



Case No: PT-2021-000360

Neutral Citation Number: [2022] EWHC 2304 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 31 August 2022

BEFORE:
MR JUSTICE LEECH

BETWEEN:

(1) HOLLIE LOUISE TOTTON
(2) DANIEL ROBERT WASHER
(as beneficiaries of the Estate of Hazel Margaret Totton, Deceased)
Applicants

- and -

MARK DAVID TOTTON
(as beneficiary and executor of the Estate of Hazel Margaret Totton, Deceased)
Respondent

Digital Transcription by Epiq Europe Ltd,
Unit 1 Blenheim Court, Beaufort Business Park, Bristol, BS32 4NE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

MS VICTORIA ADAMS appeared on behalf of the Applicants
The Respondent did not attend and was not represented

APPROVED JUDGMENT

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

MR JUSTICE LEECH:

Epiq Europe Ltd, Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
www.epiqglobal.com/en-gb/

Introduction

1. By application notice dated 5 July 2022 (the "**Committal Application**") the Claimants, Hollie Louise Totton and Daniel Robert Washer, applied for an order for committal for contempt of the Defendant, Mark David Totton. They allege in the Application Notice that the Defendant has breached an order dated 10 March 2022 as amended by Meade J under the slip-rule on 29 April 2022 (the "**Order**") in two respects:
 - (1) In breach of paragraph 7 of the order, the Defendant failed to provide any information to Pinney Talfourd Solicitors LLP ("**Pinney Talfourd**"), the Claimants' solicitors, setting out the assets and estate of the late Hazel Margaret Totton (the "**Deceased**") within one week of service of the order upon him, namely by 7 May 2022 or at all.
 - (2) In breach of paragraph 9 of the Order, the Defendant failed to swear and serve on Pinney Talfourd an affidavit setting out the information required in paragraph 7 of the Order and has not provided either a full inventory of the estate of the deceased or an up to date account of the administration of the estate or an account in full of his dealings with the estate within three weeks of service of the order upon him, namely by 21 May 2022 or at all.

Background

2. The background to the application is as follows and it is supported by the affidavit of Ms Catherine Loadman, a partner in Pinney Talfourd, sworn on 30 June 2022 and witness statements made by the Claimants themselves, together with witness statements of service to which I will refer below.
3. The Claimants are the grandchildren of the Deceased and the Defendant is their uncle and the sole executor and trustee of the estate. The Deceased died on 25 July 2019. By her will dated 30 January 2017 she left three legacies of £10,000 each and after payment of those legacies, the estate was to be divided with 50 per cent passing to the Defendant and 50 per cent passing to the Claimants upon attaining the age of 21. Hollie Totton is now 25 and Daniel Washer is now 19 and they wish to terminate the trust.

4. On 27 November 2019 a grant of probate was issued to the Defendant stating that the gross value of the estate was £576,326 and the net value £555,310. Two of the three legacies totalling £20,000 were paid on 10 July 2020. The third legacy in favour of the Deceased's son, Paul Nigel Totton, who died in September 2021 has not been paid. It is Ms Loadman's evidence that the property which formed the bulk of the estate was sold over a year ago. I am told that the principal asset in the estate consisted of the Deceased's home and the register of the title for that property confirms that it was sold for £425,000 on 7 April 2020.

Procedural History

5. By letter dated 31 July 2020 the first Claimant's former solicitors, Harvey Copping and Harrison, wrote to the Defendant asking for information and suggesting that new trustees should be appointed to hold the Second Claimant's assets until he had reached the age of 25. By letters dated 25 November 2020 and 3 February 2021, Hill and Abbott Solicitors, who were acting for both Claimants by this time, wrote to the Defendant again asking him to administer and distribute the estate. No reply was received to any of these letters.
6. Ms Victoria Adams, who appears for the Claimants at the hearing of this application, also drew my attention to the witness statement of the first claimant in which she said this at paragraph 12:

"I last spoke to the respondent on 2 October 2020 on the telephone. On that occasion I asked as to when I might receive my share of the residuary estate and was informed by the respondent that it would be transferred 'within days'. Despite this assurance, no payment was received. I have since sent text messages to the respondent on three occasions, 21 October 2020, 27 October 2020 and 4 November 2020, all of which received no response."

7. I turn next to the claim itself. By Claim Form dated 12 April 2021 (amended on 26 April 2022 to add a claim for interest, the Claimants applied under CPR Part 64.2 for a full inventory of the Deceased's estate, its distribution for the trust to be brought to an end or, alternatively, for the Defendant to be removed and the First

Claimant to be appointed as the new trustee and for an injunction to restrain the defendant from distributing or dissipating the estate pending resolution of the dispute.

8. On 10 March 2022 Meade J granted a freezing injunction to the Claimants to restrain the disposal of the Deceased's estate. It is Ms Loadman's evidence that it was made at a hearing on notice to the Defendant and that a further hearing was listed for the first available open date after 28 April 2022. The Order was endorsed with a prominent penal notice and paragraphs 7 to 9 were in the following form:

"7. Unless paragraph 8 applies, the respondent must, within one week of service of this order and to the best of his ability, inform the applicant's solicitors of all the assets from the estate of the late Hazel Margaret Totton, giving the value, location and details of all such assets.

8. If the provision of any of this information is likely to incriminate the respondent, he may be entitled to refuse to provide it, but it is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the respondent liable to be imprisoned, fined or to have his assets seized.

9. Within three weeks after being served with this order, the respondent must swear and serve on the applicants' solicitors, an affidavit setting out the above information at paragraph 7 in addition to a full inventory of the estate of Hazel Margaret Totton, an up to date account of the administration of the estate and an account in full of the respondent's dealings with the estate."

9. On 29 April 2022 the Order was amended under the slip-rule and on 30 April it was served personally by Mr Mark Da Costa, a process server. On the same day Mr Da Costa made a witness statement confirming that he served the order on the Defendant personally and the Defendant was told that he would need to read through the documents served on him and seek legal advice. Ms Loadman has confirmed in her affidavit that Pinney Talfourd did not receive any communication from the Defendant or any solicitors instructed by him by the date that she had made her affidavit. She also wrote to a firm of solicitors instructed by the Defendant in divorce proceedings and they confirmed that they were not instructed by him in respect of these proceedings.

10. On 5 July 2022 the Committal Application was issued, supported by Ms Loadman's affidavit. By Application Notice dated 26 July 2022 the Claimants applied for the Committal Application to be expedited (the "**Expedition Application**").
11. On 10 August 2022 Mr Da Costa made a second witness statement confirming that he had attempted to serve both application notices together with Ms Loadman's affidavit personally on 8 and 10 August and that on 10 August 2022 he posted a copy of the Application Notice and a covering letter through the letterbox of the Defendant's last known address and at which the Order had been served on him personally.
12. In paragraph 3 of that witness statement Mr Da Costa stated as follows in relation to this visit on 10 August:

"I returned to the address again on Wednesday 10 August 2022 at 10.30 hours and, despite there being windows open at the property and a car on the driveway, I received no response from anyone at the property."
13. On 23 August Edwin Johnson J made an order for expedition. In paragraphs 5 and 6 he ordered that valid service of both the Committal application and the Expedition Application were deemed to have been effected on 10 August 2022 and he dispensed with the requirement for personal service in both cases. On 25 August 2022 the court issued a Notice of Hearing stating that the hearing of the committal application would take place 10.30 am on 31 August 2022. That is today.
14. Ms Adams sent to my clerk, and I read, a soft copy of an unsigned witness statement of a second process server, Mr Jake Da Costa, confirming that he served the Notice of Hearing by posting it through the letterbox of the Defendant's address on 26 August 2022. The statement was unsigned but Ms Adams informed me that it had been approved but that Mr Da Costa but that had not had time to sign it. She also told me on instructions that Ms Loadman had posted the Notice of Hearing with the order for expedition, the hearing bundle and the statement of costs to the Defendant on Thursday last week by first class post.
15. Ms Adams very properly informed me that in the covering letter Ms Loadman had said that the hearing would be heard at the Rolls Building although this hearing is taking place in the Royal Courts of Justice. I therefore adjourned for half an hour to enable

searches to be carried out in order to establish whether the Defendant had gone to the Rolls Building by mistake. The Defendant was not in the Rolls Building and the first issue which I have to determine is whether I should proceed in his absence.

The Defendant's Absence

16. The notes to CPR Part 81.8.3 identify a number of authorities in which the court has considered the circumstances in which it should proceed with a committal application in the absence of the defendant. I recognise that these proceedings are quasi-criminal in nature but applying those principles I am satisfied that it is appropriate to proceed in the Defendant's absence for the following reasons.

- (1) The first question is whether the Defendant has been served with the relevant documents including the notice of the hearing. I am satisfied that there is clear evidence that both the Committal Application and the Expedition Application were served at his last known address and that this was the address at which he was personally served with the order. Moreover, this evidence satisfied Edwin Johnson J to dispense with personal service of both applications. I am satisfied, therefore, that both applications have come to his attention. I am also satisfied that the Notice of Hearing has properly come to his attention too. In reaching that conclusion I rely on the second statement dated 10 August of Mr Da Costa, the process server, from which I draw the inference that the Defendant was present at the property when he was attempting to serve the two applications but was unwilling to open the door to him or to accept personal service.
- (2) I must also consider whether the Defendant has had sufficient notice to enable him to prepare for the hearing. The original order was made on 10 March and amended under the slip rule on 29 April 2022 and served on 30 April 2022. I am satisfied that the Defendant has had sufficient time to comply with the order or to explain his failure to do so to this court.
- (3) I must consider whether any reason has been advanced for his non-appearance. He has put forward no explanation and indeed his response to the correspondence, the claim, both applications and this hearing has been one of complete non-engagement with the court or any process that is served on him.

- (4) I must also consider whether, by reference to its nature and circumstances his behaviour is such that he has waived any right to be present. It seems to me that any reasonable person in the defendant's position who was prepared to take advice would realise that if they failed to participate in this hearing, the court would be prepared to hear the application in his absence.
- (5) I must also consider whether an adjournment would be likely to secure the Defendant's attendance or facilitate his representation. There is nothing to suggest that it would. The Defendant has instructed solicitors in relation to his divorce proceedings and he has had ample opportunity to arrange representation in these proceedings. I consider that any adjournment would be highly unlikely to secure his attendance.
- (6) I must consider next the extent of the disadvantage to him of not being able to present his account of events. As I have said, he has had since 30 April 2022 to comply with the Order or to explain why he has not done so. He has also had an ample opportunity to explain any difficulties which he might have encountered in administering the estate and in correspondence since 2020.
- (7) I must also consider whether undue prejudice would be caused to the applicant by any delay. In my judgment, the Claimants have already suffered significant prejudice because of the Defendant's failure as executor to administer the estate and distribute the assets which he has realised and deal with it. It appears that the principal asset of the estate was sold well over two years ago.
- (8) I must also consider whether undue prejudice would be caused to the forensic process if the application were to proceed in the defendant's absence. I can see no reason to believe that it would affect the forensic process in any way.
- (9) Finally, I must consider the overriding objective of dealing with cases justly, expeditiously and fairly. In my judgment, in the present case it is clearly fair to proceed in the defendant's absence. His conduct to date shows that he has deliberately decided not to engage with the Claimants, their solicitors and the court process.

17. In my judgment, therefore, it is appropriate to hear this matter in the defendant's absence. I therefore turn to the two specific grounds of contempt alleged by the claimants in the committal application.

Liability

18. The first ground on which the Claimants apply to commit the Defendant is that he has failed to comply with paragraph 7 of the Order within seven days after service upon him, and the second ground is that he has failed to comply with paragraph 9 of the order within 21 days after service upon him.
19. The core principles are well known. The main elements of civil contempt were explained by Christopher Clarke J in *Masri v Consolidated Contractors International Co SAL* [2011] EWHC 1024 (Comm) at [150] and cited by Adam Johnson most recently in *Rowland v Stanford* [2022] EWHC 1436 (Ch) at [16]:

"In order to establish that someone is in contempt it is necessary to show that (i) that he knew of the terms of the order; (ii) that he acted (or failed to act) in a manner which involved a breach of the order; and (iii) that he knew of the facts which made his conduct a breach: *Marketmaker Technology (Beijing) Co Ltd v Obair Group International Corporation & Ors* [2009] EWHC 1445 (QB)."

20. I also remind myself that the burden of proof is the criminal standard of proof, beyond reasonable doubt, and in addressing both grounds, I also remind myself that the Defendant is entitled to exercise his right of silence. Nevertheless, the Court can properly draw inferences from his failure to provide any explanation.

(1) Knowledge of the terms of the Order

21. I am satisfied to the criminal standard that the Defendant was aware of the terms of the Order. I accept the evidence of Mr Da Costa that the Order was personally served on the Defendant on 30 April 2022 and that he told the Defendant that he would need to read the document through thoroughly and seek legal advice if necessary. The Order itself contained a penal notice prominently set out on the first page. Moreover, the witness statement of Mr Da Costa was itself served on the Defendant on 10 August 2022. He has had a full opportunity to challenge that evidence but has not done so.

(2) *Breach of the Order*

22. I am also satisfied to the criminal standard that the Defendant has failed to comply with paragraph 7 of the Order and has been in breach of it since 7 May 2022. As I have said, I accept the evidence of Mr Da Costa that the order was personally served on the Defendant on 30 April and the time for compliance therefore expired on 7 May 2022. I also accept the evidence of Ms Loadman that the Defendant failed to provide any information to Pinney Talfourd either by 7 May 2022 or at any time thereafter. Moreover, it is clear that the estate consisted of a number of assets, both in real property and cash, because the defendant had distributed two of the legacies and the property has now been sold.
23. I am also satisfied to the criminal standard that the Defendant has failed to comply with paragraph 9 of the order and has been in breach since 21 May 2022. Time for compliance expired on that date and I accept the evidence of Ms Loadman that the Defendant failed to serve an affidavit on Pinney Talfourd and also failed to provide either a full inventory of the estate, account of his administration or a full account of his dealings either by 21 May 2022 or at any time thereafter.

(3) *Knowledge of the Breach*

24. Finally, I am also satisfied to the criminal standard that the Defendant knew the facts which made his conduct a breach of the Order. I am satisfied that he was aware of the terms of the order and the actions which paragraphs 7 and 9 required him to carry out. I am also satisfied that he was aware that he had not provided the relevant information, sworn the relevant affidavit or provided the relevant inventory and account. It is not necessary for the Claimants to show that he knew that this failure amounted to a breach of the order but, in any event, I am prepared to draw the inference that he did so. The terms of the Order were not complicated and would not have required the Defendant to take legal advice in order to understand it. Moreover, Ms Adams persuaded me that the effect of non-compliance was clearly set out in the penal notice and that any reasonable person who had found it confusing or difficult to understand what they were required to do would have immediately contacted the claimants' solicitors for assistance.

25. I therefore hold that in breach of paragraph 7 of the Order the Defendant has not provided any information to Pinney Talfourd relating to the assets and estate of the deceased within one week of the service of the order, namely by 7 May 2022 or at all. I also hold that in breach of paragraph 9 of the Order the defendant has not sworn and served on Pinney Talfourd an affidavit setting out the information contained in paragraph 7 of the order and has not provided a full inventory of the estate of the deceased, an up to date account of the administration of the estate or an account in full of his dealings with the estate within three weeks of service of the order upon him, namely by 21 May 2022 or at all.

Sanction

26. Given that the Defendant is not present before the Court today, I do not propose to sentence him without at least giving him an opportunity to be heard. I therefore propose to make an order requiring the Defendant to attend court for that hearing, which I will list for further hearing after hearing from counsel. I also make it clear to the Defendant that if he does not attend that hearing, then the Court is likely either to proceed in his absence or to issue a bench warrant to secure his attendance. That concludes my judgment in relation to liability on the committal application which was handed down and completed at 11.45 am on 31 August 2022.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE

Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge