

Neutral Citation Number: [2018] EWHC 8 (Ch)

Case No: C30BM255

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 09/01/2018

Before :

HHJ DAVID COOKE

Between :

Audrey Mary Sargeant
- and -
Jane Louise Sargeant (1)
Michael Arthur Thomson (2)

Claimant

Defendants

David Mitchell (instructed by Withers LLP) for the Claimant
Paul Burton (instructed by Shakespeare Martineau LLP) for the First Defendant
The Second Defendant attended in person

Hearing dates: 1, 2 November 2017

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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HHJ DAVID COOKE

HHJ David Cooke:

Introduction

1. In this action the claimant, Mrs Audrey Mary Sargeant (known as Mary) seeks an order for provision from the estate of her late husband Mr Joe Sargeant pursuant to section 2 of the Inheritance (Provision for Family and Dependents) Act 1975. Mr Sargeant died on 10 May 2005 leaving a last will dated 20 February 2002, in respect of which a grant of probate was made on 30 March 2006 jointly to the claimant, the first defendant Ms Jane Sargeant (daughter of Mr and Mrs Sargeant) and the second defendant Mr Thomson, the family solicitor. I will refer to the family members as Mary, Joe and Jane respectively, as they were throughout the trial.
2. The proceedings were not issued until 20 July 2016, over 10 years after the grant of probate. Accordingly Mary requires permission to bring them pursuant to section 2 of the 1975 Act, which provides that without the permission of the court no application may be made under that Act after a period of six months from the date of the grant of representation. By an order made by consent on 21 August 2017 District Judge O'Regan directed that the question of permission be dealt with as a preliminary issue, to be tried on the basis of written evidence only, with directions to be given for the hearing of the full claim if permission was granted.
3. Mr Mitchell appeared for Mary. The application is opposed by Jane, represented by Mr Burton. Mr Thomson adopt a neutral attitude to the question of permission and to the claim in general. He appeared at the trial and gave a witness statement as to factual matters, but was not represented and made no submissions.

The will and assets of the estate

4. Mary and Joe were married in 1960, and so had been married for 45 years when Joe died. He was a farmer and inherited a share in the family farm in Northamptonshire from his own parents. He acquired other land subsequently, in his sole name. At the date of his death, Joe was the owner of substantially all of the assets of his marriage to Mary.
5. Joe and Mary had two children; Jeffery ("Jeff"), who was Mary's child from a previous relationship, adopted by Joe after they married, and Jane who was their natural child. Joe wrote a letter in July 1992 (bundle p214), setting out the reasons why he was not on good terms with Jeff and had made no substantial provision for him in a will executed at that time. They evidently had not reconciled by the date of his last will in 2002, since in the meantime Joe had made several wills, none of which left any significant bequest to Jeff.
6. By his last will, Joe left his guns and fishing equipment to Jeff, and the balance of his personal chattels and the benefit of a life policy worth £75,000 to Mary. All the remainder of his estate was left to his executors as trustees on terms of a discretionary trust. The class of potential beneficiaries was limited to Mary, Jane and Jane's issue, so excluding Jeff and his issue save for gifts over in default.
7. The value of the estate was sworn at just over £3.2m, though the land comprising the principal assets is now said to be worth much more, Mr Mitchell submits at least £8m, as a result of outline planning permission for housing development having been granted for part of it with the prospect of similar permission on other parts. In addition

land that passed to Jane outside the will by succession as partner in a working farm is said to be worth a further £2m. The main land assets Joe held before his death can be regarded as falling into three blocks as follows:

- i) Grafton Farm, comprising 103 acres of grassland and 192 acres of arable land, and adjoining residential buildings Grafton House, Grafton Lodge and Grafton Lodge Cottage
 - ii) a 50% share in land at Milton Malsor opposite the Northampton crematorium and known to the family as the "Crem land", and
 - iii) a 1/6 share in Collingtree farm, comprising 174 acres plus associated assets. Collingtree had been Joe's parents' farm and on their death he, his brother Charles and sister Hilda each inherited a 1/3 share. In 1994 Joe gave half of his share to Jane, so at his death he retained 1/6.
8. The farm land was farmed by a farming partnership called HC Sargeant and Sons ("HCS"). After the death of Joe's father the business of HCS was owned equally by Joe, Charles and Hilda, but Charles died in 1974 and his interest passed to Joe and Hilda. In 1995 a written agreement was entered into by which Hilda retired as a partner and thereafter Joe carried on the business of HCS as a sole trader until 2004.
9. There was a dispute between Joe and Hilda as to the effect of this agreement on ownership of the Crem land. Joe contended that it had the effect that the whole interest in that land became his. In 2007 however (the litigation having been carried on by the executors after Joe's death) the High Court ordered that the agreement should be rectified and declared that the Crem land was owned equally by Joe and Hilda, subject to a Farm Business Tenancy in favour of HCS (ie Joe).
10. In 2004 Jane became a partner in HCS with her father. It is her contention that his share of the Crem land was an asset of the partnership and that the effect of the partnership agreement is that it passes to her by succession on his death, and so outside the terms of the will. Mary has indicated that she will seek to bring a number of other claims for relief including:
- i) removal of the defendants as executors and replacement by a nominee of hers
 - ii) declarations that she is entitled to an equal share of Joe's assets in any event, by virtue of constructive trust or proprietary estoppel arising before his death, and
 - iii) a declaration that Joe's share of the Crem land did not pass under the partnership agreement and so forms part of his estate; alternatively an order setting aside the agreement by which Jane became a partner in HCS, with the same effect.
- On her behalf however Mr Mitchell offered an undertaking that if her Inheritance Act claim is permitted to proceed she will not pursue these other claims, except in relation to the Crem land.
11. Joe left two letters of wishes addressed to the trustees of his will trusts (pp 149-150). The first, written in November 2003, stated that:

“It is my wish that for so long as she is alive, Mary should have all the benefit from my assets unless she specifically says that she does not want everything.

Certainly, for so long as she remains mentally competent to make a decision, no land buildings or houses should be sold without her specific agreement.

After Mary's death I wish my daughter Jane to have the benefits for her lifetime if she wishes. That would enable her to live at Grafton rent-free if she wishes to do so. However unless there are completely unexpected circumstances I wish the capital assets preserved and if possible enhanced for the benefit of Jane's children and their issue...”

The second was written in March 2004 and stated:

“It is my wish that on my death I leave my house known as "Grafton House"... together with the 6 acre field adjoining the garden to my wife Mrs Audrey Mary Sargeant. This is in addition to the benefit from my assets.”

12. It is common ground that the expression "the benefit from my assets" was intended to mean the right to use and receive any income arising from the assets of the estate. It is also apparent that an underlying cause of the difficulties between the family members in the following years, leading up to the institution of these proceedings, has been that the estate assets did not produce very much in the way of income, principally because the farming partnership HCS had not historically paid any rent for the use of the land owned by the estate which it farmed, and (with Mary's agreement) continued not to do so after Joe's death when the business of HCS was carried on by Jane.
13. It had for a long time been known that some of the land owned by Joe and his family had development potential. An option agreement had been entered into before his death with Bovis Homes under which they would apply for permission for residential development. This application was pursued, initially without success but in August 2016 outline planning permission was given to build 1000 homes on a site that includes Collingtree farm and part of the Crem land. It is this, together with the prospect that permission may yet be obtained for further parts of the Crem land, that has led to the significant projected increase in land values.

Events after Joe's death

14. Mr Thomson sets out in his witness statement his account of the events after death, the financial difficulties that subsequently arose for Mary and the advice, meetings and discussions that took place as a result. Because the hearing before me proceeded by way of written evidence it has not been challenged in cross examination, but it is relevant to note, firstly, that although Mary has filed a witness statement in response, she does not appear to dispute the factual account given in any material respect (although she maintains her lack of understanding of some of the issues involved) and secondly that insofar as there are contemporary documents including correspondence available, they are entirely consistent with Mr Thomson's account. The following summary is therefore largely taken from those documents and what Mr Thomson says.

15. In June 2005, after Joe's death, Jane, who at the time was going through a divorce, moved into Grafton Lodge. At about that time, and in the months afterwards, Mr Thomson, together with the family accountant Mr David Smith and a land valuer, Mr Paul Allen, who had been advising in relation to the development potential, advised Mary that notwithstanding the availability of agricultural and business property relief, the value of the assets passing into the discretionary trust would lead to a charge to inheritance tax unless some assets were appointed out of the trust to Mary. On 18 August 2005 Mr Thomson wrote to Mary (p379) estimating that this charge would amount to £228,000, and in his witness statement Mr Thomson says that Mary was very keen to avoid this tax. In his letter he made a number of points, including that:
 - i) the charge to IHT could be avoided if Grafton Lodge and Grafton Cottage were appointed out of the trust to Mary (as well as Grafton House which was referred to in the letter of wishes)
 - ii) if this happened, Mary would be entitled to charge rent to Jane for the part of Grafton Lodge that she occupied, and to receive the rents that were being paid by third-party occupiers of the remainder of the Lodge and Grafton Cottage. However he noted that Mary had already told him she did not wish to charge Jane any rent and would not necessarily require to receive the third party rents. He said that Mr Smith had advised that there could be tax advantages in her becoming a partner in HCS and drawing a salary from that business to provide her income, and
 - iii) if Grafton Lodge and Grafton Cottage were transferred to Mary, there would be a potential charge to IHT on her death, but that this might be avoided if she transferred them on to Jane and survived for seven years after that transfer. However he cautioned against any such transfer until Jane's divorce had been resolved.
16. A copy of this letter was sent to Jane. On 23 August 2005 Mr Thomson and Mr Smith met Mary and Jane to discuss this advice. In his witness statement Mr Thomson said that he had pointed out that if the properties were transferred to Mary she would be entitled to pass them on to Jane but not obliged to do so and that they had discussed the proposal that Mary should become a partner in HCS. The following day, Mary told him that she and Jane wished to proceed with the partnership. He discussed that proposal subsequently with Mary and also with Jane's divorce lawyer who had queried it, presumably on the basis that it might be seen as an artificial reduction in her income, explaining to him that Mary could if she chose have charged Jane rent instead.
17. On 12 January 2006, the executors' oath was signed together with a memorandum appointing Grafton House with its surrounding land, Grafton Lodge and Grafton Cottage to Mary, thus giving effect to the letter of wishes and the additional transfers necessary to avoid the charge to IHT. A few days later Mary raised again with Mr Thomson the question of the partnership. He discussed this again with Mr Smith, who reiterated the tax benefits available (income from the partnership would not be taxable for some time because of accumulated tax losses) and Mary confirmed to him again that she wished to go ahead. Mr Thomson prepared a draft agreement, which was signed on 21 March 2006 at a meeting between him, Mr Smith, Mary and Jane.
18. This agreement (which was subsequently amended in certain respects following advice from Jane's divorce lawyer) provided (p383) that Mary was entitled to a fixed

salary of £20,400 per annum, together with reimbursement of any expenses properly incurred in the firm's business, but that she had no interest in the capital assets of HCS. Accordingly Jane was solely entitled to the capital assets and would receive 100% of any profits made after payment of the salary and expenses to Mary. Jane was also entitled to outvote Mary on any decision relating to the partnership business.

19. The appointments of the various properties to Mary were completed by transfers executed in April 2007, which were subsequently registered. A year later in April 2008, Mr Thomson says Mary instructed him to transfer Grafton Lodge on to Jane immediately, which was put into effect by a transfer executed by Mary on 10 July 2008. Mary told Mr Thomson however that for the time being she wished to retain ownership of Grafton Cottage.
20. The practical effect of this arrangement was that Mary received the salary of £20,400 without paying any tax on it, and in addition the running expenses of Grafton House, which had been designated as the principal place of business of HCS, were met by the partnership at no charge to Mary.
21. On 18 May 2009, Mary telephoned Mr Thomson and told him that she was concerned about her financial position. She had been advised by Mr Smith that the tax losses in HCS had been used up, with the result that she would now be liable for tax on her salary and should expect to have to pay £10,000 shortly (p193; in the same letter he points out that if Jane had paid rent instead of salary that would have been taxable without the availability of the past losses). Mary told him that Jane resented the salary she was receiving. Mr Smith had suggested that they should have a meeting to discuss these issues and the available cash flow. Mr Thomson reminded Jane that Joe's wish had been that Mary should have the income from its assets, but that Mary had refrained from charging rent, and he suggested that the trustees should sell a field in order to raise funds to provide for Mary. Jane had countered that she thought Mary was overspending, and that she was opposed to selling any land. Instead, she wanted Mary to draw on her own savings of about £100,000 which she would promise to replace in future, or after Mary had died, in order that her estate would be preserved to pass, as she had evidently indicated was her intention, to Jeff's children.
22. On 5 August 2009, Mr Thomson and Mr Smith met Jane and Mary. At that meeting Mary said that she had decided to transfer Grafton Cottage on to Jane, which she subsequently did on 5 October 2009. Jane had requested that certain other land be transferred out of the estate to her, but the trustees decided, having received advice about the tax implications, not to do so. There was a discussion about Mary's income, in which Jane said that if Mary were to charge her rent, she would insist on receiving all of the income generated by HCS, presumably implying that she would use her voting rights to terminate the salary payable to Mary. Mr Thomson again suggested that some land be sold, but both Mary and Jane were adamant that they did not wish to do this. Mary reluctantly agreed to use her own savings to supplement her income for the time being.
23. It seems to have been at about this time that a system was introduced, devised by Mr Smith the accountant, that insofar as Mary spent more money from the partnership account of HCS than the salary she was entitled to (she had a cheque book and so could make payments out of the partnership's account) the excess would be calculated and she would sign a loan note acknowledging a debt to the partnership for that amount. Further, and also at about this time, Jane designated her own property as the principal place of business of the partnership, so that it was her household expenses

that were paid as business expenses of the partnership and expenses such as council tax and utility charges at Mary's residence fell to be borne by her rather than the partnership. The practical effect of that was no doubt to increase the amount by which Mary's spending exceeded her salary, and so increase the amount of the loan notes she was asked to sign.

24. Mr Thomson says however that he heard no more from Mary about these matters until August 2011, when she telephoned him to say she was concerned about her financial position, and had a meeting with him at his offices on 16 August 2011. His note of that meeting (p389) records that she told him she needed more than her fixed income to meet living expenses and that Jane was insisting that she acknowledged the excess as a debt due from her personally to HCS (ie by the loan note system, of which Mr Thomson was not previously aware). They discussed that this was regarded as against the wishes of her late husband who wanted her to be looked after financially by the estate, but that the estate had no cash and Mr Thomson reiterated his advice that the trustees should consider selling some land. Mary told him that Jane was completely against selling any land. They discussed again the fact that Mary had been told she would be entitled to charge rent to Jane, but that structure had not been adopted. Mr Thomson advised that it would be possible to apply to the court for an order for sale of land to overcome Jane's opposition. Mary said that she would discuss matters further with Jane. She was unhappy with her financial position but did not want Mr Thomson to do anything further for the time being.
25. A few days later on 2 September 2011 Mary telephoned Mr Thomson to say that she did not wish to pursue the shortage of cash any further for the time being "but if her own private cash runs out (which it will do sooner rather than later) then she will probably wish ... that some real property asset be sold to provide a cash fund unless some development has come in the meantime."
26. On 29 June 2012 Mary met Mr Thomson again and showed him a loan note for £11,000 which she had been asked to sign in respect of her expenses that had been paid out of HCS. She told him she was concerned that the loan note was expressed to be payable on demand, and even if she was not in practice required to pay during her lifetime it would deplete her estate on death. It is apparent from the documents that she was anxious to preserve her estate so as to pass as much as possible on to Jeff's children, no doubt to make up for the fact that Jeff had not been left anything substantial in her husband's will. Mr Thomson told her that he had to advise the trustees as a body, and that if Mary or Jane wanted advice as to their personal position they would have to seek separate advice from another solicitor. They discussed again the possibility of charging rent to Jane or HCS and Mary told him that she had previously not required any rent but now felt she could not manage on the present arrangement and did not wish to incur further debts to HCS by way of the loan notes. She again said that she would talk to Jane and come back to Mr Thomson in due course.
27. Mr Thomson wrote a joint letter to Jane and Mary on 6 July 2012 (p395) setting out matters that he would like to discuss at a meeting, reminding them of Joe's letters of wishes and saying "the fundamental difficulty that the three of us have discussed on various occasions... is that the trust is capital rich and cash poor. Whilst I understand the reluctance of both of you to sell any land I have previously said that the normal way to deal with that problem would have been to have sold some land to put cash in the bank... We are however now clearly at a point where Mary is finding it

impossible to live on her salary of £20,400... if there is a shortfall of funding we trustees are under a duty to do all that we can to rectify that situation. In my view that means either selling property which as I understand it neither of you would still wish to do, or providing an income in some other way." He again suggested that the available alternatives would be payment of rent or an increase in Mary's salary.

28. The meeting was held on 10 July 2012, attended by Mary, Jane and Mr Smith. At that meeting Jane said her mother was currently spending something of the order of £40,000 per annum which Jane regarded as excessive because she said she was managing herself on a salary of £12,000. Jane pointed out that it was clear from Joe's letters of wishes that he did not wish to sell any assets and neither did she. Mary said that she did not want to sell assets but her financial position was very difficult. Mr Smith advised that they should not increase the salary paid by the partnership, saying that the present arrangement had not been questioned by the Revenue although Mary was receiving a substantial payment without doing any work. Any amendment he thought might prompt an investigation. He felt that the loan note system should continue and Mary expressed her concern that they were depleting the value of her estate. As a temporary measure, Jane agreed that some forthcoming bills could be paid by HCS provided Mary reimbursed the partnership when funds she had on deposit matured in November of that year. Mary reluctantly agreed. It is clear therefore that at the end of this meeting no resolution had been agreed and the situation continued much as before.
29. On 20 May 2014 Mr Thomson emailed Jane to say that he had been contacted again by Mary saying she was short of funds, which he had hoped they would have resolved between them, but again proposing a further meeting. I have not seen any minutes of that meeting, but about this time Jeff became involved, in order to assist his mother, and began to prepare a "report". In early 2015 he eventually produced a long document setting out his views on the situation. In April 2015 Mary said that she wanted her salary to be increased by £10,000 per annum, and that she would not sign any further loan notes to HCS, as a result of which Jane refused to permit HCS's funds to be used for payment of further household expenses. There was a further meeting on 2 September 2015, at which it appears that there was a further discussion, very similar to those that had been held previously, about the lack of cash and options to remedy it, at the end of which Mary said she would go back to Jeff and take more advice from him. In December 2015, Jane did agree that Mary's salary could be increased to £30,000.
30. In May 2016 Jeff disclosed an opinion provided by Mr Mitchell to Mary. A letter of claim was sent on 18 July 2016 and these proceedings were issued two days later.

Relevant Legal principles

31. There was no significant difference between counsel as to the law to be applied. Mary of course as spouse of the deceased is eligible to make an application under section 1(1)(a) of the 1975 Act. Section 2 of that Act provides that if the court is satisfied that the will of the deceased does not make "reasonable financial provision" for an eligible applicant, it has a discretionary power to make a wide range of orders for her provision out of the assets of the estate, which may be extended to include property jointly held before death. By section 1(2)(a) in the case of a claim by a wife who was living with the deceased at the date of his death "reasonable financial provision" means "such financial provision as it would be reasonable in all the circumstances of the case for a ... wife to receive, whether or not that provision is required for ... her

maintenance." Section 3 sets out a non-exclusive list of matters to which the court is to have regard in determining whether or not the will makes reasonable financial provision for the applicant and, if it does not, whether and in what respect the court should exercise its powers. Section 3(2) provides that in the case of a claim by such a wife the court shall also have regard to the age of the applicant, the duration of the marriage and the contribution she made to the welfare of the family, and to the provision that she might reasonably have expected to receive if on the date of death of the deceased the marriage had been terminated not by that death but by a decree of divorce. The court is not bound to approach the matter on the basis of a hypothetical divorce; apart from the general discretion section 3(2) as amended in 2014 makes expressly clear that it does not set either an upper or lower limit to the provision that may be made.

32. Almost all cases dealing with the exercise of the discretion to permit a claim to proceed outside the six month time limit start with reference to the six non-exhaustive considerations identified by Megarry VC in *Re Salmon* [1981] Ch 167, which Mr Mitchell summarised as follows:
 - i) the discretion is unfettered, and is to be exercised judicially and in accordance with what is just and proper
 - ii) the onus is on the claimant to establish a substantial case for the claim to proceed despite the normal rule, which Megarry VC said was "no triviality", noting that the rule was a substantive provision and not a mere procedural time limit imposed by rules of court which might be treated with indulgence
 - iii) it is material to consider how promptly and in what circumstances the claim has been brought outside the time limit
 - iv) it is material to consider whether negotiations were commenced within the time limit, or whether any delay after the expiry of the limit may be accounted for by negotiations
 - v) it is relevant to consider whether the estate has been distributed before a claim under the Act has been made or notified
 - vi) it is relevant to consider whether the claimant has any other redress, for example against advisers, if permission is refused.
33. The court should also consider whether the claimant has an arguable claim, which is to be approached on the basis of considering whether it would be sufficient to survive an application for summary judgment; see *Re Dennis* [1981] 2 All ER 140. Mr Burton concedes that Mary's claim passes this hurdle. Mr Mitchell urged that I should go further and approach the matter on the basis that Mary would have a very strong claim to provision equal to half the matrimonial assets, on the basis that she was the wife of a multimillionaire with a 45 year marriage and provision on divorce would have started from consideration of equal division, from which he said there were no strong reasons to depart.
34. I acknowledge that there would be an arguable case, if the claim proceeded, for provision on that basis, but I do not think it is right for me to speculate, still less to express any conclusion, on the strength of that argument or the result that might be arrived at if I were to grant permission. Mr Burton makes the point that a divorce

court could have regard to the fact that a substantial part of the assets consists of inherited family wealth. Further, it is clear that hypothetical provision on the basis of a divorce is not determinative; the fact that the will made provision for Mary as the beneficiary of a discretionary trust with guidance given by letters of wishes would be relevant for the court dealing with a claim under the 1975 Act in considering not only whether the will made "reasonable provision" but also whether it was fair and just to depart from the wishes of the deceased by making different provision. It is not necessary for me to decide whether Mary's claim would be a strong one, and I decline to do so.

Submissions and discussion

35. Mr Mitchell acknowledges that the claim is brought a very long time after expiry of the six month time period; longer than in any reported case in which permission has been granted. That however he submits is not fatal; what is important is the context and the reasons for the delay. In that respect he submits that Mary did not understand her position as a discretionary beneficiary, or the financial implications for her, until Jeff began to assist her in 2014. She says in her witness statements that she always believed she was the owner of half of all the matrimonial assets (and one of the additional claims she seeks to bring if permission is not given is that she is so entitled, by virtue of her understanding prior to her husband's death). No estate accounts had been produced which might have shown that all the assets were contained the estate. Although she had been involved in meetings before the will was entered into, she had not understood what was discussed about the discretionary trust arrangements. She had not had to be concerned whilst her husband was alive with family finances or how to finance her lifestyle and was not prepared for the costs that would be incurred in doing so after his death. She had deferred to Jane's wishes or placed Jane's interests above her own, which he said Jane had abused. As a result her income position and savings had eroded over time to the point where she was compelled to take advice from Jeff and then realised her position. In her witness statement, Mary said that she had been assured by her husband that after his death she would be a wealthy woman, and Mr Mitchell submitted that she had relied on that assurance.
36. Mr Mitchell further submitted that at no point until receiving his own advice in 2016 had she been advised that she would be entitled to make a claim under the 1975 Act. Up until Jeff's involvement she had relied on the professionals who had given legal and financial advice to her husband or the family in general, none of whom had alerted her to the possibility of such a claim. She was loyal to them as having been advisers to the family and did not question what they said, but none of them in their advice had been considering her separate position. It was understandable, he said that she had not sought any separate advice on her own position.
37. I should record that although her witness statements may have hinted at an allegation, Mr Mitchell made it expressly clear on instructions that Mary does not contend that Mr Thomson was guilty of any breach of duty owed to her as a solicitor. She has withdrawn an allegation in her first witness statement that she was not told to seek separate advice on her own position, having seen Mr Thomson's records which make it plain she was so advised on more than one occasion.
38. Mr Mitchell relied on *Stock v Brown* [1994] 1 FLR 840 in which Thorpe J dismissed an appeal against a district judge's order granting permission for a claim brought by a widow some six years after the grant of probate. The deceased's will had given her a life interest in the estate, the effect of which was that she was entitled to an income

from investments which for the first five years after death amounted to about £9000, which was sufficient for her needs. Thorpe J held that the case was exceptional because in 1992 there had been a dramatic fall in interest rates as a result of which her income fell to about £4000 per annum. He said that the claimant would never have considered a claim if this had not happened and that "the real trigger [for the claim] lies in extraneous circumstances and its activation is either fortuitous or dependent upon national and international factors far removed from the applicant's control." The circumstances here, Mr Mitchell said, were similar in that Mary had not received any advice about the possibility of making a claim, and her income had fallen.

39. Mr Mitchell submitted that there was no difficulty in making provision for Mary even after this long time because the assets of the estate had not been distributed. There was no formal recognition of the conclusion of the administration of the estate and passing over of assets to the executors as trustees of the will trusts, and even if that was found to have happened, the trustees retained sufficient assets to make any provision necessary. It would be easier and cheaper to resolve her claim by allowing the Inheritance Act claim to proceed than by forcing her to bring her additional claims including claims to existing beneficial ownership of assets and to set aside previous transactions in favour of Jane.
40. Mr Burton submitted that Mary's evidence as to her subjective lack of understanding was incredible. Her first witness statement setting out her case in this respect had been made before she had seen Mr Thomson's witness statement and the documents that he produced, and in many critical respects was so in conflict with his evidence and those documents that the only reasonable inference must be that she had not told the truth.
41. His overarching submission was that it was clear on the evidence that Mary had known from the beginning the effect of the will and of the operation of the discretionary trust, in which she had participated throughout fully acting as an executor and trustee, and that she had known from a very early stage, at least since 2009, that she was in financial difficulties through lack of income and that this was caused because the estate assets were not producing sufficient income to meet her requirements. She had been perfectly prepared to go along with the arrangements for making the will and operating the discretionary trust, many of which were designed to reduce tax, and resisted repeated advice from Mr Thomson that consideration should be given to selling assets or charging rent, notwithstanding that she knew that there was no other available source of cash.
42. It was unlikely, Mr Burton said, that Jeff had not been involved with his mother's affairs until 2014 as he claimed, pointing out that Mr Thomson had made a note of a telephone conversation from Jeff shortly after Joe died in which he complained about the provisions of the will and said that in his view "mother was entitled to half the assets", the implication being that he understood she was only a discretionary beneficiary with no substantial assets in her own name. He pointed out that the proceedings were not commenced until the middle of 2016, at least two years after Jeff became actively involved, and that he could have assisted his mother to take advice and if she wished to bring proceedings well before she eventually did. Jane regards Jeff as the driving force behind the present claim, which would not generate any more income for Mary as was its asserted objective, but would have the effect of transferring assets to Mary which could then be passed to Jeff, enabling him to benefit from the development value now anticipated and evading Joe's long held clear wish that he should be excluded.

43. Mr Burton submitted that the circumstances of this case were much closer to those in *Berger v Berger* [2014] WTLR 35, in which a widow sought to bring a claim over six years after the grant of probate. In that case the widow's income was substantially dependent on payment of dividends from a company which managed a property portfolio, but the directors pursued a policy of retaining profits within the company for improvement of the portfolio rather than payment of dividends. The Court of Appeal set aside the order of the judge below and exercised the discretion itself, refusing permission despite finding that the claim would be reasonably arguable and that it would be possible to make provision without disturbing distributions already made, because it was apparent on the evidence that the widow had known for some years that she was in financial difficulties and that the cause of them was that she was dependent upon income from the estate which she could not control, but had nevertheless delayed in taking advice or considering whether she had any remedy available because she was reluctant to disturb family arrangements.
44. I bear in mind that Mary's evidence has not been given orally and tested by cross-examination. Mr Mitchell's skeleton argument sought to blame Jane for this, saying she had resisted all suggestions that the matter be dealt with by way of trial on oral evidence. But the order for trial on written evidence was made by consent, so even if that was the position that Jane preferred rather than Mary, in the end it is one that both parties agreed to. Mr Mitchell accepted that I could disbelieve Mary's written evidence if it was clear that it could not possibly be true in the light of the contemporary documentation. But it seems to me that since the parties have agreed that the matter should be heard on the basis of written evidence I can go further than that, and whilst I should refrain from making findings against Mary on serious matters such as whether she might have lied or been dishonest, it is proper for me to take account of the weight of evidence before me as a whole and where appropriate of the relative likelihood of Mary being able to make good at trial her evidence where it is in conflict with other witnesses and the contemporary documents.
45. It is I think very difficult to imagine that Mary would be able to make good the claim that she did not understand at the time the will was made that its effect would be to transfer all of the assets that were in her husband's sole name to the discretionary trust. Mr Thomson's evidence is that he had prepared a number of previous wills for Joe, and in relation to these his discussions had always been with Joe and Mary jointly. Previous wills made in 1997, February and June 1998 and 2000 all provided for discretionary trusts of the residue of the estate, with variations in the class of beneficiaries.
46. There is in particular a note of the meeting on 11 November 2003 (p360) at which he discussed Joe's last will with Joe and Mary (and in the latter part of the meeting Jane as well) including the terms of the discretionary trust which was said to have been discussed at length and the fact that the discretionary beneficiaries were Mary, Jane and her family but excluded Jeff and his family. Mary herself told Mr Thomson that Joe had written a letter explaining why Jeff was excluded, to be opened in the event of his death, and in her presence Joe gave some details about the disagreement that had arisen between him and Jeff as a result of which he was determined that Jeff should take no benefit from his estate. There was a discussion about whether Jeff might be able to challenge the will. The discussion included "whether the discretionary trust was the right vehicle to use in the will and it was agreed that certainly for Mary's lifetime that was the right way to deal with it. The question was posed as to whether on Mary's death the assets would pass outright to Jane... Joe's feeling was that the

discretionary trust should remain in place for Jane's lifetime and onwards for the benefit of the three grandchildren." It must have been apparent from this that the assets would be held by the trustees rather than Mary. The implication is that the discretionary trust was "the right vehicle" during Mary's lifetime in part at least so that she would not inherit any assets that could be passed on to, or claimed by, Jeff on her death. When Jane joined the meeting she expressed concern as to whether the assets of the estate would be sufficient to provide an income both for Mary and for Jane and her family, so it is clear this potential issue was known before Joe died.

47. It is apparent from the notes that Mary participated in the discussion at this meeting, and very difficult, to say the least, to believe that she can have done so without any understanding of the matters under discussion, or, to the extent that she did not understand, without that being apparent to Mr Thomson. I have no doubt that if he had felt that Mary did not understand he would have taken steps to explain matters carefully to her, and it would be apparent from his subsequent correspondence that he was doing so. All of that correspondence shows that he treated her as an intelligent and capable lay person with full knowledge and recall of the facts. Further, Mary appears to have accepted the strategic objective of keeping Joe's assets from passing to Jeff; she herself told Mr Thomson of the existence of the explanatory letter and when after Joe's death additional property was appointed to her in order to avoid IHT she did not seek to subvert Joe's plans by retaining it but passed it on to Jane relatively promptly.
48. It was immediately after this meeting that the first of the two letters of wishes was executed, and its terms create a strong inference that Joe did so because he wanted to make provision for Mary's income from the discretionary trust.
49. Many of Mr Thomson's contemporary notes and letters refer to Mary's position as a beneficiary of the discretionary trust and her dependence upon income from the estate assets. His letter to her of 18 August 2005, before probate was granted, is mainly addressed to inheritance tax and the principal point that he makes in it is that the value of the estate above the threshold is liable to tax but that assets passing to a spouse are free of tax, and that "Joe's will sets up a very flexible discretionary trusts such that the three of us, as executors, have the ability to appoint additional property to you if we so wish. That could be done in order to reduce and quite possibly eliminate any IHT payable at this point." He evidently felt that she was able to understand this advice, which starts from the position that unless something is done the will provides that assets will go to the trustees and not Mary, and there is nothing else in the evidence, apart from Mary's denial, to indicate that she could not or did not do so.
50. Mary likewise participated in decisions as to the management of the estate assets, including the appointment of assets to herself and to Jane to avoid tax, the decision to decline to transfer assets to Jane at her request and the pursuit of the litigation against Hilda. It is difficult to believe that she can have done so without understanding the nature of the estate and what the issues were, or that if she had misunderstandings these would not have been apparent to Mr Thomson.
51. In relation to her own financial difficulties and the source of them, Mary made her own complaints to Mr Thomson from May 2009 onwards. His records of those complaints, and the conversations meetings and correspondence concerning them, show clearly what Mary understood about the cash flow issues. There does not appear to be a written record of the conversations and discussions in 2009, save that there is a copy of a letter written by Mr Smith advising Mary about the imminent charge to tax

on her salary and the fact that if Jane paid rent that would be taxable in Mary's hands. From 2011 onwards however Mr Thomson has notes of key meetings and conversations, and there is no reason to believe that these are not entirely accurate.

52. In particular in the note of the meeting between Mr Thomson and Mary on 16 August 2011 it is recorded that the discussion concerned her position as a beneficiary of the discretionary trust, her financial difficulties, the existing arrangement that she received a fixed income as a partner in HCS and the fact she needed more than that to meet her living expenses. Mr Thomson regarded it as contrary to the wishes of her husband that she should be in financial difficulties and explained the problem that "there is no cash in the estate, only real property assets and [Mr Thomson] has said on several occasions that as trustees we should consider selling some of the real property in order to provide cash for Mary's benefit. We discussed and agreed however that Mary's daughter Jane has always been completely set against selling anything."
53. There were very similar discussions on several occasions thereafter, generally initiated by Mary herself complaining about a shortage of cash and always leading to Mr Thomson reminding her that the reason for this was that the estate assets were producing no income with the result that she was dependent on the salary from HCS and making clear that he personally would support measures such as the sale of assets in order to realise cash for her benefit, but with Mary herself drawing back from insisting on such steps because she, or Jane, or both, was reluctant to sell assets.
54. It is not surprising that there was a reluctance to sell farming land assets; plainly it was shared by Joe as he made clear in his first letter of wishes. Furthermore, in respect of large parts of the landholding there were hopes that development value could be realised. Even if this was not the case in respect of all of the land, there may have been future potential for the remainder, or a desire to retain land which had no development potential for farming once any developable land had been sold off.
55. It is true that neither Mr Thomson nor any of the other advisers appears to have mentioned at any stage the possibility of considering a claim under the 1975 Act. His own explanation of this is perfectly plausible; Mary does not appear to have been raising with him any suggestion that she had not understood the arrangements made by the will or that she regretted them or wished to change them. What she wanted was for matters to be managed under those arrangements in some way so as to provide more income to her. Nor is it the case (as Mary now accepts) that Mr Thomson had not advised her that she should seek separate advice if she wished to about her own position. Mr Thomson made it clear on several occasions that his role was to advise the trustees as a body and if either Mary or Jane needed advice on their personal position they would have to obtain it separately from another solicitor.
56. Further, it is apparent that Mary knew, probably from 2009 onwards but certainly from 2011, that Jane was reluctant to agree to providing any further income to her, either from HCS or by payment of rent. She made her own complaint about this, and it was the subject of the numerous meetings that were held either separately between her and Mr Thomson or jointly involving Jane, over the years thereafter.
57. In the circumstances, even if Mary were to surmount the hurdle of showing that she had not understood at the time of the will that she was not the owner of half the matrimonial assets and had only an interest as a discretionary beneficiary, it is more than difficult, making every allowance in her favour where there is no contemporary documentary record it is simply impossible to believe that she was not fully aware of

that by at least the middle of 2011, and similarly impossible to believe that she was not by then at least aware that she had only a fixed income available to her and that the prospects of receiving further cash depended upon either Jane agreeing to pay more from the income of HCS (which she was evidently unwilling to do) or sale of assets which would have to be agreed by all the trustees.

Conclusion

58. Drawing all these matters together, in my judgment the claimant has not made out a sufficient case that is right and just to permit the claim to proceed. I take full account of the fact that she has at least an arguable claim, and that if it were to succeed at anything like the basis that Mr Mitchell put forward it might result in a transfer of assets to her of substantial value. I assume in her favour that if such an award was made it could be limited, or otherwise structured, so that it could be provided for out of the assets that remain in the trustees' hands. I recognise also the financial difficulties that Mary has been in for some years now, and the distress that it must have caused her that these have led to disagreements between her and Jane. Mr Burton is right however that it is not necessarily the case that any such transfer would result in an immediately increased availability of cash. Such cash as there is in the estate is generated by Jane's business, and I am not in a position at this hearing to conclude that she has been unreasonable in the amount of that cash that she has allowed, through one route or another, to be paid to Mary. I suspect it is unlikely that if more land were transferred to Mary she would take a different view about selling it than she has to date, so the prospect of it producing cash would depend upon either borrowing against it pending sale or realising development land at an appropriate time. Both of those are things that the trustees can do just as well as Mary could if she were the sole owner.
59. This is not a case in which any material facts have been concealed from Mary at any stage, or where she has been misled by Jane or the trustees. I reject any suggestion that he was misled by, or out of vulnerability or misunderstanding deferred to, the advice of professionals, or that the professionals prioritised Jane's interest over her own. On the contrary, Mr Thomson in particular made it abundantly clear that he supported her wish to have additional income and he did everything he could to explore the options of generating it with Mary and Jane, including an application to court if Jane would not agree, but Mary evidently did not want to pursue that. Nor is it a case in which the claim is been made necessary by any supervening event outside Mary's control, either an unexpected external event or some act or conduct for which Jane or the trustees are responsible.
60. I reject also any suggestion that the delay in bringing the claim has been occasioned by Mary placing reliance on generalised statements that she says her husband made to her before his death along the lines of "you will be a wealthy woman after I die". If he said that, it was true in the sense that she would have an interest in the very substantial assets of his estate. Even as she expresses it, it was not an assurance that she would have any particular level of income, and it is perfectly clear in my judgment that she knew the nature of the assets that Joe would be leaving and that the availability of income and cash from them would depend upon the management of those assets. It is, as I said above, very likely indeed that she knew exactly the implications of the discretionary trust, in the sense that it meant that control of the assets and the income they produced was in the hands of the trustees rather than herself, at the time the will was drafted. Even if she did not fully appreciate these implications at that stage, she

certainly did by 2011 at the very latest so her delay from then on cannot be explained by reliance on anything Joe said before his death.

61. The reality is that Mary took her own decision to continue to work within the arrangements provided for by the will rather than to explore whether she had any option available to vary them, in the full knowledge of the financial difficulties she was under, and maintained that decision over a very long period. It is true that she was not explicitly advised that she might consider a claim under the 1975 Act, but she accepts that Mr Thomson was not under any duty himself to give her that advice, and he did on several occasions advise her that if she wished to have advice about her own position she should seek it separately. She was fully capable of acting on that if she wished to do so, and if she needed any support (which I doubt) she had support from Jeff available to her. He is an experienced and wealthy businessman and would have been able to assist her at any time in obtaining any advice she might have needed. Even if it is the case (which seems unlikely) that she made no mention of her difficulties to Jeff until 2014, he was plainly actively involved from at least early in that year and yet Mary did not seek any external advice for a further period of about two years.
62. In all this time the trustees, and Jane in particular, have continued to manage the assets, and Jane and her family have had the legitimate expectation that they would eventually inherit them in accordance with the will and Joe's wishes. Given the very extensive delay, the operative cause of which was Mary's own failure to take any steps to explore whether she could disturb those arrangements, it would not be right to give her permission to do so now.
63. I recognise that this may have the effect that she will seek to pursue the additional claims that have been floated in these proceedings, and I say nothing about them. If she does so, their merits will be explored at a future stage.
64. I invite the parties to agree an order to reflect this judgment. I will list a date for it to be handed down; there need be no attendance if the order is agreed.