How long is too long? Out of time Inheritance Act claims: *Thakare v Bhusate* [2020] EWHC 52 (Ch)

This update examines three recent cases which have provided valuable guidance regarding the approach taken by the Court when considering an application for permission to bring proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 ("**the Act**") outside of the six-month time limit imposed by its section 4. Those cases are the High Court judgment in *Thakare v Bhusate* [2020] EWHC 52 (Ch), and the Court of Appeal decisions in *Cowan v Foreman* [2019] Fam 129 and *Begum v Ahmed* [2019] EWCA Civ 1794.

Brief background: claims under the Act

Section 1 of the Act allows certain persons (such as, *inter alios*, a spouse, civil partner, or child) to make a claim against a deceased's estate for reasonable financial provision where the estate makes no, or only limited, financial provision for them.

Section 4 of the Act provides that such a claim "*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*" (emphasis added).

The Court's jurisdiction under section 4

The Act does not contain any guidance as to how the Court should approach the question of whether to grant permission for a claim to be made out of time. The Courts have, however, stepped in to supply some assistance.

When considering an application for permission, the Court of Appeal has approved guidelines in *Berger v Berger* [2014] WTLR 35, at [44]:

"*(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?

Author / ALINA GERASIMENKO

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(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?"

Application of the principles in the recent cases

At the outset, it should be noted that every application will turn on the individual circumstances of the case. Nevertheless, some points of general principle have been clarified by the recent decisions:

1. The purpose of the s. 4 time limit is to bring a measure of certainty and avoid complications which might arise if distributions from the estate are made before the proceedings are brought, it is **not** designed to protect the Court, or indeed the parties and particularly the PRs, from "stale" claims. There is no disciplinary element to s. 4 and the time limit should not be enforced for its own sake. Accordingly, it is wrong to apply the overriding objective or the *Denton* jurisprudence to an application for permission to bring a claim under the Act out of time (see *Cowan* at [43]-[46]; *Begum* at [21], [41]; *Bhusate* at [71]).

2. The power to extend time may be exercised even if there is **no good reason** for the relevant delay, so long as the other relevant factors weigh in favour of so exercising it. It is, therefore, wrong to require there to be a "good reason" for all periods of delay without considering the matter in the round (see *Cowan* at [51]). However, where there is a lengthy delay, the Court will look for an explanation for the delay and the absence of an explanation would be a powerful factor, against the granting of permission (see *Bhusate* at [127]). For example, in *Bhusate*, the unique facts provided an explanation for the delay: the widow was a person with limited education and limited English language skills who was *"effectively powerless"* following her husband's death (at [116], [120]).

3. It is particularly important to analyse the **effect** of the delay in any particular case (bearing in mind the purpose of the time limit) and consider the prejudice caused if the application is permitted or refused. For example, if the validity of the relevant will was under challenge in any event, the delay in commencing proceedings under the Act would not result in any further delay in the administration of the estate as no certainty could be achieved by beneficiaries whilst the challenge to the validity of a will was outstanding (see *Begum* at [39]). Generally, where there has been no distribution of the Estate, the delay is likely to be less prejudicial; and, in fact, the Estate may benefit from rises in property prices (see *Bhusate* [131]-[132]).

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4. The existence of a "*trigger event*" is not a pre-condition to the grant of permission in all cases involving a long delay. Instead, the question of whether a "*trigger event*" has occurred is a relevant consideration in cases where the applicant has a change of heart about wanting to bring a claim following a period of delay, having fully understood their position under the Act prior to the delay (see *Cowan* at [71]; *Bhusate* at [136]).

5. The fact that the applicant would not have had a viable claim under the Act if he or she had brought it within the six-month time limit is not a basis for refusing permission for a claim to be brought out of time (see *Bhusate* at [75]-[86]). That is because the Court's exercise, in considering the merits of a claim under the Act at trial, is not a retrospective one; section 3(5) of the Act requires the Court to take into account the facts as known to it at the date of the hearing.

6. The Court, in considering an application for permission to bring a claim, is entitled to go beyond a finding that the relevant claim is simply arguable, where it is able to form a clear view of the merits based on undisputed facts (see *Begum* at [24], [43]; *Bhusate* at [92]-[97]). For example, in *Bhusate*, Chief Master Marsh was entitled to characterise the merits of the Claim as very strong where it was not in dispute that "*in the absence of an ability to pursue the Claim, [the 68-year-old applicant who had limited education and limited English language skills] would be left without a home or any capital other than her limited savings, and would be left to apply for housing as a homeless person*" in circumstances where the "*Estate has not been distributed. There are no competing applicants. There appear to be no competing needs…*". These facts, of course, also meant that the prejudice caused by refusing permission would be severe.

Conclusion

The Court allowed the claim in *Bhusate* to proceed after an unprecedented period of delay (some 25 years and 9 months). That was an exceptional case with unusual facts and the Court noted that "*[i]n a different case one might not expect such a period of delay to be excused.*"

Nevertheless, this case, together with *Cowan* and *Begum*, confirms that the Court will not enforce compliance for its own sake and, in applying the *Berger* guidelines, will place a great deal of weight on (i) the balance of prejudice and (ii) the prospects of the proposed claim's success. ■

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