Permission to extend time. Where are we with s.4?

1. A claim pursuant to the **Inheritance (Provision for Family and Dependants) Act 1975** ("the Act") might be permitted to proceed notwithstanding the expiry of the 6 month period of limitation provided for in s.4:

> *"An application for an order under section 2 of this Act shall not,* ***except with the permission 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…".*

2. It has long been established that the starting point for a Court in such a case (and, indeed in claims for rectification) is the 'guidelines' formulated by Megarry J in **Re Salmon [1981] Ch. 167** , 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?

3. In **Bhusate v Patel & Ors. [2019] UKHC 470 Ch.** Chief Master Marsh permitted the widow's claim to proceed more than 25 years out of time. A matter of weeks earlier Mostyn J refused permission to the widow in **Cowan v Foreman and others [2019] EWHC 349 (Fam)** where the delay was less than two years.

4. In both cases the unsuccessful parties were granted permission to appeal by the appellate courts. The Court of Appeal have now delivered judgment in **Cowan v Foreman & Ors. [2019] EWCA 1336**, the appeal in Bhusate is to be heard by the High Court in December.

5. On the merits **Cowan** lends support to the decision in **Berger** that provision for a widow by way of trust only may well be vulnerable to a challenge under the 1975 Act relying on the jurisprudence of the family division post **White v White [2000] UKHL 54** but this talk will focus on the s.4 procedural point.

6. Of course an arguable case on the merits is a necessary pre-requisite of any s.4 application. *Per* Asplin LJ in **Cowan**:

> "*The court will not entertain a claim with no merit which is commenced outside the six-month time limit, merely because the delays can be explained and no one is prejudiced. The corollary is not necessarily true. If the claim would pass the summary judgment test, it does not mean that the court will exercise the section 4 power to extend time. It is dependent upon an evaluation of all of the relevant factors in the circumstances*".

7. Perhaps the most immediate and concerning point of broad application arising from **Cowan** was Mostyn J's approach to standstill agreements. While observing that the comments were strictly *obiter* Asplin LJ nonetheless quoted them out at some length:

> "*... I was told that to agree a stand-still agreement of this nature is "common practice". If it is indeed common practice, then I suggest that it is a practice that should come to an immediate end. It is not for the parties to give away time that belongs to the court. If the parties want to agree a moratorium for the purposes of negotiations, then the claim should be issued in time and then the court invited to stay the proceedings while the negotiations are pursued. Otherwise it is, as I remarked in argument, simply to cock a snook at the clear Parliamentary intention*…"

8. Dealing with this point Asplin LJ said:

> "*…the Judge commented that standstill agreements should not be common practice and in fact the practice "should come to an immediate end". He stated that if parties want to agree a moratorium for the purposes of negotiation they should, nevertheless, issue the claim in time and invite the court to stay the proceedings and that it was not for the parties to give away time which in truth belonged to the court.*
>
> *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*"[1].

9. In a short judgment concurring on this point King LJ went somewhat further:

> "*I would not wish to go so far as the 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*

[1] All emphases added.

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".

10. Mostyn J had also characterised the exercise not as a discretion but as a 'value judgment' but per Asplin LJ:

"*whether one characterises the power under section 4 as a discretion, a qualitative decision or a value judgment, as the Judge considered appropriate at [6], is, for these purposes, a distinction without a difference and makes no difference to the Judge's reasoning. The power must be exercised for its proper purpose taking account of the context in which it arises, namely, in making reasonable financial provision for an applicant from the estate of a deceased, in the light of all of the circumstances of the particular case, having considered the "Berger" factors*…"

11. Asplin LJ rejected the contention that there needed to be 'a good reason' for every period of delay and (returning to the point) said:

> "*…it seems to me that I must take care not to fall into the trap of seeking a "good reason" for each and every lapse of time. As I have already mentioned, section 4 does not have a disciplinary element and having given proper weight to all of the relevant circumstances, the power to extend time may be exercised even if there is no good reason for delay. Having said that, as I have already mentioned, the onus is on the applicant to show sufficient grounds for the grant of permission to apply out of time and, as Black LJ mentioned in Berger v Berger at [61] where a case is long out of time the court is bound to search for explanation for the delay and to consider that as part of the circumstances of the case. The same approach was adopted in Sargeant v Sargeant. However, it is also relevant that in those cases the application was seriously out of time: six and a half years in Berger and ten years in the case of Sargeant*".

12. It may be a distinction without a difference in this case but it is respectfully suggested that the better view is that it is indeed an exercise of a discretion. In **Salmon** at paragraph at 174H Sir Robert Megarry V.-C. says:

> "*I am anxious not to go further than is proper in attempting to discover guidelines in exercising* ***the court's discretion*** *under section 4. I bear in mind what Ungoed-Thomas J. said on this, and is saying what I do, I disclaim any intention to lay down principles, though I am not sure that it makes it much better to use the term "guidelines" in place of "principles"* at 175A he continues: "*First,* ***the discretion is unfettered***. *No restrictions or requirements*

> *<u>of any kind</u> are laid down in the Act.* ***The discretion*** *is thus plainly one that is to be exercised judicially and in accordance with what is just and proper*".

The emphases are mine but the reference to an 'unfettered discretion' follows the use of precisely the same term at 174C.

13. This brings us to another assertion by Mostyn J in **<u>Cowan</u>**: that the list of 'guidelines': "*contains a number of highly prescriptive, fettering factors*". With respect to the learned judge it is difficult to see how this can be reconciled with **<u>Salmon</u>** or **<u>Berger</u>**. The first of the factors refers specifically to an 'unfettered' 'discretion' and that language is adopted without question in every following case. Asplin LJ was clear that Section 4: "*is not designed… to protect the court from stale claims as the Judge explains. On the contrary, if the circumstances warrant it, the power in section 4 can be exercised in order to further the overriding objective of bringing such claims before the court where it is just to do so, and, in such circumstances, the personal representatives have the protection afforded by section 20. The power must be considered in the context in which it arises*".

14. Nor is a punitive approach justified nor any analogy with provisions of the CPR or the **Denton** line of authorities regarding relief from sanctions (again *per* Asplin J):

> "*As Chief Master Marsh neatly described it recently in* ***Bhusate v Patel [2019] EWHC 470 (Ch)*** *at [64], to have regard to the overriding objective or the approach to relief against sanctions in the Denton case when exercising the discretion under section 4 "involves conflating issues that, if they are related, are at best distant cousins*."

15. Indeed it is the express exercise of that 'unfettered discretion' which allowed the Chief Master in **Bhusate** to reach the brave but wholly defensible decision to allow that claim to progress albeit considerably further out of time than any previous case.

16. A further key to Bhusate is to contrast the position of the Claimant widow in that case with that of the Claimant widows in **Berger**, **Sargeant v Sargeant [2018] EWHC 8** and indeed, in **Cowan**. In each of those cases the widows had been provided for to some degree, indeed in Berger the widow enjoyed a life interest in the entire estate and the trustees had power to advance capital, In Sargeant the widow enjoyed secure accommodation and an income. Mrs. Bhusate would, were the court to decline to act, enjoy no provision at all from the estate of her late husband.

17. This, in turn, raises a further interesting question. Although there must be a binary 'gateway' requirement for an arguable case, to what extent is it permissible for a court in the exercise of the s.4 discretion to take into account the apparent merits of the case? It would appear perverse if, in the exercise of a broad and unfettered discretion, that were denied to the Judge dealing with the application.

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