Radcliffe Chambers

Inheritance Act claims

Applications out of time: recent cases

Kate Selway QC

Radcliffe Chambers
11 New Square, Lincoln's Inn
London WC2A 3QB
clerks@radcliffechambers.com

Tel 020 7831 0081
Fax 020 7405 2560
DX 319 London
www.radcliffechambers.com

Inheritance (Provision for Family & Dependants) Act 1975

Section 4

Section 4 does not itself contain any guidance as to how the court should approach the question of whether to grant permission for a claim to be made out of time. It merely says:

"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 (but nothing prevents the making of an application before such representation is first taken out)"

Recent cases

Cowan-v-Foreman [2019] EWCA Civ 1336
On appeal from Mostyn J; permission granted on appeal. 17 months out of time

Re Bhusate*, *Bhusate-v-Patel [2020] EWHC 52 (Ch)
On appeal from Chief Master Marsh; decision upheld; permission granted. 25 years 9 months out of time

Begum-v-Ahmed *[2019] EWCA Civ 1794*
On appeal from Birmingham CC, HHJ McCahill; permission granted on appeal, 15 months out of time

And see also ***Nesheim-v-Kosa*** [2006] EWHC 2710 (Ch), ***Berger-v-Berger*** [2013] EWCA Civ 1305, ***Re Salmon*** [1981] Ch 167 and ***Re Dennis*** [1981] 2 AllER 140

Cowan at first instance (Mostyn J):

- the proper approach to permission applications required the court to be satisfied that the claim was arguable and that there were good reasons justifying the delay
- analogy with the overriding objective under the CPR
- the claim was unarguable given the generous trust arrangements that were in place
- there were no good reasons for the delay

Mostyn J on standstill agreements (paragraph 34):

"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."

Cowan in the Court of Appeal:-

- the CPR sanctions jurisprudence exemplified in *Denton* and subsequent cases is for the most part not appropriate to be applied to permission claims under the 1975 Act
- there is no disciplinary element to section 4
- the purpose of the time limit is not to be enforced for its own sake, unlike provisions of the CPR but is there to bring a measure of certainty for PRs and beneficiaries alike; an applicant has some latitude on delay
- the correct approach was not to take an over-disciplinary view but rather to consider all the factors set out in *Berger-v-Berger* and to give them appropriate weight in the particular circumstances
- the judge was wrong to require there to be a "good reason" for all periods of delay without considering the matter in the round.

The Court of Appeal in *Cowan* on standstill agreements:

Asplin LJ:

*"[*The Judge*] 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.*

Asplin LJ contd ...

75. Although the criteria in Berger v Berger include whether there have been negotiations before the expiry of the six-month period, it seems to me that when weighing all of the relevant circumstances, depending upon how and when they arise, it may well be appropriate to give due weight to negotiations which take place after that period has expired. In re Salmon per Sir Robert Megarry VC noted as follows at 175f:

"... For the reasons that I have already given, I think that it is obviously material whether or not negotiations have been commenced within the time limit for if they have, and time has run out while they are proceeding, this is likely to encourage the court to extend the time. Negotiations commenced after the time limit might also aid the applicant, at any rate if the defendants have not taken the point that time has expired."

King LJ in *Cowan:*

"88. Miss Angus QC on behalf of the Foundation told the court that in parts of the profession the use of stand-still agreements is strongly deprecated. Given that such agreements cannot be binding, the approached favoured by many, said Miss Angus, is that which was preferred by the judge; namely that proceedings should be issued within 6 months and, if the parties are conducting negotiations, an agreed application for an adjournment is made to the court at the earliest opportunity.

*89. That this will often be the appropriate course is undeniable but, for my part**, 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 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.***

*91. 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."*

The *Berger-v-Berger* considerations:

(as derived from *Re Salmon* & *Re Dennis*)

(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?

Bhusate-v-Patel

Chief Master Marsh, 7th March 2019
Upheld by Edwin Johnson QC, 16th Jan 2020

- A modest estate – the matrimonial home plus £1,500 cash
- Mr Bhusate died intestate in April 1990 aged 72
- Letters of administration taken out in August 1991
- Claimant (widow, 3rd wife) did not issue claim until November 2017
- They had married in India in 1979 when he was 61 and she was 28
- She left school at the age of 11; her English remained very basic
- Due to obstructiveness of defendants (adult children by 1st wife) the estate was never administered
- Claimant never received her spousal legacy; but carried on living in the house
- Her claim to her legacy became time-barred
- Her only remedy was a claim under the 1975 Act

Chief Master Marsh, applying the *Berger* guidelines, gave Mrs Bhusate permission to bring her claim. He held:-

- the merits of the claim were strong
- the delay had been explained; the claimant had been effectively powerless
- the defendants had obstructed a sale of the property and then did nothing to break the impasse for a further 23 years.
- they stood by until a claim was made and then took a limitation point. The fact that the claimant had a claim under the 1975 Act at all was due to their actions
- she had no other remedy

Chief Master Marsh:

"42. To my mind the one possible principle of general application that emerges from these cases is the question of whether the claimant needs to find a 'trigger event' in order to explain the delay. Clearly, in Berger Black LJ had the decisions in Stock v Brown and McNulty in mind when providing reasons for refusing to grant permission. Where there is an obvious trigger, it is helpful to consider it, but I can see no basis in section 4 for a trigger factor being essential to engage the court's discretion. There is nothing in section 4 that requires such a gloss. As Sir Robert Megarry V.-C described section 4 in Salmon : "...the words ...could hardly be more neutral". There needs to be an explanation for the application for permission and the applicant must show sufficient grounds for granting the application. What those grounds may be is not constrained by the statute although it is evident that the longer the delay, the more compelling the grounds will have to be."

Is a trigger event required?

- The existence of a trigger event is not a pre-condition to the grant of permission in a case involving a long delay

- The question of whether a trigger event has occurred is a relevant consideration in a case where, following a period of delay, the application has simply changed his or her mind and decided to make a claim, following a previous decision not to litigate

- The search for a trigger event was not appropriate in *Bhusate*. Mrs Bhusate had not undergone a change of heart many years later. The point was that she had been effectively powerless to act after the death of her husband and the step-children had done nothing to secure a resolution of the situation

Practical suggestions

Point 1: it's still alright to use a standstill agreement

- but see King LJ at the end of *Cowan*
- Record the agreement in writing
- Use a formal agreement
- include all potential parties

Point 2: there may well be occasions where a standstill application is preferable to issuing a protective claim form

- See King LJ in *Cowan*
- It's a judgment call depending on the circumstances
- Will it help or hinder negotiations?
- Will it harden attitudes?
- How expensive will it be?
- Will the other side demand service of all the evidence?

Chief Master Marsh in *Bhusate* at paragraph 45:

"There is some tension between the need to issue the claim promptly and the need to make real efforts to avoid contested proceedings. It was not in this case, in reality, open to the claimant to issue proceedings on a protective basis due to the cost of bringing a claim with the evidence she relied on provided at the point of issue."

Point 3: without prejudice negotiations are to be encouraged

- the sooner the better
- but not fatal if they don't start until after the expiry of the 6 month period
- but bear in mind any earlier periods of delay
- no room for complacency
- a dual approach is generally to be recommended
- engage actively in standstill discussions; if no progression consider protective claim form

Point 4: the last minute rush

- new client visits solicitor only days before the deadline
- no chance to engage with other side
- no chance to amass all relevant evidence to support a claim
- what to do?

Point 5: Distributing the estate

- executors beware
- assess the likelihood of any claims
- consider how best to deal with uncertainties
- eg where potential applicants have intimated a claim and then done nothing
- CPR Part 64 application for Court's guidance / permission to distribute may be appropriate

Radcliffe Chambers

Kate Selway QC

Radcliffe Chambers
11 New Square
Lincoln's Inn
LONDON
WC2A 3QB
+44 (0)20 7831 0081
+44 (0)20 7405 2560 (fax)
www.radcliffechambers.com
kselway@radcliffechambers.com