

Keeping time

Failure to respond to a registration notice is not necessarily fatal but serving a counter-notice in time remains the safest move, says **Jonathan Upton**

THE REGISTRAR'S POWER to correct a 'mistake' in the register is not confined to mistakes of a procedural nature, the High Court has ruled in *Baxter v Mannion* [2010] EWHC 573 (Ch), the first case on the meaning of 'mistake' within paragraph 5(a) of Schedule 4 of the Land Registration Act 2002.

The appellant in the case, B, applied to be registered as the proprietor of a field as an adverse possessor for the requisite period of ten years under the provisions of Land Registration Act 2002, sections 96-98 and schedule 6. Notice of the application was given to the proprietor, M, who failed to give counter-notice objecting. As a result, B was entered in the register as the new proprietor of the field.



“The appellant’s interpretation of the 2002 Act would be an invitation for fraud in that it would reward a dishonest applicant”

M applied for rectification under Schedule 4, paragraph 5(a), which provides that the registrar may alter the register for the purpose of 'correcting a mistake'. There is no definition or statutory guidance on what constitutes a 'mistake' for this purpose. M argued that the registration of B as the proprietor was a mistake because B had never in fact been in adverse possession of the field for the requisite period of ten years.

M's application was referred to the adjudicator. B argued, *inter alia*, that the registrar must have been satisfied that B was in adverse possession for the requisite period on the information contained in B's statutory declaration accompanying his application under schedule 6 and, therefore, there was no 'mistake' within the meaning of paragraph 5(a). The adjudicator rejected that argument and went on to find that B was not in adverse possession for the requisite period of ten years. B appealed. In dismissing the appeal,

Henderson J held that there was no good reason to confine the jurisdiction of the registrar under paragraph 5(a) to the correction of mistakes of a procedural nature. An applicant will automatically be registered as the new proprietor under the provisions set out in schedule 6 but such procedure is not necessarily conclusive of an applicant's entitlement to be registered: it is still open to the former proprietor to argue that the registration was a mistake on the ground that the applicant did not satisfy the test of ten years' adverse possession. Schedule 6 is a procedural filter, not a substantive test. Henderson J referred to the general policy of the 2002 Act of offering greater security of title for registered proprietors against squatters.

Furthermore, B's interpretation of the 2002 Act would be an invitation for fraud in that it would reward a dishonest applicant who successfully persuaded the registrar that he had been in adverse possession by telling lies about the nature and extent of his use of the land.

If B's interpretation were right, once the registrar had been persuaded, the applicant would be entitled to registration if no counter notice was served. That would be a disproportionate penalty for failing to serve a counter notice.

What does this case tell us? Practitioners are reminded that, in relation to adverse possession claims under schedule 6, there is no jurisdiction to extend the time (65 business days) for service of a counter-notice.

The failure to serve a counter-notice will result in the applicant automatically being

registered as the proprietor. While *Baxter* makes clear that such a failure is not fatal, it must be remembered that once a new proprietor is registered and in possession, rectification may only be made without the new proprietor's consent if one of the conditions in schedule 4, paragraph 6(2) is met: that the new proprietor had by fraud or lack of proper care caused or substantially contributed to the mistake or it would be unjust for any other reason for the alteration not to be made.

In many cases it will be unjust not to alter the register to correct a mistake but not all: it is far safer to serve the counter-notice in time.

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SJ takeaway

- In adverse possession claims under LA 2002, schedule 6, the failure to serve a counter-notice will result in the applicant automatically being registered as the proprietor.
- Failure to serve a counter-notice is not fatal: 'mistake' in LA 2002, Schedule 4, paragraph 5(a) is not confined to mistakes of a procedural nature. It is still open to the former proprietor to argue that the registration was a mistake on the ground that the applicant did not satisfy the test of ten years' adverse possession.
- Notwithstanding the decision in *Baxter*, It is far safer to serve the counter-notice in time.