



Neutral Citation Number: [2019] EWHC 1976 (Ch)

Case No: PT-2018-000323

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
PROPERTY, TRUSTS AND PROBATE (ChD)
IN THE ESTATE OF MICHAEL FREDERICK HENDRY DECEASED
AND IN THE MATTER OF THE INHERITANCE (PROVISION FOR FAMILY AND
DEPENDANTS) ACT 1975

Rolls Building,
Fetter Lane, London. EC4A 1NL

Date: 27/06/2019

Before :

MASTER SHUMAN

Between :

ROSITA HENDRY

Claimant

- and -

(1) MICHAEL HENDRY

Defendant

(2) DOROTHY PERTIWI

(3) IRWIN MITCHELL TRUSTEES LIMITED
(EXECUTORS OF THE ESTATE OF MICHAEL
FREDERICK DECEASED)

Stephen Willmer (instructed by **Quality Solicitors Rose & Rose**) for the **Claimant**
Katherine McQuail (instructed by **W Davies Solicitors**) for the **First and Second**
Defendants

Hearing dates: 20 November 2018

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.

.....
MASTER SHUMAN

MASTER SHUMAN :

1. The claimant brings a claim for an order under section 2 of the Inheritance (Provision for Family and Dependents) Act 1975 (“the act”) for reasonable financial provision from the estate of Michael Frederick Hendry (“the deceased”). She was married to the deceased albeit they separated in June 2016. No provision was made for the claimant under the deceased’s will dated 6 August 2016 (“the will”). The claim is brought by a Part 8 claim form issued on 27 April 2018, originally brought against the first and second defendants only, two of the deceased’s children. Probate was granted to the third defendant on 29 August 2017. The claim is therefore out of time and the claimant seeks permission under section 4 of the act to bring this claim.
2. The claim is supported by 2 witness statements of the claimant dated 24 April 2018 and 23 August 2018. The first and second defendants oppose the grant of permission. They rely on the second defendant’s witness statement dated 20 September 2018. In addition I adjourned the application to enable the claimant to file a short witness statement dealing with how promptly the application was made. Her solicitor filed a witness statement dated 23 November 2019 principally dealing with events after he realised that the time limit had been missed. The parties then made further written submissions. They were filed promptly but for some inexplicable reason they were not provided to me until much later.
3. The claimant should have joined the third defendant as a defendant to the claim from the outset. Her solicitors failed to do so. The third defendant was subsequently added as a defendant and has adopted a neutral position in respect of the claim.
4. Following the hearing of the claim there have been two very different decisions on the question of permission under section 4 of the act. In Cowan v Foreman [2019] EWHC 349 (Fam) Mostyn J refused permission to bring a claim 17 months out of time. That case sought to draw an analogy with the court’s approach to breaches of the Civil Procedural Rules 1998 and relief from sanctions. Although section 4 is a substantive not procedural rule. The judge considered that the proper approach to section 4 was to follow the principles set out in Berger v Berger [2013] EWCA Civ 1305. Permission has been granted to appeal the decision. In Bhusate v Patel [2019] EWHC 470 (Ch) Chief Master Marsh granted permission to bring a claim almost 26 years out of time. He considered that the correct approach was to follow the guidelines set out in Re Salmon (Deceased) [1981] Ch 167 and Berger v Berger. The Chief Master was critical of drawing in the overriding objective or the relief from sanctions principles to a substantive statutory provision.
5. The parties have not invited me to delay my judgment pending the decision of the appeal in Cowan and it seems to me that I should proceed to give judgment on the application for permission. The relevant legal principles were not in issue between me, simply the application of the facts to those principles.

6. Save for the deceased and the third defendant I shall refer to the relevant people by their first names, no discourtesy is intended. Quality Solicitors Rose & Rose (“R&R”) act for Rosita. W D Davies solicitors (“WDS”) act for Michael and Dorothy.

THE FACTUAL BACKGROUND

7. The deceased was born on 29 July 1946 and has 3 children: Michael (the first defendant) aged 21 years, Dorothy (the second defendant) aged 30 years and Melanie who is in her 50’s and lives in the United States with her family. Melanie has not been joined to the claim but Dorothy states that she is aware of the contents of the deceased’s will and respects his testamentary wishes.
8. Rosita (the claimant) was born on 18 September 1966. She met the deceased in the Philippines on 17 February 2001. She moved from the Philippines to the United Kingdom on 23 June 2003. The deceased and Rosita married on 31 October 2003: the deceased was aged 57 years and Rosita aged 37 years. They had entered into a pre-nuptial agreement on 8 October 2003 (“the agreement”). In summary the agreement provided that in the event of the marriage failing Rosita would receive a lump sum of £10,000 and a one-way flight to the Philippines.
9. Rosita and the deceased lived together at the deceased’s property at 39 Hampton Court Parade, Molesey, Surrey KT8 9HE (the property). Michael lived there too.
10. The deceased and Rosita separated on 24 June 2016.
11. There is a dispute about the circumstances surrounding the breakdown of the marriage. Rosita alleges that the deceased’s behaviour was increasingly erratic and that he was drinking heavily. She says that the deceased assaulted her and invaded her privacy. On 24 November 2016 South East Surrey Magistrates Court sentenced the deceased to a 12 month community order, fined him £300 together with a surcharge of £85. In addition a restraining order was made against the deceased for 12 months prohibiting him from contacting Rosita or going to 5 Walker Close, Hampton or anywhere else she was residing. She describes being supported by Paul English (Paul) following the breakdown of the marriage and she moved in with him, his mother and sister.
12. Dorothy disputes Rosita’s version of events and takes issue with her failing to set out a fuller and more accurate picture of events. She says that Paul was one of the deceased’s closest friends. Rosita had an affair with Paul which led to the breakdown of the marriage. Dorothy blames this for triggering the deceased drinking heavily. She alleges that it was Paul who goaded the deceased about Rosita which led to an altercation which became violent. Rosita alleged that the deceased assaulted her and a charge was brought against the deceased. Dorothy says that this allegation was ‘dropped’ by the Crown Prosecution Service. The sentence was in respect of the deceased posting explicit images of Rosita on Facebook on two occasions, which he admitted. Rosita has indeed been circumspect in setting out an entire picture of the background. I also note that no mention was made of the agreement in Rosita’s first statement.
13. The disputes of fact are not something that I can determine in this hearing.

14. On 6 August 2016 the deceased executed the will appointing the third defendant as the executor and dividing his residuary estate equally between Dorothy and Michael.
15. On 7 November 2016 Rosita petitioned for divorce and she says also sought a financial provision order. On 14 February 2017 the deceased died. Rosita says that there was a First Appointment listed in the financial provision proceedings but she died before that hearing. She has exhibited her unsigned Form E Statement of Financial Information.
16. Paul died on 26 June 2017. Rosita remains living with Paul's mother.
17. Probate was granted to the third defendant on 29 August 2017. For the purposes of bringing a claim under the act Rosita cannot bring a claim after the end of 6 months from the date on which representation was first taken out. This is said to be 28 February 2018 by Ms McQuail and 1 March 2018 by Rosita. Nothing turns on 1 day. I consider that the correct date is 1 March 2018, as I do not include the event, the date of representation, in the computation of the time. The claim under the Act was issued on 27 April 2018.

THE LAW

18. The parties agree that the principles that I should apply are those set out in Berger v Berger [2013] EWCA Civ 1305, paragraph 44. Those are themselves a refinement of the guidance from Re Salmon [1981] Ch 167 and Re Dennis [1981] 2 All ER 140, summarised by the trial judge and approved by the Court of Appeal.
19. In Re Salmon [1981] Ch 167 a widow applied for permission to bring a claim against her estranged husband's estate, some 6 months out of time. The husband and wife had been married for 12 years but separated in 1944 and never saw each other again. The wife met Mr Coard in 1953 and lived with him as man and wife until his death in 1975. The husband died in 1961 leaving a will making no financial provision for his wife. By the time the application was brought the proving executor had distributed most of the estate, albeit there was no evidence that the beneficiaries had disposed of the assets. It was accepted on behalf of the widow that the solicitor had forgotten about the time limit.
20. Sir Robert Megarry VC identified 6 non-exhaustive guidelines at pages 175-177, which are then summarised in Berger v Berger. In particular the first to third guidelines in Re Salmon are,

“First, the discretion is unfettered. No restrictions or requirements of any kind are laid down in the Act. The discretion is thus plainly one that is to be exercised judicially, and in accordance with what is just and proper. Second, I think that 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 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 for the court to exercise its statutory discretion to extend the time.

...

In my view, a third point is that it must be material to consider how promptly and in what circumstances the applicant has sought the permission of the court after the time limit has expired. This is not, of course, a crude matter of simply looking at the length of time that has been allowed to elapse: it is not a mere matter of comparing, for instance, the six weeks of In re Ruttie with the 2½ years of In re Gonin [1977] 2 All E.R. 720. The whole of the circumstances must be looked at, and not least the reasons for the delay, and also the promptitude with which, by letter before action or otherwise, the claimant gave warning to the defendants of the proposed application. Thus if the warning was given within time, but for some good reason the proceedings were not commenced until a short while after time had run, I would expect the applicant's task to be relatively simple. Where there has been some error or oversight, an obvious question is whether the applicant has done all that was reasonably possible to put matters right promptly, and keep the defendants informed.”

21. Permission was refused. The delay was described as substantial, there was a 4 ½ month delay before the executor was notified of the claim and a further unexplained 1 month delay in issuing the claim. The delay was solely attributable to the widow's, there were no negotiations and the estate had been distributed.
22. In Re Dennis [1981] 2 All ER 140 an adult son applied for permission under section 4 of the Act to bring a claim against his father's estate, some 19 months out of time. His mother, the deceased's first wife, brought her own claim, in time. The estate's value was £2.5 million. Save for some chattels and modest amounts the estate was divided between the deceased's children from his second marriage and a life interest to his second wife. The son had received lifetime gifts which he had dissipated through his profligate lifestyle. One of the gifts was a sum of £90,000 and he had a capital gains tax liability of around £45,000 to £50,000. At the time of the application he had no capital, no income and was unemployed. All the son sought was a sum equivalent to the sum due by way of capital gains tax. Browne-Wilkinson J applied the guidance in Re Salmon to the facts of the case. Further at page 144j to 145a he said,

“a further requirement which an applicant has to satisfy is to show that he has an arguable case, a case fit to go to trial, and that in approaching that matter the court's approach is rather the same as it adopts when considering whether a defendant ought to have leave to defend in proceedings for summary judgment.”

The application was refused. The judge determined there had been a long delay, in part unexplained and inexcusable. The son had no arguable chance of success if the matter were to go forward.

23. In Berger v Berger a widow made an application for permission to bring a claim under the act, 6 ½ years out of time. She had been married to the deceased for 36 years and they were still together when he died. The estate had a value of £7 million comprising the matrimonial home (registered in the deceased's name), a share in a property in Arizona, 3 properties in London and a majority shareholding in a company. The wife received the half-share in the Arizona property, a right to occupy the home for life with a right to have an alternative property purchased for her occupation and the income from the residue of the estate paid to her during her lifetime. The wife had concerns about her income position, there was some initial discussion about restructuring the arrangements under the will but that ended by March 2006. It was only in the summer of 2011 that her children advised her to speak to an accountant who in turn advised her to see a solicitor. The judge refused her application. She had not acted promptly and there had been no negotiations within the time limit. He considered that the provision under the will was not unreasonable, evaluating that at the date that the will took effect rather than at the date of the hearing.

24. Black LJ gave the leading judgment. At paragraph 44 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?”

25. Black LJ accepted that the judge was wrong in his assessment of the merits, it was impossible to take a concluded view about the prospects and she accepted there was an arguable case. This was only one of the factors and not determinative. The estate had not yet been fully distributed. As to the other factors she could not reach a reliable view on whether the wife had a breach of trust claim against the sons. However she agreed that the judge was right to focus on the very significant delay in commencing proceedings. Whilst the wife expressed concern about her income position soon after the deceased died and consulted solicitors, the solicitors' file ended in early 2006. There was no obvious trigger for her renewed activity in 2011. Black LJ concluded at paragraph 77,

“She says that she continued not to agree with the way in which the sons handled matters thereafter but the reality is that for years she took no steps and the respondents continued actively to manage the estate, and in particular the company, without the expectation of a challenge to the will, whilst the appellant continued to live in the Surrey property as she wished to do. In my view, it would not be appropriate, in all of these circumstances, for the appellant to be permitted to make her claim six years after the expiry of the time limit in the Act.”

THE APPLICATION FOR PERMISSION

26. It is right that the Act itself provides for late applications to be made, subject to permission. However the burden is on Rosita to show sufficient grounds for the court to grant her permission to bring a claim under the act out of time, each case will depend on its own circumstances and is therefore fact sensitive. Delay is but one of a non-exhaustive list of considerations for the court.

(3) Has Rosita acted promptly and what are the circumstances that gave rise to the application out of time?

27. Notwithstanding that in the claim form permission was sought to bring the claim under section 4 there is a paucity of evidence in Rosita's first and second witness statements that addresses this ground. The time-line set out in those witness statements together with the added court procedural steps are as follows,

No dates given “Communications between my solicitor and Irwin Mitchell were ongoing.” [1st para 15, 2nd para 16]

29 August 2017 *probate granted*

16 February 2018 “the defendant's requested the administrator of the estate to provide copies of all correspondence between them and my solicitor so they could get advice” [1st para 17, 2nd para 18]

1 March 2018 *6 month time limit to bring claim under the act expires*

- 15 March 2018 “my solicitor wrote to the administrator to obtain the details of the defendants’ solicitor is no further update was received on negotiations/settlement.” [1st para 18, 2nd para 19]
- 23 March 2018 “my solicitor received an email confirming that the defendants had no intention of negotiating and that all previous offers were no longer open for acceptance” [1st para 19, 2nd para 20]
- 27 April 2018 *Claim form issued against Michael and Dorothy only*
- 31 May 2018 *Rosita brings application to join the third defendant*
- 18 July 2018 *Order joining the third defendant and giving directions for the hearing of the application for permission*
28. The thrust of Rosita’s evidence, as supplemented in counsel’s submissions, was that she was trying to avoid litigation and was impecunious. What that does not do, without more, is to explain why the claim was not brought promptly and why there was delay. It also does not explain why the claim was only issued against the beneficiaries when it should have been brought against the estate too.
29. Following oral submissions I was concerned that this ground had not been addressed by Rosita’s legal representatives. Indeed Mr Willmer’s position was that as Rosita, on his argument, had demonstrated that she had negotiated, there was no prejudice to the defendants and Rosita had no other obvious remedy if permission was not granted then delay was not sufficiently significant to “rise to the top of the list of priorities”. “In those circumstances a comparatively trivial delay is neither here nor there and nothing turns on it”. That of course is not what the act says or indeed the case law. It seeks to diminish the importance of a substantive not procedural time limit.
30. With objection from Ms McQuail I adjourned the hearing to enable Rosita to file and serve a short statement dealing with her failure to promptly apply for permission. I then indicated to the parties that I would either hear further oral submissions or they could file written submissions. They elected to deal with the matter in writing, although I do not know why those submissions were not referred to me promptly.
31. Rosita’s solicitor, Zubair Dharamsi, rather than Rosita filed a witness statement dated 23 November 2018. That Ms McQuail observes was served shortly before the 10am 23 November 2018 deadline for service of such additional evidence. At paragraph 2 he confirmed that it was not until 23 March 2018 that “we appreciated negotiations were at an end and that a claim would have to be out-of-time.” There then follows a detailed chronology of the correspondence from 23 March 2018. It should have also set out a detailed chronology from the death of the deceased on 14 February 2017 and the grant of probate on 29 August 2017 to 23 March 2018. He confirms that on 23 March 2018 R&R notified their indemnity insurers of a potential claim. Mr Dharamsi also attaches a detailed email to Rosita dated 5 April 2017 setting out her potential claim and warning her that an application “must be made within six months of the Personal Representatives (Irwin Mitchell) obtaining a grant of probate to allow them to administer the estate. We will need to ensure that we have the application in place as soon as possible given the limitation period.”

32. In her written submissions Ms McQuail makes the following apposite observations,
- (1) It is surprising that Rosita did not file any evidence herself dealing with a failure to apply promptly for permission;
 - (2) Mr Dharamsi's witness statement makes no reference to discussing matters with Rosita, taking her instructions or about her understanding of the time limit and her reasons for being late;
 - (3) Mr Dharamsi's witness statement assumes that the court will simply be satisfied that there were ongoing negotiations until 23 March 2018.
 - (4) There is no adequate explanation as to why there was a further delay from 23 March 2018 to 27 April 2018 when the claim form was issued, albeit against Michael and Dorothy only.
33. When R&R realised that they had missed the time limit, which is only when prompted by WDS on 23 March 2018, they should have issued a protective claim as soon as reasonably practicable thereafter. In fact what is clear from an email dated 3 April 2018 from Mr Dharamsi to Rosita is that at that stage he was intending to instruct a barrister to provide an "advice on the merits of proceeding based on the facts and circumstances of your case." What R&R failed to do was keep WDS informed about what they were doing to remedy the position. That is a point specifically referred to by Megarry VC in Salmon, under the third guideline.
34. Rosita knew in April 2017 that there was a time limit to bring her claim and that the time started when the grant of probate was made. Whilst R&R have accepted that they missed the time limit there has been a failure in the evidence, even given the opportunity afforded to Rosita to file further evidence, to explain why there was a delay and moreover why R&R did not keep WDS informed. I am not satisfied on the evidence that Rosita has given a sufficient explanation for the delay, in particular when there is no explanation in the evidence detailing the steps taken both following the death of the deceased and following the grant of probate until 23 March 2018.
- (4) Were negotiations begun within the time limit?
35. Mr Willmer submits that the deceased knew there would be a financial claim in November 2016. A telephone attendance note dated 6 April 2017 made by Chris Ellison of the third defendant refers to a conversation with Mr Dharamsi and records, "seems very likely Rosita will be making a claim on the estate". R & R subsequently lodged a caveat even though there was no challenge to the validity of the will. On 27 July 2017 Mr Ellison sent an email to Mr Dharamsi asking R&R to send "a formal letter of claim from Mrs Hendry. As Executor of the estate we need to understand the nature of any claims that are being made against the estate so that we can act accordingly." Mr Ellison sent a further email on 8 August 2017 chasing a letter of claim. R&R did not send a letter of claim, then, or at any time subsequently.
36. R&R did send an email dated 8 August 2017 but that simply listed items said to have been left in the property by Rosita and concluded that as the parties were married "the default position to commence negotiations should be 50/50". On 10 August 2017 the third defendant provided a schedule of assets and liabilities to R&R On 18 August

2017 Mr Dharamsi telephoned Mr Ellison and said that Rosita “thinks she is entitled to half of the estate in accordance with the divorce rule”. R&R withdrew the caveat on 18 August 2017 which enabled probate to be granted to the third defendant on 29 August 2017. By that stage R&R should have been in a position to send a letter of claim setting out an analysis of Rosita’s claim and what she was seeking by way of financial provision together with relevant disclosure. They did not do so and no explanation has been given for this.

37. There is then nothing in the correspondence before me until 2 October 2017 when Mr Dharamsi emails Mr Ellison asking for an update. Given the gap in correspondence it is unclear what that is an update to. On 5 October 2017 Mr Ellison emailed Mr Dharamsi saying that Michael and Dorothy were struggling to deal with the situation but were aware there needed to be a response. There was then nothing until 6 November 2017 when effectively the same points were made in correspondence. On 14 November 2017 Mr Ellison confirmed that Dorothy was seeking independent legal advice and Michael did not feel that Rosita was entitled to 50%.
 38. On 19 December 2017 Mr Dharamsi asked if there was a counter-offer from Michael and Dorothy. On 12 January 2018 Mr Ellison confirmed that the offer was that Rosita should receive her entitlement under the agreement: £10,000 and a one way ticket to the Philippines. This was rejected in R&R’s email dated 16 January 2018. On 18 January 2018 Mr Ellison emailed an increased offer of £20,000. On 22 January 2018 Mr Ellison emailed confirming that Michael and Dorothy would be prepared to attend a round table negotiation, they were keen to resolve matters urgently. A meeting was proposed to take place on 2 February 2018. In a file note dated 26 January 2018 Mr Ellison records that Mr Dharamsi rang and that Rosita had changed her position on a meeting. On 29 January 2018 the third defendant confirmed that Michael and Dorothy have decided to withdraw from the mediation/negotiation proposal but would offer a three way split of the estate. That offer was rejected on 1 February 2018, Mr Dharamsi confirmed that Rosita’s position remained a 50/50 split and that Rosita would be left with no option but to bring a claim.
 39. On 26 February 20018 Mr Ellison confirmed that both Michael and Dorothy were taking independent legal advice; Michael had a meeting with WDS on 20 February 2018 and they were subsequently instructed by both Michael and Dorothy.
 40. In the technical sense there were “negotiations” between the third defendant on behalf of Michael and Dorothy and R&R on behalf of Rosita. However in order for there to be effective negotiations between the parties I would have expected R&R, as a minimum, to set out some considered analysis of Rosita’s claim. Asserting that Rosita “thinks she is entitled to half of the estate in accordance with the divorce rule” does not provide a platform for proper negotiations between the parties.
- (5) Has the estate been distributed before the claim was notified to the Defendants?
41. Mr Willmer submits there is no prejudice to Michael and Dorothy as the estate has yet to be distributed. Whilst the estate has yet to be administered I do not accept that there has been no prejudice. The deceased died on 26 June 2017. It was the testamentary wish of the deceased that Michael and Dorothy should each receive an equal half share of his estate, they have yet to receive their inheritance. It is a modest estate and the principal asset is the property, which has a value of approximately £220,000, as at

January 2018. Michael is only 21 years old and his outgoings exceed his income. Dorothy is in a precarious financial provision and has been using her savings to support her brother. However there is no evidence before me that Michael and Dorothy have changed their position in reliance on their inheritance.

42. Rosita is in receipt of an extremely modest pension from the deceased's justretirement policy of £63 per month. She says that she is unable to claim against the deceased's state pension as she was living with her new partner, Paul, at the date of the deceased's death.

(6) Would dismissal of the claim leave the Applicant without recourse to other remedies?

43. Mr Dharamsi in his witness statement baldly states that Rosita will need to decide whether to pursue a professional negligence claim against R&R and her "main difficulty will be finding funding to pursue such a claim due to her personal financial situation". Without anything more I do not accept that assertion. There are alternative funding arrangements available for parties who wish to bring a claim against a professional: for example, solicitors and counsel may agree to enter into a conditional fee arrangement. There is also the Professional Negligence Bar Association Adjudication Scheme.
44. Given that R&R have admitted that they missed the time limit Rosita would appear to have a remedy against R&R for breach of contract and negligence.

(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?

45. Mr Willmer emphasised that Rosita and the deceased had been married for 13 years, categorising this as a medium length marriage. He submitted that it is accepted that the law on divorce starts with a 50/50 split and then adjustments are made up and down. Mr Willmer said that Rosita had a strong claim that rendered the focus by Michael and Dorothy on the agreement as irrelevant. He referred me to the deceased's previous will which provided a three way split of his estate between Michael, Dorothy and Rosita.
46. Whilst the court on financial provision strives to achieve fairness between the divorcing parties Mr Willmer's position is rather a sweeping generalisation of the nuances involved in applying the statutory check list in section 25 of the Matrimonial Cause Act 1973 to the facts of each case.
47. Rosita, as an estranged spouse but a spouse nevertheless, on the death of the deceased would be entitled under section 1(2)(a) of the act to the more generous reasonable financial provision. The factors that must be considered by the court include the notional divorce test under 3(2), "the provision which the applicant might reasonably expect to have received if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce". That is particularly resonant in this case as Rosita had petitioned for divorce and a first appointment in respect of her claim for financial provision had been listed.
48. The deceased and Rosita had met in the Philippines and they had decided that Rosita would move to the United Kingdom and cohabit with the deceased. In order for

Rosita to remain in the United Kingdom they agreed to marry. On 8 October 2003 the parties entered into the agreement which stated that it was made in contemplation of their marriage. The agreement recorded that the deceased had acquired all of his property independently of and without any contribution from Rosita and that he had provided occasional financial support for Rosita. Page 2 of the agreement recorded that each party had received separate and independent legal advice prior to the execution of the agreement and that each was fully aware of the rights that they might be acquiring or surrendering. It is recorded that Miss Owen of Messrs Morrisons Solicitors and Lisa Broddle of Stone Rowe and Brewer had provided that advice. Ms Broddle also witnessed Rosita's signature. The parties intended to review the agreement after 10 years or they emigrated to the Philippines, whichever occurred first. There was no review of the agreement.

49. Clause 2 of the agreement provided that,

“All property held by Mr Hendry and Miss Menside in each of their respective ownership prior to the marriage shall remain in their respective beneficial ownership during the marriage and thereafter”.

The significance of this is that the principal asset in the estate was the property, held in the sole name of the deceased and owned by him prior to the marriage to Rosita. Clause 8 specifically provided that Rosita could acquire no beneficial interest in the property. I do not know what the value of Rosita's assets in the Philippines are; she stated in her Form E that the land that she owns has a value of £4,492.

50. Clause 5 provided that the deceased and Rosita would immediately after their marriage make wills. The deceased would make a will leaving his estate equally between Michael, Dorothy and Rosita. I am told that he executed a will to this effect: this was clearly on the basis that the parties would remain married.

51. Clause 9 provided that on dissolution or annulment of the marriage or separation all property in the separate absolute beneficial ownership of the deceased and Rosita, whether under the terms of the agreement or otherwise, would remain in the absolute beneficial ownership of that party.

52. Clause 10 provided that,

“In the event of the dissolution or annulment of the marriage or separation of Mr Hendry and Miss Menside or upon the death of either of them neither shall make any financial claim of any kind upon the other nor upon the estate of the deceased and the parties agree to incorporate the terms of this agreement insofar as may be relevant into a consent order of the court.”

53. Clause 11 provided that,

“In the event of dissolution or annulment of the marriage or the separation of Mr Hendry and Miss Menside it is agreed as follows:-

i. Mr Hendry will purchase for Miss Menside a plane ticket to enable her to return to her family in the Philippines.

ii. Provided that the marriage shall have lasted not less than five years from the date of the marriage ceremony, Mr Hendry will pay to Miss Menside a lump sum of £10,000.

iii. Neither party will pay maintenance to or for the benefit of the other.

iv. There will be no further financial provision or responsibility by either for the other.”

54. I construe clause 6 by reference to clause 11. If the parties separated or the marriage was dissolved or annulled they were perfectly entitled to make a new will, as the deceased did.
55. Whilst the court retains jurisdiction to make a financial provision order on divorce the fact that the parties entered into a prior agreement which would determine the appropriate financial provision order should the marriage come to an end is something that must be given weight by the court. I do not follow Mr Willmer’s submissions as to why the agreement equally is of no relevance to consideration of Rosita’s claim under the act. I bear in mind that the evidence before me suggests that the parties entered into the agreement having been given separate independent legal advice, having all the relevant financial information and intending that the agreement would govern the financial consequences of the marriage ending and appreciating that they would be held to the agreement.
56. I do not accept Mr Willmer’s submission that in effect Rosita has an unanswerable claim to reasonable financial provision under the act. It is not a strong claim although for the purposes of a preliminary hearing I am not satisfied that Rosita’s claim is unarguable. There are some questions over the evidence adduced by Rosita and Dorothy has identified some inconsistencies between Rosita’s witness statements. However if I were to give permission these would be matters to be tested on cross-examination.
57. In conclusion, If I acceded to Mr Willmer’s submissions I would be looking down a very narrow lens at a period of time in abstract without looking at all the circumstances. I have set out at some length the circumstances surrounding how the claim came to be issued late, the failure by Rosita to set out her claim in pre-claim correspondence facilitating a proper consideration of why it was she sought 50% of the deceased’s estate to enable the parties to enter into meaningful negotiations. I give full weight to the fact that Rosita has an arguable case, albeit not a strong one as contended for by Mr Willmer, and that the estate has not been distributed. However I do not consider that Rosita acted promptly when the circumstances are fully analysed. Technically negotiations were started within the time period but I do not consider that they were adequate and therefore this ground is not satisfied. I bear in mind that refusing permission will not leave Rosita without recourse to other remedies; she has a potential claim against R&R for professional negligence and they have admitted that they missed the time limit. The act sets out a substantive not a procedural time limit. Rosita has not shown sufficient grounds to satisfy me that permission should be granted under section 4 and I refuse permission.

POSTSCRIPT

58. Ms McQuail objected to my direction that Rosita could file a short supplemental witness statement dealing with her failure to apply promptly for permission. I indicated that I would give reasons for my decision in the judgment.
59. Under CPR 3.1 the court has very broad powers of management. In particular under CPR 3.1(m) the court may take any other step or make any order for managing the case and furthering the overriding objective. A claim must be dealt with justly and at proportionate cost.
60. The effect of the determination of the application was of fundamental importance to the parties: refusing permission would prevent Rosita from bringing a claim against the deceased's estate and allowing permission would prevent Michael and Dorothy from receiving the inheritance under the will until final determination of the claim or earlier settlement. It was a balancing act between the interests of the parties in the litigation.
61. One of the agreed principles for determining permission was for the court to consider whether the claim had been brought promptly and the circumstances in which Rosita had sought permission. It is not so simplistic an exercise as to count up the number of days or weeks that Rosita had issued her claim late. As part of my decision making process it was important that this factor was specifically addressed by Rosita, it had not been addressed in her two witness statements or in counsel's skeleton argument. The approach I adopted was that followed by Megarry VC in Re Salmon. In that case limited explanations were given for the delay, Megarry VC regarded them as inadequate and insubstantial and gave the widow an opportunity to supplement the evidence, in case there was a factor affecting her claim which had not been disclosed.
62. In order to strive to do justice I, of my own volition, gave Rosita an opportunity to file a short witness statement dealing with the hole in her evidence as to promptness whilst permitting the parties to either make further submissions orally or in writing, they agreed the latter.