



**REF/2015/0130**

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

**LAND REGISTRATION ACT 2002**

**IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY**

**BETWEEN**

**Keith Best**

**APPLICANT**

**and**

**Colin John Curtis as administrator of the estate of Doris May Curtis**

**RESPONDENTS**

**Property Address: 35 Church Road, Ilford  
Title Number: EGL33029**

**Made By: Judge Elizabeth Cooke**

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**ORDER**

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**Order**

**The Chief Land Registrar is directed to give effect to the Applicant's application in form ADV1 dated 27 November 2012 as if the Respondent's objections had not been made**

## Reasons

### *Introduction*

1. Title to 35 Church Road, Newbury Park (“the property”) is registered at HM Land Registry under title number EGL33029. The Applicant, Mr Keith Best, applied to Land Registry on 27 November 2012 to be registered as the proprietor of the property, having been in adverse possession of it for ten years. The Chief Land Registrar refused the application on the ground that to take adverse possession of a residential building was made a criminal offence by s 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Mr Best judicially reviewed that refusal, successfully: *Best v Chief Land Registrar* [2014] EWHC 1370(Admin), [2015] EWCA Civ 17.
2. Accordingly the application was then processed by Land Registry in the usual way. However, the publicity that attended the judicial review application attracted the attention of Mr Colin Curtis, the son of Mrs Doris Curtis, the registered proprietor of the property who died intestate on 23 January 1988. He contacted Land Registry. As a result, he was given notice of Mr Best’s application pursuant to Rule 17 of the Land Registration Rules 2003 (“the Rules”; I shall say more about Rule 17 below), and he objected to it. In due course the matter was referred to this Tribunal.
3. I conducted a hearing in London on 7 March 2016. Mr James McCreath of counsel represented the Applicant, and Mr Christopher Cutting of counsel represented the Respondent. I am most grateful to both for their assistance.
4. In the paragraphs that follow I first outline the law relating to the acquisition of title to registered land under the Land Registration Act 2002 (“the 2002 Act”), and the relevant procedural background. I then discuss in turn the Respondent’s two challenges to Mr Best’s application. They are, first, that during the period when Mr Best was in possession, the property was subject to a trust so that he has no entitlement to make an application to be registered pursuant to Schedule 6 to the 2002 Act and, second, that if a proper application was made then he was entitled to require it and did require it to be dealt with under paragraph 5 of Schedule 6 with the result that it must fail.

### *The law: adverse possession under the 2002 Act*

5. The 2002 Act introduced a new regime for the acquisition of title to registered land. Whereas under the Land Registration Act 1925 it was possible to acquire title to registered land or unregistered land alike simply by 12 years’ adverse possession (albeit with some technical and procedural differences), the 2002 Act provides that, where title to the relevant land is registered, adverse possession alone does not give an entitlement to registration. Schedule 6 to the 2002 Act gives a registered proprietor an almost absolute right to resist the loss of title by adverse possession, subject to certain narrowly-defined exceptions.
6. Accordingly paragraph 1 of Schedule 6 gives an entitlement to apply for registration:

*1(1)... a person may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application.*

7. Paragraph 2 provides that where such an application has been made, certain persons must be notified:

*2(1) The registrar must give notice of an application under paragraph 1 to—*

- (a) the proprietor of the estate to which the application relates,*
- (b) the proprietor of any registered charge on the estate,*
- (c) where the estate is leasehold, the proprietor of any superior registered estate,*
- (d) any person who is registered in accordance with rules as a person to be notified under this paragraph, and*
- (e) such other persons as rules may provide.*

8. Paragraph 3 then provides

*3(1) A person given notice under paragraph 2 may require that the application to which the notice relates be dealt with under paragraph 5.*

*(2) The right under this paragraph is exercisable by notice to the registrar given before the end of such period as rules may provide.*

9. The Rules provide (Rule 189) that that period ends “at 12 noon on the sixty-fifth business day after the date of issue of the notice”; there is no provision for that time to be extended or for permission to be given for the right to be exercised late. Where the right conferred by paragraph 3(1) is not exercised then paragraph 4 provides:

*4 If an application under paragraph 1 is not required to be dealt with under paragraph 5, the applicant is entitled to be entered in the register as the new proprietor of the estate.*

10. However, if notice is given to the registrar under paragraph 3(2), in response to the paragraph 2 notice, then the adverse possessor’s application will fail save in certain circumstances that are not relevant to this reference:

*5(1) If an application under paragraph 1 is required to be dealt with under this paragraph, the applicant is only entitled to be registered as the new proprietor of the estate if any of the following conditions is met. [The subsection goes on to set out three conditions, none of which is relevant here].*

11. Accordingly, if Mr Curtis gave to the registrar a valid notice under paragraph 3(2) above, Mr Best's application for registration must fail.
12. Mr Curtis also relies on paragraph 12 of Schedule 6, which takes away the entitlement to apply that paragraph 6(1) confers where the land is subject to a trust at any point during the claimed ten year period:

*12 A person is not to be regarded as being in adverse possession of an estate for the purposes of this Schedule at any time when the estate is subject to a trust, unless the interest of each of the beneficiaries in the estate is an interest in possession.*

*The relevant procedural background*

13. The Respondent, Mr Colin Curtis, is the son of the registered proprietor, Mrs Doris Curtis, who died in 1988. She made no will so far as is known and accordingly, as her only son, Mr Curtis is entitled to her estate under the provisions of the intestacy rules set out in the Administration of Estates Act 1925. But until 2014 he took no steps to administer her estate.
14. Meanwhile, Mr Best's application was made in 2012, and judgment was given in his favour in the High Court judicial review action on 7 May 2014. The registrar on 6 June 2014 sent out two notices. One was sent out under paragraph 2 of Schedule 6, addressed to the registered proprietor at the property; the 65 days within which a response must be given, pursuant to Rule 189 (see above), would expire on 5 September 2014. The other was a notice under Rule 17 of the Rules, addressed to the Respondent.
15. Rule 17 provides as follows:

*17. If the registrar at any time considers that the production of any further documents or evidence or the giving of any notice is necessary or desirable, he may refuse to complete or proceed with an application, or to do any act or make any entry, until such documents, evidence or notices have been supplied or given.*
16. Because the Respondent had been in touch with Land Registry, he was contacted pursuant to Rule 17.
17. In response on 26 June 2014 he sent to Land Registry a form NAP, which is the form that would be used in response to a notice under paragraph 2 of Schedule 6. Land Registry did not provide the Respondent with that form, because it did not give him notice under that paragraph, but his solicitors downloaded it and used to indicate to Land Registry both that he objected to Mr Best's application on the basis that the land had not been in adverse possession for the requisite period and that he required the application to be dealt with under paragraph 5 of Schedule 6. Those two objections are very different in nature. The first challenges the whole basis of the application; the second is relevant only if the first fails, and it relies upon the very strong protection given to the registered proprietor under the new legislative scheme in the 2002 Act.

18. The Respondent no longer challenges the Applicant on the basis of factual possession. But the Respondent nevertheless challenges the Applicant's entitlement to apply, on the basis that paragraph 12 of Schedule 6 applies. The Respondent says that the property was subject to a trust throughout the time in which Mr Best was in possession of the property, and that accordingly he was not in adverse possession and cannot be registered as proprietor.
19. Letters of administration were granted to Mr Curtis, in respect of Mrs Curtis' estate, on 15 October 2014.

*The Respondent's first challenge: Schedule 6 paragraph 12*

20. I turn then to the first challenge. Mr Curtis says that because the registered proprietor was dead throughout the time of the adverse possession, and her estate unadministered, the estate – including, obviously, the property – was subject to a trust. The Respondent cites *Ruoff and Roper on Registered Conveyancing* at 33.027-028:

“It is arguable that [paragraph 12] means that an application cannot be made where, at any point during the relevant period, the registered proprietor at the time (i) was dead and his estate was being administered; or (ii) was bankrupt and his property was being administered by the trustee in bankruptcy; or (iii) (being a company) was being wound up. This is because, in each of these cases, the registered estate may have been subject to a form of trust.”

21. To that the Applicant has two responses, both of them in my judgment unanswerable.
22. One is that under normal circumstances while an estate is being administered it is held by personal representatives. They are not trustees in the conventional sense. For a trust to exist there must be identifiable property, a trustee, and identifiable beneficiaries who can enforce the trustee's duties. The Applicant cites *Green v Russell* [1959] 2 QB 226, at 241, but authority is scarcely needed.
23. Executors (of a testate estate) and administrators (of an intestate estate) are fiduciaries but they do not hold the property as trustees. A trustee holds the legal title and the beneficiaries hold the equitable title. In *Commissioner of Stamp Duties (Queensland) v Livingstone* [1964] 3 AC 694, at 707: “... whatever property came to the executor *virtute officii* [by virtue of his office] came to him in full ownership, without distinction between legal and equitable interests”. The Applicant cites *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 20<sup>th</sup> Edition*, paragraph 81-02 which explains that executors are treated by the courts as trustees “for certain purposes and in some aspects”, in particular so as to enable them to be held liable as fiduciaries for breaches of duty. But the executors or administrators are not trustees in any usual sense of an unadministered estate. The trust fund is by definition unidentifiable until the administration ends. The beneficiaries are likewise unknown until the administration is brought to an end by the assenting of property to those entitled.
24. Might paragraph 12 be referring to a trust in some extended sense? I think not. Paragraph 12 assumes a trust that has beneficiaries. The Limitation Act 1980 uses the extended definition of a trust and a trustee found in the Trustee Act 1925, at section

68, so as to include personal representatives. But the 2002 Act does not employ that extended definition either explicitly or by reference; had Parliament intended an extended definition it would have said so as it did in the Limitation Act 1980 and the Trustee Act 1925.

25. The second reason why the challenge based on paragraph 12 must fail is that in this case there was not even a personal representative. Letters of administration were not granted until late in 2014. Throughout the period of adverse possession therefore the estate was vested in the Public Trustee, by virtue of section 9(1) of the Administration of Estates Act 1925. Not only is there no identified fund, not only are there no identifiable beneficiaries, but also statute explicitly provides that the Public Trustee is not subject to any duties:

“9(3) The vesting of real or personal estate in the Public Trustee by virtue of this section does not confer on him any beneficial interest in, or impose on him any duty, obligation or liability in respect of, the property.”

26. At the hearing there was some discussion as to the authority that might lie behind the statement of *Ruoff and Roper*, quoted at my paragraph [ ] above. The authors of *Ruoff and Roper* cite *Ayerst v C & K (Construction) Ltd* [1976] AC 167, at pp 175 and following. The issue in that case was whether a company, in the course of being wound up, still had a beneficial interest in its property. It is therefore particularly relevant to the third of the three cases considered in the paragraph quoted above. As to the circumstance where the registered proprietor is dead and his estate is being administered, Lord Diplock in *Ayerst* at p. 178B referred to *Commissioner of Stamp Duties (Queensland) v Livingstone* [1964] 3 AC 694 and the finding in that case that:

“... an estate while still in the course of administration was incapable of satisfying the technical requirement of a “trust” in equity that there had to be specific subjects identifiable as the trust fund”.

27. Accordingly the decision in *Ayerst* does not assist the Respondent.

28. Mr McCreath points out that the present situation was actually anticipated by the Law Commission and Land Registry in the consultation paper that preceded the drafting of the bill that became the 2002 Act. In *Land Registration for the Twenty-First Century – A Consultative Document (LC no 254, 1998)* at paragraph 10.13 they said:

“It sometimes happens that a registered proprietor abandons his or her land, or dies in circumstances in which no steps are taken to wind up his or her estate. A squatter then takes possession of the land. Here adverse possession fulfils a useful role. ... [T]he doctrine of adverse possession does at least ensure that in such cases land remains in commerce and is not rendered sterile.”

29. Mr Best has done a great deal of work on property that Mr Curtis abandoned for more than a quarter of a century. If property in these circumstances is protected by paragraph 12, then no adverse possession is possible in precisely the situation where those who designed and drafted the statute thought that it should be possible.

30. I find the Respondent's first challenge implausible. Even had he held the property as a personal representative during the period of adverse possession, paragraph 12 would not have been relevant and could not have prevented adverse possession; personal representatives do not hold the estate on trust in the conventional sense intended by paragraph 12. But that was not, in any event, what happened. The Respondent did not take out a grant until 2014, long after the ten years had been accomplished. The land was not subject to a trust at any stage during the applicant's adverse possession because it was vested in the Public Trustee on terms and in circumstances that make it clear that it is not subject to a trust.

31. Accordingly the Respondent's first challenge fails.

*The Respondent's second challenge: Schedule 6 paragraphs 2, 3 and 5*

32. Paragraph 2 sets out the persons to whom notice must be given of an application under paragraph 1. They are the registered proprietor of the estate, of any registered charge upon it and of any superior registered estate if it is leasehold, and two other categories. One is "any person who is registered in accordance with rules as a person to be notified under this paragraph", and the other is "such other person as rules may provide". As to that latter category no provision has been made. But as to the former, Rule 194 provides as follows:

"194.—(1) Any person who can satisfy the registrar that he has an interest in a registered estate in land or a registered rentcharge which would be prejudiced by the registration of any other person as proprietor of that estate under Schedule 6 to the Act or as proprietor of a registered rentcharge under that Schedule as applied by rule 191 may apply to be registered as a person to be notified under paragraph 2(1)(d) of Schedule 6.

33. Nowhere is there any mention in paragraph 2 of the personal representative of a deceased proprietor (let alone of anyone who might be entitled to take out letters of administration but has not yet done so, which was the Respondent's situation when notice was given under paragraph 2 on 6 June 2014). Where the 2002 Act refers to personal representatives it does so explicitly: it is worth quoting section 56 by way of contrast:

"Where a charge is registered in the name of two or more proprietors, a valid receipt for the money secured by the charge may be given by—

(a) the registered proprietors,

(b) the survivors or survivor of the registered proprietors, or

(c) the personal representative of the last survivor of the registered proprietors."

34. However, the personal representatives of a deceased proprietor are able to bring themselves within the scope of paragraph 2 by making use of Rule 194. Where the situation is urgent and they do not yet have a grant, they are able to apply – out of hours if necessary – for a grant *ad colligenda bona*, an emergency grant authorising

them to take action to collect in the deceased's assets (*Williams, Mortimer & Sunnucks on Executors, Administrators and Probate, 20<sup>th</sup> Edition*, paragraphs 24-47 to 24-48).

35. Paragraph 3 allows no-one except those notified under paragraph 2 to give a counter-notice – normally done in form NAP – to the registrar. Hence the importance, for personal representatives, of Rule 194 in circumstances where it is not possible or convenient either to have themselves registered as proprietors or to assent the property to a beneficiary so that he or she can be registered.
36. The Respondent was not a person listed within paragraph 2, nor did he arrange to be notified pursuant to paragraph 2(1)(d) by making use of Rule 194. Yet he says that he was entitled to give such a counter-notice and did so.
37. The Respondent says that he did so “by or on behalf of the registered proprietor” (I quote from paragraph 12 of Mr Cutting’s skeleton argument). It is difficult to understand this; a relationship of agency between the deceased registered proprietor and her son could not, in law, exist. Even had Mr Curtis at that stage taken out a grant of letters of administration so that he was by then her personal representative, as administrator of her estate he would not have been her agent. Nor is the estate a legal personality, of which Mr Curtis or any personal representative could be an agent.
38. Mr Cutting argued that, nevertheless, the counter-notice in Form NAP, given by the Respondent, was ratified by the estate once letters of administration were granted. He cited *Bowstead on Agency* paragraph 2-092:

“A solicitor issues a writ without authority, within the period of limitation applicable for the proceedings in question. The person on whose behalf the writ was issued ratifies the issue of the writ after the period of limitation has expired. The ratification is effective.”
39. Mr Cutting referred to the cases cited by *Bowstead* in support of that proposition: *Presentaciones Musicales SA v Secunda* [1994] Ch 271 and *Adams v Ford* [2012] EWCA Civ 544. But as Mr McCreath pointed out, there are two crucial differences between the situation here, and those two cases. One is that the writ was not a nullity before it was ratified. In this case, the counter-notice has no validity at all unless it is given by a proper person, to whom notice has been given under paragraph 2. Second, in each of those cases the person who was able to ratify the action was in existence, and could have ratified it, before the expiry of the limitation period. In this case there was no personal representative until long after the time for expiry of the notice had passed, and even at that stage the personal representative could not have served a counter-notice, not being one of the persons entitled to notice under paragraph 2.
40. Alternatively, the Respondent relies upon the principle of “relation back”. This is the proposition that that the grant of letters of administration, once issued, will “relate back” to something done before its issue which benefited the estate (*Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 20<sup>th</sup> Edition*, paragraph 5-12).
41. This doctrine is of no assistance to the Respondent. It applies in cases where the act later validated was an act which could properly have been done by a personal



representative. The examples given in *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 20<sup>th</sup> Edition*, paragraph 5-14 include selling goods, or using the deceased's money to pay his debts. By contrast – as demonstrated above – a personal representative as such is not entitled to give a counter-notice under paragraph 3. He or she can only do so where Rule 194 has been used, which it was not in this case.

42. Acceptance of the Respondent's arguments as to agency or relation back would have the consequence that in any case where a paragraph 3 counter-notice is given by someone who might later become entitled to give it, the registrar must wait – for how long? – to see if entitlement in fact follows.
43. More than that, it might well have an implication for the giving of notices under paragraph 2, since Paragraph 3 allows only those given notice under paragraph 2 to give a counter-notice. The registrar will not usually know whether a registered proprietor is dead. Should he on receipt of an ADV1 ascertain, before giving any notices under paragraph 2, whether or not the registered proprietor was dead, find out whether a grant has been issued and, in the absence of a grant, research the family connections of the deceased to find out who would be entitled on intestacy and might therefore take out a grant in future? It would be implausible to suggest that the registrar must take either of the first two of those steps, although in theory he could check from the public registers; and it would be simply impossible for the registrar to do the third.
44. It was the intention of those who drafted the legislation – made clear in the Report of the Law Commission and Land Registry, laid before Parliament in 2001 at the time when the bill, that became the 2002 Act, was being debated -that the scheme of adverse possession must produce a decisive result. In *Land Registration for the Twenty-First Century – A Conveyancing Revolution* (LC no 271, 2001) paragraph 14.6 reads:

“It will be apparent from this summary [of the provisions relating to adverse possession] that one of the essential features of the scheme is that it must produce a decisive result. Either the squatter is evicted or otherwise ceases to be in *adverse* possession, or he or she is registered as the proprietor of the land”.
45. That passage was quoted by Sales LJ in the Court of Appeal's decision in Mr Best's judicial review, *Best v Chief Land Registrar* [2015] EWCA Civ 17, paragraph 22. The Respondents argument would deprive the legislative scheme of much of its decisiveness; it would introduce an element of “wait and see” which Parliament clearly did not intend.
46. The Respondent says that it is curious that provision is made to protect a registered proprietor who lacks mental capacity, in paragraph 8 of Schedule 6, while none is apparently made for one who is dead. The answer to that is simply that the personal representatives of a deceased registered proprietor, or those entitle to become the personal representatives, can take the steps set out at paragraph 34 above to bring themselves within paragraphs 2 and 3. To give them an automatic protection, without the need to take active steps which they (unlike a mentally incapacitated proprietor)

are able to take, would be to frustrate the policy of the statute, discussed at paragraph 28 above.

47. True it is that in a very few circumstances this may cause some practical difficulty. If the registered proprietor died on day 60 of the 65-day period for response, having failed to respond to a paragraph 2 notice, then it may be that the deadline works hardship. But that cannot be cured by construing the statute to give a protection against adverse possession that it was manifestly not intended to give in circumstances of which the current reference could be said to be a shining example.
48. Finally, Mr Cutting referred to Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms. If, he said, the estate cannot protect itself from adverse possession in these circumstances, then it may well offend against Article 1. But the estate is able to protect itself in the manner I have set out above. It is simply not the case that “the system works well unless the owner happens to be dead” (Mr Cutting’s skeleton, paragraph 22). Protection is available except in circumstances where, as here, no steps were taken to administer the estate, and I see no merit in invoking the Convention in these circumstances.

#### *Conclusion*

49. Accordingly the Respondent’s challenges to the Applicant’s application both fail. The Applicant was entitled to make an application under paragraph 6(1) of Schedule 6 to the 2002 Act, and the Respondent was not entitled to give a counter-notice under paragraph 3 of that Schedule. Accordingly I have directed the Chief Land Registrar to give effect to the application as if the objection had not been made.
50. In this jurisdiction costs usually follow the event, and accordingly Mr Best would expect to have his legal costs – since the date of the reference to the tribunal – to be met by Mr Curtis. Mr Best has provided a schedule of his costs in the sum £37,037. If Mr Curtis wishes to argue that he should not pay those costs, or to challenge the amount, he must make submissions to that effect within 28 days of the date of this order; if he does so, Mr Best has a further 28 days within which to reply to those submissions following which I will make a decision as to costs.

**Dated this Dated this Monday 11 April 2016**

**Elizabeth Cooke**

**BY ORDER OF THE TRIBUNAL**