Neutral Citation Number: [2019] EWHC 349 (Fam)

Case No: FD18F00079

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2019

Before :

MR JUSTICE MOSTYN

- -

Between :

MARY JANE COWAN

Claimant

and

(1) MARTIN JOHN 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 and as trustee of the Michael Cowan Foundation)

(2) FARRER & CO TRUST COMPANY

(as trustee of the Business Property Trust and the Residuary Trust in the Will of Michael Cowan dated 24 March 2016)

(3) TIMOTHY COWAN
(4) MARINA COWAN
(5) AMANDA COWAN
(6) GERALD MUSIAL
(7) ROBERT MUSIAL

(8) JAMES ANTHONY TRAFFORD AND JAMES ANTHONY JOHN BEAZLEY
(as trustees of the Michael Cowan Foundation)

(9) BRYONY LOUISE ANDREE COVE
(as executor of the estate of Michael Cowan)

Defendants

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Penelope Reed QC (instructed by **Withers**) for the **Claimant**
Tracey Angus QC (instructed by **Charles Russell Speechlys**)
for **Defendant (1)* & Defendants (8)**
Richard Wilson QC (instructed by **Farrer & Co**) for **Defendants (1)**, (2) & (9)**
Defendants (3)-(7) did not attend and were not represented

* **in his capacity as a trustee of the Michael Cowan Foundation**
** **in his capacity 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**

Hearing dates: 18-19 February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MOSTYN

This case was heard in private. However, the judge gives leave for this judgment to be reported in this form, without anonymisation.

Mr Justice Mostyn:

1. This is my judgment on the application by the claimant under section 4 of the Inheritance (Provision for Family and Dependants) Act 1975 for permission to make a substantive application under section 2 of that Act against the estate of her deceased husband Michael Anthony Cowan.

2. Section 4 provides:

> "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."

3. In this case probate of the deceased's will was granted to the first and ninth defendants on 16 December 2016. The six-month period thus ran out on 16 June 2017. The application under section 4 was not made until 8 November 2018, nearly 17 months out of time.

4. The six-month rule is there for a number of obvious reasons. In *Nesheim v Kosa* [2006] EWHC 2710 (Ch) Briggs J at [26] identified one such reason thus:

> "Before leaving the relevant legal principles, 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 the 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 the unnecessary delay in the administration of estates to be caused by the tardy bringing of proceedings under the Act and to avoid the 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 "

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.

5. The principles on an application under section 4 have been developed in a number of cases and were encapsulated by Black LJ in *Berger v Berger* [2013] EWCA Civ 1305 at [44] where she said:

> "Section 4 does not give any guidance as to how the court should approach an application for permission but there is no dispute between the parties as to the judge's formulation of the correct approach to such an application. He distilled what he called "the following propositions" from *Re Salmon* [1981] Ch 167 and *Re Dennis* [1981] 2 All ER 140:
>
> "(1) The court's discretion is unfettered but must be exercised judicially in accordance with what is right and proper.
>
> (2) The onus is on the Applicant to show sufficient grounds for the granting of permission to apply out of time.
>
> (3) The court must consider whether the Applicant has acted promptly and the circumstances in which she applied for an extension of time after the expiry of the time limit.
>
> (4) Were negotiations begun within the time limit?
>
> (5) Has the estate been distributed before the claim was notified to the Defendants?
>
> (6) Would dismissal of the claim leave the Applicant without recourse to other remedies?
>
> (7) Looking at the position as it is now, has the Applicant an arguable case under the Inheritance Act if I allowed the application to proceed?"

6. 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. The difference was pithily pointed out by Lord Clarke in *Abela & Ors v. Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043 at [23]:

> "Orders under rule 6.15(1) and, by implication, also rule 6.15(2) can be made only if there is a "good reason" to do so. The question, therefore, is whether there was a good reason to order that the steps taken on 22 October 2009 in Beirut to bring the claim form to the attention of the respondent constituted good service of the claim form upon him. The judge held that there was. In doing so, he was not exercising a discretion but was reaching a value judgment based on the evaluation of a number of different factors."

So here.

7. This is not the first time that Michael Anthony Cowan has appeared in the law reports. He was the respondent in the famous financial remedy case of *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97. That was heard in 2000. The assets were shared between him and his ex-wife Jacqueline in the ratio 62:38, leaving him with just over £7m: see [72].

8. Following that division Michael rebuilt his fortune successfully so that by the time of his death on 9 April 2016 his estate amounted to a little under £16m (according to para 119 of the witness statement dated 17 January 2019 of Bryony Cove made on behalf of the executors, which all parties before me agreed I should treat as accurate). Although that increase was achieved while he and the claimant were partners it was all on the back of what was left after the divorce. Had his marriage to the claimant ended in divorce rather than death one can confidently say that her claim would have been dealt with by reference to the needs, rather than the sharing, principle.

9. Michael and the claimant met and began their relationship in 1991 although it did not become open cohabitation until after his separation from Jacqueline in 1994. They lived in Santa Barbara, California, and in London. In February 2016 Michael was diagnosed with a brain tumour. He knew it would be fatal and that he was in his last months. This prompted two things. First, he and the claimant were married on 8 February 2016. Second, he made a final will (accompanied by a letter of wishes) on 24 March 2016. As stated above, he died on 9 April 2016, aged 78.

10. Michael was plainly devoted to the claimant and the terms of his will were expressly designed to meet her every reasonable need for the rest of her life. He decided, however, not to make outright provision for the claimant but, rather, to make her the principal beneficiary of two trusts, with a life interest in one of them.

11. The structure of the will was as follows:

    i) He left some relatively modest pecuniary bequests to his son, daughter-in-law and stepsons.

    ii) He put all of his business interests which qualified for 100% IHT business property relief into a "business property trust". This was a discretionary trust of which the beneficiaries were the claimant, other members of his family, a charitable foundation (which then was virtually empty and of which the first and eighth defendants are trustees), other charities and any persons added by the trustees.

    iii) He gave his personal chattels to the claimant.

    iv) He gave all the rest of his property to a residuary trust of which the beneficiaries would be the same as for the business property trust, but subject to a revocable life interest in favour of the claimant. There was power to advance capital to the claimant from that part of the residuary fund from which the claimant was entitled to income (i.e. all of it absent a partial revocation).

12. The structure of the will was familiar and designed to avoid, so far as possible, the impact of inheritance tax. The assets that went into the business property trust qualified for 100% IHT relief. The creation of the life interest over the funds of the residuary trust meant that the spousal exemption from IHT applied in respect of those funds.

13. The accompanying letter of wishes shows Michael's intentions extremely clearly. He expressed the following wishes which he hoped and expected would guide the trustees. He wanted two funds of £500,000 to 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, he wanted the trustees to regard the claimant as the principal beneficiary of the remaining trust fund during her lifetime. He stated:

> "I would like her to receive an income from the trust and to the extent that capital needs to be released for her needs please consider generously any such requests."

14. He then referred to the residuary trust. Again, he wished that the claimant should be the principal beneficiary of it. He stated:

> "She will therefore be entitled to income and occupation of any properties during her lifetime from the Residuary Fund.
>
> It is my general wish that Mary be able to stay in the Santa Barbara property for as long as she wishes, and that income should be produced, to be supplemented by capital where required, to ensure Mary maintains a standard of living at a reasonable level to include the payment of medical bills, provision for care in old age and so on.
>
> It would also be my wish that Mary be assisted and her legal fees be paid in relation to taking such steps as she may need in order for the trust to benefit from UK spousal exemption from inheritance tax. As I understand it she may have to elect to be treated as UK domiciled for inheritance tax purposes for a few years after my death. To the extent this leads to additional tax being paid on her personal estate in the United States following Mary's death, I expect my estate to compensate her beneficiaries to make up for this. I do not wish her family to be financially disadvantaged by reason of her capturing inheritance tax relief in the UK."

15. The reasons that Michael made provision for the claimant through trust structures rather than outright are not explicitly stated but are easily deduced. At her age, then 74, now 77, it is likely that he believed that she should be spared the burden of administering, investing and deploying large sums of money. Rather, he wished his trusted trustees to do so on her behalf. Further, he wished to retain within the hands of his trustees the flexibility to deploy all that remained of the estate after the death of the claimant for the benefit of his descendants, his stepchildren and the charitable purposes which he had identified. Yet this structure is now characterised as having failed to have made "reasonable financial provision" for the claimant.

16. Two months before Michael's death he transferred $400,000 into a joint account of him and the claimant. On his death on 9 April 2016 there was $375,000 in that account which passed to the claimant by survivorship. Following Michael's death, the first defendant established that this fund would be sufficient to support the claimant pending the grant of probate and the institution of a scheme of regular monthly payments. However, in May/June 2016 the claimant and the first defendant were 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 was additionally made. The monthly payment was increased by agreement to $26,250 with effect from 1 August 2018.

17. In her witness statement the claimant says that she is confused and stressed by the arrangements that have been put in place. She asserts that the character and origin of the payments may expose her to US taxes which she does not understand. There is nothing in the evidence to suggest that her tax position as the recipient of benefit from these trusts would expose her to any more tax complexities than if she were to be the owner of a substantial investment portfolio. There is nothing in the evidence to suggest that the trustees would be indifferent, let alone obstructive, in helping her to deal with tax issues that may arise in relation to the payments made to her.

18. In her witness statement the claimant explains that she had knee replacement surgery in October 2017. On 29 November 2017 her son Jerry sent various medical invoices relating to physiotherapy and homecare totalling $27,870.16 to the trustees. In her witness statement the claimant states:

> "I was horrified, in the light of Martin and Bryony's assurance and Michael's wishes, when on 5 December 2017 Farrer and Co emailed Jerry querying the invoices I have submitted to them for payment. I have not been reimbursed for those costs"

This is more than a little unfair. The email of 5 December 2017 read as follows:

> "We are really pleased that Mary is now recovering nicely and no longer requires full homecare.
>
> We can see from the invoices that you are asking for a payment of $27,870.16 from the trusts to cover the costs of Mary's home care assistance and physical therapy from October to December.
>
> It was our understanding that Mary's monthly budget was matching her expenditure even with the additional care costs given she has not undertaken her usual day-to-day activities whilst recuperating, but we may have misunderstood.
>
> Please could you clarify the extent to which the sum of $27,870.16 is not covered by the monthly budget (received to date and potentially in the future) as well as the extent by which the homecare and physio is already met by medical insurance (private and state insurance). I note the physio is covered by the state from January. As trustees Martin and I remain happy to help but we do need to fully understand the figures before resolving any additional payment"

No reply has ever been received to this email. It was perfectly reasonable for the trustees to establish that there was no overlap between the monthly sums paid and these additional costs, as well as to find out what was covered by insurance. Indeed, in an email written on 7 December 2017 Dora Clarke of Withers writing on behalf of the claimant stated that "in fact that email has been very helpful in terms of advancing her understanding". Yet this episode seems to be the high-watermark of the claimant's case that the trustees cannot be trusted to deal with her and her future needs fairly.

19. Another matter relied on by the claimant, albeit faintly, is that at one point the first defendant canvassed with the claimant the possibility of her in the future having to go into residential care. Although the evidence about this was very exiguous, I cannot see, if the event occurred, what was remotely objectionable of the first defendant making an enquiry about a potentially foreseeable event.

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.

23. I therefore conclude that the claimant fails on the second limb of the test that I have identified.

24. In my judgment she also fails on the first limb as she has not demonstrated any good reasons for the very substantial delay in making her claim.

25. I have mentioned above that the key date is 16 June 2017, when the six-month period under section 4 expired.

26. On 20 December 2016, that is a few days after the grant of probate, Farrer & Co sent the claimant a very clear lengthy email explaining the structure and effect of Michael's

will. In her oral evidence (given by Skype from California) the claimant accepted that this clearly set out the position. On 20 February 2017 Farrer & Co sent the claimant and her sons an equally exhaustive exposition of the structure and effect of the will. On the same day the sixth defendant, the claimant's son Jerry, replied that the will and the wishes were "simple and clearly laid out". Nonetheless they wished to take the advice of a UK lawyer. They were put in touch with Helen Cheng, a private client and tax lawyer of Withers in San Diego. She contacted the London office and wrote them an email on 28 March 2017 as follows:

> "I spoke with this potential client about a probate in the UK. His mother, Mary, was married to the decedent, whose will provide for two testamentary trusts. One is a business trust with various beneficiaries, and the other is a trust where Mary is the primary beneficiary, followed by other discretionary beneficiaries. The trustees have full discretion over both trusts.
>
> The trust value is about $30 million pounds (sic), but Mary 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 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.**" (Emphasis in original)

27. On the same day Dora Clarke, a partner in wealth planning and tax at Withers in London replied to Helen Cheng. Her email concluded with the following:

> "Provided Michael Cowan 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."

28. Helen Cheng then spoke by telephone with the claimant's son Robert, the seventh defendant. The following day she emailed Dora Clarke and stated: "I told Robert most everything that you mentioned in the email".

29. Yet it is the position of the claimant and her sons that they have no recollection of ever having been told of the six-month time limit under the 1975 Act. I cannot accept that. It is inconceivable that the principal matter on which they wished advice, and about which Helen Cheng had written in bold script in her first email to Dora Clarke, was not

fully discussed. I am satisfied on the strong balance of probabilities that the claimant and her sons were made well aware of the deadline of 16 June 2017 but preferred to go down the path of engagement with the trustees to work out a scheme for support that was satisfactory for the claimant and which fully met her needs. And this is in fact what appears to have happened.

30. In his witness statement the seventh defendant, Robert, stated at paragraph 55:

> "I went back and forth with the need for this claim. I kept hoping for the best, that we would have a breakthrough and be able to communicate openly and honestly with the trustees. This appears to have been naive and has added a huge amount of stress to all of our lives. When it came to my mother's health care costs, it was not a question for me anymore."

When cross-examined about the reference to "this claim" Robert attempted to retreat from what was a plain admission that he had known about a possible claim under the 1975 Act and its time limits for a long time. I am afraid I did not find this at all convincing. It is obvious that he, his brother and his mother 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.

31. At all events, 16 June 2017 came and went without a claim being made. It is clear to me that the claimant and her sons had taken the view that it was better to work with the trustees and seek to set up arrangements that were completely predictable, transparent and reliable. This is confirmed by an agenda sent by Jerry to Farrer & Co on 5 November 2017 in anticipation of a telephone conference on 7 November 2017. At the beginning of that document he defined the goal to be to "define relationships between us and the trust. Rob and I sometimes feel as though it is a negotiation and would prefer it to be neutral problem-solving. Having some parameters would be very helpful with future decisions.".

32. However, it seems that views hardened so that on 7 December 2017 Dora Clarke wrote to Bryony Cove of Farrer & Co saying:

> "It transpires that [Mary] 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 2017 email querying payments of invoices for her recent medical expenses, although in fact that email has been very helpful in terms of advancing her understanding.

> 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 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 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 interest. However, you will be aware that Mary 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 on her claim and explore resolution with the trustees."

33. I have to say that there is a lot that has surprised me in this email. The suggestion that the claimant and her sons had not grasped the structure and disposition made by the will is unacceptable. It was equally unacceptable to suggest that the existence of the 1975 Act and its time limits had never been mentioned before.

34. On 25 January 2018 Bryony Cove wrote to Withers as follows:

> "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"

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.

36. The claim form seeking permission under section 4 was not, however, issued until 8 November 2018. A further six months of delay was allowed to elapse. It was explained that this was because there were without prejudice negotiations and a mediation in that period. In my judgment that is no excuse for this further delay given the clear terms of the expiration of the moratorium in the email of Bryony Cove dated 25 January 2018.

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.

39. I have explained above that I do not consider that I am exercising a discretion. I have weighed the relevant factors and formed a value judgment, or qualitative decision, as to whether the claimant has satisfied both limbs of the test which I have identified in para 6 above. In my judgment she satisfies neither and for the reasons I have given her application is dismissed.

40. Following this judgment being sent out in draft I have received an application for permission to appeal on behalf of the claimant. I refuse the application. In my opinion the twelve grounds, whether taken individually or collectively, do not demonstrate a real prospect of appellate success. Nor, in my opinion, is there a good reason why an appeal should be heard. Ground No. 3 complains about my characterisation of the judicial exercise as being one of evaluation rather than discretion. Plainly, as Lord Clarke pointed out in *Abela*, there is a difference between the two processes. I note that his reasoning was recently approved by Lord Carnwath in *R (on the application of AR) v Chief Constable of Greater Manchester Police & Anor* [2018] UKSC 47, [2018] 1 WLR 4079 at [60]. However, it is true that the formation of a value judgment has discretionary characteristics. Thus, in *Les Laboratoires Servier & Anor v Apotex Inc & Ors* [2014] UKSC 55 [2015] 1 AC 430, a case about the doctrine of illegality, Lord Sumption, when explaining that the doctrine was a rule of law, at [14] treated the formation of a value judgment as being discretionary "in nature". He said:

> "Under this "public conscience" test, the application of the illegality defence was not discretionary in law. But it was clearly discretionary in nature. In substance it called for a value judgment about the significance of the illegality and the injustice of barring the claimant's claim on account of it."

A similar descriptive conflation can be found in *Ilott v The Blue Cross & Ors* [2017] UKSC 17, [2018] AC 545 a case about an award made under section 2 of the 1975 Act. Traditionally, the exercise under section 2 had been analysed as falling into two parts, the first stage being evaluative and the second discretionary: see *In re Coventry* [1980]

Ch 461 at 487 per Goff LJ. However, in *Ilott* at [24] Lord Hughes was of the view that the second stage was "best described" as evaluative rather than discretionary.

41. In my judgment the difference is explained by reference to the legitimate scope of individual judicial subjectivity under the two processes. Once the facts are established the judge's personal views about rightness and wrongness are far more tightly confined where the process is evaluative rather than discretionary. If, contrary to my very clear view, the exercise under section 4 is not one of evaluation of the facts, but is in fact an unfettered discretion where I can allow my subjective, intuitive, views full rein, I would reach precisely the same conclusion namely that the claimant has virtually non-existent prospects of success were her claim to be allowed to go to trial and that she has shown no good reasons for her delay.

42. That concludes this judgment.