook County in Illinois, where the Torrens system has had some success.¹⁹ A Mr and Mrs Eliason owned a parcel of land registered under the Torrens Act. They entrusted their certificate of title to a prospective purchaser who used it to forge a transfer to himself and then proceeded to sell the property to a man named Wilborn. After extended litigation, which ended only in the Supreme Court of the United States, the defrauded proprietors failed to recover the land. They then filed a claim against the assurance fund but were advised that they must secure a judgment before they could be paid. They had already been in the courts for several years and were, as their attorneys expressed it, "so fed up with litigation that they decided to pocket their loss".²⁰

4.6 When thus defended by all the resources of the State, an assurance fund is merely a mockery, and some countries, with greater frankness, have made no specific provision for indemnity; to this extent, said Hogg, the systems of registration of title in Fiji, the Federated Malay States (now Malaysia), and British Honduras, are imperfect.²¹ Yet these systems do not appear to have suffered adversely in consequence, and both Malaysia and Fiji are rightly proud of the system they operate so effectively. The Sudan legislation, so far from providing for an assurance fund, declares that "the registration of any instrument or the making of any entry in the register shall not in any case operate as a guarantee by the Government that the transaction ought to have been registered or that the entry was a proper one"²² and expressly exempts the Government from liability; yet registration of title is nonetheless successful in the Sudan; indeed, it is now so much a fact of life that it is difficult to imagine how the major towns, at least, could get on without it. There is no indemnity in Germany, and indemnity does not appear to be a feature of the Continental systems. It can be argued, therefore, that express provision for indemnity against loss is not essential to the effective operation of registration of title.

4.7 Yet in countries where private conveyancing is well established, particularly if modelled to some extent on English lines, the legal profession would certainly argue very fiercely that indemnity is imperative if registration of title is not going to imperil those who

¹⁷ *Gill v. Frances Investment Co* (1937) (see *Powell Registration in New York* at 98 for particulars; also E D Landels 'A Brief Review of the Torrens Experiment in the United States', an address given at the California Land Title Association Convention, Santa Barbara Calif June 1938)

¹⁸ *Jones v. York County* (1929)

¹⁹ See 5.11.6

²⁰ *Eliason v. Wilborn* (1929)

²¹ See Hogg *Empire* 384

²² Land Settlement and Registration Ordinance 1925

have rights in land, and that, in fact, the system would be seriously defective without it. If their legal advisers are so sure, it is unlikely that ordinary landowners will be convinced that no special provision for indemnity is necessary.

4.8 How then should legislation be framed, and what is the likely risk? First, we can discriminate between claims arising out of first registration and claims after there has been a registered dealing. We have already described how, in England, the Chief Land Registrar exercises a very wide discretion in accepting titles for first registration, and "the Insurance Fund has enabled compulsory registration to work with a swiftness, smoothness and freedom from irritating official requisitions on small matters, which in 1897 would have been regarded as incredible".²³ This, however, is peculiar to England, where a calculated risk is taken on accepting titles for first registration in order to avoid a close official check (costly and time-wasting) of every application submitted. This has not been the practice under the Torrens system, and in New South Wales, for example, Baalman pointed out that the latitude which the assurance fund was intended to allow the administration in its approach to conveyancing problems had not been exercised, with the result that in eighty-five years the Torrens system had failed to attract more than one-third of the area of land available for conversion;²⁴ but he was writing in regard to a system of purely voluntary application, and that is never likely to be effective.²⁵

4.9 How the system of indemnity works in England can best be illustrated by an actual example. P purchased at a public auction a piece of unregistered land which was being sold by a local authority to recover road charges unpaid by the owner O, whom they had been unable to trace. The transaction was not registered, as registration was not compulsory in that locality at that time. Some years later, when P came to develop the land he found that a house had been built on it and that in possession there was a stranger S, who had purchased the land from O and registered his title to it, since by then registration had been made compulsory on sale. S, therefore, was an innocent purchaser in possession and the register could not be rectified against him; so P had lost the land that he had legitimately purchased and would have recovered from S but for the fact of registration. He was therefore entitled to, and received, compensation from the Land Registry. One might say from this that right was done - S got his house and land, P was paid in full for what he had lost; only the State suffered, though 'suffered' scarcely gives the right impression if the size of the assurance fund is remembered. An insurance company 'suffers' when it has to pay out a large sum on the loss of, say, a ship; but who would suggest that marine insurance is not a very lucrative business or that title insurance is unprofitable in the United States? Insurance merely has to be competently, not unfairly, managed in order to be profitable.

4.10 Nevertheless, despite the profit that can be legitimately made from the insurance side of registration of title, the case we have just described illustrates the sort of situation that alarms a country contemplating the introduction of registration of title. We suggest,

²³ Stewart-Wallace *Land Registration* 47

²⁴ See Baalman *New South Wales* 379

²⁵ See 3.13.3, 5.4.3, 11.3.4

however, that such a case could occur only under a sporadic²⁶ system of first registration like that used in England (which we discuss in the next chapter).⁴ When S applied for first registration there was in existence, quite unbeknown to S, not merely a rival claimant to the land but unquestionably its rightful owner. It is inconceivable that the fact of P's purchase from the local authority would not have come to light in the process of *systematic* adjudication which we describe in Chapter 15; it could only be overlooked in the English piecemeal system which gives no more publicity than a notice in the Gazette referring to the individual parcel. The legislation of some countries, indeed, expressly excepts from indemnity damage resulting from mistakes or omissions on first registration²⁷ (but this may only be from excessive caution - or *ex abundanti cautela*, as legal draftsmen like to express it - if the only way that titles can come onto the register is by a process of systematic adjudication, for then there is little possibility of any valid claim for indemnity). It should be noted that systematic adjudication also avoids the misdescription of land, which is always a possibility when parcels are being identified without any consultation with adjacent owners; it is significant that Torrens legislation excludes from indefeasibility and from compensation any misdescription on first registration.

4.11 Limitation of the warranty on first registration can be fairly carried forward even to a purchaser for value, if the title is shown as 'limited' or 'possessory'²⁸ with the effect that any purchaser must investigate the title antecedent to registration just as if it were unregistered. In due course such a title can ripen into full ownership in accordance with the ordinary principles of limitation of actions. But once a title is registered as absolute the register is conclusive, and anybody dealing in good faith on the strength of it must be completely secure if registration is to have the merits claimed for it. This then brings us to the most difficult question of all, forgery.

5 Forgery

5.1 To what extent is the Registry to take responsibility for ensuring that alterations to the register are made only on the strength of a valid instrument? In England, in 1906, the solicitor of C, the registered proprietor of a charge, forged a transfer of the charge to O who presented it for registration and was duly registered as the proprietor of the charge. O was perfectly honest in the transaction, but nevertheless the court held that in presenting the instrument of transfer he had warranted it to be genuine and so had caused or contributed to the loss. This case²⁹ "drove a coach and four" through public confidence in the indemnity. "If registration did not protect as against forgery, thought the public, what good is it, and what does your scheme of indemnity amount to?"³⁰ Yet it was not until twenty years later that the Land Registration Act 1925 altered the law thus established and expressly provided that the proprietor of any registered land or charge claiming in good faith under a forged

²⁶ We describe and discuss 'sporadic' and 'systematic' adjudication in Chapter 11 – which must be read before the point we are trying to make in this paragraph will be really clear.

²⁷ e.g. Malawi Registered Land Act 1967 s140(1)

²⁸ See 11.11

²⁹ Attorney-General v. Odell (1906) 2 Ch 47

³⁰ Stewart-Wallace Land *Registration* 47

disposition shall, where the register is rectified, be deemed to have suffered loss by reason of such rectification and shall be entitled to be indemnified.³¹

5.2 "It has never been disputed, however, that while a certificate of title issued on a forgery may not be good in favour of the owner through the forgery, even though bona fide and for value, the real person holding such certificate of title may pass a good title to a third person."³² The emphasis is on *real* because of the decision in the celebrated (or dare we say 'infamous'?) case of *Gibbs v. Messer* which is so often cited in Torrens circles that it is useful to know, at least, the bare facts. Mrs Mary Stuart Messer owned property in the Australian Colony of Victoria. She went home to Scotland, and whilst she was away, her solicitor, Cresswell, who held her duplicate certificate of title, forged a transfer to an imaginary person whom he called Hugh Cameron. He presented this transfer for registration, and a duplicate certificate of title was duly issued in the name of Hugh Cameron. Cresswell, professing to be acting for Cameron, then arranged to borrow £3,000 from a Mr and Mrs MacIntyre: and himself attested the deed of mortgage which he signed in the name of the non-existent Cameron, now registered as the proprietor. This mortgage was duly registered. When the fraud was discovered Mrs Messer brought a suit against (1) the Registrar (Gibbs), (2) the mortgagees, and (3) Cresswell (who had absconded, leaving no assets). The Judicial Committee of the Privy Council, reversing the judgment of the Supreme Court of the Colony of Victoria which had affirmed the judgment of the court of first instance, held that the duty of ascertaining the identity of the principal for whom the agent acted rested on the mortgagees and that if they accepted a forgery they must bear the consequences. "Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid title to third parties who purchase from them in good faith and for onerous consideration." It was held that no damages were recoverable from the Registrar; the certificate of title and memorial of mortgage were cancelled, and a new certificate was issued in the name of the true owner, Mrs Messer.³³ (Their lordships did not explain what faith could be had in a register which could show, apparently with impunity, a non-existent person as the proprietor of land.)

5.3 We need not add to the vast quantity of writing that has been devoted to trying to rationalize this judgment which, in truth, flouts the fundamental principle of registration of title (as expressed by E. C. Adams in respect of the Land Transfer Act of New Zealand) "that title to land and estates and interests therein should depend upon state-guaranteed registration and not upon instruments *inter partes*".³⁴ Though the unfortunate victims in *Gibbs v. Messer* were unable to recover against the Assurance Fund, the State of Victoria subsequently set its house in order. The Transfer of Land (Forgeries) Acts of 1939 and 1951, the provisions of which are now contained in the Transfer of Land Act 1954, entitle a person who suffers damage by reason of a forged instrument which is registered to claim

³¹ Land Registration Act 1925 s83(3)

³² Thorn *The Canadian Torrens System* 192

³³ *Gibbs v. Meyser* [1891] A.C. 248

³⁴ Adams Land Transfer Act 1952 7

against the Assurance Fund. Furthermore the Privy Council, in a case from New Zealand³⁵ in 1967, determined to resolve once and for all the doubts left by *Gibbs v. Messer* and accepted the general principle that registration under the New Zealand Land Transfer Act confers on a registered proprietor a title which is immune from adverse claims other than the specified exceptions.

5.4 Another memorable case where possession of the land certificate facilitated forgery arose when John George Haigh, the notorious murderer, obtained the land certificate of one of his victims, whose bodies he dissolved in a bath of acid. He used the certificate to forge a transfer to himself, and so became the registered proprietor. He then sold the land for £4,000 repaying a mortgage of £2,500 out of the proceeds. The personal representatives of the deceased proprietor sought redress. They could not be given the land, because the transfer from Haigh was valid and the purchaser who knew nothing of the fraud had gone into possession;³⁶ they were therefore awarded £1,500 (being the current value of the interest in the land at the time it was transferred) together with their costs of £78. If Haigh had not bothered to transfer the land to himself, but had forged the transfer direct to the innocent purchaser then the 'immediate disposition' to the latter would have been void, and even though he had gone into possession, he would have lost the land though he would have recovered the money that he had paid out, namely £4,000 (£2,500 of which the Land Registry would doubtless have been able to recover since the mortgagees were a building society). It seems odd that a bona fide purchaser who has actually gone into possession should be able to lose the land, once the principle has been allowed that registration of title protects against forgery, but the question of who actually receives the monetary compensation makes no financial difference to the administration which finds itself responsible for paying it.³⁷ In this case, but for the mortgage, the cost would have been £4,000, but it could just as easily have been £40,000, had that been the value of the property.

6 Some propositions regarding indemnity

6.1 What decisions, then, is a Government contemplating the introduction of registration of title required to make in regard to indemnity? First and foremost, is indemnity really necessary at all, bearing in mind that there is successful registration of title without any formal indemnity in Malaysia, the Sudan, and Fiji, not to mention countries in continental Europe? To what extent should registration confer the right to compensation on an innocent person who suffers loss in a land transaction? The State pays no compensation if a title is unregistered, however diligent an innocent purchaser may have been. Nor does the State compensate the innocent victim of wrongdoing or mischance in other fields. Perhaps something can be drawn from the analogy of motor registration (though many conveyancers would scout the suggestion). Most countries successfully operate a system which requires all motor-cars to be registered and makes it a punishable offence not to

³⁵ *Frazer v. Walker* [1967] 1 A.C. 569

³⁶ See Land Registration Act 1925 s82(3)

³⁷ It should be noted, however, that in the legislation that we commend the position of the bona fide purchaser for value, who *is in 'possession'*, is safeguarded, even if the transfer to him was forged.

register a transfer. This is unquestionably a useful and beneficial service, both to the general public and car owners, existing and potential, but of course there is no warranty, let alone indemnity. It is, we suggest, by no means a foregone conclusion that indemnity is essential to the proper working of a system of registration of title to land.

6.2 If, however, public opinion demands indemnity then, it is suggested, first registration should be made an exception despite the fact that, in England, "if a person, though having no title to land yet becomes registered as proprietor of that land with an absolute title, he will prima facie be allowed to keep it; but if he is deprived of his land, he will prima facie be compensated for his loss".³⁸ It is difficult to understand the justification for this proposition. If the customer of a bank receives a statement mistakenly showing that he has paid in more money than he really has, he does not necessarily expect to receive the difference as a grant from the bank because it has been careless. If a person purchases unregistered land which, registration being compulsory on sale, he then registers and by mistake includes land not included in the sale, he suffers no loss if his title is subsequently amended to exclude the land that he never owned; he merely fails to profit from the mistake. (The position of a subsequent purchaser who buys on the strength of the register would obviously be different.) In any event, however, such a case is unlikely to occur if there is systematic adjudication, and so far as errors in survey are concerned, any question of compensation should be expressly excluded.³⁹

6.3 It should be noted that if provision is made for indemnity 'a lot of argument can be avoided if the law provides that where the register is not rectified, the indemnity shall not exceed the value of the interest at the time the mistake or omission was made, and where the register is rectified, indemnity shall not exceed the value of the interest immediately before the time of rectification. The procedure for claiming the indemnity should also be laid down and, of course, it should be expressly provided that the State may recover its loss from the person who actually caused it. Indeed, in New South Wales the person suffering the loss is required to bring, or attempt to bring, in the first instance, an action for its recovery against the person causing it, and it is only when that attempt fails that a person suffering loss can look to the assurance fund.⁴⁰ This procedure may merely increase the expense to no useful purpose and is not to be recommended.

6.4 Lastly, it is evident that the greatest danger arises from forgery; and if registries are to take responsibility for the soundness of every entry made in the register, then they must make certain that it is actually the registered proprietor (or his duly appointed attorney) who is dealing with the registered land. It is for this reason that legislation of the sort we commend in Book 2 requires the Registrar to verify the execution of an instrument before the register is altered on the strength of it.⁴¹ Obviously, however, there is no prospect of the adoption of any such procedure in England or Australia, where, indeed, the insurance element in the fees should take care of the risk, though it is by no means always

³⁸ T B F Ruoff Registered Land - The State Guarantee' 18(NS) *The Conveyancer* (March April 1954) 133

³⁹ See 8.6.8

⁴⁰ See Baalman *New South Wales* 382

⁴¹ e.g. Malawi Registered Land Act 1967 s105

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remembered quite how large a fund (appropriated to general revenue) has been built up for this very purpose.

6.5 In Book 2 we examine the provisions made for indemnity in statutes based on the Kenya Registered Land Act 1963. There are two very simple principles. If an innocent person suffers loss because of a fault in registration (other than a first registration) he is entitled to compensation, and secondly, the possession of a registered purchaser for value who has no knowledge of the fraud or mistake will not be disturbed, thus effectively resolving the problem of who takes the money and who the land where two innocent parties are concerned. Such a problem, however, cannot arise if the procedure laid down in the Act is faithfully followed. This in its turn requires from the registry staff a high standard of competence and of course absolute integrity.