Neutral Citation Number: [2021] EWHC 1771 (Ch)

Case No: PT-2021-BRS-000030

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 27/04/2021

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

MRS JOYCE HARRIS (by her litigation friend BONITA WHITE) — **Applicant**

- and –

NO RESPONDENT

- -
- -

Wards Solicitors for the **Applicant**

Application dealt with on paper

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ Paul Matthews :

1. Mrs Joyce Harris is the current owner of 29 Stanley Chase Whitehall Bristol, which is unregistered land, something of a rarity in 2021. The property was originally solely owned by her husband, Ronald Harris, from 1952 until 1988, when it was conveyed into their joint names. When he died, in 2007, Mrs Harris became sole owner by survivorship. It appears that Mrs Harris, who is now aged 100 years, suffers from dementia and lives in care. Her children Bonita White and Michael Harris are her attorneys under an enduring power of attorney which was registered on 13 May 2020. They are currently seeking to sell the house in order to pay accrued and ongoing fees. A purchaser has now been found.

2. The main problem is that there is a class C(i) land charge (puisne mortgage) registered under the Land Charges Act 1972 against the name of the late Ronald Harris in respect of his fee simple estate in the house. According to the Land Charges Office of the Land Registry, it was registered on 15 March 1985. Unfortunately, the Land Charges Office is unable to provide an office copy of the charge. It is missing. No explanation has been given as to how this came about. That means that Mrs Harris's attorneys have no idea of the identity of the chargee, the amount of indebtedness secured by the charge, or what the underlying transaction was all about. They thus have no opportunity to discharge it.

3. The attorneys are aware of an earlier mortgage on the property, to secure the loan with which Mr Harris purchased the property. This was redeemed in 1976, and the title deeds were returned from the lender to evidence redemption. But they have no information about the land charge of 1985. (There is a curiosity as to why a puisne mortgage under class C(i) should have been registered in 1985, when the deeds were by then back in Mr Harris's hands. But I pass over that for now.) Accordingly, the attorneys are in some difficulty in showing a clear title to their purchaser, they do not know how much money (and interest) may be secured by the mortgage, and they have been unable to find out who the chargee is. It is a blot on the title. Although there is a limited compensation scheme in section 25 of the 1972 Act, I assume that the purchaser is unable or unwilling to take advantage of it.

4. The attorneys therefore wish to make an application to the court for the vacation of this charge. The court has power to do this under section 1(6) of the 1972 Act, and also pursuant to its inherent jurisdiction: see *Nugent v Nugent* [2015] Ch 121. But such an application is invariably made against the beneficiary of the charge concerned, and in the present case the identity of that person is not known. It is clear law that the claimant cannot make a claim against a person who is not merely anonymous but cannot be identified, because until that person is served with the proceedings (or the court dispenses with service) the court has no jurisdiction to make the order as against that other person: see *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471, SC.

5. Moreover, the caselaw shows that the jurisdiction to vacate an entry has up until now been exercised in two different cases. The first is where, as Morgan J put it in *Nugent v Nugent* at [35] "the right claimed was not within the class of rights which could be registered or where the claim was without any real substance". The other case is "where the right claimed did come within the class of rights which could be registered and where the claim was a good arguable one." In the second case, the application

could be treated as if it were an application for an interim injunction to restrain dealing with the property pending trial, with cross-undertakings as to damages and so on.

6. The present case is different. There is no suggestion that the right claimed was not within the class that could be registered, or that the claim was without any real substance. The charge was registered by the then land charges registry, and I must assume that it acted on proper evidence of such a charge in making the entry it did. No challenge appears to have been made at any stage to the validity of the charge, whether by Mr Harris during his life or by Mrs Harris after his death. Nor is this a case where the claim to a charge is "well arguable", and the claimant wishes to remove it pending proceedings to try that claim. Here the attorneys just want to get rid of a charge that they have no grounds for attacking. I know of no case where an application has been made successfully for the removal of such an entry. So the present application is undoubtedly a novelty, and there must be some doubt as to whether the court can do this, either under section 1(6) or the inherent jurisdiction.

7. Mrs Harris's attorneys have also considered the possibility of naming the Chief Land Registrar as a defendant. Ordinarily, neither the registry nor the registrar would expect to be a defendant in such a case. They do not have any financial interest in the outcome, unlike the chargee. Nevertheless, the attorneys' solicitors wrote to the land registry in January 2021, to ask if the registry or registrar wished to be a defendant. There has been no reply to this letter. Of course, if this were a claim brought against the land registry or the registrar for, say, negligence in losing the details of the charge, then the land registry or the registrar would indeed be the appropriate defendant: *cf Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223, CA. (I emphasise that I say nothing as to the merits of such an approach here, and particularly since I have no information as to the circumstances in which the details of the charge have gone missing.)

8. As I say, the attorneys' solicitors have accordingly decided to ask the court for permission to issue the claim under CPR Part 8 for the vacation of the charge, but without naming a defendant. CPR rule 8.2A provides for the issue of a Part 8 claim form without naming the defendant, where the court gives permission. The problem, as I see it, is that usually the facts in a claim against a chargee to vacate a land charge will be highly contentious. This means that such a claim will ordinarily be more suitable for the Part 7 procedure than the Part 8 procedure: CPR rule 8.1(2)(a). But there is no similar provision for issuing Part 7 claims without naming a defendant. I also mention that claims to vacate entries in land registers are not mentioned in section B of the Practice Direction 8A (claims that must be made under Part 8): CPR rule 8.1(2)(b).

9. I am also doubtful how far any order made by the court in the contemplated proceedings could bind the chargee. As a general rule, a person who is not named as a defendant in proceedings is not affected by the result: see *eg Vandervell Trustees Ltd v White* [1971] AC 912, HL. But the chargee is the very person who might come forward and assert his or her rights. Even if the order *could* bind the chargee in such a case, vacating the entry in the register so that it no longer bound anyone would on the face of it appear to deprive the chargee of "possessions" within the meaning of Article 1 of Protocol 1 of the European Convention on Human Rights. The two *Nugent* cases

do not do this. But section 6(1) of the Human Rights Act 1998 makes it unlawful for the court to act incompatibly with Convention rights, of which this is one.

10. A secondary problem, which I can deal with more shortly, is that Mrs Harris lacks capacity to litigate. Her attorneys cannot without more litigate on her behalf. She requires a litigation friend under CPR Part 21. Mrs Harris's daughter Ms White is prepared to undertake this role. The attorneys' solicitors point out that CPR rule 21.5(3)(a) requires that a litigation friend for a claimant must file a certificate of suitability "at the time when the claim is made". In order to avoid a further preliminary application, Ms White has filed a certificate of suitability with this application to issue the claim without a named defendant. I can see no purpose in requiring any further application to the court for the appointment of the litigation friend. If permission is given in due course and the claim is issued, Ms White will become litigation friend at that time.

11. The conclusion to which I come at this stage is that I cannot simply give permission to issue a Part 8 claim without naming the defendant. There are too many doubts in my mind to permit that. What I will do, however, is to direct that (if so advised) Mrs Harris's putative litigation friend appear before me by counsel to consider the points that I have made and to offer argument to persuade me that I am wrong in those doubts. That hearing can be remote, by MS Teams, and should take place as soon as convenient.