

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN THE MATTER OF THE ESTATE OF CHRISTINE BARBARA COLLIER-WHITE
AND IN THE MATTER OF THE INHERITANCE (PROVISION FOR FAMILY AND
DEPENDANTS) ACT 1975

Birmingham Civil and Family Justice Centre
33 Bull Street
Birmingham B4 6DS

Date: 25 November 2022

Before :

District Judge Chloë Phillips

Between :

JULIE DAWN COLBOURNE

Applicant

- and -

(1) SIMON MARK COOKE

1st Respondent

(2) ALAN JOHN MORRIS

2nd Respondent

(as executors of the estate of Christine Barbara

Collier-White, Deceased)

(3) TRACEY JAYNE COLLIER-WHITE

3rd Respondent

James Stewart Rudall (instructed by **Silks Solicitors**) for the **Applicant**
Gavin McLeod (instructed by **MFG Solicitors**) for the **Respondents**

Hearing dates: 20 September 2022

District Judge Phillips:

1. The hearing on 20 September was listed to deal with an application made by Ms Colbourne, (“the applicant”) for permission to bring her Inheritance Act claim out of time. The 1st and 2nd respondents are partners in MFG Solicitors and are the personal representatives of the Estate of the applicant’s late mother Christine Barbara Collier-White (“the deceased”). The 3rd respondent, Ms Collier-White, is the residuary beneficiary under the deceased’s last Will.
2. The first and second respondents as personal representatives of the Estate take a neutral stance in relation to this application and I therefore refer to the 3rd respondent, Ms Collier-White, who actively opposes the application, as “the respondent”.
3. At the hearing the applicant and respondent have been represented by counsel – Mr Rudall for the applicant and Mr McLeod for the respondent. The court was provided with a bundle of relevant documents and an authorities bundle. Both counsel provided skeleton arguments for the hearing.

The Application

4. The applicant's application notice dated 13 May 2022 applies for "*permission for the claimant to bring their Inheritance Act claim out of time*" and states "*The period to bring the claim ended on 20 March 2022.*" The application is supported by a witness statement of Omar Mahmoud (the applicant's solicitor) of the same date which exhibits an unsealed Part 8 Claim Form and a witness statement of the applicant dated 12 May 2022, with exhibits.

5. The respondent has filed a witness statement from Andrew James Chandler of MFG solicitors dated 15 August 2022. The respondent opposes the application for an extension of time.

6. The relevant chronology is as follows:

April 2018 – the deceased's husband of 55 years died.

July 2018 – the deceased became engaged to the respondent

27 September 2018 – the deceased executed her last Will

24 December 2018 – the deceased married the respondent

11 January 2019 – the deceased died

20 September 2021 - the executors obtained a grant of probate in respect of the deceased's estate

20 March 2022– 6 months limitation period for Inheritance Act claim

13 May 2022 – Application for extension of time for Inheritance Act claim.

Law

7. Section 4 of The Inheritance (Provision for Family and Dependents) Act 1975 (“the Inheritance Act”) 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 (but nothing prevents the making of an application before such representation is first taken out)".

8. The grant of probate in respect of the deceased's Will was extracted on 20 September 2021 and therefore the six-month period expired on 20 March

2022. In the circumstances the applicant requires the court's permission to make her application for an order under section 2 of the Inheritance Act.

9. Section 20(1)(a) of the Inheritance Act provides:

(1) The provisions of this Act shall not render the personal representative of a deceased person liable for having distributed any part of the estate of the deceased, after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out, on the ground that he ought to have taken into account the possibility—

(a) that the court might permit the making of an application for an order under section 2 of this Act after the end of that period, or

(b) that, where an order has been made under the said section 2, the court might exercise in relation thereto the powers conferred on it by section 6 of this Act,

but this subsection shall not prejudice any power to recover, by reason of the making of an order under this Act, any part of the estate so distributed.

10. Mr McLeod for the respondent raised the issue of whether the court has jurisdiction to deal with this application for the first time in his skeleton argument for the hearing – it was not previously raised in the respondent's witness statement in response to the application. Mr Rudall for the applicant was able to respond to this point in his submissions.

Jurisdiction

11. At the hearing, Mr McLeod for the respondent asked the court to deal with jurisdiction as a preliminary matter, submitting that the court does not have jurisdiction because the application for permission has not been made in the correct way – the claim form has not yet been issued and he submits that the court “*is not seised of its ordinary jurisdiction under the Act*”. He submits it is for the applicant to satisfy the court in relation to jurisdiction. He accepted, however, that he could not say that the court definitely does not have jurisdiction but submitted that the court should not exercise any jurisdiction that it may have speculatively or on assumed premises.
12. Mr McLeod referred the court to the Practice Direction issued in 1976 – Practice Note: Chancery Division: Commencement of Proceedings (Family Provision) [1976] 1WLR 418 which makes it clear that where an applicant asks the court to exercise its discretion under section 4 to extend time, “*such relief should be expressly asked for in the originating summons and the grounds on which the court's leave to entertain the application is sought should be included in the supporting affidavit*”.
13. Mr McLeod also referred to academic authorities including *Williams, Mortimer and Sunnucks – Executors, Administrators and Probate* which sets out the authors' view (citing the Practice Direction) that relief should be asked for in the claim form and *Francis, Inheritance Act Claims*, which states that applications for permission must be made in the statement on the claim form. Submissions were also made that an application to extend time under s.4 is not an interim remedy covered by the provisions of CPR r.25.1(4) and r.25.2(1).

14. In response, Mr Rudall for the applicant submits that there is no legal basis for saying that an application for permission cannot be made by way of an application notice prior to formal issuing of a claim form and that it can only be made by way of the claim form, and he asserts that there is authority for the court to make such an order inherently under section 4 of the Act. Mr Rudall referred the court to dicta in the Court of Appeal case *Begum v Ahmed* [2019] EWCA Civ 1794 in which Lord Justice Floyd, at paragraph 13 stated: "*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.*"
15. Counsel agree that in all the cases they have come across the application has been made in the issued claim form including a request for an extension, and therefore the present application is unusual.
16. I take the view that whilst the applicant has not complied with the 1976 Practice Direction and has not proceeded in the way proposed by the academic texts dealing with such applications, there is no legal authority that I am aware of which prevents the issued application for an extension being considered by the court simply because the claim form has not yet been issued.
17. The respondent submitted that the court should decline to exercise jurisdiction, for reasons set out in some detail in Mr McLeod's skeleton argument, which I have considered, including his observations on the interpretation of Lady Justice Asplin's comments in *Cowan v Foreman* [2019] EWCA Civ 1336; [2020] Fam.129.

18. The wording of Section 4 of the Inheritance Act does not prescribe how the application must be made. The Court of Appeal dicta in *Begum* (supra), refers to the court's unfettered discretion, which can be interpreted to mean unfettered by the manner in which the application is brought to court. The respondent's argument that the court should not exercise its discretion in circumstances where its jurisdiction to do so is in doubt amounts to a fetter on that discretion.
19. I also take into account the fact that the application was issued by the court and was then listed to be heard by the Order of District Judge Singh dated 13 May 2022 which also ordered that the respondents should file and serve any evidence in response at least 21 days before the hearing. No jurisdictional issue or objection was raised by the respondent in the evidence in response.
20. It is also relevant to consider the overriding objective of the Civil Procedure Rules to deal with cases justly and at proportionate cost. I do not consider that the respondent suffers any prejudice as a result of the fact that this application has been made prior to the formal issuing of the claim form: the respondent has had sight of the intended claim form and supporting witness statement as they are attached to the application notice, and the respondent has had the opportunity to provide evidence in response. A decision not to deal with the application would result in further expense and delay to both parties, since the applicant would go on with her claim by issuing the claim form with the application for an extension of time.
21. Mr McLeod submitted that the court should not allow or permit a change in law or established practice in relation to Section 4 of the Act. I am not

satisfied that there is any law preventing the application being made in this way. The established practice is for a claim form to be issued, and the conventional procedure has not been followed; however, in all the circumstances I do not consider that this is sufficient to decline to deal with the application on jurisdictional grounds or to justify dismissal of the application; rather it is in keeping with the overriding objective and in the interests of justice for the court to deal with the applicant's application.

22. I therefore turn to deal with the application for an extension.
23. For this purpose, further relevant background is that the applicant's evidence is that she is aged 56 and is the only child of the deceased. Prior to the deceased's last Will executed on 27 September 2018, the deceased and her late husband, the applicant's father, had executed mirror Wills dated 15 December 2004 benefiting the applicant. The 27 September 2018 Will leaves the deceased's entire residuary estate to the respondent.
24. The residuary estate comprises the deceased's property with a net value in the region of £195,000. The applicant does not own her own property. As the manager of a public house she occupies that property under a service tenancy which will end when her employment ceases. She is separated from her husband, who also does not own real estate.
25. The deceased died in January 2019. The explanation for the delay in making the application for provision under the Inheritance Act is set out in Mr Mahmoud's statement. The specific reason why the 20 March 2022 deadline was missed is suggested to be a technological malfunction of the firm's case management system which meant that the limitation date was either not

successfully registered on the system or was inadvertently removed when the case management system was restored overnight to a date before entry of the limitation date and thereby automatically removed. The error came to light on receipt of the letter from the respondent's solicitors dated 22 March 2022 and in response the applicant's solicitor proposed a standstill agreement by letter of 25 April 2022. This was declined by the respondent's solicitors' letter of 29 April and the applicant therefore prepared and made this application on 13 May 2022.

26. With respect to the approach the court should take, the applicant has referred the court to the case of *Re: Salmon, Coard v National Westminster Bank Ltd* [1981] CH167 in which Megarry VC held that it is material to consider the following matters:

- i. how promptly and in what circumstances the claimant (or applicant, in this case) sought an extension of time
- ii. whether negotiations commenced within the time limit
- iii. whether the estate has been distributed before a claim (or application for an extension of time) is made or notified, and
- iv. whether a refusal to extend time would leave the claimant (or applicant) without redress.

27. The parties accept that the primary relevant criteria for consideration by the court are the seven key considerations referred to by the Court of Appeal (Black LJ) in *Berger v Berger* [2013] EWCA Civ 105; [2014] WTLR 35 at

paragraph 44. I deal with these considerations in turn, taking into account the evidence and submissions of the parties:

(1) The court's discretion is unfettered but must be exercised judicially in accordance with what is right and proper

28. There is an unusual background situation in this matter - the applicant makes allegations of a serious nature against the respondent, amounting to taking financial advantage of the deceased who is alleged to have been in a vulnerable position following the death of her husband of 55 years. The circumstances set out in the applicant's witness statement are that the respondent was the deceased's late husband's carer, and within 3 months of his death the respondent became engaged to the deceased in July 2018. The deceased changed her Will to favour the respondent on 27 September 2018; on 24 December 2018 the deceased entered into a marriage with the respondent, and she died on 11 January 2019. Previously the deceased and her late husband had mirror Wills made in 2004 which benefitted the applicant who was their only child.

29. There is no evidence from the respondent before the court. The circumstances (to which further reference is made below) indicate that the applicant's prospective Inheritance Act application merits judicial consideration of the evidence and cross examination of the respondent, who has not provided written evidence for this application.

(2) The onus is on the applicant to show sufficient grounds for the granting of permission to apply out of time.

30. The burden of proof is on the applicant, and she has provided a witness statement from her solicitor which sets out his explanation for the error which has led to it becoming necessary to obtain permission for applying out of time, and the applicant has provided her own witness statement dealing with the underlying merits of the claim as grounds for the granting of permission to apply out of time. I consider the merits further below.

(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.

31. The circumstances in which the time limit was missed are dealt with by Mr Mahmood's witness statement and missing the deadline was not the applicant's fault.
32. The respondent has submitted that there has been continuing delay by the applicant in this matter as various claims have been intimated following the deceased's death in January 2019, some three and a half years ago. The applicant had delayed the Grant by way of a caveat but allowed it to lapse. Mr Chandler's statement deals with periods of delay in relation to the various claims intimated by the applicant. There was correspondence between the parties' respective solicitors from February 2019. ADR was under consideration, and in the letter dated 22 March 2022 the respondent's solicitors asked for confirmation of whether Inheritance Act proceedings had been protectively issued so that the parties might have the opportunity to explore ADR in the four month window allowed for solicitor service.

33. I find that the application has been made sufficiently promptly: the solicitors were alerted to the issue on 22nd March, proposed a standstill agreement after a short delay on 25th April and when this was refused made the application on 13th May, 14 days after the refusal. I find that the time taken to make the application is not too long in itself to persuade me that it would not be just to grant permission (*Begum v Ahmed* [2019] EWCA Civ 1794 considered and referred to further below).

(4) Were negotiations begun within the time limit?

34. It is clear from the solicitors' correspondence included in the bundle that the parties had contemplated engaging in ADR prior to the time limit, but no formal arrangements for a mediation had been agreed. The correspondence shows that the applicant wished to engage in ADR and the respondent wished to have clarity as to the nature of the applicant's claims before agreeing to mediation. It was apparently clear to the respondent that it was the applicant's intention to issue an Inheritance Act claim in order to preserve her position in the event that negotiations failed.

(5) Has the estate been distributed before the claim was notified to the defendant?

35. In this case the residuary estate comprises the property in which the respondent lives, and the estate has not been distributed.

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

36. Ultimately the missing of the six-month deadline was the fault of the applicant's solicitors, and the respondent submits that the applicant has a clear case for a remedy against her solicitors. In relation to the fact that there would be a prospective negligence claim against the applicant's solicitor, this is a factor to be taken into account but is not a counterbalance against other important factors – *Re B* [2000] Ch 206, HC (reversed on other grounds at [2000] Ch.662), and *Adams v Schofield* [2004] WTLR 1049, CA.
37. The Court of Appeal in *Adams v Schofield* [2004] WTLR 1 049 (Ormrod and Dunn LJJ, Sir Stanley Rees, 22 July 1981) gave consideration to this issue on an appeal against a decision to refuse leave to commence proceedings out of time made primarily on the basis that the appellant had a clear case against her solicitor who was responsible for the delay. Ormrod LJ considered that where the prejudice to the respondent was purely formal, in that they had simply lost the protection of Section 4 of the Inheritance Act, the existence of the remedy against solicitors was of little weight and would amount to a windfall for the respondent, since "*the claim would be transferred to the shoulders of the solicitor's insurers, unnecessarily and quite contrary to the justice of the case.*" In addition the remedy and damages for loss of a chance is difficult to assess. The appeal was therefore allowed.
38. Whilst the applicant may have a claim against her solicitors, that is a very different claim from the Inheritance Act claim which she wishes to pursue against the respondent and limiting the applicant to a loss of chance claim against her solicitors would be prejudicial to the applicant.

(7) Looking at the position as it is now, has the applicant an arguable case under the Inheritance Act if I allow the application to proceed?

39. In the context of this application, the court is not determining the merits, it is considering whether the applicant has an arguable case. The Court of Appeal in *Begum v Ahmed* [2019] EWCA Civ 1794 made the point 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 (paragraph 22, Floyd LJ), and 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*". Floyd LJ agreed with the submission that "*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*".
40. The applicant's statement sets out her case, and there is currently no evidence in response from the respondent. The applicant's case is that she is the only child of the deceased and the deceased's late husband, which is relevant given that her late father's estate passed to the deceased and therefore it represents the entirety of the applicant's late parents' estates. The applicant is the mother of the deceased's only grandchild. The deceased's last Will makes no provision for her from the residuary estate (the applicant having only received bequeathed jewellery from her late mother, with her son receiving a legacy of £5,000). The applicant fully expected to receive her parents' residuary estate and it is the applicant's case that the change to the deceased's Will took place in unusual circumstances at a time when the deceased was vulnerable. The deceased changed her Will and married the respondent, who is 33 years

younger than the deceased, within a short time after the death of her late husband of 55 years. The applicant says the respondent voluntarily gave up her Council house to move in with the deceased along with her daughter.

41. The applicant owns no property of her own and her evidence indicates that her income is fully utilised without paying rent and that she has no savings. She has a small employer's pension and has no mortgage capacity due to having a poor credit rating as a result of entering into a debt management arrangement. She has no ability to save for a deposit on a property. Currently the applicant does not pay rent because of the nature of her employment but as soon as that ends she will have additional housing costs which she says she will be unable to afford. The applicant's evidence is that the deceased used to assist her with expenses that she could not afford including white goods and furniture, and expenses for her son which she could not afford. Further, the applicant says she arranged her finances in expectation that she would inherit the deceased's property as a result of numerous assurances to this effect from her late mother and late father, including turning down a higher paid employment opportunity in order to remain close to her parents to assist with their care and to build her life in the area where she expected to be living as a result of the expected inheritance of her late parents' property.

42. On this basis I am satisfied that the applicant has an arguable case.

43. Drawing together these various factors, I note that in the Court of Appeal case of *Begum v Ahmed (supra)* the court considered that too much weight had been given to the procedural failings of the appellant's solicitors by the first instance Judge when weighing up the factors relevant to the decision in

relation to extending time for the application. In this case the respondent submits that she has suffered prejudice as a result of the applicant's delays. She has faced intimated claims of proprietary estoppel, undue influence and invalid marriage prior to this claim, and consequential uncertainty as to what claims will ultimately be pursued. Overall, I consider that the circumstances in this case are somewhat similar to the position in *Begum v Ahmed* in that the estate has not been distributed and there is no significant prejudice to the respondent as a result of the applicant exploring her possible claims arising from her having been disinherited. The only real prejudice alleged by the respondent is the uncertainty and delay experienced in finalising the applicant's potential claim. However, it is apparent from the correspondence within the bundle that in the context of the attempts to negotiate, the respondent thought it likely that proceedings had in fact been issued and she was expecting service within the four-month period.

44. The letter of 22 March 2022 from MFG solicitors states: "*Please confirm if you have protectively issued such proceedings. If you have we should be pleased to receive a sealed copy for the purposes of information, and not by way of formal service at this stage, so that we may advise our client and the parties may have the opportunity to explore ADR in the four month window allowed for solicitor service of the issued claim.*" The four month period for service would have been by 20 July 2022, had the application been made in time. In the circumstances the prejudice to the respondent is minimal.
45. By way of contrast, the applicant would suffer significant prejudice in the event that she is not permitted to continue with her claim. It is the applicant's

case that she had always expected to inherit from the deceased, that inheritance being her late parents' combined estate after a 55 year marriage, and she had the expectation of inheriting property to meet her maintenance needs in circumstances where she is currently utilising all her current income without having to meet housing costs, she owns no property of her own and has no security of tenure at the end of her current employment.

46. Asplin LJ in *Cowan v Foreman* [2019] EWCA Civ 1336; [2020] Fam. 129 said “*Section 4 is concerned with whether, given all the circumstances of the case and the delay, it is appropriate to allow a claim to be issued more than six months after a grant of probate/letters of administration*”. For the reasons given I am satisfied that the interests of justice require permission to be granted to the applicant.

District Judge Chloë Phillips