[2017] UKUT 0270 (TCC)

Appeal number: UT/2017/0039

Legal charge – appointment of receivers – procedural irregularities

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

JOHN THOMAS WAUGH

Appellant

- and –

IAN EMERY

Respondents

TRIBUNAL: JUDGE ELIZABETH COOKE

DECISION

1. This an application for permission to appeal the order of the Land Registration Division of the First-Tier Tribunal ("the FTT"), made on 13 January 2017, directing the Chief Land Registrar to give effect to Mr Emery's application to register a transfer dated 23 November 2014 of 1 – 10 Walkers Building, Borough Rd, North Shields ("the Property") to himself from receivers acting under a legal charge of the Property dated 10 December 2014 ("the 2014 charge") and a deed of appointment of receivers made pursuant to that charge and dated 3 September2015 ("the Deed of Appointment").
2. I directed an oral hearing of the application for permission, to be followed by a hearing of the appeal if permission was granted. For the reasons that follow I have granted permission to appeal the order of 13 January 2017 but have refused the appeal itself.
3. I heard the Appellant's application on 26 June 2017 in the Royal Courts of Justice. Mr Waugh travelled from the north to attend and I am grateful to him for attending and for his assistance. The Respondents did not appear and were not represented.

The factual background

4. The Appellant is a trustee of the Nelson Trust and, with the other trustees, currently one of the registered proprietors of the Property.
5. On 8 August 2003 the then trustees (trusteeship has changed over the years but the details are immaterial for present purposes) executed a deed ("the 2003 charge") charging the Property to the Royal Bank of Scotland ("the Bank") and the Bank was registered as proprietor of the 2003 charge.
6. However, the 2003 charge was defective in that it described the trustees incorrectly and was not witnessed. The trustees applied to alter the register to remove the charge. Proceedings in the High Court followed. On 21 July 2014 HHJ Behrens, sitting as a Deputy Judge of the High Court, decided that the 2003 charge was not effective to create a legal charge but that it nevertheless created an equitable charge. That is entirely unsurprising; the charge itself was signed by all parties and was an agreement to charge the property, so that the conditions for the creation of an equitable charge were made out. Accordingly it operated, by virtue of well-known legal principle, as an agreement to create a legal charge. So the trustees' application to alter the register succeeded; but HHJ Behrens ordered on 13 August 2014 that the trustees must execute a fresh legal charge or that, if they refused to do so, a District Judge should execute one on their behalf.
7. The trustees did not execute a fresh legal charge but a District Judge did, 10 December 2014 ("the 2014 charge").
8. By a deed dated 3 September 2015 the Bank appointed receivers under the 2014 charge.
9. The receivers have sold the Property to Mr Emery. Matters came to the FTT because Mr Waugh objected to the registration on the grounds that the appointment of the receiver was not valid. So Mr Emery was the Applicant in the FTT; Mr Waugh was the Respondent. He is now the Appellant, but for ease of reference I refer to the parties by name.

Permission to appeal

10. Mr Waugh has brought to my attention a number of procedural defects in the orders made by the FTT.
11. First, Mr Waugh says that he never received the notice, given under rule 31 of the Tribunal Procedure (FTT) Rules 2013 on 6 December 2016, to the effect that the FTT proposed to determine the matter without a hearing. Reasons were given in that notice, namely that since the 2014 charge had been created, and receivers appointed under it, Mr Waugh could have no valid objection to Mr Emery's application.
12. I do not know whether Mr Waugh received that notice. I have read the FTT file and I see a "carbon copy" letter of 6 December 2016 to Mr Waugh sending it to him, but it may be that it was not received.
13. However, the order of 13 January 2017 is a simple direction to the Chief Land Registrar to give effect to Mr Emery's application. It is in unusual form because the FTT's usual direction (in accordance with Rule 40 of the Tribunals procedure (First-tier Tribunal) (Property Chamber is to require the registrar to "give effect to the application as if the Respondent's objection had not been made"; no point has been taken about that and the wording could if necessary have been corrected under the slip rule. More seriously, it gives no reasons for that decision. The reasons would have been obvious to anyone reading the notice of 6 December 2017 but the FTT is obliged by its rules (Rule 36 of the Tribunals procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to give written reasons for its decisions and this should have been done. The absence of reasons for the order of 13 January 2016 would of course have caused considerable confusion if indeed the notice of 6 December 2016 was not received by Mr Waugh.
14. The FTT refused permission to appeal by an order of 27 January 2017. That refusal contained two errors. First, it said that Mr Waugh had asked for permission to appeal on the grounds that he had not received information about the appeal process when the order of 13 January 2017 was sent to him. But that was not the reason why he sought permission to appeal. He sought permission to appeal on the basis that he had not received the notice from the FTT, dated 6 December 2016, giving warning of the impending paper decision.
15. Further confusion was generated by the reference in the refusal to "the notice of 23 December 2016". There was no such notice. It is an obvious typographical error, because 23 December was the date by which responses to the notice of 6 December 2016 had to be submitted. It is easy to see that in hindsight, but equally easy to see that confusion was caused.
16. Leaving aside the claim that the notice of 6 December 2016 was not received, I accept that the subsequent collection of errors by the FTT was such that I ought to grant permission to appeal the order of 13 January 2017 directing the registrar to give effect to Mr Emery's application.

The substantive appeal

17. Despite the procedural irregularities, I refuse the appeal itself because there is no substance in the Appellant's case. The reason for that is as follows.
18. In the light of the devolution of title to the Property as set out above I see no possible reason why the Respondent's application to be registered as proprietor should not proceed. Mr Waugh has not been able to put forward any reason why either the 2014 charge, or the subsequent Deed of Appointment, was not valid.
19. Mr Waugh has made a number of arguments as follows.
20. Mr Waugh in his skeleton argument has argued that HHJ Behrens' order is void because it was legally incorrect. He has sought to appeal HHJ Behrens' order and permission was refused by the Court of Appeal. I can see no reason why there might be any flaw in HHJ Behrens' decision, but even if there were it would not be open to Mr Waugh to challenge it now. Mr Waugh wisely did not pursue that line of argument at the hearing.
21. Mr Waugh does challenge the validity of the 2014 charge. He points out that it is in very different form to the drafts sent to him by the Bank (and which the trustees did not execute, thereby failing to comply with the order of HHJ Behrens). It is a copy of the 2003 charge amended in manuscript to set out the names of the trustees and to add provision for execution by the District Judge. He says that therefore it is not the new charge ordered by HHJ Behrens. I simply do not can see why the execution of such a copy is not a fresh legal charge as ordered by HHJ Behrens. Mr Waugh also complains that the 2014 charge was not executed by the Bank. But that is immaterial; it is commonplace for charges to be executed only by the mortgagees.
22. Mr Waugh then points to correspondence between the Bank and HM Land Registry; the Bank wanted the registrar to regard the new charge as a continuation of the 2003 charge, in effect back-dating it, so that that there was no need for a fresh registration and that the 2003 charge could remain on the register as if validated by the 2014 execution. That is obviously incorrect and HM Land Registry did not accept it; so the 2014 charge stands as a fresh legal charge in dated 10 December 2014. Mr Waugh says that the attempt to back-date the fresh charge is an indication of an ulterior motive; that the Bank was trying to ensure that there was no gap in registration so that the receivers under the 2003 charge would not lose their standing, and their ability to receive rent, when the 2003 charge was taken off the register in 2013. I do not know whether that is true, or whether the attempt to back-date the 2014 charge was a simple technical error by the Bank, but that is irrelevant to this appeal because it makes no difference to the validity of the 2014 charge.
23. Mr Waugh says that the deed appointing the receivers in 2015 was not served on him, and that therefore he had no opportunity to challenge it. He says that failure to serve notice was a breach of the mortgagee's duty of good faith. I do not know whether or the deed was sent to him; certainly it cannot have come as a surprise to the trustees and certainly, even if a copy was not sent to him, that cannot be said by itself to amount to a failure of good faith.
24. Mr Waugh then says that the Deed of Appointment was not valid because it was not made by the trustees; but that is simply incorrect as a matter of law.

25. Mr Waugh has drawn to my attention a Power of Attorney dated 19 November 2014, whereby the Bank empowered certain employees of Lloyd's Bank to execute documents on its behalf, other than "the granting of Power of Attorney to non-Bank employees". He says that the Deed of Appointment is valid because it is not covered by the Power of Attorney. I do not understand how the Power of Attorney is relevant, since the Deed of Appointment of receivers was not executed under that Power of Attorney.
26. Mr Waugh also complains that the Respondent to the appeal did not serve certain documents upon the trustees in the FTT and says that their case should have been struck out. That is technically incorrect; there is no automatic strike-out. No application for strike-out was made against the Respondent in the FTT, nor did the FTT give notice warning the Respondent of striking out. The application to the Upper Tribunal is for permission to appeal and not for strike-out. I do not know whether the Respondent failed to serve documents or not, but at any rate Mr Waugh has had sight, before today, of all relevant documents and has not been prejudiced by any failure or delay in service.

Conclusion

27. Mr Waugh argued passionately that he should succeed in his appeal because of the procedural irregularities in the FTT. That is an unattractive argument in the circumstances. He is trying to escape liability incurred in 2003 when the trustees chose to grant a mortgage to the Bank. They have sought to ride free of that security, first on the basis of the defects in the 2003 charge and later on the basis of procedural errors in the FTT. The fact remains that the trustees incurred a debt and agreed to secure it. They have no valid reason to object either to the 2014 charge or the Deed of Appointment; their appeal is totally without merit and it fails.
28. The order of the FTT on 13 January 2014 was not stayed pending appeal, and I believe that Mr Emery has been registered as proprietor of the Property; had Mr Waugh been successful the register could have been altered but that is not now necessary. The registration of the Respondent as proprietor is unassailable.
29. The Respondent did not appear at the hearing on 26 June 2017 but has helpfully provided a bundle of documents. He is prima facie entitled to his costs although no application has been made. If he wishes to make an application he may do so within 28 days of the date of this order, after which I will give directions.

Judge Elizabeth Cooke

Release date: 28 June 2017