

## Correcting mistakes on the Register

**Steven John Baxter v Thomas Francis Mannion (2011) EWCA Civ 120**  
**Court of Appeal: Mummery, Jacob & Tomlinson LJJ**  
**Date: 22 February 2011**

### Background

M bought a field in 1996 and was registered as proprietor. B used the field from time to time for grazing horses. In August 2005, B applied for the field to be registered in his name claiming to have been in adverse possession since 1985. The Land Registry reviewed the application and supporting Statutory Declaration and concluded that it appeared to be in order. Consequently on 1 February 2006 the Land Registry sent the relevant statutory notice to M containing a warning that, if he objected to registration of B as proprietor or wished to serve a counter-notice, he was required to do so before noon on 8 May 2006 (i.e. within 65 days as required under paragraph 3(2) of Schedule 4 to the Land Registration Act 2002).

M received the notice but did not complete or return it within the requisite period. In fact, M had suffered a series of personal setbacks which distracted him from dealing with the notice. However, on 8 September 2006, solicitors instructed by M wrote to the Land Registry asking for an extension of time to respond to the notice notwithstanding that the Land Registry has no statutory power to grant any extension. In any event, by this time, the Land Registry had already registered B as proprietor with a possessory title. In reply to M's solicitors, the Land Registry said that, if M wished to take the matter further, he would have to apply for rectification of the register. This is the course which M duly took. M's application was referred to a Deputy Adjudicator for determination.

Under paragraph 5 of Schedule 6 to the Land Registration Act 2002, the Registrar may alter the register for the purpose of correcting a mistake. Paragraph 6(2) of the Schedule provides:

"No alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 without the proprietor's consent in relation to land in his possession unless-

- (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
- (b) it would for any other reason be unjust for the alteration not to be made."

The Deputy Adjudicator found that both limbs were satisfied. On hearing the evidence, it was found that B had not been in exclusive possession between August 1996 and August 2006 and that he had not had the necessary intention to exclude the world at large.

B appealed unsuccessfully to Henderson J who concluded that:

- (a) there was a mistake in the register which the Registrar had the power to correct;
- (b) whilst the Deputy Adjudicator had wrongly applied the onus of proof this made no difference to the outcome; and
- (c) that it would be unjust for the alteration not to be made.

B appealed to the Court of Appeal on each of these 3 issues.

### Correction of a mistake

Before the Court of Appeal, B contended that the intention underlying the Land Registration Act 2002 and the accompanying rules was clear. It was submitted that the scheme provided a "once and for all" system for the acquisition of possessory title which was operated through the medium of giving notice to the registered proprietor. Such notice could be objected to by service of a counter-notice. In the absence of the counter-notice, registration followed automatically. It was contended that by these means clarity, certainty and simplicity were achieved.

Jacob LJ rejected this submission decisively. Referring to Schedule 6(1), which provides that a person may apply to be registered "*if he has been in adverse possession of an estate*", he said:

*"That surely indicates that a person who has not in fact been in adverse possession is simply not entitled to apply. Parliament cannot have intended that such a person could get registered title. A registration obtained by a person not entitled to apply for it would be mistaken. So, putting the register back in the condition it was prior to the application would be correction of a mistake within the meaning of Schedule 4(1) and (5)."*

His Lordship also pointed out the potential consequences of B's submission by reference to the example of an application by a dishonest applicant making an application knowing that the registered proprietor would not (or could not) respond by serving a counter-notice. He concluded that, there being no provision for extending time, Parliament must have intended that the rectification power should cover cases where an erroneous entry was procured simply because the registered proprietor had not lodged a counter-notice before the application had been dealt with by the Land Registry.

His Lordship could also see no answer to the point that, if B's submission were correct, M would lose his property without compensation in breach of Article 1 to the First Protocol of the European Convention on Human Rights.

### **The onus of proof**

Jacob LJ agreed that the legal onus of proof lay on M. However, M had put in prima facie evidence to show that B's claim that he had been in adverse possession for more than 10 years was wrong. The evidential burden had therefore shifted to B and, on the facts, B had failed to discharge that burden. Indeed, since the Deputy Adjudicator had no hesitation in accepting M's evidence in preference to that given by B, the case had not turned on the onus of proof.

### **Unjust for the alteration not to be made**

By the time of the application, B had assumed possession of the land. Accordingly Schedule 4(6)(2) applied. However, before the Court of Appeal, B could only point to the fact that M had failed to return his form in time when he was capable of doing so. Jacob LJ concluded that M's failure *"to operate the bureaucratic machinery was a mere thistledown to Mr Mannion losing his land"* and held that there was no substance in this ground of appeal.

### **Comment**

The outcome of this case is a triumph of common sense. On the evidence before the Deputy Adjudicator there was no merit in B's claim to the field. Furthermore B's reliance upon M's technical procedural breach was shown in the proceedings before both Henderson J and the Court of Appeal to be opportunistic and meritless.

The Court of Appeal has also clarified the scope of the power to alter the register for the purpose of correcting a mistake, adopting a straight-forward and practical interpretation of the 2002 Act.