Thakare v Bhusate [2020] EWHC 52 (Ch) (aka Bhusate v Patel)

1. I have been invited to talk about this case with particular reference to the question of whether it highlights tension, in the context of a more liberal approach to the grant of permission out of time, between the desirability of resolving disputes without the issue of proceedings and the need to pursue litigation in a timely fashion. For the reasons that appear below, I do not believe that there is any great tension.

2. Claims under the 1975 Act must be brought within 6 months of the grant of probate (and may be brought before). However, under section 4 of the 1975 Act the court has discretion to extend the time limit.

> **S.4**: "*An application for an order under s.2 of this Act shall not, except with the of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.*"

3. In **Bhusate** the High Court (Edwin Johnson QC sitting as a Deputy Judge) upheld the decision of Chief Master Marsh to extend time for a widow to bring a claim c. 26 years out of time, longer than any previous permission by about 20 years. Mrs. Bhusate had been in occupation of her matrimonial home since the death of her husband (intestate). She was the deceased's third wife and lived with their son and, in the early years after his death, some of the children of his first marriage. While she had served notice to capitalise her part life-interest in the estate pursuant to the intestacy provisions the estate had remained unadministered. The Widow was an administratrix of the estate together with one of the daughters of the deceased.

4. There had been discussions between the widow and the deceased's children regarding a possible sale of the property in the years following his death, but these did not result in any agreement. In the proceedings commenced by Mrs. Bhusate she had also sought a

declaration as to her interest in the property, alternatively the payment of her statutory legacy. Both claims were stuck out (the former on the grounds that there was no evidence of a common intention between the parties the latter on limitation grounds). Thus, but for her claim under the 1975 Act she had no provision at all.

5. It has long been established that the starting point for Court in such a case is the 'guidelines' formulated by Megarry J in **Re Salmon [1981] Ch. 167** and expanded slightly in **Re Dennis [1981] 2 All ER 140** and endorsed and summarised by the Court of Appeal in **Berger v Berger [2014] WTLR 35**:

> *Section 4 does not give any guidance as to how the court should approach an application for permission but there is no dispute between the parties as to the judge's formulation of the correct approach to such an application. He distilled what he called "the following propositions" from Re Salmon [1981] Ch 167 and Re Dennis [1981] 2 All ER 140:*
>
> *(1) The court's discretion is unfettered but must be exercised judicially in accordance with what is right and proper.*
>
> *(2) The onus is on the Applicant to show sufficient grounds for the granting of permission to apply out of time.*
>
> *(3) The court must consider whether the Applicant has acted promptly and the circumstances in which she applied for an extension of time after the expiry of the time limit.*
>
> *(4) Were negotiations begun within the time limit?*
>
> *(5) Has the estate been distributed before the claim was notified to the Defendants?*
>
> *(6) Would dismissal of the claim leave the Applicant without recourse to other remedies?*

(7) Looking at the position as it is now, has the Applicant an arguable case under the Inheritance Act if I allowed the application to proceed.

6. In a judgment reported at **Bhusate v Patel & Ors. [2019] UKHC 470 Ch** the chief master gave permission. A matter of weeks earlier Mostyn J had refused permission to the widow Claimant in **Cowan v Foreman and others [2019] EWHC 349 (Fam)** – in that case the delay was less than two years.

7. In both cases the unsuccessful parties appealed to the High Court **[2020] EWHC 52 (Ch)** and Court of Appeal **[2019] EWCA (Civ) 1336** respectively. At about the same time a further matter proceeded to the Court of Appeal also on s.4 – **Begum v Ahmed [2019] EWCA Civ 1794**. Thus, within in a relatively short time-frame three appellate decisions on s.4 were delivered.

8. Among the key points to come out of those appeals are:
   (i) The discretion is "*very wide and unfettered*" (Chief Master Marsh in Bhusate).
   (ii) The purpose of the section is to allow claims to proceed where it is just to do so. There is no long-stop imposed by the Act and the purpose of s.4: "*exists for a special purpose, namely to avoid unnecessary delay in the administration of estates to be caused by the tardy bringing of proceedings under the Act and to avoid difficulties which might be occasioned if distributions of an estate are made before proceedings are brought…*" (**Nesheim v Kosa [2006] EWHC 2710** -cited in each case).
   (iii) The authorities on relief from sanctions do not assist in the exercise (**Cowan** and **Bhusate**).
   (iv) (Per **Cowan**) – standstill agreements are to be encouraged but must be precise and in writing.
   (v) The Guidelines set out in **Re Salmon [1981] Ch 167** and **Berger v Berger [2014] WTLR 35** must not be taken as 'a template' because that gives rise to the danger

that "…*other important factors relevant to the exercise of the discretion will be overlooked*" (Floyd LJ in **Begum**). It is well observed that most are capable of one-word answers and cannot possibly cover sufficient ground to do justice in many cases. Indeed, they only represent the factors that the court had found helpful in a small handful of previous cases.

(vi) A claim might proceed under s.4 notwithstanding the absence of an arguable case at the date of death. This is because s.3(5) of the 1975 Act requires a court to: "…*take into account the facts as known to the court at the date of the hearing*". Thus, a Claimant might succeed on a claim that, at the date of death, would have failed.

(vii) A court considering an application under s.4 need not confine itself to a binary consideration of whether a claim is 'arguable'. As Floyd LJ put it in **Begum**: "*…where the court is able to form a clear view of the merits, based on undisputed facts, it is right to reflect that view in deciding whether to extend time*". Thus, a strong claim will legitimately have better prospects of success on an application under s.4 than a marginal claim might on similar facts (endorsed in **Bhusate**).

(viii) While a court is bound to search for reasons for delay - particularly where that delay is substantial - the power to extend time may be exercised even if there is no good reason for the relevant delay. It is a mistake to demand a "good reason" for every discrete period of delay.

(ix) While a 'trigger event' – some event giving rise to the commencement of a claim after a long period of delay - may be a relevant consideration it is not a pre-condition for the grant of permission.

(x) The fact that an estate has not been administered or distributed: "*would normally… be a positive factor in favour of the applicant on an application under Section 4*" (as opposed to being a factor that does not go against the Claimant). It was perhaps a matter of relevance in **Bhusate** that the Defendants or one or more of them could at any time have made an application to compel the

administration of the estate (not that there was any obligation upon them to do so).

9. Moving to delay - is there a tension between the apparent willingness of the Court to extend time under s.4 of the 1975 Act in appropriate cases and the desirability of bringing claims forward for determination? Perhaps the first and most obvious point to make is that as this flurry of appeals (all ultimately resulting in permission being granted) demonstrates - it is far from easy to predict when one might be granted permission to proceed out of time. It is always wise, subject to one procedural caveat addressed below, to bring claims in time where one can. Of course, that will not always be possible so perhaps it is also helpful to ask what types of cases or features of cases might tend towards a grant of permission out of time.

10. In examining why Bhusate might have succeeded where other widows' claims in recent years have failed it is perhaps important to contrast the position of the Claimant widow in **Bhusate** with that of those in **Berger** and **Sargeant v Sargeant [2018] EWHC 8**. In those latter cases the widows had obtained substantial provision but had good *prima facie* cases for greater provision. The widow in Bhusate would, as matters stood, have received nothing (and the Defendants had no competing needs). Thus, it is important that **Bhusate** be considered in the light of its rather singular facts and not be taken as an indication that long extensions might be regarded as generally available.

11. **Cowan** also presents a useful counterpoint to **Berger** in that unlike in **Berger** in **Cowan** the widow had not changed her mind about pursuing a claim under the 1975 Act. The authorities tend to suggest that those who are aware of their right to claim, chose not to pursue it and then change their mind are usually going to fail. In considering delay it is not the delay itself that is relevant so much as the reasons for it and the consequences of it (particularly any prejudice suffered) that is far more important.

12. As an aside however it is very important to remember when pursuing a claim seriously out of time (or where the grant is many years after the death) that the 1975 Act has been amended on several occasions and that it is the date of death of the deceased that will determine whether or not those amendments are in effect. In particular prior to 2015 s.9 of the Act had its own freestanding and non-extendable limitation provision (of 6 months). In other cases s.1(1)(ba) might not be available or a different definition might apply to the Claimant under s1(1)(d). In such cases there is clearly no question of obtaining an extension of time in circumstances where no effective remedy would be available.

13. The procedural point that comes out of these cases is an important one and gives rise to the only circumstance in which it is legitimate deliberately to delay in issuing proceedings. In **Cowan** at first instance Mostyn J had suggested that parties should not engage in standstill agreements to extend time to resolve disputes. The time they were granting themselves, he held: "*belonged to the Court*".

14. That analysis did not find complete favour in the Court of Appeal.

> Asplin LJ:
>
> *It seems to me that although the Judge was correct to conclude that the effect of section 4 is that the legislature has determined that the power to extend the six-month period belongs to the court, and that any agreement not to take a point about delay cannot be binding, without prejudice negotiations rather than the issue of proceedings should be encouraged. Although the potential claimant will have to take a risk if an application is made subsequently to extend time in circumstances where negotiations have failed, if both parties have been legally represented, it seems to me that it would be unlikely that the court would refuse to endorse the approach* (emphases added).
>
> Black LJ:

…for my part, I would not wish to go so far as the (trial) *judge and to say that there is no place for stand-still agreements in what are often highly distressing and sensitive cases and in which a decision to issue is otherwise to be made whilst bereavement is still very raw and emotions high. In such circumstances the issue of proceedings can, rather than providing a safety net if agreement cannot be reached, lead to a hardening of attitudes and a focus on the litigation with the consequent cost to the estate and delay in its distribution.*

I agree with Asplin LJ, that whilst the final decision always rests with the court, where there is a properly evidenced agreement to which no objection has been taken by the Executors and beneficiaries, it is unlikely that in the ordinary way, a judge would dismiss an application for an extension of time.

I should stress however, that if parties choose the 'stand-still' route, there should be clear written agreement setting out the terms/duration of such an agreement and each of the potential parties should be included in the agreement. In the event that proceedings have, in due course to be issued, the court should be presented with a consent application for permission to be granted notwithstanding that six months has elapsed. (emphases added).

15. Thus, while time does undoubtedly "*belong to the court*" it would appear that the court is nonetheless happy to encourage represented parties to seek to settle their differences in a constructive fashion. There will perhaps be an interesting interplay in some cases between offers of a standstill agreement and mediation with the former to accommodate the latter.

16. A party may, in the current climate (see e.g. **PGF II SA v OMFS Co. Ltd [2014] 1 WLR 1386**), be disinclined to refuse to engage mediation bearing in mind the Courts' repeated statements that 1975 Act claims are well suited to it (e.g. **Williams v Seals & Ors. [2015] WTLR 34**: "…*unquestionably a case which cries out for mediation and I would encourage the parties in the strongest possible terms to pursue mediation, as soon as*

possible…"; **Wright v Waters [2014] EWHC 3614 (Ch)** "…*a family dispute over a relatively modest estate which cried out for some form of alternative dispute resolution*" (even where the claim was dismissed)). How can one accept mediation without the offer of a standstill?

17. It would be most unwise, however, to take any such indulgence for granted. While the Practice Direction on Pre-Action Behaviour and Protocols provides at paragraph 8:

> *Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.*

18. It also makes clear at paragraph 17:

> *This Practice Direction and the pre-action protocols do not alter the statutory time limits for starting court proceedings. If a claim is issued after the relevant limitation period has expired, the defendant will be entitled to use that as a defence to the claim. If proceedings are started to comply with the statutory time limit before the parties have followed the procedures in this Practice Direction or the relevant pre-action protocol, the parties should apply to the court for a stay of the proceedings while they so comply.*

19. That will still be the better course where a party is unrepresented.

MARK DUBBERY

PUMP COURT CHAMBERS

11TH OCTOBER 2021