Neutral Citation Number: [2019] EWCA Civ 1336

Case No: B6/2019/0546

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (Family Division)
The Hon. Mr Justice Mostyn
FD18F00079

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2019

Before:

LADY JUSTICE KING
LADY JUSTICE ASPLIN
and
LORD JUSTICE BAKER

- -

Between:

Mrs Mary Cowan	**Appellant**
- and -	
Mr Martin Foreman (as executor of the estate of Michael Cowan and as trustee of the Business Property Trust and the Residuary Trust in the Will of Michael Cowan dated 24 March 2016 (the "Will") and as trustee of the Michael Cowan Foundation (the "Foundation")	**1st Respondent**
Farrer & Co Trust Company (as trustee of the Business Property Trust and the Residuary Trust in the Will)	**2nd Respondent**
Mr James Trafford and Mr James Beazley (as trustees of the Foundation)	**3rd Respondents**
Ms Bryony Cove (as executor of the estate of Michael Cowan)	**4th Respondent**

- -
- -

Miss Penelope Reed QC and Miss Eliza Eagling (instructed by **Withers LLP**) for the **Appellant**
Mr Richard Wilson QC (instructed by **Farrer & Co**) for the **First, Second and Fourth Respondents** in the case of the First and Fourth Respondents in their capacity as Executors of the estate of Michael Cowan deceased and in the case of the First and Second Respondents in their capacity as trustees of the Business Property Trust and the Residuary Trust in the Will
Miss Tracey Angus QC (instructed by **Charles Russell Speechlys LLP**) for the **First and Third Respondents** in their capacity as the trustees of the Foundation

Hearing date: 4th July 2019

- -

Approved Judgment

Lady Justice Asplin:

INTRODUCTION

1. This appeal is concerned with the circumstances in which it is appropriate to grant permission under section 4 of the Inheritance (Provision for Family and Dependants) Act 1975 (the "1975 Act") to allow an application for an order under section 2 of the 1975 Act to be made out of time. Under section 2 the court may make any one or more of the orders set out in section 2(1)(a) – (h) if it is satisfied that the disposition of the deceased's estate effected by his/her will or the law relating to intestacy, or a combination of the two, was not such as to make reasonable financial provision for the applicant.

2. The appeal raises specific issues as to whether it is arguable that a beneficial interest under a discretionary trust rather than outright provision for a spouse is not such as to make reasonable financial provision for the purposes of section 2, and the weight to be given to and relevance of any "stand-still agreement" or moratorium to the effect that a point on delay will not be taken while an out of court settlement is pursued.

3. The appeal is from the order of Mostyn J dated 25 February 2019 by which he refused the Appellant, Mrs Mary Cowan ("Mrs Cowan") permission to bring an application out of time pursuant to section 4 of the 1975 Act. The citation for his judgment is [2019] EWHC 349 (Fam).

BACKGROUND

4. I take the background to this matter in part from the judgment but also from the witness statements and correspondence which were before the Judge and to which we were referred. Although the interpretation to be placed upon some of the events is in dispute, the events themselves are not.

5. The proposed application under section 2 of the 1975 Act is in respect of the estate of Mrs Cowan's husband Michael Cowan (the "Deceased"), who died on 9 April 2016 aged 78. At the time of the hearing below, Mrs Cowan was 78. Mrs Cowan and the Deceased began their relationship in 1991. In 1994, the Deceased separated from his wife. The Deceased was later involved in high profile divorce proceedings until 2001, which culminated in their assets being shared, leaving the Deceased with just over £7m. The citation in relation to the decision in the divorce proceedings is [2001] EWCA Civ 679. The Deceased had two sons: Andrew, from whom he was estranged, and Timothy. Mrs Cowan had also been married previously and had two sons from that marriage, Robert and Gerald Musial.

6. Although the Judge did not make findings to this effect, it is not disputed that in 1998 the Deceased asked Mrs Cowan to take early retirement so that they could spend more time together. Mrs Cowan agreed and from that point onwards was largely financially dependent on the Deceased. In 2001, they moved into a new home in Montecito, Santa Barbara County, California, which now forms part of the Deceased's estate. The property in Montecito remains Mrs Cowan's home. From 2001 until the Deceased's death, Mrs Cowan and the Deceased lived between the Montecito property and their home in Hampstead while the Deceased travelled to London to work. Mrs Cowan and the Deceased also travelled often.

7. In the years following the Deceased's divorce, he rebuilt his fortune successfully so that by the time of his death on 9 April 2016 his estate was sworn for probate at a little over £29m. Mrs Cowan and the Deceased married in February 2016 shortly after the Deceased had been diagnosed with cancer and only shortly before his death. At around that time, the Deceased transferred $400,000 into a joint account in the name of himself and Mrs Cowan. On his death, there was $375,000 remaining in the account which passed to Mrs Cowan by survivorship.

8. On 24 March 2016, the Deceased made a final will (the "Will") accompanied by a letter of wishes (the "Letter of Wishes"). In summary, by his Will the Deceased: left pecuniary legacies to his son, Timothy and his daughter-in-law, Marina and to Robert and Gerald Musial; gave his personal chattels to Mrs Cowan; left all his business assets which qualified for 100% inheritance tax business property relief on discretionary trust (the "Business Property Trust") for a class of beneficiaries including Mrs Cowan, other members of his family, a charity established by him known as the Michael Cowan Foundation (the "Foundation"), other charities and any persons added by the trustees (the "Discretionary Beneficiaries"); and gave the residue of his estate on trust for Mrs Cowan for life but subject to overriding powers of appointment in favour of the Discretionary Beneficiaries and subject thereto for the Foundation (the "Residuary Trust").

9. In summary, the following wishes were recorded in the Letter of Wishes: that two funds of £500,000 be set aside in the Business Property Trust, the first to provide education and support for his grandchildren, and the second to provide a safety net for his son, his daughter-in-law, and his stepsons and their families; subject to that, the Will Trustees were to regard Mrs Cowan as the principal beneficiary of the remaining part of the Business Property Trust fund during her lifetime. She was to receive an income and her requests for capital were to be considered generously, and Mrs Cowan should be the principal beneficiary of the Residuary Fund. She was to be entitled to income and occupation of any properties in the Residuary Trust during her lifetime. Her standard of living was to be maintained at a reasonable level to include the payment of medical bills, provision for care in old age and so on. She was also to be reimbursed for any legal fees she incurred in ensuring that the trusts established by the Will benefited from UK spousal exemption from inheritance tax and the estate was to compensate her beneficiaries for any resulting financial disadvantage.

10. Mr Martin Foreman and Ms Bryony Cove, the First and Fourth Respondents, are the Executors of the Deceased's Will (the "Executors"). Mr Foreman and the Farrer & Co Trust Company, the First and Second Respondents, are the trustees of the Business Property Trust and Residuary Trust (the "Will Trustees"). Mr Foreman, together with Mr James Trafford and Mr James Beazley (respectively the First and Third Respondents) are the trustees of the Foundation (the "Foundation Trustees").

11. Probate of the Will was granted on 16 December 2016. The evidence before the Judge was that: the estate was sworn for probate purposes at £29,347,630 (gross) and £29,146,163 (net); the value of the assets in the Residuary Trust totalled approximately £4,752,600 and the value of the assets of the Business Property Trust totalled approximately £15,337,000 to £16,637,100. In her second witness statement of 17 January 2019, Ms Cove, one of the Executors, provided a summary of the Will Trusts. Based upon the information available at that stage, she stated that the Residuary Trust comprised the Montecito property worth £3.3m and £1.45m in an

investment account. It seems that the Montecito property in which Mrs Cowan lives and has lived for the last twenty years is owned through a corporate vehicle. The Business Property Trust was comprised of a variety of investments worth around £15.3m. It is not in dispute that the Deceased's chattels were of nominal value.

12. Although Mrs Cowan met with the Executors/Will Trustees in London on one occasion, otherwise she has remained in Montecito, California and all contact with the Will Trustees has been by email correspondence whether directly, through Mrs Cowan's sons and/or through her US attorney, Peggy Barnes.

13. On 20 December 2016, shortly after the grant of probate, Mrs Cowan was sent a lengthy email containing the structure and effect of the Deceased's will. This was followed up by a further explanation sent on 20 February 2017. It was at this point that Mrs Cowan and her sons decided that they wished to take advice from a UK lawyer and they were put in touch with Helen Cheng, a private client and tax lawyer with Withers Worldwide in San Diego who in turn sought advice from Withers in London. In an email on 28 March 2017 to her London counterpart, Ms Ms Dora Clarke, Ms Cheng explained that she had been contacted and asked to advise about the Business Property Trust and the Residuary Trust. The email went as follows:

> "The trust value is about $30 million pounds, but Mary [Mrs Cowan] and her kids are concerned that the trustees are not providing enough information and that they are not providing enough funds for Mary to live on.
>
> They asked if we could take a look at the documents and advise as to whether they have any recourse or rights to demand information as to assets, income, etc., and whether Mary [Mrs Cowan] can request additional funds if necessary.
>
> **Also, if they want to contest the trust, what are the applicable time limitations? They want to make sure no statutes of limitation are blown**."

14. On the same day, the partner in Withers' London office, Ms Ms Dora Clarke, replied by email explaining about Mrs Cowan's interests under the Business Property and the Residuary Trusts, her right to see a full account of the estate and advising that:

> ". . . Provided Michael Cowan [the Deceased] was domiciled in England and Wales at the date of his death, the (sic) Mary could bring a claim against his estate, as his widow, under the Inheritance (Provision for Family and Dependants) Act 1975. The time limit for her to bring such a claim is 6 months from the date of the grant of Probate i.e. before 16 June 2017, although the court would have discretion to extend this deadline. However, I would have thought that this would really be unnecessary and that everything can be worked out with the Trustees."

15. Ms Helen Cheng then spoke by telephone with Mrs Cowan's son. The following day she emailed Ms Dora Clarke in London and stated: "I told Robert most everything

that you mentioned in the email". There was dispute as to whether the possibility of a claim under the 1975 Act and the deadline for such a claim was, in fact, mentioned in the telephone conversation with Mrs Cowan's son and, if it was, whether the information was conveyed to Mrs Cowan. The Judge found that it was. I will turn to his finding, and the ground of appeal which relates to it, below.

16. The six-month period for making an application under section 2 of the 1975 Act, ending on 16 June 2017, passed without a claim being made. Mrs Cowan has maintained throughout that the reason for this is that she did not understand the structure of the Will or that there was a deadline. As I have already mentioned, having heard evidence, the Judge rejected that explanation and instead found that Mrs Cowan and her sons had been adequately notified about the 1975 Act and six-month time limit and had instead taken the view that it was better to work with the Will Trustees and seek to set up arrangements that were completely predictable, transparent and reliable. See [29] – [31] of the judgment.

17. In any event, in May / June 2016, Mrs Cowan and the Executors/Will Trustees had been able to agree a regular monthly payment of $17,250, which commenced in April 2017 when a back-payment of $207,000, to cover the hiatus since the death, was also made. Having discussed Mrs Cowan's twelve-month budget amongst other things with Ms Cove, Mrs Cowan and her sons decided to take further advice and on 23 May 2017, Mrs Cowan's US attorney, Peggy Barnes, confirmed her "engagement" of Ms Dora Clarke at Withers in London "regarding the Mary Cowan matter" on behalf of Mrs Cowan and her sons. I should add that the monthly payment to Mrs Cowan from the Will Trusts was increased by agreement to $26,250 with effect from 1 August 2018.

18. Mrs Cowan underwent knee surgery in October 2017 and on 7 November 2017, Mrs Cowan's son Gerald (referred to in the correspondence and hereafter as Jerry) had a lengthy telephone discussion with the Will Trustees. Mrs Cowan's health, her need for 24-hour care and her expenses were discussed, amongst other things. The possibility of more suitable accommodation within an assisted community was also mentioned by Mr Foreman. Very shortly thereafter, on 9 November 2017, a telephone conversation took place between Jerry and Ms Dora Clarke of Withers in which he stated that he wished to re-instruct Ms Dora Clarke to act for his mother in respect of the estate and liaising with Farrer & Co. The attendance note states amongst other things that: there were "a few concerns, not least [your] mother had recently had a knee replacement"; and that Jerry had been speaking directly to Farrer & Co. but felt "completely out of [your] depth and need protection". Ms Dora Clarke agreed to meet with Mrs Cowan in California between 1 and 4 December 2017 when she was next in the United States.

19. On 14 November 2017, Jerry contacted Ms Dora Clarke directly by email attaching documents including an agreed budget and the amount of the disbursements Mrs Cowan received each month from the Will Trustees, a "questions and thoughts" document and a document entitled "Topics for 11717". This was described as having been "sent to the trust and discussed on 11/7". I understand these dates to relate to 7 November 2017. Jerry went on: "Rob and I had decided that we should be open and honest with the trust and hoped for a humane response. We now feel this was naïve. As a result of this discussion, we feel we are in need of an advocate (you)." In the main body of the email he stated, amongst other things: "Our number one concern is

transparency from the trust so that we can plan for the future." The "questions" document was lengthy and wide ranging. It included reference to a "goal of short to long term planning for Mary [Mrs Cowan]; however, we do not know what type of budget we are working with"; concern about future need for home care; and that the mention of future assisted living might be an attempt to reduce Mrs Cowan's spending. Reference was also made to needing confirmation that Mrs Cowan owned everything in her house and her bank account and that "the trust will never take that away."

20. On 29 November 2017, Jerry sent the Will Trustees the invoices in relation to his mother's knee surgery and home care for reimbursement. He received a response by email on 5 December 2017 asking him to clarify the extent to which the sums claimed were not already covered by Mrs Cowan's agreed monthly budget.

21. Meanwhile, having re-opened her file and included a fee earner who dealt with 1975 Act claims, Ms Dora Clarke visited Mrs Cowan in California in early December, as promised. Thereafter, on 7 December 2017, she wrote to the solicitors of the Executors and Will Trustees, stating that she had advised Mrs Cowan to bring a claim under the 1975 Act and, amongst other things, that having met Mrs Cowan it became clear that she was "deeply anxious about her future security." She went on:

> "It transpires that she [Mrs Cowan] had not understood the implications of Michael's will. Mary had very clearly been under the impression (from Michael) that she was going to receive outright provision from the estate.
>
> The reality of her situation, namely that she only has a defeasible life interest in the residuary estate, no real security in her own home because the Trustees own it through a company and no actual interest in the BPR Trust, has hit her hard. Similarly, difficult to grasp has been the fact that you and Martin have absolute discretion. Her anxiety has been compounded by your 5 December email querying payment of invoices for her recent medical expenses . . .
>
> Meanwhile it also transpires that she has very little by way of assets in her own name.
>
> The upshot is that I have advised Mary [Mrs Cowan] that she is entitled to bring a claim under the Inheritance (Provision for Family and Dependants) Act 1975.
>
> This is the first time that bringing a claim on the basis (sic) reasonable financial provision has not been made for her as Michael's widow, particularly in light of their lengthy relationship, has been mentioned to her. She would like time to understand the ramifications and, through Withers, explore resolution without having to litigate.

> I am sure that avoiding litigation is in everyone's best interests. However, you will be aware that Mary [Mrs Cowan] is outside the six month limit for bringing a claim without the court's permission. Thus, while her strong preference is to avoid litigation, she understands she may be disadvantaged if she does not issue a claim promptly now that she has been alerted to the potential.
>
> Please confirm that the Trustees will not seek to take advantage of any delay whilst we advise Mary [Mrs Cowan] on her claim and explore resolution with the Trustees.
>
> . . ."

Ms Cove responded on behalf of the Executors/Will Trustees on 14 December 2017 stating amongst other things that the administration of the estate was at a late stage, the will trusts had been constituted and business assets were in the process of being sold. She also stated that it would be helpful to understand a little more of Mrs Cowan's position and she looked forward to receiving more details soon.

22. Thereafter, on 23 January 2018, Mr Paul Hewitt of Withers e-mailed Ms Cove stating amongst other things that a letter of claim would be provided once the matter had been reviewed with leading counsel but that the email of 7 December 2017 had clearly set out the basis for Mary's [Mrs Cowan's] concerns about the present arrangement. He also mentioned that it was hoped to engage in "formal dispute resolution, potentially mediation" and that he would appreciate confirmation "that in the interim the trustees do not intend to take a point on an application to bring a 1975 Act claim out of time if we are unable to agree the substantive issues pre-action. Absent that assurance she will have to issue her application to avoid prejudice which would unfortunate (sic) in circumstances where she wishes to avoid litigation . . ."

23. On 25 January 2018, Ms Cove, on behalf of the Executors/Will Trustees replied agreeing to that request in the following terms:

> "In the first instance, I can confirm that the executors of Michael's estate … and the trustees of the two trusts established by Michael's will … will not take a point on the six-month deadline having passed pending receipt of a letter of claim. At that point, we can review the position again; it may well be appropriate at that stage to restate the trustees' position to avoid the need for Mary to issue proceedings to protect her position."

24. In the following months Withers, on behalf of Mrs Cowan, and Farrer & Co, on behalf of the Executors and Will Trustees, explored the possibility of an out of court settlement. These efforts took the form of series of emails, without prejudice negotiations and, ultimately, a failed mediation on 16 October 2018, which also involved the Foundation Trustees. It had been the intention to hold the mediation on 20 April 2018 and at that stage it was anticipated that a letter of claim would be available by 16 April 2018. In this regard, it was noted in an email of 6 April 2018 that Mrs Cowan was loath to lose the date for the mediation but that it was

appreciated that Farrer & Co might wish to postpone it so that they had sufficient time to consider the letter of claim. In response, it was accepted that the provisional date for the mediation of 20 April was unrealistic and given the many missed dates for the delivery of the letter of claim, the mediation date would be fixed once it had been received.

25. On 1 May 2018, a letter of claim was sent on behalf of Mrs Cowan. Amongst other things, reference was made to Mrs Cowan's expectation that she would own her own home, her lack of security and the need to request and justify expenditure and that she had lost confidence in the Will Trustees following the querying of the medical invoices in December 2017. Reference was made to the fact that should the matter proceed to trial the court would take account of the "divorce cross check" and in doing so would "consider the twin principles of 'sharing' and 'needs'". Outright provision was sought in the form of the Montecito property and a capital sum of $10,898,701, net of any UK and US taxes.

26. In response, Farrer & Co, on behalf of the Executors/Will Trustees sent a letter dated 23 May 2018, acknowledging the letter of claim and setting out details of the estate and its view of the claim. It also stated that, having reviewed the claim, as they had already indicated, the Trustees were prepared to enter into mediation if agreed by the other parties and that a copy of the letter was being sent to them. In fact, it was copied to the Discretionary Beneficiaries including the Foundation. The penultimate paragraph of the letter is as follows:

> "3. Our clients appreciate your client's desire for security in respect of her housing and the maintenance of her standard of living. However, they feel it is important to be clear that they have doubts as to whether the outright provision your letter envisages is necessary, or indeed the most appropriate way, to achieve this outcome. As you will appreciate, there are ways in which your client's interests under the Trusts could be altered by consent which do not involve transferring the vast bulk of the assets of the Trusts to your client outright. These alternatives would avoid the need for expensive, long running and stressful Court proceedings, and the drastic departure from the deceased's wishes and prejudice to the other beneficiaries' interests which would result from the provision your client seeks."

It was suggested that a first step would be a meeting between the respective lawyers to discuss those possibilities further. That meeting took place and on 7 June 2018, Farrer & Co wrote to Withers stating that the Will Trustees had agreed to make available £50,000 for Mrs Cowan's costs in relation to the negotiations and that "while [their] clients remain[ed] willing in principle to attend a mediation, we suggest that the current discussions are allowed to run their course before consideration is given to this wider exercise."

27. As I have already mentioned, a mediation eventually took place on 16 October and in addition to the Will Trustees, it was attended by representatives on behalf of the Foundation. It was unsuccessful and so as early as 18 October 2018 enquiries were made about instructions to accept service of Mrs Cowan's claim. Mrs Cowan

eventually issued the proceedings seeking provision under the 1975 Act and an application seeking permission to make an application under section 2 of the 1975 Act out of time, on 12 November 2018, nearly 17 months after the six-month period for the purposes of section 4 of the 1975 Act had expired. An extension of time for service of evidence was requested on behalf of both the Will Trustees and the Foundation and it was not until 30 November 2018 that those instructed on behalf of the Foundation made clear that their client intended to oppose the application for permission to bring the proceedings out of time. The Trustees did the same in a letter of the same date.

RELEVANT PROVISIONS OF THE 1975 ACT

28. Before turning to the Judge's approach to the application, I should set out the provisions of the 1975 Act which are relevant to this matter. The main provision under which an order may be made is section 2:

> "**Powers of court to make orders.**
>
> (1) Subject to the provisions of this Act, where an application is made for an order under this section, the court may, if it is satisfied that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant, make any one or more of the following orders: —
>
> (a) an order for the making to the applicant out of the net estate of the deceased of such periodical payments and for such term as may be specified in the order;
>
> (b) an order for the payment to the applicant out of that estate of a lump sum of such amount as may be so specified;
>
> (c) an order for the transfer to the applicant of such property comprised in that estate as may be so specified;
>
> (d) an order for the settlement for the benefit of the applicant of such property comprised in that estate as may be so specified;
>
> (e) an order for the acquisition out of property comprised in that estate of such property as may be so specified and for the transfer of the property so acquired to the applicant or for the settlement thereof for his benefit;
>
> (f) an order varying any ante-nuptial or post-nuptial settlement (including such a settlement made by will)

> made on the parties to a marriage to which the deceased was one of the parties, the variation being for the benefit of the surviving party to that marriage, or any child of that marriage, or any person who was treated by the deceased as a child of the family in relation to that marriage.
>
> (g) an order varying any settlement made—
>
> (i) during the subsistence of a civil partnership formed by the deceased, or
>
> (ii) in anticipation of the formation of a civil partnership by the deceased,
>
> on the civil partners (including such a settlement made by will), the variation being for the benefit of the surviving civil partner, or any child of both the civil partners, or any person who was treated by the deceased as a child of the family in relation to that civil partnership.
>
> (h) an order varying for the applicant's benefit the trusts on which the deceased's estate is held (whether arising under the will, or the law relating to intestacy, or both).
>
> . . . "

If the court considers that reasonable financial provision has not been made, it is required to have regard to the matters set out in section 3 when determining whether and in what manner to exercise its powers. The matters set out at section 3(1) (a) – (g) include the financial needs and resources which the applicant has or is likely to have in the foreseeable future and the size and nature of the net estate. In addition, in the case of a spouse, such as Mrs Cowan, the court is required to have regard to the matters set out at section 3(2). These include the age of the applicant and the duration of the marriage and the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home. Section 3(2) also provides that in circumstances such as those which apply here, the court will have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died, the marriage had ended in divorce rather than death.

29. Section 4 contains the time limit and the power to extend time with which this appeal is directly concerned. It is as follows:

> "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."

We were also referred to section 20 which is concerned with the position of the personal representatives. Where relevant, it provides as follows:

> "**Provisions as to personal representatives.**
>
> (1) The provisions of this Act shall not render the personal representative of a deceased person liable for having distributed any part of the estate of the deceased, 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, on the ground that he ought to have taken into account the possibility—
>
> (a) that the court might permit the making of an application for an order under section 2 of this Act after the end of that period, . . .
>
> . . .
>
> but this subsection shall not prejudice any power to recover, by reason of the making of an order under this Act, any part of the estate so distributed.
>
> . . ."

THE JUDGE'S ANALYSIS

30. In summary, the Judge concluded: the proper approach to an application under section 4 required the court to be satisfied that the claim was arguable and there were good reasons justifying the delay; the claim was unarguable given the generous trust arrangements the Deceased had implemented and there were no good reasons for the delay.

31. In relation to the proper approach to section 4, the Judge began by noting at [4] the statement of Briggs J at [26] in *Nesheim v Kosa* [2006] EWHC 2710 (Ch) that the six-month time limit existed to avoid the unnecessary delay in the administration of estates and to avoid the difficulties which might be occasioned if distributions of an estate are made before proceedings are brought. In the Judge's view, however, that was not the only reason for the rule. He went on:

> "4. …That is plainly a good reason for the existence of the limitation period, but it is, surely, not the only reason. Litigation is intrinsically stressful and extremely expensive. The time limit must be there to protect beneficiaries from being vexed by a stale claim, whether or not the estate has been distributed. Similarly, the time limit must be there to spare the

> court from being burdened with stale claims which should have been made much earlier. A robust application of the extension power in section 4 would be consistent with the spirit of the overriding objective, specifically CPR 1.1(2)(d) ("dealing with the case expeditiously"), 1.1(2)(e) ("allotting the case an appropriate share of the court's resources") and 1.1(2)(f) ("enforcing compliance with rules"). It would also echo the ever-developing sanctions jurisprudence exemplified by Denton & Ors v TH White Ltd & Ors [2014] EWCA Civ 906, [2014] 1 WLR 3926. The fact that the time limit is contained within the statute rather than in a procedural rule is also of significance."

32. The Judge then identified the principles relevant to an application under section 4 as those encapsulated by Black LJ in *Berger v Berger* [2013] EWCA Civ 1305 and, in particular, the seven considerations listed therein (as derived from *Re Salmon* [1981] Ch 167 and *Re Dennis* [1981] 2 All ER 140). They are:

> "(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?"

33. The Judge went on to reason:

> "6. Of course, the discretion is not "unfettered". The list above contains a number of highly prescriptive, fettering, factors which when applied will drive the exercise of the power. In fact, I doubt whether the exercise is correctly to be framed as one of "discretion" at all. Fundamentally, the court must be satisfied that the claimant has shown (a) good reasons justifying the delay and (b) that she has a claim of sufficient merit to be allowed to proceed to trial. This is not an exercise of

> discretion but is, rather, the making of a qualitative decision or a value judgment. …"

34. As to whether Mrs Cowan has an arguable case for substantive relief under the 1975 Act, the Judge considered that the requirement was not met. In summary, he held that: Mrs Cowan's marriage to the Deceased had ended in death rather than divorce, and the claim would be dealt with by reference to the "needs" rather than "sharing" principle ([8]); the Will was designed to meet Mrs Cowan's every reasonable need for the rest of her life and to spare her the burden of administering, investing and deploying large sums of money ([10] and [15]); there was no evidence to suggest that Mrs Cowan would be in a worse position as to US tax by reason of the Will ([17]); the mere fact that there was no outright legacy for Mrs Cowan did not mean the provision under the Will was unreasonable and if that were the case, and outright provision were necessary, it would introduce a form of "forced spousal heirship" unknown to the law ([20] and [21]); and there was no evidence to suggest that the Will Trustees would blatantly defy the Deceased's wishes set out in the Letter of Wishes, and were they to do so it would not only be completely immoral but would be likely to amount to a breach of trust ([22]). It is helpful to set out some of the Judge's reasoning in this regard in more detail:

> "20. I have stated above in para 6 that the second limb of the basic test is that the claimant must satisfy the court that she has an arguable case for substantive relief. All counsel are agreed that this imports the test for summary judgment in CPR 24.2 that is to say that she must show that she has a "real prospect" of succeeding substantively. What this means is that she must show that she has sufficient merit to take the case to trial. The argument of Miss Reed QC is that because the claimant does not have outright ownership of assets and therefore absolute control of them she is, as she put it, at the "mercy of the trustees" who could cut her adrift with no access to money at all. On many occasions Miss Reed QC asserted that the claimant "lacks security" and that this of itself demonstrated a prima facie case that the will failed to make reasonable financial provision for the claimant.
>
> 21. I have to say that I completely disagree. Miss Reed QC's argument was tantamount to saying that every widow has an entitlement to outright testamentary provision from her husband. This would, in effect, introduce a form of forced spousal heirship unknown to the law. Plainly, this cannot be right. It must be possible for a testator to provide for his widow by a generous trust arrangement such as this, without the fear that it will be interfered with at huge expense in proceedings under the 1975 Act.
>
> 22. I have to make the qualitative proleptic assessment as to whether the trustees will honour Michael's wishes and ensure that every reasonable need of the claimant is met until her death. There is absolutely nothing in the evidence to suggest that they would blatantly defy his wishes. Were they to do so it

> would not only be completely immoral but would likely amount to a breach of trust which would be actionable at the suit of the claimant."

35. As to whether there were good reasons for the delay, the Judge found that Mrs Cowan had not demonstrated any good reasons for what he described as the "very substantial delay". In summary, he concluded that effectively there had been 13 months of inexcusable delay in the 17-month period following the expiry of the six-month period provided for under section 4.

36. He analysed the delay in the following way: (i) there were no good reasons for the delay during the period from immediately after the deadline of 16 June 2017 until 7 December 2017 when Withers first wrote to Farrer & Co intimating Mrs Cowan's intention to bring a 1975 Act claim because by 28 March 2017, Mrs Cowan and her sons had understood both the Will and the 1975 Act, but had chosen to go down the path of engagement with the Will Trustees until views hardened on 7 December 2017 ([26] – [33]); (ii) despite strong criticism of the moratorium which was agreed in Farrer & Co's letter of 25 January 2018 (to which I shall refer below), the period from 7 December 2017 until 1 May 2018 should be ignored because it was subject to the "supposed moratorium" ([35]); but (iii) there were no good reasons for the delay between 1 May 2018 when the letter of claim was sent until 8 November 2018 when proceedings were commenced, notwithstanding the without prejudice negotiations and mediation in that period in the light of the expiry of the moratorium on 1 May 2018 ([36]). The judge concluded therefore, that:

> "37. Therefore, there are two very lengthy periods of delay here namely 17 June 2017 to 7 December 2017 and 1 May 2018 to 8 November 2018; a total of 13 months of delay.
>
> 38. In my judgment there are no good reasons justifying the delay for that aggregate period of 13 months. The period of delay is very substantial: more than twice the period allowed by Parliament for making a claim. In my judgment, absent highly exceptional factors, in the modern era of civil ligation the limit of excusable delay should be measured in weeks, or, at most, a few months."

37. Although, ultimately, his comments in relation to the moratorium were *obiter*, it is helpful to set them out in full at this stage:

> "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.

> 35. The letter of claim arrived on 1 May 2018. The claimant and her solicitors must have realised that if a moratorium had validly taken effect, then it expired on the date of that letter and it was incumbent on the claimant to issue her claim forthwith. I am prepared on the facts of this case to ignore the period of delay from 7 December 2017 to 1 May 2018, because that was the period covered by this supposed moratorium. But I suggest that in no future case should any privately agreed moratorium ever count as stopping the clock in terms of the accrual of delay. Put another way, a moratorium privately agreed after the time limit has already expired should never in the future rank as a good reason for delay."

THE PRESENT APPEAL

38. As there are many facets to this appeal, it is important to set out the grounds in some detail. In summary, the grounds of appeal are that the Judge erred in: his approach to section 4 which led him to leave out relevant considerations and take into account irrelevant considerations; holding that Mrs Cowan did not have an arguable case; and finding that there were no good reasons for the delay and in wrongly having considered that to be a determinative factor. Accordingly, we are asked to allow the appeal and rather than remit the matter, to exercise the power contained in section 4 ourselves.

39. There are, however, nine grounds of appeal, many of which have sub-grounds, and numerous matters which are raised by way of Respondent's Notice. The grounds have been grouped together both in the written and oral submissions. The first four grounds are naturally considered together. They are concerned with the nature and purpose of the power in section 4. They are that the Judge erred in: (1) holding the time limit in section 4 is there to prevent beneficiaries and the court being vexed with stale claims; (2) drawing an analogy between the jurisdiction to grant relief from sanctions and the power under section 4; (3) holding that he was not exercising a discretion but coming to a value judgment; and (4) applying the wrong test by asking only whether Mrs Cowan had an arguable claim and had shown good reasons, justifying the delay.

40. The next two grounds are concerned with matters which it is said that the Judge failed to take into consideration. They are: (5) failing to give any weight to the fact that the estate had not been distributed; and (6) disregarding negotiations taking place between 1 May 2018 to 8 November 2018 and asserting that the claim should have been issued when parties are encouraged to explore alternative dispute resolution. As ground (6) is connected with the Judge's treatment of delay, it is most natural to consider ground (9) with it. That ground is multi-faceted, but, overall, it is that the Judge erred in finding that there was no good reason why the claim was not issued before 12 November 2018. In particular, it is said that the Judge was wrong to find: that the possibility of a claim was mentioned by Helen Cheng to Robert Musial and to Mrs Cowan; that in the alternative, he was wrong to find that such mention was sufficient advice to alert Mrs Cowan to the possibility of a claim; that he was wrong to find that she and her sons understood the Will and the 1975 Act prior to 4 December 2017; and that he was wrong in the circumstances to find that there was no good reason for the period of time after 1 May 2018.

41. Grounds (7) and (8) are concerned with whether, as the Judge put it, there was an arguable case. They are that he erred in: (7) taking into account irrelevant considerations and giving insufficient weight to the fact that Mrs Cowan is the object of a discretionary trust and her life interest in residue could be terminated by exercise of the Power of Appointment; and (8) concluding that the case would be dealt with by reference to "needs" rather than the "sharing" principle under the "divorce cross check".

42. As I have already mentioned, the Will Trustees filed a Respondent's Notice and seek to uphold the Judge's order on the additional grounds that: there was no external trigger justifying Mrs Cowan's decision to issue proceedings out of time; the Judge was wrong to give effect to the standstill agreement/moratorium; no negotiations took place within the time-limit and there were no negotiations after the time-limit which the court could properly take into account; by the time the claim was intimated the estate had been distributed and the recipients had changed their position; there was no evidence that the amounts received by Mrs Cowan and agreed with the Will Trustees are insufficient; there was no good arguable case as there was no need for a "clean break"; and Mrs Cowan has alternative remedies against her professional advisers in respect of any failure to advise her as to the Will, the 1975 Act and the invalidity of the stand-still agreement/moratorium. The Foundation Trustees filed a Respondent's Notice in similar terms.

DISCUSSION

(1) The Nature and purpose of section 4

43. Although it was suggested in submissions that the Judge's observations at [4] of the judgment are of no direct relevance to his decision and should be ignored, I consider them to be important to the structure of the judgment and the outcome of the Judge's decision making. It seems to me that they are consistent with his view that, despite having set out the principles for the exercise of the power under section 4, encapsulated by Black LJ (as she then was) in *Berger v Berger*, he could approach the matter purely by reference to whether there was a good reason for the delay and whether there was an arguable case. They also appear to have led him to adopt a disciplinary view when determining whether to extend time. Before turning to the proper approach to the exercise of the section 4 power, it is important, therefore, to mention the analogy which he sought to draw with the overriding objective and in particular, CPR 1.1(2)(d), (e) and (f), what he described as the "ever-developing sanctions jurisprudence exemplified by *Denton & Ors v TH White Ltd & Ors*" and his reference to "stale claims".

44. First, it seems to me that the concept of a "stale claim" is of little relevance in the 1975 Act context. It is borrowed from and is more apposite to the consideration of matters under the Limitation Act 1980. Section 4 contains no long stop provision. Furthermore, the assessment, for the purposes of the substantive claim, is made at the date of the hearing and, therefore, concerns about the loss of evidence and witnesses over time are of much less importance than they might be. As Briggs J (as he then was) pointed out in *Nesheim v Kosa*, section 4 exists for the purpose of avoiding unnecessary delay in the administration of estates which would be caused by the tardy bringing of proceedings and to avoid the complications which might arise if distributions from the estate are made before the proceedings are brought. This

dovetails with section 20 of the 1975 Act. It provides express protection for the executors/personal representatives of an estate from any liability which might otherwise arise as a result of having made a distribution from the estate more than six months after the grant of probate/letters of administration, on the ground that they ought to have taken into account that the Court might permit a claim to be made after the end of that period. Section 4 is not designed, therefore, 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.

45. Secondly, it follows that I do not agree with the Judge that what he describes as "a robust application of the extension power" is necessary. There is nothing in section 4 or in the principles distilled in *Berger v Berger* which requires such an approach to be adopted. Furthermore, it seems to me that the paragraphs of the overriding objective to which the Judge referred are not relevant to the exercise of section 4. They were CPR 1.1(2)(d), (e) and (f) which are concerned with dealing with the case expeditiously, allotting the case an appropriate share of the court's resources and enforcing compliance with rules, respectively. They are all concerned with managing a claim proportionately and fairly once it has been commenced, whereas section 4 is concerned with whether, given all the circumstances of the case and the delay, it is appropriate to allow a claim to be issued more than six months after a grant of probate/letters of administration.

46. Thirdly, it seems to me that the Judge's references to the "ever-developing sanctions jurisprudence exemplified in *Denton* . . ." and the fact that "the time limit is contained within the statute rather than in a procedural rule" are for the most part inapposite. There is no disciplinary element to section 4. Unlike the provisions of the CPR, the six-month time limit in section 4 is not to be enforced for its own sake. The time limit is expressly made subject to permission of the court to bring an application after the six months has elapsed. It is designed to bring a measure of certainty for personal representatives and beneficiaries alike. When determining whether a claim should be brought outside the six-month period, nevertheless, the court must consider all of the relevant circumstances of the case in question and the factors which were highlighted in *Berger v Berger*. The rationale of CPR 3.9(1) with which the "*Denton* jurisprudence" is concerned, on the other hand, just like the overriding objective in CPR 1.1, is that court rules should be obeyed so that once commenced, litigation should proceed expeditiously and at proportionate cost and that court resources should not be wasted. 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."

47. Furthermore, it follows that there is no additional significance to be drawn from the fact that the approach to time limits in the context of the breach of procedural rules has become more stringent. In support of the Judge's approach Mr Wilson QC, on behalf of the Will Trustees, referred us to the judgment of Sir Robert Megarry V-C in *In re Salmon, decd, Coard v National Westminster Bank Ltd & Ors* [1981] 1 Ch 167

at 175B at which the Vice-Chancellor pointed to the fact that the time limit in section 4 is a "substantive provision laid down in the Act itself, and is not a mere procedural time limit imposed by rules of court which will be treated with the indulgence appropriate to procedural rules." This observation was also quoted by Black LJ in *Berger v Berger* at [61] of her judgment in that case. She did so in the context of having noted that there had been very significant delay in commencing proceedings (6½ years) and that "faced with a claim which is as long out of time as this one, a court is bound to search for explanations for the delay in order to consider them as part of all the circumstances of the case."

48. It seems to me that both Black LJ and the Vice-Chancellor were seeking to emphasise that an applicant must make out a substantial case for the exercise of the section 4 power and, as the Vice-Chancellor put it, it is "no triviality". It does not lead to the conclusion, as Mr Wilson would have us conclude, that because the attitude towards compliance with procedural rules is much more strict than it was in 1981 and there has been a sea change in relation to expectations in relation to the conduct of litigation which is already on foot, that the power under section 4 should be exercised just as or even more strictly, is based on the same rationale, or should be approached with the same mindset. Although it is necessary to put forward a substantial case, the position is not analogous. Not only are the circumstances different, it is also necessary to consider the statutory power in the context in which it arises. It is for those reasons that the factors distilled in *Berger v Berger* are relevant to the exercise of the power.

49. As to ground (3), I agree with Mr Wilson, whose submissions were adopted by Ms Angus QC for the Foundation Trustees, that 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.

50. As I have already mentioned, it seems to me that the erroneous approach to the exercise of the power in section 4 set out at [4] of the judgment led the Judge to take a disciplinary view and to polarise his thinking into two main streams, rather than to adopt the proper approach and consider all of the *Berger* factors and to give them appropriate weight in the particular circumstances. For example, as Miss Reed QC pointed out on behalf of Mrs Cowan, the Judge did not consider whether the estate had been distributed and whether in the light of what had taken place, the nature of the beneficiaries' interests and the assets available, whether any prejudice would be caused were permission granted to make the claim out of time. I have come to this conclusion about the Judge's polarised thinking despite the fact that depending on the circumstances of a particular case, it may be appropriate to give great weight to an unexplained or extortionate delay and it would not be appropriate to exercise the section 4 power if the claim has no merit in the sense that it would not pass the test for summary judgment. I shall return to consider those two matters in more detail.

51. A disciplinary approach also appears to have led the Judge to decide that there must be not only an explanation but a "good reason" for the delay if the section 4 power is to be exercised. It seems to me that although the applicant must put forward a

substantial case, that it is not necessarily true that there must be a good reason for all delay in every case. Each case turns on its own facts and, in each case, the judge is required to weigh the *Berger* factors and to reach a decision. If, as in *McNulty v McNulty* [2002] WTLR 737 the applicant has a strong claim for reasonable financial provision, it may be appropriate, taking into account all of the other relevant factors, to exercise the section 4 power, despite the lack of a good reason for delay or some part of it. In that case, there was a period of delay of ten months after the applicant had become aware of the true value of the estate, during which the judge, Mr Launcelot Henderson QC (as he then was) considered that the matter was treated with "inexcusable tardiness". See 766G-H. Nevertheless, despite there being no good reason for that delay, having taken all the relevant factors into account and given them their due weight, he exercised the section 4 power in the applicant's favour. It seems to me, therefore, that the Judge in this case was wrong to require there to be a "good reason" for all periods of delay without considering the matter in the round.

52. I agree with Mr Wilson and Ms Angus, however, that it is necessary to decide whether an applicant's claim has a real prospect of success rather than a fanciful one and if the claim has no real prospect of success, there is no point in considering the other relevant factors. That was made clear in *Re Dennis, Dennis v Lloyd's Bank Ltd* [1981] 2 All ER 140 per Browne-Wilkinson J at 144j-145a and 146d-e. 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.

(2) Did the Judge err in law in finding that the substantive claim had no real prospect of success?

53. As the question of whether Mrs Cowan's claim has a real prospect of success may be determinative of her application under section 4, before turning to the Judge's treatment of delay, it is convenient to consider whether he was correct to decide as he did at [20] – [23] of the judgment. Did the Judge err in law by taking into account irrelevant factors and giving insufficient weight to the fact that Mrs Cowan is a Discretionary Beneficiary and her life interest in the Residuary Trust can be terminated by the exercise of the power of appointment? Before turning to the way in which the Judge approached this matter I should mention that there is no dispute that the appropriate threshold in relation to the merits of the substantive claim is whether it would meet the summary judgment test. See *Re Dennis* per Browne-Wilkinson J at 144j – 145a.

54. Miss Reed submits, in the light of all the relevant factors set out at section 3 of the 1975 Act, including the length of the relationship between Mrs Cowan and the Deceased and the size and nature of the estate, there is clearly a real prospect of success in arguing that outright provision should have been made for Mrs Cowan rather than provision as a discretionary beneficiary of the Business Property Trust and a life interest under the Residuary Trust which includes the Montecito property which is her home, the life interest being terminable at any time by the Will Trustees. She says that the Judge's erroneous view of the effects of a claim for outright provision that it amounts to "forced spousal heirship" at [21] of the judgment and his approach

to the Letter of Wishes and the position of the Will Trustees at [22] of the judgment, led him into error in relation to the merits of the substantive claim.

55. Miss Reed also submits that the Judge sought to bolster his conclusion that it was unarguable that outright provision should have been made, along the way, in a manner which was not open to him. She points to the Judge's observation that although the reasons for the use of trust structures rather than outright provision in favour of Mrs Cowan were not explicitly stated they were "easily deduced" and were in part, that it is likely that the Deceased believed that "she [Mrs Cowan] should be spared the burden of administering, investing and deploying large sums of money" (see the judgment at [15]). Miss Reed says that there was no evidence to this effect and that the Judge's observations were merely speculation. She also submits that the Judge appears to have concluded that the Deceased's intentions in this regard were reasonable, rather than to ask himself the correct question, namely, whether it was arguable that reasonable financial provision had not been made for Mrs Cowan.

56. Before turning to those matters, I should mention that both in the grounds of appeal and in her skeleton, Miss Reed put emphasis upon whether it was appropriate for the Judge to have approached the matter on a "needs" rather than a "sharing" basis for the purposes of the "divorce cross check" in relation to whether reasonable financial provision has been made, which is required by section 3(2) 1975 Act, and submitted that the "sharing" basis was appropriate. A question had arisen as to whether a concession had been made before the Judge that this was a case which should be approached on the "needs" basis. The Judge had stated at [8] of the judgment that had the marriage between the Deceased and Mrs Cowan ended in divorce rather than death, one could confidently say that her claim would have been dealt with by references to the "needs" rather than the "sharing" principle.

57. Before us, however, Miss Reed submitted that, in the circumstances, the distinction took the matter no further, that "needs" trumped "sharing" in any event and that the heart of the matter was whether in the circumstances of the case, there was real prospect of success in arguing that reasonable financial provision for Mrs Cowan required outright provision. She pointed out that it had been conceded in numerous cases, including *Cunliffe v Fielden* [2006] 2 WLR 481, *P v G* [2007] WTLR 691 and *Sargeant v Sargeant* [2017] WTLR 1451 that making a widow the object of a discretionary trust did not make reasonable financial provision for her and submitted that the Judge had given insufficient weight to Mrs Cowan's lack of security under the provisions of the Will Trusts.

58. I agree that the Judge appears to have indulged in speculation about the Deceased's motivation at [15]. There is no evidence to support his conclusions. Such speculation is at best irrelevant. At worst, however, it is consistent with the Judge having been distracted from the real question before him, namely, whether it was arguable that reasonable financial provision had not been made for Mrs Cowan. It seems to me that the Judge's speculation is consistent with him having asked the wrong question, namely, whether the Deceased's intentions were reasonable, or, at least, erroneously having taken the Deceased's intentions into account.

59. I also agree with Miss Reed that when determining whether the substantive claim had a real rather than fanciful prospect of success, the Judge failed to have proper regard to all the circumstances of the case, including the size of the estate, the length of the

relationship, the fact that Mrs Cowan received only the chattels outright, which it is accepted were of nominal value, she has no autonomy and no security and has no direct interest, even in the Montecito property which has been her home for more than 20 years. Instead of determining whether the summary judgment test was met on the basis of all the relevant factors, including those to which I have referred, and having asked the correct question for the purposes of a substantive claim under section 2 of the 1975 Act, the Judge appears to have taken into account and relied upon two erroneous matters.

60. First, he rejected the submission that a claim for outright provision from the estate could have any merit on the basis that such a claim was "tantamount to saying that every widow has an entitlement to outright testamentary provision from her husband" and would "in effect, introduce a form of forced spousal heirship". He did so despite the fact that it was not being suggested that every widow is entitled to outright testamentary provision or that in every case a beneficial interest in a discretionary trust can never amount to reasonable financial provision for the purposes of the 1975 Act. He was being asked to consider the circumstances of Mrs Cowan's case. There can be no question of "forced spousal heirship." Each case is fact specific and must be considered in the light of the relevant factors.

61. Secondly, in this regard, he appears to have taken into account and relied upon his approach to the Letter of Wishes and the obligations of the Will Trustees expressed at [22] of the judgment. He concluded that there was no evidence to suggest that the Trustees would blatantly defy the Letter of Wishes and if they were to do so, it would be "completely immoral" and would be "likely to amount to a breach of trust." He appears to have assumed, therefore, that the Letter of Wishes, which by its very nature is unenforceable, (see *Pitt v Holt* [2013] UKSC 26 per Lord Walker at [66]) would be complied with in every respect, whatever the circumstances. He also appears to have relied incorrectly upon his conclusion that failure to comply with the Letter of Wishes would necessarily amount to an actionable breach of trust.

62. It seems to me, therefore, that this ground of appeal (Ground (7)) must succeed.

(3) Approach to delay and failure to take distribution or lack of it into account

63. What of the Judge's treatment of delay? Although I do not wish to suggest that it is necessarily appropriate to break up the period between the expiry of the six- month period and the issue of proceedings, given that the Judge approached the lapse of time in that way, I shall address the periods to which he referred. As Mrs Cowan's knowledge of the existence of the 1975 Act, the six-month time limit contained in section 4 and the date on which the six months expired in this case are relevant to the way in which the Judge analysed delay in relation to the first period which he identified as running from 16 June 2017 (when the six-month period expired) until 7 December 2018 (when the claim was intimated), I will begin with ground (9) of the grounds of appeal.

64. Despite both Mrs Cowan and her son Robert stating in their evidence that they had no memory of having been informed about the 1975 Act and the six-month time limit, having heard oral evidence, the Judge found at [29] and [30] of the judgment that it was inconceivable that the 1975 Act and the six-month time limit for making a claim were not discussed on the telephone by Ms Cheng and Mrs Cowan's son Robert on or

about 29 March 2017, and that both Mrs Cowan's sons and Mrs Cowan herself "were made well aware by virtue of Helen Cheng's conversation with Robert of the need to make the claim by 16 June 2017 if they were seriously intending to do so". The Judge's findings were reached having heard oral evidence and, in particular, having heard cross- examination of Robert Musial in relation to a paragraph of his witness statement in which he used the term "claim" despite contending that he had no recollection of ever having been told of the six-month time limit or a claim under the 1975 Act. The Judge found that evidence to be "unconvincing".

65. It is said on Mrs Cowan's behalf that even if Robert had been informed on the telephone, there was no basis upon which the Judge could have inferred, as he did, that Robert told his mother what he had been told on the telephone or to infer further that Mrs Cowan understood the information passed on to her. Mrs Cowan's evidence was that she could not recall being told about a claim under the 1975 Act until she met Ms Dora Clarke on 4 December 2017.

66. Having heard oral evidence, the Judge had a considerable advantage in comparison with this court and it seems to me that his conclusions are entitled to be given due weight and should not be interfered with. It is neither true to say that there was no evidence to support his findings nor that the findings were ones which no reasonable judge could have reached. See *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 per Lord Mance at [46], *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642 per Clarke LJ at [14] – [17] and *Parry v Raleys Solicitors* [2019] UKSC 5 at [49] – [52].

67. In any event, Miss Reed contends that the Judge was wrong to find that the mention on the telephone was sufficient advice to alert Mrs Cowan to the opportunity to make a claim within the six-month time limit such that she should be denied permission to bring a claim out of time, and that the Judge was wrong to find that she and her sons understood the nature of the trusts and the 1975 Act prior to the meeting with Ms Dora Clarke on 4 December 2017. See Grounds 9(b) and (c).

68. In this regard, 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*.

69. In this case, if one views the sequence of events as a whole, it seems to me that the Judge was wrong to accord the explanation for the period from 16 June until 7 December 2017 no weight which is, in effect, what he did and to take the period into account against Mrs Cowan. He should have considered it as part of all of the circumstances of the case. Even if Mrs Cowan and her sons were aware of the

existence of the 1975 Act and the six-month time limit after the telephone call with Helen Cheng, the explanation for the lapse of time in this case is clear.

70. First, as Miss Reed points out, the letter from Ms Dora Clarke of 28 March 2017 does not provide any substantive advice about the nature of the kind of relief which might be available under the 1975 Act or that the six-month period prescribed in section 4 would create any real barrier to commencing proceedings, if necessary, after that date. Secondly, it is clear, rather, that the explanation for the fact that a claim was not intimated until 7 December 2017 has a number of facets. Mrs Cowan and her sons and the Will Trustees were operating at a considerable distance and communicated for the most part by email. It was not until payments began from the estate/Will Trusts in April 2017 and the process of receiving income, seeking reimbursement in relation to additional expenditure and producing budgets for future needs and expenditure got underway in the subsequent months, that the reality of Mrs Cowan's situation became clear. This was highlighted for the first time after Mrs Cowan's knee surgery in October 2017. The difficulties in obtaining reimbursement, budgeting for the future and providing a secure home fell into focus. The reality of her position having become clear, as a result of distance involved, Mrs Cowan was not in a position to receive any advice face to face, about English law and the 1975 Act, in particular, until Ms Dora Clarke's visit in early December. Almost immediately after that, the claim was intimated.

71. It seems to me, therefore, that if and to the extent that he did so, it was wrong of the Judge to find that Mrs Cowan had received sufficient advice about the time limit and the 1975 Act itself in March 2017. The evidence is contrary to such a conclusion. There is no suggestion in the email correspondence between Ms Helen Cheng and Ms Dora Clarke in March 2018 that full advice was given, but also, as Miss Reed pointed out, Withers' invoice for the advice which was given was for only £232. It is unlikely on that basis that full advice was given. Furthermore, the email from Mrs Cowan's son to Ms Dora Clarke dated 14 November 2017 makes clear that he, his brother and his mother felt out of their depth. This is not a case like *Escritt v Escritt* (1982) 3 FLR 280, therefore, in which advice was received about a 1975 Act claim, the widow with full understanding of her position under the 1975 Act made a conscious decision not to make a claim against the estate and four years later changed her mind. In this case, Mrs Cowan came to understand the nature of her position over a relatively short period after payments from the Will Trusts had commenced in April 2017. Furthermore, a claim was intimated within days of Ms Dora Clarke's visit to California, during which she provided the first substantive advice about a claim under the 1975 Act, and within six months of payments having commenced. It seems to me, therefore, that this is not a case in which there was a change of heart, a considerable time having elapsed after a decision having been made not to challenge the Will Trusts. It is not necessary in this case therefore, to search for an external trigger for such a change of heart. It is only necessary to take account of the explanation for the lapse of time. If it were necessary, however, it seems to me that the querying of the invoices after Mrs Cowan's knee surgery, which occurred in November 2017, can be characterised as such a trigger.

72. Before turning to the Judge's treatment of the without prejudice negotiations in general, I must address the Judge's comments about the moratorium to which the Executors/Will Trustees agreed in their letter of 25 January 2018. In the end, the

Judge decided that the period from the date of that letter until the letter of claim of 1 May 2018 could be ignored for the purposes of calculating the length of the delay for the purposes of section 4: see the judgment at [35]. In any event, 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.

73. 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. Obviously, the court's attitude will depend upon all of the circumstances in the particular case and may be influenced by whether some of the parties have not been privy to the moratorium agreement or the negotiations. In this case, Ms Angus QC, on behalf of the Foundation Trustees, submits that her clients were only made aware of the moratorium agreement in the form of the letter of 25 January 2018, after the mediation had failed. It seems to me that in this case, that can carry very little weight. The Foundation Trustees took part in the mediation itself and, therefore, must have considered that there was a claim to settle and were also copied in on correspondence such as the letter of 23 May 2018.

74. What of the Judge's treatment of the without prejudice negotiations after the letter of claim was sent on 1 May 2018? The Judge considered that the moratorium, by its own terms, came to an end when the letter of claim was sent and therefore, on any footing, there was no proper explanation for the further lapse of time until the proceedings were issued in November 2018. He came to this conclusion despite the continued without prejudice negotiations and the mediation in mid-October 2018. See [36] – [38] of the judgment.

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."

76. In this case, although the 25 January 2018 letter from the Will Trustees had said that it "may well be appropriate at that stage to restate the trustees' position to avoid the

necessity for Mary to issue proceedings to protect her position" once a letter of claim was received, no express restatement occurred. In my view the terms of the letter disclosed a clear indication on the Will Trustees' part that a further extension was anticipated and would be agreed and indeed, whilst no formal extension was agreed, after receipt of the letter of claim and in response to it, the Will Trustees suggested negotiations about varying the trusts by consent rather than litigation, the negotiations continued, and those negotiations having failed, the anticipated mediation took place. It was not until sometime after the mediation had failed and proceedings had been issued that any point was taken about the proceedings being out of time. It seems to me that the Judge was wrong to view the sequence of events and the correspondence in the mechanistic way he did. Negotiations continued and after the receipt of the letter of claim and consideration of it by the Executors/Will Trustees, Mrs Cowan was encouraged, first to enter into without prejudice negotiations about variation of the trusts, and then to mediate. It seems to me that in those circumstances, the lapse of time and negotiations after the delivery of the letter of claim dated 1 May 2018, should have been viewed as a positive factor and should not have counted against Mrs Cowan.

77. What of the Judge's failure to consider the relevance of and what weight to give to whether the estate has been distributed? Mr Wilson submitted that the Judge's failure to consider this matter is not of vital importance. I disagree. As Black LJ put it at [60] of her judgment in the *Berger* case, the distribution of the estate or lack of it is an important but not a decisive factor and must be considered alongside other relevant factors in evaluating the case as a whole. Accordingly, in my judgment, the Judge's exercise of the section 4 power was also flawed in this respect.

78. What of the other factors raised in the Respondent's Notice? Ms Angus refers to the prejudice suffered by other beneficiaries who are in financial need and to whom distributions cannot be made whilst this application is on foot. She relies upon *Re Gonin (deceased), Gonin v Garmeson & Anr* [1977] 2 All ER 720 per Walton J at 736e -f. Clearly, account must be taken of such prejudice and there is no evidence that the Judge did so. Neither did he consider whether Mrs Cowan had alternative remedies available to her. As Dunn LJ noted in *Adams v Schofield* [2004] WTLR 1049 at 1057H – 1058 B, the power in section 4 is not subject to any express statutory guidelines. It must be approached judicially and in the light of the circumstances. Accordingly, as Dunn LJ mentioned, if there were a cast iron and easily computable remedy against an applicant's solicitor, that could be a factor to which some weight might be attached. Ormrod LJ stated at 1059B – D that when determining the weight to attach to a claim for damages against solicitors in a case of this kind:

> ". . . the right approach is to consider the justice of the case as between the parties, first of all, and to take into account all the matters set out . . . in *In re Salmon*. It is only, having done that computation, one finds that the plaintiff on the one hand has suffered severe prejudice and the defendant on the other hand has suffered severe prejudice, or will if the limitation period is extended, that the claim for damages against the plaintiff's solicitors becomes relevant. In other words if, as in this case, all the indications are on the plaintiff's side and all point to extending time, and prejudice on the defendant's side is what I

> would call purely formal in the sense that they have lost the benefit of such protection as s4 gives them, then the claim for damages against solicitors is of little weight. . . . But quite a different situation would arise if the defendants were in a position to show that they have suffered, or would suffer real prejudice in one way or another if the time period was extended. Then, at that point, the alternative remedy in the plaintiff becomes highly relevant."

However, that is far from the case here. It is not clear by any means that there would be a claim against Mrs Cowan's advisers at all.

79. Having taken account of all these matters, in my judgment, for all of the reasons set out above, the Judge was plainly wrong to come to the conclusion he did and he erred in principle in doing so, neither do the matters raised in the Respondent's Notice on behalf of the Foundation lead me to conclude that the order can be upheld on the grounds contained therein.

Exercise of section 4 power

80. In the circumstances, therefore, rather than remit this matter, it is proportionate and appropriate that we should exercise the power under section 4 ourselves. In order to assist us should we arrive at such a conclusion, the Will Trustees made an application to file further evidence. The evidence brings matters up to date in relation to the administration of the Will Trusts, the payments made to Mrs Cowan and the way in which the Will Trustees have approached their obligations. It illustrates the proper working of the Will Trusts in accordance with the Letter of Wishes.

81. Having taken account of that evidence and having evaluated the factors highlighted in *Berger v Berger*, and in the light of the observations which I have already made when considering the appeal, I would exercise the power in section 4 of the 1975 Act to allow Mrs Cowan to bring a claim out of time. The entire period from 17 June 2017 until November 2018, when the proceedings were issued, can be properly explained. Furthermore, I do not consider that period to be lengthy as Ms Angus and Mr Wilson would have it. As soon as Mrs Cowan became aware of her true position and had the opportunity to take advice, a claim was intimated. A moratorium was agreed between highly experienced legal representatives and, thereafter, without prejudice negotiations continued without any indication that a point would be taken about the lapse of time. Not only did the Will Trustees provide £50,000 in order to facilitate Mrs Cowan's participation in those negotiations, having received and evaluated the letter of claim, they also encouraged her to take that course in their letter of 23 May 2018 and added that such a course would "avoid the need for expensive, long running and stressful Court proceedings . . .". Unfortunately, the mediation which took place at a time which was convenient for the parties was unsuccessful, but almost immediately thereafter, enquiries were made about accepting service and the proceedings were issued very shortly after that.

82. This is not a case in which Mrs Cowan merely changed her mind and did so a considerable time after having acquiesced in the workings of the Will Trusts. It cannot be compared with the situation in *Sargeant v Sargeant* or *Berger v Berger* in which ten years and six and a half years respectively had expired since the six-month period

had expired. It seems to me that there is a proper explanation for the delay, Mrs Cowan acted promptly once her true position was appreciated and advice had been taken, and the negotiations, quite properly encouraged by the Will Trustees, were a significant factor even though they began after the six-month period in section 4 had elapsed.

83. Furthermore, as I have already mentioned, I consider that Mrs Cowan's substantive claim for relief under section 2 of the 1975 Act has a real as opposed to fanciful prospect of success.

84. Also, although the pecuniary legacies have been paid and the trusts have been constituted, given the size and nature of the estate, it seems to me that these are not weighty factors. The same is true of the fact that discretionary payments have been made to Mrs Cowan. It seems to me that they will be taken into account in relation to her needs and resources under section 3 of the 1975 Act and if they had not been made, Mrs Cowan would have been entitled to make an application for interim relief under section 5 of the 1975 Act. In the light of the size of the estate, no one is going to be asked to return any monies received. In addition, I do not consider that the prejudice to the other Discretionary Beneficiaries as a result of the litigation is of such as to outweigh the factors in favour of extending time under section 4. Furthermore, it cannot be said that Mrs Cowan has a clear claim, if any, against her advisers.

85. Having considered all of the circumstances of this case, therefore, I consider that it is appropriate to give permission to commence proceedings out of time.

Lord Justice Baker:

86. I agree. I have also read, and agree with, a draft of the judgment which my Lady, King LJ, now proposes to give.

Lady Justice King:

87. I agree that the appeal should be allowed for the reasons given.

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.

90. 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.

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.