

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Building
Fetter Lane
London EC4A 1NL

Thursday, 7 May 2020

BEFORE:

MR JUSTICE ROTH

BETWEEN:

ANDREW JOZEF FREJEK

Claimant

-and-

(1) STEPHEN ROBERT FREJEK
(2) SUSAN MARIA FOOTE

Defendants

MR PHILLIPS appeared on behalf of the Claimant
The First and Second Defendants were not represented

JUDGMENT
(Approved)

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Lower Ground, 18-22 Furnival Street, London, EC4A 1JS
Tel No: 020 7404 1400
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
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1. MR JUSTICE ROTH: There is before the court a committal application against the first defendant in this matter, Mr Stephen Frejek. It is being heard remotely by Skype because of the pandemic with which everyone is aware and I am satisfied that notwithstanding those circumstances there has been an effective hearing of these proceedings.
2. The first defendant, against whom the application is brought, has not attended. He was informed two days ago by email, to the address which pursuant to an earlier order of the court is one of the addresses for alternative service, of this hearing and he was sent a further email by my clerk yesterday informing him of how he can participate in the hearing by Skype. My clerk received no response to either email.
3. The background to this matter is that the claimant and the two defendants are brothers and sister. They are the three children of Mrs Brenda Frejek who died as a widow on 10 April 2009. Probate was subsequently granted to the first defendant and he was appointed executor.
4. It appears that little, if anything, was being done but in any event on 19 June 2017, on the application of the claimant, Mr Andrew Frejek, Deputy Master Lloyd made an order removing the first defendant as executor and appointing the claimant as personal representative of the estate of Mrs Brenda Frejek in his place. That order, although described as a consent order on its face was not, in fact, a consent order, it was made without opposition because neither of the two defendants had acknowledged service or engaged in any way with the proceedings started by the claimant.
5. In the usual way that order required the first defendant to transfer all papers and funds of the estate to the new personal representative and it also ordered the first defendant to make an affidavit exhibiting the accounts and an inventory of assets of the estate. He did none of those things.
6. There was then an application for a mandatory order that he produce various documents and details of the estate. That was heard by Master Teverson on 23 November 2018. At the hearing, which the first defendant again did not attend, although on that occasion the second defendant, Mrs Foot, did attend in person, Master Teverson made the order issued on 17 December 2018 which is the foundation of the present application before the court.
7. That order, endorsed with a penal notice, required the first defendant within 28 days to do four things:
 - (1) To file in relation to the estate a complete and up-to-date statement of account showing all transactions carried out by him as executor;
 - (2) To deliver to the claimant's solicitors the original grant of probate or if for any reason he were able unable to comply with the order to file and serve a witness statement explaining why he is not able to do deliver up the original grant of probate;

- (3) To file and serve as an exhibit to the account a completion statement regarding the proceeds of sale of the deceased's former home; and
 - (4) To file and serve as an exhibit to the account an inventory of all household contents and personal effects of the deceased that were at or removed from the property before its sale and to provide a list of any such items that were included within the sale.
8. That order was served by post on the first defendant at an address, 28 Heatherwood Drive in Hayes, and also on the second defendant.
9. Master Teverson had adjourned the balance of the application before him, which he proceeded to deal with on 4 March 2019 when he further ordered the first defendant to make disclosure of other matters, including bank statements and valuations and so forth. I need not go into detail of that order since it is not the subject of the committal application before me. It is sufficient to say that the second order of Master Teverson was also not complied with.
10. As a result of the failure in particular to comply with the order of 17 December 2018 the claimant issued a committal application on 21 February 2018 against the first defendant.
11. In March 2019 the claimant made enquiries about where the first defendant was living, so that personal service of the application could be effected. This revealed, as set out in a brief report from an enquiry agent, that he was no longer at the address in Hayes but was now resident at 19 Ironbridge Crescent in Southampton. However, attempts by the process server to effect personal service were not successful because repeatedly there was no answer at the door of the Southampton address and so, on 25 March 2019, the process server hand delivered the application through the letterbox. At the same time, the claimant's solicitors sent the order of Master Teverson and application by post to the first defendant at the Southampton address and for good measure separately to the Hayes address.
12. The hearing of the application was first listed on 29 March 2019 but that was vacated to give the first defendant more time to respond. It was then relisted for 28 June 2019, details of that were served by first class post to the first defendant. Again on successive dates in late June 2019 the process server could not effect personal service at the Southampton address, even though there was a car in the driveway and it appeared the house was occupied.
13. As a result on 9 September 2019 Master Teverson made an order permitting alternative service of the committal application by post to the Southampton address and by email to the last known email address of the first defendant. That is the same email addressed used by my clerk in the last few days to give notice of this hearing, as mentioned at the outset of this judgment.
14. At the same time the claimant decided that since the committal application was so old it was appropriate to issue a new one and that was done on 9 January of this year. The

application as issued still did not properly comply with Part 81. It contains no penal notice, it does not contain an enumerated list of the breaches of the court's order said to constitute contempt, it simply cross-refers to Master Teverson's order mis-described as being of 23 November 2018. In fact, as I have said, it was an order made on 17 December 2018.

15. The first date for hearing of the committal application was 16 March 2020 when the matter came before HHJ Keyser sitting as a Deputy Judge of the High Court. On that occasion I should say again the first defendant did not attend nor had he made any response at all to the application. The learned judge, by his order, noted the fact that the requirements of Part 81 had not been fully satisfied but he ordered that those requirements, in the circumstances, should be dispensed with. He noted that the application had been served on the first defendant by the methods provided for in Master Teverson's order for alternative service. He noted that it appears that there is a **prima facie** case that the first defendant had failed to comply with the original order of Master Teverson. He set out the four specific breaches of that order that were being relied on and the order recited and advised the first defendant: first, that he is likely to be eligible for criminal legal aid; secondly, that he should contact a solicitor, direct access barrister or citizen's advice bureau; third, that if he does not attend the next hearing an order fining him or committing to prison may be made in his absence; and fourth, informed him of the privilege against self-incrimination, so that he could elect to remain silent but warned him the court may draw adverse inferences from such silence.
16. On that basis, the learned judge dispensed with the requirements for personal service of the application, ordered that it shall be deemed properly served if sent by either of the methods set out in the 2019 order and also ordered the first defendant by 30 March 2020 to file and serve a witness statement which:

"Either (a) purges his contempt by complying with the 2018 order and provides the reasons for his non-compliance, (b) sets out how he complied with the 2018 order in the past and the date by which he alleges he complied or (c) indicates that he would be exercising his right to silence in relation to the alleged breach of the 2018 order."

17. The order also directs that the committal application will be heard on 7 May 2020. It said, as was the position of course at that time, that it would be heard in the Royal Courts of Justice since that order was made before the lockdown as a result of CoVid-19.
18. That order was then served on the first defendant. There is evidence before me that it was first served immediately in draft before it could be sealed, both by post to the Southampton address and by email. Once the sealed order had been obtained from the court the claimant's solicitors then served that both by post and by email. The first defendant has made no response at all pursuant to that order. I should say that in the letters of service the claimant's solicitors also advised the first defendant that he should take urgent legal advice.

19. The first question before me, given that this is a quasi-criminal matter is whether it is right for this court to proceed to a hearing in the absence of the first defendant. Mr Phillips of counsel, who appears for the claimant on this application, reminded me of the judgment of Cobb J in the case of *Sanchez v Oboz* [2015] EWHC 235 (Fam) where he set out a helpful checklist of matters to which the court should have regard when considering if it is appropriate to proceed to hear a contempt application in the absence of the respondent to that application. That checklist has been applied frequently by other judges including in this division by Warren J in *Taylor v Van Dutch Marine Holdings Ltd* [2016] EWHC 2201 (Ch). I shall follow the same course.
20. The first question is whether the respondent has been served with the relevant documents including the notice of this hearing. As I have said there is clear evidence that he has been served with certainly the order of Judge Keyser which sets out the relevant that matters and recites in it, which he has been served with the application itself. There is not such clear evidence before that he has, in fact, been served with the application of 9 January 2020 but as I say that is covered by the terms of Judge Keyser's order. In any event no one reading Judge Keyser's order could fail to appreciate the application that is being made the first defendant and its seriousness.
21. Secondly, whether the respondent has had sufficient notice to enable them to prepare for the hearing. As I said, the order of Judge Keyser was served in mid-March, we are now 7 May. Furthermore, that was really an order made after quite a long history of this matter, as I have set out earlier in this judgment. It is clear to me that the first defendant has had more than sufficient notice and adequate opportunity either to rectify his failures or to explain them to the court.
22. Third, whether any reason has been advanced for their non-appearance. None has been advanced. Indeed, the response of the first defendant to all applications in the history of these proceedings which now go back, as I have mentioned, to mid-2017 has been one of complete non-engagement with the court or any process that is served on him.
23. Fourth, whether by reference to the nature and circumstances his behaviour they have waived their right to be present. It seems to me that any reasonable person in the position of the first defendant and obtaining advice would realise that if they failed to participate in this hearing the court may hear the application in their absence. That is spelt out quite clear in Judge Keyser's order.
24. Fifth, whether an adjournment would be likely to secure the attendance of the respondent or facilitate his representation. As I have mentioned there has already been an adjournment of this matter and there is nothing whatever to suggest that it would do so. He has had ample opportunity to arrange representation and I think any adjournment would be highly unlikely to secure his attendance.
25. 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 ample opportunity to do so and ample opportunity to comply with the order against him which dates back to 2018.

26. Next, whether undue prejudice would be caused to the applicant by any delay. In my judgment the applicant has already suffered prejudice through his inability as executor to complete the affairs of the estate and realise its assets. Indeed, he has been the subject of criticism and complaint by the second defendant, the daughter of the deceased, at the failure to proceed adequately with this matter. It is clear to me that prejudice is being caused by the delay and that further delay, which as I have already said is unlikely to secure the first defendant's attendance in any event, will therefore cause further prejudice.
27. Next, whether undue prejudice would be caused to the forensic process if the application were to proceed in the absence of the respondent. I do not detect any such prejudice.
28. Finally, the terms of the overriding objective to deal with cases justly, expeditiously and fairly, in my judgment in the present case it clearly is fair to proceed in the absence of the first defendant. His conduct so far indicates that he has deliberately decided not to engage with the court proceedings and to participate.
29. Accordingly, in my judgment, it is appropriate to hear this matter in his absence. I therefore turn to the four specific grounds of contempt alleged. They are, as I have mentioned, set out conveniently in the order of Judge Keyser.
30. First, that he has failed to file and serve an up-to-date account of all transactions as executor in breach of paragraph (1). In addressing this and the other grounds of contempt I remind myself that I am applying the criminal standard of proof. Further, that although the first defendant is entitled to exercise a right of silence the court can properly draw inferences from his failure to provide any explanation. It seems to me here it is quite clear from the evidence that he has failed to file and serve any up-to-date account or indeed any account at all, so it seems, of his transactions as executor and he is clearly in breach of paragraph (1) and I so satisfied to the criminal standard.
31. Second, delivering the original grant of probate or explaining its absence. There the position is a little less straightforward. He has failed to file an affidavit explaining what has happened to the original grant of probate and therefore he is, to that extent, in breach of the order of Master Teverson. However, there is evidence before the court and Mr Phillips in response to a question from the court has confirmed that he did at some point send the original grant of probate to his sister, the second defendant, and she forwarded that, it seems after some delay, to the claimant's solicitors certainly by October 2019. The position therefore on the second ground is that I am satisfied to the criminal standard that the first defendant did not provide the grant of probate or any affidavit within the period ordered by Master Teverson. Therefore that contempt is made out, albeit that there was indirect compliance somewhat later when this document was provided not to the claimant or his solicitors but to the second defendant.
32. Third, evidencing the price achieved for the sale of the deceased's house. There has been complete failure to comply with that part of the order and I am satisfied to the criminal standard that that ground is made out.

33. Fourth, exhibiting an inventory of its possessions and all household contents removed from the deceased's house or included as fixtures or fittings. Again, there has been complete failure on the evidence before me to comply with that obligation and I am satisfied to the criminal standard that that breach is made out.
34. Accordingly, I find that the first defendant is in contempt of court on all four grounds raised in the application.
35. That being my finding the question is what the court should do about sanction. It would be possible for the court to proceed to consider the appropriate sanction on this occasion but that would be an extreme step in the absence of the first defendant. In my judgment the appropriate course is to direct the issue of a bench warrant, so that the first defendant may be apprehended and brought before the court for sentencing. That is what I shall do and direct that he be brought before the court on next Monday afternoon, when I shall sentence him at a hearing to be heard in the Royal Courts of Justice at 2.00 pm. A bench warrant will be issued after the conclusion of this hearing.

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

Lower Ground, 18-22 Fumival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge