Neutral Citation Number: [2019] EWCA Civ 1794

Case No: B2 2018 2940

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT BIRMINGHAM
HHJ McCahill QC
BM80 156A

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2019

Before :

LORD JUSTICE FLOYD
LADY JUSTICE KING
and
LORD JUSTICE HENDERSON

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Between:

SURIYA BEGUM	**Appellant**
- and -	
SHAKILA AHMED **(Personal representative of Mohammed Yousaf Khan, deceased)**	**Respondent**

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- -

David Stockill (instructed by **Silks**) for the **Appellant**
David Mitchell and Imogen Halstead (instructed by **Smith Partnership**) for the **Respondent**

Hearing date: 9 October 2019

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Approved Judgment

Lord Justice Floyd :

1. This is an appeal in relation to an application by the defendant and appellant, Suriya Begum, for permission to bring a claim out of time under the Inheritance (Provision for Family and Dependants) Act 1975 ("the Act") in relation to the estate of Mohammed Yousaf Khan ("Mr Khan"). Such claims are required to be brought within 6 months of the grant of probate unless the court extends the time. District Judge Ingram ("the District Judge") and HHJ McCahill QC ("the Circuit Judge") both refused the appellant the necessary extension by orders dated 27 July 2018 and 31 October 2018 respectively. Lewison LJ granted permission for this second appeal on 15 February 2019.

The facts

2. Mr Khan died on 22 March 2015, the only asset within his estate being a house at 22 Lombard Avenue, Dudley ("Lombard Avenue") where the appellant has lived since 1993. The appellant is some 60 years of age and is disabled, having lost one of her legs. She claims to be Mr Khan's wife by virtue of a ceremony in Pakistan in 1991, and it is not disputed for the purposes of this appeal that she is his wife. By his will dated 11 February 2014, Mr Khan appointed his daughter, Shakila Ahmed, the claimant in the action and respondent to this appeal, as his personal representative, and left the entirety of his estate, after payment of his debts and expenses, to her. Probate in respect of the will was granted on 11 April 2016, meaning that the 6 month time limit expired on 10 October 2016.

3. On 9 June 2016 solicitors instructed by the respondent wrote making a demand for possession of Lombard Avenue. On 23 June 2016 solicitors for the appellant, Silks, responded, referring to the appellant's entitlement to financial provision under the Act, and also to a challenge to the 2014 will on the grounds that Mr Khan lacked testamentary capacity at the relevant time.

4. Invalidity of the 2014 will would bring into play a previous will of Mr Khan made in 2004. The 2004 will appointed both the appellant and respondent as executors. Its provisions are to some extent unclear, but, if it is valid, it appears to give the appellant a right to reside at Lombard Avenue (conditional on repairing and other obligations) but with the right to an absolute half-share of the proceeds of sale if she ceases to reside there.

5. Silks' letter of 23 June 2016 was replied to on 27 June by solicitors acting for the respondent, Smith Partnership ("SP"). SP noted that "your client intends to bring a claim under the 1975 Act" and "you are also in the process of investigating the Deceased's capacity to execute the Will". They also indicated that they would refrain from commencing possession proceedings in the circumstances "of these impending claims". SP did not hear further from Silks, however.

6. It appears that, instead of continuing to instruct Silks, the appellant had authorised a family friend, Mr Mirza, who was not a solicitor, to act on her behalf. The correspondence with Mr Mirza continued from July 2016, but without any claim under the Act being articulated further. On 10 October 2016, the 6 months period under the Act expired. Three weeks later, on 1 November 2016, SP wrote to the

appellant saying that the correspondence had not been able to make progress, and setting a deadline of 15 November 2016 for the appellant to leave the property.

7. On 30 November 2016 the respondent issued possession proceedings in respect of Lombard Avenue. Silks were apparently reinstructed by the appellant shortly thereafter. On 4 January 2017 Mr Grimes of Silks made a witness statement. He referred to difficulties in communicating with and taking instructions from the appellant, given that her written and spoken English were poor. The statement also referred to the possibility of a defence based on lack of testamentary capacity and to seeking agreement for a stay of the possession proceedings pending further investigations. A defence (with a statement of truth signed by Mr Grimes) was served on 24 April 2017 alleging that the will was invalid and of no effect because of lack of testamentary capacity, but not referring to any claim under the Act. The defence averred the existence of a previous will, of which the appellant was then unable to locate a copy, and in the alternative that, if Mr Khan died intestate, the appellant as his widow was the sole beneficiary of the estate. These contentions were not, however, reflected in a counterclaim. This was a procedural error: see CPR 57.8(1). This, and other procedural shortcomings caused the respondent to apply to strike out the defence in August 2017. Silks indicated that they would apply on behalf of the appellant to file a counterclaim.

8. Mr Grimes left Silks as of 22 August 2017, and the conduct of the case was placed in the hands of another solicitor, a Mr Donkin. At a case management conference in the possession proceedings on 9 October 2017, District Judge Sehdev enquired whether any application had been made for provision under the Act. He recorded in his order that no such application had been made, no doubt reflecting what he had been told. However, in all likelihood prompted by that exchange, an Amended Defence and Counterclaim was served on 23 October 2017, seeking to make a claim under the Act and seeking permission to make it out of time. That was another procedural error, because pursuant to CPR 56.17, such claims must be commenced by Part 8 claim form. In her reply and defence to counterclaim the respondent challenged the entitlement to bring a claim under the Act, pointing out that it was "now 12 months out of time".

9. A freestanding application under the Act was made by Part 8 claim form sent to the court on 2 February 2018.

The law

10. Section 2 of the Act gives the court a power to make provision for an applicant out of the estate of a deceased person where 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. The section gives the court wide powers as to the provision which it may make, including an order "for the transfer to the applicant of such property comprised in that estate as may be so specified". The classes of person who may make such an application are defined by section 1 of the Act to include the spouse of the deceased as well as any person who immediately before the death of the deceased was being maintained, either wholly or partly, by him.

11. Section 4 of the Act imposes the restriction on the timing of such applications:

> "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)."

12. A personal representative is protected by section 20 of the Act from liability for having distributed the estate after the end of the period of six months on the ground that he ought to have taken into account the possibility that the court might grant an extension of time. The Act therefore contemplates that an extension of time might be granted even where assets within the estate have been distributed.

13. The Act, as has been observed more than once, gives an unfettered discretion to the court to extend the time. It gives no express guidance on how the discretion is to be exercised, but it is a discretion which must be exercised in accordance with its statutory purpose and context. In *Nesheim v Kosa* [2006] EWHC 2710 Briggs J (as he was then) identified the nature and purpose of the time limit and the power to extend as follows:

> "… it is in my judgment also relevant that the limitation period which has now expired in this case is one imposed under the *Inheritance Act*. It is both of a special type in the sense that it confers upon a court a discretionary power to permit a claim to be made out of time on well-settled principles and it exists for a particular purpose, namely to avoid unnecessary delay in the administration of estates to be caused by the tardy bringing of proceedings under the Act and to avoid difficulties which might be occasioned if distributions of an estate are made before proceedings are brought, requiring possible recoveries from beneficiaries if those proceedings once brought are successful."

14. It follows that the discretion should not normally be exercised in a way which undermines the purpose of the time limit. It will always be material to ask whether the bringing of the claim out of time will cause delay in the proper administration of the estate, or have the potential to interfere with distributions which have already been made.

15. We were shown a number of authorities where the courts have identified other principles and evidential factors as being of relevance to the exercise of the discretion. These included *re Salmon (deceased)* [1981] 1 Ch 167; *re Dennis* [1981] 2 All ER 140; *Smith v Loosley* (unreported) Court of Appeal Transcript 1 June 1986; *Perry v Horlick* (unreported) Court of Appeal Transcript 18 November 1987; *re B* [1999] Ch 206; [2000] Ch 662; *McNulty v McNulty* [2002] WTLR 737; *Adams v Schofield* [2004] WTLR 1049*; Berger v Berger* [2014] WTLR 35; *Cowan v Foreman* [2019] EWCA Civ 1336.

16. In *re Salmon* Sir Robert Megarry V-C, having pointed out that the discretion was unfettered and "to be exercised judicially, and in accordance with what is just and proper" derived the following propositions from the then-existing authorities:

> "The onus lies on the plaintiff to establish sufficient grounds for taking the case out of the general rule and depriving those who are protected by it of its benefits. Further, the time limit is a substantive provision laid down in the Act itself, and is not a mere procedural time limit imposed by rules of the court which will be treated with the indulgence appropriate to procedural rules. The burden on the applicant is thus, I think, no triviality: the applicant must make out a substantial case for it being just and proper to exercise its statutory discretion to extend the time."

17. Sir Robert Megarry went on to identify a non-exhaustive list of "guidelines" which it was material to consider. These were, in summary:

    i) How promptly and in what circumstances the applicant has sought the permission of the court after the time limit has expired. This is not just a matter of measuring the length of time. It must include all the circumstances, including the reasons for the delay, and also the promptitude with which, by letter before action or otherwise, the claimant gave warning to the defendant of the proposed application.

    ii) Whether negotiations have been commenced within the time limit.

    iii) Whether the estate has been distributed before the claim has been made or notified.

    iv) Whether a refusal to extend the time would leave the claimant without redress against anybody.

18. I do not doubt for one moment that each of these factors may, in most cases, be important. As with any such list, however, there is a danger, if they are taken as a template, that other important factors relevant to the exercise of the discretion will be overlooked.

19. In *re B* Jonathan Parker J observed, although this did not form part of the reasoning for the decision, that:

> "The crucial factor in deciding whether to grant leave to apply out of time … is the balance of prejudice (that is to say prejudice other than that which is inherent in the granting or withholding of leave)."

20. I would stop short of holding that any particular factor is the crucial one in all cases. It is plainly relevant, however, to consider any clear prejudice to the party seeking the extension if leave is withheld, and the prejudice to the other party if leave is granted. Prejudicial delay, such as delay during which the estate has been distributed, should normally be accorded more weight than delay which has caused no prejudice.

21. As Sir Robert Megarry pointed out, the approach to the statutory time limit and its extension was not informed by the "indulgence appropriate to procedural rules". Even after the introduction of the CPR, where indulgence is no longer the watchword,

the different purposes behind the two jurisdictions mean that it is wrong in principle to draw on cases decided under the CPR to inform the exercise of the discretion under the Act: see *Cowan v Foreman* at [43] to [46].

22. The cases also show that an application will not be granted where the applicant does not have a real prospect of success on the merits of the claim under the Act. How much further the merits may be taken into account must depend on how clearly the facts emerge at the stage at which the discretion is being exercised. Mr David Mitchell, who appeared for the respondent with Ms Imogen Halstead, submitted that the court should go no further than examining whether the case raised a triable issue. Otherwise, the court would risk being drawn into a mini-trial on the basis of witness statements. It was considerations such as those which led the House of Lords in *American Cyanamid v Ethicon* [1975] AC 396 to a corresponding restriction in the case of interim injunctions.

23. I agree that in a case where the claim under the Act will turn on disputed issues of fact which cannot be resolved without a trial, the court should not conduct a mini-trial at the interim stage. *Smith v Loosley*, in which Dillon LJ said "it is not for us in this court to express any view as to whether or not the plaintiff's case has strong or slight prospects of success at the trial", may be seen as an example of such a case. Other cases show that where the court is able to form a clear view of the merits, it is relevant and just to take that view into account. In *McNulty v McNulty* Mr Launcelot Henderson QC (as he then was) heard the application to extend time at the same time as the trial, and took his conclusions on the merits into account when deciding that it would be just and proportionate to extend the time: 760H-761C; 766 E-H. That approach received endorsement from the Court of Appeal in *Cowan v Foreman*. In that case, at [51], Asplin LJ, with whom Baker and King LJJ agreed, said:

> "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."

24. In my judgment, where the court is able to form a clear view of the merits, based on undisputed facts, it is right to reflect that view in deciding whether to extend time.

The decision of the District Judge

25. The District Judge, at [7], directed herself by reference to *re Salmon*. She referred, correctly, to the fact that the court has an unfettered discretion to permit an application under the Act to be made out of time, and that the discretion had to be exercised judicially. She then said that there were "four material matters to consider." These were those which I have identified in paragraph 17 above.

26. The District Judge also reminded herself, at [8], that she must take into consideration all the circumstances, including the merits, of the case. Section 4 is:

> "… not a disciplinary provision to be enforced for its own sake, but designed to provide a measure of protection for executors

> and a measure of certainty for beneficiaries by enabling the estate to be distributed once the six-month period has elapsed."

27. The District Judge further drew attention to the fact that the claimant and defendant were already in litigation over the property and the validity of the will.

28. At [10] onwards the judge proceeded to deal with what she described as "the *Salmon* criteria". Dealing with delay, she recorded that it extended from October 2016 to March 2018 when the formal application to extend time was made, a period of 17 months. She rejected the appellant's explanation for the delay, based on her language and other difficulties, because the appellant had, she inferred, been able to give instructions for the letter of 23 June 2016 to be written. She also rejected a suggestion that there had been some later "trigger event" which could justify the delay. There was, in any event, further delay between the amended Defence and Counterclaim, which intimated an intention to make a claim, and the formal claim in March 2018, (a period of 5 months). In fact the claim was sent to the court at the beginning of February, but nothing turns on that difference.

29. At [18], the District Judge said this:

> "Having found in effect there is a delay and there is no reasonable explanation given, I go on then to consider the other factors of *Salmon* to consider, in effect, "all the circumstances of the case".

30. At [18], the District Judge appears to accept the respondent's submission that there had been no negotiations within the time limit. At [19] and [20] the District Judge considers the fact that there had been no distribution of the estate. She accepts that the appellant was residing at Lombard Avenue, and would be rendered homeless from a house in which she has lived since 1993 if it were to be sold. The District Judge nevertheless accepted the respondent's submission that it would be wrong to allow the appellant to rely on this point, given that "the only reason for this [i.e. the fact that the property had not been sold] is because the defendant's actions in these proceedings have meant that the property has not been sold".

31. At [21] and following, the District Judge dealt with whether the appellant had an alternative action against her solicitors if time were not extended. She was not able to conclude on the evidence that such a claim would be available, given that the time limit expired during a period when the solicitors were not instructed.

32. The District Judge then turned to the overall merits of the claim. She said at [24] that the claim had "substantial merit"; at [26] that there was "at the very least a triable issue in respect of that matter of her potential claim"; and at [27] "the [appellant] has good merits on the case".

33. The District Judge then proceeded to enumerate various procedural failings by the appellant in the proceedings and stated at [29]:

> "All these breaches/omissions, I take into account in addition to the Court's finding that there is no good reason for the delay in bringing the 1975 Act claim".

34. She concluded thus at [30] to [31]:

> "30. Considering, therefore, all the findings and circumstances of this case, I will not exercise the discretion and allow the defendant's application to make the claim out of time. I take into account the weight to the potential merits of the claim that I have found, and I have weighed those in the balance with all the other circumstances in the case, and the *Salmon* criteria i.e. the delay, including the fact that the estate has not yet been distributed. The evidence suggests that the defendant was aware of the fact that she could bring the claim as long ago as June 2016, when she instructed the solicitors. She de-instructed them for no reason. … But the Court has found that the delay is such, that the decision I have come to is there is no explanation for the substantial delay".

Having referred again to *re Salmon* the District Judge continued:

> "31. ... I do not believe that in this case, the defendant has made out a substantial case for it being just and proper for the court to exercise its statutory discretion to extend the time. Unfortunately, with regret, the defendant has not got over that hurdle."

The judgment of the Circuit Judge

35. The Circuit Judge reviewed the exercise of the District Judge's discretion and found it to be unimpeachable. The parties were correct, however, to focus their submissions on the first instance decision. If that decision does not show any error entitling an appellate court to interfere, then the Circuit Judge was not entitled to interfere with it, and neither are we. By contrast, if the criticisms of the District Judge's decision are made out, and where the Circuit Judge did not purport to re-exercise the discretion of the District Judge, this court will be entitled to exercise the discretion afresh.

The appeal

36. On behalf of the appellant, Mr David Stockill submitted that the District Judge's exercise of discretion was flawed both for taking into account irrelevant matters and for failing to take into account relevant ones. His grounds of appeal identify in particular the District Judge's reliance on the procedural failings of the appellant and her advisors in conducting the litigation, which he contended were not relevant to be taken into account. So, for example, the delay between the Amended Defence and Counterclaim which clearly spelled out the claim under the Act, and the issue of the formal Part 8 claim ought not to have been accorded any weight. He also submitted that the District Judge wrongly failed to give any weight to the absence of any real prejudice to the respondent by the delay. No such prejudice could be identified. The estate had not been distributed. The will was under challenge in any event on the grounds of testamentary capacity, so any delay in initiating a claim under the Act was not causative of delay, let alone prejudicial delay. On the appellant's side, by contrast, the withholding of permission would, or at least could, have the effect that she would lose her home. In addition the District Judge failed to weigh in the balance

the fact that a claim had been intimated during the 6 months period, albeit not pursued until later. Instead, she had taken this fact as indicating that there was no explanation for the subsequent delay. Finally, the District Judge had given inadequate weight to the strength of the appellant's case.

37. Mr Mitchell submitted that the delay in the present case was prejudicial because beneficiaries were entitled to know where they stood. The District Judge's reliance on the procedural failings of the appellant's solicitors was not an application of procedural discipline, but merely part of her overall objective of dealing with the case justly. No criticism could be made of the District Judge for not giving weight to the merits of the appellant's case, because she had done so, even though she would have been entitled to limit her consideration of the merits to whether there was a triable issue.

Discussion

38. I would start by acknowledging that the District Judge was giving an *ex tempore* judgment under considerable time pressure, as there were further applications in the case with which she was being asked to deal on the same day. Moreover, she was exercising a broad discretion with which, as has been repeatedly emphasised, this court should not readily interfere. In my judgment, even making these allowances, the appellant is correct that the judgment of the District Judge is flawed to an extent that an appellate court is entitled to interfere.

39. Given that the purpose of the time limit is to "avoid unnecessary delay in the administration of estates … caused by the tardy bringing of proceedings under the Act and to avoid difficulties which might be occasioned if distributions of an estate are made before proceedings are brought" it was highly relevant to consider whether the delay in commencing proceedings in the present case had resulted in any delay in the administration of the estate, and whether the estate had in fact been distributed. It is true that there was a lengthy delay in issuing proceedings under the Act, and the absence of a good explanation for all of the delay was something which the District Judge was bound to take into account. In my judgment, however, she fell into error in failing to analyse the effect of that delay. Given that the validity of the 2014 will was under challenge in any event, it is difficult to ascribe any prejudice to the fact that the claim under the Act was not started sooner. The two claims were alternative ways of attempting to secure that the appellant remained in possession of Lombard Avenue in the face of the possession action. Whilst I would agree that beneficiaries are entitled to know where they stand, no certainty could be achieved whilst the challenge to the validity of the 2014 will was outstanding. Mr Mitchell submitted that if the claim under the Act had been started sooner the respondent would or might have taken different decisions with respect to the litigation, but there is no evidence to that effect and the District Judge made no such finding.

40. Against this, the District Judge appears to have discounted completely the fact that the appellant risked losing her home of more than 25 years if the extension of time was refused. Her reason for doing so was that the property would have been sold had it not been for the appellant's actions. It was, in my judgment, plainly wrong for the District Judge to reach this conclusion. It is true that the property would by now have been sold if the appellant had abandoned her challenge to the validity of the will. But that was a claim which she was entitled to bring, and which has yet to be determined.

41. Finally, I consider that the District Judge wrongly weighed in the balance the procedural failings of the appellant's solicitors, including the period of time after the Amended Defence and Counterclaim had spelled out the claim under the Act. The delay in the bringing of the claim was what it was. It was not rendered worse or more weighty by the failings of the appellant's solicitors. In taking account of these failings the District Judge fell into the error identified in the paragraphs I have cited from *Cowan v Foreman* in paragraph 21 above.

42. If the judgment of the District Judge was flawed, as I consider it to be, it is open to us to exercise the discretion afresh. To my mind this is a plain case for the discretion to extend time to be exercised. From the date of her solicitors' letter of 23 June 2016 it must have been plain to the respondent's advisers that the appellant was contemplating using the twin shields of testamentary capacity and the Act to resist any possession proceedings they might bring and so as to enable the appellant to keep her home. Whilst no negotiations were begun within the 6 months, the claim was notified to the respondent. Between July and December 2016, during which period the time limit expired, the appellant was without legal representation. Thereafter there was a period between January and October 2017 when the challenge to testamentary capacity was mounted, but not the claim under the Act. During that period the respondent could not press for the property to be sold, and the failure to bring the claim under the Act can have caused no real prejudice. The claim under the Act surfaced in the Amended Defence and Counterclaim in October, and the two proceedings could then have been progressed in tandem. Accordingly, whilst there is indeed significant delay and it is unexplained, it can have caused no real prejudice to the respondent.

43. I also consider this to be a case where the appellant is entitled to say on the basis of the undisputed facts that the merits of her claim under the Act are strong and that those merits ought to be taken into account in deciding whether to extend time. It is accepted for present purposes that (a) she was the spouse of the deceased; (b) she has lived in the house as her sole residence since the 1990s; (c) she is disabled; and (d) no financial provision whatsoever was made for her in the 2014 will. Against that, an argument is advanced that the appellant's conduct towards the deceased is such as to disentitle her to relief. We have not been taken to any details of that alleged conduct. Nevertheless, it would be surprising if any such conduct were to be such as to defeat her claim altogether, although I would accept that there may be scope for argument as to the extent of any interest in Lombard Avenue which she should be granted.

44. I would also place in the scales, were it necessary to do so, the fact that it is not clear that the appellant would have any alternative remedy. The challenge to the validity of the will faces much greater difficulties than the claim under the Act, and there must be doubt as to whether the appellant has the resources to pursue it in the absence of Legal Aid. As to an action against her solicitors, the time limit expired during a period when the appellant was not instructing them. I agree with the District Judge that it is not clear that the appellant would have a means of redress against her solicitors.

45. Drawing this together, this is a case where there was unexplained delay which caused no real prejudice to the respondent, and in which it is tolerably clear that refusing permission will defeat a strong claim under the Act for the appellant to retain her home. In my judgment it would be just and proper to extend time.

46. For all those reasons, I would allow the appeal. If my Lady and my Lord agree, it would follow that we would set aside the decisions and orders of the District Judge and Circuit Judge, and grant the appellant the extension of time which she seeks.

47. **Lady Justice King:**

48. I agree.

49. **Lord Justice Henderson**:

50. I also agree.