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The Law Reports

Chancery Division

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Chancery Division

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Prestige Properties Ltd v Scottish Provident Institution and another

[2002] EWHC 330 (Ch)

2002 Jan 30, 31;
Feb 1; 4, 5; 8; 28;
March 13

Lightman J

D

Land registration — Register — Error or omission — Official search certificate reflecting error — Claimant relying on certificate and suffering loss — Whether registrar liable to pay indemnity — Whether claimant's loss due to own lack of proper care — Land Registration Act 1925 (15 & 16 Geo 5, c 21), s 83 (as substituted by Land Registration Act 1997 (c 2), s 2)

E

When the claimant purchased some land in 1997 it obtained an official search certificate from the Land Registry stating that a small parcel of the land was unregistered. The claimant failed to apply for first registration of the parcel. In reliance on the certificate the claimant completed a sale of the property to the first defendant on the basis that the first defendant would retain a fixed sum of money if it was not able within six months to obtain first registration of the unregistered parcel. When the first defendant came to register the land it was told that due to an error in the filed plan the search certificate had been incorrect. The parcel was in fact three strips of land and all of it was registered. Furthermore the first defendant had already obtained one of the strips in the land it had purchased from the claimant and the other two strips were parts of other registered titles. The first defendant refused to pay over the retention to the claimant on the ground that it had been unable to obtain first registration of the parcel.

F

On a claim against the Chief Land Registrar for an indemnity under section 83 of the Land Registration Act 1925¹—

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Held, allowing the claim, that in order to qualify for an indemnity under section 83 of the 1925 Act a claimant had to establish that it had suffered loss by reason of an error in an official search, and for that purpose had to establish that the error was a cause, but not necessarily the sole or the sole effective cause, of the loss claimed in respect of both its occurrence and its quantum; that to invoke the partial defence under section 83(6) the registrar had to establish shared responsibility in the form of contributory negligence or failure to mitigate loss, and in such a case the reduction of the claimant's entitlement could be anything from nil to total depending on the respective blameworthiness of the claimant and the registrar; that the extent of

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¹ Land Registration Act 1925, as amended, s 83(3): see post, para 29. S 83(9): see post, para 72.

the duty of care owed by a solicitor to his client on the conveyancing transaction in question could provide a yardstick as to the care to be expected of the claimant, and for that purpose it was important to bear in mind that the statutory scheme entitled the claimant and his solicitors to rely on what a search certificate told them; that the claimant's solicitor was not bound to question or look beyond an official search certificate in respect of facts and matters certified by the certificate since it was not a pointer to other inquiries but could be relied on in respect of that which it certified; that, although the claimant had not been under a statutory obligation to register the land on its acquisition, it had been under a duty to take proper care to protect its interest in the property by applying for first registration of the parcel; that the language of section 83 indicated that a successful claimant for an indemnity was prima facie entitled to costs on an indemnity basis; and that, on the facts, since the error in the search certificate had caused the claimant's loss and since the claimant had discharged its duty to exercise proper care in investigating title by relying on the search certificate, the claimant was entitled to claim an indemnity from the registrar, and, although the claimant's application for first registration could have solved the problem, and to that extent the claimant was partially responsible for its loss, the claimant had had no reason to believe that there was a problem with the search certificate and was therefore entitled to an indemnity for 90% of its loss together with its costs on an indemnity basis (post, paras 35–36, 44, 48–50, 56, 61, 62, 74).

The following cases are referred to in the judgment:

Aryll (Duchess) v Beuselinck [1972] 2 Lloyd's Rep 172
Cobbold v Greenwich London Borough Council (unreported) 9 August 1999; Court of Appeal (Civil Division) Transcript No 1406 of 1999, CA
Dean v Dean (2000) 80 P & CR 457, CA
Jayes v IMI (Kynoch) Ltd [1985] ICR 155, CA
Midland Bank Trust Co Ltd v Hett Stubbs & Kemp [1979] Ch 384; [1978] 3 WLR 167; [1978] 3 All ER 571

The following additional cases were cited in argument:

Lee v Barrey [1957] Ch 251; [1957] 2 WLR 245; [1957] 1 All ER 191, CA
M'Lean v Bell 1932 SC(HL) 21, HL(Sc)
McManus Developments Ltd v Barbridge Properties Ltd [1996] PNLR 431, CA
Mercantile Building Society v J W Mitchell Dodds & Co [1993] NPC 99, CA
Pinekerry Ltd v Needs (Kenneth) (Contractors) (1992) 64 P & CR 245, CA
Scarfe v Adams [1981] 1 All ER 843, CA
Wibberley (Alan) Building Ltd v Insley [1999] 1 WLR 894; [1999] 2 All ER 897, HL(E)

The following additional cases, although not cited, were referred to in the skeleton arguments:

Bolton v Stone [1951] AC 850; [1951] 1 All ER 1078, HL(E)
Saif Ali v Sydney Mitchell & Co [1980] AC 198; [1978] 3 WLR 849; [1978] 3 All ER 1033, HL(E)

CLAIM

By a claim form issued on 22 February 2000 as amended on 22 December 2000 and re-amended on 5 December 2001 the claimant, Prestige Properties Ltd, brought a claim against the first defendant, Scottish Provident Institution, for rectification of an agreement dated 12 June 1999 for the sale of property known as 20 St Mary at Hill, London EC3 and against the second defendant, the Chief Land Registrar, for a declaration pursuant to section 2(1) of the Land Registration and Land Charges Act 1971 that it was entitled to an indemnity and costs pursuant to section 83 of the Land

A Registration Act 1925 (as substituted by section 2 of the Land Registration Act 1997) in respect of loss it had suffered as a result of having entered into the agreement for the sale of the property with the provision of a retention pending first registration of part of the property. The claimant included the provision since it was led, by an official search certificate from 1997, to believe that there would be no obstacle to first registration, but it later
 B transpired that the official search certificate contained an error arising from errors in the filed plan. As a consequence the claimant was unable to recover the retention sum from the first defendant. The claim against the first defendant was compromised prior to trial upon the first defendant agreeing to pay the claimant £50,000 plus £50,000 towards the claimant's costs.

The facts are stated in the judgment.

C *Simon Browne-Wilkinson QC* and *Elizabeth Weaver* for the claimant. Had there been no error in the 1997 search certificate there would not have been a retention from the purchase price and the claimant would not have suffered the loss. It is sufficient to show that the error was a cause of the loss, not that it was the sole cause: see *Dean v Dean* (2000) 80 P & CR 457.

D Just because the claimant could have discovered the error by applying for first registration, it does not follow that not taking the required steps involved a lack of proper care. The claimant's solicitor did obtain office copy entries and filed plans and there was no lack of care in inspecting those documents. There was no reason for him to embark on a detailed examination of all the background deeds and documents. The claimant's representatives carried out an inspection and there was nothing to suggest that the land in question was not part of the property. There was no proper
 E ground for reducing the amount of the indemnity to which the claimant was entitled.

There is a statutory right to indemnity for the costs of proceedings under section 83(9).

F *Mark Cunningham QC* for the defendant. The claimant's loss was wholly or substantially a result of the claimant's own lack of proper care, not a result of the error in the search certificate. Under section 83(1)(b), (2) and (3) there must be a causative connection between the error relied on and the loss. The claimant is unable to establish such a connection. [Reference was made to *Dean v Dean* 80 P & CR 457, 462 and *M'Lean v Bell* [1932] SC(HL) 21.] The claimant's conduct showed a want of proper care since it knew that a problem with the land existed but took no steps to sort the problem out.

G It is possible to have 100% contributory negligence. If the claimant is 100% blameworthy no damages are recoverable: see *Jayes v IMI (Kynoch) Ltd* [1985] ICR 155. The plans used in a conveyance must be adequate but plans prepared by the Land Registry provide general boundaries only : see *Scarfe v Adams* [1981] 1 All ER 843; *McManus Developments Ltd v Barbridge Properties Ltd* [1996] PNLR 431; *Pinekerry Ltd v Needs (Kenneth)(Contractors) Ltd* (1992) 64 P & CR 245 and *Mercantile Building Society v J W Mitchell Dodds & Co* [1993] NPC 99. Furthermore, the
 H parcels index does not purport to be determinative of the physical extent of the land it refers to; see *Wibberley (Alan) Building Ltd v v Insley* [1999] 1 WLR 894 and *Lee v Barrey* [1957] Ch 251. The reliance by the claimant on a plan that was recognised as unreliable and whose accuracy had not been

verified either by cross-reference to other available plans or by physical comparison with the land itself was contrary to the guidance given by the Court of Appeal in *Scarfe v Adams* [1981] 1 All ER 843.

In the event that some indemnity is payable the court must carry out a reduction or discounting exercise by conducting two analyses. (1) It must consider the claimant's share of responsibility for the occurrence of the loss. (2) It must consider the claimant's share of responsibility for the quantum of the loss. The court should reduce the quantum claimed to reflect the true value of the lost land and then reduce the figure by whatever percentage it regards as just and equitable, having regard to the claimant's share of responsibility for the occurrence of the loss of the retention.

As to costs under section 83(9), it is for the court to decide the extent of the order and whether it should be on a standard or indemnity basis.

Cur adv vult

13 March. LIGHTMAN J handed down the following judgment.

1 In this action the claimant Prestige Properties Ltd claims an indemnity from the second defendant, the Chief Land Registrar, for loss alleged to have been suffered by reason of an error in a filed plan of a registered title and the reflection of that error and the making of two other errors in a certificate of result of a search dated 31 July 1997 issued under rule 9 of the Land Registration (Open Register) Rules 1991 (SI 1992/122). The 1997 search certificate related to a city office block known as 20 St Mary at Hill, London EC3. The thrust of the errors was to show as part of the property a parcel of unregistered land, parcel 116, the area of which is 14 metres square. Parcel 116 consisted in fact of three narrow strips. The larger part of the parcel, the green land, the area of which is 9 metres square, formed part, but by reason of an error of the Land Registry was omitted from the filed plan, of the registered title to a freehold parcel forming part of the property; and two strips making up the smaller part, the blue land and the orange land, measuring 5 metres square, which comprised part of a shared service yard, never did form part of the property but formed parts of the registered titles, in the case of the blue land freehold and in the case of the orange land leasehold, belonging to two separate proprietors. In the belief induced by the errors in the filed plan and 1997 search certificate that the property included the entirety of parcel 116, in its contract dated 15 July 1999 for the sale of the property to the first defendant, the Scottish Provident Institution ("SPI"), Prestige agreed to transfer to SPI the entirety of parcel 116 and that SPI should be entitled to retain £450,000 of the purchase price if it could not obtain registration of title to the entirety of parcel 116 within six months. The transfer dated 12 July 1999 giving effect to the agreement contained a provision to like effect. Inevitably in the circumstances on its application for registration of title SPI could only obtain registration of title to the green land. Though it therefore obtained title to the entirety of the property, SPI did not obtain, as the agreement and the 1999 transfer provided that it should obtain, registered title to the blue and orange land. On this pretext SPI refused to pay over the retention. Prestige sued SPI claiming by way of rectification of the agreement and the 1999 transfer the exclusion of any right on the part of SPI to withhold the retention in the event that SPI obtained registration of title to the entirety of the property without also

A obtaining registration in respect of the blue and orange land and, consequent thereon, payment of the retention. Prestige also sued the registrar in the alternative claiming an indemnity in respect of the loss of the retention. The claim by Prestige against SPI was compromised prior to trial on terms which provided for a payment by SPI to Prestige of £50,000, a sum for which Prestige gives credit in its continuing claim against the registrar.

B 2 The critical issue in this case is whether, as alleged by the registrar, Prestige is precluded in whole or in part from obtaining the indemnity which it seeks on the ground that the loss which it suffered was wholly or partly the result of its own lack of proper care. This issue raises novel and far reaching questions of construction of the statutory provisions conferring rights of indemnity against the registrar and, most important of all, questions as to the extent to which a buyer or seller of registered land is entitled, in lieu of
C investigation of title, to place reliance upon a statement in a parcels index forming part of a search certificate.

History

D 3 This litigation focuses upon two events, namely the purchase in 1997 by Prestige of the property from Legal and General Assurance Society (“L & G”), and the subsequent sale by Prestige in 1999 of the property to SPI. The principal actor in the events under consideration and the principal witness at the trial was Mr Norman Cohen. At the date of the purchase in 1997 he was a partner in the firm of Kaufman Kramer Shebson. Shortly thereafter in 1997 or early 1998 Kaufman Kramer Shebson merged with Fladgate Fielder and Mr Cohen became a partner in Fladgate Fielder and was such at the time of the sale. Kaufman Kramer Shebson acted as
E solicitors for Prestige on the purchase and Fladgate Fielder acted for Prestige on the sale, and Mr Cohen had the conduct of both the purchase and the sale on behalf of those respective firms. A Mr Richard Kaufman, who was at all material times a partner of Mr Cohen in both firms, played a subsidiary role, most particularly, in the 1999 sale.

F 4 L & G became the registered proprietor of the property on 23 July 1975. On 16 October 1978 L & G granted a lease for 21 years from 1 April 1978 of the property to Central Trustee Savings Bank Ltd (“TSB”). In 1997 L & G entered into negotiations with Prestige for the sale of the property subject to the lease to Prestige for the sum of £9,900,000. This purchase by Prestige was to be as an investment and was to be funded by a syndicate of lenders led by Rheinboden Hypothekenbank AG which was to be granted a mortgage of the property securing repayment of the funding. Separate
G partners in the firm of Lawrence Graham acted as solicitors on this transaction for L & G and the bank.

H 5 On 18 July 1997 Lawrence Graham provided Kaufman Kramer Shebson with five files of documents relating to the title to the property. The documents included office copy entries of the registers and the filed plans for seven registered titles: NGL329711, LN130416, LN218734, LN216688, 244513, NGL242596 and NGL99884. All of the titles were freehold except for NGL3269711, which was held leasehold from the Corporation of London. The documents provided by Lawrence Graham also included a copy of the lease which was registered under title number NGL339408. The papers provided did not include any documents deducing title to any unregistered land, a fact indicative of the fact that the title to the property

did not include any unregistered land. Kaufman Kramer Shebson did not obtain from Lawrence Graham or otherwise the office copy entries or filed plans in respect of the registered leasehold title NGL242448, which included the blue land, or the registered freehold title NGL242406, which included the orange land, because both firms thought, in fact correctly, that neither title related to any part of the property.

6 As part of his investigation into title, in July 1997 Mr Cohen applied to the Land Registry for an official search of the index map pursuant to rule 9 of the 1991 Rules. This search was calculated to reveal whether the land comprised in the reversion to the lease was registered and, if so, under what title numbers, and accordingly calculated to enable Mr Cohen to check those title numbers against the seven registered titles shown in documents provided by Lawrence Graham and satisfy himself that Prestige would get title to the property. Mr Cohen therefore attached a copy of the plan from the lease to the application on which he edged in red the area demised by the lease, i.e. the property, together with an area over which the TSB had rights of access under the lease, the additional area. The legal position in respect of the additional area is not relevant to any issue in this action.

7 In response to that application on 31 July 1997 in the 1997 search certificate the Land Registry “certified that the official search applied for has been made with the following result”. It then went on to state the position as regards the registration of title to “the land”, i.e. the property: “Please see attached copy of the index map 3280G parcel numbers [sic] which are highlighted.” The extract from the index map, which is a scale Ordnance Survey map, showed the parcel numbers of the various parcels of land shown on the map and highlighted eight parcels comprising the property and the additional area, the subject of the search. The attached parcels index identified in respect of each of the parcels whether the title to the parcel was registered with a freehold or leasehold title and under the heading “remarks” spelt out the extent of the registered title in respect of each of the parcels. What is of critical significance in this case is that in respect of parcel 116 the parcels index stated that no freehold title was registered and that the entirety of the parcel was included within the registered leasehold title to the lease, NGL339408. Mr Cohen checked the parcel numbers against the parcels index and the seven registered titles as shown in the documents produced by Lawrence Graham. He noted that parcel 116 was highlighted as being within the area searched against and was shown to be affected by, i.e. comprised within, the lease, but not to be affected by, i.e. comprised within, any registered freehold title. That was both what the 1997 search certificate certified and what Mr Cohen quite reasonably read and understood the search certificate to certify. There is and can be no dispute about that.

8 To ascertain the extent of the lease, on or about 8 August 1997 Mr Cohen applied to the Land Registry for an office copy entry and filed plan for the lease and received the entries and plan on or about 11 August 1997. He then compared the filed plan for the lease with the parcels map to see what parcels were within the area of the lease. In respect of this exercise he stated in his evidence:

“The boundaries of the two plans were not completely flush with each other but I was aware that the plans had been prepared at different times

A and that HM Land Registry plans are not to be relied on entirely to show the actual extent of the land.”

9 Mr Cohen then raised with Lawrence Graham the fact that part of the reversion to the lease, i.e. parcel 116, appeared to be unregistered. Lawrence Graham took up the matter with the Land Registry and reported back that Lawrence Graham and L & G had no documentary evidence of title, but that B the TSB had been registered with title absolute in respect of the whole of the demise, including parcel 116. The significance of the TSB having been registered with an absolute leasehold title was and is that such a title means that the Land Registry was satisfied when making that registration, not only as to the lessee’s title, but also as to the lessor’s title: see section 8 of the Land Registration Act 1925. Subsequently, by letter dated 17 September 1997 the C Land Registry stated that no documentary evidence of title to parcel 116 had been lodged with the first registration application, but that the Land Registry nevertheless decided to grant absolute leasehold title to the whole of the demise. The Land Registry added the comment that, while no binding assurance could be given, the grant of absolute freehold title on an application based on a statutory declaration would be likely, subject to survey and service of notice on adjoining owners. In the circumstances of D the case and most particularly having regard to the 1997 search certificate, Mr Cohen considered the risk of any adverse claim to title to parcel 116 to be insignificant.

10 In consequence of the identification by the 1997 search of parcel 116 as part of the reversion to the lease and the (remote) possibility of an adverse claim by a third party, Prestige, L & G and the bank agreed that the sale to E Prestige would include parcel 116, that L & G would provide a statutory declaration as to the period of its undisturbed possession of parcel 116 and would obtain a defective title indemnity policy covering the full value of the parcel, £100,000, and that on completion Lawrence Graham as solicitors for the bank, as mortgagee, and for Prestige, as proprietor, would apply for first registration of parcel 116.

11 On 1 October 1997 L & G entered into a formal contract for sale of F the property to Prestige for the sum of £9.9m. The terms provided that L & G should sell “all its right title and interest in” parcel 116. By a statutory declaration dated the 6 October 1997 one Clare Turner of L & G made a statutory declaration that L & G had been “in continuous full free and undisturbed possession and enjoyment” of parcel 116 since 1975. On the 7 October 1997 Guardian Insurance issued a defective title indemnity policy G in favour of Prestige and the bank for cover of £100,000. By a transfer dated the 8 October 1997, the 1997 transfer, L & G transferred to Prestige the property which was described as comprising the seven registered titles together with parcel 116.

12 Mr Cohen thereafter heard nothing about the application for first registration of parcel 116. He never checked whether Lawrence Graham had, as agreed, made the application or whether this application had H proceeded successfully without a hitch. He merely assumed that Lawrence Graham had fulfilled its obligation in this regard, had met with no difficulties and had no occasion to report to him in this regard. Accordingly, when on 30 March 1998 Kaufman Kramer Shebson were informed by Harrow District Land Registry that the application for registration of the

1997 transfer and legal charge to the bank had been completed, he assumed that the Land Registry had added parcel 116 to one of the adjoining registered freehold titles as was, in his understanding, its usual practice in the case of such a relatively small piece of land. The failure by Lawrence Graham to fulfil its obligation is totally unexplained. The reason for the failure is not an issue raised in this case and has not been explored in the evidence.

13 In April 1998 Prestige gave preliminary instructions to Mr Cohen on behalf of Fladgate Fielder in respect of a possible sale of the property. On 26 June 1998 Mr Cohen obtained office copy entries and filed plans of the seven previously registered titles and made a cursory comparison of the filed plans of the seven registered titles with the filed plans of the title to the lease, which he had retained. In respect of this examination he said in his evidence:

“All these filed plans are stated to be of scale 1:1250. However there are slight differences in the dates of the plans, some predating the erection of the present buildings on the property, and in so comparing them I was not alerted to any discrepancy between the filed plans of the title to the reversion and the filed plan of the TSB lease.”

He did not compare the filed plans with the index plan. He did not make any check in respect of the application for first registration. The proposed sale did not go ahead and he did not investigate the extent of the freehold and leasehold titles further.

14 In June 1999 Prestige negotiated a sale of the property to SPI. SPI was also buying the property as an investment. The price of £12.65m appears to have been determined by reference to the projected yield from the property after refurbishment. On 2 June 1998, in the absence of Mr Cohen from the office, Mr Kaufman applied under rule 9 of the 1991 Rules for an official search of the index map, attaching to the application the plan attached to the particulars of sale prepared by Prestige’s chartered surveyor and property agent, Mr Andrew Mayer, which extended beyond the ambit of the lease. Mr Kaufman attached this plan because the original deeds were with the bank, as mortgagee, and Fladgate Fielder’s filed copies had gone into storage. He intended “then to apply for office copies from the search results in order to get the ball rolling on the transaction”. The search was intended to obtain details of the titles which comprised the freehold reversion to the lease: as he said in his evidence, it is settled conveyancing practice to carry out an index search against a lease plan in order to obtain details of the titles affecting the reversion. The search result, the first 1999 search, was a slip of paper listing nine title numbers as affecting part of the land searched two of which were freehold NGL242448, which included the blue land, and leasehold NGL242406, which included the orange land. Mr Kaufman obtained office copy entries in respect of those listed title numbers. These he passed on to Mr Cohen for him, in turn, to pass on, with the five binders of documents, to Freshfields, SPI’s solicitors. Without appreciating that the first 1999 search had even been made, Mr Cohen caused these documents to be passed over with the other papers to Freshfields. Mr Cohen did not appreciate any significance in the two title numbers, nor evidently did Freshfields, and no careful examination of them took place. Consistently with Mr Cohen’s belief that parcel 116 had been registered and included in one of the seven registered titles, Mr Cohen sent

A Freshfields five binders of documents including the office copy entries for the seven registered titles which he had obtained in 1997. Mr Cohen also sent a draft of the agreement which defined the property as being comprised in the seven registered titles and made no specific reference to parcel 116.

B 15 Freshfields applied for a search of the index map, the second 1999 search. Consistently with the 1997 search certificate, the extract from the parcels index which was provided to Freshfields showed that parcel 116 was affected by the lease but was not registered freehold. Freshfields also obtained a copy of the 1997 transfer.

C 16 Freshfields in its requisitions on title served on 19 June 1999 raised questions regarding problems in establishing the boundary of parcel 116 apparent on overlaying the filed plans of parcels 105 and 109, LN130416 and LN216688. Mr Cohen would not or could not see the problem. For him the 1997 search certificate rendered such questions superfluous. Freshfields pursued this line of inquiry with Mr Cohen for a period but, after Mr Cohen requested a plan or map setting out what the problem was, Freshfields dropped the issue, plainly satisfied that the 1997 search certificate absolved them from pursuing it further. Freshfields were so satisfied after and notwithstanding a physical inspection on the ground.

D 17 Freshfields raised with Mr Cohen the discrepancy that, although parcel 116 was part of the reversion to the lease and had been included in the 1997 transfer, it was neither registered nor included in the draft agreement. By a letter dated 25 June 1999 Mr Cohen wrote to Lawrence Graham to express concern about the “worrying situation” that SPI’s searches had apparently revealed. The worry was not that an adverse claim might preclude the achievement of registration, but that negotiations were far advanced to achieve an expeditious sale to SPI on the basis that registration of parcel 116 had already been effected, and the absence of this registration created a new and unnecessary hurdle. In reply Lawrence Graham confirmed that no application for first registration had been made. SPI was insistent that, if it was to proceed with the proposed purchase, speed was essential both in concluding a contract and in overcoming this hurdle in a manner satisfactory to itself. Prestige was most anxious to achieve what appeared to it to be a highly advantageous sale, and accordingly for Prestige time was also of the essence. Consideration was given to the possibility of Prestige proceeding belatedly with the application for first registration of parcel 116, but this possibility was rejected because of the inevitable delay and the jeopardy to the deal which would thereby be occasioned. In the event, in order to deal with the problem arising from the non-registration of parcel 116, Prestige and SPI agreed that the agreement would include a provision for the retention pending registration of SPI as proprietor of parcel 116 with freehold title absolute and its subsequent payment over to Prestige if, but only if, such registration was effected within six months of the date of completion. The agreement was signed on 15 July 1999 and the sale was completed on 15 July 1999 by the 1999 transfer which contained the like retention provision. Freshfields, on behalf of SPI, then applied for registration of the 1999 transfer and first registration of title to parcel 116.

H 18 In response to Freshfields’ application, by letters dated 4 and 26 October 1999 Mrs Shah of the Harrow District Land Registry made the disclosure for the first time and informed Freshfields: (1) that no part of parcel 116 was unregistered land; (2) that parcel 116 contained three

component parts each of which formed part of a distinct title; (3) that the lease only included part of parcel 116, namely the green land, the freehold of which had been registered under LN216688, ie one of the seven registered titles, but had then been removed from that title in error by the Land Registry; (4) that the green land could and would be added back to title LN216688; (5) that the blue land was part of freehold title NGL242448; and (6) that the orange land was unregistered as to the freehold but registered leasehold under title NGL76055. She further explained that by error the new editions of the index map prepared in 1987 and 1993 failed to reveal any of the above, and it was for this reason that parcel 116 was wrongly shown in the index plan and parcels index to be unregistered.

19 The consequence was that SPI was registered as proprietor with title absolute of the green land, but it had no claim to be registered as proprietor either of the orange or of the blue land which had never been part of the seven registered titles nor part of the property but had at all material times been owned by third parties. The six registered freehold titles, including the green land, were amalgamated and SPI was registered as proprietor thereof with title absolute under a new title, NLG775335.

20 SPI refused to release the retention to Prestige on the ground that it was not required by the agreement to do so unless it was registered with title absolute to the whole of parcel 116. Prestige thereupon commenced these proceedings. The primary claim was for rectification of the agreement and the 1999 transfer. The substance of its claim was that the reality of the agreement between Prestige and SPI was that Prestige agreed to secure for SPI registration as proprietor of the freehold reversion of the lease and that this had been achieved; it was never intended that SPI should obtain any more and in particular, as they did not form part of the reversion, either the blue or the orange land. It is difficult to read the papers in this case without seeing the greatest force in this claim. But SPI maintained by way of defence that the parties' agreement was that SPI should obtain more than title to the freehold reversion and in particular should indeed obtain the blue and orange land, and that accordingly rectification was not available. Evidence in support of this contention was given by Mr Dodsworth, a solicitor employed by Freshfields who had acted on the transaction. He stated in his witness statement that to his mind and to the mind of SPI the subject of the sale extended beyond the freehold reversion to the lease and included the entirety of parcel 116 comprising part of the shared service yard. Faced with this defence supported by this evidence Prestige entered into a compromise with SPI under which SPI agreed to pay over £50,000 of the retention, keeping the balance, and £50,000 in respect of Prestige's costs.

21 Despite requests in correspondence the registrar refused to agree that he would indemnify Prestige for any loss suffered by reason of the errors by the Land Registry in the 1997 search certificate and the filed plan in respect of the green land, and Prestige therefore joined the registrar as second defendant and claimed an indemnity from him under section 2(1) of the Land Registration and Land Charges Act 1971 in respect of the balance of its loss and interest.

The issues

22 The issues raised in this case may be summarised as follows. Does the error in the filed plan relating to the green land give rise to a prima facie

- A claim by Prestige to an indemnity in respect of its loss under section 83(1)(b) or (2) of the 1925 Act, as substituted by section 2 of the Land Registration Act 1997? Do the errors in the 1997 search certificate relating to the blue and orange land give rise to a prima facie claim by Prestige to an indemnity in respect of its loss under section 83(3) of the 1925 Act? Is the prima facie entitlement of Prestige under either or both of the above defeated in whole or in part by reason of the responsibility for its loss being its own lack of proper care under section 83(5)(a) or (6) of the 1925 Act?

Witnesses

23 Prestige submitted witness statements by three witnesses, Mr Cohen, Mr Kaufman and Mr Mayer, a chartered surveyor instructed in 1999 by Prestige as its property agent in respect of the sale of the property.

- C 24 Mr Cohen's evidence and cross-examination was primarily directed at his state of mind in 1997 and 1999, and in particular (1) whether at these times he believed that parcel 116 formed part of the property, whether he was led to the belief by the 1997 search and whether he was at any time disabused of this belief, and (2) whether this belief induced him to agree to the inclusion of the provision for the retention in the agreement. Mr Cohen D both in his two witness statements and his evidence under cross-examination firmly and consistently answered these questions in the affirmative. I fully accept his evidence. It may be noted that at no time did Mr Cunningham, counsel for the registrar, challenge his honesty as a witness and for good reason. There was no basis for any such challenge. Rather his cross-examination was directed at the reasonableness of his belief and the existence of material available to Mr Cohen which might have disabused E him. The position at all times taken by Mr Cohen was that he was at all times entitled to take what the 1997 search certificate told him at face value: indeed that was the statutory purpose of an official search. He had no reason to doubt what the official search revealed and therefore had no reason to look at the available further material.

- F 25 In my view for the reasons which I shall shortly give Mr Cohen was fully entitled to take the view which he did. The registrar sought to establish the unreasonableness of Mr Cohen's belief and of his failure to look at further available material by adducing the evidence of Mr Dodsworth of Freshfields, who was the registrar's first witness. When I asked Mr Cunningham what was the relevance of Mr Dodsworth's evidence, he told me that it afforded the yardstick to judge the reasonableness of the belief and care taken by Mr Cohen and to judge Mr Cohen wanting on both scores. G For this purpose he relied on the paragraph in Mr Dodsworth's evidence which I have earlier referred to in paragraph 20 of this judgment. In his cross-examination Mr Dodsworth initially stood by what he said in those paragraphs. Mr Dodsworth however proved to be a most unsatisfactory witness, not least to the registrar. For, when faced in cross-examination with his categorical statements in a letter and a report on title to his clients in 1999 H that the subject of the sale, and in particular parcel 116, was limited to the freehold reversion on the lease, he eventually confirmed that this indeed had been his belief at the dates of the agreement and 1999 transfer, and that if he had thought otherwise he would have made a note of it and felt bound in all honesty so to inform Prestige, neither of which he did. Accordingly, far from undermining the evidence of Mr Cohen, Mr Dodsworth confirmed it, for

Freshfields, like Mr Cohen, formed the view based on the 1997 search certificate that parcel 116 in its entirety was unregistered land forming part of the freehold reversion and that this was the reason why it was necessary to include the provision for the retention.

26 Mr Kaufman was at all times Mr Cohen's senior in the two firms. On the sale of the property in 1999, he passed responsibility of the conduct of the transaction to Mr Cohen, but filled in providing his services on occasions when Mr Cohen was away in Israel. I prefer Mr Cohen's recollection to that of Mr Kaufman in respect of the one area where there was a difference in their evidence relating to the first 1999 search. I have set out Mr Cohen's account in the history which I have recounted. Subject to this qualification I fully accept Mr Kaufman's evidence.

27 Prestige also called Mr Mayer. He told me that he had inspected the property on 26 May 1999 with representatives of SPI. His understanding at the time of the agreement was that parcel 116 formed part of the freehold reversion on the lease, that SPI would only proceed with the purchase if there was a retention of £450,000 and that in view of the late stage at which the non-registration of parcel 116 came to light he was in a very weak position to negotiate a lower retention figure.

28 Beyond that of Mr Dodsworth, the registrar adduced witness statements of Mr Anthony McCurley of SPI's agents, Mr Ernest Coupe of SPI's property managers, Mr Charles Beeden, a surveyor employed by the survey and mapping services section of the Land Registry, Mr Keith Lawrence, the site manager for the property, Mr Bruce Haggata, the survey and plans officer at the Harrow District Land registry, and finally Ms Linda Williams, a solicitor employed by the Land Registry. Mr Browne-Wilkinson, counsel for Prestige, told me that he saw no reason to cross-examine any of these witnesses, for they said nothing contentious or of any real relevance and significance. I agree and, whilst I have their evidence in mind, I do not need to make any specific reference to it.

Legislation

29 Section 82(1)(h) of the 1925 Act provides that, subject to the provisions of the section and an appeal to the court, the registrar may rectify the register in any case "where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register". Section 83 of the 1925 Act so far as material provides:

"(1) Where the register is rectified under this Act, then, subject to the provisions of this Act—(a) any person suffering loss by reason of the rectification shall be entitled to be indemnified; and (b) if, notwithstanding the rectification, the person in whose favour the register is rectified suffers loss by reason of an error or omission in the register in respect of which it is so rectified, he also shall be entitled to be indemnified.

"(2) Where an error or omission has occurred in the register, but the register is not rectified, any person suffering loss by reason of the error or omission shall, subject to the provisions of this Act, be entitled to be indemnified.

A “(3) Where any person suffers loss . . . by reason of an error in any official search, he shall be entitled to be indemnified under this Act . . .

“(5) No indemnity shall be payable under this Act—(a) on account of any loss suffered by a claimant . . . wholly as a result of his own lack of proper care . . .

B “(6) Where any loss suffered by a claimant is suffered partly as a result of his own lack of proper care, any indemnity payable to him shall be reduced to such extent as is just and equitable having regard to his share in the responsibility for the loss . . .

C “(8) Where an indemnity is paid in respect of the loss of an estate or interest in or charge on land, the amount so paid shall not exceed—(a) where the register is not rectified, the value of the estate, interest or charge at the time when the error or omission which caused the loss was made; (b) where the register is rectified, the value (if there had been no rectification) of the estate, interest or charge, immediately before the time of rectification . . .

D “(10) Where indemnity is paid to a claimant in respect of any loss, the registrar, on behalf of the Crown, shall be entitled—(a) to recover the amount paid from any person who caused or substantially contributed to the loss by his fraud; or (b) for the purpose of recovering the amount paid, to enforce—(i) any right of action (of whatever nature and howsoever arising) which the claimant would have been entitled to enforce had the indemnity not been paid . . .”

E 30 For completeness it is appropriate at this stage to set out the provision in rule 13 of the Land Registration Rules 1925 (SR & O 1925/1093) for correction of the register:

F “Where any clerical error or error of a like nature is discovered in the register or in any plan or document referred to therein, which can be corrected without detriment to any registered interest, the registrar may (if he thinks fit, and after giving any notices, and calling for any evidence or obtaining any assent he may deem proper) cause the necessary correction to be made.”

31 The 1991 Rules so far as material make provision for two types of search, namely an application under rule 9 for a search certificate, as was made in 1997, giving rise to a right to an indemnity under section 83(3) and an application under rule 10 for a copy of an index map section, as was the second 1999 search, which gives rise to no such right:

G “9(1) Any person may apply for an official search of the index map or general map and the parcel index . . .

“(2) An application under paragraph (1) shall be made: (a) by delivering in documentary form an application in Form 96 . . .

“(4) If the application is in order an official certificate of search shall be issued.

H “(5) An official certificate of search shall be issued in the form set out under the heading ‘Certificate of result of Official Search of the Index Map’ in Form 96 or to like effect.

“10(1) Any person may apply for a copy of an index map section.

“(2) An application under paragraph (1) shall be made by delivering in documentary form an application in Form 96B.

“(3) A copy of an index map section provided by the registrar under this rule shall not constitute . . . an official search for the purpose of section 83(3) of the Act . . .”

32 The legal and practical significance of a search certificate goes beyond entitling the party relying on it to an indemnity in respect of errors contained in it. For rule 295 of the 1925 Rules provides: “(1) When a solicitor or other person obtains an official certificate of the result of a search he shall not be answerable in respect of loss that may arise from any error therein.”

33 The 1925 Rules explain the roles of the index map and the parcels index:

“8(1) Index maps shall be kept in the registry which shall show the position and extent of every registered estate . . .”

“(3) Where there is a registered index map, the number under which each estate was first registered shall be shown thereon or, where practicable, the current title number.”

“274(1) A parcels index shall be kept in the registry containing any reference numbers on the parcels of registered land shown on the general map, and showing, with regard to each of such parcels, the numbers of the titles . . .”

34 It is common ground that in practice the general map during the 1990s fell into abeyance and was replaced for the purpose of this rule and other rules by the index map. This process culminated in legislative effect being given to this change by the Land Registration (No 2) Rules 1999 (SI 1999/2097).

Statutory scheme

35 An analysis of the statutory scheme entitling claimants to an indemnity in respect of loss suffered by reason of errors in a search certificate is not entirely easy. Most particularly it is not immediately obvious what is the relationship between section 83(3) conferring a right to an indemnity in case of a loss suffered “by reason of an error in any official search”, which necessitates a causal relationship between the error and the loss, and section 83(5)(a) which disentitles a claimant to an indemnity where the loss is suffered “wholly as a result of his own lack of . . . care”. Plainly, before there is any occasion for section 83(5)(a) to come into play at all, the Land Registry error must have been an effective cause of the loss: section 83(5)(a) cannot accordingly be construed as meaning that the right to an indemnity is excluded where the lack of care is the only effective cause of the loss. Reading the section as a whole, the general scheme of the section appears to me to be as follows: (a) to establish a prima facie claim to an indemnity the claimant must establish that an error of the Land Registry was an effective cause of his loss: this is necessary to bring into play section 83(3). For the registrar to invoke the complete defence afforded by section 83(5) he must establish that, notwithstanding that the error of the Land Registry was an effective cause of the loss, yet that loss should be regarded as wholly attributable to the claimant’s lack of proper care. This he may seek to do in an appropriate case by establishing that proper care on the part of the claimant could and should have prevented that error from having any such

A effect. For the registrar to invoke the defence afforded by section 83(6), it is sufficient only that he establishes the shared responsibility of the claimant's lack of care for the loss; (b) the shared responsibility may take the form of contributory negligence or a failure to mitigate damage, and in either case the reduction of the claimant's entitlement, depending on what is just and equitable, may be anything from nil to total: consider *Jayes v IMI (Kynoch) Ltd* [1985] ICR 155; (c) in the case of the defence of contributory negligence the focus goes beyond causation and extends to the respective blameworthiness of the claimant and the Land Registry.

36 My detailed analysis of the statutory provisions, embracing the various issues raised by the parties, is as follows: (a) there is no need to look beyond the language of section 83 in deciding questions of entitlement and disentitlement to an indemnity and section 83(5) must be read in conjunction with section 83(6): see *Dean v Dean* (2000) 80 P & CR 457, per Gibson LJ, at p 462, and per May LJ, at p 464; (b) in order to qualify to make a claim to an indemnity, it is necessary for the claimant to establish that he has suffered a loss "by reason of" an error in an official search: see section 83(3). For this purpose the claimant must establish that, beyond the existence of the error, the error was "an", but not "the" or "the sole", effective cause of the loss claimed both in respect of its occurrence of the loss and its quantum; (c) if the claimant establishes the error and causation of the loss, in the absence of circumstances bringing into play section 83(5) or (6), he is entitled to an indemnity in respect of his full loss: see section 83(3). In cases where the loss is not of an estate or charge, there is no statutory limit of the amount payable under the indemnity: compare section 83(8); (d) notwithstanding the fact that the Land Registry's error was an effective cause of the loss, it is however open to the registrar by way of defence to establish that the claimant's own lack of proper care was also an effective cause of his loss. There are two distinct defences. The first is that the significance and causative effect of the claimant's lack of proper care was such that the loss should be regarded as wholly the result of that lack of care: section 83(5). For this purpose it will only rarely be sufficient to establish that the Land Registry error would not have caused the loss "but for" the claimant's lack of care: see *Dean v Dean*. The second is that the loss resulted both from the Land Registry's error and the claimant's own lack of care: section 83(5) and (6); (e) the claimant's "own" lack of care includes lack of care both by the claimant and by his servants and agents. The word "own" distinguishes lack of care by the claimant, his servants and agents from lack of care by an independent third party; (f) the lack of care by an independent third party does not operate to reduce the entitlement of the claimant, but may operate under section 83(10)(b)(i) to vest in the registrar by way of subrogation any right on the part of the claimant against that third party; (g) the language of section 83(5) and (6) is apt to embrace consideration of the claimant's lack of proper care in respect both of the occurrence and quantum of loss. Accordingly it is open to the registrar to maintain a challenge to the claimant's entitlement to an indemnity on grounds both that the claimant was negligent in failing to exercise proper care in preventing the occurrence of the loss and that the claimant failed to exercise proper care to mitigate and limit the loss; (h) if the registrar is to take either or both of these defences, he must clearly and distinctly raise them at an early stage in any proceedings and, in particular if the proceedings are to be tried on pleadings,

in his defence; (i) the claimant's lack of care under consideration refers to lack of care to prevent the loss or occasion for the loss arising or the loss being greater than it need be. In respect of the occurrence of the loss the investigation may require consideration of the extent to which the claimant may have taken steps which would have revealed the existence of the error or prevented the error having the impact which it did; (j) the extent of the ordinary duty of care owed by a solicitor to his client on the conveyancing transaction in question, as opposed to the duty provided for in a particular retainer which may extend or restrict that duty, may provide a yardstick as to the care to be expected of the claimant. For this purpose it is important to bear in mind, when considering the nature and extent of the care to be expected of the claimant, the reliance which the statutory scheme, and most particularly section 83 of the 1925 Act and rule 295 of the 1925 Rules, entitles the claimant and his solicitor to place on what a search certificate tells them.

Error in filed plan

37 In a late amendment of its particulars of claim made without objection at the trial, Prestige added a claim to an indemnity under section 83(2) of the 1925 Act or in the alternative section 83(1)(b) in respect of the error in the filed plan for LN216688 which omitted from that registered title the green land. By the amendment Prestige claims (1) that, when the Land Registry made good that omission, this was a correction made pursuant to rule 13 of the 1925 Rules rather than a rectification pursuant to section 82(1) of the 1925 Act, and that accordingly it can make a claim under the 1925 Act (section 83(1)); and (2) in the alternative, if what happened was a rectification, it was a rectification in favour of Prestige entitling Prestige to make a claim under the 1925 Act (section 83(1)(b)).

38 In my view, upon the true construction of rule 13, a correction is limited to the cure of a mistake of a trivial or clerical nature, and cannot extend to an amendment of the extent of a registered title of a more substantive character such as arose in this case which must constitute a rectification falling within the ambit of section 83 of the 1925 Act. Accordingly Prestige can make no claim under section 83(2).

39 I turn to the claim under section 83(1)(b). The question raised is whether, as contended for by Prestige, the rectification was made "in favour of" Prestige within the meaning of the section. The application which resulted in the rectification, by arrangement between Prestige and SPI, was made by SPI on 21 July 1999; the registration, which included making the rectification, was completed on 20 December 1999; and, by virtue of rules 24 and 42 of the 1925 Rules, the registration, including the rectification, was backdated to the date of the application. On behalf of the registrar it was argued that Prestige was at no stage involved in the process or interested in the outcome, and accordingly the rectification was not made in its favour. I reject this argument. If the question has to be viewed technically, as the registrar contended, in my judgment Prestige was the person entitled to rectification both at the date of the application and at the date on which the rectification, by reason of the backdating, took effect and accordingly technically the rectification was indeed made in its favour. But the registrar's submission in any event appears to me to be wholly unreal. The person primarily entitled to rectification at all times until the rectification

A was effected was Prestige and Prestige was critically interested by reason of the provision for the retention in the agreement and 1999 transfer which turned on the success of the application.

B 40 The claim to an indemnity resting on the error in the filed plan is not however a matter of real significance. For the prejudice suffered by Prestige arising from this error was not by reason of any reliance on this filed plan by Prestige, but the reliance on this filed plan by the Land Registry in preparing the 1997 search certificate. Prestige relied on that certificate. In the circumstances the parties sensibly agreed that this case should be decided on the basis, not of any independent claim in respect of the filed plans relating to the green land, but on the basis that the 1997 search certificate contained the critical errors relating to all three parcels of land, the green, blue and orange.

C *Errors in official search certificate*

D 41 I turn first to the question whether Prestige is prima facie entitled to an indemnity under section 83(3) of the 1925 Act, in respect of the errors in the 1997 search certificate. The answer is clearly in the affirmative. The Land Registry made the errors alleged certifying that parcel 116 was unregistered land and formed part of the freehold reversion to the lease and these errors were the effective cause for the agreement by Prestige, believing that the title to the green, blue and orange land was unregistered and part of the freehold reversion to the lease, to the insertion into the agreement of the provision relating to the retention and consequently, pursuant to that provision, for the loss of the retention.

E *Lack of proper care*

F 42 I must now turn to the question whether the registrar can establish the defences under section 83(5) and(6) of lack of care. Four specific instances of lack of proper care are relied on by the registrar. The first three relate to the investigation of title by Prestige's solicitors and the fourth relates to the failure of Prestige to make an application for first registration of parcel 116 on or after the completion of its purchase of the property in 1997. I shall first and together deal with the three complaints relating to investigation of title.

Lack of proper care and reliance on an official search certificate

G 43 The first complaint is the failure of Prestige to inspect the office copy entries in relation to the orange and blue land. The second is the failure of Prestige to make a detailed examination of all the background deeds and documents. The third is the failure to inspect parcel 116.

H 44 In order to evaluate these allegations by the registrar of lack of proper care on the part of Prestige, it is necessary to consider (a) the ordinary duties of a solicitor on a conveyancing transaction, most particularly on a transaction relating to registered land, and (b) the role of a search certificate in a conveyancing transaction and most particularly its impact on the duties of the parties' solicitors.

45 I must begin by making two general observations on the ordinary duties of a solicitor on a conveyancing transaction. First, a solicitor should not be judged by the standard of "a particularly meticulous and conscientious practitioner . . . The test is what the reasonably competent

practitioner would do having regard to the standards normally adopted in his profession”: per Oliver J in *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] Ch 384, 403. Second, in determining whether a solicitor has exercised reasonable skill and care, he should be judged in the light of the circumstances at the time. His actions and advice may with the benefit of hindsight be shown to have been utterly wrong, “but hindsight is no touchstone of negligence”: *Duchess of Argyll v Beuselinck* [1972] 2 Lloyd’s Rep 172, 185.

46 I turn now to the more specific duties of a conveyancing solicitor in the case of transactions relating to registered land. The registrar in this regard has referred me to the Law Society’s *Conveyancing Handbook*, 5th ed (1996) by Frances Silverman whose aim, as is stated in the preface to the first edition (1992), is to present a ready reference handbook of the practice of registered conveyancing. Subject to one critical qualification, there is and cannot be any real dispute as to the nature or extent of the duty of the conveyancing solicitor. The seller’s solicitor should obtain office copies of the register of title and investigate the title before drafting the contract for sale. He should take precautionary measures to ensure that the seller is entitled to sell the whole of the estate which he is to contract to sell, and seek to spot and rectify any defects in title. The purchaser’s solicitor in his investigation of title should examine the office copy entries supplied by the seller, and in particular check that the contract description of the property being sold accords with the description in the property register and is included within the title shown on the filed plan. Wherever a transfer is by reference to a plan, the plan must be of sufficient size and scale to enable the boundaries and other features of the property to be readily identified. For this purpose it is necessary to bear in mind that boundaries shown in plans prepared by the Land Registry, unless “fixed”, are general boundaries only and may not show the precise line of the boundaries. If on an investigation the solicitor is put on notice that there arises a serious question whether good title is being shown in any material respect or as to the precise boundaries, alarm bells should ring and the solicitor is obliged to come to grips with and resolve that question. An inspection on the ground may be and often is called for.

47 The registrar’s case is that there were facts in this case which should have put Mr Cohen on notice that parcel 116 was not unregistered land. He relies on the facts noted by Mr Cohen regarding the plans in 1997 and 1998 and the requisitions on title raised by Freshfields in 1999 to which I have referred. The registrar also relies on the facts that a close scrutiny of the filed plans and a close examination or survey would have revealed that the 1997 search certificate was wrong. I have no doubt that Mr Cohen should in the circumstances to which I have referred in the absence of the 1997 search certificate have pursued further investigations along the lines indicated by the registrar and these might well have revealed that parcel 116 was not unregistered land. The critical issue of law however is whether Mr Cohen was bound to question or look beyond the 1997 search certificate in respect of facts and matters certified by that certificate.

48 The answer to this question is provided by rule 295 of the 1925 Rules and by section 83(3) of the 1925 Act. Their conjoint effect is that a solicitor who obtains and relies on a search certificate is exonerated from any liability in respect of any loss arising from any error therein and his

A client can instead claim an indemnity from the registrar. The statutory scheme is quite clear. The public and their solicitors as their agents can confidently rely on the result of such a search: a solicitor's duty to investigate and inquire in respect of the facts certified is fully discharged by obtaining the search certificate and the solicitor is entitled without more to rely on the search certificate as correct. Likewise a claimant for a statutory indemnity under section 83 of the 1925 Act duly discharges his duty to exercise proper care in investigating title by relying on a search certificate. Neither the solicitor nor the claimant is under any obligation to check or confirm whether the search certificate is correct. To impose any such requirement must be totally to undermine the object of the statutory provision and rule, which is to provide certainty and save expenditure of cost and time on such an investigation.

C 49 The registrar has however submitted that the search certificate is only a signpost to other inquiries required to be made and in particular to the various registered titles there referred to, and that therefore in this case the 1997 search could not be relied on for the proposition that parcel 116 was unregistered land and that it was embraced within the registered leasehold title to the property: Mr Cohen as solicitor for Prestige both on the purchase and subsequent sale was required to investigate the title numbers given to him and the filed plans in respect of those titles, and that if he had done so he should on a careful examination have deduced the true position. In my judgment this submission is wrong.

D 50 The search certificate is of course only to be relied on in respect of that which it certifies and it must accordingly be carefully examined for this purpose. The search certificate may be such that it leaves open areas of inquiry which must still be actively pursued, e.g. the exact boundaries of the registered title. But in this case what the 1997 search certificate did undoubtedly and unequivocally certify was that parcel 116 formed part of the registered title to the lease, and was accordingly part of the freehold reversion, and that its freehold title was unregistered, and accordingly did not form part of the registered title to any land. These were the certified facts on which Kaufman Kramer Shebson and Fladgate Fielder relied and on which they were entitled to rely, and they were not obliged to investigate title further in this regard. This is not a case where there was an issue, e.g. as to boundaries, as to which the 1997 search certificate may not be conclusive. The issue was whether parcel 116 formed part of the registered title to the lease and as to that issue the 1997 search certificate was clear and unambiguous.

G 51 Comfort in reaching this conclusion may be found in a number of matters. The first is that this was also the view of the experienced conveyancers, not just at Kaufman Kramer Shebson and Fladgate Fielder, but also at Lawrence Graham and Freshfields. It may be noted that Freshfields reached the conclusion that parcel 116 formed part of the property after a careful inspection of the site. The second is that it accords with the view expressed in what may almost be regarded as an official publication of the Land Registry, *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, looseleaf ed (2001), which contains the following passage, at para 4-06:

“Land Registry index map. The Chief Land Registrar keeps an index map from which it is possible, in relation to any parcel of land, to ascertain whether that land is registered or affected by a caution against first registration and, if so, the title number or numbers under which the land is registered or the distinguishing number of every caution against first registration that affects it. Anyone who wishes to ascertain whether the title to a particular parcel of land is registered or to discover the extent of a registered title may apply for an official search of the Land Registry index map [citing rule 9 of the 1991 Rules].”

52 In short, therefore, whilst all the exercises suggested by the registrar would no doubt have been appropriate in the absence of the 1997 search certificate, in view of the terms of that certificate I do not think that proper care required any of them to be undertaken to check the correctness of the certificate. Possessed of an honest belief that reliance could be placed on what the 1997 search certificate stated, I do not think that Prestige was obliged to pay the degree of attention to these potential sources of information which could or would have disabused Prestige of its belief as to the status of parcel 116. As soon as the Land Registry revealed the true state of affairs and the errors in the 1997 search certificate, everything became plain and obvious: the potential significance of what could be extracted from the deeds, plans and a survey was realised. But what could be and was discovered after removal of the blinkers furnished by the 1997 search certificate and with the benefit of hindsight was not hidden from Prestige by reason of any lack of proper care on the part of Prestige and its solicitors: it was hidden by the issue by the Land Registry of the 1997 search certificate in the terms which it was expressed.

Non-registration

53 The fourth alleged instance of lack of care was the failure of Prestige upon completion of its purchase in 1997 or thereafter to apply for first registration of parcel 116.

54 The first issue relates to the effect of an application made by Prestige for first registration of parcel 116 before the date of the agreement. Mr Cunningham submitted that, had Prestige applied for first registration, or ensured that Lawrence Graham had applied on its behalf, it would have known, as SPI subsequently discovered, that it would never obtain freehold title to the orange and blue land, and that these did not form part of the property, and in such circumstances Prestige would not have contracted to sell that land to SPI and would not have lost the retention. This submission is clearly correct. The second and only issue is whether the failure to make this application constituted a lack of proper care on the part of Prestige.

55 There is a degree of artificiality in respect of this issue. There is a degree of artificiality because in fact, unknown to the parties and the Land Registry at the time, the freehold titles to the green and the blue land and the leasehold title to the orange land were already registered. Accordingly an application for first registration was apposite only in respect of the freehold title to the orange land. But it is I think clear as well as common ground that what the exercise of proper care required Prestige to do must be determined by reference to the factual situation as perceived by the parties at the time, i.e. on the premise that the whole of parcel 116 was unregistered land.

A 56 Mr Cunningham first contended that Prestige was under a statutory obligation to make the application. For this purpose he invoked the provisions of section 123A(1) and (5) of the 1925 Act (as amended by sections 1 and 5(4) of the 1997 Act). These provisions made registration of parcel 116, so far as it was or included unregistered land, within “the applicable period”, i.e. two months of the date of the transfer to Prestige, “compulsory”: the sanction laid down for non-compliance was that

B 1997 transfer ceased to be effective to transfer the legal estate in parcel 116 to Prestige and the legal title vested in L & G, though it left Prestige with the full equitable title. The answer is clear: there was no such obligation: but the failure to apply for registration brought into play, as the sanction for non-compliance, the retrospective avoidance of the transfer as a transfer of the legal estate in the unregistered land.

C 57 In the alternative Mr Cunningham submitted that, irrespective of any statutory obligation, a proper care to protect its interest in parcel 116 required Prestige to apply for such registration. I think that this submission is correct. There was at all times until the application for registration was made and adjudicated upon by the Land Registry a risk, albeit in the mind of Mr Cohen an insignificant risk, that there might be a valid adverse claim.

D The application would either flush out that risk or totally remove it. It was an elementary precaution for Prestige to proceed with the application as soon as its purchase was completed and most certainly well ahead of any sale. Prestige’s solicitors clearly recognised this: and this was a reason why it agreed with Lawrence Graham that it should lodge Prestige’s application for first registration. But Lawrence Graham did not lodge the application. If Prestige had made the application prior to the date of the agreement, there

E can be no doubt that the true position would have been revealed, as it was after the date of the agreement, and Prestige would not have entered, indeed would have had no occasion to enter into, the provision in the agreement relating to the retention. The failure on the part of Prestige was accordingly an effective cause of the loss sued for in this action.

F 58 The question is however raised by Prestige whether the failure to lodge the application involved a lack of proper care on the part of Prestige, its servants or agents. Prestige correctly agreed and accepted in pre-trial correspondence that any lack of proper care by its servants or agents was attributable to itself. Prestige again accepts correctly that any lack of care by Kaufman Kramer Shebson or Fladgate Fielder as its solicitors is attributable to Prestige, but it challenges that any lack of care by Lawrence Graham is so attributable on the ground that Lawrence Graham was not its agent. For this

G purpose Prestige maintains that the definition of agency in *Bowstead & Reynolds on Agency*, 17th ed (2001), para 1-001 should be adopted:

“Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly so consents so to act or so acts.”

H 59 It is sufficient in answer to say that plainly there was a lack of proper care by Kaufman Kramer Shepson and Fladgate Fielder in failing ever to check whether Lawrence Graham, to whom it had delegated the task of lodging the application, had performed the task or to check the form that the registration took, whether registration with a separate title or as an

accretion to one of the existing titles. But going beyond this it is quite clear, as Prestige in its pleadings and Mr Cohen in his evidence on its behalf spelt out, that Prestige appointed Lawrence Graham to act as agent for Prestige in lodging the application and the default by Lawrence Graham in this regard constituted a lack of proper care by Lawrence Graham acting as agent for Prestige. Prestige argued that agency for these purposes requires the assumption of a fiduciary relationship under which the agent was empowered to affect the legal relations between his principal and a third party and that the assumption of ministerial task of lodging a document is not sufficient. I am quite satisfied that there was constituted such a fiduciary relationship when Prestige entrusted to Lawrence Graham the application for first registration and the task of lodging it on its behalf: the lodging was calculated to affect the legal relations of Prestige, amongst others, with Lawrence Graham in respect of the legal ownership of parcel 116. But in any event I am likewise satisfied that the necessary agency relationship for this purpose existed even if, as alleged by Prestige, Lawrence Graham assumed the merely ministerial role of physically lodging the application and there was fiduciary relationship or there was to be no action by Lawrence Graham affecting the legal relations of Prestige with any third party.

60 Prestige also argued that it was unfair for the registrar to rely on the omission of Lawrence Graham to lodge the application because the registrar's pleadings and the pre-trial correspondence made no specific reference to it, and that, if the registrar had made it plain before trial that it intended to do so, Prestige would or could have joined Lawrence Graham as a defendant to the proceedings. I see neither merit nor substance in this argument. It was sufficient for the registrar to plead the omission of Prestige to proceed with the application: it was for Prestige, and not the registrar, to explain why it failed to do so, and the explanation it gave focused on the default of Lawrence Graham. The pre-trial correspondence made plain the agreement that the defaults of its servants and agents generally were attributable to Prestige. Prestige must have known long before trial that the issues before the court included whether its indemnity should be lost or omitted by reason of the lack of care of Kaufman Kramer Shebson, Fladgate Fielder and Lawrence Graham. In any event there is no reason why Prestige should not now pursue any claim which it wishes against any or all of the three firms.

61 I take the view that both the errors of the Land Registry and the lack of proper care by Prestige were both responsible for the loss. Only blind application of the "but for" test would lead to the application of section 83(5) of the 1925 Act. It is important to bear in mind that the risk which the application for first registration was designed to obviate was not the risk which eventuated by reason of the errors of the Land Registry. The risk which the application was designed to obviate was the existence of an adverse interest in parcel 116, being an interest in unregistered land forming part of the reversion to the lease. The risk which eventuated was no such risk: it was the risk that parcel 116, contrary to the guarantee by the Land Registry, constituted registered land and part of other registered titles. In no way was the application for first registration a safeguard directed at picking up or correcting any such error of the Land Registry, though coincidentally it was calculated to do so. I do not think that Prestige or its servants or agents could or should reasonably have foreseen any risk that the 1997 search

A certificate would prove wrong and that the application would bring such an error to light for correction.

62 In the circumstances, far from the loss arising wholly from Prestige's lack of proper care, in the application of section 83(6) of the 1925 Act, I think that the responsibility for the loss of the Land Registry is far greater than the lack of proper care by Prestige. The error of the Land Registry created the problem. The application for first registration could have resolved it, but Prestige had no reason to believe that there was any such problem: the 1997 search certificate said that there was no such problem. In the circumstances I think that, having regard to Prestige's much more limited share in the responsibility, it is just and equitable that its indemnity should be reduced by 10% only.

C *Failure to mitigate*

63 The registrar in his defence dated 18 December 2001 made no plea of any failure on the part of Prestige to mitigate its loss, and, in particular, that Prestige in agreeing to the retention of £450,000 in respect of parcel 116 failed to exercise proper care to mitigate damages. In the circumstances no order was ever applied for or made permitting expert evidence to be called as to the value of parcel 116.

64 The trial was fixed to commence on 30 January 2002. On 24 January 2002 the registrar sent to Prestige a valuation report prepared by the district valuer's office as of relevance on the issue of quantum. The accompanying letter apologised for the late service of the evidence and requested confirmation whether Prestige would oppose its introduction at this late stage. On the same day the registrar served its skeleton argument which raised the issue of quantum and contended that Prestige had failed to fulfil its duty to mitigate damages. Again on the same day Prestige replied to the registrar's letter stating that it would object to the late service of the evidence without any permission to call expert evidence and without any pleaded case alleging failure to mitigate.

65 On receipt of Prestige's letter, the registrar took no action whatsoever: he did not say what he would do in the face of the objection or even respond to the letter. Most particularly the registrar did not prepare any amended pleading or make any application for leave to amend or serve expert evidence. In the course of his opening Mr Browne-Wilkinson, for Prestige, made clear that there was on the pleadings no issue as to mitigation and that accordingly the passage in the registrar's skeleton directed to that issue was out of place. In response Mr Cunningham, for the registrar, stated that he would draft an amended pleading raising the issue and apply in the course of the trial for permission to amend. The amended pleading was produced the following day.

66 The amended pleading alleged that, if Prestige had suffered the loss alleged by reason of any error or omission on the part of the registrar, such loss had been suffered, if not wholly, at least partly as a result of its own lack of proper care in relation to the quantum of the loss, and that in support of the allegation of Prestige's lack of proper care in relation to the quantum of the loss the registrar relied on four matters: (a) the failure to negotiate any reduction in the retention figure of £450,000; (b) agreeing to a retention figure of £450,000 which, as Prestige knew, was far in excess of the true value of parcel 116 at the time, ie in 1997, when the errors made by the

registrar were made; (c) the failure to apportion the retention between the land within and without the reversion to the lease; and (d) the failure to ensure that there would be a pro-rated release of the retention in the event of some of parcel 116 being registered with absolute freehold title in the name of SPI within the registration period.

67 CPR r 17.1 provides for an application by a party for the grant by the court of permission to amend. The principle guiding the court's approach to such an application is stated by Peter Gibson LJ in *Cobbold v Greenwich London Borough Council* (unreported) 9 August 1999; Court of Appeal (Civil Division) Transcript No 1406 of 1999, which is quoted in *Civil Procedure* (Autumn 2001), vol 1, p 296, para 17.3.5:

“The overriding objective (of the Civil Procedure Rules) is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed.”

68 The application was made and heard as a matter of urgency in the middle of the cross-examination of Mr Cohen. This was because the outcome affected the evidence he should give and the areas to be covered in his cross-examination. After hearing counsel, with their agreement, I gave my decision refusing permission immediately and, so as not to defer the cross-examination of Mr Cohen, stated that I would give my reasons in my judgment. I can do so quite briefly. I fully accept that the registrar by his application wishes to raise a new, but real, matter of dispute between the parties, namely the extent to which, if he failed on other issues, the registrar should be exposed to an award of damages in excess of the value of parcel 116 and that in the ordinary case for the court to deal with the case justly would require that the registrar be allowed permission to amend to raise this issue; and I would have been inclined to give permission if allowing the amendment would have occasioned no prejudice to Prestige which could not be compensated for in costs and would not have harmed the efficient administration of justice. But in my view the overriding objective of the Civil Procedure Rules that the court shall deal with cases justly in the circumstances of the present case preclude me from doing so and in particular I have regard to the prejudice which would be caused by the amendment to Prestige and the public interest in the efficient administration of justice. The relevant circumstances include the following: (a) the registrar has proffered no reason for his failure to raise this new defence earlier save a failure to recognise its availability. If this is a good defence, the registrar, and his legal advisers, should surely have appreciated its availability long ago; (b) even after appreciating its availability not later than 24 January 2002 the registrar proceeded thereafter lackadaisically, not even preparing a draft amended pleading until some way into the trial; (c) the delay in raising this new defence has seriously prejudiced the ability of Prestige to meet it, for an explanation of the commercial and other reasons for agreeing to the terms of the agreement relating to the retention, and in particular the importance to Prestige of the proposed sale, were matters to be addressed in

A the evidence of Mr Aviv, the alter ego of Prestige, who died without any occasion to prepare a witness statement addressing this issue in October 2001. This prejudice plainly cannot be compensated for by any order for costs; (d) the raising of this new issue would necessitate the trial being adjourned to enable the parties to adduce relevant evidence on this issue and in particular: (i) to admit expert evidence on the value of parcel 116 at the relevant date in 1999. The registrar has never even applied for an order for such evidence. Indeed he remained inactive in this regard even after Prestige's letter of 24 January 2002; and (ii) to allow an Israeli, Mr Herbert Kaufman, the father of Mr Kaufman and a consultant with Fladgate Fielder living in Israel, who discussed the provisions of the retention clause with Mr Aviv, to come to give evidence here; and (iii) to investigate whether evidence was available from SPI as to its likely response in 1999 to overtures from Prestige along the lines which the registrar suggests should have been advanced; (e) it is also likely that Mr Cohen, who came over to this country to give evidence at this trial, would be needed to come again to give evidence on the new issue in the light of the new pleading and other new evidence; (f) the raising of the new issue would occasion material delay to Prestige in obtaining finality in this case and any sum to which it is entitled from the registrar; and (g) the raising of the new issue would also mean that, beyond the five to seven days set aside by the court for the trial of this action, there would have to have been made available a further trial period for conclusion of this new issue at the expense of other litigants awaiting trials of their cases.

E 69 In summary the registrar has by proceeding at a leisurely pace without any consideration for others created a situation in which he can now only raise this new issue at the expense of injustice and an unacceptable cost to Prestige and significant harm to other litigants, and I ought therefore in this case to refuse permission.

Indemnity as to costs

F 70 The question has been raised as to the proper approach to the award of costs on a successful application for an indemnity. I am asked to give this guidance in my judgment, though any application for costs must await this judgment and argument in the light of it.

G 71 Section 83(5)(c) of the 1925 Act as originally enacted precluded any indemnity payable under the Act extending to any costs or expenses incurred without the consent of the registrar subject to two exceptions. This provision was limited in its application by section 2 of the 1971 Act, which provides: "(2) Section 83(5)(c) of the Land Registration Act 1925 (by virtue of which no indemnity is payable under that Act on account of costs incurred in taking or defending any legal proceedings without the consent of the registrar) shall not apply to [proceedings for an indemnity under the provisions of the 1925 Act]."

72 Section 83(9) goes on to provide:

H "Subject to subsection (5)(c) above, as restricted by section 2(2) of the Land Registration and Land Charges Act 1971—(a) an indemnity under any provision of this Act shall include such amount, if any, as may be reasonable in respect of any costs or expenses properly incurred by the claimant in relation to the matter; and (b) a claimant for an indemnity

under any such provision shall be entitled to an indemnity thereunder of such amount, if any, as may be reasonable in respect of any such costs or expenses, notwithstanding that no other indemnity money is payable thereunder.”

73 The question raised before me is as to the approach to be adopted on an application for costs by a successful applicant for an indemnity and in particular whether costs can or should be awarded to him assessed on a standard or indemnity basis. The distinction between the two assessments is set out in CPR r 44.4. In case of both assessments, costs will be allowed which are reasonable, but any doubt on reasonableness will be resolved, in case of assessment on a standard basis, in favour of the paying party and, in the case of an assessment on an indemnity basis, in favour of the receiving party. There is one further distinction, that in case of an assessment on a standard basis the costs must be proportionate to the matters in issue.

74 As it seems to me, the language of section 83 indicates that a successful claimant for an indemnity is prima facie entitled to costs assessed on an indemnity basis. The built-in limitation in case of such awards that the costs must be reasonably incurred protects the Land Registry and nothing in the section precludes the court in the exercise of its statutory discretion under the Civil Procedure Rules from reflecting in its order for costs the failure of the claimant on any issue or the fact that costs have been unnecessarily incurred or thrown away by reason of the way the successful claimant has conducted his case. I would accordingly propose to adopt this approach in this case, but this does not mean that I should disregard the limited success of the registrar on the issue of contributory negligence.

Conclusion

75 I therefore hold that Prestige is entitled to recover by way of indemnity from the registrar 90% of its loss, namely £450,000, plus interest. Prestige must however give credit for the £50,000 received from SPI.

Order accordingly.

Second defendant to pay claimants costs on indemnity basis.

Solicitors: Fladgate Fielder; Treasury Solicitor.

Reported by JESSICA GILES, Solicitor
