

[2019] UKFTT 0252 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2017/1115

BETWEEN

THE LORD CHANCELLOR (LEGAL AID AGENCY)

Applicant

and

1. WILFRED HARTLEY
2. REBECCA LOUISE HARLING
3. JOHN HARTLEY

Respondents

Property address: 5 Valley Mount, Kippax, Leeds LS25 7DF
Title number: WYK592261

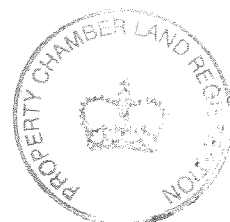
Before: Judge Hargreaves

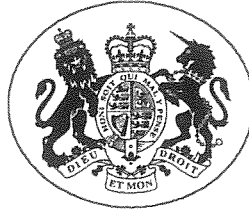
ORDER

The Tribunal directs the Chief Land Registrar to give effect to the Applicant's application for a statutory charge made in Form e-CST lodged on 6th September 2017.

Dated 28th March 2019

Sara Hargreaves
BY ORDER OF THE TRIBUNAL





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**Property address: 5 Valley Mount, Kippax, Leeds LS25 7DF
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**Before: Judge Hargreaves
Leeds Magistrates
11th March 2019**

Applicant represented by Kate Wilson

Respondents in person and represented by John Hartley

DECISION

Key words – Legal aid – statutory charge – matrimonial proceedings – s10(7) Access to Justice Act 1999 – Community Legal Service (Financial) Regulations 2000 - Hanlon v Law Society [1981] AC 124 – property recovered or preserved and for whom – property held in trust by First Respondent for Second and Third Respondents subject to charge

1. For the following reasons I direct the Chief Land Registrar to give effect to an electronic application made in form e-CST by the Applicant on 6th September 2017 for a statutory charge under s10(7) Access to Justice Act 1999.
2. This is one of many cases where the Applicant makes an application to register a charge against a property which prompts claims of injustice and unfairness from those in a similar position to the Respondents. However, on investigation of both the law and the facts, this is a clear case for giving effect to the application.
3. Page references are to those in the trial bundle provided by the Applicant except where otherwise noted. I am grateful to the parties for their submissions.
4. The Third Respondent acts as the First Respondent's litigation friend and on his own behalf as an objector.
5. The relevant facts and chronology, by way of background, are as follows. The property was registered in the name of Wilfred Hartley on 16th August 1999. He is the father of the Second and Third Respondents. He is now 89, in poor physical and mental health, and his care is provided by John Hartley who appeared before me and conducted the hearing in person, opposing the application. The application has a negative effect on the Second and Third Respondents' interests in the property and all three objected to the application. See p1. The property was transferred by Leeds City Council to Wilfred Hartley and his first wife Sarah (the mother of the Second and Third Respondents) on 12th August 1996. Sarah Hartley, not Wilfred, funded the purchase.
6. The marriage broke down in 1998 when the Second and Third Respondents were 6 and 5 years old. In their divorce, Sarah Hartley and the First Respondent agreed that the property would be held by the First Respondent on trust for the Second and Third Respondents (see p170). No steps were taken when the property was registered in the First Respondent's name in 1999 to protect this trust by any entry on the register. The First Respondent remarried Sam Hartley in 1998, there was another child of the family, and that marriage broke down around the end of 2010. There were accusations of domestic violence against the First Respondent, who instructed a firm of solicitors called Crockett & Co to represent him in related applications and an application for a

contact order respecting their child. Crockett made an application for emergency legal aid (p1-13) which was granted on 20th March 2012 (p15).

7. The First Respondent signed the required declaration on 20th March 2012 indicating that the risk of a statutory charge had been explained to him (p13). A substantive certificate for full representation in the proceedings was granted on 3rd April 2012 (p15).
8. A question then arose as to the First Respondent's capacity to conduct legal proceedings. Dementia was suspected in January 2013 and confirmed in May 2013 after Crockett & Co obtained specific advice on the issue and asked the Official Solicitor to act: see p161-164. See also p167. Critically the First Respondent had signed the relevant declaration about the legal aid charge when he had capacity. The earliest sign of dementia on the facts before me was in November 2012 (see p50).
9. Legal aid was extended to cover Family Help on 20th April 2013, and to be represented in divorce proceedings on 12th November 2013 (see p17). Meanwhile, Sam Hartley had issued a divorce petition on 8th May 2013 and completed Form E on 21st November 2013 (it starts at p18).
10. Sam Hartley claimed an interest in the property because she wrote in section 5 of the Form E (p44): "I wish to realise my interest in the matrimonial home." She added "If the family home cannot be sold, I would seek a transfer ... to me for me and Christina to live in." Some background to the family dispute is evidenced in a brief to the First Respondent's counsel Natalia Escorzia dated 12th February 2014 at p47-56.
11. Disregarding the first part of those instructions (which do not relate to the financial side of the divorce), it is clear that they deal with practical and procedural issues arising out of the First Respondent's capacity prior to a hearing on 14th February 2014. Just over a year later the question of competing claims to the property was beginning to take a central role in the financial relief application. This is evident from communications with Natalia Escorzia at p57-59 where she expressed concern about gaining additional advice to deal with the question whether the property was held in trust for the Second and Third Respondents. In April 2015 Sam Hartley's solicitors

were clearly seeking an interest in the property: see eg their letter dated 27th April 2015 at p60-61.

12. Crockett & Co took specialist counsel's advice on the trust point and concluded that the trust was valid: that point is central to their letter to Sam Hartley's solicitors dated 19th May 2015, at p62-65. But Sam Hartley still included the property as an asset she was claiming for the purposes of a final hearing, set down for 3rd and 4th June 2015: see p66-67. The point was stressed in the First Respondent's counsel's case summary prepared for that hearing and dated 1st June 2015: see paragraph B at p69-70, and p75, p77. As the Third Respondent told me at the hearing on 11th March, he amongst others gave evidence to DDJ Nightingale about the trust and after the hearing (over two days), DDJ Nightingale recorded that "the property .. is held on trust by the Respondent Husband for the benefit and John Hartley and Rebecca Hartley, these being the children of his marriage to Sarah Leadley." See p78, p82 and p89.
13. There is no doubt that the result of DDJ Nightingale's order is that the property was preserved as an asset for the Second and Third Respondents. Sam Hartley's claim to a transfer or an interest in it was pursued to a hearing and failed.
14. The parties to this application then became involved in the dispute as to whether or not the Applicant is entitled to register a statutory charge. Crockett & Co sought to postpone enforcement in June 2015 (p81-89) on the grounds of hardship to the First Respondent and further argued that as the property was held in trust for third parties, the Applicant could not register a charge: see letters at p90-91, p92, p93-94 for example. Although the Applicant agreed to review imposing a charge, it basically required protection in some form of charge if not a statutory one (see eg p100). Again the position of the Respondents was to oppose on the grounds that the property was not an asset belonging to the First Respondent which fell within the terms of the statute: see eg p112.
15. The dispute between the parties is a relatively narrow matter requiring the construction of statute and regulations. The Respondents have filed several statements setting out their opposition, and these are to be found, for example, at p132, p145, 151. Dealing with a number of issues raised, I should stress that I am satisfied that when he signed the declaration as to understanding about the legal aid charge, the First Respondent

had capacity. His solicitors were sensitive to that issue and it is clear that when they had doubts, they took steps to protect his and their position. They also took additional advice about the trust in order to ensure they were correct in opposing Sam Hartley's claim. Whilst the Third Respondent argues that neither he nor his sister were represented or in receipt of legal aid themselves, but (he submits) are being asked to pay for it, it seems to me that (for example) had he and his sister been entitled to apply for legal aid to intervene in the financial relief proceedings to protect their interest in the property, it might well have been subject to the charge in any event. Whilst it is given in this case that the First Respondent is elderly and in bad health, the Applicant's position is constrained when it comes to waiving the right to charge the asset on those grounds alone, see below, though it indicates that it will postpone the enforcement of the charge. The First Respondent did have the benefit of public funding in this case, and as a result, defeated the claims of Sam Hartley at the hearing. It must generally be the case that where an asset is charged to secure repayment to the legal aid fund, someone's financial interests are reduced or affected by that amount. That is why an explanation must be given, and an acceptance of that explanation acknowledged. The First Respondent had a duty as trustee to protect the asset, and as the asset is charged, it is right that he has been indemnified out of the trust asset: the usual outcome is that the fund in which the beneficiaries have an interest bears the costs of proper legal proceedings taken to protect it, so the Second and Third Respondents are in the usual position of beneficiaries where trust assets have been protected by legal proceedings.

16. In this particular case the statutory regime applies as follows. Although pleaded in the Applicant's statement of case at tab 1 p1, there was a failure to set out the relevant statutory provision in full: see the Applicant's letter at p129-130. The following summary is therefore taken from the skeleton argument settled by Ms Wilson dated 1st March 2019.

17. The starting point is s10 *Access to Justice Act 1999* which provides as follows. First, by s10(1) "*An individual for whom services are funded by the Commission as part of the Community Legal Service shall not be required to make any payment in respect of the services except where regulations otherwise provide.*" S10(7) provides "*Except so far as regulations otherwise provide, where services have been funded by the*

Commission for an individual as part of the Community Legal Service – (a) sums expended by the Commission in funding the Services ... and (b) other sums payable by the individual by virtue of regulations under this section, shall constitute a first charge on any property recovered or preserved by him (whether for himself or any other person) in any proceedings or in any compromise or settlement of any dispute in connection with which the services were provided” (my emphasis).

18. It is clear, as Ms Wilson submitted, that the charge extends to “*property ... recovered by the claimant if it has been the subject of a successful claim, preserved by the respondent if the claim fails [as in this case]. In either case it is a question of fact ... In property adjustment proceedings ... it is only property the ownership or transfer of which has been in issue which has been “recovered or preserved” so as to be the subject of a legal aid charge. What has been in issue is to be collected as a matter of fact from pleadings, evidence, judgment and/or order. I can see no reason for extending the words to items of property the ownership or possession of which has never been questioned.*” This was set out by Lord Simon in *Hanlon v The Law Society* [1981] AC 124 at p180 F-H. It still applies and covers the point in issue in this case.
19. The authority applies to the 1999 Act, in the same words except for the addition of “*or any other person*” in s10(7). The concept of “property” is wide and includes either the trust asset for the First Respondent or the beneficial interest of the Second and Third Respondents, who are “*any other person*” caught by the words of the section. They do not have to be litigants or in receipt of funding to have their interest charged.
20. As for relevant regulations, the applicable regulations for the purpose of s10(1) of the 1999 Act in this case are the *Community Legal Service (Financial) Regulations 2000*. So far as the Respondents seek to rely on the provisions of the *Civil Legal Aid (Statutory Charge) Regulations 2013* they apply to funding under *Legal Aid Sentencing and Punishment of Offenders Act 2012*, which did not apply to the funding regime in this case. The 2013 regulations came into force on 1st April 2013 whereas the First Respondent’s legal aid certificate was granted prior to that date. None of the exemptions apply. Regulation 47 (waiver of charge in cases of wider public interest) does not seem appropriate on the facts of this case. The exemption for the client’s

dwelling in Regulation 44(1)(g) does not apply where the certificate covers representation at court in proceedings (as opposed to Legal Help or Help at Court): see Regulation 45. The Applicant has power pursuant to Regulation 52 and 52A to postpone the enforcement of the charge. The application of Regulations 47, 52 and 52A are not a matter for me.

21. In the circumstances the Applicant has made out its case. It follows that it is the successful party: if it wishes to make an application for costs then it should file and serve an application in Form N260 or similar, dealing only with costs from the date of the reference (1st December 2017). The schedule should be served by 16th April. The Respondents have the opportunity to serve their submissions in reply by 30th April 2019, after which I will deal with costs if required to do so.

BY ORDER OF THE TRIBUNAL

Sara Hargreaves

DATED 28TH MARCH 2019

