Answers to end of chapter Q&A

Question 1: What were the aims of the Land Registration Act 2002?

The specific aims of the 2002 Act are discussed on pp 484-485. It is useful to see these specific aims within the wider context of registration systems as a whole, as discussed on pp 479-484. In particular, the 2002 Act aims to further the chief goal of a land registration system: to protect C, a third party acquiring a right in land, from the risk of being bound by a pre-existing but hidden property right of B. To meet that goal, the 2002 Act has, as its ‘fundamental objective’, the desire to establish a register that is a ‘complete and accurate reflection of the state of the title of the land at any given time’ (see the extract from Law Commission Report No 271, set out on pp 484). In turn, that fundamental objective leads to more specific aims, such as the reduction of the list of overriding interests. A particularly important tactic of the 2002 Act, in its drive for a ‘complete and accurate’ register, is the use of electronic conveyancing.

Question 2: Following the enactment of the 2002 Act, is it true to say that the register is now ‘complete and accurate’? If not, will it be so once e-conveyancing rules have been introduced?

As noted in the answer to Question 1 above, the 2002 Act aims to establish a ‘complete and accurate’ register: such a register would record all pre-existing property rights that exist in relation to land. It should be noted that, at the start of the extract set out on pp 484-485, the Law Commission states that such a complete and accurate register will exist ‘under the system of electronic dealing with land’ that the 2002 Act seeks to create.

It is certainly the case that the 2002 Act itself, coming into effect before the full adoption of e-conveyancing, has not created a complete and accurate register. For example, the possibility of rectification, discussed in section 3.1.1, is inconsistent with the idea that the register is complete and accurate: changes prejudicially affecting the title of a registered proprietor would be unnecessary if the register were wholly accurate. Moreover, as noted on pp 488-490, it is still possible, in certain cases, for B to acquire a legal estate or interest in registered land without having registered that right. In such a case, as noted on pp 490-491, B’s right will almost always count as an overriding interest and so be capable of binding C, even if C later acquires for value, and registers, a legal property right in the registered land. Further, as discussed on p 490, registration is never necessary for the acquisition of an equitable interest in registered land. Moreover, an equitable interest in land, even if not protected by the entry of a notice on the register, will count as an overriding interest (and so be immune to the lack of registration defence) if its holder is in actual occupation of the registered land at the relevant time: see p 491.

Although the 2002 Act came into force in October 2003, the e-conveyancing system is still not fully operational. Even when such a system does exist, the register will not be complete and accurate. As discussed on pp 491-493, there are certain to be cases in which B will be able to acquire a legal estate or interest in land, or an equitable interest in land, despite failing to register that right. Moreover, as discussed on pp 493-510, even
under an e-conveyancing system, the possibility of rectification and the continued existence of overriding interests will demonstrate that a register can never be complete and accurate.

**Question 3: Do you agree with the Law Commission that overriding interests are an inherently ‘unsatisfactory’ aspect of a registration system?**

In the extract from Law Commission Report No 271, set out on p 508, overriding interests are described as an ‘unsatisfactory feature of the system of registered conveyancing’. The problem, according to the Law Commission, is that such rights ‘bind any person who acquires any interest in registered land’. Of course, that is not quite right: if a pre-existing property right is an overriding interest, that does not mean that it will bind all third parties: it simply means that a third party will not be able to use the lack of registration defence against the pre-existing property right (see Chapter 12, section 3.3). The Law Commission’s concern is therefore that overriding interests are immune to the lack of registration defence.

Certainly, from the point of view of C, a third party acquiring a right in registered land, it will be frustrating if B has a pre-existing property right which, despite its lack of registration, can still bind C. In that way, the existence of overriding interests may be unsatisfactory to C. In particular, as noted by Dixon in the extract set out on p 510, the courts’ willingness to recognise that B has informally acquired an equitable interest, for example by means of proprietary estoppel or a constructive trust, may cause problems to C where B is in actual occupation of the registered land.

However, it can be argued that we need to take a more general view when considering the appropriateness of overriding interests: we cannot take only C’s views into account. It may be argued, contrary to the Law Commission’s view, that overriding interests are necessary precisely because there may be situations in which, despite B’s failure to register a pre-existing property right, B deserves protection; or in which, despite the fact that B’s right is not recorded on the register, C does not deserve to be free from that right. That argument is made in the extract from McFarlane set out on pp 511-512.

**Question 4: What different approaches can be taken to interpreting the term ‘mistake’ in Sch 4 of the 2002 Act? Which approach is preferable?**

This question is considered in part 3.1. It is useful to distinguish between two party and three party cases.

In two party cases, it is possible to interpret ‘mistake’ to mean only procedural mistakes, or to adopt a broader approach. In *Baxter v Mannion*, (see the extract in part 3.1.1) in order for B to become the registered proprietor of the field, he had to show that he had been in adverse possession of the land for 10 years, and that A had been given 65 days’ notice to object to B being registered. In fact, B had not been in adverse possession, but he was in any case registered as the new holder of A’s freehold. B claimed that, as there had been
no procedural mistake, rectification should not be permitted. The court rejected this narrow interpretation of mistake.

In three-party cases, there is also a choice between a narrow approach and a broad approach. The typical facts are: A is the initial registered proprietor; through fraudulent means, X becomes the registered proprietor (which amounts to a mistake); X then grants a registered right to C, with the consequence that C becomes a registered holder of a right. One issue is whether C’s registration is a ‘mistake’. The narrow approach would deny that there is a ‘mistake’, because section 58 of LRA states that the register is conclusive, and therefore once X is registered he has the power to transfer the title to C. Lloyd LJ in Barclays Bank v Guy adopted this approach, as discussed in part 3.1.3, but his Lordship qualified this by stating that if C had notice that X’s registration was mistaken, C’s registration would also be mistaken. The difficulties with this approach are examined in part 3.1.3. In particular, it should be noted that by taking a narrow view of “mistake”, a court will also limit the circumstances in which an indemnity may be available.

There are two broader approaches (see part 3.1.4). Firstly, in Odogwu v Vastguide, the Chief Land Registrar conceded that the registration of C amounted to a ‘mistake’. Secondly, according to Ruoff and Roper, and Lord Neuberger in Barclays Bank v Guy, although the registration of C is not a mistake, the registration of X is a mistake, and its rectification necessarily involves rectifying C’s registration (this analysis is referred to by Cooper as “long arm rectification”: (2015) 131 LQR 108, 111. The approach favoured by Cooper is the first, as it gives the courts more flexibility to strike an appropriate balance between the claims of B and those of C. As noted by Goymour (see the extract in part 3.1.4), the courts have often resisted taking a narrow approach, as it would be out of step with general property law principles, such as the idea that parties such as B “should not normally be deprived of their titles without their consent.”

As shown in part 3.1.6, the Court of Appeal’s decision in Gold Harp Properties Ltd v Macleod [2014] EWCA Civ 1084 provides further support for the first of the broader approaches to defining mistake. It may not be the last word on the issue, however, as it has been noted (e.g. by Lees (2015) 131 LQR 515) that the approach to interpreting the LRA 2002 in Gold Harp may be in conflict with that adopted more recently in Swift 1st Ltd v Chief Land Registrar [2015] EWCA Civ 330, [2015] 3 WLR 239 (see the Update to Chapter 3).

**Question 5: What aims should the Law Commission have in mind when considering reform of the 2002 Act?**

The Law Commission has recently begun work on a Land Registration project. It aims to publish a consultation paper in Spring 2016 and a report and draft Bill in late 2017. This wide ranging review will aim to make the law clearer and less complex: certainly, as seen in the discussion of rectification in part 3.1, there are areas of the LRA 2002 scheme which remain unclear. These tensions can perhaps be related back to that noted in part 1: between giving a guarantee to registered parties on the one hand, and allowing some protection for unregistered parties on the other. Moreover, the LRA 2002 itself was premised on the introduction of e-conveyancing, which has not occurred. One interesting possibility is that the new Bill could perhaps make more use of indemnity payments as a
means of balancing the interests of registered and unregistered parties: this point is discussed in part 4.1. For further discussion of the success or otherwise of the LRA 2002, see S Gardner, “The Land Registration Act 2002 – The Show on the Road” (2014) 77 MLR 763.

**Question 6: Is it possible or desirable for the principles of a land registration system to be wholly separate from the general principles of land law?**

This is clearly a very general question, which demands reflection on both the detail of the 2002 Act, as discussed in Chapter 14, and the general aims of the Act, as discussed in Chapter 15.

One way to focus the question is to consider the interpretation of ‘mistake’ under LRA 2002. As discussed in Question 4, in three party cases, the court has a choice of adopting a narrow or broad approach when interpreting the word ‘mistake’. On the one hand, in the first Court of Appeal decision in *Barclays Bank v Guy*, it was decided that even if X acted fraudulently in order to become registered as a freehold owner of land, X has the power to transfer that title to B, and therefore the registration of B is not a ‘mistake’. This adopts the view that the Act establishes a wholly new set of principles. On the other hand, the approach adopted by the Chief Registrar in his concession in *Odogwu v Vastguide*, and favoured by the Court of Appeal in *Gold Harp Properties Ltd v Macleod* [2014] EWCA Civ 1084, is that B’s registration is a ‘mistake’, adopts general principles of land law, favouring the pre-existing right of the former owner. Such an approach also finds some support from Lady Hale’s general statement in *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52 (see chapter 3, section 3.3.2 and chapter 12, part 3.1.3) that “the system of land registration is merely conveyancing machinery”.