Neutral Citation Number: [2024] EWHC 2108 (Ch)

Case No: PT-2023-001049

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

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

Date: 17/9/2024

Before:

MASTER CLARK

- -

Between:

(1) MARK KEILAUS **(2) SIOBHAN KEILAUS**	**Claimants**
- and -	
(1) NICOLA HOUGHTON **(2) CHARLOTTE JANE FERGUSSON** **(as personal representatives and beneficiaries of the estate of Jane May Fergusson (deceased))**	**Defendants**

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Chris Bryden (instructed by **Slee Blackwell LLP)** for the **Claimants**
Sarah Lawrenson (instructed by **Jackson Lees**) for the **Defendants**

Hearing date: 3 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 17 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Master Clark:

1. This is my judgment on two applications arising from the fact that the Part 8 claim form was served outside its period of validity:
   (1) the defendants' application dated 24 April 2024 under CPR Part 11 challenging jurisdiction;
   (2) the claimants' application dated 26 April 2024 for relief from sanctions and to remedy their procedural failure pursuant to CPR 3.10, or alternatively, for permission to extend time; alternatively (by amendment for which permission was granted at the hearing) retrospective permission to serve the claim form by an alternative method.

   It was common ground that if one application succeeds, the other must fail.

2. In the light of the decision in *Ideal Shopping Direct Ltd and others v Mastercard Incorporated and others* [2022] EWCA Civ 14, [2022] 1 W.L.R. 1541, the claimants did not maintain CPR 3.10 as a basis for their application.

Parties and the claim

3. The parties are siblings and are all the children of Jane May Fergusson who died on 22 December 2022, leaving a will dated 24 May 2010 ("the Will").

4. The Will makes no provision for the claimants, Mark and Siobhan Keilaus; and the letter of wishes accompanying the Will states that Mrs Fergusson was estranged from them.

5. The defendants, Nicola Houghton and Charlotte Fergusson are the executors appointed by the Will and beneficiaries under it. They obtained a grant of probate on 1 June 2023.

6. The claim is for provision under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"). It is not necessary for present purposes to consider its merits.

Procedural background

7. The time limit for bringing the claim expired on 1 December 2023: section 4 of the 1975 Act.

8. The claim form was issued on a protective basis on 29 November 2023. The deadline for taking the step required by CPR 7.5 was therefore 12.00 midnight on the calendar day 4 months after the date of issue of the claim form i.e. by midnight on 28 March 2024.

9. Following issue of the claim form, the claimants sent on 14 December 2023 a letter of claim, and negotiations towards mediation took place.

10. On 13 March 2024, the claimants' solicitors sought by email and obtained (by email) the defendants' solicitors' confirmation that they were instructed to accept service.

11. This was subsequently overlooked by the claimants' solicitors. 12 days later, on 25 March 2024, they wrote to the defendants' solicitors:

> "Having reviewed our file, we do not see that you have yet expressly confirmed that you are instructed to receive our clients' service of proceedings. As you will appreciate, this means that we are yet unable to validly serve proceedings upon your client through you.
>
> Given the approaching deadline for service, please confirm that you have been duly instructed at your earliest opportunity and in any event by close of business tomorrow, Tuesday 26 March 2024, failing which we will be serving your clients' personally."

12. On 26 March 2024, the defendants' solicitors replied to another email sent on 25 March 2024, but not to the email asking about service. The same day the claimants' solicitors emailed:

> "Please could you also confirm **whether you have been instructed to receive our service of proceedings** by your clients? Please provide an answer before the close of business, otherwise we will be serving your clients personally." (emphasis as in original)

13. Finally, on 27 March 2024, the claimant's solicitors emailed:

> "The service deadline is tomorrow, can you please confirm if you have instructions to accept service?"

14. The response to this email was an out-of-office email. On 27 March 2024, the claimants' solicitors served the claim form (and supporting evidence) on the defendants personally, and also sent those documents (by email) to the defendants' solicitors under cover of a letter stating:

> "We write further to previous correspondence in this matter, having noting (*sic*) you have failed to confirm you were instructed to accept service of proceedings in this matter.
>
> As such, we have effected service of proceedings upon your clients personally today.

As a courtesy, we enclose the copy letters and enclosures sent directly to your clients for your records."

15. On 28 March 2024 the deadline for service expired. Notwithstanding this the parties continued negotiating as to the date for mediation, which was ultimately agreed for 2 July 2024. On 12 April 2024, the defendants filed acknowledgements of service contesting jurisdiction, and copied the claimants' solicitors in by email.

Legal principles

16. The following were common ground:
    (1) Service on a defendant personally where their solicitors have confirmed that they are instructed to accept service is not valid service: see CPR 6.7 and *Nanglegan v Royal Free* [2001] EWCA Civ 127, [2002] 1 W.L.R. 1043;
    (2) in the absence of express agreement to accept service by email, it is not a valid method of service: CPR PD 6A, para 4.1.

Service by an alternative method

17. CPR 6.15 provides:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

18. The principles applicable to applications under CPR 6.15 are conveniently summarised by Carr LJ (as she was) in *R.(on the application of the Good Law Project) v Secretary of State for Health and Social Care* [2022] EWCA Civ 355, [2022] 1 W.L.R. 2339 at [55]:

> "i) The test is whether in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant are good service;
> ii) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served. This is a critical factor. But the mere fact that the defendant knew of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under CPR 6.15(2) ;
> iii) The manner in which service is effected is also important. A "bright line" is necessary to determine the precise point at which time runs for subsequent procedural steps. Service of the claim form within its period of validity may have significant implications for the operation of any relevant limitation

period. It is important that there should be a finite limit on the extension of the limitation period;

iv) In the generality of cases, the main relevant factors are likely to be:
   a) Whether the claimant has taken reasonable steps to effect service in accordance with the rules;
   b) Whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired;
   c) What, if any, prejudice the defendant would suffer by the retrospective validation of a non-compliant service of the claim form.

None of these factors are decisive in themselves, and the weight to be attached to them will vary with all the circumstances."

19. As Carr LJ observed,

> "The power in CPR 6.15 can be (and is) often used to assist claimants where there are difficulties in service, for example, because a defendant is being evasive or abroad and difficult to locate, or because service through diplomatic channels proves impossible to achieve in time. The courts are often invited (prospectively) and agree to authorise alternative methods or places in such circumstances."

Extending time for service pursuant to CPR 7.6(3)

20. CPR 7.6(3) provides, so far as relevant:

> "If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if –
> …
> (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
> (c) … the claimant has acted promptly in making the application."

21. "Reasonable steps" is to be considered in the following context:
   (1) Provided he has done nothing to put obstacles in the claimant's way, a potential defendant is under no obligation to give any positive assistance to the claimant to serve the claim form*:* see *Sodastream Ltd v Coates* [2009] EWHC 1936 (Ch) at [50(9)]
   (2) In particular, there is no duty on a defendant to warn a claimant that valid service of a claim form has not been effected (see *Barton v Wright Hassall LLP* [2018] UKSC 12; [2018] 1 WLR 1119 at [22] and *Woodward v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985 at [48].

   (See the *Good Law Project*) at [57])

Issues

22. In this framework, the issues arising were:

(1) whether there was "good reason" to (retrospectively) authorise service of the claim form by
    (i) sending it directly to the defendants; or
    (ii) sending it by email to the solicitors.
(2) whether the claimants had taken all reasonable steps to serve the claim form in time and been unable to do so.

Discussion and conclusions

23. The claimants' counsel relied upon the same factual matters in relation to both issues. He submitted that although the claimants' solicitors had made an error, that error should not be considered in isolation, but in the context of their repeated requests to the defendants' solicitors as to whether they were instructed to accept service. He relied upon the fact that the defendants' solicitors saw the mistake, responded to email correspondence on another topic, but did not correct the error.

24. He accepted, correctly, that the defendants' solicitors were under no duty to point out the error. He submitted, however, that the error was one of inadvertent oversight, not incompetence. It would, he submitted, be unfair and unjust for the defendants to take advantage of the oversight when they were on notice that it had taken place, and had ignored the repeated emails that made it clear that the mistake had been made. This was, he submitted a "good reason" within CPR 6.15 to authorise service by the methods used, or, alternatively, a ground for concluding that the claimants had taken all reasonable steps to serve the claim form.

25. I do not accept this characterisation. Whether a defendant's solicitors are instructed to accept service is, self-evidently, a very significant fact in the conduct of litigation. Once the inquiry has been made and answered, reasonable steps would consist of recording or highlighting that fact on the file, so it is readily ascertainable, not leaving it unmarked in correspondence to be reviewed, in this case, when the remaining time for service was running short. If that had been done, the error would not have been made. The fact that it was not done led to what I consider to be the avoidable error by the claimants' solicitor in reviewing the file. This means that, in my judgment, the claimants cannot show that there is good reason to authorise service by an alternative method; or that they took all reasonable steps to serve the claim form within the period of its validity, or that they were unable to do so. They were in my judgment plainly able to do so.

26. For the reasons set out above, therefore, I dismiss the claimants' application. As to the consequences of doing so, the analysis in *Aktas v Adepta* [2011] QB 894 (at [19]-[21]) shows that the effect of failing to serve a claim form within the prescribed 4 month

period is "not that the claim automatically lapses, but rather that it remains 'in limbo' and thus requires to be given a formal quietus – either by serving a notice of discontinuance or, if the relevant claimant fails to take this step (and to accept the usual costs consequences), by an order of the court to 'set aside' the claim [form]": see *Jerrard v Blyth* [2014] EWHC 647 (QB) at [16].