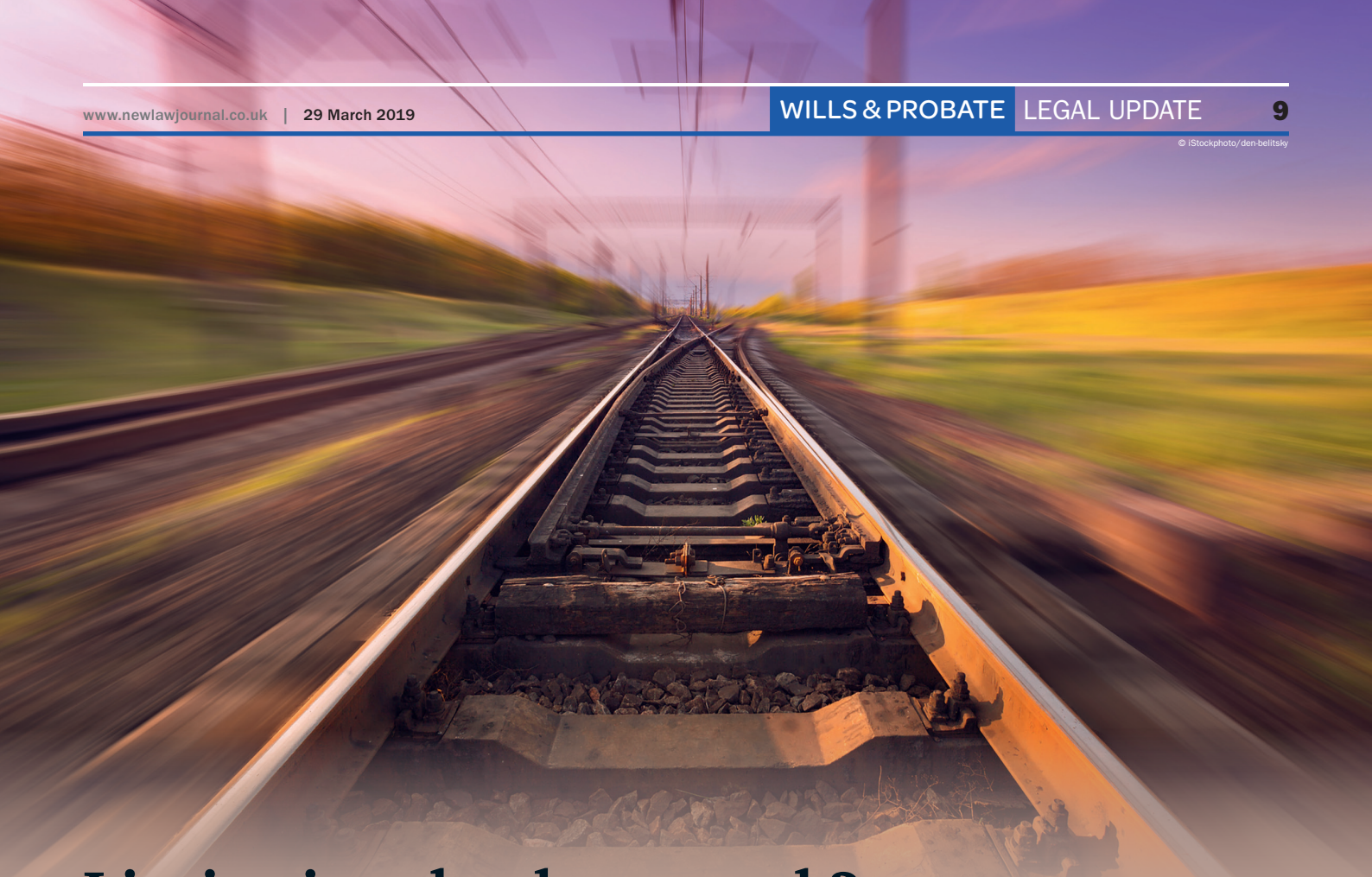



# Limitation: back on track?

**Scott Taylor** considers the appropriate use of 'standstill' agreements in claims for financial provision

**IN BRIEF**

▶ *Bhusate v Patel* and *Cowan v Foreman*: the facts; reconciling the judgments; and the implications of the cases.

In *Bhusate v Patel* [2019] EWHC 470 (Ch) Mrs B, the claimant, was the widow of the deceased who died intestate on 28 April 1990. She was Mr Bhusate's third wife. Together they had one child. Mr Bhusate had had five children with his first wife who were aged between 54 and 72 at the time of the hearing and relations between four of those children and the claimant were not good as they objected to her receiving anything from their father's estate, which they regarded as belonging to their mother who had died some years previously.

## The estate

The estate was limited, with the main asset being the house (valued at £850,000) and around £1,500 in bank accounts. The claimant and the second eldest of the deceased's children (with whom the claimant enjoyed a reasonably supportive relationship) took out the grant of letters of administration on 12 August 1991. This entitled the claimant to a statutory legacy of £75,000 plus interest of six per cent from the date of death and a life interest in one half share of the residuary estate. The remainder of the estate was to be shared equally between the six children. Although some efforts were made to sell the house shortly after Mr Bhusate's death, the three offers that were received were not accepted by some of the claimant's stepchildren. The only way for the claimant to receive her entitlement was by way of a sale of the property. As this could not be agreed, the estate was never distributed and the claimant and her son continued to live in the property.

The claimant brought a claim under the Inheritance (Provision for Family and Dependants) Act 1975 (the Act) 25 years and nine months after the six-month deadline to bring a claim.

The judge stated the relevant factors for consideration, as set out in *Berger v Berger* [2013] EWCA Civ 1305, [2013] All ER (D) 319 (Oct).

1. The court's discretion is unfettered but it 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 he or 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?

Of these factors, the judge considered that in this particular case 1, 2, 6 and 7 were most relevant. In assessing the justification for the delay, the judge drew attention to the fact that Mrs Bhusate had left school in India at 11, could not read or write English and could speak very little English which would have impacted substantially on her ability to understand any advice given to her.

The reasons for allowing her claim were as follows.

1. The merits of her claim were very strong.
2. The delay in bringing the claim was not down to the claimant. She had not been able to obtain an agreement from her stepchildren and it would have been unrealistic to expect her to apply to the court for directions.
3. The four stepchildren obstructed the sale and then did nothing to try to negotiate an agreement for the next 23 years. When the claimant brought her

claim they took the limitation point in relation to the legacy and life interest in order to deprive her of anything whatsoever from their father's estate.
4. As a result, largely of those stepchildren's actions, if this claim was not allowed the claimant would be left with no benefit from her husband's estate and no other remedy.

The judge, therefore, considered that the claimant had shown sufficient grounds for permission to be granted and that there were compelling reasons to allow this claim.

## Cowan v Foreman

In *Cowan v Foreman* [2019] EWHC 349 (Fam), the claimant was the second wife of the deceased, Michael Cowan. They had married in 2016 although their relationship had begun in 1991. The deceased's will put almost all of his assets into two trusts, largely, it would appear, in order to reduce the inheritance tax liability. The claimant was the principal beneficiary of both trusts and the deceased's letter of wishes clearly stated that he wished for the claimant to be allowed to occupy any of the properties during her lifetime and that she should have sufficient income to maintain a reasonable standard of living.

Monthly payments were established of $17,250,which were later increased to $26,250. The claimant set out various points in her evidence which she felt indicated that she could not trust the trustees to deal fairly with her and her future needs, including the fact that the trustees had raised some queries on invoices she had sent for payment.

She sought permission to bring a claim for provision under the Act almost 17 months past the six-month deadline, stating that as she did not have outright ownership of any assets she was at the 'mercy of the trustees' and therefore lacked security.

The judge considered that the essence of the *Berger* factors was:

- whether the claimant had shown good reasons justifying the delay; and
- whether the claim is of sufficient merit to be allowed to proceed to trial.

He considered that rather than exercising discretion, this involved making a value judgement or qualitative decision.

In relation to the claimant's justification of the delay, the judge did not consider that she had done so adequately. The structure and effect of her husband's will had been explained to her in a lengthy email from solicitors shortly after probate had been granted. She had accepted in her evidence that this email set out the position clearly. She and her son had also taken advice from a UK lawyer who had advised on the time limit of six months for a claim under the Act.

The judge strongly objected to the fact that the parties had agreed between themselves that no point would be taken on limitation for six months while arrangements were sought with the trustees as to the claimant's position. He stated that the correct course of action would be to issue a claim and then apply for a stay while negotiations took place. It was for the court to decide whether the delay was reasonable, not the parties.

> *"While it may seem difficult to reconcile these two decisions, there are a number of factors which explain the contrasting decisions"*

As to whether he considered the claimant had a claim of sufficient merit, the judge did not accept the claimant's argument that she should be awarded outright provision as accepting this would effectively mean that every widow(er) would have a right to outright testamentary provision from their spouse, which is not an existing legal principle. The judge did not find that any of the evidence before him showed that the trustees were not likely to act in line with the deceased's wishes. An additional factor on this point was that if the trustees did not do so, the claimant would have an action in breach of trust.

Permission to bring a claim out of time was, therefore, refused.

## Reconciling the judgments

While on the face of it it may seem difficult to reconcile these two decisions, there are a number of factors which explain the contrasting decisions. In *Cowan* the judge stated that unless there were highly exceptional factors, an excusable delay was likely to be weeks or a few months. There are a number of factors which could be said to be highly exceptional in the case of Mrs Bhusate.

The first is that Mrs Cowan was receiving provision from the estate of her husband, and her concerns that this may not continue were speculative. Mrs Bhusate, however, had received nothing of the entitlements she was due. The fact that Mrs Bhusate would have been homeless had the claim not been allowed therefore appears to be a significant factor in the court's consideration.

It is likely that the sophistication of each claimant also played a part. Mrs Cowan had received substantial legal advice and it was shown that she was able to understand this. This is contrasted with Mrs Bhusate who had received minimal advice which it was likely she did not fully understand. Mrs Bhusate was also contrasted with her stepchildren who were highly educated which the judge considered further reduced any control she would have had as administrator, essentially therefore the court considered the parties' respective strength of bargaining position.

As a result of the actions of Mrs Bhusate's stepchildren in taking the limitation point, she would have had no other remedy if her claim had not been allowed. This is contrasted with Mrs Cowan's possible claim in breach of trust if the trustees did not follow her husband's wishes.

The delay in *Bhusate* was caused largely by the actions of her stepchildren and was not something she had control over. This contrasts with Mrs Cowan having the structure and implications of her husband's will explained to her in detail well before the six-month deadline and having been advised of this deadline.

## Implications

The contrast between these two cases serves to illustrate that in applications for financial provision brought out of time, it is always unclear whether a case is likely to receive permission or not. However, following the guidance of the judge in *Bhusate* 'the longer the delay, the more compelling the grounds will have to be'.

On balance, it appears that the unique facts in *Bhusate* meant the case was easily distinguishable from many claims for financial provision, hence 'normal service' may have been resumed in *Cowan*. However, it has now been confirmed that the claimant in *Cowan* has made an application for permission to appeal the decision of Mostyn J, and it will be interesting to see if any reference is made to the *Bhusate* decision. Whatever the case, it is hoped that the appeal will give further guidance to practitioners as to the appropriate use of 'standstill' agreements in claims for financial provision. NLJ

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