Neutral Citation Number: [2020] EWHC 933 (Ch)

Case No: CH-2019-000098
CH-2019-000258

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
On appeal from the Orders of Deputy Master Rhys made on 21st March 2019 and Master Clark made on 13th September 2019 in action PT-2018-000426

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 29/04/2020

Before :

MR JUSTICE BIRSS

- -

Between :
The Mayor and Burgesses of the London Borough of Brent
Claimant/Respondent

and

(1) Leonard Johnson (claiming to be a trustee of 'Harlesden Peoples Community Council')
(2) Stonebridge Community Trust (HPCC) Limited
Defendants/Appellants

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Matthew Smith (instructed by **Bevan Brittan**) for the **Respondent**
Stephen Cottle (instructed by **Hogan Lovells**) for the **Appellants**

Hearing date: 24th March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30pm on 29 April 2020.

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MR JUSTICE BIRSS

Mr Justice Birss :

1. This is an appeal from two orders of Masters in the Chancery Division. The first, of Deputy Master Rhys, is dated 21st March 2019. The second, of Master Clark, is dated 13th September 2019. Although there are two orders, the appeal raises essentially a single issue. The issue is about the need for the Attorney General to be a party to proceedings in which certain kinds of question arise about the terms on which an owner holds property. The property is a former bus depot in Stonebridge, Harlesden in North London. The owner is the London Borough of Brent. The property was bought by Brent in 1982. The funding did not all come from Brent's own resources. A grass roots local organisation called Harlesden Peoples Community Council (HPCC) contends it was involved in raising some of the funds, from government grants. The first defendant/appellant, Mr Johnson, was closely involved with HPCC although Brent disputes whether he was a trustee. The second defendant/appellant company was set up by HPCC and now claims to act to represent the local community. Mr Johnson is a director of the second defendant/appellant.

2. Brent wishes to sell the property, contending it is free to do so. The appellants contend it is not free to do that because it holds the property on terms, essentially that the property is held for the benefit of the local community. After a dispute in the Land Registry, Brent started a claim for a declaration against the appellants that it, Brent, was the sole legal and beneficial owner of the property, together with an order restraining the appellants from entering restrictions on the register. The appellants defended the claim, advancing four bases on which, it was contended, Brent was not the beneficial owner and not free to sell the property. They were promissory estoppel, constructive trust, charitable trust and public law arguments. Brent applied to strike the defences out as unarguable. That came before Deputy Master Rhys and his decision led to the order of 21st March 2019. He rejected Brent's attempts to strike out as unarguable the appellants' arguments based on promissory estoppel, constructive trust and charitable trust. He did decide that the public law arguments were unarguable. As a result of the Deputy Master's decision there will be a trial in July 2020 of the promissory estoppel and constructive trust arguments, while the public law arguments have been struck out. Neither side appealed those aspects of the Deputy Master's decision.

3. The problem is about the arguable charitable trust point. Counsel for Brent had put to the Deputy Master that an argument adverse to the owner of property that they held that property on a charitable trust was one which could only be advanced by the Attorney General (AG) and that the appellants had no standing to advance such an argument. The Deputy Master considered an authority cited by the appellants (***Hauxwell v Barton-on-Humber*** [1974] Ch 432) and held at paragraph 59:

> "59. In my view, it would be wrong if the charity issue could not proceed or be properly litigated due to the Defendants' lack of standing. I shall therefore direct the Defendants to serve notice of the proceedings, together with the pleadings, the documents before me and this judgment on the Attorney-General. It will then be a matter for the Attorney to decide if he wishes to take up the cudgels on behalf of the local charity. This point can be dealt with in more detail when judgment is handed down."

4. The Deputy Master's order in paragraph 1 struck out the paragraphs of the Particulars of Claim based on the public law point but otherwise dismissed the strike out application. In paragraph 3 the order required Brent to serve the AG with notice of the proceedings and various documents such as a copy of his judgment and a copy of the core bundle. The only other provisions in the order were directions for the future conduct of the action. The Deputy Master refused permission to appeal for Brent in relation to paragraph 1 and refused the appellants' permission to appeal against his costs order.

5. Brent's solicitors wrote to the AG as directed on 28th March 2019. There were telephone discussions with officials in the Government Legal Department and further letters were written, in the end by both parties. Consistent with Brent's case, the letters to the AG from Brent's solicitors contended that the charitable trust point was unarguable and generally sought to discourage the AG from joining the proceedings. The letters from the appellants' solicitors (Hogan Lovells, acting pro bono) argued the merits of the appellant's cause, invited the AG to join but also suggested that the case could continue even if the AG did not join in the proceedings.

6. On 17th July 2019 the AG responded. The sole communication from the AG about the issue of joinder is an email from Mr Edmonds of the Government Legal Department on the AG's behalf, as follows:

> "Dear all,
>
> I write to confirm that as presently instructed and based on the materials disclosed to date, the Attorney General will not be applying to join these proceedings.
>
> Yours faithfully, etc."

7. Matters returned to court, now before Master Clark. Brent submitted that although the order made by Deputy Master Rhys did not say so, the inevitable and automatic consequence of the combination of the decision of Deputy Master Rhys and the decision of the AG to decline to join in the proceedings was that the charitable trust argument had to be struck out. The appellants argued that was not so and that the court had a discretion applying the overriding objective to allow the case to continue including that argument.

8. Master Clark examined Deputy Master Rhys's decision and the order made as well as the transcript of the discussion when the judgment was handed down. The Master decided that Deputy Master Rhys had decided that the appellants did not have standing to maintain the existence of the charitable trust and that only the AG did have that standing; and held that the Deputy Master's order did not fully reflect the consequences of his decision. Those consequences were that relevant paragraphs of the defence which raise the charitable trust argument must be struck out for lack of standing because the AG had declined to join the proceedings. The Master held that it was not open to the defendants to reopen the issue of standing before her. In any event the Master re-examined the cases, including ***Hauxwell*** as well as ***Re Belling*** [1967] Ch 425, and concluded that the appellants had no standing to assert the existence of the charitable trust.

9. The Master therefore made an order striking out the paragraphs in which the charitable trust arguments are made.

10. The appellants sought permission to appeal from the order of Master Clark and separately from the order of Deputy Master Rhys, and contended they be dealt with together. I gave permission in relation both on the AG issue and directed they be heard together. The appeal was heard before me by video conference. I had refused the application for permission to appeal Deputy Master Rhys's costs order on paper and directed that a renewed application for oral reconsideration would be dealt with together with the main appeal. Having heard oral submissions on it at the hearing of the main appeal I refused it again orally. It had no real prospect of success.

11. The respondent contends that the AG is the only person with standing to advance an argument like this one adverse to the holder of legal title to property and so since the AG has declined to join the proceedings, the argument must be struck out.

12. The respondent contends this principle is well established by authority (***Re Belling*** and ***Hauxwell***) and is based on sound policy reasons. The first policy reason is the general rule that only those claiming a beneficial interest in the property can assert the existence of a trust. Since a charitable trust is a trust for a purpose and has no individually identifiable beneficiaries, it falls to the Crown as *parens patriae*, acting via the AG, to represent the beneficial interest under such a trust. The second is to prevent proliferation of proceedings on the same issue. If the law was otherwise then the same argument could be rerun successively. This risk is illustrated by the present case because after the strike out a further local resident has sought to join the case and re-argue the struck out issue. Whereas once the point has been decided with the AG as a party representing the charity, as the respondent put it "the abstract concept of charity is bound by the result". The respondent accepts there are exceptions when the AG need not be a party: such as a claim by an annuitant under the trust property, a claim by a donor who intended to create a trust but may have failed, and other cases such as ***Derby Teaching Hospitals v Derby City Council*** [2019] EWHC 3439 (Ch) and tax cases, but argues that none of these assist in the present case.

13. The appellants argue that while the AG does have standing to make such an argument, in effect representing the beneficial interest, nevertheless the court has a discretion to allow such an argument to be maintained by individual litigants with a sufficient interest in the outcome even if the AG is not a party. The appellants argue that when examined, the basis for the proposition advanced by the respondent based on the cases is not sound, and that even if the cases such as ***Hauxwell*** did represent the law at the time they were decided, other recent developments in the law relating to charities and relating to standing in claims for declaratory relief mean that such a strict approach should no longer be taken.

14. The appellants argue that the exceptions admitted by the respondent cannot be justified on a principled basis other than by demonstrating that the need for the AG as a party is not absolute. ***Derby TH v Derby CC*** shows how the question whether a body is a charity comes up in many different circumstances and the court can decide whether a trust is charitable without the AG. The decision of Knox J in ***Mills v Winchester Diocesan Board*** [1989] 1 Ch 428 explains that in ***Goodman v Saltash*** (1889) 7 App Cas 633 the local inhabitants successfully claimed a charitable trust for their benefit as inhabitants of the locality without joining the AG.

15. Before I examine the law, I will make no secret of the fact that it seems to me that something has gone wrong in these proceedings. First, while I see the force in Master Clark's analysis that Deputy Master Rhys's order does not reflect the consequences of his decision as she analysed it, it is clear that the Deputy Master did not accidentally omit to make an order automatically striking out the charity arguments if the AG declined to join the proceedings. As I read the first sentence of paragraph 59 of the Deputy Master's judgment, he thought the charity arguments should be maintained and was concerned that that should not be stymied by the absence of the AG at that stage. However he also recognised that ultimately what the AG did was a matter for the AG. At the handing down of the Deputy Master's decision, the transcript of oral submissions does suggest that the Deputy Master seemed to agree that the claim might have to be struck out but he still did not make an order to that effect. It is not clear to me that the Deputy Master did, rightly or wrongly, actually decide that the proceedings had to be struck out if the AG did not join in.

16. In any event the result of this was that when the matter was put to the AG in correspondence, it was not made clear to the AG what the consequences of a decision not to join the proceedings would be. At that stage there was no court order in place which provided that the argument would be struck out if the AG did not join, and indeed the appellants' own letter is written on the basis that the charitable argument can be decided with or without the AG.

17. The email from the AG's office is unspecific. I am not surprised given the way the matter was presented, but in the circumstances as they then developed and given the AG's role in relation to charitable trusts, I would be much happier if it was clear whether the AG had decided not to join the proceedings because the view was taken that the AG was content for the charity point to be decided without the AG's involvement, or whether the AG was deciding to act in such a way as to prevent the charity point from being argued in the exercise of the AG's role in representing the beneficial interest under any charitable trust. We do not know.

18. The respondent contends this is a problem of the appellants' making and also points out that the appellants had said they would try to engage with the AG but since nothing has been forthcoming, one can assume the worst for the appellants. I do not accept that is a fair way of looking at it when the position presented to the AG was as confused as it was in this case.

19. I turn to consider the two key cases, ***Re Belling***, ***Hauxwell***.

20. ***Re Belling*** was an application for an interim injunction in a dispute between a local authority, which contended that a codicil to a will created a charitable trust, and the executors of that will, who contended it did not. The testator died in 1965 and the dispute about the codicil then arose between the council and the executors. The council contended the codicil required a property called Owls Hall Farm to be used to set up a technical college in the locality. The executors wrote to the Treasury Solicitor, who replied stating that the AG considered that the codicil did not have testamentary effect and so did not propose to claim that the document constituted a charitable gift. The executors put the property up for sale by auction and exchanged contracts for the sale of the property. The council issued a writ claiming a declaration that the property was held on charitable trusts and brought an interim application for an injunction restraining sale.

21. The application came before Pennycuick J. He was not prepared to find that the point on codicil was unarguable. Nevertheless he dismissed the application for an injunction, rejecting all three grounds on which the council brought its case. One ground for the council's case was related to the Education Act 1944 and is not relevant, but the other two grounds are relevant. They were about standing to bring the claim and a point on the Charities Act. It is convenient to mention the Charities Act point first.

22. The council submitted that the proceedings were "charity proceedings" within section 28(8) of the Charities Act 1960. The significance of that was that if they were, then there would have been a mechanism (s28(5)) giving the court power to give permission for the proceedings to be continued despite the fact (as had happened) that the relevant authority had refused to give the council authorisation to bring them. At that time the relevant authority was the Secretary of State, while today the relevant authority under the modern version of the Charities Act is the Charity Commission. Pennycuick J decided that the proceedings were not charity proceedings and so rejected this ground.

23. The point on standing was that the executors contended that only the AG had standing to bring a claim like this one and so the council had no standing to sue. The council contended that they did have standing, but Pennycuick J decided that they did not. His judgment is at p432D-433D:

> "The fact remains that the testator executed the document in testamentary form and I am not prepared to hold that it is so manifestly ineffective to create a charitable trust that the executors could properly deal with the Owls Hall property without regard to the document if a request to seek a decision of the court upon it were made by someone having a locus standi in the matter. Indeed, Mr. Brightman, for the executors, accepts that they would have been bound to comply with such a request if made by the Attorney-General.
>
> The real question on the present motion is, it seems to me, whether the council has such a locus standi. When a testator creates, or purports to create, a new charitable trust, in contradistinction to making a gift to an existing charity, he does not seek to confer a beneficial interest on any person. He seeks to dedicate part of his estate to a purpose and, in legal theory, the Sovereign, as *parens patriae*, has the right to compel the testator's personal representatives to set aside the assets directed or required to meet that purpose. In this connection the Attorney-General acts on behalf of the Sovereign and in the ordinary course the Attorney-General takes whatever steps may be necessary, including the institution or defence of proceedings by originating summons for the construction of a will alleged to create a charitable trust. Upon this point I refer to Strickland v. Weldon, 10 where Pearson J. said: 'The Attorney-General is the only person who can really represent a charity and sue on its behalf.' For a concise statement of principle, I refer to Halsbury's Laws of England, 3rd ed., Vol. 4 (1953), at p. 446, where it says:

> 'As a rule, the Attorney-General is a necessary party to all actions relating to charities. It is the duty of the Queen, as *parens patriae*, to protect property devoted to charitable uses, and that duty is executed by the Attorney-General as the officer who represents the Crown for all forensic purposes. He represents the beneficial interest, in other words the objects, of the charity.'
>
> No case has been cited to me in which anyone, other than the Attorney-General, has been admitted to institute proceedings of this type and it is difficult to see how, apart from some statutory provision, anyone other than the Attorney-General could so assume the mantle of the Sovereign. The position is, of course, different where a party claims some beneficial interest for himself, for example, an annuity out of property otherwise devoted to charity."

24. Before me counsel for the appellants identified what he called the "Belling concession" made by Mr Brightman QC, who was arguing the case for the executors, in the first paragraph of the quotation from Pennycuick J's judgment. I will come back to that.

25. 7 years later ***Hauxwell*** came before Brightman J, who was now on the bench. The dispute was between local residents and a local authority. The local authority had conveyed a strip of the land to the county council for use in a road widening scheme. The residents claimed that a park had been dedicated for charitable purposes when it was conveyed to the local authority and so it could not be used that way. The residents issued proceedings for a declaration that the property was held on charitable trust and an injunction preventing its use as a highway by either the local or county council. The residents obtained an *ex parte* injunction against the council. The local authority applied to strike out the proceedings. On the same day the application to strike out was issued, the residents added the AG as a defendant in the proceedings.

26. Brightman J reached the prima facie conclusion that the property remained subject to a charitable trust and so held that he would grant the residents an interim injunction if they had *locus standi* in the action (p446 G-H). He decided there were three questions to be answered about standing (p449E-F):

> " … First, whether the proceedings are "charity proceedings" within the meaning of section 28, so that I have jurisdiction to give leave for the proceedings to be brought. If not, the second question is whether the plaintiffs can none the less act as plaintiffs in this action because the charity is a local charity and they are inhabitants of the locality. If that question is also answered in the negative, the third question is whether these proceedings should be struck out on the ground that the plaintiffs are incompetent to bring them."

27. On the first question, Brightman J followed ***Re Belling*** and held that these were not charity proceedings and so leave to continue them under the Charities Act was not available.

28. On the second question, Brightman J reviewed the authorities and also rejected the residents' case, holding as follows:

> "I am able to discern nothing in the cases which have been cited to me to indicate that anyone save the Attorney-General is entitled to maintain an action against supposed trustees to establish the existence of a charitable trust, or that anyone except the Attorney-General or the trustees of the charity can bring proceedings to recover charity property from a third person, or that persons are capable of maintaining such a suit on the ground that the charity is a local one and that they are persons of that locality who are thus potential recipients of benefits under the trust. The only case, as it seems to me, where the inhabitants of a locality can bring proceedings in respect of a local charity is where the proceedings are " charity proceedings " within the meaning of section 28. Such proceedings do not include proceedings which have as one of their objects the construction of a conveyance for the purpose of determining whether the conveyance was effective to create a charitable trust." (p450F-H)

29. In reaching the conclusion Brightman J was, amongst other things, specifically rejecting a submission by the residents that they could sue in their own names with the AG as defendant (p449H).

30. However despite answering the first two questions against the residents, Brightman J held that it did not follow the proceedings should be struck out. Before Brightman J, the AG was represented, as well the residents and the local authorities. Counsel for the AG (Andrew Morritt) had submitted that the property was subject to a charitable trust, and had submitted that the residents had no standing but had also submitted that if the court accepted those two submissions, which is in effect what had happened, then he would make an application for the AG to be substituted as a claimant. Brightman J decided to hear that application instead of striking out the proceedings. The judge then heard the application, dismissed a submission by the local authorities that it was made too late and so dismissed the strike out and added the AG as an additional claimant.

31. In my judgment these two cases establish at least the following propositions relevant to the present case. The first is that it is not fruitful to look at the earlier decisions cited by the appellants. The two cases are clear in their own terms and make sense. Even if earlier authority did not require the judges to do what was done in them, nevertheless they did so. Nor am I persuaded that anything useful can be derived from arguments about the concession in ***Re Belling***. If necessary to do so, I would hold it was rightly made.

32. Second, these are not charity proceedings within the Charities Act. They simply do not fall within that Act. I will also say at this stage that nothing in the changes between the Act in its form in ***Re Belling*** up to the modern form has made any difference to that conclusion. That disposes of one aspect of the appellants' argument. It shows that no analogy should be drawn between this case and the circumstances specified by statute in the Charities Act when the court could give permission to a party in the same position

as the appellants to continue charity proceedings despite the stance of the Charity Commission.

33. The third proposition is that the AG does indeed represent the beneficial interest in a charitable trust, in other words the objects of the charity. The proposition means that the AG is entitled to join a suitable case in the position of a claimant advancing a claim that a charitable trust exists (see ***Hauxwell***). It also means that if the AG decides that in his or her view the property is not held on charitable trusts then that decision is, in effect, binding. I put it that way because it explains what happened in ***Re Belling***. The problem in ***Re Belling*** was not really about the absence of the AG as such, the problem was that if the AG had been the claimant, then the claim would have been dropped. To get what it wanted, the council claiming the declaration that the charitable trust existed in ***Re Belling*** needed to have the ability to maintain that argument despite the AG's contrary view. The result was that they could not do so.

34. However a striking procedural difference between the present case and both ***Re Belling*** and ***Hauxwell*** is that by the time the matter fell to be decided in those two cases, the court knew what the AG's stance was on the point at issue, i.e. whether the instrument did or did not create a charitable trust. In the present case the AG's position was not known. It was certainly not known before the Deputy Master. By the time the case came before Master Clark, the email on the AG's behalf had been sent but it cannot be read as an expression of the AG's stance on that question, and neither side suggested that it was.

35. The question which arose in the present case before the Deputy Master was what to do when the AG's position was unknown. That did not arise in either ***Re Belling*** or in ***Hauxwell***. In my judgment the answer ought to be simple enough. What should have happened here is that the AG ought to have been asked directly what his (or her) view was about whether the property was held under a charitable trust. If the AG had wished to "take up the cudgels" as the Deputy Master put it then the AG could have joined the proceedings as a claimant and done so (***Hauxwell***). If the AG took the view that the property was not held under a charitable trust then no doubt the AG would not wish to join the proceedings as a claimant and the question would have arisen whether the proceedings must fail for lack of standing (following ***Re Belling***) or whether ***Re Belling*** could be distinguished in some way.

36. Making an order giving the AG notice of the proceedings no doubt seemed to be a simple way to achieve this end, but as events proved it was not, and it has not worked.

37. If the appellants are right on their broadest case, that the AG is simply not a necessary party at all, then no problem arises. However in my judgment the appellants' broad point is not right. The appellants have provided no example of a case like this one being heard without the AG being a party. By a case like this one I mean a claim brought by persons with some interest (albeit not a proprietary one) in the subject matter and made adverse to the putative trustee, that the property they hold is held on charitable trust. I am not persuaded that Knox J's judgment in ***Mills v Winchester Diocesan Board*** can be used as the appellants seek to do, as a way of showing that local inhabitants succeeded without the AG in ***Goodman v Saltash***. I do note that in ***Mills v Winchester Diocesan Board*** itself the AG had been joined as a defendant rather than a claimant (430 G-H).

38. The second policy reason advanced by the respondent, the avoidance of multiplicity of proceedings, provides a sound practical reason why the AG should be a party when the court decides a case like this one, at least one in which there may be a risk of multiple proceedings, as here. However that principle would be satisfied by the AG being at least a defendant. The AG would be bound by the outcome and, if a second claim was brought, would be entitled to be joined and thereby bring it to an end.

39. One can imagine that the AG may sometimes wish to take a neutral stance on the question in a given case whether a charitable trust exists or not. It may be what the AG intended to do in the present case. Being added as a defendant would allow the AG to maintain that position, allow the party interested in doing so to argue the point, ensure the outcome is binding, while not forcing the AG to participate to any greater extent than he or she wished to, and thereby to save costs.

40. As for the respondent's case, the exceptions identified demonstrate that arguments about whether an instrument creates a charitable trust can be decided upon without the AG being a party. I am not convinced ***Derby TH v Derby CC*** is a good example to illustrate the point since it was a complex case under the Local Government Finance Act 1988, but the existence of the exceptions, such as cases involving HMRC in which the trustees contend they hold property on charitable trusts in order to satisfy the revenue, was accepted. In ***Re Belling*** itself Pennycuick J held that those with a relevant interest in the property which was contingent on the existence or non-existence of a charitable trust (such as an interest in an annuity) could bring a claim in which its existence or otherwise would be determined.

41. The respondent submits, correctly, that these are not cases like this one brought by "strangers" and contrary to the position of the trustee. So they are not but that is not a distinction which makes an obviously relevant difference. The multiplicity of proceedings point could apply just as much in those cases too. Decisions in any of those cases, made absent the AG, would not be binding on the representative of the beneficial interest and could be relitigated at least by the AG. No doubt this is highly unlikely in practice but that is not the point. However although I am not satisfied by the logic of them, I do not believe this case can be said to fall into one of the exceptions.

42. In my judgment if the charity point is not struck out then the AG is a necessary party, but that is different from saying that the case should be struck out in the present circumstances. It would not be right to strike out this case without knowing what the AG's stance is. If the AG's view is against the existence of the charitable trust, then the appellants will find themselves in the same position as the council was in ***Re Belling***. No convincing reason has been advanced before me now why the outcome should be any different. In other words if the AG did take that stance then I do not see how ***Re Belling*** could be distinguished on the facts of this case. As the representative of the beneficial interest, if the AG takes the view there is no charitable trust then that is that.

43. However if the reason for the email on the AG's behalf was because the AG intended to take a neutral stance, then the way to achieve that is for the AG to be joined as a defendant. That would ensure the result was binding. If it were not for the point about the AG, I believe the appellants do have a sufficient interest in the argument that Brent holds the property on a charitable trust such that a declaration to that effect would serve

a useful purpose (***Rolls Royce v Unite the Union*** [2010] 1 WLR 318) and so it should go to trial.

44. For these reasons I am satisfied I should allow the appeal. The question is what order to make instead. The trial is due in July. I will hear the parties as to the proper order to make but I will say that I am minded to make an order joining the AG as a defendant. If the AG wishes to maintain a neutral stance on the charitable trust argument then nothing further needs to happen. If the AG's view is against the existence of the charitable trust, then she can say so and the point will then need to be struck out.