Neutral Citation Number: [2019] EWHC 470 (Ch)

Case No: PT-2017-000167

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST

In the Estate of Mr Kashinath Vithoba Bhusate (deceased)

And in the matter of the Inheritance (Provision for Family and Dependants) Act 1975

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 07/03/2019

Before:

CHIEF MASTER MARSH

- -

Between:

MRS SHANTABAI KASHINATH BHUSATE	**Claimant**
- and -	
(1) DR MANGALA PATEL	
(2) MRS JEEJA THAKARE	
(3) MRS ULKA PARMAR	
(4) DR RAVINDRA BHUSATE	
(5) DR LEKHA HERBERT	
(6) DR ARVIND BHUSATE	**Defendants**

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- -

Mark Dubbery (instructed by **Withers LLP**) for the **Claimant**
Richard Wilson QC and Toby Bishop (instructed by **Anthony Gold Solicitors**) for the **2nd to 5th Defendants**
The 1st and 6th Defendants did not appear and were not represented

Hearing date: 15 February 2019

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.

.....

CHIEF MASTER MARSH

Chief Master Marsh:

1. This is my judgment on the application by the claimant for the court's permission to bring a claim under the Inheritance (Provision for Family and Dependants) Act 1975 ("the Inheritance Act"). The application is governed by section 4 of the Inheritance Act which 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 6 months from the date on which representation with respect to the estate of the deceased is first taken out …".

2. The claimant's husband ("Mr Bhusate") died intestate on 28 April 1990 aged 72. A grant of letters of administration was taken out by the claimant and the first defendant ("Mangala") on 12 August 1991. For convenience, I will throughout this judgment refer to the defendants, who are all children of Mr Bhusate, by their given names. No disrespect is intended by using this shorthand.

3. The claim was issued on 29 November 2017. As will be apparent from the date of the grant and the date of the issue of this claim, the claimant seeks the court's permission to bring the claim under the Inheritance Act 25 years and 9 months after the deadline for doing so expired. If that is not unprecedented, it is certainly very unusual for an application to be made for permission after such a long delay.

4. The claimant's claim under the Inheritance Act is for:

> ""*...such financial provision as it would be reasonable in all the circumstances of the case for a... wife to receive, whether or not that provision is required for... her maintenance.*" (s.1(2)(a))."

5. On Mr Bhusate's death, the claimant in her personal capacity was entitled to a statutory legacy and a one half share of the residuary estate in trust for her absolutely. Under section 33 of the Administration of Estates Act 1925 ("AEA 1925") the administrators, the claimant and her step-daughter Mangala, held 62 Brookside Road on trust for the estate. Under section 46 AEA 1925, the residuary estate of the deceased was charged with the payment to the claimant of the statutory legacy applicable at the time of Mr Bhusate's death (£75,000), together with interest at 6% from the date of death. In addition, she was entitled to a life interest in a one half share of the residuary estate. She and Mangala owed duties to the estate as administrators and the claimant had an entitlement as a beneficiary. The only way in which the claimant could have received her entitlement as a beneficiary was by 62 Brookside Road being sold.

6. The claimant included a number of different types of claim in the proceedings she commenced on 29 November 2017. These included (a) proprietary claims in various forms relating to 62 Brookside Road where she remains living and has now lived for the past 38 years and (b) for payment of the statutory legacy and capitalised life interest (plus statutory interest). The latter claim was necessary because Mr Bhusate's estate has not been administered by the administrators over all the years that have passed since Mr Bhusate's death and 62 Brookside Road remains registered in his name.

7. On 13 September 2018, I handed down a judgment on an application made by the 2nd to 5th defendants in which I struck out the claimant's proprietary claims on the basis that they were bound to fail and struck out her claim to her statutory legacy and capitalised life interest on the basis that her entitlement was statute barred. I also appointed a professional administrator to administer Mr Bhusate's estate in place of the claimant and Mangala. The 6th defendant supported the claimant's case and brought his own claim in respect of 62 Brookside Road. His Part 20 claim was also struck out. It was agreed between the parties that the claimant's application under section 4 of the Inheritance Act would be left over to a separate hearing.

Background

8. Mr Bhusate came to the UK in about 1957. He worked as a messenger for the Indian High Commission until 1978 earning a very modest salary. He tried unsuccessfully to find another job and retired at the age of 65 on a state pension. He was married to his first wife, Mrs Bhusate, in India on 25 December 1930 when she was aged 5 and he was aged 13. She died on 6 December 1971. He assented 62 Brookside Road to himself as her personal representative on 24 November 1972 and later assented the property to himself personally. Mr Bhusate married a second time, but the marriage ended in divorce after a few years. On 28 October 1979, Mr Bhusate married the claimant in India. He was then aged 61 and she was aged 28. The claimant arrived in the UK with Mr Bhusate in June 1980.

9. The claimant is now aged 67. She was born in India and Marathi is her mother tongue. She received limited education, leaving school at the age of 11. She was married in an arranged marriage at the age of 16 but separated from her first husband a few months after the wedding and they were divorced seven years later. There is some controversy about the validity of her divorce, and therefore the validity of her marriage to Mr Bhusate, but no point is taken for the purposes of the application under section 4 of the Inheritance Act. Despite having lived in the UK over 38 years she can only speak basic and broken English. She can read very little English and understand only simple words. She speaks good Hindi and her native language Marathi.

10. Mr Bhusate had five children with his first wife. They are the 1st to 5th defendants.

- Jeeja is the 2nd defendant and was born on 21 May 1946. She is aged 72.
- Mangala is the 1st defendant and was born on 24 June 1958. She is aged 60.
- Ulka is the 3rd defendant and was born on 14 September 1960. She is aged 58.
- Ravindra is the 4th defendant and is the only male child. He was born on 17 March 1963 and is aged 55.
- Lekha is the 5th defendant and was born on 24 September 1964. She is aged 54.

11. All five children have all been very successful. The 4th and 5th defendants obtained doctorates. Mangala obtained a doctorate in dental materials science and when she made her statement was a reader and senior tutor in dentistry at Queen Mary College, London. All are married and they all own their own homes. Jeeja has retired.

12. The 6th defendant "Arvind" is the only child of Mr Bhusate and the claimant. He was aged just 9 when his father died. He is now aged 38. Although he is not currently employed, like his step-siblings, he has been successful and he obtained a doctorate. He described his employment in his witness statement as a Workplace Architect Lead. He is married with a small child and he and his family live with the claimant at the property. He is 35 years younger than Jeeja and 16 years younger than Lekha.

13. Sadly, there is a considerable depth of ill-feeling between the 2nd to 5th defendants on the one hand and the claimant and Arvind on the other hand. The objective of the 2nd to 5th defendants in vigorously opposing these proceedings is to leave the claimant with nothing from her husband's estate. That is not a matter of surmise. They chose to include in their strike out application two elements which indicate clearly their approach. First, they applied to strike out the claimant's claim to her statutory legacy and capitalised life interest by taking a limitation point; they could have chosen not to do so. Secondly, they included a claim for an order that 62 Brookside Road had not passed to Mr Bhusate by virtue of the rule against self-dealing, submitting that the court was required to set aside the transfer by Mr Bhusate to himself personally *ex debito justicae*. This would have had the effect that Mrs Bhusate's estate comprising 62 Brookside Road would have passed to the 1st to 5th defendants. They succeeded in depriving the claimant of her statutory legacy but failed to persuade the court that the transfer of the property should be set aside. I am left in no doubt that not only is there ill will between the 2nd to 5th defendants and the claimant but they also wish her ill.

The estate

14. The value of the estate at the date of Mr Bhusate's death was modest. The grant of letters of administration records the estate as having a net value of £137,449.70. The property was valued for the purposes of the grant at £135,000. Mr Bhusate had cash in two bank accounts totalling about £1,500. As my earlier judgment records, there was a deep recession in the early 1990's during which period the value of houses fell quite markedly. It seems likely that the value of 62 Brookside Road went down between the date of the valuation obtained for the grant and about 1995. Certainly, the value for grant of letters of administration, as the evidence shows, proved to be optimistic. The current value of the property is in the region of £850,000. No withdrawals of any significance have been made from the bank accounts held in Mr Bhusate's name and the cash balance is still in the region of £1,500.

The evidence

15. Witness statements have been filed by all the parties which traverse a lot of material about the family for the purposes of establishing Mr Bhusate's domicile and also dealing with allegations about the contribution made by the claimant to the family. None of the evidence has been tested and there are significant disputes of fact which cannot be resolved at this stage. The evidence mainly relates to a period approaching 30 years ago that was traumatic for the whole family and about which emotions ran and still run high. It is inevitable for these reasons, and the passing of time, that recollections may be deficient. Clearly the claimant's arrival into the family was not easy and long before Mr Bhusate's death most of the claimant's step-children held her in low regard. They considered her to have been a poor substitute for their mother, who died prematurely, and their father marrying a woman who was less than half his age was unwelcome. Ravindra describes her as being "cruel and abusive" and Jeeja,

Ulka and Lekha are also uncomplimentary. Such evidence is immaterial for present purposes other than to illustrate the very real depth of ill-feeling that exists between the claimant's step-children, other than Mangala, and the claimant. There are, however, areas of the evidence that are relevant to the application where there is little dispute.

16. The claimant's evidence is important. In summary, she says:

(1) When she arrived in the UK she spoke or read no English and only very limited Hindi. She had to be taught how to sign her signature in English by her husband. She says she was dependant on him and he supported her in everything. He dealt with the day to day finances and managed the property. The evidence of Mrs Anusaya Jirapure, who was an interpreter at the Indian High Commission, is contentious so far as she says she was a family friend and about what she observed. However, she confirms that at the date of Mr Bhusate's death, the claimant spoke little English and Mrs Jirapure provided her with some practical help.

(2) She says Ravindra had tried to persuade Mr Bhusate to put his name on the title but his requests had been declined. This led to heated arguments and a breakdown in relations between Mr Bhusate and Ravindra that lasted six years. The claimant was placed under pressure to transfer the property to him after Mr Bhusate's death.

(3) Only a month after Mr Bhusate's death, she underwent surgery to remove lumps from her breast which fortunately proved to be benign.

(4) She describes the period after Mr Bhusate's death as being very traumatic and she felt unable to address the practicalities of widowhood. She says she was referred to a bereavement counsellor by her GP and she goes on:

> "Unfortunately I did not have time to do this as I was so busy managing my grief, dealing with my health issues, taking Arvind to and from school, running the household (including feeding two other adults – Ravi and Lekha) and trying to manage in a country where I did not read the language and spoke very little."

(5) She felt isolated and received little support from any of the defendants other than Mangala. Arvind was aged only 9 and in the atmosphere which the claimant describes as being "high pressured and emotionally fraught" Arvind was referred to a psychiatrist.

(6) She heard the family discussing her future and propose that she be sent back to India with a one-way ticket. Her evidence recounts other later conversations she was a party to and it is clear that the claimant and her five step-children were unable to discuss matters affecting Mr Bhusate's estate.

(7) Later, after Kannan & Co had become involved, she says she was told by Kannan & Co in April 1994 that her step-children would not agree to sell 62 Brookside Road at £135,000.

17. In her second witness statement the claimant describes her recollection of events that led to the impasse that lasted 27 years:

> "55. I recall asking at around this time Kannan & Co how much I would receive if the Property was sold for £135,000. A house across the road was for sale and I had it in mind to buy (I think that it sold for approximately £100,000 at the end of 1994). Kannan & Co told me that Mangala, Jeeja, Ulka, Ravi Lekha and Arvind would only receive around £2,000 each from the sale, after costs and conveyancing fees. This would leave me a balance that I understood would have enabled me to buy a house in the Golders Green area. I presume that once Jeeja, Ulka, Ravi and Lekha were informed of their share based on the £135,000 offer, they decided to reject it.
>
> 56. I also recall Kannan & Co telling me (in a meeting) that all the offers for the Property that were received were sent to all of them but that some of them did not agree with the offers received. I felt that I had to continue instructing the estate agents to list the Property to try to achieve a higher price. Another offer for £120,000 was received on 9 August 1994. This offer was once again rejected by Jeeja, Ulka, Ravi and Lekha.
>
> 57. I recall the estate agent asking me something along the lines of *"if you don't want to sell it* [the Property] *why are you wasting both our time?"* I had to explain the situation to them and say the other parties were not in agreement with these offers.
>
> 58. I felt that the estate agents became frustrated and were unhappy with the rejection of the three offers. I recall that then, all correspondence from the estate agents soon stopped. I felt at the time that there were no other options open to me and that I had nobody left to help me.
>
> 59. I believe that around this time Jeeja and Ulka were getting on with their lives, and Ravi and Lekha setting up theirs. They were busy with their homes, families and careers."

18. Mangala was the only one of Mr Bhusate's step-children who provided any support to the claimant. She says she was the only one of them who was willing to speak to the claimant and she mediated (using the term loosely) between the claimant and her siblings. Mangala says she has tried to forget what was a very difficult period for everyone. However, she provides helpful background about the efforts the family made to resolve the position about their father's estate.

19. Mangala describes the claimant as being very anxious about what would happen to her and Arvind. She took the claimant to Sangam, a charity that provided free advice for Asian people, two or three times in 1990 or 1991. A reference to a solicitor who spoke Hindi, Mrs Kannan, was provided. Mangala accompanied the claimant to one or more meetings with Mrs Kannan of Kannan & Co in West Hendon. Her recollection of the period is limited. However, to my mind the following extract from her evidence provides useful insight into what happened and the difficulties that were faced. She says:

> "49....

I remember being advised that my father had died intestate. Although the details are unclear, I think I remember the advisor saying the Claimant could be entitled to 75% and my siblings to the remaining 25% of my father's estate, but I was unable to comprehend the situation and was unable to explain this to the Claimant at the time. It was a long time ago. It may have been 70/30, but for some reason I remember the advisor mentioning a percentage split. I also remember that I could not see how we could make this split work because the Claimant had no money to buy out my siblings' share of 62 Brookside Road. I recall that I was shocked to hear that my siblings and I could have a share. This is because when my mother passed away, everything she owned went to my father.

50. I informed my siblings of my understanding of the situation from Sangam and we decided to put the house on the market. I remember that the house was not valued highly because it was in a state of disrepair. I remember the Claimant telling me that she would show prospective buyers around the property.

51. The Claimant continued to show prospective buyers around the house but they would make ridiculous offers, much lower than the asking price. The house needed total modernisation, it had not been modernised since around 1980 and hence I assume this is why these low offers were made.

52. Around this time, there was a family meeting, which escalated into an argument. I remember the meetings were very difficult because the Claimant kept breaking down understandably, my siblings were upset by the situation, and I also found it upsetting being in the middle.

53. This was a very difficult time for all of us and I do not like to bring up these difficult memories. I have buried them. In the end the property did not sell because we (my siblings, the Claimant and I) could not agree on the right offer price. No further attempts were made to sell the house.

54. While the house was on the market, I said I would help the Claimant to find another property to live in because she had, ever since she moved to England, treated the house as her home. I did not want to keep my share of the property (as above, the legal adviser advised us that I had a share in the house) and I thought that we could put together my share, Arvind's share and the Claimant's share to find a property.

55. The Claimant did not know how to even start to look for a new property and we did not take any steps to look for a property. She did not know how to pay her bills and did not know what the bank was all about. While my father was alive the Claimant never went out without him, apart from dropping and picking up Arvind from school. Both my father and the Claimant were traditional in their views; she was not to go out without my father and her place was in the home. So, of course, after my father passed away, she would telephone me every time she needed help eg to pay a bill or when a letter arrived.

56. …

57. On 12th August 1991, the Claimant and I obtained a grant of letters of administration. I took this role on with the Claimant because I was the only one of

my siblings who communicated with the Claimant at the time. I informed my siblings and they appeared fine with this. I remember that we went to the bank and there was little money in my father's two accounts."

20. Mangala does not deal with the events after letters of administration had been obtained.

21. The picture that emerges from the evidence provided by Ravindra is rather less sympathetic to the claimant than that provided by Mangala. In summary he says that:

(1) His expectation as his mother and father's eldest son was that he would inherit 62 Brookside Road. He thought of the property as his mother's because her family provided the money with which to purchase it. He expresses disappointment that neither he nor his sisters ever received any part of their mother's estate.

(2) He says his father refused to transfer the property into joint names with the claimant.

(3) The claimant was a "cruel, abusive person" who isolated Mr Bhusate from his children.

(4) He did not have any meetings with the claimant to discuss the property either before or after he moved out. "I certainly did not tell her she could stay in the Property, nor did I ask her to transfer the Property into my name."

(5) The claimant has failed to administer the estate or provide an account of her dealings with it. "My sisters and I have therefore been left completely in the dark".

(6) The claimant and Arvind have lived rent free in the house but have never offered to pay an occupation rent.

(7) "At the time of my father's death the Claimant was 38 years old and fully able to work. She chose not to. However, the Claimant did take money from lodgers staying in the Property."

> "52. I have always known that we would need to deal with the property at some stage. I have not aggressively sought to have the Claimant and Arvind removed from the Property. It wasn't my role as I wasn't administering the estate, but also I always hoped the estate would be distributed amicably. It seems unjust to me that the Claimant and Arvind are now seeking to take advantage from my not having started litigation against them.
>
> 53. The Property was my mother's; it was bought through her and my grandmother's hard work. I have always been of the view it should stay within our family. The Claimant made it clear to me when I was a child and young man that she did not consider me to be part of her family and gradually I came to the view she is not part of mine."

(8) The claimant has denied access to the property to Ravindra and his siblings.

22. It is unnecessary for me to summarise the evidence provided by Jeeja, Ulka and Lekha beyond recording that:

    (1) Jeeja instructed Francis and Solomons to represent her. She says: "From 1992 until 1994 my solicitors exchanged correspondence with the Claimant's solicitors in an effort to reach an agreement regarding the sale of the Property and distribution of the estate to the beneficiaries; however, no agreement was ever reached."

    (2) Lekha says: "I never had a conversation with the Claimant about the Property, either before or after my father's death." She also has no recollection of any family meetings about the property.

    (3) All three support the evidence provided by Ravindra.

    (4) They say Ravindra and Lekha were mistreated by the claimant.

23. Unsurprisingly, only a small number of documents have survived from the early 1990's and it is not possible to discern with accuracy the complete picture. Kannan & Co has long since ceased to exist as a firm.

24. The claimant gave notice on 16 March 1992 under section 47A Administration of Estates Act 1925 to capitalise her life interest in the estate. On 8 July 1992 Kannan & Co wrote to Rubens Rabin & Co, who were instructed by Ravindra, to set out the claimant's entitlement in the estate. The letter provides a careful calculation adding the capitalised value of her life interest to the statutory legacy of £75,000 on the basis of an assumed value of the property, based on a valuation, of £161,000. In fact, no doubt due to the recession, this valuation proved to be very optimistic. Kannan & Co calculated that the claimant's entitlement would be to £114,434.86 taking the net value of the estate at £155,176.72. After deduction of costs and expenses, each of the six children would have been entitled to £6,700.19. In round terms therefore, with the estate valued at that optimistic figure, the claimant was entitled to 74% of the estate with each of the six children receiving 4.33%. Kannan & Co noted that the figures they provided were subject to adjustment with any change in price at which the property was sold or change to the estimated expenses.

25. Two points emerge clearly from the limited correspondence that has survived. First, both Jeeja and Ravindra objected to the claimant receiving interest on her statutory legacy and capitalised sum while she had the benefit of living in the house. Secondly, the property was placed on the market but there was difficulty attracting offers at the level of the probate valuation. On 8 July 1993 an offer of £120,000 was received. That offer appears to have been rejected. On 15 October 1993, Claridges Property Consultants said they felt the market was improving and the house could be sold for £135,000. Kannan & Co said to Rubens Rabin & Co on 18 November 1993 that the claimant had no objection to selling at a price between £120,000 and £130,000.[1] Then on 20 April 1994, Kannan & Co said that a purchaser had been found who was willing to buy the property for £135,000. On 26 April 1994, Rubens Rabin & Co

[1] There is an obvious typographical error in the letter which says £20,000 to £130,000. £20,000 was obviously intended to be £120,000.

asked for a calculation of how much each beneficiary would receive if a sale proceeded at that price. It is unclear what happened after that other than that Kannan & Co wrote on 15 November 1994 to say they were without instructions. Baistow Eves wrote in April 1994 to say their instructions had been withdrawn by the claimant.

26. It appears that dealings between the solicitors ended in the Autumn of 1994 and were not revived.

27. Arvind says that since 2000 he has spent about £60,000 maintaining the property. He says he initiated a series of conversations with his half siblings in 2004 to talk about buying out their interest in the property. After some initial interest in his suggestion, he says, Ravindra, who he believed was speaking for his siblings said: "the deal was off".

28. In 2016, Arvind saw his half siblings at a family wedding. There is some suggestion that Arvind may not have behaved well on that occasion but it is not in dispute that he had further contact with Ravindra. Arvind wrote a long letter, they met and later in November 2016 Ravindra wrote an emollient email suggesting that further discussion should take place. The claimant instructed solicitors (who act under a CFA) in 2017 and they wrote a letter of claim on 11 July 2017. A reply was made on 11 September 2017 and mediation was held on 26 October 2017. The parties were unable to reach agreement and the claim was issued on 29 November 2017.

The law

29. There is no reported case in which a claimant has been granted permission to bring a claim under the Inheritance Act out of time when the period that has elapsed is anywhere near 25 years and 9 months. On any view, it is a very lengthy period whether it is measured against the time limit of 6 months in section 4 or even the standard 6 year limitation period.

30. It is common ground that the limitation period of 6 months in section 4 of the Inheritance Act is substantive rather than procedural (see: *In re Ruttie* [1970] 1 WLR 89 at 93 per Ungoed-Thomas J).

31. In *Nesheim v Kosa* [2006] EWHC 2710 (Ch), Briggs J (as he then was) provided helpful observations about the time limit under section 4:

> *"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".*

32. The well settled principles to which Briggs J referred were at the time those set out in the judgments of Sir Robert Megarry V.-C in *Re Salmon* [1981] Ch 167 and Browne-Wilkinson J in *Re Dennis* [1981] 2 All ER 140. Sir Robert Megarry V.-C observed he was anxious not to go further than was proper in attempting to discover guidelines and disclaimed any intention to lay down principles. Later in his judgment (page 176H) he said the six considerations he had discussed in his judgment were not exhaustive: "plainly they are not".

33. Black LJ in *Berger v Berger* [2013] EWCA Civ 1305, adopted the "propositions" relied on by the judge at first instance which comprise the six guidelines provided by Sir Robert Megarry V.-C and added a seventh guideline:

> "*(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?*

34. These guidelines are not homogenous. The first guideline is very general and supervenes all the others. The court is required to exercise an unfettered discretion judicially in accordance with what is right and proper. No gloss is needed. The second guideline emphasises that the burden is on the applicant to provide "sufficient" grounds. Without diminishing the burden placed on the applicant under section 4, the sufficiency of the grounds that are provided is highly fact sensitive and the grounds that relied on will vary widely from case to case.

35. Guidelines 3 to 6 are straightforward issues of fact that should be capable of a yes/no answer. The answer to each will be put in the balance but none are determinative. In the course of argument, Mr Wilson submitted in relation to guideline 5 ("Has the estate been distributed?") that the absence of distribution of the estate, as here, cannot be used by the claimant as a positive point in her favour. I disagree. The court is given the task of exercising a very wide and unfettered discretion. I can see no reason why the distribution or partial distribution of the estate should only be a negative factor counting against the applicant whereas a complete absence of distribution is neutral. The observations of Briggs J in *Nesheim* support this approach when regard is had to the purpose for which the time limit is provided and the fact that at one time the claimant was the principal beneficiary of the estate.

36. Guideline 7 is clearly important. If the applicant does not have an arguable case, there would be no benefit in granting permission. I draw attention to the qualification that was approved by Black LJ, namely that the position is considered "as it is now", that is the date of the hearing of the application for permission.

37. The parties have referred to a number of cases. Mr Dubbery who appeared for the claimant pointed to *Lloyd v Ayres* [2018] WTLR 521, an Isle of Man case, *Moffatt v Moffatt* [2016] NICh 17 (a Northern Ireland case), *Berger v Berger* and *Sargeant v Sargeant* [2018] EWHC 8 (Ch).

38. In *Lloyd v Ayres*, the Manx Court permitted a claim to procced 9 years out of time. In *Moffat,* the claimant was not granted permission after a delay of 18 years where the claim was weak and the estate had been fully distributed. The delay was described as being "gross and inordinate". I accept that some consideration of the decisions in other cases as examples of the exercise of the court's discretion is useful, but I question the value of looking at cases from other jurisdictions merely as examples of the exercise of a similar power to facts that do not coincide with the case in hand. Neither of the two cases provides much assistance given the very different circumstances that were considered by the court.

39. In *Berger* the deceased's widow was in her mid-80s at the time of the hearing and brought a claim over six years after his death. She had the benefit of being entitled to live in a house valued at £2.5 million for the remainder of her life and a right to request sale of the house and the purchase of an alternative property. She was also a beneficiary of the residuary estate. It comprised investment properties held in trust. The assets in the trust produced only limited income for the claimant because of the investment policy adopted by the trustees on legal advice. She took no steps to claim over a lengthy period while the trustees managed the estate, and particularly a company forming part of it, without being on notice of her intention to claim. Black LJ placed considerable emphasis on the absence of a particular event that triggered her claim such as the discovery of something for which the respondents were responsible (eg the concealment of information) or an extraneous event such a fall in the market.

40. In *Sargeant*, the value of the estate was sworn at just over £3.2 million but was probably worth a great deal more in light of outline planning consent for housing. The claimant widow was one of a class of beneficiaries under a discretionary trust of the residuary estate. Probate was granted on 30 March 2006 (the claimant was one of the proving executors) and her claim was issued on 20 July 2016. The claimant was provided with a house, a salary from the farming partnership of £20,400 and the running expenses of the house were met in addition by the partnership. After a full analysis of the history HHJ David Cooke concluded at [62] that in the absence of a challenge, the other beneficiaries had a legitimate expectation they would inherit in accordance with the will and the deceased's wishes. Furthermore, the reality was that the claimant took her own decision to continue to work within the arrangements provided for in the will rather than to explore whether she had any option available to vary them.

41. The 2nd to 5th defendants relied on a number of additional cases:

    (1) In *Re Trott* [1958] 1 WLR 604 Upjohn J granted permission to the deceased's two month old child who was born four days before the expiry of the 6 month limitation period.

(2) In *Re Ruttie* [1970] 1 WLR 89 permission was granted 6 weeks and 2 days out of time where there had been negotiations throughout that time and a period of ill health.

(3) In *Stock v Brown* [1994] 1 FLR 840 Thorpe J dismissed an appeal against the grant of permission by the 85 year old widow who brought a claim five years and five months out of time. This period was described by the judge as being "exceptional delay". She was left the entire estate for life with a provision that she could occupy the former matrimonial home and have the benefit from investments held by the trustees in her lifetime. She had no advice about the will or her ability to claim. In 1993 she was hit by a dramatic fall in interest rates and increasing cost of her care which meant she did not have enough to live on. The extraneous events that affected her income were a significant 'trigger' factor affecting the exercise of the court's discretion.

(4) In *McNulty v McNulty* [2002] All ER (D) 150 the claimant brought a claim 3 years and 7 months after expiry of the limitation period. Information had been deliberately withheld from the probate valuer causing the estate's principal asset to be valued for probate in January 1995 at £175,000. The claimant became aware of a possible claim in April 1999. By 2001 the land had been sold for £1.6 million. Unfortunately, the claimant delayed for 10 months from the date when she became aware of being able to make a claim until issuing it. The Deputy High Court judge described that delay as "inexcusable tardiness" but granted permission.

42. To my mind the one possible principle of general application that emerges from these cases is the question of whether the claimant needs to find a 'trigger event' in order to explain the delay. Clearly, in *Berger* Black LJ had the decisions in *Stock v Brown* and *McNulty* in mind when providing reasons for refusing to grant permission. Where there is an obvious trigger, it is helpful to consider it, but I can see no basis in section 4 for a trigger factor being essential to engage the court's discretion. There is nothing in section 4 that requires such a gloss. As Sir Robert Megarry V.-C described section 4 in *Salmon*: "...the words ... could hardly be more neutral". There needs to be an explanation for the application for permission and the applicant must show sufficient grounds for granting the application. What those grounds may be is not constrained by the statute although it is evident that the longer the delay, the more compelling the grounds will have to be.

43. It is notable that in *Stock v Brown*, *Berger* and *Sargeant*, the claimant had obtained some benefit from the estate. The issue for the court was whether the claimant should be permitted to apply to increase that benefit in light of the position when the application to the court was made.

The Salmon/Berger guidelines

44. I will return later in this judgment to the first two guidelines. I will deal first with guidelines 3 to 7.

"*(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.*"

45. I have set out earlier in this judgment the period between the letter of claim and the issue of the claim. There is some tension between the need to issue the claim promptly and the need to make real efforts to avoid contested proceedings. It was not in this case, in reality, open to the claimant to issue proceedings on a protective basis due to the cost of bringing a claim with the evidence she relied on provided at the point of issue. The delay in 2017 was not material and the claimant's advisers were right to encourage her to agree to mediation in light of the unhappy family history and, indeed, of the delay. I consider this guideline leads to a neutral outcome.

(4) Were negotiations begun within the time limit?

46. This guideline has only limited application because the claimant is bound to accept that upon the grant of letters of administration, it is unlikely she had a claim of any size under the Inheritance Act due to the extent of her benefit under the intestacy relative to the value of 62 Brookside Road at that time. In a similar way, although she was not advised about making a claim under the Inheritance Act, the absence of advice does not assist her because the advice she was given about her entitlement in the intestacy was more apposite. There must be real doubt, however, for reasons I will elaborate whether the claimant would have been able to understand the advice she received and the effect of leaving the decision about the sale price of 62 Brookside Road to her step children. Overall this factor again is neutral.

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

47. The estate has not been administered or distributed. This was one of the core complaints against the claimant on the hearing of the 2nd to 5th defendants' application to strike to strike out the claim. As I recorded in the judgment dated 13 September 2018:

> "60. The claimant's position is a stark one. If the 2nd to 5th defendants are right, not only does the claimant have no interest in the property but, also, she has lost her entitlement to her statutory legacy and capitalised life interest. She will have lost her home and will obtain no benefit from Mr Bhusate's estate aside from having lived at the property for many years. The 2nd to 5th defendants have done nothing to require due administration of their father's estate over the same period and will obtain a windfall.
>
> 61. However, the starting point concerning Mr Bhusate's estate is not in doubt. The claimant and the first defendant were under a duty to administer the estate and it was their responsibility to keep the property in repair."

48. The judgment goes on to hold that the 2nd to 5th defendants were indeed right and the claimant's entitlement to a statutory legacy and capitalised life interest was statute barred. An order was also made under section 50 of the Administration of Justice Act 1985 removing the claimant and Mangala as administrators. On the hearing of the claimant's application under section 4 of the Inheritance Act, Mr Wilson made much of the claimant's breach of duty and referred to part of my reasoning for making an order under section 50. I concluded that:

> "79. It is not essential for the court to make findings that are adverse to the claimant and the first defendant to enable the court to remove them.

> However, in this case it is plain there has been a singular failure on their part to fulfil their duties. It matters not that their failure to act properly may have been due to ignorance or poor advice. They have demonstrated an inability to act in accordance with their duties over many years. Furthermore, in light of the orders that will be made on the application to strike out the claim, or for summary judgment, it seems to me that it would be impossible for the claimant to remain in office and it is not desirable for the 1st defendant to continue in a role that she has failed to perform adequately, or at all. It is undesirable that this relatively small estate should be burdened with the fees of a professional administrator. However, in reality professional advice would be needed in any event if the claimant and 1st defendant were to remain in office and so the legal additional costs will not be substantial."

49. There was certainly a breach of duty but to the extent there was culpability on the part of the claimant, it was shared by Mangala, with whom she was bound to act and the degree of culpability is very low in reality given the imbalance between the claimant and her stepchildren in relation to education, cultural upbringing, money and so on. As I have previously indicated, the fact that the estate has not been distributed is capable of being a factor that weighs in the balance in favour of the claimant because there is no question of having to recoup assets or money that have been distributed. Inevitably, however, the failure to distribute has occasioned some prejudice to the defendants. As Walton J remarked in *Re Gonin* [1977] 2 All ER 720 at 736e: "… it is always prejudice to anybody not to receive money which they are due to receive at the earliest possible moment."

50. There are two related points to note concerning prejudice. First, there is the remarkable fact that the 2nd to 5th defendants have shown no interest in obtaining their share of their father's estate for over 23 years. Secondly, the claimant, by failing to distribute the estate, has retained the benefit of living in the property over 25 years.

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

51. The claim under the Inheritance Act is the only claim that is available to the claimant. But for the choice made by the 2nd to 5th defendants to take the point about limitation, she would have retained her entitlement to a statutory legacy, a capitalised life interest and interest on those amounts. At the risk of re-stating the obvious, it was a matter for the 2nd to 5th defendants whether to take the limitation point. The potential outcome for the claimant is catastrophic because she will be without a home or any capital, other than her limited savings, and left to apply for housing as a homeless person.

(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?"

52. This is an area of substantial dispute between the parties. Mr Dubbery submits that pursuant to section 3(5) of the IHA, the court is required to consider matters as they stand at the date of the trial. Mr Wilson submits that, put more accurately, section 3(5) requires the court to "… take into account the facts as known to the court at the date of the hearing" and that this requires the court to look back at the position as if the claim had been issued in time. Had the claimant made a claim in 1991, she would not

have succeeded because she had the benefit of her statutory legacy and capitalised life interest.

53. In my judgment, Mr Dubbery is right in his submissions on this point. There are two reasons for reaching this conclusion. First, it is clear from *Stock v Brown* that the claimant in that case did not have a claim at the time probate was granted in 1987 because the return from the investments in which she had a life interest was sufficient for her needs. Secondly, the way in which the seventh guideline was formulated by Black LJ looks forward in time to the hearing if permission to bring the claim is granted. It does not look backward to a time within the 6 month limitation period. It is open to a claimant to bring a claim out of time when there was no claim at an earlier date. To conclude otherwise would put a restraint on the court's power to give permission that cannot be found either directly or indirectly in section 4.

54. Mr Dubbery submits that the claimant has an arguable case applying the criteria in section 3(1) and (2):

(a) The claimant has an obvious need for both housing and income. As matters stand, she has no home of her own. There is no immediate threat of a claim for possession but in this case past behaviour can be taken as a predictor of the future. It is right to proceed on the basis that the 2nd to 5th defendants will take any steps that furthers their interest at the expense of the claimant;

(b) The 1st to 5th defendants have no competing needs;

(c) There are no other applicants to consider;

(d) The estate is almost completely comprised of the matrimonial home which she has occupied for the duration of her marriage and widowhood (in excess of 38 years);

(e) The obligations and responsibilities owed to a widow are very great particularly where the widow is considerably younger than the deceased and her vulnerability is, in consequence, both highly predictable and of great duration (and even more so where she has been left with the burden of a young child in a country where she does not speak the language);

(f) The claimant has arthritis and suffers from a bad neck and back.

(g) The marriage was of medium length albeit brought to an end by the deceased's death;

(h) More controversially, it is said the claimant's contribution to looking after Mr Bhusate and his family was a very substantial one including as it did several step-children in addition to the full-time role of wife (including nursing her husband through his final illness) and mother to the child of the family. This role continued after the Mr Bhusate's death. This is an area which would need to be explored at trial;

(i) Upon any hypothetical divorce between these parties the claimant would not have expected to receive less than one half of the matrimonial home it being a

special class of asset and not vulnerable to arguments about unmatched contributions.

Further submissions by the 2nd to 5th Defendants

55. Mr Wilson submits that the claimant faces two insurmountable obstacles. First, the period of the delay, which he characterises as being due to the claimant's "indolence", is itself fatal. Secondly, there was no failure on the part of Mr Bhusate to make reasonable financial provision for her. Her current predicament is a consequence of her own conduct, namely her breach of duty as an administrator of the estate. He described the application as a "brazen attempt to place the product of her breach at the heart of the application". I am bound to say that the facts as I have summarised them do not speak to me of indolence or brazenness.

56. It is of course right that the period of delay is very long indeed. It is not correct, however, to say that the period of delay itself has the inevitable consequence that the application should be dismissed, accepting of course that the longer the period of delay, the greater the burden the claimant has to discharge. In this case, as I will explain, the length of time that has elapsed is not a factor that only creates difficulty for the claimant. It is also a circumstance that may count in her favour in light of the obstructive behaviour of the 2nd to 5th defendants.

57. Mr Wilson took the second of his core submissions as a springboard to invite the court to consider three analogous legal propositions which he submits illustrate that public policy should not support an application such as this one that is based on the claimant's own breach of duty:

(1) The *ex turpi causa no oritur action* principle.

(2) The equitable maxim *'she who comes into equity must come with clean hands'*. He refers to the decision of the House of Lords in *Grobbelaar v News Group Newspapers* [2002] 1 WLR 3024 and to the speech of Lord Scott at 3057F where he discussed the need for the 'grime on the hands' to be sufficiently closely connected with the equitable remedy that is sought. It is notable, however, that the House of Lords did not consider the degree of grime adhering to Mr Grobbelaar's hands was such as to deprive him of a remedy.

(3) The rule of contractual construction derived from the speech of Lord Diplock in *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180 at p189.

58. It seems to me that these illustrations are detached from the reality of this application and I do not find them helpful. They provide no illumination at all.

(1) There is no true analogy with the *ex turpi* principle.

(2) Resort to the maxims of equity is also unhelpful because the claimant could retort, for example, with the maxim *equity looks on as done that which ought to be done* in relation to her rights under the Administration of Justice Act 1925.

(3) Quite how an approach to the construction of a contract is analogous to the application of the test under section 4 is not obvious to me.

The exercise of discretion

(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

59. The evidence reveals the following facts that have an important bearing on this application:

(1) The claimant is unsophisticated, having left school at the age of 11.

(2) The claimant did not speak, read or write English at around the time her husband died. Her native language was Marathi although she had some Hindi. She would not have been able to read letters sent by her solicitors without help and it is unrealistic to think she obtained a ready understanding of the niceties of intestacy, the statutory legacy, capitalising her life interest and the duties of an administrator. It is clear that even Mangala, who became a successful academic, had little or no understanding of the position.

(3) The claimant describes her husband's cultural approach as traditional. He looked after matters of 'business' for the household. She had no experience of such matters and she was not equipped to deal with them. Both gender and cultural issues weighed against the claimant being in a position to take effective action.

(4) The claimant, with the help of Mangala, had access to legal advice. She was poorly served by being put forward for the role of Administrator, a role for which she clearly was unsuited due to her lack of sophistication and very limited English. She could not have had any real understanding of what it required or her duties.

(5) The claimant was profoundly affected by her husband's death and had surgery only weeks afterwards. She was left to care for a vulnerable 9 year old.

(6) The dynamics in the family were profoundly awry. For present purposes it does not matter why that was. None of the 2nd to 5th defendants were willing to speak to the claimant or provided her with any help. On the contrary, they took strong positions against her.

(7) The claimant had very little money. Even so, she has not touched the limited funds in Mr Bhusate's bank accounts.

(8) The value of houses fell from the date of Mr Bhusate's death for the following two or three years.

(9) With the exception of Mangala, the claimant was the subject of implacable hostility on the part of her step-children. Notwithstanding that hostility, she

tried to get agreement amongst all the step-children to a sale price, but that proved to be impossible. Had they agreed to the sale at the price recommended by the selling agents, the claimant and Mangala would have been able to fulfil their duties as administrators.

(10) In the absence of co-operation by the 2nd to 5th defendants, it is simply unrealistic to think that the claimant could have imposed her will on the step children, ultimately by applying to the court for directions.

60. Taken together, these facts demonstrate that by the time instructions were withdrawn from the agents in 1994, the claimant was effectively powerless. Her co-administrator did not actively assist her. She lacked money, experience and understanding. She faced four well-educated and comfortably off step-children who were unwilling to engage with her. There was a significant imbalance between them and the claimant. In light of this analysis, although when looked at objectively the claimant was in breach of her duties as an administrator, as was Mangala, it is difficult to see what she could have done. That she did nothing is unsurprising.

61. What is surprising is that the 2nd to 5th defendants also did nothing despite an acceptance by Ravindra that he knew the position needed to be resolved. There was no legal duty placed on the 2nd to 5th defendants to act to break the deadlock but the court is entitled to have regard to their conduct and their lack of action in taking some step to obtain their entitlement as beneficiaries. They stood by and permitted the claimant and Arvind to remain in the property knowing that the claimant had an entitlement to her statutory legacy and capitalised life interest. They took no action until the claimant asserted rights, albeit belatedly, when they opted to take the limitation point so as to deprive her of her legal entitlement as Mr Bhusate's widow.

62. Drawing the strands together, the grounds for the claimant being permitted to make her application 25 years and 9 months out of time are:

(1) The merits of her claim under the Inheritance Act as Mr Bhusate's spouse are very strong.

(2) The delay in bringing the claim has been explained. The claimant was effectively powerless to do anything in the absence of agreement or engagement by the claimant's stepchildren. The breach of duty by her in failing to administer the estate, was sufficient basis for her to be removed as an administrator but her level of culpability is negligible. It was most unfortunate, given her level of sophistication and limited language skills, that she was advised to apply for a grant in her name.

(3) The 2nd to 5th defendants obstructed the sale of 62 Brookside Road by insisting on a sale at a price they agreed and having obstructed the sale they did nothing to break the impasse for a further 23 years. They have stood by until a claim was made and then taken a limitation point so as to deprive the claimant of her entitlement from the estate. That the claimant has a claim, subject to her section 4 application succeeding, is due to their actions.

(4) If the application under section 4 is not granted, the claimant will be left with no remedy at all and no benefit from her husband's estate. She will be left homeless.

63. I consider that the claimant has shown sufficient grounds for the granting of permission to apply under the Inheritance Act. Indeed, I consider she has demonstrated compelling reasons why it is right and proper that the court should exercise its discretion in her favour.

Afterword

64. After drafting this judgment, but before handing it down I was referred to the judgment of Mostyn J in *Cowan v Foreman and others* [2019] EWHC 349 (Fam) that was handed down on 25 February 2019. I do not consider it is necessary for me to refer in detail to the judgment, or to the obiter remarks about the scope of section 4 made by Mostyn J. I would just say, however, that I do not consider it is right, when considering the exercise of discretion under section 4, to have regard to the overriding objective in CPR 1.1 or the approach to relief against sanctions in *Denton v TH White Ltd* [2014] EWCA Civ 906: see para 4 of the judgment. To do so, I suggest, involves conflating issues that, if they are related, are at best distant cousins.