



Supreme Court
New South Wales

Case Name: Harrison v Office of Registrar General & Anor

Medium Neutral Citation: [2020] NSWSC 626

Hearing Date(s): 7 April 2020 and then on the papers

Date of Orders: 25 May 2020

Decision Date: 25 May 2020

Jurisdiction: Equity - Real Property List

Before: Kunc J

Decision: Orders made for production of certificate of title and issue of new certificate of title in default of production

Catchwords: LAND LAW – Torrens title – The register – Order for issue of new certificate of title – Bankrupt refuses to provide certificate of title to trustee

Legislation Cited: Bankruptcy Act 1966 (Cth)
Real Property Act 1900 (NSW)

Cases Cited: Botterill v Botterill [2000] NSWSC 1152; (2000) 10 BPR 18,787
Darren v McMahon [2012] NSWSC 761
Prentice v Registrar General [2014] NSWSC 1060
Woodgate as trustee in bankruptcy of Geoffrey Leonard
Hadley v Registrar-General [2012] NSWSC 1640

Category: Principal judgment

Parties: Brett Richard Geoffrey Harrison (Plaintiff)

Office of Registrar General ABN 819 138 30179 (First Defendant)
Leonie Maree Hartwig (Second Defendant)

Representation:

Solicitors:

SLF Lawyers (Plaintiff)
Office of the Registrar General, Department of
Customer Service (First Defendant)
Leonie Hartwig (in person) (Second Defendant)

File Number(s):

2019/248166

Publication Restriction:

No

JUDGMENT

Summary

- 1 The plaintiff (the “Trustee”) is the trustee of the bankrupt estate of the second defendant, Ms Leonie Hartwig (“Ms Hartwig”). As the beneficiary of her late mother’s estate, Ms Hartwig succeeded to and became the registered proprietor of a property in Dubbo (the “Property”).
- 2 By summons filed on 9 August 2019, the Trustee seeks, inter alia, an order that the first defendant, the Office of the Registrar General (the “Registrar General”) issue to the Trustee a replacement Certificate of Title for the Property. The Trustee requires a Certificate of Title so that, in his capacity as Ms Hartwig’s trustee in bankruptcy, he can sell the Property for the purpose of paying out her bankrupt estate’s creditors.
- 3 The Trustee has now been registered as the registered proprietor of the Property. However, he has had to bring these proceedings because Ms Hartwig has repeatedly failed to comply with his requests that she deliver up to him the Certificate of Title to the Property.
- 4 There can be no doubt that the Property forms part of Ms Hartwig’s bankrupt estate and that, in his capacity as her trustee in bankruptcy, the Trustee is entitled to be on the register as the proprietor of the Property. Ms Hartwig has admitted that she has the original Certificate of the Title for the Property. She has failed to comply with the Trustee’s requests that she deliver up the Certificate of Title. The Court therefore concludes that, if Ms Hartwig fails to deliver up the Certificate of Title in accordance with an order of the Court, then

the Registrar General should be ordered to issue a replacement Certificate of Title.

- 5 The matter was heard before me initially by telephone hearing (due to the Court's COVID-19 protocols) on 7 April 2020. Mr M J Davis of Counsel appeared on behalf of the Trustee. Ms Hartwig appeared for herself. The Registrar General has filed a submitting appearance in these proceedings, save as to costs.
- 6 The resolution of the legal issue presented by these proceedings has been straightforward. However, for reasons which will become apparent, it is necessary to set out the procedural aspects of the matter in some detail.

Procedural history

- 7 The matter came before the Real Property List Judge, Darke J, on four occasions in 2019. The following procedural history will suffice:
 - (1) On 13 September 2019, his Honour stood the matter over for directions in the Real Property List on 11 October 2019, to allow Ms Hartwig to obtain legal advice. Ms N Khan, Solicitor appeared for the Trustee and Ms Hartwig appeared in person, although an examination of the Court record discloses that she has never filed an appearance.
 - (2) On 11 October 2019, his Honour directed Ms Hartwig to serve any affidavits upon which she sought to rely by 8 November 2019. The matter was stood over for further directions in the Real Property List on 15 November 2019. Mr P Centraco, Solicitor, appeared for the Trustee and Ms Hartwig again appeared in person.
 - (3) The order for the service of evidence by Ms Hartwig by 8 November 2019 was not complied with.
 - (4) On 15 November 2019 his Honour directed that Ms Hartwig serve any affidavits upon which she sought to rely by 13 December 2019, and that Ms Hartwig not be permitted to rely on any affidavits served after that date without obtaining the leave of the Court. The matter was stood over for directions in the Real Property List on 20 December 2019. Mr Centraco again appeared on behalf of the Trustee and Ms Hartwig appeared in person.
 - (5) The order for the service of evidence by Ms Hartwig by 13 December 2019 was not complied with.
 - (6) On 20 December 2019 the matter was set down for hearing before his Honour on 7 April 2020, with the usual order for hearing made in accordance with the Real Property List Practice Note. Ms A Smith, Solicitor, appeared on behalf of the Trustee and Ms Hartwig appeared in person.

- 8 The matter was subsequently reallocated to be heard by me.
- 9 In response to the developing COVID-19 pandemic, the Court announced that from 24 March 2020 there would be no personal appearances save in exceptional circumstances with the leave of the Chief Justice (also applying to unrepresented litigants). As is discussed in further detail below from paragraph [34] and following, a determination was made for this matter to proceed before me by way of telephone hearing on 7 April 2020.
- 10 Given what had been served by Ms Hartwig prior to the hearing (see paragraph [34] and following below) and the Court's desire to ensure she was afforded procedural fairness, I determined the matter should proceed by the Trustee's case being presented at the hearing, with Ms Hartwig then being given an opportunity to respond by way of written submissions, followed by a written reply from the Trustee to conclude the argument. At the conclusion of the telephone hearing, these orders were made:
- “1. The Second Defendant is to serve and file by email to the Associate to Kunc J submissions and any evidence on or before 12 May 2020.
 2. The Plaintiff is to serve and file by email to the Associate to Kunc J submissions in reply and any evidence on or before 19 May 2020.
 3. Direct the matter thereafter be determined on the papers.”
- 11 As is set out at paragraph [61] and following below, Ms Hartwig failed to comply with the order to serve and file her submissions and evidence by 12 May 2020. Moreover, it became apparent that such contact details as the Court had for Ms Hartwig were no longer current and the Court has now been unable to make contact with her.
- 12 In light of the developments in the preceding paragraph, I determined that the course which would facilitate the just, cheap and quick resolution of this matter would be to proceed to judgment on the papers, as anticipated in Order 3 of the orders set out in paragraph [10] above. Given Ms Hartwig's failure to provide any submissions, the Trustee was dispensed from having to serve and file submissions in reply and any further evidence.

The facts

- 13 What follows is largely derived from the submissions and affidavit evidence filed and served on behalf of the Trustee, with consideration given to those

documents provided by Ms Hartwig to the Court Registry on 27 March 2020 (see paragraph [39] below).

- 14 To the extent that any facts set out below were not agreed by the parties, I am satisfied that the evidence clearly establishes them.

The Estate of the late Vicki Price

- 15 On 2 January 2016, Ms Hartwig's mother, Vicki Price (the "deceased"), died. At the time of her death, the deceased was the registered proprietor of the Property.
- 16 On 27 January 2016, Ms Hartwig published a Notice of Intended Application for Probate on the New South Wales Online Registry, calling for creditors of the deceased to send her particulars of their claims.
- 17 On 10 March 2016, The Owners – Strata Plan XXXXX (the "Owners Corporation") wrote to Ms Hartwig informing her of their claim in respect of unpaid strata levies in relation to the Property. Further correspondence was sent to Ms Hartwig by the Owners Corporation concerning the unpaid strata levies.
- 18 On 5 October 2017, upon the application of the Owners Corporation, the Federal Circuit Court of Australia made an order for administration of the deceased's estate under Part XI of the *Bankruptcy Act 1966* (Cth) (the "Act").
- 19 On 30 April 2018, the Trustee was appointed as trustee of the bankrupt estate of the deceased.

Ms Hartwig's bankruptcy

- 20 On 10 November 2016, Ms Hartwig was granted probate in respect of the deceased's last will and testament. As the beneficiary to the deceased's estate, Ms Hartwig succeeded to and subsequently transferred to herself the title to the Property. By 11 October 2017, Ms Hartwig was recorded as the registered proprietor of the Property.
- 21 Upon becoming the registered proprietor of the Property, Ms Hartwig became jointly and severally liable for the strata levies debt owing to the Owners Corporation at the time of the transfer, and liable for the debt owing to the Owners Corporation accruing since the date of transfer.

22 Accordingly, on 1 February 2019, upon the application of the Owners' Corporation, the Federal Circuit Court of Australia ordered that the estate of Ms Hartwig be sequestrated under the Act. The Trustee was also appointed as trustee of Ms Hartwig's bankrupt estate. By operation of s 58 of the Act, the Property vested in the Trustee.

Trustee's application for replacement Certificate of Title

- 23 On 9 April 2019, the solicitor for the Trustee wrote a letter to Ms Hartwig, serving her with the Certificate of Appointment of the Trustee and requesting her to deliver up the original Certificate of Title in respect of the Property within seven days. This letter was served on Ms Hartwig on 16 April 2019 by a process server. Ms Hartwig failed to comply with this request.
- 24 On 2 May 2019, the Trustee emailed the solicitors then acting for Ms Hartwig, requesting again that the original Certificate of Title in respect of the Property be delivered up, so that the Trustee could proceed with the administration of the bankrupt estate. A follow-up email was sent on 16 May 2019.
- 25 On 29 May 2019 the solicitors acting for the Trustee sent a further letter to the solicitors then acting for Ms Hartwig, requesting the original Certificate of Title be delivered up within seven days. No response was received.
- 26 On or around 25 June 2019, the Trustee lodged an Application for Replacement Certificate of Title with NSW Land Registry Services (the "LRS"). The LRS informed the Trustee that a Court order would be required.
- 27 However, on 1 July 2019, pursuant to s 90 of the *Real Property Act 1900* (NSW) (the "RPA"), the LRS transmitted ownership of the Property to the Trustee, so that the Trustee is now recorded on the register as the registered proprietor.
- 28 As at the date of the hearing, the Trustee had taken possession of the Property, however still required the Certificate of Title in order to sell the Property and proceed with the administration of Ms Hartwig's bankrupt estate.

The law

29 Section 138 of the RPA sets out the Court's jurisdiction and powers in relation to the cancellation of folios and related actions. For these proceedings, the relevant provisions are:

“138 Court may direct cancellation of folios and other actions related to folios

....

(2) A court may, in proceedings for the possession or production of a certificate of title or in proceedings in which the court makes a determination as to an estate or interest in land, make ancillary orders of the kind set out in subsection (3), if the court is of the opinion that the certificate of title has not been, or is not likely to be, produced by a person for the purposes of the registration of a dealing affecting the land concerned.

(3) A court may order the Registrar-General to do one or more of the following:

- (a) cancel or amend a folio of the Register,
- (b) cancel, amend or make a recording in a folio of the Register,
- (c) create a new folio of the Register,
- (c1) create a new edition of a computer folio,
- (d) issue a new certificate of title.

...

(4) The Registrar-General must give effect to any such order.

(5) A court that makes an order under this section may order that a person deliver a certificate of title or other instrument to the Registrar-General for the purpose of giving effect to any such order. ...”

30 As can be seen, the Court's jurisdiction to make ancillary orders under s 138(3) is enlivened by satisfying the preconditions in s 138(2). The powers in s138(3) are not substantive or stand alone powers: *Prentice v Registrar General* [2014] NSWSC 1060 at [7] (“*Prentice*”). Two practical consequences of this should be noted.

31 First, in order for a party to obtain ancillary relief under s 138(3), the proceedings must be “for the possession or production of a certificate of title”: *Botterill v Botterill* [2000] NSWSC 1152; (2000) 10 BPR 18,787 at [2]-[3]; *Prentice* at [8].

32 Second, s 138(2) also makes clear that before relief under s 138(3) is granted, the Court must be satisfied that the certificate of title “*has not been, or is not likely to be, produced*” by the relevant person: *Prentice* at [11]-[13]; *Woodgate*

as trustee in bankruptcy of Geoffrey Leonard Hadley v Registrar-General
[2012] NSWSC 1640 at [12].

Ms Hartwig's participation in these proceedings

33 Before turning to the submissions made by the parties and consideration of the issues, it is necessary to recite the Court's engagement with Ms Hartwig in these proceedings. Notwithstanding the apparent involvement of legal representation at some point in time (see paragraphs [24] and [25] above), Ms Hartwig was self-represented in these proceedings.

Correspondence with Ms Hartwig prior to the hearing

34 Ms Hartwig appeared in person at the various directions hearings before Darke J in 2019 (see paragraph [7] above) although, as I have noted, never filed a formal appearance.

35 On 25 March 2020, the Associate to Darke J informed the parties that the matter had been transferred to me and foreshadowed the changes to in-person Court attendance in light of the COVID-19 pandemic:

"RE: Brett Richard Geoffrey Harrison v Registrar General of NSW -
2019/248166

I refer to the abovementioned matter which is listed for hearing on 7 April 2020. I advise that the hearing has been reallocated to his Honour Justice Kunc.

I note that, due to the current circumstances [referring to the Covid-19 pandemic], the Court is no longer conducting matters face-to-face.

Can the parties please advise whether the hearing of this matter can be conducted fairly, and reasonably efficiently, by way of the Virtual Courtroom (either by telephone or videolink) and if so, provide an assurance that the parties will be ready and able to do so by 7 April 2020 wherein the matter is set down for hearing.

If videolink is required, the Court will need to request a courtroom with these facilities. The availability of such a courtroom is not guaranteed. Therefore could the parties please advise by 5pm on 2 April 2020 whether videolink facilities are necessary so that arrangements can be made as soon as possible to request videolink via the Virtual Courtroom."

36 It appears that an email contact for Ms Hartwig was inadvertently left off this correspondence.

37 The Trustee's solicitor, Ms Smith, replied on 27 March 2020 in two separate emails, confirming, inter alia, that their client was ready and willing to proceed

with the hearing (by telephone or videolink). Again, it appears that an email contact for Ms Hartwig was not included on this correspondence.

- 38 Separate to, and apparently unaware of, the above correspondence, at 10.42am on 27 March 2020 Ms Hartwig sent an email to the Court Registry, sent from the email address of her partner, Trent Taylor. The email was not received by my Chambers until Monday, 30 March 2020 when it was forwarded by the Registry:

“I Leonie Hartwig regarding case number 2019/00248166 before the Equity court on 7 April 2020 are forwarding documentation and history of the case and what I have forwarded on to AFSA as a complaint against the original Trustee of my late mothers bankrupt estate under part 11 of the act, in which David Sampson of BPS Sydney was appointed Trustee, this appointment of Trustee has since been taken over by Brett Richard Geoffrey Harrison of Paul Cook and Associates Hobart. I am also putting in a complaint of my Trustee in my bankruptcy Brett Richard Geoffrey Harrison of Paul Cook and Associates Hobart.

Please find this information helpful in resolving this matter.”

- 39 The email attached a four page submission document, together with a one-page pdf document entitled “court” (which appeared to be the first page of a court cover sheet for these proceedings) and a 43-page pdf document bundle entitled “Bankruptcy Documents”.
- 40 The documents referred to in the preceding paragraph were the first Ms Hartwig had provided in the matter, despite the various orders of Darke J set out in paragraph [7] above. Further consideration of these documents is set out in paragraph [74] and following below.
- 41 On 31 March 2020, my Associate responded to the Trustee’s solicitor, acknowledging receipt of the emails referred to in paragraph [37] above and noting “Could the defendant please advise if they are also able to proceed on that basis” (i.e. by way of telephone hearing).
- 42 It was at this point in time that it came to my attention that Ms Hartwig had not been included on the original email correspondence dated 25 March 2020 (see paragraph [35] above) and subsequent emails in that chain.
- 43 In an effort to remedy that, on 1 April 2020 my chambers contacted the Trustee’s solicitor to ascertain whether she had on record any recent contact details for Ms Hartwig. While waiting for confirmation from Ms Smith, my staff

were able to telephone Ms Hartwig directly via the contact mobile number provided on the “court” document (see paragraph [39] above).

- 44 Like the email address, that number also belonged to Mr Taylor. He was able to put Ms Hartwig on the phone. Ms Hartwig said that she was not aware of the COVID-19 protocols preventing in-person appearances at Court save in exceptional circumstances. She said she did not consent to a telephone hearing, because she would be disadvantaged as a self-represented litigant. Ms Hartwig confirmed that her contact email was Mr Taylor’s email address.
- 45 Following this conversation, my chambers sent an email to Ms Hartwig (care of Mr Taylor and copied to all other parties) at 3:42pm on 1 April 2020:

“Dear Ms Hartwig

2019/248166 Brett Richard Geoffrey Harrison v Office of the Registrar General and Ms Hartwig Maree Hartwig

I refer to the above matter, which is listed for hearing on the coming Tuesday, 7 April 2020 before his Honour, Justice Kunc.

In light of current restrictions in place due to COVID-19, we note there are no personal appearances in any matters save where leave has been granted based on exceptional circumstances. Attached is a copy of the Court’s latest COVID-19 protocol.

We would be grateful if you could please advise if you consent to the hearing taking place by way of telephone link. If you do not, please notify us as soon as possible and provide an explanation of the exceptional circumstances as to why the hearing should be adjourned.

Furthermore, while his Honour has dispensed with the requirement for a court book, it is important that each party complies with the usual order for hearing insofar as outlines of submissions are served and the court has before it all material that is proposed to be referred to.

To that end, subject to hearing from the parties, his Honour proposes amended directions:

1. Plaintiff to serve and file by email to the Associate to Kunc J (mary.boneham@courts.nsw.gov.au) an outline of submissions and copies of affidavits and other evidence proposed to be relied on by 10am on Friday, 3 April.
2. Second Defendant to serve and file by email to the Associate to Kunc J (mary.boneham@courts.nsw.gov.au) an outline of submissions and copies of affidavits and other evidence proposed to be relied on by 2pm on Monday, 6 April.

Could each party please let me know by reply email whether there are any difficulties with these directions being made? I note that if any supporting documents or other evidence need to be provided in relation to this matter which cannot be provided by way of email (i.e. due to size), there is a dropbox

in the foyer of the Court (Law Courts Building, 184 Phillip Street, Sydney NSW 2000) where such material may be left.

Please note I have copied all parties to the proceedings to this conversation. Please ensure that all parties are copied in to any reply correspondence.”

- 46 By reply email to all parties sent at 12.46pm on 2 April 2020, Ms Smith advised on behalf of the Trustee that he was content with the proposed amended directions outlined in the preceding paragraph.
- 47 At 5.36pm on 2 April 2020, Ms Hartwig replied by email (copied to all parties) to convey her opposition:

“I Leonie Hartwig do not consent to the hearing taking place by way of telephone link, as I would be disadvantaged as I am representing myself. I only received the call late Wednesday afternoon from Rebecca regarding this matter, which is under 7days notice. I should be able to see who is present and be able to argue my case face to face before the courts. Apart from that I do not own a phone and I have never had a telephone conference before and would find this quite daunting and undue stress and anxiety which I have been diagnosed with recently.

Therefore I require this case be adjourned and everything put on hold until the courts are reopened.”

- 48 On the morning of Friday, 3 April 2020 my Associate acknowledged receipt of Ms Hartwig’s email (copied to all parties) and, in light of Ms Hartwig’s response, requested the Trustee to inform the Court of his attitude to the adjournment application and whether he considered the matter could be dealt with on the papers with written submissions.
- 49 Ms Smith immediately indicated by reply email (copied to all parties) that the adjournment application was opposed by the Trustee, however noted the Trustee did not object to the proceedings being dealt with on the papers.
- 50 My Associate sent a further email to Ms Hartwig (copied to all parties) at 11.29am that morning (the references to “First Defendant” were an error for “Second Defendant”):

“Further to my email below his Honour is not minded to adjourn the hearing. The application is one which can be dealt with on the papers in the current circumstances. The plaintiff consents to that course. Please let me know as soon as possible if you consent to what follows. If you do not consent or we do not hear from you by 10am on Monday morning, the matter will proceed as a telephone hearing next Tuesday at 10am.

The formal orders his Honour proposes are:

1. First Defendant to serve and file submissions and any evidence on or before 27 April 2020.
2. Direct the First Defendant may file submissions and evidence by posting to the Supreme Court of NSW, GPO Box 3, Sydney 2000, Attn: Chambers of Justice Kunc.
3. The plaintiff is to serve and file by email to the Associate to Kunc J submissions in reply no later than 7 days after the plaintiff has received the submissions and evidence of the First Defendant.
4. Direct the matter be determined on the papers.
5. Vacate the hearing fixed for 6 April 2020.

As a practical matter, to assist you his Honour proposes as follows:

1. The proposed orders give you longer than would usually be the case for you to prepare your submissions and evidence.
2. Can you please provide a postal address to which the plaintiff can express post you a copy of their submissions and evidence in case you have difficulties accessing and printing an email? His Honour requests the plaintiff to express post this material to you in addition to emailing it today.
3. It will be sufficient if you post your submissions and evidence to me at the address in the orders. We will scan and email the material to the plaintiff to enable them to prepare their material in reply.

Please let me whether you agree to these matters by return and no later than 10am on Monday. As I indicated above, if you do not consent or we do not hear from you, the matter will proceed on Tuesday by telephone.”

- 51 At 7.50am on Monday, 6 April 2020 Ms Hartwig replied to the above email (copied to all parties), reiterating her request to have the matter adjourned:

“As I have previously stated that I am not comfortable with the arranged telephone conference nor the notice of such which was under 7 days. I would like the matter adjourned given the circumstances and the importance of the matter being that of my brother and myself family home which is in question. I also find the fact that the plaintiff only sent me any affidavits and relating material on Friday, way inside the 7 days time frame.

Therefore I request that this matter be adjourned.”

- 52 Ms Smith responded shortly after on behalf of the Trustee (copied to all parties), clarifying the Trustee’s position on the adjournment:

“In order to clarify the position of the Plaintiff, while we do not object to the proceedings being adjourned for the purpose of being dealt with on the papers, we do not consent to the proceedings being adjourned generally.

In relation to the request for the adjournment below, we are instructed to oppose any such application on the basis that this matter has previously been delayed without any progress being made by the [Second] Defendant, and no opposition to the application before the Court has been articulated at any time.

We remain of the view that the matter can proceed to hearing on 7 May 2020 by way of telephone link.”

53 Notwithstanding my view that the matter could be dealt with on the papers, in light of Ms Hartwig's position set out at paragraphs [47] and [51] above, I determined that the way to resolve these proceedings in the most efficient and procedurally fair manner was for the hearing to proceed by way of telephone link. All parties were informed of this by email from my Associate at 10.48am on Monday, 6 April 2020:

"His Honour has noted:

1. Ms Hartwig has again pressed for an adjournment and has declined the opportunity for the matter to be decided on the papers, an opportunity which would have given her 3 weeks to respond in writing to the plaintiff's case;
2. Ms Hartwig's previous failures to comply with the Court's directions to file any evidence;
3. The plaintiff's submission that the matter can proceed to hearing tomorrow by way of telephone link.

His Honour has reviewed the file. Given the nature of the application, his Honour is satisfied that it could be dealt with on the papers, however because Ms Hartwig does not wish to avail herself of that opportunity, his Honour has determined that the just, cheap and quick way to resolve these proceedings is for the hearing to proceed tomorrow by telephone link. I will send the parties a separate email with the dial in information.

Please note that to minimise connectivity issues which the Court has experienced at "peak" periods, the hearing will commence at 11am.

If Ms Hartwig does not appear by telephone, subject to any submissions which the plaintiff may make, his Honour will take into account the material emailed to the Court on 27 March 2020 by Mr Trent Taylor on behalf of Ms Hartwig. I will attach that again to the email which I will be sending to the parties with the dial in details."

54 Shortly after sending the above email, my Associate circulated to all parties the Court's COVID-19 procedures, a fact sheet in relation to the virtual courtroom and the relevant dial-in details for the telephone hearing. As foreshadowed, the documents sent to the Court Registry by Mr Taylor on behalf of Ms Hartwig on 27 March 2020 (see paragraph [39] above) were also attached.

The hearing

55 The hearing proceeded by way of telephone link at 11am on Tuesday, 7 April 2020. Mr Davies appeared for the Trustee and Ms Hartwig did in fact appear for herself.

56 On a number of occasions during the hearing, I informed Ms Hartwig that it was important she communicate to the Court if she did not understand any part of the proceedings (T1:37-40; T6:9-13):

“...Miss Hartwig, feel free if at any point you do not understand what is happening or have a question about the procedure to be followed to interrupt. It’s a little awkward doing this by phone in the sense that we can’t see people, but if at any time you wish to raise anything please do so.”

...

“...Miss Hartwig, the Court is anxious to ensure that you are afforded procedural fairness and that you are given the opportunity to put before the Court any reasons why you say that the orders that are being sought in the summons should not be made.”

57 At the conclusion of the hearing and before the Court made its further orders (see paragraph [10] above), I had this exchange with Ms Hartwig as to her best contact details and whether or not she understood what was required of her as a consequence of the orders being made (T27:24 – 28:37):

HIS HONOUR: I’m trying to make this as simple for you as I can. If you have concerns about doing things on the computer I’m prepared to allow you to simply file the submissions and evidence by posting them to the Court.

SECOND DEFENDANT: Okay.

HIS HONOUR: Would you prefer to do that? Is that going to be easier for you?

SECOND DEFENDANT: No, but that might cost a bit of money.

HIS HONOUR: So you’re going to send them to me ---

SECOND DEFENDANT: ---year ever[y] dollar I get really counts.

HIS HONOUR: Are you going to be content to do it by email?

SECOND DEFENDANT: I will ask my partner if he would be willing to do that for me.

HIS HONOUR: To do what?

SECOND DEFENDANT: To email you.

HIS HONOUR: All right. That will be how you are going to send it to me.

....

HIS HONOUR: You will need to email your submissions and your evidence both to my associate. That’s the address you have been getting emails from us.

SECOND DEFENDANT: I will email it to the Supreme Court.

HIS HONOUR: You can email it to the Supreme Court and at the same time you will have to email it to Ms Smith, do you understand?

SECOND DEFENDANT: I think so. I’m quite upset...

HIS HONOUR: I just want to make very clear to you, Ms Hartwig ---

SECOND DEFENDANT: ---I will definitely send it to you, your Honour.

HIS HONOUR: I want it very make (sic) clear to you, Ms Hartwig, that you will need to have sent it through to me and to Ms Smith by 12 May...

If you don't send it through by then I will proceed to deliver judgment. Please understand that it is a very important date that you must have sent through your material by 12 May, do you understand?

SECOND DEFENDANT: Yes.

- 58 Shortly after this exchange, Ms Hartwig abruptly disconnected from the Virtual Courtroom.

Correspondence with Ms Hartwig following the hearing

- 59 Immediately following the hearing, my chambers emailed all parties at 12:46pm and set out the orders made in Court (which appear at paragraph [10] above). In accordance with Ms Hartwig's desire for her address for service to continue to be by way of email to Mr Taylor, that correspondence was sent to Mr Taylor's email address. The following exchange in that email was marked specifically for Ms Hartwig's attention:

"...Ms Hartwig – his Honour has asked me to remind you that it is important for you to comply with the orders and provide any submissions and evidence by 12 May 2020. Please also note that when you email this material to the Associate to his Honour, you should at the same time email to Ms Smith. Both the Associate and Ms Smith are copied to this email."

- 60 No reply or acknowledgement of receipt was provided by Ms Hartwig or Mr Taylor.

Final correspondence with Ms Hartwig

- 61 Pursuant to Order 1 of the orders made on 7 April 2020, Ms Hartwig was to serve and file by email to my Associate submissions and any evidence on or before 12 May 2020. No submissions or evidence were received by that date.
- 62 On 13 May 2020 my Associate sent an email to Ms Hartwig, care of Mr Taylor's email address, marked for the attention of both Ms Hartwig and Mr Taylor (copied to all other parties):

"I note that Ms Hartwig's submissions were due yesterday, 12 May 2020. Could you please advise when the submissions will be provided as we will need to give the plaintiff extra time to respond."

63 With no reply received, on 14 May 2020 my Associate sent the following correspondence (copied to all parties):

“Dear Ms Hartwig / Mr Taylor

His Honour has noted that your submissions and any evidence were due to be filed on or before 12 May 2020 and that you have not replied to my earlier email sent on 13 May 2020.

His Honour has asked me to inform you that if you have not served and filed by email to me your submissions and any evidence on or before 19 May 2020 his Honour will dispense the plaintiff from having to file any submissions in reply or any evidence and will deal with the matter on the papers on the basis that you have not, and do not intend to, file and serve any submissions or evidence.”

64 At 8.39am on the morning of Monday, 18 May 2020 the Court received a reply from Mr Taylor, saying that Ms Hartwig and he had separated and that any correspondence for Ms Hartwig would have to be sent via mail and not directed to him.

65 Noting Mr Taylor’s reply, my Associate responded later that morning (copied to all parties), seeking to ascertain alternative means of contacting Ms Hartwig directly:

“Dear Mr Taylor

Thank you for your email. Can you please confirm whether you have passed on my previous emails to Ms hartwig (sic). In any event do you have any contact details for her e.g. phone, email or address.”

66 No contact details were provided by Mr Taylor, who replied at 12:25pm:

“As I have said this has nothing to do with me apart from my tools of trade being held to ransom for 12 months and owed money from unpaid work. Please do not contact my number in any form or I will seek legal advice.”

67 My Associate acknowledged receipt of Mr Taylor’s email. No further correspondence has been received by my chambers from or on behalf of Ms Hartwig.

The parties’ submissions

Plaintiff’s submissions

68 On behalf of the Trustee, Mr Davis submitted there are two bases upon which the Trustee can call for the production or delivery up of the Certificate of Title for the Property: first, by virtue of Ms Hartwig’s property vesting in him under s

58 of the Act; and, second, the fact that on 1 July 2019 the LRS transmitted ownership of the Property, so that the Trustee is now its registered proprietor.

69 Next, it was submitted that the claim for substantive relief set out in the summons for Ms Hartwig to deliver up to the Trustee the Certificate of Title for the Property was sufficient to satisfy the precondition to a grant of ancillary relief under s 138(2) of the RPA.

70 Mr Davis submitted that “[g]iven the history of intransigence and non-response to requests for production”, it was open for the Court to conclude that Ms Hartwig is unlikely to produce the Certificate of Title in the absence of an order. In support of this contention, Mr Davis drew attention to these matters:

- (1) The Property was previously owned by the deceased, with Ms Hartwig the sole beneficiary to the whole of her estate. Ms Hartwig succeeded to and became the registered proprietor of the Property.
- (2) By tracing the history of the Property, it was open to the Court to infer that Ms Hartwig has possession of the Certificate of Title;
- (3) On several occasions the Trustee and/or his solicitor have requested Ms Hartwig directly, and via solicitors then acting on her behalf, to produce the Certificate of Title in respect of the Property;
- (4) Despite those requests, Ms Hartwig has to date not produced the Certificate of Title.

71 If the Court was satisfied that it was not likely that the Certificate of Title would be produced by Ms Hartwig, then it was also open to the Court to grant the ancillary relief sought by the Trustee for the issue of a new Certificate of Title.

72 Finally, Mr Davis submitted that any concern the Court may have about the circulation of duplicate or cancelled certificates of title would be allayed by the Registrar General’s practice upon receipt of orders made under s 138 of the RPA. That practice was described as:

“The usual practice of the Registrar General involves the cancellation of the old Certificate of Title; the adding of a notation to the folio advising of the cancelled edition of the Certificate of Title; and the issuing of a computerised folio of the register. If a prudent person were to then deal with the land, it would be expected a title search would be performed, which would in turn disclose the current edition of the Certificate of Title...”

73 Mr Davis then referred to evidence in these proceedings that the Registrar General has indicated that the practice just referred to, and as described in

Darren v McMahon [2012] NSWSC 761 (per Stevenson J at [4]-[5]), remained the practice of the Registrar General.

Ms Hartwig's submissions

74 Ms Hartwig has not filed or served any formal submissions or evidence in these proceedings. However, as noted in paragraph [39] above, on 27 March 2020 she forwarded to the Court Registry a four page submissions document, together with the pdf attachments entitled "court" and "Bankruptcy Documents". She also appeared for herself during the telephone hearing on 7 April 2020 and stated her objection to the orders sought.

75 With no disrespect intended, the material and oral submissions provided by Ms Hartwig did not really address how she resisted the Trustee's application. She seemed to be relying on a number of issues outside the scope of the current proceedings, such as:

- (1) the validity of the Owners Corporation's claim in respect of unpaid strata levies in relation to the Property;
- (2) the validity of the Court's sequestration orders declaring both her mother's estate and herself bankrupt;
- (3) the validity of the Court's orders appointing the Trustee as trustee of the bankrupt estates of both the deceased and herself (noting in particular the Trustee's location in Hobart, Tasmania);
- (4) Ms Hartwig's intention to lodge a complaint with the Australian Financial Security Authority in relation to the appointment of the Trustee as set out in subparagraph (3) above;
- (5) a claim of monies owing to her partner, Mr Taylor, who she alleges spent approximately \$30,000 renovating the Property for sale before the Trustee took possession, as well as access to his tools of trade allegedly left at the Property.

76 The only reference in her submission document to the relief sort in these proceedings appeared at the bottom of the third page:

"I am currently in the Equity Court of the Supreme Court of NSW for the handing over of the documents and title of the property and are confused as to how [the Trustee] has already put [the Property] in his name and has the title, whilst still before the Courts."

Consideration

77 The Court is satisfied orders requiring delivery up and then, if necessary, a replacement Certificate of Title for the Property to be issued and delivered to the Trustee should be made. The reasons for this are:

- (1) As Ms Hartwig's trustee in bankruptcy and the current registered proprietor of the Property, the Trustee is entitled to possession of the Certificate of Title to the Property;
- (2) The Court's jurisdiction to make ancillary orders under s 138(3) of the Real Property Act has been enlivened because the proceedings are proceedings for the possession or production of a certificate of title;
- (3) The Court finds Ms Hartwig has the current Certificate of Title for the Property in her possession. She admitted this in terms on several occasions during the telephone hearing (see, for example T2:37; T4:9; T8:36);
- (4) Based on her pattern of refusal and objection to date, and now complete disengagement, the Court is of the opinion for the purposes of s 138(2) of the RPA that the Certificate of Title for the Property has not been, and is not likely to be, produced by Ms Hartwig for the purposes of the registration of a dealing affecting the Property, that dealing including any transfer which the Trustee will have to execute to sell the Property;
- (5) The Court is satisfied that any concern about the current Certificate of Title being in circulation is not a sufficient discretionary reason against making the orders sought. Any such concern has been allayed by the evidence, which the Court accepts, that the Registrar General will follow the practice set out in paragraph [72] above.

Conclusion

78 The orders of the Court are :

- (1) On or before 1 June 2020, the Second Defendant is to deliver up into the possession of the Plaintiff the Certificate of Title for Lot X in Strata Plan XXXXX, being X/XXX Street, Dubbo New South Wales 2830.
- (2) If the Second Defendant does not comply with Order 1, then upon the First Defendant receiving a statutory declaration made by the Plaintiff to that effect, the First Defendant is forthwith to issue to the Plaintiff a replacement Certificate of Title for Lot X in Strata Plan XXXXX, being X/XXX Street, Dubbo New South Wales 2830.
- (3) Direct these orders be taken out forthwith.

79 The parties will be given an opportunity to make submissions as to costs.

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