



Neutral Citation Number: [2020] EWHC 1507 (Ch)

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**CHANCERY APPEALS (ChD)**

Claim No.: CH-2020-000017

Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London, EC4A 1NL

Wednesday, 8 April 2020

**Before:**

**THE HON. MR. JUSTICE FANCOURT**

**Between:**

(1) MERWIN AMIRTHAN AMIRTHARAJA  
(2) JENNIFER SHIROMI AMIRTHARAJA

Appellants/Defendants

**-and-**

(1) WILLIAM CECIL WHITE  
(2) COLIN WHITE  
(3) FRANCES WHITE

Respondents/Claimants

---

**Mr David Sawtell** (instructed by **Indra Sebastian Solicitors**) appeared on behalf of the **Appellants**.

**Mr Robin Howard** (instructed by **Hattens Solicitors**) appeared on behalf of the **Respondents**.

Hearing date: 8 April 2020

---

**Approved Judgment**

**MR JUSTICE FANCOURT:**

- 1 The proceedings before me are an appeal by the defendants to the original claim against an order of HHJ Holmes made in the County Court at Southend on 4 October 2019. The Judge declared that the claimants in the claim, the respondents to the appeal, were entitled to be registered as proprietors of the disputed land and the Judge ordered that the Chief Land Registrar should alter the register of title to remove the land from the appellants' title and include it instead in the respondents' title.
- 2 The claim form in the claim was issued on 14 January 2019. There were three named claimants - William Cecil White, Colin White, and Frances Elizabeth White - the three registered proprietors of their property. Both the appellants and the respondents bought their land from predecessors in title in 2017. The appellants were registered as proprietors on 21 April 2017 and the respondents were registered on 1 March 2017.
- 3 Mr William White died in September 2017, so after the purchase of their property but before the claim was brought. The parties were in correspondence about the disputed land by then or shortly afterwards, and it is accepted that the appellants' solicitors were notified by the respondents' solicitors of the death of Mr White senior. There was no alteration of the register of the respondents' title on Mr White's death but the effect, as a matter of law, was to make the two surviving respondents the legal owners of the property on trust for whoever were the equitable owners.
- 4 The right claimants in the claim were therefore the two surviving registered proprietors, Colin White and Francis White. The claim, however, was wrongly issued in the name of all three. The explanation now put forward by Mr Daniels, who is a partner in the firm of Hattons who acted for the Whites at trial, is that although he knew of the death of William White, the file when it became litigious was passed to an employed solicitor, a Mr Mugadza, in the autumn of 2018 and Mr Mugadza then dealt with the case until Mr Daniels came back in in about March 2020. Mr Mugadza had apparently overlooked the fact that Mr White had already died.
- 5 What is very odd is that all the parties and their representatives seem to have overlooked that matter entirely until 12 March 2020, five months after judgment, when the appellants' solicitors wrote to the respondents' solicitors suggesting that what had happened amounted to "a possible misleading of the court/abuse of process". At the date of that letter, the appeal was already listed to be heard in a window starting on Monday this week.
- 6 The appellants were not satisfied by the explanation that was put forward by Mr Daniels' firm and so on 31 March 2020 they issued an application first to adjourn the hearing until it could be dealt with in open court and, second, to strike out the claim on account of alleged abuse of process. I dealt on paper with the application to adjourn. There has been no application to vary or set aside that part of my order but I ordered that the application to strike out should be heard today together with any application that the respondents, if so advised, might bring to deal with the question of Mr William White's status in these proceedings.

- 7 Following that, on 6 April 2020, the respondents issued an application asking for Mr White deceased to be removed as a respondent to the appeal and from the order and judgment of 4 October 2019, either straightaway or after the hearing of the appeal. It is the two applications therefore of 31 March and 6 April that I have to deal with today.
- 8 It is common ground that a claim brought by a deceased person is a nullity. This is established authoritatively by the case of *Kimathi v Foreign & Commonwealth Office* [2017] 1 WLR 1081 at [5]. However, that does not make a nullity a claim also issued by or on behalf of other claimants with their authority. That is established by the case of *Adams v Ford* [2012] 1 WLR 3211 at [36] and by brief reference in [19] of the *Kimathi* case too.
- 9 The claim was no doubt intended to be brought by the registered proprietors of the respondents' land. The fact that someone else was also mistakenly thought to be a registered proprietor does not affect the legal analysis that a claim issued by the second and third respondents, who were in law the registered proprietors, was a valid claim. There are undoubtedly questions of breach of warranty of authority as between the respondents' solicitors and the appellants in relation to any loss that was caused, but that does not affect the status of the second and third respondents as proper claimants.
- 10 The appellants do not accept that the error made by Mr Mugadza was inadvertent. They characterise it as grossly negligent and reckless and therefore culpable, though, very properly, Mr Sawtell did not go as far as to suggest that it was deliberate. There was no real dispute in argument that what had been done by Mr Mugadza was, at best, grossly negligent. However, as far as I can see, there was no benefit at all that could be obtained by the respondents in bringing the claim in Mr William White's name too. Bringing the claim in the name of the two surviving Whites would have given rise to exactly the same issues and arguments at trial. So it is unrealistic to think that Mr White's name was added knowingly and deliberately as a claimant as an abuse of process for that reason. Nevertheless, it is suggested that his presence as a claimant was an abuse of process because a claim brought by solicitors in the name of a dead person can be properly characterised in that way and also because the second and third respondents at no stage raised the inappropriate presence of Mr William White as a claimant in the proceedings.
- 11 At the trial, only one factual question arose in which Mr William White, in particular, was indirectly concerned. In the cross-examination of Mr Colin White, a question arose about the use of the disputed land for wheelchair access for Mr William White. Mr William White had, of course, been alive at the time when the respondents' property was purchased and the evidence that was given by Colin White was a reference back to the time of purchase and the considerations then in the respondents' minds.
- 12 It is, however, possible - I go no further than that for today's purposes - that the Judge might have been mistaken in thinking that at the date of trial it was still a relevant consideration for a living Mr White. That is an argument which may well be material on the appeal and which can be advanced on behalf of the appellants at the substantive hearing, as too can any issue arising from a failure by anybody during the course of the trial to correct the impression that the Judge apparently had that Mr White was still alive. I will allow the appellants' application to amend their grounds of appeal, both Ground 5 and Ground 6, to enable them to raise any such arguments at the hearing of the appeal itself.
- 13 The question that I have to decide today is whether the abuse of process comprising Mr Mugadza's erroneous conduct and the respondents' failure to correct the mistake is so

serious and culpable on the part of the Respondents, or alternatively that Mr Mugadza's culpability is visited on them, that this court can and should now strike out the whole of the claim at this stage without proceeding to hear the appeal on its merits.

- 14 It is not wholly clear to me that the High Court as an appellate court has any power at this stage, other than its powers arising as the appeal court itself, to make any amendment to the order in the lower court or to strike out that claim. Mr Sawtell argued that, on a number of different bases, it was arguable that the High Court had the power to do so. I am not convinced about any of them but it is not necessary to decide the question for today's purposes. That is because it seems to me that the conduct of the Respondents and their solicitor was not so egregious and culpable that the court should take what, on any view, must be an exceptional step at this stage to strike out the claim retrospectively, without even engaging with the merits of the appeal.
- 15 Mr Sawtell relied on a number of points in support of his argument that the abuse of process was extremely serious and that the court should do so. First, he said that the Judge was confused into thinking that William White was still alive, hence the confusion about wheelchair access. Secondly, at no stage since the giving of the judgment of the Judge have the respondents raised the issue about the death of Mr White or made any application sooner than they did, which was not until 6 April 2020. Thirdly, he says that the quality of the explanation given in the evidence in support of the respondents' application is poor, in that no attempt appears to have been made to obtain accurate factual information from Mr Mugadza or, indeed, from the second and third claimants.
- 16 I accept that all those points so far as they go are criticisms that can properly be made but even taking them at their height, I do not consider that they are sufficient to justify the court in taking an exceptional course, if it has jurisdiction to do so, to strike out the whole of the claim. They are matters that, in my judgment, should be considered in the context of the merits of the appeal as a whole, particularly the merits of the amended Ground 5 of the appeal which will no doubt be a significant part of the argument at the hearing.
- 17 Since I have allowed the amendment to the appellant's notice and grounds of appeal to add Ground 6, which is abuse of process, that is no prejudice to the appellants because, if they see fit, they can seek to argue that the appeal should be allowed on the basis of the abuse of process that they have already identified. I therefore give permission, as I have said, for the grounds of appeal to be amended so that those matters can be argued at the hearing of the appeal.
- 18 So far as today is concerned, it is clearly right to make an order that the late Mr White cease to be a respondent to the appeal and I make that order pursuant to Rule 19.2(3) of the Civil Procedure Rules. Whether any further amendment should be made to the title of the County Court proceedings is a matter that can properly be considered in the light of the appeal hearing in due course.
- 19 For today, therefore, I reject the application on behalf of the appellants to strike out the claim. I allow, in part, the application of the respondents in relation to the presence of Mr White as a party to the appeal and I effectively defer any further arguments arising from these matters until the hearing of the appeal itself.
- 20 That is the end of my judgment.

**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

*Transcribed by Opus 2 International Limited  
Official Court Reporters and Audio Transcribers  
5 New Street Square, London, EC4A 3BF  
Tel: 020 7831 5627 Fax: 020 7831 7737  
civil@opus2.digital*

**\*\* This transcript is subject to Judge's approval \*\***