Mitsui Sumitomo Insurance has questionably deprecated the deterrence rationale for the 1886 Act. For, without it, there is little reason for the additional condition "tumultuously". The explanation offered in *Dwyer* for the "tumultuous" requirement, and generally accepted since, has gone. But it can scarcely have been included for reasons of euphony ("tumultuously" is, admittedly, a pleasing word). Parliamentary Counsel has austerely observed that in order to avoid ambiguity, "legislation speaks in a monotone and its language is compressed". Statutes have to be unpoetic. Nevertheless, the Court of Appeal seemed to view "tumultuously" as merely a fine metaphor for an ugly situation: "In short, the focus of the inquiry is whether property has been damaged or destroyed as a result of mob violence", a question of fact and degree.

What, then, is the Act's true rationale? It is anomalous viewed purely as compensation (the general Criminal Injuries Compensation Scheme (CICS) covers personal injuries; why would the 1886 Act extend to property damage, and a small subset at that?). It is odder still, from the compensation perspective, for the financial burden to fall on police authorities rather than the national taxpayer's broader shoulders (again, compare the CICS). The 1886 Act should rather be conceived as strict accountability for failures in riot policing. A recent report has broadly endorsed that principle (although HM Treasury often indemnifies police authorities in practice, which seriously undermines any deterrent effect): *Independent Review of the Riot (Damages) Act* (Home Office, 2013). Reform seems likely to follow, in the guise of revision rather than outright repeal: Draft Riot Compensation Bill (Cm. 9036, 2015). Therefore, the underlying rationale for riot compensation remains an important, if neglected, question. The Supreme Court has given permission to appeal in *Mitsui Sumitomo Insurance* (although the specific linguistic controversy would be resolved by the recent Draft Bill, which uses the definition in the Public Order Act in place of the existing "outdated" and unclear provisions: *Reform of the Riot (Damages) Act 1886: Summary of Consultation Responses and Conclusions* (Home Office, 2015), para. 2.12).

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FORGERIES AND INDEMNITY IN LAND REGISTRATION

A standard land law problem is that land, or an interest in it, is claimed by two persons, usually as a result of a mistake or fraud of a third party, not worth suing. Both of the claimants are innocent parties. Common law solutions tend to an all-or-nothing approach – one person wins and the other

loses. Land registration possesses the significant advantage that compensation (indemnity) may be paid to the losing party. For this to be possible, either a loss must be caused by rectification of the register or there must be a loss which requires rectification to be remedied. So, if the wrong person is registered as proprietor, whoever loses the land (which is likely to turn on the rules for rectification of the register) will be compensated. There has been little litigation on indemnity, but it was established by *Re Chowood's Registered Land* [1933] Ch. 574 that a purchaser bound by an overriding interest is not entitled to indemnity. Rectification of the purchaser's title recognises existing legal rights to the land and itself causes no loss to the purchaser.

Swift 1st Ltd. v Chief Land Registrar [2015] EWCA Civ 330; [2015] 3 W.L.R. 239 considered indemnity in the context of a forgery. Forgeries attract special rules. Originally, *Attorney-General v Odell* [1906] 2 Ch. 47 had held that a purchaser under a forged transfer obtained no good title and was not entitled to indemnity (as with overriding interests, no loss was caused by the rectification). This was countered by a special provision inserted in the Land Registration Act 1925 enabling indemnity to be paid. Today, paragraph 1(2)(b) of Schedule 8 to the Land Registration Act 2002 provides that the purchaser "is, where the register is rectified, to be regarded as having suffered loss by reason of such rectification". In *Swift 1st*, the forged document, a charge, was registered. The holder of the charge consented to rectification deleting the charge, but now sought an indemnity. As we will see, the claim succeeded on the basis of paragraph 1(2)(b). This was despite the actual occupation (and hence overriding interest) of the original registered proprietor, whose signature had been forged.

However, it was not just the interpretation of paragraph 1(2)(b) that was discussed by the Court of Appeal. We will concentrate on three issues: the effect of forgeries, paragraph 1(2)(b) itself, and the right to rectify as an overriding interest.

Applying the 1925 legislation, the Court of Appeal in *Malory Enterprises Ltd. v Cheshire Homes (UK) Ltd.* [2002] Ch. 216 held that a registered transfer was effective to vest the legal title in the transferee, but left the equitable title in the original proprietor (whose signature had been forged). This was followed by Newey J. in *Fitzwilliam v Richall Holding Services Ltd.* [2013] EWHC 86 (Ch); [2013] 1 P.&C.R. 318 (noted [2013] C.L.J. 257), but has been criticised by most commentators – largely because it limits the protection accorded to the registered proprietor. However, there was disagreement amongst the commentators as to whether the purchaser should be protected by section 58 of the 2002 Act (which vests title in the proprietor) or section 29 (which defeats unprotected interests).

Swift 1st held that *Malory* should not be followed. This aspect of the case is probably the most interesting. Reactions to the effect of registration of

forgeries reveal the extent to which we want to recognise existing titles and reflect the refined wisdom of property lawyers over the centuries (often described as "static security") or protect the innocent purchaser who has been registered as proprietor. The latter places greater emphasis on the register and makes land transactions more secure (often described as "dynamic security"). Neither approach is demonstrably superior, despite the somewhat extreme language employed by some commentators. It should be remembered that the purchaser has not in any way been misled by the register – the problem is caused by the identity of the vendor. The purchaser believes, wrongly, that he or she is dealing with the proprietor. Nevertheless, the generally hostile response to *Malory* indicates that *Swift 1st* is likely to be widely welcomed. The protection of the purchaser can still be challenged in a rectification claim (as in *Swift 1st* itself) and this enables the respective merits of the parties to be taken into account – most especially recognising the purchaser's possession.

However, we need to consider the basis upon which *Swift 1st* rejected *Malory*. Though the court referred to "the beneficial ownership issue" (which sounds like a reference to s. 58), the precise reasoning was that *Malory* was decided *per incuriam* the little-noticed section 114 of the 1925 Act. As *Swift 1st* explained, this refers to the effect of what is now section 29 and assumes that the beneficial title passes. Though the protection of transferees may be welcomed, the reasoning is curious. Quite apart from the fact that section 114 might have other explanations, it was not relied upon in any of the previous criticisms of *Malory*. Furthermore, it has been dropped from the 2002 Act.

Whether it is section 29 or section 58 that confers equitable title can be really important. For example, section 29 applies only to dispositions for valuable consideration whereas section 58 is unlimited. Also, it takes effect subject to overriding interests, which are ignored by section 58. *Swift 1st* assumes that overriding interests do bind the new proprietor – this lends some support to section 29's providing the crucial protection.

We will now turn to paragraph 1(2)(b). Once *Swift 1st* had decided that the purchaser had a good title, notwithstanding the forgery, it might be thought that payment of indemnity would be straightforward. So it would have been, but for the overriding interest point. It has been seen that indemnity is not payable if the new proprietor is bound by an overriding interest, as the rectification causes no loss (since the 2002 Act it is alteration rather than rectification). On the facts, the original proprietor was in actual occupation and was held to have a right to rectify as an overriding interest (the nature of this right is discussed below).

As mentioned above, the paragraph was intended to reverse *Odell*; the 2002 reforms intended no change in this. Though the motive for it was unconnected with the overriding interest issue that arose in *Swift 1st*, its wording does not readily allow for any exception. It was largely on that basis that

indemnity was allowed by the Court of Appeal. Though this application of paragraph 1(2)(b) might seem entirely fortuitous (overriding interests in other situations debar indemnity), it is supported by one factor. In the great majority of cases, the actual occupation is by a person other than the vendor; obvious good practice is to make enquiries of the occupier. But, with forgery, the purchaser believes that the occupier is the vendor – it is entirely superfluous to make enquiries of interests claimed by the vendor.

Finally, we turn to two points regarding the overriding interest in *Swift 1st* which was the right to rectify. The first is that it is arguable that this right is unlike other overriding interests, such that indemnity should be payable without recourse to paragraph 1(2)(b). Central is the argument that the right to rectify is one where indemnity is normally payable. Take this situation. Because of a mistake other than forgery, B (in good faith) is registered as proprietor of A's land. B gets a good title; it is uncontroversial that, if it is lost by rectification, then B will receive indemnity. If that right binds a subsequent purchaser, C (A being in actual occupation at the time of the transfer to C, but not B's transfer), one might think it odd if C is not paid indemnity. The nature of the binding right is one that is linked with indemnity entitlement. A's actual occupation might indicate fault on C's part, but this can be recognised by refusing or reducing indemnity in appropriate cases.

A more far-reaching question is whether the statutory right to rectify the register should be recognised as an overriding interest in the first place. In *Malory*, it seems to have been accepted on the coat-tails of the very different equitable right to rectify documents; it was conceded in *Swift 1st*. Though some situations give rise to both the equitable right and the statutory right, there is no necessary link. Indeed, when a statutory right is intended to affect a purchaser, it is usual for this to be made explicit (an example being the right to occupy the matrimonial home: Family Law Act 1996, ss. 30–31). Overall, the exceptional nature of a statutory right provides no definitive conclusion either way, so what is the benefit of its being an overriding interest?

Most obviously, the right to rectify will bind a purchaser. However, rights to rectify can already affect subordinate titles: *Macleod v Gold Harp Properties Ltd.* [2014] EWCA Civ 1084; [2015] 1 W.L.R. 1249 (relying on para. 8 of Sch. 4). Unless there are limits on the application of the *Gold Harp* analysis, the overriding interest looks superfluous. In each of *Swift 1st* and *Malory*, it was the transferee under the forged disposition who was affected by the overriding interest. As rectification was available anyway against the transferee, it is unclear how far it helps to add an overriding interest. The sceptic might say that it simply sets up the indemnity problem that forced paragraph 1(2)(b) into operation. As the overriding

interest analysis adds little to land registration, would it not be better and simpler to excise it?

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DISHONEST ASSISTANCE AND ACCOUNT OF PROFITS

THIS subject has been considered in *Novoship (UK) Ltd. v Mikhayluk* [2015] 2 W.L.R. 526; [2014] Q.B. 499. The first plaintiff ("Novoship") and the 14 other plaintiff companies ("the Novoship Group") were indirect subsidiaries of the JSC Novorossiyak Shipping Co., incorporated in Russia. The first defendant, Mr. Mikhayluk, was an officer of Novoship and in charge of negotiating the charter of vessels owned by members of the Novoship Group. In litigation in the Commercial Court, he was held to have been in breach of his fiduciary duty to members of the Novoship Group by his corrupt conduct between 2002 and 2004 in dealings with various charterers. These included the sixth defendant, Mr. Nikitin, and the eighth defendant, Henriot Finance Ltd. ("Henriot"), a Virgin Islands company owned and controlled by him. There were connections with a number of jurisdictions but the litigation was conducted on the footing that the governing law was that of the English forum.

The trial judge (Christopher Clarke J.) held that Mr. Nikitin and Henriot were liable to account for profits made from charters to Henriot ("the Henriot charters") of vessels of the Novoship Group, which had been arranged between Mr. Mikhayluk and Mr. Nikitin. His Lordship concluded ([2012] EWHC 3586 (Comm), at [519]–[520]) that: (1) in negotiating the Henriot charters, Mr. Mikhayluk had been in breach of his fiduciary duty and that Mr. Nikitin and Henriot had dishonestly assisted that breach; (2) the profit by Henriot and Mr. Nikitin from deployment of vessels under the Henriot charters to carry freight "resulted from" Henriot entering into those charters, the very activity which constituted their dishonest assistance, so that there was "a sufficiently direct causal connection between the assistance and the profit"; and (3) it was no answer that the charters were at commercial rates and would have been made anyway in an arm's-length transaction, or that Henriot would have made the same profits from charters of vessels from other than the Novoship Group.

The Court of Appeal (Longmore, Moore-Bick, Lewison L.JJ.) set aside the order against Mr. Nikitin and Henriot for an account of profits. It did so on the footing that (1) the "real and effective cause" of their profits had been a supervening and favourable shift in the rates for freight; (2) therefore there was "no sufficiently direct causal connection" between the entry into the