[2017] JMSC Civ 132

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE CIVIL DIVISION

CLAIM NO. 2016 HCV 02218

IN THE MATTER OF the Estate of NEVILLE NICHOLAS

AND

IN THE MATTER OF an application by the wife of the deceased pursuant to the Inheritance (Provision for Family and Dependents) Act

AND

IN THE MATTER of the Property (Rights of Spouses) Act

AND

IN THE MATTER of Nick's Haulage Contractor's Limited

BETWEEN	**LYSTRA NICHOLAS**	**CLAIMANT**
AND	**EVERALD NICHOLAS (Executor in the estate of Neville Nicholas)**	**1st DEFENDANT**
AND	**NICK'S HAULAGE CONTRACTOR'S LTD**	**2nd DEFENDANT**

IN CHAMBERS

Mrs. Carol Davis and Mr. S Hanson instructed by Seyon T. Hanson & Co. for the Claimant.

Ms. Vivienne Washington for the 1st Defendant.

Dr. M. Anderson for the 2nd Defendant.

Heard: April 7, 2017 and September 25, 2017

CIVIL PROCEDURE - APPLICATION FOR COURT ORDERS - APPLICATION FOR EXTENSION OF TIME PURSUANT TO SECTION 4, 5 AND 6 OF THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDENTS) ACT

Thompson-James, J

[1] This is an application by the Claimant for the court to extend time to make an application under the **Inheritance (Provision for Family and Dependants) Act** (hereinafter referred to as the '**Inheritance Act**').

[2] May 30, 2016, the Claimant, who at the time was 70 years old, initiated a claim by way of Fixed Date Claim Form against the Defendants, seeking several reliefs in relation to the estate of her deceased husband, Neville Nicholas. He died testate May 24, 2009. The Claimant contends, among others, that the deceased failed to make provision for her in his Will and she is in need of maintenance. The Claimant and the deceased were married February 12, 1972.

[3] The 1st Defendant is the executor of the deceased's estate. The 2nd Defendant is a company duly incorporated under the Laws of Jamaica October 19, 1978. The deceased was majority shareholder (85%) and director. The Claimant is a minority shareholder in the 2nd Defendant company, holding 5% of shares. The 1st Defendant avers that he is a director of the 2nd Defendant company and Chairman of the board, having been initially appointed February 21, 2012, replacing the deceased who was the managing director of the company. In evidence is a copy of a company status letter dated June 23, 2017 from the Companies Office of Jamaica indicating same. However, the Claimant disagrees that this is so, on the basis that no resolution was passed appointing him as such.

[4] Probate was granted in the deceased's estate November 12, 2010.July 6, 2016, the Claimant filed a Notice of Application for Court Orders seeking several orders, some of which were made pursuant to the **Property Rights of Spouses Act** (hereinafter referred to as '**PROSA**'), and the **Inheritance Act**. It is apparent that the contents of the Notice are the same as the Fixed Date Claim Form.

[5] When the matter came up before this court for hearing April 7, 2017, two other applications had also been filed, one being filed jointly by both Defendants August 15, 2016, and the other filed by the 2nd Defendant only; January 31, 2017. These applications seek, inter-alia, an injunction restraining the Claimant from dealing with company property, disclosure in relation to company property and accounts, and recovery of possession of company property.

[6] It is not disputed that an application of the type that the Claimant seeks to make pursuant to the **Inheritance Act** shall ordinarily be made within six (6) months of the date on which the grant of administration in the deceased's estate is taken out. It is also undisputed that the Claimant is well past this deadline, almost 6 years having passed since the 1st Defendant took out the grant. She therefore requires the permission of the court.

[7] April 7, 2017, the court was only concerned with hearing the application in relation to the following order in the Notice:

> *xvii) An order granting leave of this Honourable Court extending the time for the making of this application by the Claimant under the Property (Rights of Spouses) Act and the Inheritance (Provision for Family and Dependants) Act.*

[8] At the hearing, the Claimant conceded that an application could not ordinarily be made under PROSA after the death of a spouse (section 3 of PROSA), hence that aspect of the application was withdrawn by the Claimant.

[9] The sole issue for the court's determination is whether time to make an application under the Inheritance Act should be extended.

[10] August 2, 2016, an interim injunction was granted against both Defendants, and extended on several occasions; from selling or entering into any agreement for sale in respect of the properties at 7 and 9 Beechwood Avenue, both belonging to the 2nd Defendant, as well as the property at 46 Aqua Avenue held jointly by the Claimant and the deceased; preventing the 1st Defendant, along with his servants/agents from withdrawing funds from the accounts of the 2nd Defendant except for the purpose of ordinary business expenses; and from disposing of any and all assets of the 2nd Defendant company. Up to the time of hearing, this interim injunction was still in force.

[11] The Claimant and the deceased did not have any children together; however, they each had three children prior to the marriage.

[12] The net estate of the deceased primarily consists of his shares in the 2nd Defendant, his half share in the matrimonial home at 46 Aqua Avenue, and property at Danvers Pen in St. Thomas. The deceased devised these assets to his three children in his Last Will and Testament dated September 20, 1999, along with the residue of his estate (both real and personal). In his Will, the deceased also purported to devise assets of the company, by directing that his children, to whom he gave all his shares in the company, should transfer certain assets to the persons specified. These assets include the property at 7 Beechwood Avenue and a truck. No provision was made in the Will for the benefit of the Claimant.

[13] The Claimant operates a business called “Capricorn Guesthouse” (initially registered under the Business Names Act November 15, 2010) along with Andre Damian Shim, at 7 Beechwood Avenue. The property is owned by the 2nd Defendant.

[14] The parties have filed a total of seven (7) affidavits prior to the hearing of the application. Whilst some of these affidavits were not filed with particular reference to the aspect Notice of Application being dealt with at this time, I find it necessary and useful to consider them in coming to a decision.

THE CLAIMANT'S SUBMISSIONS

[15] The Claimant submits that the court has the power to grant permission for an extension of time within which claims may be brought pursuant to the Inheritance (Provisions for Family and Dependents) Act and relies on sections 4, 5, and 13.

[16] It is submitted that the Claimant should be granted such permission in light of the following:

i. There is merit to the claim;

ii. There would be no prejudice to the Defendants;

iii. There is a reasonable explanation for the delay;

iv. The Claimant was unaware of the limitation period despite retaining the services of various Attorneys none of which advised her regarding same;

v. The delay on the Claimant's part was not intentional;

vi. It is in the interest of the administration of justice that the Claimant be granted leave to pursue her claim;

vii. The estate has not yet been wound up and sums collected have not been distributed, nor have the properties comprising the real estate been sold;

viii. The Claimant through her Attorneys has been in negotiations with the Attorney for the 1st Defendant and the 1st Defendant was always aware of her concerns regarding his handling of the estate and the division of same as contained in the will of the Claimant's deceased husband.

[17] It is further submitted that the Claimant has a strong case with a real prospect of success and that she has a reasonable explanation for her delay in applying pursuant to the relevant act.

[18] Her explanation for the delay is to be found in her affidavit filed July 6, 2016 in support of the Notice of Application, in which she essentially states that she was unaware of the time limit for making application, as she was not so advised by three (3) attorneys that she had consulted with prior to her current attorney, who

subsequently advised her of the time limit. The relevant paragraphs of the aforementioned affidavit read as follows:

> *"37) That I have been advised by my Attorneys-at-Law that this action should have been brought under the Property (Rights of Spouses) Act within a period of twelve months of the termination of cohabitation, and under the Inheritance Provisions for Family and Dependants) Act within a period of six months from the date representation with respect of the estate of the deceased is taken out.*
>
> *38) That I am aware that my claim has exceeded the period stipulated under both acts and I wish to state that immediately after my Husband's death I went to Mr. Gilroy English Attorney-at-Law however he was ill and his daughter who is also an Attorney had my files for some time without initiating any action or advising me of any time limits within which to do same.*
>
> *39) That I eventually proceeded to recover my files and took them to Mr. Anthony Pearson and he proceeded to enter into communication with an Attorney representing the estate of my deceased husband however the matter was not resolved and I eventually took my files to Mr. Pearnel Charles Jr. who also had some communication with the 1st Defendant's Attorney-at-Law.*
>
> *40) That Mr. Charles eventually referred me to my current Attorney with whom I did a consultation, and it was during the said consultation that my Attorney advised me that there were time limits on the applications which I am now making, and that in the event that applications are done outside of that period the leave of the court would have to be sought.*
>
> *41) That in the circumstances I believe that I have a good explanation for the failure to take action under the Property (Rights of Spouses) Act, and under the Inheritance (Provisions for Family and Dependants) Act, and I would ask that this Honourable Court grant me an extension to apply under both acts in the interest of justice so that I may pursue my claim against the Defendants."*

[19] The Claimant has submitted that she also relies on her evidence in her affidavit filed in support of the Fixed Date Claim Form filed May 30, 2016, as well as that in her affidavit in response to the Affidavit of Everald Nicholas filed August 17, 2016. She does not identify what it is she is relying on therefrom. However, the paragraphs that speak to the delay in filing the application under the Inheritance Act are for the most part the same as above.

[20] She relies on the principles espoused in the authorities of Sharon Smith v Vincent Service [2013] JMSC Civ 78, Stock v Brown and Another [1994], Deidre Ann Hart Chang v Leslie Chang (unreported), Supreme Court, Jamaica, Claim No. 2010HCV03675, judgment delivered November 22, 2011, as to the approach that the court should take.

[21] In relation to *Sharon Smith v Vincent Service*, Mrs. Davis submits that although the case did not involve the Inheritance Act and related only to PROSA, it is appropriate because it deals with the considerations applicable to extension of time. In that regard, she submitted, the principles outlined by Sykes J, including whether there was a prima facie claim, whether there would be any prejudice to the Defendants, and whether there were any attempts at negotiation, are applicable. She further submitted that, in the case at hand, the correspondence shows that there were attempts to settle.

[22] The facts that Claimant relies on in support of her application, as found in her affidavits, are as follows:

I. That she is currently in need of assistance to meet her monthly expenses that were handled by her husband while he was alive;

II. That she is over seventy years old and has lived a full life, and is past retirement age;

III. That both herself and her deceased husband formed the company Nick's Haulage Contractors Limited;

IV. She located the property at 46 Aqua Avenue and she obtained a loan from her Aunt Ms. Gloria Comry to purchase same, and the said property was purchased using the said loan, and the parties were entered on the certificate of title as Tenants in Common;

V. That she renovated the house over the years and used her personal money to tile the house and maintain it over the years;

VI. That the Claimant and her husband lived at 46 Aqua Avenue Kingston 17 for approximately 26 years before he died;

VII. That she has always acted as secretary of the 2nd Defendant company, and would normally go overseas to do housekeeping jobs to assist her husband with foreign exchange, which was then invested in the business;

VIII. *That all the properties purchased by the company were done through the joint efforts of the Claimant and her deceased husband;*

IX. *That the 1st Defendant has been selling the 2nd Defendant's assets under the pretext that he is liquidating the estate of the Claimant's deceased husband when the company is not the deceased husband's estate, and the only interest the estate has in same is in the shares owned by the Claimant's deceased husband;*

X. *The Notices to "All Persons Having Claims against the estate" was only issued in or about August 11, 2014 and August 18, 2014;*

[23] It was submitted at the hearing that the issue raised by counsel for the 2nd Defendant that there is not much money in the account should not be taken into consideration by this court, as there is a statement of account in evidence that indicates that the executor has $6 million dollars in an account, and that the Act permits the court to make orders in respect of the deceased's property.

[24] The court was further urged to consider that the Claimant was looking at the possibility of being out on the street with nowhere to go, whilst the assets would go to the deceased's children who would probably be able to look after themselves.

THE 1st DEFENDANT'S SUBMISSIONS

[25] The crux of the 1st Defendant's case is that the application should be denied on the basis that it has not properly been brought, and alternatively it lacks any prospect of success and amounts to an abuse of the process of the court.

[26] It is essentially submitted that:

i. The Applicant has no good and arguable case;

ii. No evidence has been placed before the court to explain the lack of promptitude by the Applicant in bringing her claim;

iii. The Applicant seeks equity with unclean hands as she has not declared her involvement with the assets of the 2nd Defendant to its

detriment, as well as her total and undisturbed enjoyment of the matrimonial home over the past seven (7) years.

[27] The 1st Defendant further submits that the Claimant has abused the process of the court by making her Application before seeking leave, which she ought to have done first.

[28] Further, it is submitted that the onus is on the Applicant to establish compelling reasons for judicial discretion to be exercised in her favour, and nothing substantial has been placed before the court to support her application in this respect.

[29] Counsel for the 1st Defendant, Ms. Washington, submitted that since the matrimonial home was jointly acquired and registered as tenants in common during the life of the testator that would suggest that there was an intention for adequate provision for the Claimant, the Claimant having already been given half of the property.

[30] In the same regard, Ms. Washington pointed out that the Claimant was made a director and shareholder of the deceased's company, with the deceased holding a majority of the shares.

[31] Counsel also pointed out that since the death of the testator, the Claimant has been living off earnings from a property belonging to the 2nd Defendant, and at the time of the hearing, had not ever accounted for the sums earned. This, counsel submitted, cast doubt as to whether the Claimant was entitled to come to the court seeking maintenance.

[32] Further, in relation to written correspondence between herself and Mr. Pearson (one of the Claimant's previous attorneys), Ms. Washington averred that there was nothing in those letters that suggests the negotiation of any settlement between the parties. The purpose of the letters, she submitted, were merely efforts by the executor, having been granted probate, to wind up the estate in keeping with the wishes of the testator. Given that many of the assets of the

estate and the 2nd Defendant company, as well as property titles, were in the possession and control of the Claimant, the 1st Defendant was merely seeking to recover those assets.

[33] Ms. Washington averred that several letters had been written to both the Claimant and her counsel. Of these letters, only two were before the court. One of these letters, dated March 14, 2014, made demands for the assets sequestered by the Claimant and does not indicate any negotiation. These requests, it is submitted, were made from the date the probate was granted. In that regard, Ms. Washington strenuously argued that if the Claimant wanted or had the intention to make any claim for provision, she would have had ample time. Further, the issuing of the probate was advertised in the newspapers on two separate occasions (Affidavit of Mr. Everald Nicholas, paras. 35 and 36), and copies of the grant of probate were given to the Claimant through her attorney, Mr. Pearson. The Claimant ought to have availed herself of the opportunity to make an application between the granting of the probate and 6 months later.

[34] The 1st Defendant relies on the cases of Berger v Berger [2013] EWCA Civ 1305 and Re Salmon (deceased) [1980] 3 All ER 532, and submits that Claimant has not crossed the hurdles required for the extension to be granted, in that she is well taken care of and has not shown she is in need; she has not shown that no prejudice would be caused to the beneficiaries, and that if she believes she was given bad advice or no advice, she has remedies she can pursue. It is submitted that the Claimant is an adult and she should have stated what she needed from her attorneys.

THE 2nd DEFENDANT'S SUBMISSIONS

[35] In the main, the 2nd Defendant submits that the application should be denied as the Claimant has not shown any special reason for the delay, has been reasonably provided for, has no arguable case, and the testator's children and other beneficiaries will suffer severe prejudice if the application is granted and his wishes are varied.

[36] The 2nd Defendant relies on the United Kingdom authorities of Re Dennis (deceased) [1981] 2 All ER 140 and Re Salmon (deceased) [1980] 3 All ER 532 as to the principles that should guide the court in making its decision, as the legislative provision being examined in that case contains similar wording to the Jamaican Inheritance Act.

[37] It is submitted that the case of Re Salmon, which was approved in Re Dennis, has established that the onus is on the Claimant to show special reasons why the court should take the matter out of the stipulated time limit, and that this is a heavy burden. It is submitted that the Claimant has not met this burden. The Claimant ought to prove that there are special circumstances, in that no adequate provision has been made for her; that she has no income or sufficient income, and also, what is in the estate to give her this periodic payment. She must also prove that she has a good case. It is also noted that under section 7 of the Inheritance Act, the court must take into account certain factors such as the size and nature of the estate, the financial resources of the Claimant now and that which is likely in the future

[38] In relation to the delay, it is submitted that the evidence is that the Claimant went to two senior attorneys four (4) years after the granting of the probate. Counsel submitted that whilst he could not say what advice she was given; there is no indication as to why she waited so long.

[39] In relation to the assets of the estate, it is submitted that the net estate of the deceased consists of the family home and the shares in the company. There is no cash in the estate and therefore the size of the estate is such that there is nothing from which the Claimant can get a periodic payment or lump-sum for maintenance. Counsel distinguishes the assets of the estate from the assets of the company, and makes the point that the $6 million dollars outlined in the statement of account filed by the 1st Defendant relates to those assets of the Defendant company that were sold by the 1st Defendant in his capacity as a director of the company. It is submitted that these assets belong to the company

and do not form part of the deceased's estate, and so provision cannot be made from them. Further, the 2nd Defendant has only two lines of payment, being the trucking business which is no longer in operation, and the guest house business, which it is submitted is currently under the direction and control of the Claimant, for which she has not accounted and has not been forthright in relation thereto.

[40] In relation to the Claimant's financial circumstances, it is submitted that the Claimant is not in need of any provision. She already has a half share of the family home and 5% of shares in the 2nd Defendant company, and the guest house business of the 2nd Defendant which she unlawfully operates and controls. As it relates to the house, Counsel for the 2nd Defendant submitted that it was conveyed as tenants in common and there was no common intention for joint tenancy, partly because both parties had children prior to the marriage. It is further submitted that, when the house is taken out of the equation, only the shares are left, and it is submitted, there is no basis to vary the Claimant's portion of shares from 5%, as her evidence is that her only contribution was in helping to purchase a truck, and that amounts to a contribution that is worth far less than the 5% that she has been granted.

[41] In relation to the authorities relied on by the Claimant, counsel for the 2nd Defendant submitted that the case of *Stock v Brown* relied on by the Claimant can be clearly distinguished, as in that case other sums were available, …through no fault of the deceased or the wife, and there would be no prejudice to the beneficiaries. Counsel also sought to distinguish the case of *Sharon Smith v Vincent Service* on the basis that the language in PROSA is quite flexible, which is not the case with the Inheritance Act, as section 13(2) of PROSA provides that an application may be made within the time stipulated "or such longer period…", whilst section 5 of the Inheritance Act uses the words "shall not…". It is submitted that the discretion under PROSA is greater and more flexible.

[42] The court is also urged to consider that the Claimant has not been forthright in respect of her dealings with the 2nd Defendant's property, and her affidavit evidence in regard to her dealings with the guest house at 7 Beechwood Avenue is contradictory, in that she states in her affidavit filed August 17, 2016, that at no time did the 2nd Defendant operate a business there and that its only relation to the property is that it is the registered proprietor, whilst later on admitting that her husband had operated a guesthouse at the premises prior to his death, but that it had fallen into disrepair and ceased to operate after his death.

THE CLAIMANT'S RESPONSE

[43] In relation to the issue of the assets available for distribution, Mrs. Davis responded that the proceeds of the company's assets that had been sold and held in an account by the executor are held on behalf of the estate and therefore available for distribution. As support for her argument, she referred to the document filed by the 1st Defendant regarding 'an account on behalf of the executor'.

[44] In relation to Ms. Washington's submission that the correspondence in evidence between the parties showed no reference to negotiations, she submitted that one letter in particular expressly states that they sought to come to an amicable solution to the matter.

[45] Further, in distinguishing, Mrs. Davis noted this case is not one where the Claimant didn't wish to litigate as in *Berger v Berger. N*othing has been distributed so far contrary to *Re Salmon* wherein most of the estate had already been distributed, and contrary to *Re Dennis* where the Applicant was an able bodied well to do son with the ability to take care of himself, the Claimant here is a 73 year old widow who is not working and is unable to sustain herself with what she is able to get.

LAW & ANALYSIS

THE LAW

[46] In her substantive claim, the Claimant seeks relief pursuant to **Section 6** of the **Inheritance Provisions Act** which empowers the court to make several orders contrary to the Will of a deceased and the law of intestacy, if the court is satisfied that the provisions therein insufficiently provide for the reasonable financial maintenance of the Applicant:

> *"6.- (1) Subject to the provisions of this Act, where an application is made for an order under this section, the court may, if it satisfied that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such, at the time of the hearing of the application, as to make reasonable financial provision for the maintenance of the applicant, make any one or more of the following orders…"*

[47] By **section 4(1)** and **(2)** of the Act, it is clear that the Claimant would be permitted under the Act to make an application, in that she is the wife of the deceased.

[48] However, **section 5** provides that an application under **section 6** shall not be made after six (6) months of the date on which the grant of administration in the deceased's estate is taken out, except with the permission of the court:

> *"5. An application for an order under section 6 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."*

[49] There is no dispute between the parties that the Claimant is out of time in filing her application and must obtain permission in order to proceed, having approached the court roughly 5 years and 8 months following the issuing of the grant of probate. The grant was taken out November 10, 2010, whilst the application for permission was filed July 16, 2016.

[50] Although the Act explicitly empowers the court to give permission for an extension of time to file the application, the Act does not outline the factors that

the court ought to take into consideration in doing so. However, I found several United Kingdom authorities useful in this respect.

[51] In **Re Salmon (deceased), Coard v National Westminister Bank Ltd and others** [1980] 3 All ER, Sir Robert Megarry V-C, in examining **section 4** of the UK **Inheritance (Provision for Family & Dependants) Act 1975**, a provision very similar to **section 5** of our **Inheritance Act**, and after observing that the provision gave no guidance to the court as to the principles on which the court should rely to exercise its discretion, and examining the few authorities on which he had to rely, identified six 'guidelines' that he thought useful for the court to follow, albeit he recognized that they were not exhaustive. These may be distilled as follows:

i. The court has an unfettered discretion, but one that must be exercised judicially and according to what is just and proper;

ii. The time limit is a substantive provision rather than a merely procedural one, and as such cannot be treated with the indulgence appropriate to procedural rules. The onus therefore lies on the claimant to sufficiently establish grounds for taking the case out of the general rule and depriving those who are protected by it of its benefits. This burden is no triviality and the applicant must make out a substantial case for it being just and proper for the court to exercise its statutory discretion to extend time;

iii. How promptly has the applicant sought the permission of the court after the expiry of the time limit? This question must be assessed in light of all the circumstances, particularly the reasons for the delay, as well as the promptitude with which the claimant gave notice to the defendants of the proposed application. Where there has been some error or oversight, the question to be considered is 'whether the applicant has done all that was reasonably possible to put matters right promptly, and keep the defendants informed;

iv. Whether or not negotiations were commenced within the time limit. If they have, and time has run out whilst they are ongoing, the court is likely to be encouraged to extend time. Even if negotiations were commenced after the time limit this may aid the applicant if the respondent does not take the point that time has expired.

v. Whether or not the estate has been distributed before a claim under the Act has been made or notified, the beneficiaries would be prejudiced. According to Megarry V-C

> *"...there will usually be a real psychological change when the estate is distributed. Before the distribution, they would have only the expectation of payment; and if they are entitled to a share of residue, they will often have a considerable degree of uncertainty as to the amount. If an order is made under the Act, the difference will be the difference between the prospect of receiving in due course less than they had hoped, and on the other hand having something that they had already received and regarded as their own taken away from them. For most people, there is a real difference between the bird in the hand and the bird in the bush. In addition, of course, the beneficiaries are more likely to have changed their position in reliance on the benefaction if they have actually received it than if it lies merely in prospect. If* ***it is always prejudicial to claimants not to receive money that they are entitled to receive at the earliest possible moment****, it is likely to be even more prejudicial to have taken away from them money that they have actually received and begun to enjoy. The point is strengthened if they have changed their position in reliance on what they have received, as by making purchases or gifts that they otherwise would not have made."*

vi. Whether a refusal to extend time would leave the claimant without any redress. Sir Megarry V-C considered the line of cases associated with Allen v Sir Alfred McAlpine & Sons Ltd [1968] 1 All ER 543, [1968] 2 QB 229, and noted the following at page 538, paragraphs c, d, and e:

> *"Even if the plaintiff personally is completely blameless. The delays of his or her solicitors must be treated as the delays of the plaintiff, though injustice to the plaintiff will often be avoided by the existence of the plaintiff's right to sue the solicitors for negligence: see particularly per Diplock LJ ([1968] 1 All ER 543 at 553-554, [1968] 2 QB 229 at 256-257). There may appear to be some logical difficulty in making the decision whether the defendants should escape liability under the 1975 Act depend in any degree on whether the responsibility for the delay was that of the plaintiff personally or was that of the plaintiff's solictitors: the liability of the defendants, it may be said, ought not to depend on the distribution of fault between the plaintiff and his or her solicitors. Nevertheless, however logic may affect the defendant's position, there is a real and plain difference to a plaintiff between having a claim*

against his or her solicitors instead of against the defendants, and having no claim against anybody."

[52] Before Sir Megarry, as in this case, was an application by the widow plaintiff to extend the time for making an application under the 1975 Act for financial provision out of her deceased husband's estate, some 5½ months having passed since the expiry of the 6 month time limit for making the application under the Act.

[53] The circumstances were that the Plaintiff and the deceased were married in 1932, the marriage became unhappy shortly thereafter in 1934, with the Plaintiff subsequently leaving him in 1944. The couple had no children, and during the period of cohabitation, the plaintiff assisted her husband in selling 7 days a week in his shop located below their place of abode. The Plaintiff, in 1941, went to work in a post office, much to her husband's disapproval. The couple would usually quarrel over money, as she said he was mean.

[54] After the Plaintiff left the matrimonial home in 1944, she never saw the deceased again, and in 1953 she met a Mr. Coard, with whom she began a relationship and lived with as man and wife until his death in October of 1974. The Plaintiff and the deceased were never divorced, but the deceased never paid his wife anything, and there was no link between them after she left. The deceased subsequently died in October of 1978 at the age of 83 years, leaving a Will that left nothing to the Plaintiff. He left his possessions to the 2nd, 3rd and 4th Defendants only, one of whom was his sister, and the others, persons he described as having showed him great kindness in his loneliness.

[55] A grant of Letters of Administration was made to the 1st Defendant bank, the executors (the 2nd and 4th Defendants) having renounced executorship. After hearing of her husband's death, the plaintiff consulted a friend of hers, a Mr. Chambers, who was a fellow of the Institute of Legal Executives, who wrote to the solicitors for the bank seeking an ex gratia payment from the estate for the Plaintiff in lieu of proceedings under the Act. The bank's solicitors advised that it was unable to make such a payment, and that the widow should take such action

as advised. There was no reply to this letter by the widow's solicitors, who by this time had been instructed with a view to instituting proceedings. The widow's solicitor, who had been informed that she would need legal aid, filed the necessary paper work with the legal aid committee, neglecting to apply for an emergency certificate, as since 4 months had passed since the grant, he thought the urgency was implicit. During this time, the deadline passed, and according to Mr. Whyte, went unnoticed by him, due to the pressure of work, and the fact that he had convinced himself that he would have heard from the legal aid committee well within the 2 months. The legal aid committee, however, took over 3 months. July 31, 1979, 16 weeks after time had expired, it issued a legal aid certificate limited to obtaining counsel's opinion on the merits with no authority to institute proceedings. Subsequently, October 4, 1979, the limitation of the certificate was removed (after representations made by counsel) and the originating summons was eventually issued November 27, some 5 and ½ months late. (The summons and supporting affidavits had been settled some 6 weeks before, on October 12). It is to be noted that the solicitors did nothing to inform the bank that proceedings under the Act were contemplated until October 31, 1979, almost 7 months after they were first instructed. By this time, most of the estate had been distributed; the bulk of distribution having taken place between June 27 and November 11, shortly after the 6 month period had expired.

[56] In refusing the application, Megarry V-C found that the delay was substantial and the explanation for the delay was inadequate and insubstantial, being that the fault was wholly on the side of the widow, and not attributable to the Defendants or any extraneous factors beyond her control. The bank was not informed of the proposed proceedings until 4 and ½ months after the expiry, and it was not until a month later that the proceedings were actually commenced; there had been no negotiations either within or out of time and nearly all the estate had been distributed to the beneficiaries, without any warning of the possibility of a claim that might require them to give back some of the money they were receiving. In the premises, and considering that proceedings for negligence against the solicitors was available to the plaintiff, the court found that the widow had not

made out a sufficient case for extending a statutory time limit that was substantive rather than merely procedural, and therefore that time should not be extended.

[57] In **Berger v Berger** [2013] EWCA Civ 1305, an appeal against an order of the lower court refusing permission to make an application under the UK **Inheritance Act**, Black LJ approved and applied the principles in ***Re Salmon***. The Appellant had applied for permission to make an application under the Act, 6 and ½ years having elapsed from the expiry of the time limit before which she ought to have brought her application under the Act. The Appellant, who was a widow in her mid 80s and in poor health, contended that her husband, whom she was with for 36 years, failed to make reasonable financial provision for her in his Will. The couple began cohabiting in 1969, were married in 1983, and remained together until his death. Both parties had been married before, and as in the case at bar, both parties had children prior to their union. The Appellant had two adult sons and an adult daughter, and her husband had two sons. The deceased's sons were small boys when their father and the Appellant started to live together, but by the time of hearing, they were both adults and solicitors, and one had two sons of his own. The sons and the grandchildren of the deceased were the Defendants in the case. The estate of the deceased roughly consisted of the matrimonial home which was in his name, a half share in another property (the other half being owned by the Appellant), three other properties in London and the majority shareholding in a company. The deceased, in his Will, devised one of the properties to his own children in equal shares, and another to the Appellant's adult daughter from her first marriage, gifts to which were given effect at the time of the proceedings. The Will did in fact provide for the Appellant, in that it provided that the matrimonial home be held on trust for sale with the provision that the Appellant be allowed to live there as long as she wished or that it be sold to provide an alternate property for her use. The deceased's share of the property that he held jointly with the Appellant was devised to her, to be sold, with his share of the proceeds to be given to his children and grandchildren. The residue of the estate was to be held on trust to pay the income of the Appellant

during her lifetime and thereafter to be held on trust for the deceased's sons and grandchildren. Finally, the Will provided that, notwithstanding the previous trusts, the trustees had the power during the lifetime of the Appellant to, from time to time, pay or apply the whole or such parts of the residuary estate to or for the benefit of his wife absolutely. There was further evidence by way of letter from the deceased to one of his sons, indicating his intention for his wife "to receive maximum income during her lifetime". Whilst the deceased was alive, he and the Appellant enjoyed a high standard of living, supported mainly by income from the company, as is the case here.

[58] After her husband's death, the Appellant received income from the company as a director, and mortgage and housekeeper's bills, for the most part, was paid for by the company. It is to be noted that the Appellant was not only a director of the company, as in the case at bar, but also an executor and trustee of the deceased's estate. Her net income per year was assessed at 96,000 pounds.

[59] The court dismissed the appeal, having considered the potential merits of the claim, that the estate had not yet been fully distributed and that it was likely that sufficient capital could be found to make a reasonable award to the Appellant without disturbing any gifts that had already taken effect. It was further considered that the evidence did not establish that the Appellant was advised about the possibility of a claim under the Act when she consulted solicitors in 2006/2007. However, this was offset against what the court found to be a very substantial delay, and, significantly, the fact that the circumstances after the death of the deceased were such that the Appellant continued to live on the Surrey property as she chose, and performed her functions alongside the deceased's sons as executor, trustee and director, albeit that the extent to which she participated could not be ascertained. Further, the Appellant had demonstrated that she was quite capable of obtaining assistance to protect her interests as she had on several occasions following the death of the deceased, enlisted the services of accountants and solicitors in respect of her displeasure

as to how the estate was being dealt with. In the premises, it was found that it would not have been appropriate to allow her to pursue her claim.

[60] The Claimant relies on ***Stock v Brown***, a case in which the 90 year old widow Applicant was granted permission to bring her claim under a similar Act 5 and ½ years out of time. I am of the view, however, that this case is only helpful insofar as it applies the approach espoused in ***Re Salmon***, and for the proposition that "where a statutory time-limit had been so grossly exceeded, the Applicant had a heavy burden to prove sufficient grounds for its extension" (page 2). The court went on to find in ***Stock v Brown***, that although the delay had been exceptional, the claim was meritorious and there were extenuating circumstances caused by the extraneous factor of falling interest rates that resulted in greatly reduced income for the Applicant, and compelled her to apply under the Act at the late stage that she did.

[61] The Claimant further relies on the case of ***Sharon Smith v Vincent Service***, a case involving an application under PROSA, on the basis that the principles espoused are applicable because they deal with the considerations in respect of an extension of time. Dr. Anderson argued that this was not so because the language in **section 13(2)** of **PROSA** is more flexible than that in section 5 of the **Inheritance Act** and as such, the court's discretion is wider.

[62] **Section 13(2)** of **PROSA** provides as follows:

> *"An application under subsection (1)(a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the court may allow after hearing the applicant."*

[63] Whilst, **section 5** of the **Inheritance Act** provides:

> *"An application for an order under section 6 shall not, except with the permission of the court, be made after the end of period of six months from the state on which representation with respect to the estate of the deceased is first taken out."*

[64] Whilst I agree that the language used in the **Inheritance Act** is framed differently and in more prohibitive terms, I am of the view that, in practicality, the provisions in both Acts require the exercise of a similar discretion by the court once the stipulated time limit has passed.

[65] Indeed, in ***Sharon Smith***, Sykes J underscored the importance of and rationale behind the limitation, citing Harris JA in the case of **Allen v Mesquita** [2011] JMCA Civ 36, a case in which a claim under PROSA was filed outside the limitation period. At paragraph 11-13 he stated as follows:

> *"[11] Her Ladyship reminded at [26]:*
>
> *A court, in deciding whether a limitation period should take effect, is under an obligation to consider the circumstances of the particular case, taking into account whether there is any good reason which would prevail against the statute operating.*
>
> *[12] Harris JA took a strong line in favour of upholding the limitation defence. Her Ladyship held at [31]:*
>
> *Section 13(2) of the Act places a limit on the time within which a party may initiate proceedings. This limitation is a benefit which the appellant is entitled to enjoy. Such entitlement should operate to her advantage after the expiration of the one year permitted for the respondent to file a claim…He advanced no reasons for the failure to file his claim, nor has he proffered any reason to show why the appellant should be deprived of the accrual of her right.*
>
> *[13] So there is a clear authority consistent with Mr. Cowan's position that limitation defences under PROSA should be upheld unless there is good reason not to do so. The court's starting point then should be in favour of the defence when it is raised and that benefit which accrued to the defendant should only be taken away on good reason being shown."*

[66] From the foregoing, it is clear that Harris JA interpreted the limitation provision in PROSA in a way that is far less flexible than that suggested by Dr. Anderson, and as a right that should not lightly be taken away. I am of the view that the language of **section 5** of the **Inheritance Act** imputes a similar meaning, and that the approach taken by Harris JA provides useful guidance to matters of this nature. I would add to that the following dictum of Lord Griffith in **Donovan v Gwentoys Ltd** [1990] 1 WLR 472 at 479A:

> *"The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to have to deal."*

[67] In that regard, I am of the view that this court may be guided by the considerations that have been applied in PROSA cases of this nature. In any event, my observation is that the considerations, such as those outlined by Sykes J in ***Sharon Smith***, are very similar to those outlined in the line of UK cases discussed earlier in this judgment.

[68] In assessing what should be taken into account in the exercise of his discretion to extend time, Sykes J relied on the Court of Appeal cases of ***Mesquita***, **Brown v Brown** [2010] JMCA Civ 12 and **Saddler v Saddler** [2013] JMCA Civ 11 which highlight the following factors:

i. reasons for the delay;

ii. length of the delay;

iii. whether the applicant has a prima facie case worthy of the grant of an extension of time;

iv. whether any prejudice would be caused to the respondent, as well as the applicant;

v. the overriding objective and whether it would be fair to the parties to allow the application to be made out of time.

[69] Sykes J granted the extension of time sought primarily on the basis that the Applicant had a prima facie case in equity and so the limitation defence under PROSA would not prevent such a claim. He also considered that the parties had been negotiating with a view to settling the case outside of litigation and that the Respondent did not assert that he would be hampered defending the claim.

The Delay in Bringing The Claim

[70] I would describe the delay in this case as inordinately long, the application having been filed almost 6 years (5 years and 8 months) out of time. The Claimant's reason for the delay is that she went to three (3) attorneys prior to her current

attorney, and none of them told her about her right to sue under the Act and the relevant limitation period. I have a few concerns in relation to that explanation. Firstly, there is no evidence as to what instructions were given to the attorneys and whether those instructions would have required the attorneys to provide information about the cause of action under the Act.

[71] Secondly, the Claimant does not sufficiently account for the time frames and lag in time between her visits to the attorneys. Her evidence is that immediately after her husband's death she visited attorney Mr. Gilroy English, but he was ill, and his daughter who is also an attorney, had her files but did not initiate any action or advise her of any time limits. The Claimant does not say whether she had instructed this attorney to initiate action. She did not explain how long this period was and why she did not retrieve her files sooner. She then took her files to Mr. Anthony Pearson, who she says began to communicate with the attorney representing the estate, but the matter was not resolved. She does not indicate what it was that Mr. Pearson required of her to do. She then took her files to Mr. Pearnel Charles Jr. who, according to her, also communicated with the Defendants' attorney and referred her to her current attorney. Again, she does not indicate the dates she first attended on these attorneys and when she removed her files. I find her evidence in this regard to be vague and insufficient to be considered as a good reason for the delay. In my view there was a lot of inaction on the part of the Claimant. She went to only 3 attorneys over a period of at least 5 years and 8 months, who she infers did not give her any assistance or useful advice. This begs the question that if the Claimant was so dissatisfied with the service that she was receiving, why did she take so long to retrieve her files and move on? There is a letter in evidence dated September 3, 2013 from Pearson & Company to Ms. Washington, which shows that the parties had been communicating since at least July 24, 2013. This would have been about three years since the application for probate had been taken out. Mr. Pearson was the second attorney she visited. Thus, one could surmise that her files would have been with Mr. English's firm for at least a couple of years.

[72] Thirdly, the Claimant has shown that she is capable of handling her legal affairs to some extent, as it is her own evidence that when her husband was alive and had put only his name on the family home title, she took him back to the lawyer to have her name added. She does not appear to the court to be someone as helpless as the Claimant's attorney has portrayed her to be. In any event, if the Claimant believes that any of the attorneys negligently handled her case, she has the option of bringing an action against them in that respect, as was advised in ***Re Salmon***.

[73] Further, it seems to me that there were no negotiations between the parties during this period of delay. The Claimant's attorney argued that the aforementioned correspondence between the parties is evidence that the parties were negotiating. I do not find that the words 'we hope to arrive at an amicable solution' in the relevant letter amounts to a negotiation. It is quite clear that, as submitted by counsel for the 1st Defendant, the executor was speaking in the context of what was being requested of the Claimant in the 2014 letter. I find that there is no evidence that the Claimant, during this period, while corresponding, mentioned anything to the executor about her dissatisfaction with the Will.

Does the Claimant have a prima facie case worthy of the grant of an extension of time?

[74] **Section 7** of the **Inheritance Act** provides as follows:

> *"(1) Where an application is made for an order under section 6, the court shall, in determining whether the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the maintenance of the applicant and, if the court considers that such reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters –*
>
> *a) the size and nature of the net estate of the deceased;*
>
> *b) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;*

c) the financial resources and financial needs which any other applicant for an order under section 6 has or is likely to have in the foreseeable future;

d) any obligations and responsibilities which the deceased had towards any applicant for an order under section 6 or towards any applicant for an order under section 6 or towards any beneficiary of the estate of the deceased;

e) any physical or mental disability of any applicant for an order under section 6 or any beneficiary of the estate of the deceased;

f) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;

g) the deceased's reasons, so far as they are ascertainable, for making provision or for not making provision or for not making adequate provision, as the case may be, for any person by his will;

h) the conduct of the applicant towards the deceased;

i) the relationship of the applicant to the deceased and the nature of any provision for the applicant which was made by the deceased during his lifetime;

j) any other matter which, in the circumstances of the case, the court may consider relevant.

…"

[75] The question of reasonable financial provision is to be determined at the time of hearing, rather than at the time of death of the deceased (**section 6** of the **Inheritance Act**).

[76] **Ilott v The Blue Cross and others** [2017] UKSC 17 provides some useful guidance. The case concerned an appeal of a sizeable award by the Court of Appeal under the UK Inheritance (Provision for Family and Dependants) Act 1975, to the adult child of the deceased. Whilst the provisions of that Act differ somewhat from our Act, the approach taken is useful. I find the following points useful:

i. The test of reasonable financial provision is an objective one, and is a question of whether the Will fails to make reasonable financial

provision for the applicant, as opposed to whether the deceased acted unreasonably [paragraph 2];

ii. Where the Act limits reasonable financial provision to maintenance, the pertinent question is 'what would be reasonable for the applicant to receive for maintenance' [paragraph 12]. Lord Hughes was of the view that the limitation to maintenance represented a deliberate choice by the legislature that took into account the significance of testamentary freedom in English Law, and an intent not to bestow on the courts 'general power to re-write the testator's will', [paragraph 13]; He found that the correct test was that set out by Oliver J in In **re Coventry** [1980] Ch 461 at 474-475 in the following oft-cited passage [paragraph 18]:

> *"It is not the purpose of the Act to provide legacies or rewards for meritorious conduct. Subject to the court's powers under the Act and to fiscal demands, an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases or, if he chooses to do so, to leave that disposition to be regulated by the laws of intestate succession. In order to enable the court to interfere with and reform those dispositions it must, in my judgment, be shown, not that the deceased acted unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant - and that means, in the case of an applicant other than a spouse for that applicant's maintenance. It clearly cannot be enough to say that the circumstances are such that if the deceased had made a particular provision for the applicant, that would not have been an unreasonable thing for him to do and therefore it now ought to be done. The court has no carte blanche to reform the deceased's dispositions or those which statute makes of his estate to accord with what the court itself might have thought would be sensible if it had been in the deceased's position."*

iii. 'Maintenance' connotes provision to meet the everyday expenses of living. Lord Hale cited with approval (at paragraph 14) the following from Brown-Wilkinson J **In re Dennis [1981] 2 All ER 140 at 145-146**:

> *"The applicant has to show that the will fails to make provision for his maintenance: see In re Coventry (deceased) ... [1980] Ch 461. In that case both Oliver J at first instance and Goff LJ in the Court of Appeal disapproved of the decision in In re Christie (deceased) ... [1979] Ch 168, in which the judge had treated maintenance as being equivalent to providing for the well-being or benefit of the applicant. The word 'maintenance' is*

> *not as wide as that. The court has, up until now, declined to define the exact meaning of the word 'maintenance' and I am certainly not going to depart from that approach. But in my judgment the word 'maintenance' connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him. The provision that is to be made is to meet recurring expenses, being expenses of living of an income nature. This does not mean that the provision need be by way of income payments. The provision can be by way of a lump sum, for example, to buy a house in which the applicant can be housed, thereby relieving him pro tanto of income expenditure. Nor am I suggesting that there may not be cases in which payment of existing debts may not be appropriate as a maintenance payment; for example, to pay the debts of an applicant in order to enable a [sic] him to continue to carry on a profit-making business or profession may well be for his maintenance."*

iv. All cases limited to maintenance will turn largely on the needs of the claimant [paragraph 19].

v. These needs by themselves, however, are not sufficient to necessitate an order by the court. Nor too will a familial relationship always be enough. The claimant must show 'some sort of moral claim to be maintained by the deceased or at the expense of his estate' [paragraph 19; **In Re Coventry** as cited by Lord Hughes in paragraph 19];

vi. "…[T]he competing claims of others may inhibit the practicability of wholly meeting the needs of the claimant, however reasonable." *[paragraph 22];*

[77] In considering whether there is a prima facie case, it is well accepted that the court is not embarking on a mini trial, but simply assessing whether or not the Claimant has an arguable case.

[78] There is no doubt that the deceased failed to make provision for the Claimant in his Will. It also has not been disputed that the deceased maintained the Claimant whilst he was alive. From the evidence before the court, however, it is not ascertainable as to why the deceased would have done so, nor is the nature of the relationship between the deceased and the Claimant ascertainable. The 1st Defendant gave evidence that the couple had been separated at the time of

the deceased's death, however, the Claimant gave evidence that this was not so. There is not enough evidence, however, to persuade the court one way or the other, to conclude that it was arguably unreasonable for the deceased to have left nothing to the Claimant.

[79] It was further submitted by the Defendants that the dispositions in the Will were reasonable given that the Claimant is a joint holder of the matrimonial home, and so she would have already been provided for. I find that there is merit in that submission. The fact remains that the estate is not incredibly large, and it is not unusual, in my view, given that the Claimant already had an interest in that home, to make provision for his children, who did not have same.

[80] In relation to the considerations under section 7(d), (e) and (f), there is no evidence before the court as to the financial resources and needs of the beneficiaries, whether the deceased had in fact been maintaining any of them prior to his death, or whether any of them have any physical or mental disability. In the absence of such evidence, the court cannot countenance the Claimant's argument that the deceased's children will probably be able to look after themselves, as the court ought not to speculate.

The Size and Nature of the Estate/Stage of Distribution

[81] The parties disagree as to the nature and size of the estate, and how it is that any order to be made by the court under the **Inheritance Act** would be satisfied. The Claimant has submitted that the estate has assets to satisfy such an order, particularly since the estate has not yet been wound up, sums collected have not been distributed, and the properties comprising the real estate have not been sold. Whilst the Defendants have submitted that there is no cash in the estate, and the size of the estate is such that there is nothing from which the Claimant can get the periodic payment or lump-sum for maintenance that she seeks.

[82] As counsel for the Defendants have argued, that any order to be made under the **Inheritance Act** could only be satisfied out of the assets of the deceased's estate. This is made clear by the language of the provisions in **section 6** of the

Inheritance Act, which repeatedly refers to orders for payment, settlement, transfers and so forth to be made from the "the net estate" of the deceased. 'Net estate' is defined in section 2 of the Act to mean 'property which the deceased had the power to dispose by his will…less the amount of his funeral, testamentary and administration expenses, debts and liabilities…'. It also includes other property that the court chooses to treat as part of the net estate for the purposes of the Act.

[83] The net estate of the deceased, as far as the court can glean from the evidence, consists of the deceased's shares in the 2nd Defendant, his share in the matrimonial home at 46 Aqua Avenue, and property at Danvers Pen in St. Thomas.

[84] In that regard, the Claimant has made reference to the *'executor's summary statement of account'* filed by the 1st Defendant which indicates that the executor has control of an account containing over $6 million dollars. The Defendants have pointed out, rightly in my view, that that sum represents funds belonging to the company, and are comprised in large part by the proceeds of sale of some of the assets of the company. They do not form part of the estate. The statement makes reference to 'total cash sales' of $9,025,000, less the expenses listed. Counsel for the Claimant did not dispute that this was indeed so. I reject her contention that, simply because the document is labelled as an 'executor's summary statement of account' that this means that these funds now form part of the estate.

[85] The court further recognizes that the 2nd Defendant is a limited liability company with separate legal personality, and consequently its assets are owned by it and not the deceased. Notwithstanding that the deceased owned the majority of the 2nd Defendant's shares, the assets of the company do not form part of his estate and are therefore irrelevant to this application. The court in these circumstances may only deal with the shares held by the deceased and is only empowered, in

this regard, under section 6 to make an order transferring some or all of the shares to the Applicant.

[86] Therefore, it is clear that if an order is to be made in the Claimant's favour, then that order would have to be satisfied out of the inheritance of one or more of the beneficiaries so that the court would be required to take away from such persons, whether it be in the form of shares, or the half share in the matrimonial home.

[87] It is also important to note that the distribution of the estate has not taken place as far as the court is aware. None of the beneficiaries has received what it is that they are to get. The matrimonial home is still in the sole possession of the Claimant who has enjoyed the property by herself for the period of 7 years since the death of the testator. It is clear that the estate does not have an overwhelming amount of funds from which the order can be satisfied, and this court is not minded to grant the extension of time unless the Claimant can show a very good reason for the court to do so. The Claimant has a rather heavy burden in this respect.

Prejudice to the Beneficiaries

[88] The Claimant has argued that no prejudice would be caused to the Defendants by her application and that the Claimant was looking at the possibility of being out on the street with nowhere to go, whilst the assets would go to the deceased's children who would probably be able to look after themselves. Whilst, the 2nd Defendant argued that the testator's children and other beneficiaries will suffer severe prejudice if the application is granted and testator's wishes are varied.

[89] The court is at a disadvantaged position being that there is no direct evidence from the beneficiaries to indicate how and to what extent they would be affected by this application and any order varying their inheritance under the Will. There is no indication that the beneficiaries were served with any of the documents filed in this matter, which would have been expected where a matter, will or may, affect that particular person (see CPR 68.56). The beneficiaries have not put forward

evidence to show and to what extent they would be prejudiced by an order varying what it is that they are supposed to get under the Act. One of the considerations under the Act is the financial resources and needs of the beneficiaries, currently and in the foreseeable future (section 7(f), Inheritance Act). The court cannot countenance the Claimant's argument that the deceased's children will probably be able to look after themselves. In the absence of such evidence, the court cannot speculate.

[90] At page 537 paragraph h, Megarry V-C stated the following in ***Re Salmon***:

> *"...there will usually be a real psychological change when the estate is distributed. Before the distribution, they would have only the expectation of payment; and if they are entitled to a share of residue, they will often have a considerable degree of uncertainty as to the amount. If an order is made under the Act, the difference will be the difference between the prospect of receiving in due course less than they had hoped, and on the other hand having something that they had already received and regarded as their own taken away from them; For most people, there is a real difference between the bird in the hand and the bird in the bush. In addition, of course, the beneficiaries are more likely to have changed their position in reliance on the benefaction if they have actually received it than if it lies merely in prospect. If* ***it is always prejudicial to claimants not to receive money that they are entitled to receive at the earliest possible moment****, it is likely to be even more prejudicial to have taken away from them money that they have actually received and begun to enjoy. The point is strengthened if they have changed their position in reliance on what they have received, as by making purchases or gifts that they otherwise would not have made."*

[91] If it is as the Defendants submit, that there is no cash in the estate and the size is such that there is nothing from which the Claimant can get the sum she seeks for maintenance, the court would have to deprive one or more of the beneficiaries of part of their inheritance. There is no doubt that this in and of itself would be prejudicial to the beneficiaries. For the court to do this, the Claimant must show good reason as to why this would be fair to do in all the circumstances. Particularly so in this case where most of the beneficiaries are the children of the deceased. I have not seen the reason shown.

The Claimant's Needs/Resources

[92] The Claimant claims that she is in need of assistance as she is unemployed and not earning sufficient income from her business to pay her expenses, which she states amount to a total of $156,500.00 per month. In her Notice of Application, in this regard, she seeks interim payments of $156,500.00 per month, an order for a monthly periodic payment out of the net estate, an order that the costs of proceedings be paid out of the net estate. In the Amended Fixed Date Claim Form, she seeks maintenance under the Act by way of a transfer of the deceased's 50% interest in the matrimonial to herself, or in the alternative, that she be given the option of purchasing any interest in the property found to be due to the 1st Defendant, or that the Claimant be allowed to remain in occupation of the family home for the rest of her natural life.

[93] Her evidence is that whilst her husband was alive, he was the one who provided the money to meet their expenses, whilst she cooked, washed and looked after the home as was expected of her as a wife. This money, she asserts, came from income from the 2nd Defendant, and was used to maintain their lifestyle and to run the household. Since her husband's death, she has not received any payments from the income of the company, and her husband's Will has not made provision for her continued maintenance.

[94] In her Affidavit in Support of the application filed July 6, 2016, she stated that her only source of income is from her guest house that she has been operating for her own benefit since the death of her husband. This business is registered in her name (along with her grandson, Andre Shim) and operated at 7 Beechwood Avenue, property belonging to the 2nd Defendant. The Defendants, who aver that the business belongs to the 2nd Defendant company, have argued that the Claimant has not been forthright with the court in relation to this business, her income and her needs, and I am in agreement. In her affidavit filed August 17, 2016, the Claimant stated that at no time did the 2nd Defendant ever operate a business from 7 Beechwood Avenue, and that the only relationship that the 2nd Defendant has with the property is as its registered proprietor (paragraph 10).

However, later in the same affidavit, she admits that her husband operated a guest house on the premises during his lifetime, however, same ceased operations and fell into a state of disrepair (para 12). According to her, she intervened to restore the property and then registered her business to operate from there.

[95] It is important to note that the Claimant has not accounted to the Defendants for the money she has earned from the business, and has not paid any rent for the use of the property. She did not disclose the amount of income earned from the business, nor has the Claimant disclosed to the court, up to the date of the hearing, the amount of income she has earned or is earning from the business.

[96] The court is of the view that the Claimant has not been forthright or forthcoming with the court. The Claimant has enjoyed sole possession of the 2nd Defendant's property at 7 Beechwood Avenue for which she has not accounted or paid any rent.

[97] The Claimant has averred in her evidence that her contribution to the development of the company is worth more than 5% of shares. This court is of the view that that is also a matter that is not directly relevant to a claim under the **Inheritance Act**. It seems to me that the Claimant may bring such a claim, providing evidence to show her contribution to the company, and if the court were to agree that she is entitled to more shares, the court would be empowered to vary the share holdings of the company. In such a case, those shares would no longer form part of the estate of the deceased. In my view, the Inheritance Act only deals with the estate of a deceased person, whether on intestacy or testacy. Based on the foregoing, I can safely conclude that the Claimant has not shown that she has a prima facie case worthy of the grant of an extension of time.

CONCLUSION

[98] The Claimant has not demonstrated special reasons sufficient for this court to take the matter outside of the limitation period and to grant her an extension to

make a claim under the **Inheritance Act**. Although most of the estate has not yet been distributed, the delay is substantial, her reasons for the delay are insufficient and prejudice will be caused to the beneficiaries. The Claimant has been less than forthright and forthcoming. Further, the Claimant has been operating a business on the 2nd Defendant's property since the death of her husband, from which she gains income and has not accounted for. The application is therefore refused.

ORDER:-

1. **Application refused.**
2. **Costs to the 1st and 2nd Defendants to be taxed if not agreed.**
3. **Leave to appeal granted.**