UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007
AN APPEAL FROM A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

LANDS REGISTRATION – PRACTICE AND PROCEDURE – striking out of proceedings - statement of case –unilateral notice - breach of trust – appeal allowed

BETWEEN:

CHERYL MICHELLE COWIE **Appellant**

and

(1) DARREN THOMAS ASHWORTH **Respondents**
(2) DANIELLE ASHWORTH

Re: 328 Newchurch Road,
Stacksteads,
Bacup,
Lancashire,
OL13 OBD

Judge Elizabeth Cooke
Determination on written representations

Introduction

1. This is an appeal by the appellant, Ms Cowie, from an order of the First-tier Tribunal ("the FTT") made on 19 November 2020 in a reference from HM Land Registry. It was the last in a series of decisions whose effect was that her proceedings in the FTT were struck out and that she could no longer resist an application by the first respondent, Mr Ashworth, to remove from the register an entry protecting her claim to the equitable ownership of 328 Newchurch Road, Stacksteads, Bacup of which the respondents are the registered proprietors.

2. In brief, the appellant's proceedings were struck out because she did not provide a Statement of Case as ordered by the FTT. Her application to reinstate her proceedings was refused, and that is the decision she appeals.

3. The appeal has been decided under the Tribunal's written representations procedure. Neither party has been legally represented.

The procedural background

4. I begin with the procedural background so as to explain how the appeal arises. At this stage all I need say about the facts is that the appellant and first respondent are the registered proprietors of the appellant's home in Blackwood Court, Stacksteads, Bacup where she lives with their two children, and that the two respondents live at, and are the registered proprietors of, 328 Newchurch Road, Stacksteads, Bacup, just round the corner. The appeal relates to the latter property, and I refer to it as "the appeal property". At some point in 2019 solicitors for the appellant entered a unilateral notice against the register of title to the property in order to protect her claim which they regarded as arising from proprietary estoppel.

5. Proprietary estoppel can arise when A says to B that B will have an interest in A's property. As we shall see, that is not the best way of describing the appellant's case, but that does not matter for the moment.

6. Later in 2019 the first respondent applied to remove the notice; the appellant objected. The matter was referred to the FTT pursuant to section 73(7) of the Land Registration Act 2002.

7. On 3 September 2020 the FTT made an order on receipt of a reference from HM Land Registry, designating the appellant as the applicant, because it was for her to prove in the FTT that she was entitled to have the notice remain on the register. The order required her to file and serve a statement of case by 1 October 2020.

8. No statement of case was filed and on 8 October 2020 the FTT made an order stating that unless the appellant filed and served her statement of case by 5pm on 22 October 2020 then the Tribunal "will strike out her proceedings" and direct the registrar to give effect to the respondent's application.

9. Such an order, using the word "will" rather than "may", is something of a hostage to fortune because it gives the FTT no choice if there is a further failure to comply no matter what the reason for that failure. Rule 9(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 states:

> "(1) The proceedings or case, or the appropriate part of them, will automatically be struck out if the applicant has failed to comply with a direction that stated that failure by the applicant to comply with the direction by a stated date would lead to the striking out of the proceedings or that part of them."

10. No statement of case was filed by 22 October 2020 and therefore, as the FTT observed in its further order of 2 November 2020, her proceedings were automatically struck out. That further order appears to have been made in response to correspondence from the appellant and it gave her until 5pm on 16 November 2020 to provide a statement of case and to apply for her proceedings to be reinstated. The order of 2 November 2020 referred to the appellant's solicitors having come off the record, and one can infer that the appellant had explained that the rule 9 notice had not been drawn to her attention because it had been sent to her solicitors after she ceased to be represented by them. The FTT in its order of 2 November 2020 gave the appellant another 14 days to plead her case. Failing that, said the order, the striking out of her case would be "completed" by the FTT giving a direction to the registrar to give effect to the respondent's application.

11. At 16:51 on 16 November 2020 the appellant sent an email to the FTT. In it she explained that she had been advised by the FTT's office to send two emails setting out her case, and promised to send the second one within the next 24 hours due to "an internet issue" which she said had been explained to the FTT staff on the telephone. She said she wanted both her emails to be used as her "full statement." She sent a further email at 07:37 the following morning.

12. On 19 November 2020 the FTT made the order that is now appealed; it refused her application to reinstate the proceedings and directed the registrar to give effect to the respondent's application to cancel the unilateral notice. In her reasons the judge recited the previous orders and the 16th November deadline and said:

> "3. Whilst it would be in accordance with the overriding objective to treat the Applicant's email of 16 November timed 14:18 as a response and to extend time to consider her email timed 7.37 dated 17th November with it as part of that response it is impossible to stretch any reading of those emails as containing a statement of case. At most there is a suggestion that the Applicant and the First Respondent were in a relationship which was or became abusive and that the Applicant received damages for a personal injury accident which – in some way – were used to buy the property. Beyond that the matter is wholly unclear. There is no pleading to which the Respondents could make a response.
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> 4. The Tribunal has read and considered the letter from Woodcocks Howarth and Nuttall dated 20th December 2019 which forms part of the case summary documents sent to the Tribunal by the Land Registry. That evidences that money

> from the personal injury fund of £110,000 was used to buy the Respondents' property in 2013. The Respondents say it was a gift and that the Applicant had legal advice at the time. The Applicant wants to stop them from selling the property. But the fact remains that the Applicant has failed to produce a pleading which explains her case and this letter is no substitute.
>
> 5. The Tribunal is unable to offer advice. It is an independent judicial tribunal. The Applicant has been given many opportunities and plenty of time to provide a statement of case explaining why she has a claim to a beneficial interest in the property. The Tribunal is unable to do this for her. In the circumstances, her pleading must remain struck out."

13. It appears that the appellant sought permission to appeal promptly, because the FTT refused permission on 23 November 2020. Its reasons said:

> "1. To repeat, the reasons given for the order dated 19th November (in italics) show why the Applicant has no reasonable grounds for being granted permission to appeal."

14. The reasons then copied-and-pasted, in italics, the reasons given in the order of 19th November 2020, and then said:

> "The Applicant has sent the Tribunal and the Respondents a series of emails which do not amount to a pleading or provision of a statement of case in accordance with Tribunal guidance. The Tribunal cannot plead the Applicant's case for her. Her case was automatically struck out because she failed to file a statement of case in time as required, and her application to reinstate her proceedings was dismissed for the reasons set out on 19th November"

15. I pause to observe that the issue on an application for permission to appeal is not whether the FTT is convinced of the correctness of its own decision but whether the appeal has a realistic prospect of success; "realistic" means some more than fanciful.

16. The appellant now appeals the order of 19 November 2020 on the basis that she did provide a statement of case and her proceedings in the FTT should be reinstated.

17. The FTT's decision that her emails did not constitute a statement of case was an exercise of judgment and, to some extent, of discretion. The Tribunal will not interfere with an exercise of discretion by the FTT merely because it disagrees. It will interfere only if the FTT's decision fell outside the range of reasonable decisions the FTT could have taken. In considering the appeal I have to consider whether a reasonable tribunal could have taken the view that what she submitted to the FTT on 16 and 17 November 2020 did not amount to a statement of case or, put another way, was not something to which the respondent could plead in reply.

The appellant's emails of 16 and 17 November

18. The two emails of 16 and 17 November 2020 are very obviously the work of a litigant in person and not of a lawyer. They are poorly structured and difficult to follow. A pleading should set out the facts on which the case is based and not the evidence by which the case is to be proved, and the two emails read far more like a witness statement than a pleading. They tell the appellant's story. The email of 17 November begins with a copy-and-paste of that of 16 November and so one has to get through several pages before the appellant begins her story in 2001; the narrative that follows is some 14 pages long. Both emails are emotional in content and indicate that the writer is very stressed by long-standing physical injuries, by the risk of losing a house bought with her money, and by the requirement to produce a statement of case quickly in a situation where her solicitors ceased to act because she could not get legal aid for the FTT proceedings and where the order of 8 October 2020 did not come to her attention.

19. None of that should prevent her from getting access to justice if she has a case. The most cursory perusal of the two emails reveals that she has and that, if what she says is true, the removal of the notice will work injustice and may cause the irrecoverable loss of funds transferred in breach of trust. A bare summary of what I understand to be her case from her two emails, in particular that of 17 November 2020, is this:

    a. In 2001 the appellant was employed as the manager of a nursery. She commenced a relationship with the first respondent and the couple had a son, Kyle. She describes that relationship as controlling and abusive.

    b. In 2003 the appellant suffered life-changing injuries in an accident and became severely disabled.

    c. In 2009 the first respondent left her for a new partner, the second respondent. Nevertheless the two remained closely involved with each other because they shared the care of Kyle, and the first respondent used to take her to solicitors' appointments because by now she was pursuing damages for personal injury.

    d. At some point between 2009 and 2013 the appellant became pregnant by the first respondent and their daughter Lily-May was born.

    e. In 2013 the appellant recovered nearly £300,000 in damages. It was placed in trust for her as sole beneficiary, and she and the first respondent were the trustees of the fund. She says that the trust fund, and the first respondent's trusteeship, were explained to her as a way of protecting the money for the children.

    f. In 2013 the two respondents took the appellant to see the property where she now lives and suggested she buy it. It was adapted for disabled use and was, the appellant thought, perfect for her needs, both in the way it was built and in its location. On the same day they showed her the appeal property round the corner, and suggested she buy it as a home for them, a base for their child-minding business, and a second home for Kyle and Lily-May, who would be able to stay

there, have their own bedrooms, and pop round the corner to play whenever they wanted. She agreed.

g. Within a few days both purchases had been funded by the personal injury fund. The first respondent's solicitors, who were doing the conveyancing, asked that she be given independent legal advice, and he took her to see another firm of solicitors who pointed out to her that she did not have to give her money away to the first respondent. She chose to go ahead.

h. The appellant says that she did not realise at the time that her home was going to be put into the joint names of herself and the first respondent. Nor did she realise that the two respondents, rather than just the first respondent, were to be the owners of the appeal property. She says she also paid for renovation and furnishings for them. She says that for most of the period from 2003 until a few years after the purchase of the two properties she was taking heavy quantities of medication, including morphine, and that the combination of the effects of injury, the medication, and the coercion involved in the relationship meant that she agreed to something that she now wishes she had not done.

i. The appellant concludes by saying that "I therefore will be seeking that the whole house is immediately put back in too the trust fund for the actual use of me and the children too support and fund the life that we need assistance with … as this is indeed what I believed I was doing in 2013 when I provided the funds for the purchase of 328 Newchurch Road."

20. Two things stand out from that summary. One is that the appellant is saying that the appellant is calling into question the validity of the transfer of funds for the purchase of 328 Newchurch Road. There may have been undue influence. She says she did not intend to make a gift; if what she says is true, the property might be held on resulting trust for her. But the other and even more obvious point is that 328 Newchurch Road was bought with money from a fund of which the first respondent was trustee. Even if the appellant did intend to make a gift of the money and the property to him, or to the two respondents, as a trustee the first respondent cannot take that gift and the property is held by him as part of the trust fund.

21. I say that without having heard evidence and without evidence having been tested. But the existence of the trust fund, and the respondent's trusteeship, are evident since the appellant has provided the Tribunal with a copy of the trust deed.

22. The FTT also had sight of a letter sent to HM Land Registry by solicitors then acting for the appellant in December 2019 in response to the first respondent's application to remove the notice. What they say is consistent with my summary of facts above. Their explanation of the legal consequences of the situation was that it gave rise to an equity in proprietary estoppel, because the appellant had relied to her detriment on the first respondent's promises.

23. Were the two emails sufficient to be accepted as a statement of case? I find that they were sufficient. I have had no difficulty in understanding them and in summarising the story they tell. Could the respondents plead to them? The first respondent has argued to HM Land Registry, and in his written submission to this Tribunal (to which I refer below) that the purchase money for the appeal property was intended as a gift. He has made no reference to his trusteeship, but the appellant's account of what happened sets out the facts from which her claim arises, and her claim is summarised succinctly in her words quoted at paragraph 19(i) above. The respondents can plead in response to those facts and they can give their answer to that claim.

24. The FTT said "it is impossible to stretch any reading of those emails as containing a statement of case". I not only disagree, I regard that assessment, and the FTT's refusal to reinstate the appellant's case, as irrational. It lay outside the bounds of a reasonable exercise of discretion.

25. As to timing, there is some confusion about precisely when the first email arrived, but it was before the deadline of 5pm on 16 November. The second was late. The FTT said it would have extended time if the pleading had been adequate, and I agree that that would have been appropriate since the delay was trivial and has been explained, and no harm was caused to the respondents. The few hours' delay will have made no difference to the point at which they were placed before the judge.

The respondents' position

26. The respondents have not submitted a Respondents' Notice or Grounds of Opposition despite the Tribunal's invitation to do so. Technically therefore they are not respondents to the appeal. But the first respondent made written submissions in response to the application for permission to appeal, on behalf of both respondents, read as follows:

> Our representation will be as follows .
> The applicant has provided no new information and the fact remains the money was gifted as per the letter from Donald Race and Newton.
> I did not transfer funds as suggested this was the whole point of the applicant receiving independent legal advice.
> The applicant gifted only the sum of money and did not purchase the property. I ask that the tribunal please lift the stay to enable the sale of the property. We do not feel there is any reason for the applicant to be awarded permission to appeal .

27. Donald Race and Newton are the solicitors who provided independent advice. The issue of fact raised in that response refers, I believe, to the question of whether funds for the purchase were transferred to the respondents' solicitors before the appellant received independent legal advice, which is what she says happened. That is not material to the appeal. That response says nothing as to whether the appellant has provided a Statement of Case and is of no assistance to the Tribunal on that issue.

Conclusion

28. The FTT's decision that the appellant had not provided a Statement of Case was irrational. Insofar as it was an exercise of discretion, it lay outside the range of reasonable decisions open to the FTT in the exercise of its discretion. It is set aside.

29. There remains the question what the Tribunal should do. It can substitute its own decision by reinstating the appellant's case, and I do so.

30. If the case is remitted to the FTT it will have to be transferred to the county court, for two reasons. First, the appellant's case has been framed in proprietary estoppel. That is not how she puts it but that was the reason given for the entry of the notice; and the FTT does not have jurisdiction to respond to an equity by estoppel (save in the narrow circumstances set out in section 110(4) of the Land Registration Act 2002). Second, and much more importantly, if what the appellant says about the trust fund is correct – and the first respondent has denied neither the trusteeship nor the source of the funds – then the appellant is entitled to a declaration that the appeal property belongs to the trust fund, and to consequent orders under the Trusts of Land and Appointment of Trustees Act 1996, which the FTT does not have jurisdiction to make.

31. In view of that I propose to conduct a case management hearing so that I can discuss with the parties how the matter should proceed. The hearing will be by remote video platform. I am minded to transfer the matter to the county court in Manchester, but I would like to hear their views. I hope they can be represented at that hearing since both sides need advice from solicitors familiar with trust law. I stress, to the respondents in particular, that I am aware only of the appellant's case, and of such representations as the respondents have chosen to make, and I have not made any findings of fact. There may be relevant facts of which I am unaware and which would alter my perception of the case. I am concerned about the second respondent's position; she may need independent representation. I hope that the parties can find representation, perhaps on a conditional fee basis, with the assistance of this judgment.

32. On receipt of the appellant's application for permission to appeal I gave a direction requiring the Chief Land Registrar to reinstate the unilateral notice and to keep it on the register pending the appeal, and I have now made a further order to ensure that the notice will remain on the register until an order is made for its removal; if the parties are able to reach an appropriate agreement then a consent order can be made. That does not prevent the respondents from marketing the property but they will not be able to complete a sale with the notice in place. A possible outcome of the proceedings might be a sale of the appeal property in order to return the proceeds to the trust fund, and it may be that if (and only if) the parties are legally represented a sale might be managed and the proceeds held on trust by solicitors, or paid into court, until the proceedings are concluded.

Judge Elizabeth Cooke

10 February 2021