

## Lack of Proper Care

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### I. INTRODUCTION

The rigid structures of land registration, its formal communication methods, its bureaucratic administration and its bright-line rules, all combine to render it easily portrayed as mechanistic, simplistic, formulaic and routine. It has been depicted as highly abstract and devoid of features which enable it to recognise the complexity of human interactions: Gray and Gray<sup>1</sup> castigated it as ‘non-Atkinian’ in reference to its dissociation from Lord Atkins’ ideal duty of care between neighbours in law.<sup>2</sup> This chapter seeks to contest those characterisations, to redress the balance by demonstrating the significant legal role that is played by ‘care’ in human interactions concerning title and registration, and to put forward a structured basis for understanding and applying care as a concept in registered land.

Central to understanding any registration system is the degree to which the Register is determinative of title. In England, the Register is qualified by the power to rectify, whose exercise may be affected by a ‘lack of proper care’ by one or more of the parties. A requirement to take care is therefore an integral component of the registration system, and one which is practically important to all participants, yet the High Court has found it ‘curiously void of discussion or consideration in the authorities and textbooks’.<sup>3</sup> That omission is remedied here.

The aim of this chapter is to bring order to the requirement of care in the context of registration. It does so in two stages: concept-building and normative evaluation. The first stage—concept-building—begins in Part II by showing the statutory channels through which care may be relevant to the resolution of disputes about rectification of the Register and claims to indemnity. Part III then puts forward the foundational concept in land registration law of a care requirement which occurs as a feature of the relationship that exists between certain participants in registration processes. It argues that the care requirements introduced through the various statutory channels can only be understood by reference to a particular relationship involving a requirement on one person to act or forbear from acting in certain ways so as to protect the interests of another. It categorises the relevant relationships and identifies the interests which are protected within those relationships.

The conceptual structure created in the first stage paves the way for the second stage of the chapter which asks what conduct should be expected of the participants. It advances some pivotal normative propositions and justifies them by reference to the protected interests within the relevant relationships. The propositions are arranged according to the different relationship settings in which they arise. Part IV deals with the position of acquirers towards

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<sup>1</sup> K Gray and S Gray, ‘The Rhetoric of Realty’ in J Getzler (ed), *Rationalizing Property, Equity and Trusts* (London, Butterworths, 2003).

<sup>2</sup> *Donoghue v Stevenson* [1932] AC 562, 580.

<sup>3</sup> *Sainsbury’s Supermarkets Ltd v Olympia Homes Ltd* [2005] EWHC 1235 (Ch), [2006] 1 P &CR 17 [87] (Mann J). See also *Mann v Dingley* [2011] EWLandRA 2010\_0582 [37] (Michael Michell).

owners; Part V deals with the position of owners towards acquirers; and Part VI deals with the position of both owners and acquirers towards those responsible for providing an indemnity. Collectively, they give substance to the nature and content of the care requirement and provide guidance on a crucial but neglected element influencing the indefeasibility of titles.

The analysis in this chapter relies on an existing tradition in scholarly literature which re-conceives the events that generate title disputes and priority disputes as ‘accidents’ insofar as they are the occasion for the recognition of a loss.<sup>4</sup> The loss must be allocated to a losing party and so property law can be understood as carrying out a function which resembles a function of tort law—although, unlike accidents, priority disputes also allocate a corresponding gain of the entitlement to the winning party. In developing some of its techniques, the chapter accordingly draws inspiration from tort law, such as the duty of care and the reasonableness criterion. In particular, in the course of discussing the possible ways to interpret and apply the legislative rules, it considers a party’s potential opportunities to take cost-effective precautions that might prevent such disputes from arising, and whether the failure to do so should have negative repercussions for his entitlements to property or compensation in rectification or indemnity proceedings.

## II. LEGAL BACKGROUND: THE STATUTORY FRAMEWORK

If the Register were only ever changed so as to allocate rights in accordance with a legal entitlement to procure such a change, such as a valid conveyance from the true owner, then there would be no occasion for inquiring, more generally, into participants’ behaviour. But when a Register change has been effected by mistake, further provisions come into play: the correction power becomes available to determine who acquires or retains the land,<sup>5</sup> and in some cases also the statutory indemnity provisions determine any entitlement to a state monetary award.<sup>6</sup> Claims under these provisions are the occasions when participants’ lack of care may be scrutinised.

The correction power is available to resolve entitlements to the land itself following a mistaken change to the Register. The relevant provision blandly states, ‘[t]he court may make an order for alteration of the register for the purpose of—(a) correcting a mistake...’.<sup>7</sup> When this correction power is available it must be exercised unless there are ‘exceptional circumstances’.<sup>8</sup> If the proposed correction would prejudicially affect the title of the

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<sup>4</sup> D Baird and T Jackson, ‘Information, Uncertainty and the Transfer of Property’ (1984) 13 *JLS* 299; D Baird, ‘Notice Filing and the Problem of Ostensible Ownership’ (1983) 12 *JLS* 53; T J Miceli et al, ‘Title Systems and Land Values’ (2002) 45 *JLE* 565; B Arrunada and N Garoupa, ‘The Choice of Titling System in Land’ (2005) 48 *JLE* 709; S Sterk, ‘Property Rules, Liability Rules, and Uncertainty about Property Rights’ (2008) 106 *Mich LR* 1285; M Mautner, ‘The Eternal Triangles of the Law: Toward a Theory of Priorities in Conflicts Involving Remote Parties’ (1991) 90 *Mich LR* 95; G Calabresi, ‘Transaction Costs, Resource Allocation and Liability Rules’ (1968) 11 *JLE* 67; S Levmore, ‘Variety and Uniformity in the Treatment of the Good Faith Purchaser’ (1987) 16 *JLS* 43; B Medina, ‘Augmenting the Value of Ownership by Protecting It Only Partially’ (2003) 19 *JLEO* 343.

<sup>5</sup> LRA 2002, sch 4, para 2(1)(a).

<sup>6</sup> LRA 2002, sch 8, para 1(1)(a), (b).

<sup>7</sup> LRA 2002, sch 4, para 2(1)(a). A similar power is conferred on the Registrar by para 5(a).

<sup>8</sup> For court proceedings: LRA 2002, sch 4, para 3(3) (rectification) and Land Registration Rules 2003, r 126 (correction) (the ‘exceptional circumstances test’). For proceedings in the First-Tier Tribunal: LRA 2002, sch 4, para 6(3) (rectification); there is ‘nothing wrong’ with applying the same approach to correction: *Derbyshire County Council v Fallon* [2007] EWHC 1326 (Ch) [28] (Mr C Nugee QC).

proprietor of a registered estate in land, the situation is known as ‘rectification’ and special consequences follow. Generally, no correction order may be made in relation to land in the registered proprietor’s possession.<sup>9</sup> That is the strongest form of protection against correction that a registered title receives under the LRA 2002. But that protection is specifically excluded by a pair of provisos which apply where the proprietor ‘has by fraud or lack of proper care caused or substantially contributed to the mistake’<sup>10</sup> or where it would for any other reason be ‘unjust for the alteration not to be made.’<sup>11</sup> If either is present, then the power is restored and must once again be exercised unless there are exceptional circumstances.<sup>12</sup>

The legislation makes express reference to lack of proper care in one of these provisos. But the open texture of the words used in the other provisions suggests that, when a claim is brought under the correction power, there may be further channels through which the degree of care by participants in registration processes could be a relevant factor. In relation to correction proceedings, this chapter identifies three statutory channels by which the determination of entitlements may be influenced by participants’ lack of care. They are:

Channel 1: ‘the exceptional circumstances test’ which denies correction to a claimant on grounds amounting to exceptional circumstances;

Channel 2: ‘the lack of care proviso’ which removes the protection against rectification for a proprietor in possession on grounds of his lack of proper care which substantially contributed to the mistake;

Channel 3: ‘the injustice proviso’ which removes the protection against rectification for a proprietor in possession on grounds that it would be unjust not to rectify.

Turning now to the state compensation provisions, there are further occasions when participants’ care may be taken into account. Whenever correction amounts to ‘rectification’, the power is supplemented by an indemnity for the loss caused to whichever party suffers from the adverse exercise of discretion, whether the entry is rectified or allowed to stand.<sup>13</sup> That indemnity, however, is excluded<sup>14</sup> in cases where the loss is suffered by the indemnity claimant wholly as a result of his own lack of proper care, and it is reduced proportionately<sup>15</sup> where the loss is suffered by the claimant partly as a result of his own lack of proper care.<sup>16</sup> These instances may be grouped together as representing a fourth situation in which participants’ care will influence entitlements, this time pertaining not to recovery of the land itself, but to the compensatory award:

Channel 4: ‘the lack of care defence to indemnity’ which removes or reduces in quantum the entitlement to state compensation for loss suffered by rectification on grounds of lack of proper care.

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<sup>9</sup> LRA 2002, sch 4, para 3(2).

<sup>10</sup> LRA 2002, sch 4, para 3(2)(a) (the ‘lack of care proviso’).

<sup>11</sup> LRA 2002, sch 4, para 3(2)(b) (the ‘injustice proviso’).

<sup>12</sup> LRA 2002, sch 4, para 3(3); Law Commission & HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 10.18, n 79.

<sup>13</sup> LRA 2002, sch 8, para 1(1)(a), (b).

<sup>14</sup> LRA 2002, sch 8, para 5(1)(b).

<sup>15</sup> LRA 2002, sch 8, para 5(2).

<sup>16</sup> Note that lack of care on the part of a person from whom the claimant derives title (otherwise than under a disposition for valuable consideration which is registered or protected by an entry in the Register) is to be treated as if it were fraud or lack of care on the part of the claimant: LRA 2002, sch 8, para 5(3).

Those, then, are the four channels which this chapter identifies as the means through which participants' care might intrude into judicial decision making concerning entitlements in registered land. The next part will establish the conceptual tools for use in understanding those provisions.

### III. CONCEPTUAL FOUNDATIONS: THE CARE REQUIREMENT AND RELATIONSHIP SETTINGS

This part proposes an autonomous concept of a 'care requirement' which will be of value in understanding the commonalities across all four of the channels mentioned above, and which will be used as the basis for making recommendations about the interpretation and application of the correction and indemnity provisions. For this purpose, a 'care requirement' exists where, within the registration system, a rule or principle has the effect of prejudicing the entitlement (whether to the land itself or to indemnity) of a person who failed to meet some standard of behaviour, where that standard of behaviour required the person to act or forbear from acting in a certain manner so as to protect the interests of another.

The concept of the care requirement possesses its own internal coherence and is capable of tying together important aspects of decision-making across all four channels. Imagine A is the true owner of land. B, an applicant for registration on the ground of long adverse possession,<sup>17</sup> lodges an inaccurate statutory declaration which is accepted at face value by the Registry. A is notified of it but neglects to act, and B is registered as proprietor. To the extent that B has not reached a certain minimum standard of behaviour to protect A from loss of title, B has failed to meet the care requirement which, as elaborated later, applies to a party in his position. This could have a variety of consequences. B's lack of care in causing the mistaken entry could remove his protection as proprietor in possession through either the lack of care proviso or the injustice proviso. On the other hand, to the extent that A has not reached a certain minimum basic standard of behaviour to protect B from future disputes, A too has failed to meet the care requirement which, as elaborated later, applies to a party in his position. In correction proceedings, the court may form the opinion that A's conduct is sufficiently crass and sufficiently relevant to refusing relief that it counterbalances the factors which might otherwise have satisfied the injustice proviso, or it may deny correction on the basis of 'exceptional circumstances'. Whichever party loses in the correction proceedings might then also find that indemnity is denied or reduced by reason of their lack of care.

The concept of the care requirement supposes a relationship between two parties which establishes a legal requirement that one must act in a certain manner for the benefit of the other. That the legal response is founded on a particular relationship has been forcefully made in another regime which determines liabilities as between the true owners and certain converters of cheques,<sup>18</sup> where a care requirement is expressed in terms of the converter's negligence: '[t]here can be no negligence without neglect of some duty'.<sup>19</sup> The negligence contemplated by the provision is a failure to take 'such reasonable precautions as ought to be

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<sup>17</sup> See LRA 2002, s 97 and sch 6.

<sup>18</sup> Cheques Act 1957, s 4, and its predecessors. The provision prevented a defendant bank from relying on the statutory defence to conversion when collecting on a cheque for someone other than the true owner unless it did so 'without negligence'.

<sup>19</sup> *Patent Safety Gun Cotton Co v Wilson* (1880) 49 LJ QB 713; *Bissell & Co v Fox Bros Co* (1884) 51 LT 663 (QB), (1885) 53 LT 193 (CA).

taken with reference to the interests of the [true owner]'.<sup>20</sup> The requirement is a 'purely statutory one imposed on [the converter] in favour of the true owner, and the negligence consists in the disregard of his interests ... It is from the standpoint, then, of the true owner that all questions of negligence under this section must be viewed'.<sup>21</sup> It is this concept of a relationship, pursuant to which one must have regard to the interests of the other, which underlies the care requirement in relation not only to cheques but also, it is submitted, in relation to the LRA 2002.

Although it is possible to portray the care requirement as a 'duty' in a loose sense, it does not connote a freestanding duty enforceable through an action in tort for damages.<sup>22</sup> There is no necessity to establish independently any tortious duty of care between acquirer and owner through rules of proximity and foreseeability. The care requirement does not give rise to a duty in Hohfeld's terminology, but only removes the new acquirer's immunity from rectification, or leads to the dismissal of the ousted owner's claim to rectify; it is therefore accurately if cumbrously described as the forfeiture of legal power to recover title or the susceptibility to loss of title.

The final concept used in this analysis is the categorisation of participants as either owners or acquirers. This is necessary in order to determine who are the parties to the relationship that carries the care requirement. Every rectification claim, by definition, must involve a mistake whose correction would prejudicially affect the title of a registered proprietor. Given that registration as a proprietor confers title,<sup>23</sup> and assuming all land to have been in the ownership of someone, it follows that every rectification claim must involve two persons: the owner of a right<sup>24</sup> who has been ousted<sup>25</sup> by a mistaken change to the Register, and the new acquirer of a competing registered right taking directly or indirectly under the mistake.<sup>26</sup> This yields the characterisation of parties as either owner and acquirer. They are the two fundamentally different statuses by which the parties in the care relationship are to be categorised, although of course one individual will occupy the two roles at different times as his efforts to acquire come to fruition and he makes the transition from acquirer to owner. The two roles will be used to create the foundation for building the distinctive content of their respective care requirements.

Using those concepts, the care requirement imposed on the new acquirer may be fleshed out. Due to the vesting effect of registration, an application for registration by the acquirer will harm the owner's interests if it results in their acquiring title without authorisation. That is the loss against which the acquirer should take care. In this first relationship, the care requirement ought to be that a prospective acquirer act carefully during the course of acquisition. It exists to safeguard the owner of the property.

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<sup>20</sup> *Bissell & Co v Fox Bros Co* (1884) 51 LT 663 (QB).

<sup>21</sup> *Marfani v Midland Bank Ltd* [1964] 1 WLR 956 (CA) 964–5.

<sup>22</sup> Cf the Registrar's right to recover under LRA 2002, sch 8, para 10(1).

<sup>23</sup> LRA 2002, s 58(1).

<sup>24</sup> In some cases the ousted owner is deregistered and loses a registered interest by the mistake; in others, the ousted owner is the holder of a pre-registration title which has been overridden by a later mistaken Register entry.

<sup>25</sup> The owner may be ousted wholly or partly. The ousted owner may actually continue to appear on the Register despite the mistaken change to the Register, as where the mistake is the entry of an acquirer with a lesser interest, or the opening of a separate but conflicting register.

<sup>26</sup> Claims involving correction that do not amount to rectification do not follow the pattern of ousted owner and new acquirer since they do not involve affect a proprietor with guaranteed title. Nor can they engage the second, third or fourth channels for introducing the care requirement, but are regulated only by the exceptional circumstances test. They are not considered further.

A corresponding approach can also be taken towards owners. The care requirement imposed on an owner requires a consideration of the loss that might be caused by an owner through his conduct relating to title. The owner's failure to warn prospective acquirers about the owner's rights might result in an acquirer squandering resources in attempting to acquire title from a non-owner, becoming caught up in a priority dispute, and suffering losses as a result of his reliance on an expectation of gaining title. That is the loss against which the owner should arguably take care. In this second relationship, the care requirement ought to be the requirement that an owner act carefully to warn others of his ownership. It exists to safeguard persons who are contemplating acquisition.

Those are the distinct care requirements imposed respectively on acquirers and owners which pursue the policy of encouraging care so as to reduce the incidence of mistaken changes to the Register that may harm the other affected party. Further care requirements are imposed by the LRA 2002. In particular, there is the lack of care defence to indemnity which applies when loss occurs due to mistake.<sup>27</sup> A successful claimant against the indemnity fund depletes the fund and casts a burden on those who pay. That suggests a separate relationship of care between all participants in land registration processes and those responsible for the fund. In this third relationship, the care requirement ought to be that anyone who is liable to make an indemnity claim, whether owner or acquirer, act carefully in order to safeguard the interests of those who endow it.

The care requirement in the three relationship settings will be used as the conceptual foundation for the work undertaken in the remainder of this chapter. The relationships each carry distinct ramifications for the content of the care requirement which will now be explored separately. Part IV deals with the acquirer's care requirement towards the owner; Part V deals with the owner's care requirement towards acquirers; and Part VI deals with both owners' and acquirers' care requirements towards the funders of indemnity. These parts involve a significant change of tack as they turn to making prescriptive arguments about the content of the care requirement within those relationship settings.

#### IV. . CARE AND ALTERATION CLAIMS: WHAT SHOULD BE REQUIRED OF ACQUIRERS OF LAND?

Having identified the channels through which care requirements might influence decisions about entitlements, and having developed concepts for the purpose of analysing care issues, the chapter now moves to examine what standards ought to be expected from participants in registration processes by way of the care requirement. It does so by proposing various principles about how the scope and content of the care requirement should be regulated and demonstrating why those principles are justified by context and policy. It is intended throughout that the principles offered are compatible with the statutory provisions and underlying policy concerns, so that the care requirements should find legal expression through the statutory channels identified above and thereby influence the success of rectification or indemnity claims. Relevant case law will be drawn upon to provide useful scenarios for practical illustration of the points being made, and in order to point out where decisions conform to or depart from the propositions presented here.

This part is concerned with the care requirement that should be recognised as imposed upon an acquirer to protect the interests of an owner. It is assumed that the acquirer obtained an interest in land pursuant to a mistaken entry and that rectification proceedings have been

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<sup>27</sup> LRA 2002, sch 8, para 5.

initiated; the concern is not, however, with the conduct of the acquirer in the rectification litigation, but instead with the steps he should have taken in the stages leading up to the acquisition of the interest, particularly when putting forward his application for registration. The starting point is that the care requirement in this first setting demands that the acquirer disclose defects or weaknesses (representing a potential outstanding owner's claim) in his submission to the owner or Registry, and thereby provide an opportunity for them to address the matter and to object before the acquirer gains title by registration. There are many different contexts in which an acquirer might submit an application: it might be at first registration; it might relate to a title which has arisen by operation of law that does not derive from a registered proprietor; or it might relate to a derivative title obtained by purchase from a registered proprietor. It will be argued that in some of these contexts any care requirement ought to be entirely excluded from the legal equation, and in other contexts, where a care requirement should apply, arguments are put forward about factors that should assist in setting the standard of care at a suitable level.

### **A. Carve-Out from the Care Requirement to Avoid Undermining the Register**

Registration of title is about convenience and reliability of the information sources and the cheapness of acquiring that information. To superimpose a care requirement is to introduce a concession to other values, such as morality and cost-efficient loss avoidance. Nevertheless, it is argued that there are places in which the primary statutory objectives of reliability and cheapness must be protected from erosion through the imposition of a particular care requirement. The first of these relates to defects arising not from the events by which the acquirer claims to have obtained title, but from events which already affected the registered title of the owner from whom title was obtained—flaws, that is, in the 'root of title'. The second relates to the capacity of the owner to deal with the property, where any defects in his capacity are not apparent from the Register.

If an acquirer takes a transfer of registered land, the vendor having been registered pursuant to a mistake, then there must be no scope for care requirements to play a part in penalising the acquirer simply on the ground that he ought to have known of the mistake. It is imperative that care requirements should give way to certainty of title in these circumstances. The reason is that the introduction of a care requirement here would undermine reliability of the Register. It might encourage conveyancers to seek out potential mistakes or rectification claims. That would reintroduce all of the disadvantages of wide-ranging, costly and inconclusive investigations associated with the doctrine of constructive notice. The registration system would have failed to achieve its basic purpose. It is therefore submitted that an applicant for registration who takes a derivative grant comes under no requirement to alert the Registry or the owner to any defects in the registered root of title. Fortunately, there is no judicial support for it, except an isolated interlocutory reference to 'turning a blind eye'<sup>28</sup> towards such a matter.

In addition to excluding from care requirements any investigation into possible defects into the registered root of title, the same arguments apply to defects in the capacity of the registered proprietor to make a disposition. A proprietor's capacity is presumptively confirmed by the Register unless a restriction is entered,<sup>29</sup> and so proper care must not require investigations into unregistered limits on capacity.

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<sup>28</sup> *Barclays Bank v Guy* [2008] EWCA Civ 452, [2008] 2 EGLR 74 [23] (Lloyd LJ); not taken further in *Fye v High Grange Developments Ltd* [2015] UKFTT 0437 (Property Chamber) [31] (Judge Owen Rhys). See also *Iqbal v Najeed* [2011] EWLandRA 2009\_1234 [37].

<sup>29</sup> LRA 2002, ss 23–26.

While any equivalent to the old doctrine of constructive notice of defects in the Register must be eliminated from the remit of the acquirer's care requirement, the matter is not so compelling in relation to actual notice of defects in the registered root of title or capacity to grant. The possibility of actual notice resurfacing through a care requirement was recognised in *Odogwu v Vastguide Ltd*<sup>30</sup> which represents the high water-mark of the acquirer's obligations in the case law. Odogwu was registered proprietor, an imposter granted a registered charge to a lender, and the lender sold to Vastguide. Vastguide had been alerted before completion to the fraud. Upon Vastguide's registration, Odogwu sought rectification and it was held that Vastguide's actual knowledge of the fraud at the time it took the transfer constituted a lack of proper care.<sup>31</sup>

Nevertheless, it is argued that, on balance, actual notice of defects in the root of title or the capacity to grant should be excluded from the care requirement. An approach to rectification proceedings which penalises those who acquired with awareness of a defect in the Register introduces the same problems suffered by the concept of 'actual notice' as employed in the equitable doctrine of notice. It is deeply unsatisfactory for its indeterminacy and its likely practical effects. It would, in particular, tend to encourage litigation that probes the borderline of subjective awareness,<sup>32</sup> and the problems of such litigation are magnified when the alleged owner's information is uncorroborated and self-serving. The problems are illustrated by the facts of *Odogwu*. The ousted owner had not lodged a restriction, had not had his claim filtered by the Registry, and offered no supporting affidavit or undertaking in damages. The information suggestive of a defect in the Register came to light only after contracts had been exchanged between the selling lender and Vastguide, forcing the new acquirer into the difficult position of having to make a decision about the quality of the information under time pressure from the vendor, and knowing that a breach of contract action could result from delay or withdrawal. Upholding the reliability of the Register would avoid these practical quandaries and the particularly troublesome litigation over states of mind which they generate.

The conclusions that might be drawn from these pragmatic arguments—that an acquirer's actual awareness of such root or capacity defects should be disregarded—might be reinforced by a provision of the LRA 2002. The lack of proper care proviso—which defeats a possessing registered proprietor's defence to a rectification claim—operates when the acquirer has 'caused or substantially contributed to the mistake'.<sup>33</sup> This rule would achieve a potent source of purchaser protection if the 'mistake' is taken to be the original mistake which first led to the ousted owner's right to rectify. As stated in *Epps*:<sup>34</sup>

[i]f the proprietor [that is, the new acquirer] is not the first registered proprietor but is a subsequent transferee [of an already-registered title] he will not normally be responsible for the mistake in registration in any way at all.<sup>35</sup>

Adopting this interpretation, the relevant question (for the purpose of interpreting the lack of care proviso) is whether the acquirer has contributed, through lack of care, to the mistaken

<sup>30</sup> *Odogwu v Vastguide Ltd* [2008] EWHC 3565 (Ch).

<sup>31</sup> *ibid* [64] (Sir Donald Rattee). See the text to n 58 below where the implications of this finding are discussed.

<sup>32</sup> *cf* *Midland Bank Trust Co Ltd v Green (No 1)* [1981] AC 513 (HL) 530 (Lord Wilberforce).

<sup>33</sup> LRA 2002, sch 4, para 3(2)(a). It is not enough to show there was lack of care by a predecessor in title: *Paton v Todd* [2012] EWHC 1248, [2012] 2 EGLR 19 [62] (Morgan J); see also *Kingsalton Ltd v Thames Water Developments Ltd* [2001] EWCA Civ 20, [2002] 1 P & CR 15 [25] (Peter Gibson LJ).

<sup>34</sup> *Epps v Esso Petroleum Ltd* [1971] 1 WLR 1071 (Ch).

<sup>35</sup> *ibid* 1079D.

registration of the vendor. Where the acquirer's involvement with the property arises only *after* the vendor has been mistakenly registered, he will not have caused—whether through lack of care or otherwise—the relevant mistake. This interpretation of the causation issue would generally eradicate any requirement on an acquirer to attend to mistakes already in the Register. It appears to have been confirmed by Sir Christopher Slade in *Kingsalton Ltd v Thames Water Developments Ltd*.<sup>36</sup> His Lordship regarded the acquirers as entitled to assume that their registered title would be afforded the normal protection of registration despite their actual knowledge of the ownership dispute pre-dating first registration which had led to a mistake in the registered title: '[t]he very purpose of registration was to resolve such doubts'.<sup>37</sup> Those two cases were decided under the LRA 1925 but the same interpretation has been reiterated under the LRA 2002 by *Fye v High Grange Ltd*<sup>38</sup> which denied 'any basis in law for requiring [the acquirer] to go behind the [R]egister, and satisfy itself that the earlier transaction was bona fide'.<sup>39</sup>

The position under the LRA 2002 has, however, been complicated by the answer that recent cases have given to the question whether the registration of a transferee of a mistaken title was rectifiable as a mistake in itself or was rectifiable merely to correct the consequences of the earlier mistake.<sup>40</sup> *Odogwu v Vastguide Ltd*<sup>41</sup> accepted that there was a mistake in entering the acquirer as successor to the mistaken entry—albeit on the basis of issue estoppel—and proceeded to make striking comments against the protection of acquirers from defects in the registered root of title. The acquirer was denied the possession defence against rectification on the ground that it chose to 'compound the effect of the fraud'<sup>42</sup> by taking the transfer knowing that it was able to do so only because of that fraud. The case represents a clear conflict with the principle outlined above. Even if the care requirement were to take account only of actual awareness of an existing right to rectify, and not constructive notice, it would still engender a risk that the Register becomes perceived as having impaired reliability; defensive investigative practices might in turn ensue, along with litigation over the requisite mental state.

It is submitted that the preferable approach involves the provision of a safe harbour for acquirers through the no-causation analysis, illustrated by *Epps*, so that actual notice of defects in the registered root of title is disregarded when applying the care requirement. Although that proposition was developed in the context of the lack of care proviso, it concerns the content of the acquirer's care requirement generally and so should apply uniformly to that care requirement, independently of the particular channel under which it is considered. It must therefore be equally inappropriate to smuggle the same factor into decision making either through the 'injustice proviso', as was suggested as an alternative route in *Odogwu*,<sup>43</sup> or through the 'exceptional circumstances' test, as was done in *Kingsalton* and *Barwell*.<sup>44</sup> Those cases should all fall together.

## **B. Care Requirements Not Undermining the Register**

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<sup>36</sup> *Kingsalton* (n 33).

<sup>37</sup> *Kingsalton* (n 33) [56] (Sir Christopher Slade; Arden LJ concurring).

<sup>38</sup> *Fye* (n 27) (obiter as the proprietor was not in possession).

<sup>39</sup> *Fye* (n 27) [24] (Judge Owen Rhys). See also *Wheeler v Patnaik* [2015] EWLandRA 2014\_0519 [52] (Judge McAllister).

<sup>40</sup> The point was recognised in *Fye* (n 27).

<sup>41</sup> *Odogwu* (n 29).

<sup>42</sup> *ibid* [68] (Sir Donald Rattee).

<sup>43</sup> *ibid* [68] (Sir Donald Rattee).

<sup>44</sup> *Kingsalton* (n 33) [27] (Peter Gibson LJ); *Barwell v Skinner* [2011] EWLandRA 2010\_0982 [126] (Mr Simon Brilliant).

There are occasions when a potential care requirement might suggest that investigations should properly be undertaken by an acquirer into matters other than the validity of Register information. As such, they would not undermine the Register, and there is no objection on that ground to imposing a care requirement—which might, as explained above, carry adverse consequences in rectification or indemnity proceedings. The following paragraphs explain three factual contexts. Section C then explores how any care requirement ought to be fulfilled in each.

The first context involves defects in the immediate disposition to the acquirer. If the acquirer is aware of such a defect, then there is no reason to resist the recognition of a requirement to raise the matter with the Registry or the owner, so as to afford the opportunity to object. Such a requirement would not encourage conveyancers to undertake undesirable investigations. The case law has recognised a care requirement—correctly on the arguments presented here—when the acquirer submits a transfer containing a defect which is not apparent on its face and does not draw the defect to the attention of the Registry or owner. Examples include execution under a revoked power of attorney,<sup>45</sup> attestation by an absent witness,<sup>46</sup> and an interpolated execution page.<sup>47</sup>

The second context in which a care requirement would not compel investigations behind the Register concerns adverse possession applications and other modes of acquisition without consent. Such circumstances show clearly the nature of the obligation on the acquirer: it requires some communication from the acquirer to the Registry or owner which discloses potential defects and affords the owner an opportunity to object. A compelling account of that reasoning is found in *Balevents Ltd v Sartori*<sup>48</sup> in which Sartori secured registration as freehold proprietor on the basis of his false statutory declaration as to the nature and duration of his adverse possession against its owner. Balevents Ltd, which had previous connections with Sartori, then sought rectification against him on the basis either that Sartori's possession enured to the benefit of Balevents Ltd, or that Sartori held the title on constructive trust for Balevents Ltd, or that neither had any title. Balevents Ltd argued that Sartori was prevented from relying on his possession as a defence to rectification, owing to the lack of proper care in his application for registration.

The court's decision was that the acquirer in this case—Sartori—had not exercised proper care, and was therefore unable to resist the rectification claim on the ground of being in possession. The importance of the case lies in the court's explanation of why the false statement in Sartori's application should have amounted to lack of proper care. The court found lack of proper care on the basis that (i) the false assertion was effective to persuade the Registry not to serve a notice on a potential rival claimant who knew of the history and would have effectively opposed the application, and (ii) the false allegation also led to the Registry being dismissive of the objections put forward by the true owner.<sup>49</sup> Such reasoning demonstrates that truthful communication to the Registry of the facts about possession are required and that misleading statements of fact in statutory declarations can be penalised through the lack of care proviso.<sup>50</sup> But most importantly it confirms that this is required in

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<sup>45</sup> *Iqbal* (n 28).

<sup>46</sup> *Xu v Guo* [2015] UKFTT 0525 (Property Chamber)

<sup>47</sup> *Garguilo v Gershinson* [2012] EWLandRA 2011\_0377.

<sup>48</sup> *Balevents Ltd v Sartori* [2014] EWHC 1164 (Ch).

<sup>49</sup> *ibid* [174] (Morgan J).

<sup>50</sup> *Balevents* (n 48); *Wheeler v Patnaik* [2015] EWLandRA 2014\_0519; *Wilson v Grainger* [2009] EWHC 3145 (Ch); *Thompson v Hatherton Marina Ltd* [2007] EWLandRA 2004\_0765; *Khalifa Holdings Aktiengesellschaft v Way* [2010] EWLandRA 2008\_1438; *Baxter v Mannion* [2011] EWCA Civ 120, [2011] 1 WLR 1594; *Chapman v Godinn Properties Ltd* [2005] EWCA Civ 941 [20] (Chadwick LJ).

order that the Registry might then be equipped to alert interested parties and make an informed decision, and thus implies that this is a care requirement designed to protect the interests of owners.

The third context involves the care requirement in applications for first registration—which by definition cannot involve inquiry behind any Register entries. The case law recognises the potential relevance of the care requirement in this context, typically in the submission of ambiguous or imprecise plans or parcel descriptions,<sup>51</sup> and confirms that the care requirement is satisfied through communicating in a way that enables opposition to the application. It is submitted that this is the correct approach to take. In *Saxon v Moore*<sup>52</sup> and *Mann v Dingley*,<sup>53</sup> the prospective acquirer was found to have lacked proper care when he was well aware of the existing dispute over ownership but had nevertheless applied for first registration without making disclosure in a way that would have prompted Registry inquiries which in turn would have given the owner an opportunity to object. When the putative owner sought rectification of the Register, the judge noted that

Mr Dingley [the acquirer who successfully applied for first registration] was under a duty to bring the fact that there was a dispute about the land which had been the subject of correspondence with HM Land Registry to the attention of the Registry. It might have been different had he warned Mrs Mann [who claimed to be true owner under a prior unregistered title] that he was going to make the application so that she could have made representations to the Registry herself.<sup>54</sup>

The principles embodied in that passage are unassailable. The acquirer's lack of proper care resulted in his being denied the possession defence to the owner's rectification claim. On the facts, however, the decision is somewhat unsatisfactory. Mr Dingley had failed to make frank disclosure and thus lost protection against rectification, yet Mrs Mann failed at trial to substantiate her assertion of prior ownership, and so—incongruously—the case effectively imposes on the acquirer a requirement to protect the interests of someone who turned out not to have been the owner.<sup>55</sup> That approach appears to create a concept of care in the abstract and misses the point that a care requirement makes practical sense only when understood in terms of a particular relationship setting. The court should not have stigmatised Dingley's conduct as careless and should have declined rectification: rectification exists to protect private interests rather than to police careful behaviour for its own sake. For that reason, the same criticism applies to cases in which an acquirer is penalised for failing to take care when an action is brought by a concerned member of the public.

The facts of *Sainsbury's Supermarkets Ltd v Olympia Homes Ltd*<sup>56</sup> demonstrate the converse position. The acquirer's solicitor had previously held discussions with the Registry concerning an anticipated title problem—admittedly on a narrow point about the title to be conveyed—but the discussions still had the effect of drawing to the Registry's attention the broader problem which indicated the existence of a mistake. Against that background, the court thought the acquirer's solicitor

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<sup>51</sup> *Epps* (n 34); *Mann* (n 3); *Barwell* (n 44); *Facey v Bedford BC* [2014] EWLandRA 2014\_0022.

<sup>52</sup> *Saxon v Moore* [2005] EWHC 27 (Ch).

<sup>53</sup> *Mann* (n 3).

<sup>54</sup> *ibid* [40] (Judge McCahill QC). See *Saxon* (n 52) [92], point 2 (Judge Behrens).

<sup>55</sup> The same criticism applies to *Walker v Burton* [2013] EWCA Civ 1228, [2014] 1 P & CR 9.

<sup>56</sup> *Sainsbury's Supermarkets Ltd v Olympia Homes Ltd* [2005] EWHC 1235 (Ch), [2006] 1 P & CR 17.

should [not] have been expected to do anything more than submit the title documents with which he had been supplied so that the Registry could make up its own mind on what sort of title they entitled his client to.<sup>57</sup>

That approach is supported on the ground that the acquirer had discharged the care requirement by acting (whether consciously or not) in a way that drew at least an aspect of the issue to the attention of the Registry.

### **C. Fulfilling the Care Requirement**

Having addressed certain conditions in which the acquirer should and should not be burdened by the care requirement, it now remains to consider some important dimensions in the application of the care requirement.

#### **(i) A requirement to communicate or a requirement to desist from seeking registration?**

The preceding sections have argued that the primary responsibility of the acquirer in fulfilling any care requirement is one of communication with the owner or the Registry to draw attention to facts which are potentially indicative that the proposed acquisition could create a mistake in the Register. But it must also be questioned whether the care requirement may demand more than mere communication. The court in *Odogwu v Vastguide Ltd*<sup>58</sup> appears to go further. The judgment can be interpreted as extending the acquirer's care requirement (in the context of the lack of care proviso) to include a requirement to desist from proceeding with an application to register.

Recall that Odogwu was registered proprietor of the fee simple. A fraudster, impersonating Odogwu, executed a registered charge in favour of Credit & Mercantile. The latter negotiated a sale to Vastguide, the acquirer. Before the exchange of contracts for sale, Vastguide was informed by Odogwu's solicitor that the charge had been executed by an imposter; the police confirmed the fraud in a letter received by Vastguide between contract and transfer. Thereafter—and before taking the transfer—Vastguide's solicitor had corresponded with Odogwu's solicitor; he had stated that Vastguide had contracted to buy, he had invited Odogwu to initiate proceedings before completion of the purchase, he had telephoned to inquire what Odogwu planned to do, and he had later offered a very short delay in completion to permit an emergency injunction application. In the absence of a reply, Vastguide completed the purchase and was registered as proprietor. Thus presented, the facts showed a concern by the potential acquirer (Vastguide) to disclose its acquisition plans fully to the ousted owner (Odogwu) and to give the ousted owner an opportunity to object. It is difficult to see what further level of communication could have been offered by or demanded from the acquirer on these facts. Despite this, it was held that Vastguide came within the lack of care proviso, meaning it was denied the defence against the owner's rectification claim, which would ordinarily be available to a possessor. The court did not describe what more it expected of the acquirer, but there is one crucial allusion: Vastguide 'apparently did not think fit to ask Credit & Mercantile to release it from its contract ... once it had knowledge of the fraud'.<sup>59</sup> That establishes an innovation that goes far beyond all other reported cases: a requirement to desist from applying for registration, even if the acquirer had already contracted to buy and had paid over the price to the vendor (in this case, Credit &

<sup>57</sup> *ibid* [87] (Mann J). See also *Walker v Burton* [2012] EWHC 978 [99] (Jeremy Cousins QC).

<sup>58</sup> *Odogwu* (n 30).

<sup>59</sup> *ibid* [64] (Sir Donald Rattee).

Mercantile). It is submitted that a requirement to desist from seeking registration should be rejected as it leads to an unacceptable allocation of responsibilities. First, by deterring prospective purchasers, it would detract from the right of the vendor (Credit & Mercantile) to dispose of its property. Secondly, the requirement to desist would mean that the prospective acquirer would not proceed, and the vendor would expect the former owner to commence alteration proceedings against the vendor. Because the vendor cannot claim a statutory indemnity until the rectification question has been resolved,<sup>60</sup> the vendor's desire to avoid the alteration litigation might provide an undesirable incentive for the vendor to sell to another without disclosing the problem, thereby throwing the risk of that lawsuit onto a third party. Thirdly, it would put an unfair risk of delay on the acquirer who must wait for the ousted owner to take action and yet there is no limitation period for the owner's rectification proceedings.

Those arguments would be relevant in a case such as *Odogwu* in which the issue was the acquirer's notice of an alleged flaw affecting the seller's registered title. But even if notice of defects behind the Register is carved out from the care requirement, as proposed above, then the point remains valid that acquirers should not be required to desist from registering. That would remain relevant in cases where the acquirer sought registration under an entitlement by operation of law or at first registration. In those circumstances, a requirement to desist from seeking registration would involve unnecessary paternalism towards owners. There is no basis for treating owners as unduly vulnerable and they have various registration facilities available to protect their position. A better balance would be struck between the interests of the acquirer and the ousted owner if the law accepted that the acquirer discharged his responsibility by disclosing and giving the opportunity to object. Consequently, the acquirer's care requirement should be satisfied merely by making suitable disclosure on or before applying to be registered, and should not demand that acquirers desist from seeking registration altogether.

## **(ii) Standard of care: subjective awareness and constructive notice**

So far it has been argued that the acquirer's care requirement ought to apply only in relation to matters which do not lie behind the Register, and that it extends only to appropriate communication with the Registry or the owner. It is now possible to move on to consider the standard of care within those parameters.

Standards of care have long been managed in the tort of negligence through a framework of factors that have universal applicability.<sup>61</sup> The factors, bearing on what 'reasonable care' requires, traditionally dwell on the four matters indicated in these extracts:

not only [1] how remote is the chance that a person might [suffer harm] but also [2] how serious the consequences are likely to be.<sup>62</sup>

Furthermore,

[i]t is well settled that in measuring due care [3] you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: [4] you must balance the risk against the end to be achieved.<sup>63</sup>

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<sup>60</sup> LRA 2002, sch 8, para 1(3).

<sup>61</sup> *Bamford v Turnley* (1860) 3 B&S 62; 122 ER 25, *United States v Carroll Towing Co* (1947) 159 F 2d 169.

<sup>62</sup> *Bolton v Stone* [1951] AC 850 (HL), 867 (Lord Reid).

<sup>63</sup> *Watt v Hertfordshire CC* [1954] 1 WLR 835 (CA) 838 (Denning LJ).

Those factors also serve well in the land registration context. The harm is constant in taking one of two forms—it equates to the ousted owner’s loss of title or the acquirer’s squandered efforts to acquire good title—so attention focuses on the foreseeability of those two harms, the practicability of precautions, and the social desirability of reducing the precautionary measures needed to be taken by owners or the investigatory measures taken by acquirers. When it comes to applying these factors, there is a difficult balance to be struck if expropriation via a mistaken registration is to be combatted while avoiding costly investigations that impede the acquisition of rights. The following paragraphs will focus on one particular controversy: how the factors just identified relate to an acquirer’s actual and constructive notice of facts which indicate that a mistake will arise by the acquirer’s entry as registered proprietor. It will be argued that an acquirer’s subjective awareness of a competing claim, if not appropriately communicated, will amount to a breach of the acquirer’s care requirement. But beyond this, there will be circumstances in which the care requirement is more stringent, in as much as it might penalise an acquirer for conduct which falls below an *objective* standard, even in the absence of subjective awareness of a competing claim. In effect, this may involve attaching legal consequences to a failure to observe a limited objective duty of inquiry in certain circumstances.

It is contended here that legal significance should be attached to the acquirer’s actual notice or subjective awareness of an outstanding claim derogating from the title with which he seeks to be registered, or of a flaw in his application which could represent an outstanding claim, coupled with lack of candid disclosure. The importance of subjective awareness in the standard of care is twofold. First, it operates as a distinctive moral element that serves to penalise an acquirer who conceals another’s claim for the purpose of advancing his own application to register. Second, the use of subjective awareness does not imply any obligation to make unprompted inquiries in the field. That is significant to the test of reasonableness found in tort law which has traditionally considered the cost of precautions. In the context of information about rival claims, the cost of precautions must equate to the costs of detection. If an outstanding ownership claim could be detected in the course of other endeavours without any cost, and disclosure would be equally costless, that is likely to tip the scales of reasonableness, especially if the information appears reliable and thereby raises the foreseeability or probability of the risk materialising. In these circumstances of low-cost protection of the owner’s rights, the acquirer should be expected to act.

This approach does not appear to require any departure from the existing case law. Subjective awareness certainly figures in the cases, although it has not been explicitly tied to the reasonableness factors noted above. It has been emphasised in relation to an acquirer’s awareness of facts indicating defects in the immediate transfer. Examples include acquirers seeking to register transfers known to be executed under a revoked power of attorney,<sup>64</sup> executed improperly<sup>65</sup> or attested by an absent witness.<sup>66</sup> It also makes an appearance in first registration applications. *Epps v Esso Petroleum Ltd*<sup>67</sup> is an early case which broadly attaches significance to an acquirer’s awareness of a defect concerning a boundary at first registration. The acquirers who sought first registration ‘were taking a gamble ... [They] must have realised that there might be some difficulty over the boundary’,<sup>68</sup> yet did not communicate their doubts. That was held to engage the injustice proviso, although the facts and reasoning

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<sup>64</sup> *Iqbal* (n 28) [34]-[35] (Michael Mark) (obiter).

<sup>65</sup> *Garguilo v Gershinon* (n 45) [82] (Ann McAllister).

<sup>66</sup> *Xu* (n 46) [16] (Judge Owen Rhys).

<sup>67</sup> *Epps* (n 33).

<sup>68</sup> *Epps* (n 33) 1080–81 (Templeman J).

could have equally support analysis under the lack of care proviso as the Law Commission has recognised.<sup>69</sup> Further, subjective awareness has been considered relevant in claims to acquire registered land by adverse possession. The failure to disclose an ongoing dispute of which the acquirer was all too aware has also been held sufficient to invoke the injustice proviso against the acquirer, when facing a rectification claim by the owner.<sup>70</sup>

These common case references are consistent with the argument that *subjective* awareness or actual notice of a defect which the acquirer does not disclose may indicate unreasonable conduct and thus fail the acquirer's care requirement. However, the cases mentioned do not indicate what place (if any) *objective* tests of knowledge have in determining standards of care. In particular, it is not clear whether subjective awareness was a redundant feature in those cases, whether standards of care are assessed by an objective test, or whether they operate in tandem so that an acquirer may satisfy an objective standard yet fail overall to show proper care due to his subjective awareness of a problem.

The importation of any objective element may be less welcome. It has associations with the taboo of constructive notice<sup>71</sup> that traditionally raises fears of unpalatable vagueness, adjudication with the benefit of hindsight, and excessively onerous expectations in investigating title, collectively tending to increase cost and unpredictability for acquirers.

Despite those reservations, objective standards should have a place in the application of the standard of care required by the provisions of the LRA 2002. Apart from the objective connotations of the phrase 'proper care',<sup>72</sup> which suggests action and not passively waiting to see if information finds its way to one's attention, there are substantial policy considerations in favour of objective minimum standards. They ensure predictable minimum protections for owners, they deter acquirers from consciously avoiding cheap and convenient investigations, they ensure there is background information which equips the acquirer to recognise subsequent warning signs that may suggest defects, and they avoid problems in attributing subjective mental states to corporations.<sup>73</sup> To resurrect some features of constructive notice in the present context would not infringe the paramount principle that Register entries must not be questioned, since the present context is restricted to occasions such as first registrations and disposition defects where that principle has traditionally had no application. Nevertheless, it is also submitted that in applying any care requirement one should heed the reservations noted above and be alert to the danger of escalating conveyancing costs and unnecessarily hampering the formal acquisition of rights. The terminology of constructive notice may be avoided by reframing the objective care requirement in tortious terms: unreasonably taking foreseeable risks in circumstances of heightened probability of error where precautionary investigative costs are low.

That principle probably cannot be broken down further to provide more concrete guidance in any universal formula. But further assistance is to be gained from taking separately the diverse types of situation in which the care requirement may be applied. Four key illustrations can be considered in turn.

First, when applied to the acquirer's conduct at first registration, it is submitted that an objective standard of care is not merely desirable, but vital to the working of land registration

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<sup>69</sup> Law Commission, *Third Report on Land Registration* (Law Com No 158, 1987) para 3.14, n 36.

<sup>70</sup> *Andrews v Tonks* [2013] EWLandRA 2012\_0518 [41] (Judge Michell).

<sup>71</sup> See R Smith, *Property Law*, 8th edn (Harlow, Pearson Longman, 2014) 280. See also Law Commission, *Third Report on Land Registration* (Law Com No 158, 1987) paras 3.14–3.15 and Law Commission, *Land Registration for the Twenty-First Century—A Consultative Document* (Law Com No 254, 1998) paras 3.44–3.49.

<sup>72</sup> LRA 2002, sch 4, para 3(2)(a); also, in a different relationship setting, LRA 2002, sch 8, para 5(2).

<sup>73</sup> On attribution to corporations: see *Facey v Bedford Borough Council* REF/2014/22 (11 Sept 2014) and (17 Nov 2014).

under the English model. It ensures that the enduring record of title is compiled from information generated by a minimum level of inquiry in a regime where the Registry places reliance on the conveyancer's work. That approach necessarily assumes a reasonable conveyancer rather than a reasonable lay person. However, it is not unduly onerous as the Registry adopts the standard that would typically be used by conveyancers acting for willing purchasers, namely what might be called a 'safe holding title'<sup>74</sup> as opposed to 'good marketable title'.<sup>75</sup> The starting point for the proposed objective standard of care should, therefore, simply track the obligations owed by a solicitor to a client in relation to investigating title,<sup>76</sup> as qualified by the requirements of the LRA 2002, the Land Registration Rules ('LRR') 2003,<sup>77</sup> and professional standards developed in response to published Registry guidance.<sup>78</sup>

That approach seems compatible with the case law. In *Johnson v Shaw*,<sup>79</sup> there was recognition of an objective standard in that the acquirer knew 'or ought to have known'<sup>80</sup> that she had no entitlement, a matter that was relevant in deciding whether to order rectification under the unregulated discretionary test as it stood before the exceptional circumstances test was introduced.<sup>81</sup> The point has since been made fully and forcefully in *Walker v Burton*<sup>82</sup> where an objective test was explicitly argued. While the Court of Appeal did not categorically confirm the point, it did refer to the 'reasonableness' of the acquisitive conduct<sup>83</sup> and generally approved the High Court's approach which had clearly applied objective standards of proper care<sup>84</sup>—although its precedential value is somewhat weakened by the procedural failure to plead lack of proper care in registering the relevant *wasteland* (the object of the claim) as opposed to the *manor* (which was not the object of the claim), and by the fact that the acquirer's solicitors had been subjectively aware of the limitations of their title investigations. The adoption of an objective standard may be evident in the court's acknowledgement that 'issues of proportionality of costs to the subject matter have to be kept in mind'.<sup>85</sup> In these circumstances, the investigations should not be treated in isolation from the communications to the Registry. While the acquirer's conveyancers had probably not undertaken investigations that would satisfy the traditional unregistered conveyancing standard, they had deduced documentary evidence back to 1836 and pointed out to the Registry that they declined to certify title in the usual way. That was perfectly acceptable as it would have been 'unrealistic'<sup>86</sup> to require the acquirer to undertake the factual and legal research necessary to resolve the title issues (which related to the devolution of a manor from a charter of 1254) and in circumstances where the only other rival claimants had been

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<sup>74</sup> Land Transfer Act 1875, s17(3), now embodied in LRA 2002, s 9(2) and (3). See *Report of the Royal Commissioners Appointed to Inquire into the Operation of the Land Transfer Act (1870, c 20)* para 77; *Royal Commission on the Land Transfer Acts: Second and Final Report of the Commissioners* (Cmd 5483, 1911) para 59.

<sup>75</sup> Formerly required by Land Registry Act 1862, s 5.

<sup>76</sup> *Prestige Properties Ltd v Scottish Provident Institution* [2002] EWHC 330 (Ch), [2003] Ch 1 [36] (Lightman J); *Walker v Burton* [2013] EWCA Civ 1228, [2014] 1 P & CR 9 [97] (Mummery LJ).

<sup>77</sup> eg LRA 2002, s 71; Land Registration Rules ('LRR') 2003, SI 2003/1417, rr 24, 28 and 30.

<sup>78</sup> eg Land Registry, *Practice Guide 1: First Registrations* (Feb 2017).

<sup>79</sup> *Johnson v Shaw* [2003] EWCA Civ 894, [2004] 1 P & CR 10.

<sup>80</sup> *ibid* [48] (Peter Gibson LJ).

<sup>81</sup> LRA 1925, s 82(1).

<sup>82</sup> *Walker v Burton* (n 75).

<sup>83</sup> *ibid* [98].

<sup>84</sup> *Walker v Burton* [2012] EWHC 978 [88] (Mr Jeremy Cousins QC).

<sup>85</sup> *ibid* [88].

<sup>86</sup> *ibid* [88].

identified and dealt with directly,<sup>87</sup> and there had been no public suggestion for over a century that anyone else claimed superior title. The court's approach in *Walker* is conceptually and practically sound: it sets an objective threshold based on reasonableness and proportionality for acquirers at first registration according to the principles proposed here.

Secondly, a comparable approach should be applied when dealing with registered land that is being conveyed through intermediate instruments as yet unregistered. When, for example, land of a deceased registered proprietor is sold by executors to a developer, who resells before making a registered entry, the ultimate acquirer should be expected to take reasonable steps to ensure that all intermediate instruments are effective before lodging an application for registration. The task requires a review of parcels clauses, proper execution, and so on, to ensure that there is nothing on the face of the instruments to suggest invalidity. Similar considerations should always apply to the immediate instrument under which the acquirer takes the entitlement to become registered even if there have been no other intermediate transactions.

Thirdly, there are problems concerning identity verification. The Register does not, of course, guarantee that the identity of a particular vendor matches the registered proprietor. This too should be a matter for an objective standard on account of the general advantages put forward above. In relation to identity theft, the case of *Swift 1st* has already considered the possibility of lack of care in the industry practice of commercial lenders when confirming a mortgagee's identity. In *Swift 1st*, the court examined the lender's standard routines in a way that suggests it was those processes that were assessed, rather than any subjective awareness of the identity fraud, to determine whether the minimum level of care had been reached.<sup>88</sup> It is submitted that is the correct attitude to the matter of an acquirer's investigation into a vendor's identity for the purpose of the care requirement. *Swift 1st* itself concerned the 'lack of care' defence to indemnity, but because the lender's investigation into the mortgagor's identity is the very conduct whose omission could cause expropriation of the true owner, the same stance should also be taken respecting the acquirer's care requirement vis-à-vis the owner.<sup>89</sup> How might proper care be demonstrated? For some acquirers, such as regulated lenders obtaining mortgages from their clients, there are some obvious sources of guidance to help determine the range of investigations into identity that are required to fulfil the basic objective threshold: they will comprise professional duties as understood in the light of regulatory guidance, money laundering controls, emerging information sources and risk assessments. For acquirers acting through conveyancers, some similar types of sources might be relevant, but the obvious difference from mortgage lending is that the transferor is not the acquirer's client; where the transferor is legally represented, a test of reasonableness might suggest that the acquirer's conveyancer should generally be permitted to rely on the identity verification undertaken by their opposite number. In other situations, few such advance guidelines are likely to be available and generalisations are difficult; it may even be reasonable to rely on the transferor's own assertion of identity if the transaction is one in which the circumstances strongly militate against any likelihood of deception.

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<sup>87</sup> *Burton v Walker* [2010] EWLandRA 2007\_1124 [112] (Mr Donachie) and [116] (Mr & Mrs Brown).

<sup>88</sup> *Swift 1st Ltd v Chief Land Registrar* [2014] EWHC 4866 (Ch) [61] (Richard Sheldon QC). See also the hypothetical reference to reckless lending policies in *English v English* [2010] EWHC 2058 (Ch) [60] (HHJ David Cooke).

<sup>89</sup> While the principle generally holds good, the specific context of identity deception by mortgagors is unlikely in practice to generate judicial consideration of the care requirement imposed on mortgage acquirers towards the true owners if the legislation denies mortgagees protection against rectification through restrictive definitions of 'proprietor in possession' (LRA 2002, s 131(2)) or proprietors of 'estates' (LRA 2002, sch 4, para 3(2) and s 132(1)); the only remaining channel is the 'exceptional circumstances' test, but it is inconceivable that the mortgagee's lack of care would justify refusing the defrauded owner's claim to correction.

Fourthly and finally, when applying the standard in relation to adverse possession and other unilateral acquisitions where an entitlement is claimed by operation of law, the position is again made complex by the absence of any existing legal or regulatory standards by reference to which the appropriate investigations can be determined. The factual context also takes it out of the normal market conditions in which standards have developed for other legal purposes. Unilateral acquisitions involve an informational asymmetry that favours the acquirer and an absence of transactional deadlines; both of these may influence the application of the reasonableness factors and suggest that the acquirer should be required to take steps to verify the assertions he makes when seeking registration. Such a requirement has the advantage of offsetting the temptation to overstate claims which might influence certain acquirers who see a chance to gain without paying and for whom the penalties for false declarations may be an insufficient deterrent. Any counter-argument that the truth will ultimately emerge from the owner's opposition fails to acknowledge the many reasons that might explain an owner's failure to object.

Implementing the recommended proposal for an objective standard in these unilateral claims would not require any departure from existing case law, but would make explicit what seems already to be a theme in the case law. For example, in *Thompson v Hatherton Marina Ltd*<sup>90</sup>, the existence of an error in the acquirer's statutory declaration would have engaged the lack of care proviso or the injustice proviso as it was 'something which proper care could have established'<sup>91</sup> implying the applicant should have investigated further. In *Khalifa Holdings Aktiengesellschaft v Way*,<sup>92</sup> an adverse possession claimant omitted to mention that her occupation had been under licence, a matter that engaged the lack of care proviso as it 'amounts to, at best, a lack of proper care'<sup>93</sup>, again suggesting an objective standard since it presumably implies lesser blameworthiness than deliberate concealment.<sup>94</sup> In *Balevents Ltd v Sartori*,<sup>95</sup> it was indicated that the acquirer, if he was unsure about possession, could have 'investigated the facts rather than making up the assertions' to avoid the application of the lack of care proviso.

This chapter has proposed both a potential subjective test of general application and an objective test in relation to certain unilateral acquisitions. Their simultaneous existence requires reconciliation. The solution is simply that the subjective awareness of material facts always justifies a requirement to disclose to the owner or to the Registry; and that for acquisitions by operation of law, in circumstances where the Registry must rely on the acquirer propounding a version of events that is not supported by the former owner's consensual disposition, a minimum objective threshold should be set that requires certain pre-emptive investigations and disclosures, with the standard varying according to the strength of the policy of facilitating unilateral acquisitions.

## V. CARE AND ALTERATION CLAIMS: WHAT SHOULD BE REQUIRED OF EXISTING OWNERS?

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<sup>90</sup> *Thompson v Hatherton Marina* (n 49).

<sup>91</sup> *ibid* [81] (Mr Cousins).

<sup>92</sup> *Khalifa Holdings* (n 49).

<sup>93</sup> *ibid* [24] (Michael Michell).

<sup>94</sup> See also *Wilson v Grainger* (n 49) [37] (Vos J), commenting on the Deputy Adjudicator's finding of lack of care on grounds that the applicants 'ought to have known' of rival claim.

<sup>95</sup> *Balevents Ltd v Sartori* (n 47) [174] (Morgan J).

The second relationship setting for the imposition of a care requirement exists between the same participants—acquirer and owner—but operates in reverse. It relates to an owner’s conduct in protecting a prospective acquirer from loss. This loss could comprise the wasted expense incurred by the acquirer in dealing with a third person whom the acquirer wrongly believed to have title; alternatively, where the acquirer succeeds in taking title by virtue of registration, it might comprise expenses incurred in defending rectification proceedings and, if unsuccessful in that defence, any wasted expenditure incurred in reliance on his expectation of ownership according to the Register. The owner could help to reduce the incidence of such expenses by taking steps in advance to communicate the existence of the owner’s rights and disabuse the acquirer of any false expectations over who has title. In the light of this, this section argues that it is appropriate to impose a care requirement on the owner to alert acquirers to the owner’s interest.

It is uncontroversial that the LRA 2002 prescribes a means for the owner to warn others via a Register entry and, as against a purchaser for value of the relevant estate, penalises failure to do so through its provisions on priority.<sup>96</sup> These provisions represent the central core of the owner’s care requirement—to alert acquirers by means of an entry in the Register, whether as registered proprietor or via the entry of a notice or restriction. As reflected in these provisions, this duty is strict and not cast in terms of ‘taking care’: an owner is either entered in the Register (and therefore protected) or not entered (and therefore vulnerable to subsequent registered dispositions). Nevertheless, this section argues that this core duty to register does not exclude the possibility of a wider scope to the requirement of care in using the registration system that augments the strict duty of registration expressed through priority rules, and which may assume relevance in the various channels that penalise lack of care. The following subheadings explore the potential scope and content of the care requirement that should be acknowledged through those channels.

### **A. Use of Warning Facilities**

There are occasions when an owner’s use of the register as a warning facility is mishandled. The classic example occurs upon first registrations which follow a sale of part. A, owner of unregistered Blackacre, conveys part of Blackacre to S1, who becomes first registered proprietor of the severed part. The retained part of Blackacre undergoes first registration and the registered proprietor is R1. It transpires that S1 became registered with either too much or too little land because the registration either went beyond or fell short of what was covered by the conveyance to S1. That error then influences the registration of R1, who becomes registered with correspondingly less or more land than he should have been.

This is a context where care is potentially relevant. Had S1 taken greater care at first registration to ensure the accuracy of his register entry, the issue would have been caught and resolved before R1 became registered proprietor. Once R1 becomes registered, the issue must be resolved through rectification proceedings to make adjustments to the relevant registered plan or plans. The situation is therefore one in which S1’s defective registration resulted in R1 becoming embroiled in rectification litigation. This may justify considering S1’s potential breach of care requirement towards R1 in any alteration proceedings brought by R1. There is some evidence of an attitude of stigmatising such failures and, for the reasons given here, it is argued that the attitude is fully justified. In *Kingsalton*,<sup>97</sup> for example, S1’s conduct was branded as ‘carelessness’<sup>98</sup>, although it was not apparently relied on in deciding the outcome.

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<sup>96</sup> LRA 2002, ss 29 and 30.

<sup>97</sup> *Kingsalton* (n 33).

<sup>98</sup> *ibid* [25] (Peter Gibson LJ).

Taking the illustration a stage further, it should also be noted that R1 might be guilty of a similar neglect. Had R1 taken greater care at his own first registration to ensure the accuracy of his register entry, the issue would have been spotted and resolved at that point. That would be of benefit to any person to whom S1 subsequently transfers the severed part - S2. The situation is therefore one in which R1's defective registration could result in S2 becoming embroiled in rectification litigation. This may justify considering R1's potential breach of care requirement towards S2 in any alteration proceedings between them. That scenario occurred in *Barwell v Skinner*,<sup>99</sup> where it was said that there was 'weight' in the contention that R1 was 'culpable',<sup>100</sup> when considering the exceptional circumstances test.

The care requirement in those circumstances would typically require buyers to take the practical step of checking that the eventual registered entry reflects the entitlements under the conveyance that was lodged. However, there is no reason to restrict the precautionary steps to the registration context; the same penalty for failing in the care requirement is capable of extending even to neglected pre-registration conduct, such as failing to warn others by indorsing a sale of part on the vendor's deeds.<sup>101</sup> Whatever the context, the standard expected should be sensitive to the cost, time and effort involved in the detection of possible mistakes, in line with the factors identified in Part IV as material to determinations of what reasonable care requires. It would ordinarily be reasonable to require an owner to inspect the Register to ensure the accuracy of his own warning entry; conversely, it would hardly be reasonable to go significantly further, and require an owner to seek out possible conflicting entries elsewhere, or to cross-check all corresponding entries for easements or covenants in a subdivided estate involving many separate registers.

Where the owner has a right in unregistered land and the duty to apply for first registration has not been activated, there are still facilities for the owner to warn others. The safest option for the owner might be voluntary first registration, or a caution against first registration, if permissible.<sup>102</sup> Failure to employ these voluntary protective measures should not typically be stigmatised as failing the care requirement.<sup>103</sup> Ultimately, the requirement's demands in these circumstances are heavily fact-dependent. The owner of the right may not even have been informed of the availability of those facilities; in particular, an owner may have acquired the right in circumstances where there was no solicitor advising, or long ago when the introduction of compulsory registration to the district was a remote prospect and thus the solicitor gave no advice that it might be desirable to invoke the voluntary measures as protection against another's application for first registration.

## **B. Requirement to Communicate or Requirement to Resist the Acquirer's Attempts to Register?**

The preceding section argued that the primary responsibility of an owner is to alert acquirers to the owner's entitlement. In the light of recent case law, it must be questioned whether the care requirement should demand something more than mere communication.

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<sup>99</sup> *Barwell* (n 43).

<sup>100</sup> *ibid* [125] (Simon Brilliant).

<sup>101</sup> *cf Re Sea View Gardens* [1967] 1 WLR 134 (ChD) where non-indorsement was the origin of the problem, although not attributed with any legal significance on the facts.

<sup>102</sup> LRA 2002, s 16(3).

<sup>103</sup> Cases such as *Horrill v Cooper* (2000) 80 P & CR D16 (CA) and *Rees v Peters* [2011] EWCA Civ 836, [2011] 2 P & CR 18, in which ousted owners incurred no criticism for failing to lodge cautions against first registration, are of little value here as the owners of the right had given warning through the Land Charges Register.

Case law has generally taken a stance against recognising that an owner might be responsible for refreshing any warnings or actively resisting an acquirer's manoeuvres. In *Facey v Bedford CC*,<sup>104</sup> there was no hint of criticism of the owner who had ceased answering the acquirer's direct correspondence and who had merely requested the Registry not to register the acquirer without offering the owner an opportunity to object. In *Mann v Dingley*,<sup>105</sup> where the owner failed to take court proceedings to resolve the dispute after having threatened to do so, this was not to be held against her as she had beforehand vigorously communicated her objections to the acquirer's claims. The courts have even accepted that, in circumstances where a statute sets a deadline before which the owner must object, it is not fatal to any subsequent rectification claim by the owner that he might have missed this deadline. In particular, in the context of decisions concerning whether the injustice proviso should be invoked, such delay was belittled as not 'very telling' in *Sainsbury's Supermarkets*<sup>106</sup> and as mere 'thistledown' in *Baxter v Mannion*.<sup>107</sup> There is nothing here to suggest that the owner's communication alone is insufficient and that the owner must go further and actively contest an acquirer's efforts.

In contrast, *Johnson v Shaw*<sup>108</sup> accepted that the owner's failure to act on a Registry letter proposing a solution to the dispute was a discretionary factor in favour of the acquirer, even though the owner had already communicated his objections to the acquirer and the Registry prior to the letter. Demanding more of owners than communication of the basis for objection could yield some advantages. To require an owner to answer Registry letters might cheaply and simply avert an acquirer's foreseeable loss; and to require an owner actively to controvert the acquirer's claim would help quieten titles. But such advantages pale in comparison to the cost, time and effort of defending or recovering one's title, perhaps repeatedly, against successive acquirers. Furthermore, the owner's warning should be enough to empower the acquirer to make a decision; acquirers as a class are not so vulnerable that owners should protect them against their own poor decision to press ahead with acquisition. For those reasons, the better approach is to reject the extension of the care requirement to active resistance, and adopt the owners' and acquirers' reciprocal communication requirements of warning and disclosure as the basic institutions of careful registration practice.

### **C. Additional Care Requirements when Communication Procedures are Known to be Bypassed**

The care requirement has great flexibility. It was argued in Part IV that, in relation to acquirers, subjective awareness of a high risk of a particular flaw in the title which the acquirer propounds to the registry should impose on him responsibilities to take steps to communicate the issue. The same is true in relation to owners. An owner should bear extra responsibility when, despite having used the registration system to warn the world of his rights, he is aware that the acquirer is nonetheless proceeding with an acquisition. This may occur when the owner becomes aware of someone who has the ability or desire to create a mistaken Register entry—a typical example occurs when an owner suspects that a stranger is planning an identity theft or that the owner's own agent is no longer to be trusted. These cases are unique because the owner foresees that the defect in the acquirer's application to the

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<sup>104</sup> *Facey v Bedford Borough Council* REF/2014/22 (17 Nov 2014).

<sup>105</sup> *Mann v Dingley* (n 3) [35] (Michael Michell).

<sup>106</sup> *Sainsbury's Supermarkets* (n 3) [92] (Mann J).

<sup>107</sup> *Baxter v Mannion* (n 50) [42] (Jacob LJ).

<sup>108</sup> *Johnson v Shaw* (n 79) [49] (Peter Gibson LJ).

Registry will not be disclosed, with the result that the Registry's notification processes will not be invoked and the owner's opportunity to object will be bypassed. In these circumstances, the owner must anticipate that his warning by registration will be ineffective. His subjective awareness of this problem justifies imposing a further responsibility on him to take action to counteract the risk of a mistaken Register entry and of the land being transferred to an innocent buyer who will be caught in a rectification dispute.

One precautionary mechanism available to an owner which might forestall this type of harm is the entry of a restriction.<sup>109</sup> It is likely for it to be reasonable (in the light of the reasonableness factors discussed in Part IV) to require an owner to utilise this mechanism. The owner's position of knowledge, the expected likelihood of risk materialising, the owner's capacity to take a cheap precaution that will efficiently prevent loss, and the purchaser's assumed powerlessness as a victim of misapprehension, all point towards imposing such a requirement on the owner once the suspicious behaviour has been brought to his attention.

Of course, a fact-sensitive approach must be taken when applying this care requirement. The most difficult are cases where, in the period before there is a mistaken entry in the Register, the owner merely *suspects* that a mistake might occur in the future, eg due to identity theft or agent misconduct. A court would need to consider, amongst other factors, the degree of confidence that the owner had in his suspicions of the acquirer's intentions, how the owner perceived the likelihood of those suspected intentions being put into practice, whether the owner had embarked on steps to investigate the matter, and so on. Employing that approach does not appear to require any substantial departure from the case law<sup>110</sup>, but it is apt to make for challenging litigation involving issues of fact and inference so troublesome that they might call into question the desirability of treating such suspicion as potential failure of care. In contrast, once the suspected unauthorised entry becomes a reality and the owner becomes aware of the fraud or error, the position changes dramatically. Suspicion is then replaced by a certainty, and thereafter owners should receive clear censure for failing to protect further potential acquirers by decisive action, such as seeking a protective entry, claiming rectification, or initiating court proceedings to block further transfer.<sup>111</sup>

Following a mistaken registration, the owner's care requirement should remain one of warning potential future acquirers of the danger of becoming caught up in rectification proceedings. But that warning should be regarded as a good discharge of the owner's responsibility only if it is mediated through the Register by way of a protective entry such as a notice or restriction. It was argued in Part IV that an acquirer should not be prejudiced through any of the legal channels simply for having gained actual notice of a defect in the root of title from some source outside the Register; and if the acquirer should not be deterred by notice outside the Register, then it follows that it would make no sense to require the owner to give such notice to the acquirer as it would have no impact on the acquirer's legal position. Were the owner permitted to give such informal notice in fulfilment of the care requirement, it would allow personal correspondence from the owner to undermine the reliability of the Register. It would force the purchaser to take difficult decisions about the veracity of the allegations made by the alleged ousted owner at the purchaser while under pressure from the vendor to complete. A policy-led approach should accordingly recognise

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<sup>109</sup> LRA 2002, s 42(1). The appropriate restriction might be a restriction in Form RQ requiring the owner's conveyancer to confirm the genuineness of the owner's signature as a protection against identity theft.

<sup>110</sup> See *Iqbal* (n 27) [36] (Michael Mark); *Nouri v Marvi* [2005] EWHC 2996 (Ch), [2006] 1 EGLR 71 [49] (Judge Rich QC). See also *Andrews v Tonks* (n 69) [40] (Judge Michell) (delay in bringing rectification proceedings was not an exceptional circumstance).

<sup>111</sup> *Odogwu* (n 30) [64] (Sir Donald Rattee); *Iqbal* (n 28) (Michael Mark) [36]-[37] (exceptional circumstance denying rectification); *Nouri* (n 110) [49] and [51] (Judge Rich QC) (lack of care proviso applied).

that in relation to Register mistakes the requirement on the owner is to communicate *via the Register* with its built-in safeguards.<sup>112</sup>

#### **D. Proactive Monitoring**

From the discussion above it is clear that the owner's responsibility to warn acquirers should not necessarily be discharged once and for all by making a warning entry. In cases where the owner actually suspects an unauthorised removal of the warning from the Register, for example, the care requirement should demand further action. But the discovery of the information which generates the suspicion may be entirely serendipitous. This raises the question whether the owner should be required to gather information proactively, by regularly reviewing the Register, observing activity on the ground, monitoring agents and so on, in order to build an information base which would facilitate the detection of suspicious behaviour.

While agencies now offer the service of regularly checking the Register for unauthorised alterations, it is submitted that the law should not require this in fulfilment of the owner's care requirement. There are various arguments against this step. First, there is a broad argument of cost and benefit. Imposing monitoring requirements would exceed reasonable precautions: given the still relatively low likelihood of fraud and error, the limited capacity to prevent loss once a problem is detected, and the integral scheme of indemnity designed to spread the losses, it would be a disproportionate social cost to require every landowner to order office copies at frequent intervals for every parcel. Secondly, there is an argument from convenience that restricting the owner's obligation to communication of actual suspicion of mistake would draw a relatively clear line for future guidance, whereas the introduction of any further general requirement to monitor frequently would open entirely new arenas for dispute over the required extent of precautionary acts.<sup>113</sup>

Further questions might arise where private agents are acting for an owner. Does a care requirement under the LRA 2002 imply a duty to monitor such agents? There is a case to be made for extending an owner's care requirement beyond monitoring the Registry to include systematic monitoring of private agents. The Registry is a statutory body charged with the constitutional function of administering registration, and it would seem appropriate to allow citizens to repose confidence in its actions without requiring on-going supervision. But there is no such argument in respect of private agents. Nevertheless, on balance, it is suggested that the difficulty in fixing a suitable standard for the infinitely variable circumstances of agency makes it appropriate to require actual suspicion of agent misconduct before an owner can be accused of falling below the standard of care required. That appears to be in line with the case law which has made no reference to any requirement to monitor the donee of a power of attorney<sup>114</sup> or a family friend acting as informal agent.<sup>115</sup>

Keeping apprised of events on the ground constitutes a further potential opportunity for monitoring. But it is doubted that failure to monitor events on the land should ever be held against an owner in alteration proceedings, despite the existence of doctrines elsewhere in land law—such as adverse possession—which imply that it is good practice to monitor one's land. It is false to draw an analogy from the doctrine of adverse possession which is designed

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<sup>112</sup> eg duty not to lodge notices, restrictions or objections without reasonable grounds: LRA 2002, s 77. Consider also an action by a seller against an ownership claimant for slander of title.

<sup>113</sup> eg lodging the restriction in Form RQ (requiring confirmation of the owner's conveyancer as a protection against identity theft) when aware of heightened risk factors.

<sup>114</sup> *Iqbal* (n 28).

<sup>115</sup> *Nouri* (n 110).

to protect the acquirer's long use of land and to penalise the owner's long non-use. It is not a doctrine concerned with the protection of titles from the consequences of misappropriation and is therefore unhelpful in discussion concerning the care required for the purpose of denying rectification claims by an owner. As there appears to be little else to justify special and onerous monitoring obligations in respect of land, it is submitted that there should be no unprompted requirement to monitor the land.<sup>116</sup>

## VI. . CARE AND INDEMNITY CLAIMS

The third and final care requirement arises between a participant—whether owner or acquirer of land—and those responsible for making or funding indemnity awards. A care requirement is implicit from the statutory rule which denies or reduces an indemnity payment where the loss is suffered as a result of the indemnity claimant's lack of proper care.<sup>117</sup> In this setting, the owner or acquirer's responsibility for taking proper care is given legal expression through the claimant's susceptibility to losing the entitlement to compensation in full or in part. It is argued that this care requirement serves to protect the following bodies: (i) the Land Registry, as the entity which owns the Indemnity Fund<sup>118</sup> (albeit that it should not deliberately aim to build up a surplus<sup>119</sup>) and as the entity which bears the immediate burden of replenishing it; (ii) central government, as the entity which guarantees the solvency of the Indemnity Fund and to which the Fund's surpluses may be transferred;<sup>120</sup> and also, in an indirect sense, (iii) future taxpayers, whose burden will ultimately increase if the actuarial calculations require greater public contribution to the Fund.

It is submitted that the care requirement in this setting has two constituent limbs. The first constituent is simply parasitic on the communication responsibilities, discussed in Parts IV and V, which owners and acquirers owe each other to prevent the other suffering by reason of a mistake in the Register. Those care requirements affect not only the availability of rectification but also indemnity; they recognise the interests of the Land Registry, central government and taxpayers in discouraging avoidable conduct that contributes to Register mistakes, which may result in indemnity payments. Similar reasons also justify a second constituent limb to the care requirement: to avoid any unreasonable escalation in the burden on the Fund. This implies a requirement on owners and acquirers to avoid magnifying the extent of their own losses beyond the loss of the land itself, and consequently it is not restricted to a contribution to the mistake in the Register.

### A. Magnifying One's Own Loss

The advantage of dividing up the care requirement into the two constituent limbs is that it reveals an important difference in the legal significance of failing to take suitable steps to protect oneself from any losses going beyond the loss of the land itself. On the one hand, a failure to minimise harm to oneself should have no role in rectification decisions as it does

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<sup>116</sup> A reference in *Fye* (n 28) [33] (Judge Owen Rhys) to the owner's neglect of the land for 30 years, and then a further 11 years after the fraud, must be taken not as a failure to monitor but as delay in bringing proceedings and a general lack of interest in enjoying the land in specie.

<sup>117</sup> LRA 2002, sch 8, para 5(1) and (2).

<sup>118</sup> The Indemnity Fund is calculated on an actuarial basis. Indemnity claims are, in the first instance, charged against the Fund.

<sup>119</sup> HM Treasury, 'Guide to the Establishment and Operation of Trading Funds' (May 2004) paras 8.2.2–8.2.3.

<sup>120</sup> Government Trading Funds Act 1973, s 4.

not affect the balance of equities between the rival parties' claims to the land itself. On the other hand, such failure should be an important constituent of the care requirement in the indemnity context in order to protect the Fund from avoidable loss. The requirement to minimise loss to oneself is therefore unique to the indemnity context and has no counterpart in the care requirement existing as between owner and acquirer.

To illustrate the proposition that carelessly exacerbating loss to oneself should be an irrelevance in proceedings for rectification, take *Rees v National Trust*.<sup>121</sup> Rees built a lengthy fence over difficult terrain, presumably at substantial cost, on land claimed by him but of which the National Trust was mistakenly registered as proprietor. The fact that an ousted owner had undertaken such work when unaware of a rival claim might normally be a factor supporting an order for rectification in his favour. However, because Rees had been well aware that his claim to the land was contested, the works were held not to count positively in his favour when considering the application of the injustice proviso in rectification proceedings.<sup>122</sup> Equally, there was no basis to hold the expenditure against him. That reasoning is impeccable. Rees may have exacerbated his own loss by his expenditure on the fence, but that fact alone could not inflict any loss on the National Trust, assuming that the fence did not devalue the land.<sup>123</sup> It could not, therefore, constitute a breach of his care requirement towards the National Trust, and should not be treated as lack of care in the context of altering the register. The decision appears to recognise that a disregard for one's own interests is pertinent to rectification proceedings in only one way—it negates the force which expenditure might otherwise have had in the balance of equities between the parties for the purpose of determining their respective claims to the land within alteration proceedings.

Another case, in contrast, appears to have taken a conflicting position. In *Saxon v Moore*,<sup>124</sup> the court held it to be a relevant factor supporting an order for rectification in the owner's favour that the acquirer had erected a fence and installed utilities in full knowledge of the dispute and in the teeth of objections.<sup>125</sup> The approach suggests that the acquirer was required not to magnify his own potential losses. That cannot be right in the context of rectification: the ousted owner has no interest in being protected from the acquirer's failure to mitigate the acquirer's own losses. Whether the ousted owner wins or loses the rectification proceedings, such losses have no bearing on him. Only the acquirer himself and the Indemnity Fund are concerned with those losses, so the extent of those losses should not have been raised in relation to the rectification issue. On that basis, it is argued that the reasoning in the case should not be followed.

In direct contrast, indemnity claims should certainly take account of any exacerbation of one's own loss. The concept of 'a duty to oneself' occasionally makes appearance in case law, yet it does not make sense unless restated in terms of a requirement to minimise the burden on the Indemnity Fund. It is submitted that such a requirement underlies the comment in *Prestige Properties Ltd v Scottish Provident Institution*. that a lack of care for indemnity

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<sup>121</sup> *Rees v National Trust* [2007] EWLandRA 2005\_1838.

<sup>122</sup> *ibid* [48]–[50] (Simon Brilliant).

<sup>123</sup> While one party's exacerbation of his own loss could not by itself affect the other, that is not to imply that his expenditure could have no bearing on their respective positions. If the acquirer had performed works that led to the land possessing significantly greater value to the acquirer than to the ousted owner, the court might be prepared to look upon such *ex post facto* considerations as exceptional circumstances justifying the refusal of rectification. But they would be unrelated to any care requirement.

<sup>124</sup> *Saxon* (n 52).

<sup>125</sup> *ibid* [92] (Judge Behrens).

purposes would embrace a claimant's lack of proper care 'in respect both of the occurrence and quantum of loss'.<sup>126</sup>

It might be noted, however, that this is not universally accepted: there is an ambiguous comment in *Dean v Dean*<sup>127</sup> to the effect that a dereliction of duty to oneself is irrelevant to indemnity.<sup>128</sup> In *Dean*, a house was purchased by Dean and the registered title was vested in a Gibraltar company, Honeysuckle Ltd, which he owned and which was serviced by corporate directors and a corporate secretary. His wife and others fraudulently caused the corporate secretary to deregister Honeysuckle Ltd from the Companies Register and then arranged for the registration of a new company with the same name, under the fraudsters' control, through which they fraudulently sold the house. It was seven years before Dean discovered that the original Honeysuckle Ltd had been removed from the Companies Register. When Dean sought an indemnity, the Land Registrar argued that it was a dereliction of duty to himself that Dean should have done nothing about Honeysuckle Ltd. The court, however, ultimately held that his inaction was not relevant to the availability of an indemnity.<sup>129</sup>

In the light of the arguments presented above and the decision in *Prestige*, it is impossible to support any general proposition that a dereliction of duty to oneself is irrelevant to the availability of indemnity. On the contrary, as a general rule, one does owe a duty to oneself in this context. The view expressed in *Dean* is acceptable only if it is read subject to some implied qualification reflecting a particular feature of the case. For instance, it could be construed in context to refer to a dereliction of duty specifically in respect of superintending the company's affairs. Recast in those terms, it would be a perfectly tenable proposition, affirming that owners have no responsibility to the Registry to undertake any pre-emptive monitoring of property holdings in the absence of suspicion, just as they have no such responsibility to potential acquirers to do so.

## **B. Relationship between Care in Rectification and Care in Indemnity**

The arguments put forward above propose a distinction between the content of the care requirement as it is used in rectification and its content as it is used in indemnity. Although the same words in a statute are generally to be interpreted alike, the context justifies interpreting the phrase 'lack of proper care' as bearing different content according to the rule in which it is employed; it is an example of the maxim that in a single scenario the attribution of cause and blame may vary with the purpose of the inquiry.<sup>130</sup> Since rectification determines land title allocation between rival parties, whereas indemnity determines broader wealth allocation through state involvement, the two bodies of rules have quite different functions.

Differentiating the care requirements assists in determining the relevance of indemnity as a factor in rectification proceedings, a matter on which judicial views have spanned the entire spectrum.<sup>131</sup> It was argued earlier that a requirement not to magnify one's

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<sup>126</sup> *Prestige Properties Ltd v Scottish Provident Institution* [2002] EWHC 330 (Ch), [2003] Ch 1 [36] point (g) (Lightman J). Whether the claimant's losses had been magnified by its contractual arrangements was not raised properly on the pleadings. See also *Swift 1st Ltd v Chief Land Registrar* [2014] EWHC 4866 (Ch) [61] – [64] (Richard Sheldon QC).

<sup>127</sup> *Dean v Dean* (2000) 80 P & CR 457 (CA).

<sup>128</sup> *ibid* 463 (Gibson LJ).

<sup>129</sup> *ibid* 463 (Gibson LJ).

<sup>130</sup> *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 (HL) 29 (Lord Hoffmann).

<sup>131</sup> *Nouri* (n 109) [51] (Judge Rich QC); *Pinto v Lim* [2005] EWHC 630 (Ch) [99] and [102] (Blackburne J); *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216 [15] (Arden LJ);

own loss should be relevant only in the setting of the relationship between a party and the Indemnity Fund, and irrelevant in determining rectification claims. If the court were to anticipate the outcome of the future indemnity claim and take that into account as a factor in rectification proceedings, then matters pertinent to indemnity would be brought into rectification. In particular, a party's failure to fulfil a care requirement towards the Indemnity Fund, such as a failure to mitigate, might obliquely influence the outcome of rectification proceedings. That result is undesirable: one party's care requirement towards the Indemnity Fund has no bearing on the other party, and consequently should have no significance in regulating the allocation of title between the owner and the acquirer.

In the light of that argument, one case is open to criticism. In *Nouri v Marvi*,<sup>132</sup> an ousted owner's loss of title had been caused in part by his own lack of proper care. In his rectification proceedings against the acquirer, the court regarded the anticipated indemnity position as a primary reason to decline rectification. The court anticipated that any indemnity for the ousted owner would be reduced due to his lack of care, but commented that it would be perverse to regard the reduction of indemnity as a reason for restoring the land to the ousted owner; on the contrary, it was perceived as a reason to refuse rectification and 'avoid relieving the [ousted owner] of the consequences of his own disregard for his own interests'.<sup>133</sup> Such reasoning is unsatisfactory. Rather than anticipating the determination of a future indemnity claim, the court should have placed reliance solely on the ousted owner's failure to take the necessary care to protect the interests of the acquirer. That approach would keep attention focused on the relations between the owner and acquirer, without introducing the extraneous relationship with the Indemnity Fund and would preserve the value of rectification proceedings as a forum for a wide ranging, merit-based assessment of the parties' relative positions.

## VII. ONCLUSION

A minimum requirement of care is inherent in every registration system, if only in respect of the owner's core responsibility to warn others by making a Register entry on pain of losing title or ceding priority. It has been submitted here that the English system goes very much further, as its rectification scheme, and thus indefeasibility generally, are structured around a web of implicit and sometimes explicit care requirements that take a central role in the event of an unauthorised change to the Register. In particular it was proposed that owners have distinctive responsibilities to acquirers; acquirers have distinctive responsibilities to owners; and both have responsibilities to the indemnity provider.

The analysis offered in this chapter, through its elaboration of the care requirement and the identification of the relationship settings, is able to bring structure to a legislative system which must regulate conduct in circumstances of immense factual variety. It organises the field using the concept of relationships and reveals how the application of the care requirement differs between them. It exposes the care requirements that lie concealed within the injustice proviso and the exceptional circumstances test. It facilitates the determination of the factors which should influence the setting of the standards of care. It explains why the care requirement must show a significant divergence as between the rectification and

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*Kingsalton* (n 33) [27] (Peter Gibson LJ); *Fye* (n 27) [32] (Judge Owen Rhys); *Epps* (n 33) 1082–83 (Templeman J); *Ijacic v Game Developments Ltd* [2009] EWLandRA 2008\_1081 and 1083 [71]–[76] (Simon Brilliant); *Paton* (n 32) [84] (Morgan J); *Wheeler v Patnaik* (n 49) [57] (Judge McAllister).

<sup>132</sup> *ibid* [51] (Judge Rich QC).

<sup>133</sup> *ibid* [51] (Judge Rich QC).

indemnity provisions. The structured environment created by the care requirement analysis can also be put to use in appraising case law. It equipped this chapter with the tools to challenge existing jurisprudence, including the acquirer's supposed duty to desist from acquiring, the owner's supposed duty to resist acquisition by another, the supposed duties to mitigate owed by owners and acquirers to each other, the supposed irrelevance to indemnity of 'dereliction of duty to oneself', and the over-reliance on indemnity as a factor in rectification.

Further areas are ripe for examination using this structure. In particular, more is needed to unravel situations where interactions have involved lack of care by multiple parties. How do the care requirements of owner and acquirer interact when both have been careless towards each other? That requires a debate on the merits of compelling owners to take greater responsibility for safeguarding their own property as opposed to requiring greater rigour from acquirers in investigating the basis for their own application to become registered and in communicating to the Registry their knowledge of possible outstanding ownership claims. That complexity is exacerbated when the Registry itself fails to take care towards owners and acquirers. Where the Registry is at fault, the impact on what is expected from owners and acquirers is far from clear and leads to difficult questions of comparative fault and causative potency. If e-conveyancing and operational reforms bring a more passive role for the Registry, with a wholesale shifting of responsibility onto the parties and their conveyancers, then the existence and content of these and perhaps other care requirements can be expected to assume a very much heightened importance.