REF/2018/0589

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

BETWEEN

VARSHA GOHIL (as executrix of Babulal Ramji Gohil)

APPLICANT

and

KAMLA GOHIL

RESPONDENTS

Property Address: 158 Leesons Hill, Chislehurst BR7 6QL

Title Number: SGL575381

Before: Judge Owen Rhys

Sitting at: 10 Alfred Place London WC1E 7LR

On: 9th and 10th May 2019

O R D E R

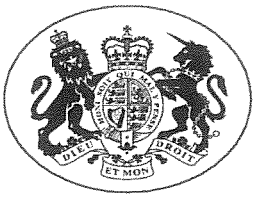
IT IS ORDERED that the Chief Land Registrar shall give effect to the Applicants' application in Form AP1 dated 10th April 2018.

Dated this 31st day of May 2019

Owen Rhys

PROPERTY CHAMBER LAND REGISTRATION

BY ORDER OF THE TRIBUNAL



[2019] UKFTT 0381 (PC)

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Applicant representation: Mr Aaron Walder of Counsel (Direct access)
Respondent representation: Mr Desmond Kilcoyne of Counsel (Direct access)

D E C I S I O N

Introduction

1. The Applicant is the executrix of the Will of Babulal Ramji Gohil deceased, who died in January 2018. Prior to his death he was the joint registered proprietor, with the Respondent, of the above-named property, registered under title number SGL575381 ("the Property"). On 10th April 2018 the Applicant applied to the Land Registry in Form AP1 to reinstate a Form A restriction that had been

removed from the title at the Respondent's request. Although the Applicant has not taken out a grant of Probate – and there is a dispute between the parties as to the validity of the Will – she is entitled to make the application in her capacity as Executrix, drawing her authority from the Will itself. The Respondent objected to the application, and the dispute was referred to the Tribunal on 10th July 2018.

2. The dispute arises in the following circumstances. As I have said, the Deceased and the Respondent were husband and wife, and the joint proprietors of the Property which was the matrimonial home. They had acquired the Property as beneficial joint tenants. They separated in around 2001, when the Deceased returned to India to reside permanently. They ceased to live together from that time onwards, but the Respondent continued to live at the Property. By an application in Form RX1 made on 15th May 2009 the Deceased's solicitors applied to the Land Registry to enter a Form A restriction against the title to the Property. This was stated to be in consequence of a Notice of Severance ("the Notice") served by the Deceased on the Respondent on 1st April 2009. A copy of the Notice was supplied to the Land Registry at the time. The restriction was entered on the register as from that date.

3. In February 2018 the Respondent applied to the Land Registry to cancel the Form A restriction, on the stated grounds that she had never been served with the Notice, and therefore the joint tenancy still subsisted at the date of the Deceased's death. Perhaps surprisingly, the Land Registry acceded to the application without any notice being given to the Deceased's estate and the restriction was duly cancelled. In subsequent correspondence the Land Registry accepts that it was wrong to do so. On 10th April 2018 the referred application was made. The dispute raises one central issue, namely: was the Notice validly served on the Respondent in April 2009? If it was, and subject to the provisions of Schedule 4 para.6(3) of the Land Registration Act 2002 ("LRA 2002") the register should be altered to reinstate the Form A restriction. If not, no alteration should be made.

The legal framework.

4. Section 36 of the Law of Property Act 1925 ("LPA 1925") makes provision for the unilateral severance of a beneficial joint tenancy simply by serving notice on

the other joint tenant or tenants. The notice need not take any particular form. For example, in Quigley v Masterson [2011] EWHC 2529 (Ch), it was held that service of a writ or originating summons commencing legal proceedings, or even service of an affidavit in those proceedings, could constitute sufficient notice.

5. In this case the Applicant relies on three discrete events as constituting sufficient service, namely:

   (1) The service of the Notice by Recorded Delivery on the Respondent at the Property at the beginning of April 2009;

   (2) The service by the Land Registry of a B61 Notice on the Respondent in May 2009 at 288/290 Lewisham High Street, informing her that the Deceased had severed the joint tenancy;

   (3) The service on the Respondent of a witness statement by the Deceased in April 2015, relating to confiscation proceedings affecting the Property. The affidavit exhibited the office copy entries relating to the Property, which included the Form A restriction.

6. As regards the first method of service, which is her primary case, the Applicant relies on the provisions of section 196(3) and (4) of the LPA 1925, which are in these terms:

> *(3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.*
>
> *(4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned by the postal operator (within the meaning of Part 3 of the Postal Services Act 2011) concerned undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered."*

By virtue of the Recorded Delivery Service Act 1962, the reference in section 196(4) to a registered letter is deemed to include a reference to a recorded delivery letter.

7. Mr Walder, for the Applicant, has referred me to a number of authorities. In Kinch v Bullard [1999] 1 WLR 423, Neuberger J (as he then was) held that there was no distinction between "service" of a notice for the purposes of section 196, and "giving" a notice under section 36 of the LPA 1925. He also held that: "*Section 196(4) deems service on the premises to have taken place if the requirements of sending by registered post and non-return by the Post Office are satisfied, even if it can be shown that physical service did not in fact take place on those premises.*" In WX Investments Ltd v Begg [2002] 1 WLR 2849, Patten J (as he then was) considered previous cases on section 196 and considered that they all seemed to recognise "*a statutory fiction may operate to deem service of the relevant notice by registered post or recorded delivery even when the letter never in fact arrives. This necessarily involves a complete disregard of the actuality.*"

8. Mr Walder submits, on the basis of these authorities, that the Applicant has to demonstrate, on the balance of probabilities, that the Notice was sent to the Respondent at the Property by recorded delivery, and was not returned through the Post Office. If that can be proved, it is immaterial if the Respondent never actually saw it, for whatever reason.

9. I shall deal with the Applicant's primary case first, and then consider the alternative methods of service referred to in paragraph 5(2) and (3) above.

The documents.

10. A number of documents have been produced by the Applicant, including the following:

    (1) A letter dated 31st March 2009 from Mr Nosworthy of solicitors, Cree, Godfrey & Wood ("CGW") to the Deceased, in which he wrote: "*I confirm your call at my office when you signed your Will and I now enclose the original having taken a copy from my file. The original Will*

should be kept in a safe place and it is most important that your Executors know of its whereabouts. I have served the Notice of Severance on your wife."

(2) The Deceased's Will dated 30th March 2009, witnessed by Mr Nosworthy.

(3) A Notice of Severance the joint tenancy in the Property, addressed to the Respondent, signed by the Deceased and dated 30th March 2009.

(4) A copy letter dated 1st April 2009 from CGW to the Respondent, addressed to the Property, as follows: "*We act for [the Deceased] and on his instructions and by way of service upon you, we enclose Notice of Severance of Joint Tenancy in respect of the above property. Please sign and return the duplicate copy."*

(5) A Post Office *"Recorded signed for"* slip, bearing a number "*BE739192107GB*", with the Respondent's name and address filled in by hand.

(6) A letter dated 15th May 2009 from the Land Registry, addressed to the Respondent at 288-290 High Street, Lewisham, London SE13 6JZ. The letter is described as a "*B61 Notice of severance of a joint tenancy",* and contains the following passage: "*I am writing to inform you that we have received an application to "sever the joint tenancy". The application was lodged by Cree Godfrey & Wood ..... who are acting on behalf of Babulai Ramji Gohil being one of the joint proprietors of the property referred to above."*

(7) A letter dated 18th May 2009 from Mr Nosworthy to the Deceased as follows: *"I enclose a copy of the deeds of 158, Leesons Hill showing the registration as tenants in common."*

(8) A letter dated 15th May 2009 from the Land Registry to CGW, stating that their application lodged on 15th May 2009 has been completed, and enclosing an official copy of the title register.

(9) Office copy entries relating to the Property and dated 15th May 2009, which includes, at entry 5 in the Proprietorship Register, a Form A restriction of that date.

(10) A letter dated 10th April 2016 from Mr Nosworthy to the Land Registry, written in support of the Applicant's AP1 application. This includes the following paragraph: "*This firm acted for Mr Gohil in 2009 in relation to the preparation of his Will and also the service of a Notice of Severance of Joint Tenancy on his wife and co-proprietor of the property at 158 Leesons Hill Chislehurst BR7 6QL, Kamla Gohil. The signed Notice of Severance, a copy of which is attached to Form AP1, was sent by Recorded Delivery to Mrs Gohil at the property on 1st April 2009. Also attached is a copy of our file version of that letter to which is attached the Recorded Delivery slip. There is no evidence on our file to suggest that the letter enclosing the Notice of Severance of Joint Tenancy was not delivered to and received by Kamla Gohil who was, therefore, on notice of the severance.*"

The Applicant's witness statements

11. There was only very limited evidence available with regard to the service of the Notice. A witness statement was made by Zoe Flavin on 20th March 2019. It appears that she was the receptionist at CGW in 2009 and has been shown the copy letter dated 1st April 2009 and attached Recorded Delivery slip. She says: "*3. I am fully conversant with Recorded Delivery and was in 2009 and I have no doubt that I took the letter to East Finchley Post Office for it to be sent by Recorded Delivery. 4. It was my practice on the return from the Post Office to place Recorded Delivery receipts in my desk drawer. After this length of time it is not available.*" Ms Flavin did not attend the hearing, but the statement was allowed in as a hearsay statement, since she was heavily pregnant and unable to travel. Although admissible, the statement does not of course carry as much weight as it would if the witness was subject to cross-examination.

12. In addition, there was a statement from Mr Nosworthy, the solicitor who had corresponded with and acted for the Deceased in Spring 2009. He had not made a

statement prior to the hearing. However, when it became apparent that Ms Flavin could not give evidence, a statement was obtained and an application made to call him to give evidence. I refused that application, however the statement was admitted as a hearsay statement, subject to the same limitations as Ms Flavin's statement. However, his statement adds very little, save that it identifies Ms Flavin as the firm's receptionist between November 2007 and December 2013, and states that she had responsibility for posting Recorded Delivery letters. He also says that: "*The said letter was not returned and therefore must have been delivered. If it had been returned than I would have dealt with it and re-served the document immediately.*"

13. The Applicant had also made a statement, on which she was briefly cross-examined, but she know nothing of the circumstances of the service of the Notice, and could add nothing the evidence of Ms Flavin and Mr Nosworthy.

The Respondent's witness statements.

14. The Respondent made a witness statement in Gujarati, which was translated into English, and which she verified on oath. The nub of her statement was that "*I can categorically state that I have never taken delivery of the document that I now know as the Notice.*" In her statement, she went into a great deal of detail regarding the delivery of post to the house, by means of a locked mail box, to which she says only she had the key. She stated that her son Bhadresh was probably living with her at the time, as well as her eldest grandchild Devan. She continues: "*If the Notice had been delivered, I would have needed help to understand the meaning of it as my command of English is limited. However, having looked at the document and seen that it had my husband's signature on it , if I had received the document it would have been a big event in my life as my husband had left the U.K to live in India in 2001 and I would have immediately wanted to know what this document was and why he had sent it to me.*" She was cross-examined on her statement, with the aid of a Gujarati interpreter.

15. The Respondent's daughter, Ms Sima Sud, and a practising solicitor, also made a statement. Her evidence was to the effect that her mother used to discuss important matters with her, and if she had received the Notice, she would have

mentioned it to her or someone in the family. She states that: "*It is simply inconceivable that my mother would have received the Notice and done nothing, or else, having told us about the Notice, that we would have done nothing.*" She too was cross-examined on her statement.

16. The final item of evidence relied on by the Respondent was a report from Mr Gary Rowland, a former Royal Mail manager, who was asked to give some detailed insight into the Recorded Delivery service as it operated in 2009. There was no application to admit expert evidence, and the statement was exchanged in the normal way as if it were simply a statement from a witness of fact. Objection to the statement was taken quite late in the day, which led to an application by Mr Kilcoyne for permission to rely on the statement as expert evidence. Mr Rowland exhibited his original witness statement, supported by a declaration appropriate to an expert witness. Although Mr Walder, for the Applicant, opposed the application, I did give leave for the evidence to be admitted as an expert report. Mr Rowland attended the hearing and was cross-examined.

Conclusions on the evidence.

17. The Applicant's primary case is that service of the Notice was effected under section 196(4) of the LPA 1925. This is deemed service. It is enough if the Applicant can establish, on the balance of probabilities, that the Notice was "*sent by post in a registered letter addressed to the .... person to be served, by name, at the aforesaid place of abode or business ...*" – a recorded delivery letter being sufficient for these purposes. In that event, "*if that letter is not returned through the post undelivered ..... service shall be deemed to be made at the time at which a registered letter would in the ordinary course of business be delivered.*" It is enough for the Applicant to prove that the Notice was posted by recorded delivery. Proof of actual receipt by the Respondent is not required.

18. The evidence relied on by the Applicant is largely circumstantial. First, there are the documents which I have referred to in paragraph 8 above. These speak for themselves, and are all consistent with the Notice having been served on the Respondent in accordance with the Deceased's instructions. These include the Recorded Delivery slip, showing the name and address of the Respondent. Secondly, the hearsay statements of Ms Flavin and Mr Nosworthy. Although

these statements are not as full as they might be, they are also consistent with the contemporaneous documents.

19. The Respondent's own evidence does not take the matter very much further. In her statement she was adamant that she did not receive the Notice. When she came to be cross-examined on the statement, however, she was unable to recall very much of anything. Her stock reply was that she could not remember a document or an event, that she did not understand any documents, and that she would have given any "legal" letters to her children to tell her what it contained. At one point she said that she had never received a recorded delivery letter, and later she said that there were "lots" of recorded delivery letters in the house. There had been proceedings in 2008 whereby the Crown Prosecution Service had obtained a confiscation order against the Property. The Respondent's son Bhadresh had been convicted of various offences of fraud, and had been ordered to make reparation. It was in that context that the orders were obtained in relation to the Property. In 2015 there were further proceedings, instigated by the Deceased, to vary the 2008 orders. The Respondent – who (as a registered proprietor) must have been a party to both sets of proceedings – was unable to recall ever seeing any documents relating to those proceedings and claimed to be unaware that any orders had been made against the Property.

20. My conclusion, having seen her give her evidence, was that she either had a very poor memory indeed, or that she was being deliberately evasive and unhelpful. Wherever the truth lies, I am unable to give much credence to her categorical evidence that she did not receive the Notice.

21. Sima Sur verified her statement, in which she said that she had been unaware of the Notice at the time, and that she was sure that she would have been told about it if had been received. She also said that her mother would pass legal documents to her children for an explanation. However, she accepted that the Respondent would have been more likely to have discussed the Notice, if received, with her brother, Bhadresh, who was living at the Property in 2009. She also accepted that Bhadresh and the Respondent did not always discuss affairs relating to the Property with her. For example, there seems to have been an attempt, in 2007, to remove the Deceased from the title to the Property, and an application was made

to the Land Registry by the Respondent and Bhadresh for that purpose. Sima Sur said that she had no inkling of this at the time. Her evidence, therefore, does not assist in determining if the Notice had been received. If it had been, she would not necessarily have been involved in any discussions relating to it.

22. Mr Rowland made a statement, based on some 30 years' experience as a Manager with Royal Mail in the Kent area. He gave evidence as to the procedure for Recorded Delivery mail in 2009, and was cross-examined on his statement. In essence, he said that the Recorded Delivery slip or docket was not in itself proof of postage. The slip was part of a larger item, with the bottom half being a peel-off section which contained a unique barcode containing a reference number. This number was entered on the till receipt, once the postage charge as paid, and it was the till receipt that constituted proof of postage. He said that the blank slip was available on the public side of the Post Office counter. A customer would collect a slip, fill in the addressee's name and address, and take the slip to the counter. The fee is paid, the peel-off section is kept by the Post Office and the information incorporated into the till receipt. The customer keeps the remainder of the slip, which may or may be stamped by the receiving Post Office. Even a stamped slip, however, is not proof of postage. Only the till receipt will be sufficient.

23. In the light of the evidence, I have concluded that the Deceased, through his solicitors, sent the Notice, with the covering letter, to the Respondent at the Property, by Recorded Delivery, on or about 1st April 2009. The B61 Notice from the Land Registry demonstrates that the Notice was signed by the Deceased, and that his solicitors had sent it to the Land Registry in support of the restriction application. The solicitors' file demonstrates that a covering letter had been prepared for service with the Notice. The Recorded Delivery slip demonstrates that someone – presumably Zoe Flavin – had gone to the trouble of filling in the Respondent's name and address on the top half of the slip and peeling off the bottom half of the slip. Mr Nosworthy's letter to his client dated 31st March 2009 states that the Notice has been served on the Respondent. It is true that the actual till receipt – the formal proof of postage for Royal Mai purposes – has not been produced, although Zoe Flavin states that she put it in her drawer at the time but it

has since disappeared. In addition, Mr Nosworthy's more recent correspondence with the Land Registry reiterates that the Notice had been served in 2009.

24. In my judgment, there are two possible explanations for these documents. First, CGW was engaged in an elaborate deceit, practiced both on their client and the Land Registry, to induce them to believe that they had indeed served the Notice, when they had failed to do so. As a variation, it might be that Zoe Flavin practised the deception on her employers, and they innocently accepted that she had posted the letter correctly. However, any such deceit was likely to have been exposed as soon as the Land Registry served its B61 Notice on the Respondent. It is far more likely that the Notice and covering letter were prepared in good faith, and entrusted to Zoe Flavin to send by Recorded Delivery post, and that she carried out those instructions. This seems to me to be by far the most probable explanation. It defies belief that Ms Flavin would have gone to the trouble of procuring a Recorded Delivery slip, filled in the addressee, removed and discarded the peel-off section, and then simply failed to hand the letter and slip over the counter for posting. It is far more likely that she performed the function for which she was employed, and posted the letter. It is not the slightest bit surprising that the till receipt has disappeared from her desk in the office – she having left that employment in 2013. If there had been any doubt as to whether the Notice had been properly posted, or if it had been returned, it is unthinkable that an ordinarily competent solicitor would not simply have re-served it. Mr Nosworthy himself makes this point.

25. The evidence given by and on behalf of the Respondent does not, for the reasons already explained, cause me to re-assess the probabilities of the situation. In my judgment, the contemporaneous documents, prepared at a time long before any dispute had arisen, are far more compelling than what is essentially self-serving evidence from a witness whose recollection of other documents and events is so compromised. The evidence of Sima Sud adds nothing. Mr Rowland's evidence was helpful, but does little more than confirm that the till receipt was the formal proof of posting, which Ms Flavin's statement recognises. In any event, as a matter of law it is enough if the Notice was posted. The authorities cited by Mr

Walder show that it need not be proved that a notice of severance was actually seen by the recipient.

The Applicant's additional arguments.

26. Mr Walder, for the Applicant, advances two further arguments in support of the claim that the Notice was validly served. First, that the Land Registry's B61 Notice, sent to the Respondent on 15th May 2009, notifying her that the Deceased had served a Notice of Severance. Mr Walder relies on the deemed service provisions of Rule 199 of the Land Registration Rules 2003, which applies to *"All notices which the registrar is required to give..."* In the present case, the B61 notice was to the Respondent's address as stated on the register, namely 288-290 High Street, Lewisham, London SE13. Although the letter was returned undelivered, under Rule 199 the notice would be deemed to have been served in ordinary course of post. However, this deeming provision would only apply if the notice was one which the registrar was required to give. However, 8.10 of the Land Registry Practice Guide 24 makes it clear that Rule 199 does not apply:

> *"Where the application is made by, or with the consent of, all the proprietors, no difficulty arises. Where possible you should try to obtain the consent of all proprietors. However, in many cases the joint tenancy is severed by notice as a unilateral act of one of the proprietors, who will make the application alone, without the consent of the other(s). In these circumstances, we will treat it as made under section 43(1)(c) of the Land Registration Act 2002. Panel 12 or 13 of form RX1 should be completed with details of the severance. An application lodged by a conveyancer should be accompanied by either:*
>
> - *a certificate that they hold the original or a certified copy of the notice of severance, signed by the other proprietor(s) to acknowledge receipt (this certificate appears in panel 7 of form SEV)*
> - *a certificate that they hold the original or a certified copy and that it was served on the other registered proprietor(s) in accordance with sections 36(2) and 196 of the Law of Property Act 1925 (this certificate appears in panel 7 of form SEV)*
>
> *The application will be one that the applicant is obliged to make under rule 94 of the Land Registration Rules 2003. Accordingly, it will not be notifiable within the meaning of section 45 of the Land Registration Act 2002. If it is in order, we will complete it without sending the other proprietors a notice giving them the opportunity to object. We will, however, send them a notification when the application has been completed, telling them of the*

change to the register. A proprietor who considers that no valid severance has taken place, and that the register is therefore incorrect, will be entitled to apply for the register to be altered to correct the mistake (under paragraph 5(a) of Schedule 4 of the Land Registration Act 2002)."

27. Accordingly, the argument t based on Rule 199 must fail.

28. His second point is that the witness statement made by the Deceased in the confiscation proceedings, and which exhibited the office copy entries, constitutes notice for the purposes of section 36 of the LPA 1925. He argues that the Form A restriction in the proprietorship register must have put the Respondent on notice of the severance. I disagree for two reasons. First, because the Form A restriction is only an oblique reference to a severance. It is not something that a lay person would necessarily understand. Secondly, there is no sufficient evidence that the Respondent ever saw the witness statement. Given her lack of English, even if she had received the document, she may well not have read it.

29. Given my primary conclusion, however, Mr Walder does not need to rely on these additional arguments.

Exceptional circumstances.

30. There remains one final issue for determination. I have held that the Notice was validly served and, therefore, that the original Form A restriction was validly entered. It follows that the cancellation of the restriction, on the Respondent's application made in February 2018, was a mistake. Under paragraph 6(2) of Schedule 4 of the LRA 2002, and unless sub-paragraphs (a) or (b) apply, the consent of the Respondent, as a proprietor in possession, is required before the register can be rectified. Sub-paragraphs (a) and (b) provides an exception where the proprietor in possession has by fraud or lack of proper care caused or contributed to the mistake, or where *"it would for any other reason be unjust for the alteration not to be made."* The Tribunal is spared the task of deciding if sub-paragraph (a) applies, since it has been conceded by the Respondent that it would be unjust for the alteration not to be made. However, Mr Kilcoyne relies on paragraph 6(3), which provides: *"If on an application for alteration under paragraph 5 the registrar has power to make the alteration, the application must*

be approved, unless there are exceptional circumstances which justify not making the alteration."

31. Mr Kilcoyne submits that exceptional circumstances are present in this case. As far as I understand his submission, the exceptional circumstances are that the Respondent is an elderly lady, the Property is her home, and she had no idea that the joint tenancy had been severed. Even if all these factors are accepted, in my judgment they do not amount to exceptional circumstances. The rectification of the register does no more than correct a mistake that arose as a result of her recent application to remove the restriction that had validly been in place since 2009. The restriction does no more than protect the interests of the Deceased's estate. It does not inevitably lead to a sale of the Property or the eviction of the Respondent. That might be a consequence of an application under the Trusts of Land and Appointment of Trustees Act 1996, but not of the entry of the restriction. The finding of this Tribunal is that the joint tenancy was severed – the restriction is a procedural, not substantive, entry. Finally, I question whether a proprietor in possession, who has conceded that it would be "*unjust*" for the registrar not to rectify the register (by restoring the restriction), can subvert that concession by arguing for exceptional circumstances. The concession and the argument appear to me to be wholly inconsistent.

32. I shall therefore direct the Chief Land Registrar to give effect to the Applicants' application in Form AP1 dated 10th April 2018. I do not see why the Respondent should not pay the Applicant's costs. The Applicant must file and serve a statement of costs by 4 pm on 14th June 2019. The Respondent, if she wishes to do so, may provide written objections to the proposed order, to include an objection to any item in the costs statement, no later than 4 pm on 28th June 2019.

Dated this 30th day of May 2019

Owen Rhys

PROPERTY CHAMBER LAND REGISTRATION

BY ORDER OF THE TRIBUNAL