

[2018] UKFTT 331 (PC)

REF/2017/0217

**PROPERTY CHAMBER LAND REGISTRATION
FIRST-TIER TRIBUNAL
IN THE MATTER OF A REFERENCE
UNDER THE LAND REGISTRATION ACT 2002**

BETWEEN

HM REVENUE & CUSTOMS

APPLICANT

and

EDWARD ST CLARE

RESPONDENT

**Property Address: 18 Tudor Road, Southport PR8 2RY and land associated with 20
Tudor Road, Southport, PR8 2RY**

Title Number: MS121386 and MS121387

Before: Judge Owen Rhys

Sitting at: 10 Alfred Place London WC1E 7LR

On: 26th April 2018

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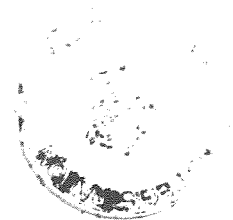
ORDER

IT IS ORDERED that the Chief Land Registrar shall cancel the Respondent's application in Form UN4 dated 3rd October 2016.

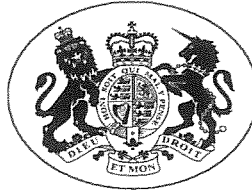
Dated this 22nd day of May 2018

Owen Rhys

BY ORDER OF THE TRIBUNAL



10/10/10



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Applicant representation: Mr Christopher Vallis instructed by HMRC
Solicitor's Office
Respondent representation: Mr Grahame Sellers of Counsel (Direct Access)

DECISION

THE BACKGROUND

1. On 3rd October 2016 the Respondent applied in Form UN4 for the cancellation of unilateral notices in the Charges Registers of the above titles ("the Property"). The Applicant, (to which I shall refer as "HMRC" which terms shall also include Her Majesty's Inland Revenue where appropriate), which is the beneficiary of the

unilateral notices, objected, and the dispute was referred to the Tribunal on 21st February 2017. The unilateral notices, registered on 11th August 2011, read as follows:

“UNILATERAL NOTICE in respect of an agreement to create a first legal mortgage constituted by an offer in writing dated 26 May 1989 signed by the solicitors for the registered proprietors Carter Hodge Solicitors of 2 Liverpool Avenue, Ainsdale, Southport, Merseyside PR8 3LX, and an acceptance contained in a letter dated 7 June 1989 from the then Enquiry Branch of the Inland Revenue (now HM Revenue & Customs) of 4th Floor, 72 Church Street, Liverpool L1 3AY.”

Notice of the deposit of the Land Certificates relating to both titles with the Commissioners of Inland Revenue is also entered on the register, dated 22nd December 1994. The Respondent’s application does not relate to this entry. However, the Land Registry considers that this entry should have been removed when the unilateral notices were entered on the register, and it has been agreed with the Applicant that this will be done once this dispute has been disposed of.

2. The dispute arises out of a very simple set of facts. Mr Peter Joannides, and his wife Mrs Deborah Joannides, became the registered proprietors of the Property – No. 18 Tudor Road, Southport and land associated with No. 20 Tudor Road, Southport – on 14th November 1988 and 4th January 1989 respectively. On 16th May 1989, Mr D A Hartnett, HM Inspector of Taxes of the Enquiry Branch, wrote to a colleague at the Solicitor’s Office as follows:

The first Enquiry Branch investigation of Peter Joannides was settled in April 1988, by offer an acceptance, for £250,000. (The whole sum should have been paid by now but there is an outstanding balance of c.£20,000). Shortly afterwards Joannides was investigated by Customs & Excise and the police in connection with the illegal importation of gemstones and dealing with stolen goods. In March this year I obtained evidence that he had seriously misled the Enquiry Branch investigator in April 1988 and had not disclosed a number of bank accounts operated in false names..... Estimad assessments have ben made on Joannides and these produce a tax charge of c. £900,000: his accountants have appealed against the assessments but when told of the

operation of bank accounts in false names decided that an application for postponement of the tax would not be appropriate.” Carter Hodge are unable to contact their client although he telephones them regularly. In brief, I asked for £250,000 on account and have been given the land certificates for Joannides’ home: the title is apparently unencumbered. Joannides wrote to Carter Hodge instructing them to offer his home by way of security and Mrs Joannides, who remains in the U.K., has agreed to this. The property is currently on the market for £250,000, not an unrealistic price, and Carter Hodge have agreed that if it is sold the proceeds will be deposited with the Revenue.”

3. On 12th May 1989 a memorandum was signed in these terms: *“re: 18 Tudor Road, Ainsdale. Received the land certificates in respect of titles numbered MS121386 and MS121387 from Carter Hodge, Solicitors...”*
4. On 26th May 1989 Carter Hodge Solicitors wrote to Mr Hartnett at H.M.Inland Revenue as follows: *“In consideration of the Commissioners of Inland Revenue not proceeding to enforce the existing assessments which have been served upon Mr. Joannides and not collecting any tax on such assessments our clients Peter and Debbie Joannides offer, through ourselves, to create a first Legal Charge on their freehold property known as 18, Tudor Road, Ainsdale, Southport registered at H.M.Land Registry under Title Numbers MS121386 and MS121387 (“the Property”) to secure the payment to the Commissioners of Inland Revenue of all amounts of tax found to be due when the assessments are no longer subject to appeal.”* Various other subsidiary terms were agreed, to include a provision that the Solicitor to the Inland Revenue would prepare the form of Legal Charge, the charge to be completed within 28 days from the date of the letter.
5. On 7th June 1989 the Inland Revenue Inspector accepted the offer on behalf of the Commissioners. On 9th June 1989 a Caution against dealings was registered against the titles to protect the agreement made in correspondence. On 22nd November 1994 a Notice of deposit of the Land Certificates with the Commissioners of Inland Revenue was entered on the register of both titles.
6. In the meantime, in or around 1990, the Respondent had gone into possession of the Property, on the basis of an oral (and therefore legally ineffective) gift from

Mr and Mrs Joannides. He has remained in possession ever since. On 15th August 2004 an “Assignment” by way of gift of 18 Tudor Road was made by Mr and Mrs Joannides to the Respondent. At this time Mr and Mrs Joannides were living in South Africa. By a TR1 bearing the date 1st September 2004 Mr and Mrs Joannides purported to transfer No.18 Tudor Road to the Respondent for nil consideration.

7. As I have said, the Respondent has applied to cancel the unilateral notice. with the Commissioners of Inland Revenue is also entered on the register, dated 22nd December 1994. The Respondent’s application does not relate to the Notice of the deposit of the Land Certificates relating to both titles this entry. However, the Land Registry considers that this entry should have been removed when the unilateral notices were entered on the register, and it has been agreed with the Applicant that this will be done once this dispute has been disposed of. Furthermore, the Respondent has accepted that he has no basis to cancel the notice insofar as it relates to MS121387. At the hearing before me, HMRC was represented by Mr Christopher Vallis, and the Respondent by Mr Graeme Sellers of Counsel.

HMRC’S CASE

8. HMRC’s case is set out in its Statement of Case. It is pleaded at paragraph 11 that the taxpayer’s debt as per the assessments made on him, has been quantified in the sum of £1,009,051.55. The full breakdown of the assessments has been produced by HMRC and is at Tab 20 of the Hearing Bundle. HMRC relies on the deposit of the land certificates 12th May 1989 as creating an equitable charge over the titles. Alternatively, it relies on the written agreement between the taxpayer’s solicitors and HMRC as creating an equitable charge. These points are fleshed out in Mr Vallis’s Skeleton Argument. With regard to the deposit of the land certificates, Mr Vallis refers to section 69 of the LRA 1925 which is in these terms: *“The proprietor of any registered land or charge may..... create a lien on the registered land or charge by deposit of the land certificate; and such lien shall be equivalent to a lien in the case of unregistered land by the deposit of documents of title or of the mortgage deed by an owner entitled for his own benefit to the registered estate, or a mortgagee beneficially entitled to the*

mortgage, as the case may be.” He relies on a passage (at p.395) from the judgment of Templeman J (as he then was) in Re Wallis & Simmonds (Builders) [1974] 1 WLR 391, in which he cited and approved a statement in Coote on Mortgages 9th ed. (1927) as follows: “*A mere delivery of the deeds will have this operation without any express agreement, whether in writing or oral, as to the conditions or purpose of the delivery, as the court would infer the intent and agreement to create a security from the relation of debtor and creditor subsisting between the parties, unless the contrary were shown....*” Templeman J also cited a passage in the then current edition of Halsbury’s Laws 3rd ed. Vol.27 (1959) at p.168 which stated that a deposit of title deeds “... *let in evidence of an intention to create a charge which would otherwise be inadmissible, and raises a presumption of charge which throws upon the debtor the burden of rebutting it...*”

9. Mr Sellers, for the Respondent, referred me to the current edition of Halsbury’s Laws, Vol.27 at paras 222 and 228. Paragraph 228 makes it clear that “*A deposit of title deeds did not in itself create a charge, and the mere possession of deeds without evidence of the contract under which possession was obtained, or of the manner in which the possession originated so that a contract might be inferred, did not create an equitable security. The deposit was a fact which admitted evidence of an intention to create a charge which would otherwise be inadmissible, and raised a presumption of a charge which threw upon the debtor the burden of rebutting it.*”
10. In relation to the second limb of HMRC’s case, Mr Vallis submitted that an equitable charge arises when an agreement to create a legal charge is created by a specifically enforceable contract, but not by deed. He referred me to the decision in Bank of Scotland plc v John Thomas Waugh [2014] EWHC 2117 (Ch) at paragraphs 83 and 85.

THE TRIBUNAL’S JURISDICTION

11. Mr Vallis, for HMRC, submitted that the Tribunal was only entitled to look at the validity of the initial registration of the unilateral notices, and could not take into account any subsequent events. In other words, if HMRC had been entitled to register the UN1 because at that time it had the benefit of an equitable charge

over the titles, that was conclusive, even if the equitable charge has subsequently become unenforceable. The situation here is a little more complicated, of course, because the initial registration (in 1989) was of a caution against dealings. Due to the enactment of the Land Registration Act 2002 (“LRA 2002”) (and repeal of the Land Registration Act 1925) the cautions were converted into unilateral notices in 2011. It is not clear whether Mr Vallis was arguing whether the Tribunal was limited to a consideration of the situation in 1989, or in 2011, when the notices first appeared on the register. Mr Vallis relied, in particular, on dicta of Rimer LJ in Silkstone v Tatnall [2011] EWCA Civ 801 at paragraph 48, as follows: “*I would summarise the position in my own words as follows. A reference to an adjudicator of a 'matter' under section 73(7) confers jurisdiction upon the adjudicator to decide whether or not the application should succeed, a jurisdiction that includes the determination of the underlying merits of the claim that have provoked the making of the application. If the adjudicator does not choose to require the issue to be referred to the court for decision, he must determine it himself. In the case of an application under section 36 to which an objection has been raised, the relevant issue will be the underlying merits of the claim to register the unilateral notice.*”

12. In the Silkstone case, a unilateral notice had been registered on 7th February 2008, on the basis of a claimed prescriptive right of way. On 21st February 2008 the servient owner applied for cancellation of the notice on the grounds that no such right of way had been acquired. Manifestly, the only legal and factual issue was whether, at the date of registration, a matter of weeks before the application to cancel, the dominant owner had acquired the claimed easement. It is in that context that the following sentence must be read: “*In the case of an application under section 36 to which an objection has been raised, the relevant issue will be the underlying merits of the claim to register the unilateral notice.*” Where an applicant applies to cancel a unilateral notice, in my judgment there is nothing in the Silkstone decision to limit the Tribunal’s jurisdiction to determine “*the underlying merits of the claim that have provoked the making of the application...*” If the applicant’s case is, or includes, a claim that the interest protected by the unilateral notice has, in the events that have happened, ceased to exist, the merits of that claim must be determined in order to decide whether or

not the notice should be cancelled. An alternative way of achieving the same result would be for an application to be made in Form AP1 under paragraph 5(b) or (d) of Schedule 4 to the LRA 2002, to bring the register up to date or to remove a superfluous entry. In my judgment, whichever method is chosen, and if the facts establish that the interest which gave rise to the initial registration has been determined, the Tribunal is bound to consider that fact and make a determination on that basis. However, for the reason which I shall explain, this point is not material to my decision in this reference.

THE RESPONDENT'S CASE

13. When I asked Mr Sellers to summarise his client's case, he put forward these three propositions. First, the deposit of title deeds was ineffective to create an equitable charge. Secondly, the offer and acceptance contained in the correspondence in May 1989 was ineffective to create a contract to create a Legal Charge. Thirdly, even if some form of equitable charge was created in 1989, in the events that have happened the charge is no longer enforceable and therefore the unilateral notices protecting them should be removed.
14. The basis of the application to cancel the unilateral notice is explained in more detail in the Respondent's Statement of Case. At paragraph 7 it is pleaded that: *".... [HMRC's] objection is based squarely on the assertion that an equitable charge arose, either on the basis of a written agreement, or alternatively, upon deposit of the relevant land certificates with HMIR. It is submitted that the Applicant's assertion that an equitable charge arose is simply flawed but even if this is wrong and an equitable charge did in fact arise then any such charge can now be defeated on the basis of delay and/or laches and/or change of position (the delay of 28 years being nothing short of staggering)."*
15. Various matters are pleaded at paragraphs 8 and 9, to the effect that the taxpayer's offer was put forward on a without prejudice basis, that the liability was uncertain, that the offer was intended as an interim measure only and that the Legal Charge was to be completed within 28 days. Further, certain implied terms are alleged, namely that the parties *"would exercise all reasonable endeavours to ascertain whether or not there was in fact an income tax liability"*, and the amount thereof, *"within a reasonable period from May/June 1989"*. In summary,

it is pleaded in paragraph 11 that *“The deal struck on or about 7.6.89 was insufficiently certain and far too imprecise to create an equitable charge. Further or alternatively, there is simply no evidence to suggest that there was an intention for HMIR to have a present (as opposed to a future) right to security.”*

16. The Respondent’s case with regard to the deposit of title deeds is set out at paragraph 12 of the Statement of Case. *“The actual reason for the deposit of title deeds with HMIR is wholly unclear but nonetheless, it is clear beyond peradventure that any deposit well pre-dated the subsequent deal that was struck on or about the 7.6.1989. It is submitted that this timing problem is fatal to the Applicant’s deposit argument.”*

17. Finally, and in the event that it is held that HMRC did have the benefit of an equitable charge when the unilateral notices were entered on the register, the Respondent pleads a number of circumstances at paragraphs 18 to 21 of the Statement of Case under a section headed “Equitable Defences”, being an allegation of delay and laches, and an alleged change of position, of which particulars are given. It is said that *“The Respondent has changed his position on the basis and in the genuine and honest belief that the Applicants did not have an interest in the property or, rather, security over it.”* The facts relied on are that the Respondent has lived at No.18 as his home since 1990, and has paid all outgoings on the property since that time, and has repaired and in some respects improved the property. It is pleaded at paragraph 21 that *“on the particular facts which have arisen in this case, it would be wholly inequitable and unjust for effect to be given to any equitable charge that may have arisen.”*

THE MATERIAL FACTS

18. HMRC did not call any “live” evidence. It relied on the Statement of Case, verified by a statement of truth, and on the various documents to which I have referred above. For his part, the Respondent did make a witness statement, which he verified on oath, and upon which he was cross-examined by Mr Vallis. Having regard to all the evidence, my findings are as follows:

- a. Prior to 12th May 1989 income tax assessments were raised against Mr Joannides in the sum of approximately £900,000.

- b. Appeals were lodged against the assessment but no application for postponement of payment was made.
- c. HMRC asked for payment on account on the sum of £250,000.
- d. On 12th May 1989 the solicitors acting for Mr and Mrs Joannides deposited the land certificates of MS121386 and 121387 with HMRC.
- e. On 26th May 1989 the solicitors acting for Mr and Mrs Joannides made an offer to HMRC to create a first Legal Charge to secure the payment to the Commissioners of Inland Revenue of all amounts of tax found to be due when the assessments are no longer subject to appeal.
- f. Various other subsidiary terms were agreed, to include a provision that the Solicitor to the Inland Revenue would prepare the form of Legal Charge, the charge to be completed within 28 days from the date of the letter.
- g. On 7th June 1989 the Inland Revenue Inspector accepted the offer.
- h. On 9th June 1989 a Caution against dealings was registered against the titles to protect the agreement made in correspondence.
- i. In or about 1990 the Respondent went into possession of the Property on the basis of an oral (and therefore legally ineffective) gift from Mr and Mrs Joannides.
- j. On 22nd November 1994 a Notice of deposit of the Land Certificates with the Commissioners of Inland Revenue was entered on the register of both titles.
- k. On 15th August 2004 an "Assignment" by way of gift of 18 Tudor Road was made by Mr and Mrs Joannides to the Respondent. At this time Mr and Mrs Joannides were living in South Africa. By a TR1 bearing the date 1st September 2004 Mr and Mrs Joannides purported to transfer No.18 Tudor Road to the Respondent for nil consideration.
- l. At some time in 2004 and (according to his own oral evidence) on another occasion, the Respondent applied to the Land Registry to register himself as proprietor on the basis of the TR1. HMRC as Cautioners objected,

relying on the deposit of Land Certificate and alleged contract which were protected by the Caution. Mr St. Clare did not proceed with the applications.

- m. Mr Joannides died in 2006.
- n. The tax assessments raised on Mr Joannides remain unsatisfied and he (or rather his estate) owes the sum of £1,009,051.55.

THE ISSUES

19. The principal issue to be decided is whether HMRC is entitled to maintain the unilateral notice on the register, or whether it should be cancelled in accordance with the Respondent's application. As I have said, I am not attracted by Mr Vallis's analysis of Silkstone v Tatnall or of the scope of the Tribunal's jurisdiction in this case. If I am satisfied that HMRC never obtained an equitable charge (or cautionable interest) or, in the events that have happened, that such an interest has ceased to exist, I must give effect to the Respondent's application.
20. What interest, if any, arose as a result of the dealings between Mr Ioannides and HMRC in May and June 1989? I shall first consider the deposit of the land certificate. Mr Sellers, for the Respondent, submits that "*The actual reason for the deposit of the land certificates with HMIR is wholly unclear but nonetheless, it is clear beyond peradventure that any deposit well pre-dated the subsequent deal that was struck on or about 7.6.1989. It is submitted that this timing problem is fatal to the Applicant's deposit argument.*" He goes on to point out that the deposit is treated as part performance of an agreement to create a charge. If the deposit had taken place after 27th September 1989 it would not have satisfied the requirements imposed by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 – see United Bank of Kuwait v Sahib [1997] Ch 107. However, since it pre-dated section 2, this is not a live issue.
21. In my judgment, and contrary to Mr Seller's' submissions, the reason for the deposit of land certificates is entirely clear from the letter referred to at paragraph 2 of this Decision. The Revenue had raised assessments on Mr Joannides in the region of £900,000, and had demanded a payment on account of £250,000. Although the assessments were under appeal, there was no claim to postpone the

payment of the tax. Mr Joannides therefore had an existing liability to the Revenue in the amount of the assessments, and was subject to a demand for £250,000 on account. The Revenue had the right to enforce that liability, but Mr Joannides, through his solicitors, offered security in the form of the land certificates. I see no reason why the deposit did not effectively create an equitable charge over the Property. The tax assessments and demand for payment pre-dated the deposit – the fact that a further agreement was made in June 1989 does not in any way detract from the enforceability of the charge by way of deposit. Mr Sellers refers to no less than nine separate authorities, and cites a number of passages from the textbooks, regarding the law of equitable charges. However, none of these citations assists him.

22. The Applicant also relies on the exchange of correspondence in May and June 1989 as creating a specifically enforceable contract to create a legal mortgage. In my judgment, it contains all the essentials of such a contract. It identifies the property to be charged, the liability which it secures, and the consideration. The liability is, as I have said, an immediate one, arising out of the tax assessments made on Mr Joannides. There is no conditionality or uncertainty. The obvious intent was to create an immediate and binding obligation to execute a legal charge, which is treated as the creation of an equitable charge. Because the agreement was made before the Law of Property (Miscellaneous Provisions) Act 1989 came into force, there is no reason why such an agreement by correspondence should not be effective.
23. It is true that the charge was intended to be completed within 28 days, and a failure by Mr and Mrs Joannides to do so would entitle the Commissioners of Inland Revenue to “*pursue any of their remedies against Mr Joannides in respect of the tax mentioned above.*” However, in my judgment the obligation to execute the legal charge continues, unless and until the liability is discharged, or the agreement ceases to be specifically enforceable for some other reason. That feeds into the Respondent’s final point, namely that it would be unjust and inequitable for HMRC to rely on the contract or the deposit of the land certificates. However, Mrs Joannides remains the registered proprietor of the Property, and a party to the contract made in June 1989. If there is a defence to specific performance based

on laches or delay, it must be her defence, as the contracting party. I have seen no evidence that she has such an available defence, and none has been put forward by the Respondent.

24. However, the Respondent argues that HMRC has lost the right to enforce the equitable charges because of the changes in his position, as a third party, pleaded in his Statement of Case. This appears to operate by some species of estoppel, but in my judgment this argument is misconceived, and fails on the facts. At its highest, he alleges that the “*staggering delay*” in enforcing the charge (see paragraph 29(d) of the Skeleton Argument) makes it inequitable and unjust for the charge to be enforced now. He alleges that this delay, coupled with his expenditure on the Property in the years since 1990, constitutes a change of position on his part, which prevents HMRC from enforcing its charge.
25. The Respondent does not allege that HMRC has made any direct representation to him, to the effect that it would not enforce its charge. Nor could he do so on the facts of this case. The liability of Mr Joannides has never been satisfied, and there is no applicable limitation period, so the secured indebtedness remains outstanding and recoverable. There has been a caution registered against the titles since 1989, and a Notice of the deposit of the land certificates since 1994. He did not obtain any interest in the Property until 2004. The Assignment was probably effective to assign the entire beneficial interest in the Property to him, but would not have affected the legal estate, which remained with the registered proprietors. When he applied to register the TR1 from Mr and Mrs Joannides, in 2004, notice was served on HMRC as cautioners, and it objected. The Respondent did not challenge this, but simply withdrew the application. From this time onwards, he was clearly aware of HMRC’s interest in the Property as equitable chargee. If and to the extent that he spent money on the Property, he did so in the knowledge that the Property was subject to an equitable charge, and took the risk that the security would be realised. He does not even suggest that HMRC was aware of his expenditure on or interest in the Property.
26. Insofar as he spent money on the Property prior to 2004, he did so at a time when he was simply occupying under a gratuitous licence. I cannot see that the failure to enforce the equitable charge at this time could possibly, in the absence of any

express or implied representation, deprive HMRC of its rights. In any event, it is impossible to show any detrimental reliance, given that the Respondent was occupying the Property free of charge and was doing little more than preserving and maintaining it as any prudent occupier would.

27. I shall therefore direct the Chief Land Registrar to cancel the Respondent's application in Form UN4 dated 3rd October 2016. Given that I have held that the deposit of the land certificates created a separate equitable charge – one distinct from the charge created by the specifically enforceable contract – it is not entirely clear to me that the separate entry on the register should be cancelled. If for some reason HMRC was unable to enforce the contract, it might be obliged to rely on the earlier charge. It may be that the wording of the unilateral notice should make reference to the earlier deposit, as well as to the later contract.

28. As to costs, these normally follow the event and I am therefore minded to award the Applicant its costs on the standard basis. I am prepared to assess the costs summarily if they do not exceed £25,000. I direct the Applicant to file and serve a Statement of Costs by 4 pm on Friday 1st June 2018. The Respondent may file written submissions 7 days thereafter, if he wishes to object to the proposed order, to include any dispute as to the amount of costs.

Dated this 22nd day of May 2018

Owen Rhys

BY ORDER OF THE TRIBUNAL

