Neutral Citation Number: [2020] EWHC 52 (Ch)

Case No: PT-2017-000167
Appeal No. CH-2019-000080

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)

On appeal from the Business and Property Court (Chief Master Marsh)

In the estate of Mr. Kashinath Vithoba Bhusate (deceased)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2020

Before :

MR EDWIN JOHNSON QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

(1) MRS JEEJA THAKARE **(2) MRS ULKA PARMAR** **(3) DR. RAVINDRA BHUSATE** **(4) DR. LEKHA HERBERT**	**Appellants** **(Defendants in the action)**
- and -	
MRS SHANTABAI KASHINATH BHUSATE	**Respondent** **(Claimant in the action)**

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Richard Wilson QC and Toby Bishop (instructed by **Anthony Gold Solicitors**) for the Appellants
Penelope Reed QC and Mark Dubbery (instructed by **Withers LLP**) for the Respondent

Hearing date: 13th December 2019

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Approved Judgment

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

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MR EDWIN JOHNSON QC

Mr Edwin Johnson QC :

Introduction

1. This is an appeal against a decision of Chief Master Marsh to grant permission for the making of a claim, out of time, pursuant to the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act").

2. The claim concerns the estate of Mr. Kashinath Vithoba Bhusate ("the Deceased"), who died on 28th April 1990. The Deceased died intestate. A grant of letters of administration was taken out in respect of the Deceased's estate ("the Estate") by the Respondent and Dr. Mangala Patel (the First Defendant in this action) on 12th August 1991.

3. The party who makes the claim under the 1975 Act ("the Claim") is the Respondent, Mrs Shantabai Kashinath Bhusate. Subject to a point to which I shall come, the Respondent was the third wife and is the widow of the Deceased. The Respondent is the Claimant in this action. The Respondent makes the Claim, pursuant to Section 1(1)(a) of the 1975 Act, as spouse of the Deceased.

4. Section 4 of the 1975 Act ("Section 4") prescribes the following time limit for claims under the 1975 Act (italics have been added to all quotations in this judgment).

> *"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)."*

5. It follows that, in the present case, the time limit for making the Claim expired on 12th February 1992; that is to say six months after the grant of administration in respect of the Estate, on 12th August 1991.

6. This action was commenced by claim form issued on 29th November 2017. The claims made by the Respondent in the action were not confined to the Claim, but also included other claims for relief, which have been struck out. In respect of the Claim the Respondent sought, as she had to, permission to make the Claim outside the six month time limit in Section 4.

7. On their face therefore, the facts of the present case are remarkable. The Respondent sought permission to make the Claim some 25 years and 9 months after the expiration of the six month time limit for the making of a claim under the 1975 Act. I do not know whether this can be described as unprecedented, but no authority has been cited to me in which the Court has granted permission for a claim to be made under the 1975 Act after such a lengthy period of delay.

8. The Appellants say that the Chief Master was wrong to grant permission in this case. The Appellants say that, in the making of his decision, the Chief Master went wrong in a number of ways, with the result that his decision to grant permission should be set aside.

9. The hearing of the application for permission to make the Claim out of time came before the Chief Master for hearing on 15th February 2019. The Chief Master handed down his reserved judgment, setting out his reasons for granting permission for the Claim to be made out of time, on 7th March 2019. I will refer to the judgment of the Chief Master as "the Judgment". References in the present judgment to Paragraphs mean, unless otherwise indicated, the paragraphs of the Judgment.

10. Permission to appeal was refused by the Chief Master, but was granted by Marcus Smith J.

11. On the hearing of this appeal the Appellants were represented by Richard Wilson QC and Toby Bishop. The Respondent was represented by Penelope Reed QC and Mark Dubbery. In addition to the oral submissions, I had the benefit of skeleton arguments from Counsel on each side and, in the case of the Appellants, a supplementary note which updated the Appellants' argument in the light of two very recent decisions of the Court of Appeal which came after the Judgment. I am most grateful to Counsel on both sides for their written and oral submissions, all of which I have taken into account. These submissions have been of great assistance to me in reaching my decision on this appeal.

12. Included in the bundle of documents for the hearing of the appeal was a transcript of the hearing before the Chief Master on 15th February 2019. I was taken to the transcript in oral submissions. I was also given, by Mr. Wilson, a list of certain parts of the transcript which I was asked to read for myself. I confirm that I have complied with this request, and read or re-read the parts of the transcript specified in this list.

The parties

13. The Respondent and Claimant in this action was, as I have said, the third wife and widow of the Deceased. The Respondent is now aged 68. The Respondent and the Deceased were married in India in 1979, when the Deceased was aged 61, and the Respondent was aged 28. The Respondent came from India to the United Kingdom with the Deceased in 1980. The Respondent was previously married in India, in an arranged marriage at the age of 16. The Respondent separated from her first husband after a few months of marriage, and they were divorced some 7 years later.

14. The Appellants have put the Respondent to proof that she was validly divorced from her first husband and, in consequence, that she was validly married to the Deceased. The Appellants reserve their position on these questions, if the Claim is allowed to

proceed. It is however accepted, but only for the purposes of the application for permission to make the Claim out of time, that the Respondent was validly married to the Deceased. I can therefore proceed, so far as this appeal is concerned, on the basis that the Respondent was validly married to the Deceased. For completeness I should mention that the Claim is not only made under Section 1(1)(a) of the 1975 Act. The Claim is also made, in the alternative, under Section 1(1)(e) of the 1975 Act, on the basis that the Respondent was a person maintained by the Deceased immediately before his death. As I have explained, and so far as this appeal is concerned, I can proceed on the basis that the Claim is made under Section 1(1)(a).

15. The Defendants to this action are the children of the Deceased. In referring to the children of the Deceased, on an individual basis, I will use their given names. It will be understood that I intend no discourtesy by this form of description. Nor does it imply any form of discrimination or distinction, as between the Respondent and the children of the Deceased.

16. The Deceased and the Respondent had one child; their son Dr. Arvind Bhusate, who was born on 29th November 1980, and is aged 39. Arvind is the Sixth Defendant to the action.

17. The Deceased and his first wife (Shantabai Dehankar Bhusate), who died on 6th December 1971, had five children. In order of age, they are as follows.

    (1) Mrs Jeeja Thakare, the Second Defendant to the action, was born on 21st May 1946, and is now aged 73.

    (2) Dr. Mangala Patel, the First Defendant to the action, was born on 24th June 1958, and is now aged 61.

    (3) Mrs Ulka Parmar, the Third Defendant to the action, was born on 14th September 1960, and is now aged 59.

    (4) Dr. Ravindra Bhusate, the Fourth Defendant to the action, was born on 17th March 1963, and is now aged 56.

    (5) Dr. Lekha Herbert, the Fifth Defendant to the action, was born on 24th September 1964, and is now aged 55.

18. The Appellants are the Second, Third, Fourth, and Fifth Defendants in the action. As the Chief Master recorded, at Paragraph 11, all five children of the Deceased and his first wife have been very successful. Three have doctorates. All are married, and all have their own homes. Jeeja is now retired. I did not understand there to be any challenge to the factual position as recorded by the Chief Master in Paragraph 11.

Relevant factual background

19. The Chief Master gave a full account of the factual background to the Claim in the Judgment. In these circumstances it is only necessary for me to give the following short summary of the relevant factual background. I derive this background principally from the Judgment, but also from the witness statements which have been served in the action, and from the other documents in the bundle of documents

prepared for this appeal hearing. In relation to the witness statements, it is important to keep in mind that there has been no trial in the action. As the Chief Master noted, in summarising the evidence given in the witness statements (Paragraphs 15-28), the evidence in the witness statements has not been tested or challenged in cross examination, and there are significant disputes of fact which cannot be resolved at this stage.

20. The Deceased came to this country in about 1957. He worked as a messenger for the Indian High Commission, earning a modest salary, until 1978. Thereafter the Deceased tried unsuccessfully to find another job, and retired at 65 on a state pension.

21. The Deceased was married to his first wife, in India, in 1930. By the time of the death of his first wife, in 1971, the matrimonial home appears to have been the property known as 62 Brookside Road, Golders Green, London NW11 ("the Property"). The Property appears to have been held in the name of the Deceased's first wife, who died intestate. Following her death, the Deceased assented the Property to himself, as her personal representative, and then to himself in his personal capacity.

22. The Deceased and the Respondent came to this country in 1980, following their marriage, and took up residence in the Property. It does not appear to be in dispute that the Respondent had only a limited education, and has only limited ability to speak and read English. The Respondent left school at 11, and was married in an arranged marriage at the age of 16. The Respondent's first language is Marathi, and I understand that she also speaks good Hindi.

23. Following the death of the Deceased the Respondent and Mangala took out letters of administration in respect of the Estate, on 12th August 1991. The value of the Estate was modest. The principal asset in the Estate was the Property. The grant 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. I understand that there were also two bank accounts in the name of the Deceased, containing some £1,500 between them.

24. The Deceased died intestate. The Respondent's entitlement in her personal capacity, on the death of the Deceased, was as follows.

    (1) The Respondent was entitled to receive a statutory legacy in the sum of £75,000, together with interest thereon at the rate of 6% from the date of the death of the Deceased.

    (2) The Respondent was entitled to a life interest in a one half share of the residuary estate.

25. At this stage, following the death of the Deceased, the Respondent had solicitors acting for her (Kannan & Co.) who corresponded on her behalf with solicitors acting for at least some of the Appellants. Some of this correspondence, from late 1991 to 1994 has survived. It includes a letter from Kannan & Co. to the solicitors (Rubens Rabin & Co.) acting for Ravindra (the Fourth Defendant). The letter is dated 8th July 1992, and sets out in some detail what Kannan & Co. calculated to be the likely entitlement of the Respondent in respect of the Estate and the likely entitlement of the

six children of the Deceased in respect of the Estate. Since it is useful, for the purposes of the arguments in this appeal, to have an understanding of the entitlement of the parties to the Estate following the death of the Deceased, I set out these calculations in some more detail.

26. The calculations in the letter of 8th July 1992 were set out on alternative hypotheses, but it is most useful to record the calculations which Kannan & Co. set out as giving *"an approximate idea of the likely division of the estate in practice"*. Kannan & Co. based these calculations on the Property having an estimated sale price of £158,000, which may have been optimistic in the property recession of the early 1990s. On this hypothesis the relevant calculations were as follows.

    (1) The net value of the Estate, after costs and expenses (including the costs of the sale of the Property), and assuming a sale price of £158,000, was £155,176.72.

    (2) The value of the statutory legacy of £75,000, plus accrued interest to 28th June 1992, was £84,750. This left a sum of £70,426.72, as the residuary value of the Estate.

    (3) Thereafter there appears to be a minor error in the calculations. Kannan & Co. calculated a half share of the residuary estate as £35,426.72. The correct figure appears to be £35,213.36.

    (4) The capitalised value of the Respondent's life interest in a one half share of the residuary estate, using a multiplier of 0.843, was £29,684.86. This figure appears to have been derived by Kannan & Co. from the correct figure of £35,213.36 for the value of a one half share of the residuary estate.

    (5) The Respondent's total entitlement in respect of the Estate (calculating interest to 28th June 1992) was therefore £114,434.86.

    (6) This left a residue of £40,741.14 to be divided between the six children, in the sum of £6,790.19 each.

27. As the letter from Kannan & Co. recorded, the Respondent had given notice to capitalise her life interest in one half of the residuary estate. I understand that this notice was given, pursuant to Section 47A of the Administration of Estates Act 1925, on 16th March 1992.

28. The limited correspondence which is available between 1991 and 1994 ends with a letter from Kannan & Co. to Ravindra's solicitors, dated 15th November 1994, which states that Kannan & Co. were without instructions in the matter. The letter to which that letter was responding is not available.

29. The solicitors' correspondence which has survived from that period was principally concerned with questions regarding the distribution of the Estate and, in particular, the sale of the Property proposed by Kannan & Co., and the price at which the Property should be sold. No agreement appears to have been reached on a sale of the Property, and the Property was not sold.

30. Nor was there any administration of the Estate. Neither the Respondent nor Mangala appear to have taken any steps to further the administration of the Estate. On their side none of the Appellants took any steps to enforce the administration of the Estate. Essentially, the administration of the Estate remained in limbo, and the Respondent continued to occupy the Property as her home. The Respondent continues to occupy the Property as her home, together with Arvind and his wife and child. In the Judgment, the current value of the Property is stated to be around £850,000 (Paragraph 14). I have also seen a recent valuation of the Property, by M.J. Foreman & Co., which was obtained by the Appellants' solicitors. This valuation puts the value of the Property, as at 11th November 2019, at £825,000.

31. It appears to be common ground that there were discussions regarding the ownership of the Property in 2004, between Arvind and his half siblings, which were initiated by Arvind. Those discussions did not result in any resolution.

32. In July 2016 Arvind saw the Appellants at a family wedding. There is some dispute as to what occurred at this wedding, but in the month following the wedding there was an exchange of communications and a meeting between Arvind and Ravindra, the principal object of which appears to have been to resolve the question of ownership of the Property. Following the meeting there was a further exchange of communications, but no resolution was achieved. The Respondent instructed solicitors in 2017, and they sent a letter of claim on 11th July 2017. A reply was sent on 11th September 2017. A mediation was held on 26th October 2017. The parties were unable to reach agreement and, on 29th November 2017, the Respondent commenced this action.

The action

33. As I have said, the Respondent's claims in the action were not confined to the Claim. The Respondent also claimed that she was entitled to the sole beneficial interest in the Property by virtue of her rights on the intestacy of the Deceased. The Respondent also claimed that she was entitled to the sole beneficial interest in the Property, or to part of that beneficial interest by virtue of a resulting or constructive trust. The Respondent also sought payment of what she had been entitled to on the intestacy of the Deceased; namely the statutory legacy and her capitalised life interest in half of the residuary estate, and interest thereon. The Respondent also sought directions, essentially for the distribution of the Estate in accordance with the entitlement of the parties, as determined in the action. The Defendants to the action were the six children of the Deceased. The essential contest was however, and remains between the Respondent on the one side, and the Appellants on the other side.

34. Arvind served a Defence and Counterclaim in the action. Arvind did not take issue with his mother's claim, but advanced, if and in so far as the Respondent's claim failed, his own claim that he and the Respondent were entitled to the sole beneficial interest in the Property by virtue of what appears to have been pleaded as an alleged common intention trust, alternatively by virtue of a proprietary estoppel. Arvind also claimed an account in respect of his alleged expenditure on repair and improvement of the Property.

35. The Appellants served Points of Defence, pursuant to a direction of the Chief Master, in response to the Respondent's claims, and in response to Arvind's Counterclaim. The Points of Defence also included a Counterclaim, and a Part 20 Claim against Mangala, the First Defendant to the action and still then a co-administrator of the Estate with the Respondent. The Respondent's various claims, and Arvind's claim were all denied in these Points of Defence. The most relevant features of the Points of Defence, for present purposes, are as follows:

    (1) The Points of Defence pleaded a limitation defence in response to the Respondent's claim to the statutory legacy and the capitalised life interest in half of the residuary estate. The Respondent's entitlement to these amounts was said to be statute barred.

    (2) In addition to a denial of the substance of the Claim, the point was taken that the Claim had been made outside the time limit in Section 4.

    (3) The Appellants sought, by the Counterclaim and the Part 20 Claim, a variety of accounts, inquiries and directions for the administration of the Estate, including an order for the replacement of the Respondent and Mangala as administrators of the Estate, and directions requiring the Respondent and Mangala to account to the Estate for income received out of the Property since the death of the Deceased, and to account for the benefit of the Respondent's occupation of the Property.

    (4) The Points of Defence put the Respondent to proof that the Deceased had in fact been the sole owner of the Property on the date of his death. It will be recalled that the Property was in the sole name of the Deceased's first wife, when she died in 1971, and that the Deceased assented the Property to himself on her death. The Points of Defence took the point that the Deceased's first wife died intestate, and that if the value of the Property had exceeded the Deceased's rights on the intestacy, at the point when he assented the Property to himself, the assent would have contravened the self-dealing rule. The Appellants elected to treat the assent as void, if the self-dealing rule had been contravened. The Appellants also sought an order for the appointment of an administrator in respect of the estate of their late mother (the Deceased's first wife) if the beneficial interest in the Property was found to fall into the estate of their late mother.

36. By application notice dated 21st February 2018 the Appellants sought certain case management directions in the action. The Appellants also sought an order striking out the claims to a proprietary interest in the Property made by the Respondent and Arvind and/or for summary judgment in respect of those claims, and for a similar order in respect of the Respondent's claim to the statutory legacy and capitalised life interest in half of the residuary estate, and interest thereon. The Appellants also sought summary judgment on the issues of the removal of the Respondent and Mangala as administrators of the Estate, the grant of administration of the estate of their late mother (the Deceased's first wife), and whether the Property was held by the Estate on trust for the estate of their late mother. The application notice also sought determination of the Respondent's application, under Section 4, for permission to make the Claim out of time as a preliminary issue.

37. These various applications for striking out and/or summary judgment and case management directions were heard by the Chief Master on 28th and 29th June 2018. The Chief Master handed down his reserved judgment on those applications on 13th September 2018. The neutral citation for this judgment ("the September 2018 Judgment") is [2018] EWHC 2362 (Ch). As I understand the position, there has been no appeal against the September 2018 Judgment. In summary, the principal decisions of the Chief Master in the September 2018 Judgment were as follows.

    (1) The claims of the Respondent and Arvind to a proprietary interest in the Property, and Arvind's claim for an account were struck out.

    (2) The Respondent's claim to the statutory legacy, a capitalised life interest in half of the residuary estate, and interest thereon was struck out, on the basis that the Respondent's entitlement on the intestacy of the Deceased was statute barred.

    (3) The Appellants' application for summary judgment in respect of the question of whether the Estate held the Property on trust for the estate of their late mother was refused.

    (4) The Respondent and Mangala were removed as administrators of the Estate and, in their place, Mr. Gregory White of Dixon Ward Solicitors was appointed as administrator of the Estate.

38. The application for permission to make the Claim out of time was, by agreement, heard separately on 15th February 2019 and, as I have already recorded, the Chief Master handed down the Judgment, granting permission under Section 4, on 7th March 2019.

39. The essential relevance of the September 2018 Judgment, for present purposes, is that it established that the Respondent has no proprietary interest in respect of the Property, and no rights in respect of the Estate save for the Claim, if the Claim can be pursued out of time.

The jurisdiction under Section 4

40. Section 4 does not itself 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. In Berger v Berger [2014] WTLR 35, at [44], Black LJ (as she then was) approved certain guidelines which had been formulated by the Judge at first instance in that case. The Judge at first instance (HH Judge Hayward Smith QC) formulated these guidelines from 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.

41. The guidelines, which I will refer to as the Berger Guidelines, are as follows:

    "(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?"*

42. The Chief Master set out the Berger Guidelines at Paragraph 33. The Chief Master also made the following general observations on the Berger Guidelines, at Paragraphs 34-36:

> *"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."*

43. I set out the Berger Guidelines at the outset, together with the general observations of the Chief Master upon the Berger Guidelines, because the essential complaint of the Appellants in this appeal is that the Chief Master erred in numerous respects in applying what the Appellants refer to, in paragraph 14 of their skeleton argument in the appeal, as *"the test set out in Berger*".

The grounds of appeal

44. The Appellants' case on the appeal has required some revision because, following the handing down of the Judgment there have been two decisions of the Court of Appeal in cases concerning applications for permission under Section 4. The decisions in question are Cowan v Foreman [2019] EWCA Civ 1336 and Begum v Ahmed [2019] EWCA Civ 1794. The Appellants provided a helpful supplementary note, which narrowed the issues and updated the Appellants' position in the light of these decisions.

45. Subject to this narrowing of issues and updating, the grounds of appeal, as they appear in the Appellants' skeleton argument and supplementary note, and as developed in Mr. Wilson's oral submissions, can be summarised as follows. I stress that this is only a summary. It is not intended to be an exhaustive description of the Appellants' case in the appeal.

46. The first ground of appeal (Ground 1 in the Appellants' skeleton argument) is that the Chief Master, in exercising his discretion, took into account a host of irrelevant matters, and failed to take into account a number of relevant matters. The detail of this is set out in subsequent grounds of appeal, but the overall first ground of appeal is that, taking all of these factors together, the Chief Master failed to exercise his discretion judicially, and in accordance with what is right and proper.

47. The next ground of appeal (Ground 2 in the Appellants' skeleton argument) attacks the conclusions reached by the Chief Master, at Paragraph 62. In Paragraph 62 the Chief Master summarised his conclusions in the following terms:

> *"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."

48. The Appellants attack Paragraph 62 on a number of grounds, which I summarise as follows:

(1) The Chief Master was wrong to describe the merits of the Claim as very strong, for a number of reasons:

(i) The Chief Master should have confined himself to the question of whether the Claim was arguable. Beyond that, the Chief Master was wrong to speculate or express any conclusion on the strength of the Claim. Strength beyond an arguable case may legitimately be a factor in appropriate circumstances (such as those where the Court has heard the evidence in full), but not in the present case.

(ii) This error was compounded by reliance upon this conclusion as a factor in favour of granting permission.

(iii) The Chief Master was in fact wrong, as matter of law, to conclude that the Respondent had satisfied the arguable case threshold. The Claim did not even satisfy that threshold requirement.

(2) The Chief Master was wrong to conclude that the Respondent's delay of over 25 years in bringing the Claim had been adequately explained. Great weight should have been given to this period of delay, which was both unexplained and extortionate.

(3) The Chief Master was wrong in law to weigh the Appellants' successful limitation defence as a factor in favour of granting permission.

(4) The Chief Master was wrong to conclude that the Appellants obstructed the sale of the Property.

(5) The Chief Master was wrong to take into account that the Appellants did not take steps to compel the administration of the Estate.

(6) In addition to wrongfully attributing blame, for the failure of the administrators (the Respondent and Mangala) to administer the Estate, to the Appellants, the Chief Master failed to place any proper weight on the fact that the Respondent was responsible for her own situation which gave rise to the Claim.

(7) The Chief Master erred in inconsistently and unjustly applying a flawed analysis to the evidence, deciding that he had to have regard to facts as they stood at the date of the hearing, and then giving weight to facts relied upon by the Respondent which prevailed at an earlier time but which had no application at the date of the hearing.

49. The next ground of appeal (Ground 3 in the Appellants' skeleton argument) criticises the Chief Master's conclusion, at Paragraph 45, that the Respondent acted promptly, in circumstances where the Chief Master based this conclusion on the period of time following the sending of the letter of claim, when the actual period of delay was far longer, and where there was an absence of any trigger event which could have justified the period of delay prior to the sending of the letter of claim. The point is made that the period of delay is far longer than that described as lengthy and significant in Begum.

50. The next ground of appeal (Ground 4 in the Appellants' skeleton argument) asserts that the Chief Master fell into error in treating the absence of distribution of the Estate as a factor in favour of the Respondent. At best, it is contended, this was a neutral factor. In addition to this the Respondent should not have been permitted to rely on the absence of distribution because this was the result of her own breach of duty as co-administrator of the Estate. The Appellants point out, correctly, that a finding of breach of this duty on the part of the Respondent was made by the Chief Master in the September 2018 Judgment.

51. The next ground of appeal, as it appears in the original Grounds of Appeal, concerns the sixth of the Berger Guidelines. In considering this Guideline it is contended that the Chief Master wrongly failed to place weight on the fact that the Respondent's situation was attributable to her failure to enforce her rights on the intestacy of the Deceased and to her breach of duty in failing to administer the Estate. It is also contended that the Chief Master wrongly attributed culpability for the Respondent's position to the Appellants on the basis of their assertion of a limitation defence and/or in not compelling the Respondent to discharge her duty to administer the Estate. I will refer to this ground of appeal as Ground 5. Ground 5 is not identified as a separate ground of appeal in the Appellants' skeleton argument, but the arguments in support of Ground 5 are firmly embedded in the grounds of appeal, as they appear in the Appellants' skeleton argument; in particular within the group of arguments which make up Ground 2.

52. The next ground of appeal (Ground 6 in the Appellants' skeleton argument) reiterates and expands upon the Appellants' argument that the Chief Master was wrong to find that the Respondent had even an arguable case. The essential points here, which Mr. Wilson placed at the heart of his arguments before me, were (i) that the Respondent would, by virtue of her rights on the intestacy, have had no claim under the 1975 Act if the claim had been brought within the statutory time limit, and (ii) that the circumstances which gave rise to the Claim arose as a result of the failure of the Respondent to administer the Estate and as a result of the Respondent allowing her rights on the intestacy to become statute barred. The argument of the Appellants is that the situation of the Respondent is not one where reasonable financial provision has not been made for her. The effect of the intestacy rules was to make reasonable financial provision for the Respondent on the death of the Deceased. The

Respondent's situation is that she has lost, by her own actions, what she was given. In the result, so it is argued, she has no claim under the 1975 Act.

53. The next, and now final ground of appeal (Ground 7 in the Appellants' skeleton argument) effectively repeats the point that the Chief Master appears to have attributed culpability to the Appellants for failing to take action to compel the Respondent to administer the Estate, without considering that the Respondent's inaction in relation to the administration (which the Chief Master found to be a breach of duty sufficient to warrant her removal as administrator) was a factor which weighed against her being allowed to bring the Claim out of time. It is argued that this approach was inconsistent and unfair. It was the Respondent who was under a positive duty to act, not the Appellants.

54. The eighth ground of appeal (Ground 8 in the Appellants' skeleton argument) was that the Chief Master had failed to follow the decision at first instance in Cowan. This ground of appeal is no longer relied upon, following the overturning of the first instance decision in Cowan by the Court of Appeal.

My jurisdiction on this appeal

55. Before coming to my consideration of the grounds of appeal, it is important to remind myself of the jurisdiction which I am exercising on this appeal.

56. In deciding to grant permission for the Claim to be made, the Chief Master was exercising a discretion. That discretion is described as unfettered in the first of the Berger Guidelines. I also repeat what the Chief Master said, at Paragraph 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."*

57. This approach is consistent with what was said by Floyd LJ in Begum, at [13].

> *"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. In Nesheim v Kosa [2006] EWHC 2710 Briggs J (as he was then) identified the nature and purpose of the time limit and the power to extend as follows:*
>
> > *"... 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 a 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 unnecessary delay in the administration of estates to be caused by the tardy bringing of proceedings under the Act and to avoid 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."*

58. Floyd LJ also said, at [18], by way of comment upon the guidelines formulated by Sir Robert Megarry V-C in Re Salmon [1981] Ch 167 (the predecessors of the Berger Guidelines):

> *"I do not doubt for one moment that each of these factors may, in most cases, be important. As with any such list, however, there is a danger, if they are taken as a template, that other important factors relevant to the exercise of the discretion will be overlooked."*

59. I also refer to what was said by Sir Robert Megarry in Re Salmon, at 174G-H and 175A, in relation to the formulation of guidelines in respect of the exercise of the discretion given by Section 4:

> *"I am anxious not to go further than is proper in attempting to discover guidelines in exercising the court's discretion under section 4. I bear in mind what Ungoed-Thomas J. said on this; and in saying what I do, I disclaim any intention to lay down principles, though I am not sure that it makes it much better to use the term "guidelines" in place of "principles."*
>
> *"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."*

60. Mr. Wilson submitted that *"unfettered"*, in the description of the discretion under Section 4, means *"general"*. I doubt that much turns on whether one uses either word to describe the discretion. It is plainly a wide discretion. It seems to me however that it is better to follow the language of the case law, which clearly states that this is an unfettered discretion.

61. In this context Mr. Wilson also submitted that the Chief Master had been wrong, in Paragraph 35, to describe the discretion as *"a very wide and unfettered discretion"*. Mr. Wilson referred me to the submissions of Counsel for the plaintiff widow, in Re Salmon , at 169D-E, which dealt with the statutory history of the discretion in Section 4. Originally there was no provision to extend the time limit for claims under the Inheritance (Family Provision) Act 1938, the statutory predecessor of the 1975 Act. This position was relaxed by Schedule 3 to the Intestates' Estates Act 1952, but only in certain circumstances. This fetter was removed by further amendments made by the Family Provision Act 1966, and the same provision was then re-enacted in Section 4. Mr. Wilson's point was that one had to look at Section 4 in its historical context. When viewed in the historical context of Section 4, the description of the discretion under Section 4 was no more than an acknowledgment that there was no statutory pre-

condition for an extension of time under Section 4, whereas there had been one previously.

62. I do not accept this submission. It seems to me to be inconsistent with the actual judgment in Re Salmon, where Sir Robert Megarry V-C, while acknowledging the statutory history which had resulted in the discretion becoming unfettered (173E-G), does not appear to have treated the discretion as being actually more restricted than would normally be encompassed by the description *"unfettered"*. This submission also seems to me to be inconsistent with the description of the discretion in subsequent cases, in which the wide nature of the discretion is repeatedly emphasized. In my view the Chief Master's description of the discretion as *"a very wide and unfettered discretion"* was correct. The exercise of the discretion is subject to the Berger Guidelines, but the Chief Master had that well in mind.

63. In reviewing the exercise of this discretion by the Chief Master, I am not concerned with the question of whether I consider that permission should be granted under Section 4. Rather, the question for me is whether the Chief Master went wrong in the exercise of his discretion, in such a way as to justify the setting aside of his decision to grant permission. It seems to me that this is the position whether this discretion is properly described as unfettered, or general, or wide

64. The limitations imposed upon an appeal court, in reviewing the exercise of a discretion by a first instance court have been stressed in a number of cases. Included in the authorities before me is the decision of the Court of Appeal in A.E.I. Rediffusion Music Ltd v Phonographic Performance Ltd [1999] 1 WLR 1507. The case was concerned with an appeal against a costs order of the Copyright Tribunal. The case therefore involved an appeal against the exercise of a discretion. At 1523B-D Lord Woolf MR said this:

> *"It was correctly accepted by the judge that his right to interfere with the tribunal decision on costs was constrained in the same way that this court's discretion is constrained in relation to decisions of judges of first instance. The conventional approach of this court is conveniently summarised by Stuart-Smith L.J. in Roache v. News Group Newspapers Ltd. [1998] E.M.L.R. 161 , 172 in these terms:*
>
> > *"Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale. See per Griffiths L.J. in Alltrans Express Ltd. v. C.V.A. Holdings Ltd. [1984] 1 W.L.R. 394 , 403g"*

65. I have also been referred to the decision of the House of Lords in Piglowska v Piglowski [1999] 1 WLR 1360. The case involved an appeal against the decision of a District Judge on an application for ancillary relief. In his speech Lord Hoffmann referred to Lord Fraser's approval, in G v G (Minors: Custody Appeal) [1985] 1 WLR 647 (at 651F-652A), of the following statement of principle of Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343 (at 345):

> *"It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."*

66. I therefore approach this appeal by reference to the guidance given in these authorities. I add only, for the sake of completeness, that this is not a case where the Chief Master had the advantage of me, in terms of hearing the oral evidence of witnesses. The hearing below was not a trial and, as the Chief Master had well in mind (Paragraph 15), the evidence in the witness statements was not tested by cross examination, leaving significant disputes of fact which could not be resolved at this stage. This is not a case similar to McNulty v McNulty [2002] WTLR 737, where the substantive claim under the 1975 Act was heard together with the application for permission to make the claim out of time, so that the Judge had the advantage of having heard the oral evidence before making his decision on whether to grant permission under Section 4.

The nature of the time limit in Section 4

67. One other exercise which I find it useful to carry out, before coming to the specific grounds of appeal, is briefly to consider the nature of the time limit in Section 4.

68. The nature of the time limit was explained by Briggs J., as he then was, in Nesheim v Kosa [2006] EWHC 2710 (Ch), at [26]. This paragraph was cited with approval in the judgment of Floyd LJ in Begum, at [13], which I have cited above. I repeat what Briggs J. said at [26] for ease of reference.

> *"Before leaving the relevant legal principles, it is in my judgment also relevant that the limitation period which has now expired in this case is one imposed under the Inheritance Act. It is both of a special type in the sense that it confers upon a 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 unnecessary delay in the administration of estates to be caused by the tardy bringing of proceedings under the Act and to avoid 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."*

69. Although the time limit in Section 4 is sometimes referred to as a limitation period, it is clear that it is not the equivalent of a limitation period under the Limitation Act 1980. This was explained by Asplin LJ in Cowan, at [44], in the following terms:

> *"44. First, it seems to me that the concept of a "stale claim" is of little relevance in the 1975 Act context. It is borrowed from and is more apposite to the consideration of matters under the Limitation Act 1980 . Section 4 contains no long stop provision. Furthermore, the*

> *assessment, for the purposes of the substantive claim, is made at the date of the hearing and, therefore, concerns about the loss of evidence and witnesses over time are of much less importance than they might be. As Briggs J (as he then was) pointed out in Nesheim v Kosa , section 4 exists for the purpose of avoiding unnecessary delay in the administration of estates which would be caused by the tardy bringing of proceedings and to avoid the complications which might arise if distributions from the estate are made before the proceedings are brought. This dovetails with section 20 of the 1975 Act. It provides express protection for the executors/personal representatives of an estate from any liability which might otherwise arise as a result of having made a distribution from the estate more than six months after the grant of probate/letters of administration, on the ground that they ought to have taken into account that the Court might permit a claim to be made after the end of that period. Section 4 is not designed, therefore, to protect the court from stale claims as the Judge explains. On the contrary, if the circumstances warrant it, the power in section 4 can be exercised in order to further the overriding objective of bringing such claims before the court where it is just to do so, and, in such circumstances, the personal representatives have the protection afforded by section 20 . The power must be considered in the context in which it arises."*

70. Returning to Begum, Floyd LJ cited with approval the paragraph from the judgment of Briggs J. in Nesheim which I have just set out. At [14] Floyd LJ went on to say this:

> *"14. It follows that the discretion should not normally be exercised in a way which undermines the purpose of the time limit. It will always be material to ask whether the bringing of the claim out of time will cause delay in the proper administration of the estate, or have the potential to interfere with distributions which have already been made."*

71. It is also clear that the time limit in Section 4 is not analogous to time limits under the CPR, with the result that neither the overriding objective in the CPR nor the Denton jurisprudence are relevant to applications under Section 4. Prior to handing down the Judgment, the attention of the Chief Master was drawn to the first instance decision in Cowan. The Chief Master did not consider it right to have regard to the overriding objective or the Denton jurisprudence in his decision on Section 4; see Paragraph 64. The correctness of his decision on this question was confirmed by the Court of Appeal in Cowan, where Asplin LJ explained the position in the following terms, at [45] and [46]:

> *"45. Secondly, it follows that I do not agree with the Judge that what he describes as "a robust application of the extension power" is necessary. There is nothing in section 4 or in the principles distilled in Berger v Berger which requires such an approach to be adopted.*

> *Furthermore, it seems to me that the paragraphs of the overriding objective to which the Judge referred are not relevant to the exercise of section 4 . They were CPR 1.1(2)(d), (e) and (f) which are concerned with dealing with the case expeditiously, allotting the case an appropriate share of the court's resources and enforcing compliance with rules, respectively. They are all concerned with managing a claim proportionately and fairly once it has been commenced, whereas 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.*
>
> 46. *Thirdly, it seems to me that the Judge's references to the "ever-developing sanctions jurisprudence exemplified in Denton …" and the fact that "the time limit is contained within the statute rather than in a procedural rule" are for the most part inapposite. There is no disciplinary element to section 4 . Unlike the provisions of the CPR , the six-month time limit in section 4 is not to be enforced for its own sake. The time limit is expressly made subject to permission of the court to bring an application after the six months has elapsed. It is designed to bring a measure of certainty for personal representatives and beneficiaries alike. When determining whether a claim should be brought outside the six-month period, nevertheless, the court must consider all of the relevant circumstances of the case in question and the factors which were highlighted in Berger v Berger . The rationale of CPR 3.9(1) with which the " Denton jurisprudence" is concerned, on the other hand, just like the overriding objective in CPR 1.1 , is that court rules should be obeyed so that once commenced, litigation should proceed expeditiously and at proportionate cost and that court resources should not be wasted. As Chief Master Marsh neatly described it recently in Bhusate v Patel [2019] EWHC 470 (Ch) at [64], to have regard to the overriding objective or the approach to relief against sanctions in the Denton case when exercising the discretion under section 4 "involves conflating issues that, if they are related, are at best distant cousins."*

Discussion of the grounds of appeal

72. In my discussion of the grounds of appeal, I will take each of the grounds (Grounds 1-7) as I have summarised them above, and in the same order as set out above. The exception is Ground 1. It seems to me that Ground 1 is a general ground, which falls to be considered after I have considered the competing arguments in relation to Grounds 2-7. In dealing with each Ground I have, for the avoidance of doubt, considered all the written and oral arguments relevant to that Ground, although I have not found it necessary to set out or deal with all the arguments in terms.

Ground 2 - discussion

73. It seems to me that the first point to consider, in the context of Ground 2, is the question of whether Mr. Wilson is right to submit that the Respondent has in fact no arguable case under the 1975 Act, so that the Claim failed to reach the arguable case threshold required by the seventh of the Berger Guidelines. As the Chief Master pointed out (Paragraph 36), if the Respondent does not have an arguable case, there would be no point in granting permission under Section 4.

74. It is clear from the authorities that the test for an arguable case is the same as it is in relation to applications for summary judgment. The question is whether the relevant claim, which is the subject of the application for permission, has a real prospect of success.

75. I have summarised the argument of Mr. Wilson earlier in this judgment. The essential point is that the effect of the intestacy rules was to make reasonable financial provision for the Respondent on the death of the Deceased. As such, so it is argued, if the Claim had been made within time, it would have failed. The Respondent has lost this reasonable financial provision as a result of her own actions, or lack of action; namely her failure to administer the Estate, and allowing her rights on the intestacy to become statute barred. Essentially, the argument is that the Respondent has lost what she was given, and has lost what she was given through her own fault. In the Appellants' skeleton argument the Respondent's position was described as being akin to that of someone who has gambled away his entitlement, and lost. In his oral submissions, Mr. Wilson came up with a further example to illustrate his argument; of someone who allows his land to become subject to a successful claim in adverse possession.

76. It seems to me that there is an essential problem with Mr. Wilson's argument, which is this. Section 3 of the 1975 Act sets out a series of matters to which the Court is required to have regard, in considering an application for reasonable financial provision under the 1975 Act. Section 3(5) then provides as follows:

> *"(5) In considering the matters to which the court is required to have regard under this section, the court shall take into account the facts as known to the court at the date of the hearing."*

77. So, the Court must consider the matters to which it is required to have regard under Section 3 as the facts are known to the Court at the date of the hearing. The exercise is not a retrospective one, where the facts are considered at an earlier date. This in turn means that a claim which would not or might not have been viable at the time when the relevant person (the testator or the person dying intestate) died, may become viable as a result of a subsequent change of circumstances; affecting the matters to be considered under Section 3. It is clear from the authorities that this can happen.

78. In Stock v Brown [1994] 1 FLR 840 the applicant widow made her claim out of time as a result of certain events (the collapse of interest rates and the increasing costs of her care) which meant that the provision made for her by her late husband's will had become inadequate. The claim was not considered to be disqualified because, by reason of the financial conditions when the time limit for the claim was still running, the claim would never then have been launched.

79. Equally, in Re Hancock [1998] 2 FLR 346 the relevant estate included land which was subsequently sold for a supermarket development at a much greater figure than the probate valuation of the land. The land had been left by the deceased to the family firm, which was operated as a partnership by his four sons and one of his three daughters. The deceased left his residuary estate to his widow. The applicant, a daughter of the deceased who was not in the partnership, was not left anything in her father's will. The will did express the wish that the deceased's widow should, by her will, make provision for his two daughters who were not in the partnership, and for his seven grandchildren. On the death of the widow, the daughter did receive a small legacy. She made a successful application for financial provision out of the estate of her deceased father under the 1975 Act. The judge at first instance found that, at the time of the death of the deceased, it had not been unreasonable for the will to have made no financial provision for the applicant, but that it was reasonable to make such financial provision by the time of the trial, which took place some 11 years after the death of the deceased, and following the windfall to the estate of the sale of land for supermarket development.

80. The decision of the first instance judge in Re Hancock was upheld by the Court of Appeal. Butler-Sloss LJ explained the position in the following terms, at page 353:

> *"Mr Crawford submitted to us first that the court ought not to look at all at the increase of the value of the estate in 1989. Second if the court did take the windfall into account, it should give it little or no weight. Neither argument can stand in the light of the clear words of section 3(5) :—*
>
> > *"In considering the matters to which the court is required to have regard under this section, the court shall take into account the facts as known to the court at the date of the hearing."*
>
> *My view is supported by Goff LJ in re Coventry who said at page 491G:—*
>
> > *"Reliance was placed on section 3(5) as entitling us to have regard to those subsequent events, and I think the true meaning of that section must be that the court is required to have regard to facts known to it at the date of the hearing, and not merely any further knowledge that the court may have acquired about the facts as they were."*
>
> *Applying the approach of Goff LJ and rejecting the view that section 3(5) only allows 'hindsight' to be taken into account, there is no other line that can sensibly be drawn in point of time until the date of the hearing and the net estate has to be considered as at that latter date. The definition of 'net estate' which is incorporated by section 3 (1)(e) into the first issue which the court has to address, that is to say, was the provision or lack of provision such as to make reasonable financial provision for the applicant, shows by the inclusion of funeral, testamentary and administration expenses (section 25(a))that events and liabilities after the death have to be taken into account. Clearly the change in the size of the estate, up or down, is a relevant fact for the court at the date of the hearing. The length of time the case took to come to court is a matter which the court, may,*

> *where appropriate, take in to account under (g), particularly if there is any blame to attach to any of the parties. Any prejudice resulting, for instance, to a defendant to the application as a result of the delay would also be a relevant consideration."*

81. Mr. Wilson criticised the Chief Master's treatment of Stock v Brown. His point was that the Chief Master treated the case as one where the applicant did not have a claim under the 1975 Act at the time when probate was granted in respect of the will in that case. This did not reflect the relevant language of Thorpe J. in his judgment, at 842, which was in the following terms:

> *"In 1992 the dramatic fall in interest rates reduced that yield to its present figure of £4101 per annum. I have no doubt at all that the relationship between that fall and the applicant's first visit to solicitors is far from coincidental. One compelled the other.*
>
> *It is plain to me that at the time that probate was granted, and in the years that followed, the plaintiff never considered the possibility of a claim since the estate's yield more or less met her needs. Had interest rates continued as they were, I have no doubt that this application would never have been launched.*
>
> *The real trigger lies in extraneous circumstances, and its activation is either fortuitous or dependent upon national and international factors far removed from the applicant's control. Had interest rates fallen dramatically in 1988, then no doubt the application would have been issued with only a 6 month hurdle to clear. Had interest rates fallen dramatically in 1988, then no doubt the application would have been issued with only a 6 month hurdle to clear. Had interest rates remained high for 2 or 3 years longer than they did, then the period of delay would have been even more extreme."*

82. The applicant in Stock v Brown was a spouse. As such, her claim to reasonable financial provision was not limited to what was required for her maintenance. In reality, so Mr. Wilson argued, Stock v Brown was a case where the applicant would have had an arguable case, if the claim had been made within time.

83. I see the point that, in Stock v Brown, the position was not one where the applicant would necessarily have had no case if the claim had been made in time. It looks as though such a claim would have been difficult, but I can see that it may be going too far, looking at the judgment of Thorpe J., to say that the applicant did not have a claim at the time when probate was granted. What I cannot see however is how this kind of analysis is helpful to the Appellants' argument. The short point is that Section 3(5) requires matters to be considered as at the date of the hearing of the relevant claim under the 1975 Act. It seems to me therefore to follow that it is possible, under the 1975 Act, for a claim to become viable (a non-technical word I choose deliberately), as a result of a change of circumstances, which would not have been viable if the claim had been made within time.

84. This was the second point made by the Chief Master in Paragraph 53, in the following terms.

> *"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."*

85. In my view the Chief Master was correct in this analysis. I would also add that it seems to me an unreliable method of analysis to try to draw a distinction of the kind which Mr. Wilson sought to draw between the facts of Stock v Brown and the facts of the present case. In the present case I am doubtful that it is right to say that the Respondent would have had no claim if she had made a claim within time. In theory, and as a spouse of the Deceased, the Respondent might have been able to put together a case, in such a claim, that she should be entitled to an even greater share of the Estate than her entitlement on intestacy. It seems unlikely that such a claim would have been feasible; see the analysis of the entitlement of the parties to the Estate in the letter of Kannan & Co. dated 8th July 1992. My point is however that I regard it as unreliable to draw a distinction between Stock v Brown and the present case, on the basis that (i) if a claim had been made within time in Stock v Brown, it would have been arguable, but that (ii) there could have been no claim at all in the present case, if the claim had been made in time.

86. In summary, it seems to me that the argument that a claim cannot be made out of time, if there could have been no claim within time, founders on Section 3(5) of the 1975 Act. It seems to me that a change of circumstances can permit a claim to be made out of time, even if there could have been no claim if the claim had been made within time.

87. This is of course only half of the relevant argument in the present case. There is also the point that the Claim only arises as a result of the Respondent allowing her rights on the intestacy to become statute barred and as a result of the failure of the Respondent to comply with her duties as administrator.

88. I cannot see how this disqualifies the Respondent from making the Claim. The essential argument seems to me to be that the Respondent should not be allowed to take advantage of her own wrong. I can see that, at the trial of the Claim, a point like this might be relied upon by the Appellants, as a matter of conduct which the Court should take into account in its consideration of the substantive Claim. The merits of that point would be a matter for the trial Judge. I can also see how this point is one which should be weighed in the balance in the exercise of the discretion under Section 4. What I cannot see is that this point renders the Claim one which is incapable of being pursued. Essentially, this seems to me to be an argument that the Respondent should not be allowed to take advantage of her own wrong, if the relevant conduct of the Respondent is correctly characterised as a wrong. This was a point on which the Chief Master was addressed, and in respect of which he was referred to various

authorities which illustrate the operation of what may be referred to as the principle that a party cannot take advantage of his own wrong.

89. While this is not a criticism, I was not taken directly to the same or any further authorities on this point. Essentially, the submission to me was that a party in the position of the Respondent should not be entitled to make a claim under the 1975 Act. I am not able to accept this submission. The question of when a party is or is not disqualified from making a claim or advancing an argument, on the basis that it involves that party taking advantage of his own wrong, is not an easy one. There is a good deal of case law on this question, and I am aware that the application of the principle is not straightforward. I am not persuaded that the present case is one where it can be said that there is no claim because the Respondent is taking advantage of her own wrong, even if, which I return to later in this judgment, the relevant conduct of the Respondent is correctly characterised as a wrong of which the Respondent is taking advantage. In expressing this conclusion I rely on much the same reasoning as the Chief Master summarised in Paragraph 58.

90. One can also test this part of the Appellants' argument by going back to the examples given by the Appellants in their argument, of someone who gambles away his entitlement, or allows land to become the subject of a successful adverse possession claim. As Ms. Reed pointed out, both these examples assume a person who has received the relevant property and then, by his own fault, lost the property. If the present case was to be analogous the Respondent would actually have had to receive her entitlement on the intestacy. That never happened. Rather the Estate remained in a state of limbo for close on 30 years.

91. I therefore conclude that the present case is not one where the Chief Master should have found as a matter of law, on the basis of the reasons advanced by the Appellants on this appeal, that the Claim did not satisfy the arguable case threshold.

92. With this argument cleared away, the next question is whether the Chief Master should have found that the merits of the Claim were very strong, as opposed to confining himself to a finding that the Claim was arguable. It is clear from both Cowan and Begum that, in an appropriate case, the Court is entitled to go beyond a finding that the relevant claim is arguable. As Floyd LJ succinctly stated in Begum, at [24]:

> *"In my judgment, where the court is able to form a clear view of the merits, based on undisputed facts, it is right to reflect that view in deciding whether to extend time."*

93. Nor do I think that there is anything to the contrary in Sargeant v Sargeant, where the Judge declined to go further into the merits of the relevant claim beyond a decision on whether the claim was arguable. It is clear from what the Judge said in Sargeant, at [34], that the case was not one where the Judge thought it right, in the circumstances of that case, to go further into the merits of the claim. The Judge was not laying down a rule that a Court should never do so. It seems to me that it all depends upon the circumstances of the relevant case.

94. In the present case, at Paragraph 54, the Chief Master listed a series of matters which were put before him, by the Respondent's Counsel, in support of the argument that the Respondent had an arguable case. They included certain facts which do not appear to be in dispute and are very striking. The vast bulk of the Estate comprises the Property. The Property has been the Respondent's home for 39 years. There is no evidence that the Respondent has any substantial assets. The September 2018 Judgment establishes that the Respondent has no proprietary interest in the Property and, if the Claim cannot proceed, no rights in respect of the Estate. Put simply, if the Claim cannot proceed, the Respondent will be left homeless and, so far as I can see, somewhere close to destitute. Mr. Wilson argued that the local authority would rehouse the Respondent if she was left homeless. I give little weight to this argument. I was not given any explanation of how the local authority would approach the matter, either in terms of the relevant legislation or the relevant policy or policies. Still less was there any evidence that any such rehousing would provide the Respondent with accommodation comparable to her existing home. It seems to me that the Respondent has an obvious need for both housing and income. The Estate has not been distributed. There are no competing applicants. There appear to be no competing needs. The Respondent is a 68 year old woman, with limited education and limited English language skills.

95. In terms of the Respondent's English language skills, I should mention that Mr. Wilson submitted to me that the extent of the Respondent's English language skills would be a matter for cross examination, but I could not see in the witness statements anything which contradicted the evidence of the Respondent, in her first and second witness statements, that she speaks *"very basic and broken English"*. The most there is, so far as I can see, is a reference in paragraph 28 of Ravindra's witness statement to Ravindra and his siblings welcoming the Respondent into the Property in 1980, teaching her English, and speaking with her in the limited Marathi they knew. It is not identified how far the tuition in English went, but this evidence does not seem to me to be a contradiction of the Respondent's evidence on this point.

96. In Paragraph 51 the Chief Master described the potential outcome for the Respondent as *"catastrophic"*, in the absence of an ability to pursue the Claim, because she 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. I cannot see anything wrong with the Chief Master's analysis of the position.

97. It is clear that the Respondent has an arguable case, so that the threshold requirement in the seventh Berger Guideline is satisfied. It seems to me however that the Chief Master was quite entitled, on those of the facts of the present case which do not appear to be in dispute, to go further and characterise the merits of the Claim as very strong. I find it impossible to say that the Chief Master was wrong in this description.

98. The next argument within Ground 2 is that the Chief Master was wrong to find that the delay in bringing the Claim had been explained. As this argument seems to me to overlap with the arguments in support of Ground 3, I deal with this argument in my consideration of Ground 3.

99. The next argument is that the Chief Master was wrong to give weight to the Appellants' successful pleading of a limitation defence to the Respondent's claim on

the intestacy. The point which Mr. Wilson was at pains to make to me, both in the written and oral submissions, was that the Appellants' pleading of the limitation defence was part of a wholly proper and legitimate response to the legal proceedings which the Respondent chose to commence against the Appellants.

100. It seems to me that all this misses the point. In Paragraph 62(3) the Chief Master said this:

> *"(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."*

101. The Appellants were not obliged to plead the limitation defence. They chose to do so. It seems to me that the Appellants were quite entitled to take the limitation point but, as a matter of fact, the result of their taking the limitation point is that the Respondent is deprived of her rights on the intestacy. This in turn leaves the Respondent with a claim under the 1975 Act. While I am wary of speaking in absolute terms about the prospects of success for a claim under the 1975 Act if the claim had been made in time, the fact that the Respondent now has no rights on the intestacy has plainly transformed the position, in terms of the viability of a claim under the 1975 Act. It seems to me that it was a matter for the Chief Master to decide what weight to give to the pleading of the limitation defence, and its consequences. The Chief Master decided that he should give weight to these matters. I do not think that it is open to me to interfere with that decision, even if I thought it wrong, which I do not.

102. Before leaving this argument I should mention one specific point within this argument which was taken before me. It was submitted that the application for permission under Section 4 would have failed if it had been heard before the strike out application because, on that hypothesis, there would have been no ruling on the limitation defence before the application under Section 4 was heard. The essential point here is that when the action was commenced, limitation had not been pleaded, and the factual position recorded by the Chief Master at Paragraph 62(3) did not exist. As such, so it is argued, the subsequent pleading of the limitation defence should not be used as a reason to justify granting permission under Section 4.

103. I do not accept this point. It seems to me to ignore the reality of the position. Given the lapse of time in this case, it was always possible that the Respondent's claim on the intestacy would be met by a limitation defence. It was plainly essential for the position in this respect to be established before the application under Section 4 was made, so that the Court would know whether the possibility had become an actuality. I cannot however see that the Court was not entitled to take the limitation position, and its consequences for the Claim into account, whether the limitation position was a possibility or an actuality.

104. The next argument is that the Chief Master was wrong to characterise the Appellants as having obstructed the sale of the Property. In this context Mr. Wilson took me

through the surviving correspondence from 1991-1994, with a view to making good his contention that the Appellants did not obstruct a sale of the Property.

105. It seems to me that this argument falls to be considered with the following two arguments under Ground 2. The first of the two following arguments is that the Chief Master was wrong to take into account that the Appellants did not take steps to compel the administration of the Estate. The second of the two following arguments is that the Chief Master failed to place any proper weight on the fact that the Respondent was responsible for her own situation, by her failure to discharge her duties as administrator.

106. I have set out Paragraph 62(3) above. It is important not to take this sub-paragraph, or any part of Paragraph 62 in isolation. The Chief Master reached his conclusions on the reasons why he should grant permission after a lengthy and careful review of the facts and arguments in the case. In particular, at Paragraph 59, the Chief Master set out a list of the facts which he saw as having an important bearing on the application under Section 4.

107. So far as the reference to obstruction of the sale of the Property is concerned, it seems to me that the Chief Master was entitled to characterise what occurred in this manner. Reading the limited correspondence which has survived, two things are clear.

108. First, the Respondent wanted to achieve a sale of the Property. Quite sensibly, in my view, she sought the agreement of the Appellants to the sale taking place.

109. Second, that agreement was not forthcoming. There is no evidence of any of the Appellants having agreed to a sale or having offered any co-operation in respect of a sale.

110. The position appears however not simply to have been confined to a lack of agreement. In the case of at least one of the Appellants, matters went rather further than this. In this context, I refer to the letter dated 18th February 1993 from Francis and Solomons, the solicitors who were acting for Jeeja, to the Respondent's then solicitors, Kannan & Co. I set out the text of this letter in full:

> *"We duly received your letter of the 4th December last, the contents of which we noted. It was unfortunate that you were instructed, although it was well-known within the family when our client was going abroad, not to communicate with us until such time as your letter would be received by us just after our client had left the country.*
>
> *We are disturbed to note that, if we understand you correctly, your client, the widow, does not intend to give credit for the fact that she has lived in the freehold property, rent-free, and has indeed drawn an income from lettings. The intestacy rules take no account whatsoever of the circumstances such as obtain here, which are covered by general equitable principles.*
>
> *As to the third paragraph of your letter, we await to hear from you the result of your enquiries.*

> *Clearly, the interests of the beneficiaries, as well as the dictates of commonsense, suggest that this is a bad time to market the property, prices having been at their nadir, but there does appear to be the slightest sign of an upturn, and it may be that, in a couple of months' time, it will be seriously worth giving consideration to a possible sale of the property."*

111. As can be seen, the tone and content of this letter were aggressive and confrontational. On any view of the matter the letter would have given any administrator of the Estate concern as to the consequences of proceeding with a sale of the Property in the face of these objections from at least one beneficiary of the Estate.

112. In my view the Chief Master was entitled to conclude that what occurred could be characterised as obstruction of the sale of the Property. Having done so, it seems to me that it was then a matter for the Chief Master to decide what weight to give to this factor. While I do not think that I am able to interfere with this decision, I should say that I can see nothing wrong with the weight the Chief Master chose to give this factor in Paragraph 62(3).

113. Turning to the failure of the Appellants to take any action to compel the administration of the Estate, I cannot see that the Chief Master made any factual error in this respect. As a matter of fact, the Appellants did not take any action to compel the administration of the Estate. That being the factual position, it seems to me, again, that it was a matter for the Chief Master to decide what weight to give to this factor. Again, while I do not think that I am able to interfere with this decision I can see nothing wrong with the weight the Chief Master chose to give this factor in Paragraph 62(3).

114. Turning to the argument that the Chief Master failed to give proper weight to the fact, as alleged, that the Respondent was responsible for her own situation, the Chief Master's analysis of the position was rather different. I refer to Paragraph 62(2). The Chief Master had well in mind his own previous finding that the Respondent had breached her duty as administrator. He considered however that her culpability was negligible, given his examination of the facts of the case. He considered that the Respondent had the Claim as a result of the Appellants' actions.

115. I do not think that the Chief Master was wrong in reaching these conclusions on the undisputed evidence which was before him. It seems to me that they were conclusions which were open to the Chief Master on that evidence. It also seems to me that the Chief Master was correct in those conclusions. Having reached those conclusions, it seems to me that it was a matter for the Chief Master to decide how those conclusions should weigh in the balance, in the exercise of his discretion. The Chief Master attached importance to these conclusions. I think that he was entitled to do so, and I think that he was right to do so.

116. I think that there is a further point to be added in this context. In their arguments in support of Ground 2 the Appellants separate out different parts of the conclusions of the Chief Master in Paragraph 62. I do not criticise this approach. It is helpful in allowing the Court to understand the arguments of the Appellants. It does however seem to me to carry with it the risk of losing sight of the essential reasoning of the Chief Master, which is not contained within self-contained categories. I make this

point because a striking feature of the present case is that, save for Arvind's attempts in 2004 and 2016 to secure an agreement on the Property, no one appears to have done anything in relation to the Estate between 1994 and 2017. The administration of the Estate was left in limbo. As the Chief Master found, the Respondent lacked the skills to deal with the situation, and the Appellants appear to have been content to leave matters unresolved. The facts of the present case were highly unusual. In a different case, involving a different administrator, the failure of the administrator to act might well have been viewed by the Chief Master in the manner contended for by the Appellants. In such a different case the Chief Master might well have taken a different view of the Appellants' inaction. On the facts of the present case however, the Chief Master thought that very little culpability attached to the Respondent, and that the conduct of the Appellants could be characterised as set out in Paragraph 62(3). Looking at matters in the round, I cannot see that the Chief Master went wrong in his judgment of the facts of the case.

117. In terms of Ground 2 this leaves the argument that the Chief Master applied a flawed analysis to the evidence, by having regard to facts as they stood at the date of the hearing, and then giving weight to facts relied on by the Respondent which prevailed at an earlier time, but which had no application at the date of the hearing.

118. This argument seems to me to be misconceived. I do not think that the Chief Master analysed the evidence in a flawed fashion. For the purposes of considering the merits of the Claim, the Chief Master was required, by reason of the effect of Section 3(5) of the 1975 Act, to concentrate on matters as they stood on the date of the hearing before him. By contrast, and for the purposes of considering the first six Berger Guidelines, the Chief Master necessarily had to consider all the history of the case.

119. One can test this by looking at the two examples given by the Appellants, in their skeleton argument, of the Chief Master giving weight to facts which had no application at the date of the hearing before him. The two examples are as follows.

    (1) The fact that the Respondent was considerably younger than the Deceased, when the Deceased died. The point is made that this was the position when the Deceased died, but is not the position now.

    (2) The fact that the Respondent had been left with the burden of a young child. The point is made that Arvind is now aged 39, with a PhD.

120. These historical facts were highly relevant to the Chief Master's consideration of the position of the Respondent following the death of her husband. The Chief Master's assessment of the position of the Respondent during that period was, in turn, central, amongst other matters, to the Chief Master's view that the Respondent was effectively powerless to do anything without the agreement or engagement of her stepchildren. That in turn was central to the Chief Master's view that the Respondent's level of culpability was negligible. The reality is that the Chief Master's analysis would have been badly flawed if he had not given careful consideration to the facts as they stood in the aftermath of the Deceased's death. It would have been absurd to ignore the fact that Arvind was then a young child, simply because he is no longer a young child. It would have been equally absurd to ignore the disparity in age between the Deceased and the Respondent, during their marriage and in the aftermath of the death of the

Deceased, simply because the Respondent is now close to the age of the Deceased when he died.

121. In conclusion, and leaving to one side the argument based on delay which I have reserved to my consideration of Ground 3, I am not persuaded that the Chief Master went wrong in the exercise of his discretion on the basis of any of the arguments advanced by the Appellants within Ground 2.

Ground 3 - discussion

122. Ground 3 concentrates on Paragraph 45, and the finding of the Chief Master that the period of delay between the letter of claim and the commencement of the action was not material. The letter of claim was sent on 11th July 2017 and the action was commenced on 29th November 2017. The Chief Master therefore decided that the third Berger Guideline led to a neutral outcome. The essential argument in Ground 3 is that the Respondent had to show that she acted promptly after the expiry of the time limit for making a claim. That time limit expired on 12th February 1992. The Chief Master made a clear error of law, so it is contended, in effectively ignoring the lengthy period of delay which occurred prior to the letter of claim, and in focussing only on the period following the letter of claim.

123. This argument proceeds on the assumption that the Chief Master did ignore the period of delay prior to the letter of claim. While it is true that the Chief Master did not deal with this period of delay in Paragraph 45, it is not correct that the Chief Master failed to address this period of delay elsewhere in the Judgment. The Chief Master dealt with the history of the case in great detail in the Judgment, starting from Paragraph 8 and including a thorough review of the witness statements. The Judge returned to the question of delay, in Paragraph 59, in his summary of those facts having an important bearing on the application, and in Paragraphs 60 and 61, where the Chief Master addressed directly the reasons for the Respondent's inaction and also addressed the inaction of the Appellants. On the basis of all this analysis, the Chief Master concluded that the delay in bringing the Claim had been explained; see Paragraph 62(2).

124. The Chief Master did therefore address the period of delay prior to the letter of claim in the Judgment and, on the basis of his analysis, reached his conclusion that the period of delay had been explained.

125. The other argument within Ground 3 is that there was no trigger event, of the kind referred to by Black LJ in Berger v Berger, which entitled the Chief Master effectively to ignore the long period of delay prior to the letter of claim. As I do not think that the Chief Master did ignore this period of delay, it seems to me that this argument, as it is formulated, falls away. I think however that the question of whether a trigger event was required in the present case does still arise, in the context of what seems to me to be the real argument in this part of the appeal. The real argument in this part of the appeal seems to me to be the argument which I reserved for consideration out of Ground 2, and to which I now turn. That argument is that the Chief Master was simply wrong, in his conclusion, in Paragraph 62(2), that the period of delay had been adequately explained. It is contended that no plausible reason was

advanced by the Respondent for the delay, and that there was therefore no proper basis for a finding that the delay had been explained.

126. Before considering this argument directly, it is important to have in mind the guidance given in Cowan and Begum on the question of delay. In Cowan, at [68], Asplin LJ provided the following guidance:

> *"68. In this regard, it seems to me that I must take care not to fall into the trap of seeking a "good reason" for each and every lapse of time. As I have already mentioned, section 4 does not have a disciplinary element and having given proper weight to all of the relevant circumstances, the power to extend time may be exercised even if there is no good reason for delay. Having said that, as I have already mentioned, the onus is on the applicant to show sufficient grounds for the grant of permission to apply out of time and, as Black LJ mentioned in Berger v Berger at [61] where a case is long out of time the court is bound to search for explanation for the delay and to consider that as part of the circumstances of the case. The same approach was adopted in Sargeant v Sargeant . However, it is also relevant that in those cases the application was seriously out of time: six and a half years in Berger and ten years in the case of Sargeant ."*

127. It will be noted that the power to extend time may be exercised even if there is no good reason for the relevant delay. As against that, where the delay is a lengthy one, the Court is bound to search for an explanation for the delay, and to consider that as part of the circumstances of the case. It is also, I think, relevant to note that Asplin LJ regarded the applications in Berger and Sargeant as being seriously out of time when they were made, respectively, six and a half years and ten years out of time. The delay in the present case, which appears to be unprecedented, is 25 years and 9 months. This would suggest, applying the reasoning of Asplin LJ, that there was an acute need for the Court to search for an explanation in the present case. It would also suggest that the absence of such explanation (if such is the position) would be a powerful factor, against the granting of permission, in the exercise of the discretion in the present case.

128. In Begum, at [19] and [20], Floyd LJ identified the importance of considering the question of prejudice in applications under Section 4, as follows:

> *"19. In re B Jonathan Parker J observed, although this did not form part of the reasoning for the decision, that:*
>
> > *"The crucial factor in deciding whether to grant leave to apply out of time … is the balance of prejudice (that is to say prejudice other than that which is inherent in the granting or withholding of leave)."*
>
> *20. I would stop short of holding that any particular factor is the crucial one in all cases. It is plainly relevant, however, to consider any clear prejudice to the party seeking the extension if leave is withheld, and the prejudice to the other party if leave is granted. Prejudicial delay,*

> *such as delay during which the estate has been distributed, should normally be accorded more weight than delay which has caused no prejudice."*

129. Floyd LJ also identified, at [39], the importance of analysing the effect of delay in any particular case.

> *"39. Given that the purpose of the time limit is to "avoid unnecessary delay in the administration of estates … caused by the tardy bringing of proceedings under the Act and to avoid difficulties which might be occasioned if distributions of an estate are made before proceedings are brought" it was highly relevant to consider whether the delay in commencing proceedings in the present case had resulted in any delay in the administration of the estate, and whether the estate had in fact been distributed. It is true that there was a lengthy delay in issuing proceedings under the Act, and the absence of a good explanation for all of the delay was something which the District Judge was bound to take into account. In my judgment, however, she fell into error in failing to analyse the effect of that delay. Given that the validity of the 2014 will was under challenge in any event, it is difficult to ascribe any prejudice to the fact that the claim under the Act was not started sooner. The two claims were alternative ways of attempting to secure that the appellant remained in possession of Lombard Avenue in the face of the possession action. Whilst I would agree that beneficiaries are entitled to know where they stand, no certainty could be achieved whilst the challenge to the validity of the 2014 will was outstanding. Mr Mitchell submitted that if the claim under the Act had been started sooner the respondent would or might have taken different decisions with respect to the litigation, but there is no evidence to that effect and the District Judge made no such finding."*

130. As I have said, the Chief Master did consider the question of delay prior to the letter of claim. He did so at some length, and came to the conclusion that the delay in bringing the Claim had been explained. The Chief Master identified the key facts in Paragraphs 59-62. It seems to me that those facts provided the Chief Master with ample grounds to find that the delay had been explained. At the risk of repeating myself the facts of the present case are very striking. The Respondent was, and remains, a person with limited education and limited English language skills. I cannot see that the Chief Master was wrong in his description of her as *"effectively powerless"* following her husband's death. In the absence of the co-operation of the Appellants the Respondent was unable to achieve a sale of the Property following her husband's death. Thereafter the administration of the Estate was left in limbo. There was no distribution. Instead, as the Chief Master pointed out in Paragraph 61, the Appellants stood by and permitted the Respondent and Arvind to remain in occupation of the Property, knowing that the Respondent had her right to the statutory legacy and the capitalised life interest.

131. If one analyses the effect of the delay in the present case, two points are particularly worthy of note. First, there is no evidence of any particular prejudice to the Appellants caused by the delay, beyond the prejudice of not having received what they are entitled to out of the Estate, and the fact that the Respondent has retained the benefit of living in the Property since the death of the Deceased; see Paragraphs 49-50. If the information as to the value of the Property which I have is correct, it would seem that the Estate has benefited from the substantial rises in property prices since the death of the Deceased. Second, there has been no distribution of the Estate. As Briggs J. explained in Nesheim, at [26], the time limit for claims under the 1975 Act;

> *"exists for a particular purpose, namely to avoid unnecessary delay in the administration of estates to be caused by the tardy bringing of proceedings under the Act and to avoid 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."*

132. The period of delay in the present case, long though it has been, has created no difficulties of the kind referred to by Briggs J. It follows that the grant of permission by the Chief Master did not offend the purpose for which the time limit in Section 4 exists.

133. There is still the Appellants' argument that there was not, in the present case, any trigger event which justified the Respondent in deciding to take action after such a long period of delay.

134. In this context it is important to keep in mind the role which a trigger event may play in applications of this kind. This was explained by Asplin LJ in Cowan, at [71]:

> *"71. It seems to me, therefore, that if and to the extent that he did so, it was wrong of the Judge to find that Mrs Cowan had received sufficient advice about the time limit and the 1975 Act itself in March 2017. The evidence is contrary to such a conclusion. There is no suggestion in the email correspondence between Ms Helen Cheng and Ms Dora Clarke in March 2018 that full advice was given, but also, as Miss Reed pointed out, Withers' invoice for the advice which was given was for only £232. It is unlikely on that basis that full advice was given. Furthermore, the email from Mrs Cowan's son to Ms Dora Clarke dated 14 November 2017 makes clear that he, his brother and his mother felt out of their depth. This is not a case like Escritt v Escritt (1982) 3 FLR 280 , therefore, in which advice was received about a 1975 Act claim, the widow with full understanding of her position under the 1975 Act made a conscious decision not to make a claim against the estate and four years later changed her mind. In this case, Mrs Cowan came to understand the nature of her position over a relatively short period after payments from the Will Trusts had commenced in April 2017. Furthermore, a claim was intimated within days of Ms Dora Clarke's visit to California, during which she provided the first substantive advice about a claim under the 1975*

> *Act, and within six months of payments having commenced. It seems to me, therefore, that this is not a case in which there was a change of heart, a considerable time having elapsed after a decision having been made not to challenge the Will Trusts. It is not necessary in this case therefore, to search for an external trigger for such a change of heart. It is only necessary to take account of the explanation for the lapse of time. If it were necessary, however, it seems to me that the querying of the invoices after Mrs Cowan's knee surgery, which occurred in November 2017, can be characterised as such a trigger."*

135. In Berger v Berger Black LJ referred to the role of a trigger event in the following terms, at [77]:

> *"77. Taking all the factors in the case together, I would not permit the appellant to make her claim. I give full weight to the potential merits of the claim and to the fact that the estate has not yet been fully distributed and that it is likely that sufficient capital could be found to fund whatever award the appellant might reasonably expect without disturbing any gifts that have already taken effect. I also remind myself that the evidence does not establish that the appellant was advised about the possibility of a claim under the Act when she consulted solicitors in 2006/7. Against these factors must be set not just the fact of the very substantial delay in bringing proceedings but the history during the period since the deceased died. This is not a claim which has been provoked by a particular event, be it something for which the respondents were responsible (as in the late discovery in McNulty of the true value of the land which the defendants had concealed) or something extraneous (such as the dramatic fall in interest rates in Stock v Brown). It appears much more likely that the appellant, who had hitherto understandably not wished to litigate with her family, eventually decided that proceedings were appropriate. We are in no position to test the proposition that she was fully involved in the strategy for and management of the estate over the years but what is clear is that she was actively interested in 2005/2006 when she consulted her own accountants and solicitors and showed herself able to pursue her interests should she have wished to do so. 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."*

136. As I read what was said in Cowan and Berger, the existence of a trigger event is not a pre-condition to the grant of permission in a case involving a long delay. Rather, the

question of whether a trigger event has occurred is a relevant consideration in a case where, following a period of delay, the applicant has simply changed his or her mind and decided to make a claim, following a previous decision not to litigate. In Cowan the case was not one involving a change of heart, a considerable time having elapsed after a decision had been made not to challenge the will. It was not therefore necessary to search for an external trigger for such a change of heart. In Berger, for the reasons identified at [77], the applicant did have a change of heart. The applicant stood by and allowed the estate to be managed without challenge. Later she changed her mind and decided that proceedings were appropriate. There was no external trigger for this decision. There was simply a change of heart. The absence of such an external trigger, on the facts of that case, was an important factor in the refusal of permission.

137. The present case is very different, for the reasons given by the Chief Master. I refer again, in particular, to the findings of the Chief Master at Paragraphs 59-61. The present case is not one where the Respondent, with knowledge and understanding of her rights under the 1975 Act, decided not to take action and then, many years later, had a change of heart. For the reasons identified by the Chief Master the Respondent was effectively powerless to act following the death of her husband. The Appellants, on their side, did nothing to secure a resolution of the situation, and so the situation continued for many years. These facts bear no resemblance to the facts in Berger.

138. I therefore reject the argument that the Respondent was required to show a trigger event in the present case, or that the Chief Master was required to take into account the absence of a trigger event.

139. Drawing together all of the above discussion, I conclude that the Chief Master was entitled to reach his conclusion that the delay in bringing the Claim had been explained. In my view there were perfectly proper grounds upon which the Chief Master could base that conclusion, and I should add that I agree with the Chief Master's conclusion.

140. In overall conclusion, I am not persuaded that the Chief Master went wrong in the exercise of his discretion, either on the basis of any of the arguments advanced by the Appellants within Ground 3, or on the basis of the argument which I reserved for consideration out of Ground 2.

Ground 4 - discussion

141. The principal argument within Ground 4 is that the Chief Master was wrong in treating the fact that the Estate had not been administered as a factor positively assisting the Respondent.

142. I should point out that the Chief Master took a measured view of this point in his consideration of the fifth of Berger Guidelines; see Paragraphs 47-50. The Chief Master did identify the non-distribution of the Estate as a factor capable of weighing in the balance in favour of the Respondent. The Chief Master did however acknowledge that the failure to distribute had caused some prejudice to the Appellants. I am not therefore convinced that the non-distribution of the Estate was quite the positive factor in the Chief Master's thinking which it is represented to be in Ground 4.

143. In any event, I simply disagree with the submission that the Chief Master was not entitled to treat the non-distribution of the Estate as a positive factor in favour of the Respondent. In my view the Chief Master was quite entitled to treat this as a positive factor, to the extent that he did so, and to the extent that the Chief Master did so, I think that the Chief Master was right to do so. The question of whether the relevant estate has been distributed must always be an important consideration in an application under Section 4. That is why it is the specific subject of one of the Berger Guidelines. As Briggs J. has explained in Nesheim, the time limit for claims under the 1975 Act exists for a particular purpose; namely to avoid unnecessary delay in the administration of estates being caused by the tardy bringing of proceedings under the Act, and to avoid 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. Given this particular purpose, one would normally expect the fact that an estate has not been administered or distributed to be a positive factor in favour of the applicant on an application under Section 4.

144. The particular point which the Appellants rely upon in this context is that the non-administration and non-distribution of the Estate were the result of the Respondent's own breach of duty as administrator, as found by the Chief Master in the September 2018 Judgment. As such, so it is contended, the Respondent cannot rely on the lack of distribution of the Estate because this involves relying upon her own breach of duty.

145. I have already essentially dealt with this argument earlier in this judgment. So far as this is an argument that the Respondent cannot rely on the lack of distribution of the Estate, because it involves taking advantage of her own wrong, I repeat my reasoning in response to the argument that the Respondent cannot make the Claim because to do so involves taking advantage of her own wrong. I am not persuaded, on the facts of this case, that the general principle (if that is what it is) that a party cannot take advantage of his own wrong can be relied upon to preclude the Respondent from placing reliance on the lack of distribution of the Estate.

146. So far as this is an argument that the Chief Master should have attached greater weight to the Respondent's breach of duty, this was a matter for the Chief Master to decide. The Chief Master had the Respondent's breach of duty very well in mind in the Judgment, but considered that the degree of culpability was *"very low in reality given the imbalance between the claimant and her stepchildren in relation to education, cultural upbringing, money and so on."* (Paragraph 49). I do not think that it would be open to me to interfere with the decisions of the Chief Master in this respect, even if I disagreed with them, which I do not.

147. The Chief Master did also address himself specifically to the Appellants' various arguments based on the general principle (if that is what it is) that a party cannot take advantage of his own wrong. The Chief Master rejected those arguments; see Paragraphs 57 and 58. In my view he was right to do so, and was right for the reasons which he gave.

148. I also add, because this is a point which I said I would come back to, that this part of the Appellants' case proceeds on the footing that the Respondent committed a

relevant wrong by her failure, in breach of duty, to administer the Estate. The Chief Master took the view that her degree of culpability was very low in reality. Given this conclusion, which was a conclusion which the Chief Master was in my view entitled to reach and with which I agree, it is difficult to see how any argument which relies upon the proposition that the Respondent is taking advantage of her own wrong can get off the ground.

149. In conclusion, I am not persuaded that the Chief Master went wrong in the exercise of his discretion on the basis of any of the arguments advanced by the Appellants within Ground 4.

Ground 5 - discussion

150. Ground 5 concerns the sixth of the Berger Guidelines. In considering this Guideline it is contended that the Chief Master wrongly failed to place weight on the fact that the Respondent's situation was attributable to her failure to enforce her rights on the intestacy of the Deceased and to her breach of duty in failing to administer the Estate. It is also contended that the Chief Master wrongly attributed culpability for the Respondent's position to the Appellants on the basis of their assertion of a limitation defence and/or in not compelling the Respondent to discharge her duty to administer the Estate.

151. I have already dealt with these various arguments in my consideration of the previous Grounds. For the reasons which I have already given I do not think that the Chief Master did go wrong in his consideration of the sixth Berger Guideline. The Chief Master considered the question of whether the Respondent would be able to have recourse to any other remedies if the Claim was dismissed. The Chief Master identified the Claim as the only claim available to the Respondent, and described the potential outcome for the Respondent as *"catastrophic"*, if the Claim should be dismissed. As I have already said, I agree with this analysis of the Respondent's position. Nor, for the reasons which I have already given, do I think that the Chief Master's analysis was flawed in the manner contended by the Appellants.

152. I should at this point deal with a general theme in Mr. Wilson's submissions, which is relevant both in this particular context and generally in the context of how the Chief Master should have treated the Respondent's breach of duty, the inaction of the Appellants in terms of compelling the administration of the Estate, and the decision of the Appellants to plead the limitation defence in response to the Respondent's claim to her rights on the intestacy.

153. In his oral submissions Mr. Wilson was at pains to defend the Appellants against what were perceived to have been the Chief Master's criticisms of their conduct. The points were emphasized to me that the Appellants were under no duty to compel the administration of the Estate. The administration of the Estate was the responsibility of the Respondent, which she failed to discharge. Equally the Appellants had no option but to defend themselves against the proceedings which were launched against them by the Respondent and, in particular, were quite entitled to take the limitation point. Mr. Wilson's key point was that the Chief Master had been wrong to find the Appellants in any way responsible for the delay, or the Respondent's current position.

154. In my view there is a danger of missing the essential point in all of this. It does not seem to me to matter that much what view one takes of the conduct of the Appellants. The facts of the present case, as I have already said, are very unusual. In the present context particularly relevant facts are that (i) the Appellants did not take any action to compel the administration of the Estate, (ii) the administration of the Estate was left in limbo for very many years, and (iii) when the Respondent took action to enforce her rights on the intestacy, she was met with a successful defence of limitation. The result is the current situation. It seems to me that the reasoning of the Chief Master in these respects can stand perfectly well without the necessity to attach blame to the Appellants, and without the necessity for any adverse moral judgment against the Appellants. I do not read the Judgment as doing these things, but if and in so far as it does, I do not see that this vitiates the reasoning of the Chief Master.

155. In conclusion, I am not persuaded that the Chief Master went wrong in the exercise of his discretion on the basis of any of the arguments advanced by the Appellants within Ground 5.

Ground 6 - discussion

156. Ground 6 is concerned with the Appellants' argument that the Respondent did not even have an arguable case. For the reasons which I have already given in this judgment I reject this argument. Accordingly Ground 6 fails.

Ground 7 - discussion

157. Ground 7 returns to the argument that the Chief Master appears to have attributed culpability to the Appellants for failing to take action to compel the Respondent to administer the Estate, without considering that the Respondent's inaction in relation to the administration (which the Chief Master found to be a breach of duty sufficient to warrant her removal as administrator) was a factor which weighed against her being allowed to bring the Claim out of time. It is argued that this approach was inconsistent and unfair. It was the Respondent who was under a positive duty to act, not the Appellants.

158. I have already dealt with these arguments in my consideration of the previous Grounds. For the reasons which I have already given, I do not consider that the Chief Master was either inconsistent or unfair in his approach. In my view it was for the Chief Master to decide how to deal with the question of culpability, and what weight to attach to the inaction, respectively, of the Respondent and the Appellants. I do not consider that I would be entitled to interfere with the approach adopted by the Chief Master, as set out in the Judgment, even if I disagreed with that approach, which I do not.

159. I also repeat the point that the reasoning of the Chief Master can perfectly well stand without any finding, against the Appellants, of what the Appellants refer to as culpability. I am doubtful that it is right to read the Judgment as containing a finding of *"culpability"* against the Appellants, but if I am wrong in saying this, I do not see that this vitiates the reasoning of the Chief Master.

160. Accordingly Ground 7 also fails, for the reasons which I have already given in this judgment.

Ground 1 - discussion

161. This brings me finally to the general ground of appeal in Ground 1, where the complaint is made that the Chief Master took into account a host of irrelevant matters, and failed to consider a number of relevant matters. It is said that these errors, taken together, amounted to a failure on the part of the Chief Master to exercise his discretion judicially and in accordance with what is right and proper.

162. For the reasons which I have given in this judgment, I do not think that the Chief Master took into account irrelevant matters, or failed to take into account relevant matters, or failed to exercise his discretion judicially, or failed to exercise his discretion in accordance with what is right and proper. To the contrary, the Chief Master directed himself by reference to the Berger Guidelines, and carried out an analysis which, in my view, was thorough and legitimate, and did not involve any errors of law. As it happens I agree with the analysis of the Chief Master and the conclusions which he reached. Even if I did not agree however, I do not see the present case as one where I would be entitled to interfere with the Chief Master's exercise of his discretion.

163. Accordingly, and as follows from my rejection of the other grounds of appeal, Ground 1 fails.

Conclusion

164. Taking into account all of the materials before me on this appeal, and taking into account all of the competing arguments, both written and oral, I can see no grounds for setting aside the decision of the Chief Master to grant permission for the Claim to be made out of time. The period of delay in the present case is a very exceptional one. In a different case one might not expect such a period of delay to be excused. In all the circumstances of the present case however I can see no reason for interfering with the Chief Master's decision.

165. Accordingly the appeal fails, and falls to be dismissed.

166. If and in so far as the same cannot be agreed and embodied into an agreed order for my approval, I will hear Counsel on the terms of the order to be made consequential upon this judgment.