

[2019] UKFTT 0052 (PC)

REF/2017/1050

**PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL**

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

David Mark Jackson

APPLICANT

and

Myck Djurberg

RESPONDENT(S)

**Property Address: Hampton Riviera Boatyard & The Chalet both Hampton Court
Road East Molesey KT8 9BP
Title Number: TGL353054 & TGL388694**

ORDER

IT IS ORDERED as follows:

1. The Chief Land Registrar is to cancel the Applicant's original application dated 4 September 2017 for the entry of a restriction on the title to the properties registered under title numbers TGL353054 and TGL388694; but
2. As a condition of that direction, pursuant to rule 40(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 the registrar is to enter on the registers of title to

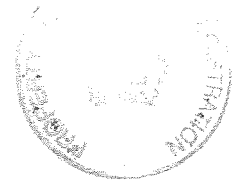
the properties registered under title numbers TGL353054 and TGL388694 a notice of an equitable charge in favour of David Jackson made by deed dated 5 May 2017.

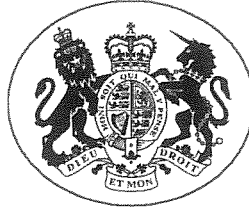
3. The Respondent is to pay the Applicant's legal costs uncured since the reference to this Tribunal on 9 November 2017, to be summarily assessed if not agreed.

Dated this 12 December 2018

BY ORDER OF THE TRIBUNAL

Elizabeth Cook





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DECISION

1. The Applicant, Mr David Jackson, has applied for the entry of a restriction on the register of title to land belonging to the Respondent, Mr Myck Djurberg. The property is a boatyard and chalet at Hampton Court, registered under two title numbers, TGL353054 and TGL388694; I refer to both titles together as “the property”.

2. The restriction the Applicant seeks is in Form A, to protect what he says is his interest as a joint owner of the property in equity pursuant to a declaration of trust dated 5 May 2017, executed by the Respondent in the presence of a witness.
3. The Respondent's case has been both that he did not sign the document and that he did not know what it was when he signed it.
4. The matter was listed for a hearing before me on 12 December 2018. On 10 December the Respondent sent an email to the Applicant, copied to the Tribunal, saying that he had a severe cold and would not be able to attend the hearing on 12th, and also that he was going to the doctor's the following day to have some stitches removed after a recent operation. The Tribunal staff emailed back at my direction on 11th December to say that the hearing would not be adjourned unless he produced medical evidence to demonstrate that he could not attend.
5. The Respondent emailed a letter on 11th December to the Tribunal to say that he authorised his assistant Mr Fulford to attend the Tribunal on 12th to deliver a medical certificate. With that letter he copied a self-certification form, addressed to his employer, saying that he had a severe cold and flu. There is a stamp on that form from the Glenlyn Medical Centre, but no indication that a doctor has looked at the form nor any suggestion that the Respondent is unable to attend the hearing. On 12th December at 0949 the Respondent again emailed the Tribunal to say that he was in bed with a severe cold and flu and was in pain.
6. The Respondent did not attend on 12th December 2018, nor did any representative of his. No medical evidence has been produced. As a matter of common sense it does not seem to me that a severe cold would normally prevent attendance; the Respondent has said that he was seeing a doctor about another matter on 11th so I take it that he could have obtained medical evidence if the doctor was prepared to provide any.
7. Accordingly I refused an adjournment and the hearing proceeded in the Respondent's absence. The Applicant attended with his witnesses, and did not have legal representation.

The Applicant's case

8. In 2011 the Applicant bought a boat from the Respondent. Problems arose similar to those which prompted other purchasers, of other boats, to bring a successful action in the High Court against the Respondent; the Applicant chose not to join in that action and decided that he would sell the boat and move on.

9. His case is that the Respondent agreed to pay him £600,000 both as the price of the boat and in settlement of a loan of £50,000. He was going to do so by selling the boat and then paying the Applicant, and a Bill of Sale in respect of the boat, dated 5 May 2017 was signed by the Applicant to enable him to do so. On the same date the parties both executed a declaration of trust, and their signatures were witnessed by Mr Gabor Mosel, who made a witness statement and came to the hearing with the Applicant.
10. The declaration of trust states that the Respondent holds the property upon trust for himself and the Applicant as tenants in common “with Mr Jackson having an interest of £600,000”. It goes on to say that the proceeds of sale of the property would be distributed first to the legal mortgagee Saving Stream Charges, then to Mr Djurberg’s litigation solicitors in a sum of up to £300,000, then to the Applicant in the sum of £600,000, together with interest at 10% per annum if the sum remained unpaid after 31 December 2017, and the balance to the Respondent. Pending sale the Respondent covenants to keep the property insured and in good repair, and he also covenants to indemnify the Applicant against any liability under the first charge to Saving Stream Charges.
11. The Applicant’s evidence is that what he wanted was to secure the debt for the sale of the boat. The mortgagee was not willing to permit another mortgage and so a declaration of trust was drafted by his solicitor instead. The declaration of trust purports to make him a joint owner of the property and therefore he seeks a joint proprietorship restriction.

The Respondent’s case

12. The Respondent’s Statement of Case says that the declaration of trust is a fabrication and asks for a graphologist to give independent evidence about it.
13. The Respondent’s witness statement dated 10 April 2018 appears to say that he did sign the declaration of trust; he says at paragraph 12 that Mr Moser “set a trap for me to agree to sign a document where I would pay the Applicant £300,000 and to Mr Moser a commission as he put it, the remaining £300,000 from the sale of the Applicant’s houseboat or from the sale of my entire assets.”
14. An email from the Respondent to the Applicant dated 6 September 2017 says:

“Gabor Moser, your business partner, has dishonestly and coningly (sic) forced me to sign these documents on the assurances that such documents were only for the purpose of security against your boathouse that you wish to sell back to

me as a settlement for the moneys you owed to me for many years, back to 2012.”

15. The Respondent says that he has dyslexia, and that may be why the Statement of case and email are unclear; but taken together it seems to me that the Respondent is saying that he did sign the declaration of trust, but intended it to be a security – which of course is what the Applicant wanted it for.
16. So the Respondent’s case is ambiguous, as he has said both that he did not sign the declaration and also that he did, but intended it to be a security.

Discussion

17. The parties were directed to instruct a handwriting expert jointly to examine the Respondent’s signature on the declaration. They were unable to agree joint instructions and so the Applicant instructed and obtained a report from Catriona MacDonald, a Forensic Document Examiner, dated 14 May 20178. Ms MacDonald attended the hearing. Her report concludes that it is probable that the signature was written by the Respondent.
18. The Applicant has also provided copies of photographs taken of the Respondent sitting in a car looking at a document, which the Applicant says is the declaration of trust. The photographs prove nothing and I take no notice of them.
19. The Respondent has not instructed a handwriting expert of his own. In the light of Ms MacDonald’s evidence, and of his own apparent admission that he did sign the declaration, together with Mr Moser’s evidence, I find that he did so. I also accept his evidence that he thought the document created a security; and I come back to that point below.
20. It is clear from the correspondent between the parties that the reason why the declaration was executed is hotly contested. There are suggestions that other sums are owed on both sides. Neither that nor the many other issues that remain contested between them are relevant to the matter I have to decide.
21. What does trouble me, however, is that the declaration of trust does not in fact create joint ownership. The Applicant is not given a proportion of the proceeds of sale, and he bears no risk of loss nor any prospect of appreciation in value of the property on the terms of the document. He gets just a specific sum, with interest. The document purports to be a declaration of trust but it seems to me that it does exactly what both parties intended it to do, which is to secure a debt by guaranteeing to the Applicant the payment of that sum, in the proper order and subsequent to the first charge, out of the proceeds

of sale. It is a principle of the law of mortgages that a document that purports to transfer ownership but is in reality a mortgage will be treated as a mortgage.

22. Accordingly there can be no justification for the entry of a joint proprietorship restriction; but as a condition of my direction to the registrar to cancel the Applicant's application for the entry of a restriction, I have directed the registrar to enter a notice to protect the equitable mortgage created by that deed.
23. The Applicant has been successful in getting his interest protected on the register, and so is entitled to his costs. If those costs cannot be agreed he may send a schedule of his costs to the tribunal within 28 days of the date of this order. If he does so the Respondent will have a further 28 days to respond, and the Applicant 21 days after that to reply.

Dated this 12 December 2018

BY ORDER OF THE TRIBUNAL

Elizabeth Cooke

