

**ALTERATION OR RECTIFICATION: THE “MALORY 2” CONUNDRUM
REVISITED IN NORTHERN POWERGRID (YORKSHIRE) PLC V LEATHAM
ESTATES LIMITED (REF 2019/0649 (FTT))**

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Practice points: land registration; rectification; proprietor not in possession; overriding interests; exceptional circumstances

1. As the Law Commission has acknowledged, this an area of registration law that needs reform. However, pending any change to the law, the issues discussed below are problematic for registered proprietors.
2. The question of whether or not a claim to alter the Register on the grounds of mistake qualifies as one for “alteration” or for “rectification” is determined by whether or not the effect of the alteration is to “prejudicially affect” the title of a registered proprietor (Land Registration Act 2002 [“LRA 2002”], Schedule 4, paragraph 1(b)).
3. Where alteration of the Register takes place in circumstances where at the time of the application, the Applicant’s right to apply constitutes an overriding interest (when combined with actual occupation for the purposes of LRA 2002, Schedule 4, paragraph 2), such an application is one for alteration, not rectification. That is the effect of the second part of the decision in Malory Enterprises v Cheshire Homes and Chief Land Registrar [2002] EWCA Civ 151, the so-called “Malory 2” point. It is the current state of the law (based upon the approval of Malory 2 in Swift 1st Ltd V Chief Land Registrar [2015] EWCA Civ 330), notwithstanding the counter-intuitive consequence which is that the removal of the registered proprietor’s name from the proprietorship register does not prejudicially affect his title, according to Malory 2 and Swift.
4. The most obvious scenario in which this operates is where the title in respect of which the applicant has a right to alter the register is transferred to a third party. According to Malory, where the applicant is in actual occupation of the land to which the right to rectify attaches (and concomitantly, the third party/subsequent proprietor is not “in possession” for the purposes of Schedule 4, paragraph 3(2) or 6(2)), the existence of overriding interest at the date of the transfer gives rise to the prejudice. Consequently, the subsequent application to alter does not have that affect because title is already prejudiced.
5. The consequence of the operation of that logic in these circumstances is that where the Registrar (himself or via the First Tier Tribunal) has the power to alter on the grounds of a mistake (i) no indemnity will be payable as the alteration is not rectification and (ii) the Court’s power to alter is not circumscribed by reference to Schedule 4 paragraph 6(3) i.e. there are exceptional circumstances, justifying a refusal of rectification. As to those points:
 - (i) potentially works an unfairness against an unwitting buyer of land which is subject to the right to rectify, operating as an overriding interest because it will

not be entitled to an indemnity in respect of loss suffered, if it is removed as the registered proprietor, following alteration. An indemnity under Schedule 8 paragraph 1 is only available where there is rectification of the register.

- (ii) arguably means that where the case is one of pure alteration, the Court's discretion is less circumscribed. However, the limits of the discretion have to some extent been defined by the decision in Derbyshire County Council v Fallon v another [2007 EWHC 1326 (Ch)] where the judge accepted that reference to exceptional circumstances could be made, by analogy with the control on the Court's powers to alter under r.126 of the Land Registration Rules 2003. Rule 126(2) provides that the court is not obliged to alter where there are exceptional circumstances. Indeed, the judge appeared to go further in stating that all the circumstances, whether exceptional or not, might be considered/ However, the ambit of his extra-statutory limitation is rather vague.
6. All these issues were considered by Judge Owen Rhys in the December 2020 decision of the First-Tier Tribunal ("FTT") in Northern Powergrid (Yorkshire) Plc v Leatham Estates Limited (Ref/2019/0649) which concerned the application by the electricity undertaker ("NPG") to alter the register to reflect its claim to title to part of land acquired by the respondent at auction. The land acquired had purported to be the freehold reversion to the entirety of NPG's leasehold interest in its sub-station site in Central Doncaster. However, NPG contended that it was vested with part of that land as freehold owner, by reason of a vesting deed executed in 1956.
 7. NPG's case, which the FTT accepted, was that in the course of the undertaking of a voluntary registration exercise, the respondent's predecessor in title (Canal and Rivers Trust- "CRT") had mistakenly asserted title (by means of a statutory declaration) to the land, that in fact had been vested by the earlier deed. As the FTT found, the vesting deed would have constituted a good root of title (as a because of the combined effect of ss. 44 and 45(6) of the Law of Property Act 1925) had it been produced in support of the application to register (which it was not because, as it appeared, the CRT was unaware of it).
 8. Notwithstanding the respondent's attempts to undermine the clear ostensible effect of the deed, the FTT held that the registration of the CRT with title to the Disputed Land was a mistake. As the Applicant was in occupation, the Respondent was subject to the overriding interest constituted by the claim to rectify, so that Schedule 4, paragraph 6 did not apply. Consequently, unless the circumstances were exceptional or more broadly "relevant", the Registrar/FTT was under an obligation to alter. Although the respondent argued prejudice arising from delay in making the application, on the facts the Tribunal found there were insufficient countervailing factors to prevent alteration (particularly because it appeared that the respondent was aware of an anomaly, prior to bidding at auction).
 9. The Upper Tribunal has recently (30 March 2021) refused permission to appeal.

10. The Law Commission proposed in its 2018 Report on Land Registration and the Government has recently accepted (March 2021) that the law in this area should be amended: it would be stated explicitly that the right to rectify should not be capable of constituting an overriding interest and that rights of successors would be protected by the Act. That would, if enacted, neutralise the Malory 2 point. We wait to see if, and if so when, that takes place; given that the Government has called for a redrafting of elements of the proposed Bill, it may be a while longer yet.

James Hanbam of Maitland Chambers represented the successful Applicant. Katharyn Holland QC and Kimberley Ziya of Landmark Chambers represented the Respondent.