Neutral Citation Number: [2024] EWHC 130 (Ch)

IN THE HIGH COURT OF JUSTICE **Case No: PT-2023-000162**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (Ch)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 January 2024

Before :

MASTER TEVERSON
(Sitting in retirement)

- -

IN THE ESTATE OF TETLA YVONNE GOULBOURNE otherwise TETLA YVONNE BUTLER

BETWEEN :

MS DERINA TETLA PHIPPS **Claimant**

- and –

MR BRUCE CONSTANTINE GOULBOURNE

Defendant

- -
- -

SARAH EGAN (instructed by **Austen Jones Solicitors**) for the **Claimant**
RORY BROWN (instructed by **BIRKETTS LLP**) for the **Defendant**

Hearing date: 14 December 2023
- -

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.

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This Judgment was handed down remotely at 10.30am on 26 January 2024. It was sent by email to the parties' legal representatives and to the National Archives.

MASTER TEVERSON :

1. This is an application by the Claimant by application notice dated 28 July 2023 for an order that she be granted relief from sanctions.

2. The application is made in the context of a probate claim. The claim concerns the estate of Tetla Yvonne Goulbourne (also known as Tetla Yvonne Butler) ("the Deceased") who died on 6 May 2020. The Claimant, Derina Tetla Phipps, is the daughter of the Deceased. The Defendant, Bruce Constantine Goulbourne, is the widower of the Deceased. The Claimant is seeking to propound a copy of a will dated 2 March 2021 ("the will") which following the death of the Deceased could not be found. The Claimant discovered a copy of the will when going through the Deceased's emails. The will was attached to an e-mail from the Deceased to a financial adviser dated 2 February 2018. The Claimant is the sole beneficiary of the Deceased's estate under the will. In addition she was appointed by the Deceased as her sole executrix.

3. On 18 June 2020 the Claimant forwarded to the Defendant a photo of the will. On 16 February 2021 the Defendant entered a caveat.

4. Between 17 February 2021 and 5 August 2021 correspondence regarding the will and the estate was exchanged between Batchelors solicitors acting on behalf of the Defendant and Woodfords Solicitors acting on behalf of the Claimant.

5. By a citation issued in the Principal Probate Registry on 13 June 2022, the Defendant called upon the Claimant to enter an appearance and to propound the will, should she think it in her interest to do so, or show cause why letters of administration should not be granted to the Defendant.

6. On 29 June 2022 Austen Jones Solicitors ("Austen Jones") acting on behalf of the Claimant entered an Appearance to the Citation.

7. By email of 5 July 2022 Mr Haigh of Austen Jones informed Mr Stotesbury of Batchelors he was preparing an application under Rule 54 of the NCPR 1987 to have a copy of the will admitted to probate. By letter dated 18 July 2022 Austen Jones served a sealed copy of the Appearance on Batchelors.

8. On 31 August 2022 Mr Stotesbury learnt from Mr Haigh's wife that her husband was indisposed. On 13 September 2022 Mr Stotesbury was told by Mr Ian Austen-Jones, the Managing Director of Austen Jones, that Richard Haigh was unable to continue with his work on the grounds of ill health and was asked to wait while the file was re-allocated.

9. On 8 November 2022 Batchelors asked by email for confirmation that Austen Jones was still acting and, if so, to whom the file had been re-allocated.

10. On 23 November 2022, having heard nothing further from Austen Jones, Batchelors on behalf of the Defendant applied by summons for an order pursuant to rule 48(2) of the Non-Contentious Probate Rules 1987 for an order for a grant as if the will were invalid.

The grounds on which the order was sought were that since entering an Appearance the Claimant had not proceeded with reasonable diligence to propound the will.

11. On 23 January 2023 the summons was dealt with by directions in the absence of the parties by District Registrar Whitby in Chambers at the District Probate Registry at Leeds. An order was made in the following terms:-

> "IT IS ORDERED that unless the Respondent [Derina Tetla Phipps] issues and serves within 28 days of service of this order a probate action in Chancery Division of the High Court to propound the said paper writing dated 10 March 2010 in solemn form, a grant in respect of the estate of the above deceased will issue as if the said Will dated 10 March 2010 of the deceased is invalid."

The references in the order to the paper writing and will dated 10 March 2010 are clearly clerical errors. Earlier in the order it is recited that the Respondent had failed to propound the paper writing dated 2 March 2010.

12. By letter dated 1 February 2023 the parties were provided by the Probate Service with the sealed order of District Registrar Whitby dated 23 January 2023 ("the unless order"). The letter stated that the Probate Service had effected service of the order on all parties by first class post on the 1 February 2023 and that the deemed date of service was therefore the 3 February 2023 (the second business day from posting).

13. On 9 February 2023 Mr Austen-Jones requested and received by return email a copy of the summons and statement in support recited in the order dated 23 January 2023. The time for compliance with the unless order expired on 3 March 2023.

14. On 2 March 2023 the Claimant filed with the court the N2 claim form with Particulars of Claim settled by Counsel attached and a witness statement of the Claimant setting out her knowledge of the Deceased's testamentary documents. The filings were accepted by the court on 2 March 2023 at 14.38.

15. An unsealed copy of the claim form together with the Particulars of Claim dated 1 March 2023 settled by counsel and the witness statement of the Claimant dated 1 March 2023 were emailed to Mr Stotesbury by Mr Austen-Jones on 2 March 2023 at 10.32 am. The email asked for confirmation that service by email was accepted. Copies of the same documents were sent by fax to Batchelors by Mr Austen-Jones on 2 March 2023 at 10.49 am. These documents were stated to be sent by way of service.

16. However, in a further email sent on 2 March 2023 at 15.18 to Mr Stotesbury Mr Austen-Jones stated:-

> *"Apologies Nick, the papers enclosed and faxed are not sent by way of service-that is for the court to do. They are for your information only.*
>
> *Evidence of filing is attached."*

From this email it appears that Mr Austen-Jones was expecting the claim form and the Particulars of Claim and the witness statement of testamentary documents to be served by the court.

17. By email sent on 9 March 2023 Mr Stotesbury acknowledged receipt of the emails of the 2 March, with attachments, which he said had been received in his absence from the office on leave. He noted the position regarding the claim to prove the will in solemn form and suggested a telephone call to discuss the matter.

18. That telephone call took place on 15 March 2023. During the course of that telephone call open and without prejudice discussions took place. Mr Stotesbury queried whether the claim form had been issued as required by the order. The issue of service of the claim form is not recorded in Mr Stotesbury's attendance note as having been raised.

19. Some two months later, on 18 May 2023, Mr Austin-Jones emailed Mr Stotesbury:-

> *"Nick, a quick email to confirm that I anticipate coming back to you shortly regarding our last conversation."*

20. By letter dated 26 June 2023 Mr Stotesbury writing on behalf of Birketts LLP with whom Batchelors had by then merged wrote to Austen Jones stating that whilst the action might have been issued within the time specified in the unless order, it had not been served on time or at all as required by the unless order. That was the first time the issue of service was raised in correspondence by Mr Stotesbury. The letter said that the Claimant, if so advised, now needed relief from sanctions under CPR r. 3.9. The letter said that if an application for relief was made it should be served on that firm by post within 14 days of that date. Failing that, the letter stated they would ask the Leeds DPR to issue a grant to their client as provided for by the unless order. The 14 day time limit given by that letter expired on 10 July 2023.

21. On 11 July 2023 at 15.59 Mr Austen-Jones sent an email to the court:-

> *"Good afternoon*
>
> *Could you please confirm the position with this matter – proceedings were lodged in March, but we have yet to receive the sealed documents, which need to be served."*

From this email it appears that Mr Austen-Jones was expecting the court to send the sealed documents to his firm for them to serve. This was the first time Austen Jones communicated with the court in writing about service of the claim form. Mr Austen-Jones says in his witness statement that the court was called on 15 March and 11 May 2023. He does say what was said or what his firm was told.

22. Birketts wrote again on 17 July 2023 to Austen Jones solicitors noting they had not received a response to their letter of 26 June 2023. The letter stated that as the Claimant had not complied with the unless order the Defendant would now apply to the Leeds District Probate Registry for an intestate grant to the estate of his late wife. The letter also referred to the requirement under CPR r.7.5(1) for the claim form to have been served within four months of issue. It was pointed out that on the basis the claim form had been issued on 2 March 2023, this had required service of the claim form by no later than midnight on 2 July 2023.

23. By email sent on 21 July 2023, Mr Austen-Jones replied:-

"My client has been advised that her application to propound stood very good prospects, but that w/p, I was instructed to negotiate your client's claim based on your representations concerning his 1975 Act position, but it seems that that opportunity has passed.

I and my client are conferring with counsel about next steps and I will revert to you very shortly."

24. Mr Stotesbury replied by email on 24 July 2023:-

"Thank you for your mail.

Please ensure that I hear further from you no later than close of play on Thursday 3 August. Meantime my clients position remains that he is entitled firstly to apply for an intestate grant and secondly to seek his costs incurred in relation to your client's claim."

25. By faxed letter dated 27 July 2023 Austen Jones purported to enclose by way of service a sealed copy of the Claim Form with the Particulars of Claim and witness statement of the Claimant relating to testamentary documents. By then the time for service of the claim form had expired under CPR r. 7.5(1).

26. On 28 July 2023 the application for relief from sanctions now before me was issued. By email on 28 July 2023 timed at 17.14 Mr Austen-Jones emailed Mr Stotesbury:-

"Thank you for the breathing space, Nick.

Your client's position is noted.

I attach an application for relief. Can I assume it is opposed? .."

27. The application seeks relief from the sanction imposed by the unless order. The unless order was made in the Family Division to which by the Senior Courts Act 1981 s.61 and schedule 1 para 3(b) (iv) are assigned all causes and matters relating to non-contentious or common form probate business. The issue of jurisdiction was not raised before me. I shall therefore proceed on the basis that I have jurisdiction to grant relief from the sanction contained in the unless order.

28. CPR r. 3.8 provides:-

"(1)Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction."

29. CPR r. 3.9 sets out the circumstances which the court will consider on an application to grant relief from a sanction. Rule 3.9 provides:-

(1)On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need-

(a)for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2)An application for relief must be supported by evidence.

30. The guidance given by the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3296 requires the application to be assessed in three stages. The first stage is to assess the seriousness or significance of the breach. The second stage is to determine whether there was good reason for the breach. The third stage involves considering all the circumstances of the case, assigning particular weight to factors (a) and (b) set out in rule 3.9, and dealing justly with the application.

31. It is important at the outset to identify the relevant breach. In the present case the claim form was issued in time but was not served in time. An unsealed copy of the claim form as submitted to the court for filing was provided within time but service of an unsealed claim form is not valid or sufficient by way of service: see *Ideal Shopping Direct Ltd v Mastercard Incorporated* [2022] EWCA Civ 14 at [138]. It is the failure to serve the claim within the time period laid down in the unless order which is the breach in respect of which relief against sanction is required.

32. In *Oak Cash & Carry Limited v British Gas Trading Limited* [2016] EWCA Civ 153; [2016] 1 W.L.R. 4530; Jackson LJ held that in order to assess the seriousness and significance of a breach of an unless order, the court must look at what X failed to do in the first place, when assessing X's failure to take advantage of the second chance he was given. In the present case, there was no prior breach by the Claimant of a court order. The unless order was made on the grounds that the Claimant had not proceeded with reasonable diligence to propound the will having been cited to do so.

33. The very fact that a person has failed to comply with an unless order was said by Jackson LJ at [41] undoubtedly to be a pointer towards seriousness and significance. He said this was for two reasons. First the person is in breach of two successive obligations. Secondly, that the court has underlined the importance of doing that thing by specifying an automatic sanction in default. On the other hand, Jackson LJ agreed with counsel for the appellant at [42] that not every breach of an unless order is serious or significant.

34. In paragraph 4 of his witness statement, Mr Austen-Jones concedes that the breach was "reasonably serious" but submits that the breach was not significant as:-

> "it has not disrupted the litigation given the court has not issued an order for directions for the timetable of the matter. No trial date or court time has been lost."

A submission of this nature was rejected by Coulson LJ in *Diriye v Boja* [2020] EWCA Civ 1400 at 58 and 59 as follows:-

> *"58. I consider that in advancing this submission, Mr Peter misread paragraph 26 of Denton. It is certainly right that Lord Dyson MR and Vos LJ said that there are many circumstances in which materiality, which they define as having an effect on litigation generally (not only the litigation in which the application is made), will*

> *be the most useful measure of whether a breach is serious or significant. But they were very clear that it cannot be limited to that consideration, because they immediately went on to say that there will be breaches which are significant or serious even though they have no effect on litigation, such as the failure to pay court fees. They expressly rejected the submission that seriousness and significance could only be measured by whether the breach had imperilled the timetable or affected the course of the litigation. Thus the effect of the breach on litigation generally is just one way in which significance can be measured: it is not the only way.*
>
> *59. If a breach was required adversely to affect the court timetable before it could be called serious or significant, that would be uncomfortably and unacceptably close to the pre-CPR regime, where the defaulting party could get away with repeated breaches of court orders simply because the other side could not show that they had suffered specific prejudice as a result. That is not the law."*

35. In the present case, on the Claimant's case[1], there was a delay in service of the claim form until 28 July 2023. This was more than four months after the date by which the claim form was required to be served under the terms of the unless order. It was more than four months after the claim form was issued. The fact that the Defendant through service of the unsealed claim form with particulars of claim attached was made aware of the claim and the grounds for it, does not in my view make the delay in service insignificant. Until service of the claim form on the Defendant, the proceedings were effectively on hold. In the context of an application for an order under CPR 6.15, Lord Sumption JSC in *Barton v Wright* [2018] UKSC 12 said at [16]:-

> *"Although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules of court must identify some formal step which can be treated as making him aware of it. This is because a bright line is necessary in order to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them."*

36. It is not in my view possible to classify the Claimant's breach as anything other than serious and significant. There was a breach of an unless order and it was not a breach that was promptly remedied. On the contrary the breach was allowed to remain outstanding until after the validity of the claim form had expired.

37. The issue at the second stage of the inquiry is whether there was good reason for the default. From the email sent by Mr Austen-Jones to Mr Stotesbury on 2 March 2023 timed at 15.18, it would appear that Mr Austen-Jones's then understanding was that the court would serve the claim form. If so, that was a mistaken understanding. Practice Direction 51O-The Electronic Working Pilot Scheme operates in the Chancery Division of the High Court which is part of "the Rolls Building Jurisdictions" as defined in paragraph 1.1. Paragraph 2.2A provides that:-

> *"In the Rolls Building Jurisdictions from 1 October 2017-*

[1] The Defendant disputes that service of the claim form on 28 July was valid on the grounds that authority to accept service had not been given by a solicitor acting for the Defendant.

(a)for a party who is legally represented, Electronic Working must be used by that party to start and/or continue any relevant claims or applications;"

Paragraph 8 provides:-

"8.1The Court will electronically return the sealed and issued claim form, …… to the party's Electronic Working online account and notify the party that it is ready for service.

8.2 Unless the Court orders otherwise, any document filed by any party or issued by the Court using Electronic Working in the Rolls Building Jurisdictions, the B&PCs District Registries, the Central Office of the King's Bench Division ….or the Court of Appeal (Civil Division) which is required to be served shall be served by the parties and not the Court."

The practice in the Chancery Division was set out in paragraph 4.15 of the Chancery Guide 2022 as follows:-

"The current practice in the ChD B&CPs London is that all claim forms are served by the claimant and not the court. Claimants must ensure that they serve a sealed copy of the claim form (downloading the sealed copy from CE-file) rather than the unsealed copy as submitted to the court to be issued (see Ideal Shopping Direct Ltd v Mastercard Incorporated [2022] EWCA Civ 14 and R (Good Law Project) v Secretary of State for Health and Social Care [2022] EWCA Civ 355)."

38. I do not consider that any good reason has been shown for the default. The unless order required the Claimant to issue and serve a probate action in the Chancery Division within 28 days of service of the unless order. It is clear that by 9 February 2023 at the latest the Claimant was in a position to set about complying with the unless order. The claim form was not filed until 2 March. That left insufficient time for service. In any event, Mr Austen-Jones's mistaken belief that the claim form would be served by the court cannot be relied upon as a good reason for the default.

39. The third stage requires the court to look at all the circumstances of the case so as to enable it to do justly with the application but requires the court to attach particular weight to:-

"the need-

(a)for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders."

40. On behalf of the Claimant it was submitted that the effect of not granting relief would be extremely serious. It would prevent her from seeking to propound the will. In view of the terms of the unless order which provides that in the event of default a grant will issue "as if the will is invalid", I agree that will be the effect if relief is not granted.

41. The proportionality of the sanction needs to be considered against the full background. The Deceased died on 6 March 2020. The Claimant found a copy of the will in June 2020 and forwarded it to the Defendant. The Claimant was cited to propound the will

in June 2022 two years later. By the date of the unless order it was more than three and a half years since the death of the Deceased. The effect of the unless order was to give the Claimant a final opportunity in which to issue and serve a claim to propound the will.

42. There was partial compliance with the unless order in that a probate action was issued within the time period in the Chancery Division. The delay in service thereafter was however as I have concluded both serious and significant. Given the terms of the unless order, the Claimant's solicitor should not have waited until 11 March 2023 before telephoning the court. He should not have waited a further two months before telephoning again. He most certainly should not have waited four months before sending any written communication to the court by which time the time for service of the claim form under CPR r. 7.5(1) had expired.

43. On behalf of the Claimant, it was submitted by Ms Egan that the Defendant's solicitors could have been more collaborative. Having reviewed the correspondence, I do not think it can be said that they acted in an obstructive manner. They were in my view entitled to wait for the claim form and other documents to be served. I do not consider they were under any duty to warn the Claimant's solicitors that the time for service of the claim form would expire at midnight on 3 July 2023.

44. The effect of the delay in service until after the expiry of four months from the issue of the claim form is likely to be that if relief from sanction were to be granted, the Claimant would have to discontinue the present claim and start a fresh claim. The effect of the breach is now that the claim form is no longer valid.

45. In my view the Claimant before the unless order was made had had ample time in which to propound the will even allowing for the delay caused by the ill health and death in service of her solicitor. I do not think the fact this is a probate claim can result in any special rule being applied. Following the introduction of the Civil Procedure Rules, the court expects all claims, including probate claims to be conducted efficiently and in accordance with rules, practice directions and orders. In the present case, there has been a serious and significant breach of an unless order. The effect of granting relief after the expiry of the validity of the claim form would be to undermine the unless order whose purpose was to require a probate claim to be brought by no later than 28 days after service of the unless order.

46. Further, when considering all the circumstances of the case, the court must have regard to the promptness or otherwise of the application for relief from sanctions. Mr Austen-Jones seeks to argue that the application was made promptly on the grounds that it was not until 21 July 2023 that information was provided by the court that the sealed claim form was on a portal. I have no hesitation in not accepting that argument. Mr Austen-Jones was aware of the terms of the unless order. He had received no notification from the court that it had served the claim form. An application for relief from sanction should have been made well before the expiry of four months from the issue of the claim form.

47. On behalf of the Claimant it was submitted that the court should take into account that the failure to comply with the unless order was the fault not of the Claimant but of her solicitors. On behalf of the Claimant I was referred by Ms Egan to a sentence in

paragraph 32 of Gloster LJ's judgment in *Mischon de Reya v Caliendo* [2015] EWCA Civ 1029; [2015] Costs LR 849 where an appeal against a decision to grant relief against sanction was dismissed. Gloster L.J. stated:-

> *"Even if the claim against DLA was unanswerable, he [the judge] was nonetheless entitled to take the view, in the light of the comments made in paras 21 and 41 of Denton, and in all the circumstances of the case before him, that it was preferable to grant relief, rather than encourage what would inevitably be satellite litigation involving the respondents suing their own solicitors."*

48. In my view the weight to be attached to the failure to comply being that of the party's legal representative must depend on all the circumstances of the case. In paragraph 21 of *Denton* it is recorded that one of the criticisms made of the *Mitchell* guidance is that the result is that one party gets a windfall, while the other party is left to sue its own solicitors. In paragraph 41 the Court of Appeal in *Denton* made it plain that parties should not opportunistically and unreasonably oppose applications for relief from sanction in the hope that relief from sanctions will be denied and that they will obtain a windfall. However, as pointed out by Coulson LJ in *Diriye v Boja* at [69], Lord Dyson and Vos LJ were careful to say at [41] in *Denton* that mistakes should not be taken advantage of in circumstances where the failure was neither serious nor significant, where a good reason was demonstrated, or where it is "otherwise obvious that relief from sanctions is appropriate". That is plainly not this case.

49. In my view looking at all the circumstances there is no basis on which the court can grant the Claimant relief from sanctions. The clear purpose of the unless order was to give the Claimant a final opportunity in which to issue and serve a probate claim in order to propound the will. The delay in serving the claim form exceeded not only the time permitted under the terms of the unless order, but also the four month period permitted for service under CPR r. 7.5. That is particularly serious. The effect of granting the Claimant relief from sanctions now would be to drive a coach and horses through the unless order. The sanction imposed by the unless order was in my view proportionate given the time the Claimant had had in which to propound the will. The breach of the unless order has been serious and significant. No prompt action was taken to remedy it or to apply for relief from sanctions. As a result, the claim form is no longer valid and there is no basis on which the court can grant relief from sanctions without completely undermining the effect of the unless order.

50. I am afraid that the Claimant has been let down by her solicitors. They should have known that in the Rolls Building Jurisdictions proceedings are not served by the court. That has been the position since 1 October 2017. An application for relief from sanctions should have been made much sooner. Further, and critically, the validity of the claim form should not have been allowed to expire without any application being made to the court to preserve its validity.

51. I recognise that the effect of this judgment is that the Claimant has lost the opportunity to propound the will. The terms of the unless order made clear that was the sanction. In my view in all the circumstances the sanction was proportionate.

52. The Claimant filed a witness statement made on 7 December 2023 a week before the hearing. The Claimant said a very personal consequence of relief being refused would

be that she would not be able to keep her mother's house. The Claimant says she grew up in that house and that her mother lived in it until she died. That cannot in my view be a determinative consideration or one which persuades the court to grant relief from sanctions where it would not otherwise do so. It appears from the correspondence passing between the parties in February 2021 that the Defendant was in occupation of the property as his home. There is prejudice to the Defendant in the disposition of the estate having been unresolved for so long. It was made clear in correspondence that if the will was admitted to probate, a claim under the Inheritance (Provision for Family and Dependants) Act 1975 would be pursued by the Defendant. There can therefore be no certainty that the Claimant would be able to require the Defendant to give up his home in any event.

53. For those reasons I refuse the Claimant's application for relief from sanctions. I will hear counsel on consequential matters on a date to be fixed.

54. This judgment will be handed down remotely without any attendances being required at 10.30am on Friday 26 January 2024. I would be grateful if by 4pm on 25 January 2024 counsel would provide me with any typographical corrections and dates convenient to them both in the next 28 days for a short hearing to deal with any consequential matters such hearing to be conducted remotely with a time estimate of 30 minutes.