TRANSCRIPT OF PROCEEDINGS

[2019] EWHC 214 (Fam)

Ref. FD17F00099

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

The Royal Courts of Justice
Strand
London

Before THE HONOURABLE MRS JUSTICE LIEVEN

T (Claimant)

- v -

V (First Defendant
W (Second Defendant)
X (Third Defendant)
Y (Fourth Defendant)
Z (Fifth Defendant)

MS ALLARDICE appeared on behalf of the Claimant
MR JAMES WEALE appeared on behalf of the First, Second, Third and Fifth Defendants
MS LISTER appeared on behalf of the Fourth Defendant

JUDGMENT
15th JANUARY 2019, 15.04-15.09; 15.09-15.32; 16.09-16.13; 16.40-16.45
(AS APPROVED)

The first part of this judgment was delivered in private the Court them moved into open court.. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MRS JUSTICE LIEVEN:

1. I need to start by giving a ruling as to whether I am going to give this judgment in open court or not. This is a case under the Inheritance Act 1975 where an application is made before me under section 5 of that Act for interim relief, "an interim payment."

2. The first issue that arises is whether I should give this judgment in open court. The question of whether or not the case should be heard in open court was raised briefly yesterday morning at the beginning of the proceedings and the claimant resisted it being heard in open court and, for reasons largely of timing, I decided to proceed in chambers.

3. However, this afternoon, just before I gave judgment, Mr Weale pointed me to the Practice Guidance - Interim Non-disclosures Orders [2012] 1 WLR 1003 as set out in the White Book and, in particular, paragraphs 9-11, derogations from the general principle - open justice:

> "Open justice is a fundamental principle. The general rule is that hearings are carried out, in and judgments and orders are, public: see Article 6 of the Convention."

> And then paragraph 10:

> "Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice."

> Paragraph 11:

> "The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test..."

4. Mr Weale also points me to the notes in the White Book under rule 39.2 in respect of the general rule for hearings to be in public and the exception in respect of (g), "The court considers it to be necessary in the interests of justice". And he points me to the notes in the White Book that refer to a judgment of Morgan J, *V v T [2014] EWHC 2432 (Ch)*, where Morgan J referred to the practice guidance that I have just referred to and noted that:

> "Derogations from the fundamental principle of open justice can only be justified in exceptional circumstances where they are strictly necessary..."

And he then sets out various factors to take into account.

5. Ms Allardice, who appears for the claimant, did refer me to Practice Direction 39A, Miscellaneous Provisions Relating to Hearings, and paragraph 1.5:

> "The hearings set out below shall in the first instance be listed by the court as hearings in private under rule 39.2(3)(c), namely ..."

Under (9) that includes proceedings under the Inheritance (Provision for Families and Dependants) Act 1975.

6. However, it does appear that the 2012 Practice Direction postdates PD39A and, therefore, so do the comments of Morgan J . Further, the importance of hearings being held in open court has perhaps come to the fore somewhat more in recent years. Critically in this case, I can see no good reason for this judgment not to be given in open court. It does not concern the welfare of children. There are no particularly confidential financial matters at stake, nor any particularly confidential personal matters that will be revealed.

7. It seems to me that the importance of open justice referred to in the Practice Direction and the need to justify derogations only in exceptional circumstances, points very clearly on the facts of this case to the appropriateness of delivering this judgment in open court.

8. I do, of course, take into account PD39A. And it may well be that in some 1975 Act cases it is appropriate to hold them in private, but it does not appear to me that paragraph 1.5 is not indicating that all such hearings should be heard in private and, therefore, in my view the general principles as to open hearings apply.

9. Therefore, I am going to deliver this judgment in open court, although I suspect in practice it is not going to make very much difference except somebody will remove the notice on the door. It does however allow for the judgment to be recorded for open consideration and reporting.

MRS JUSTICE LIEVEN:

10. Turning to the substantive judgment, the case, as I have said, concerns a claim under the Inheritance (Provisions of Family and Dependants) Act 1975, the substantive claim being made under section 1(1)(e). The substantive case is listed for a five day

hearing commencing on 18 March 2019. The application which I have before me is one made by the claimant for interim relief under section 5 of the Act. That application was issued on 8 February 2019.

11. The claimant is represented by Ms Allardice. The first, second, third and fifth defendants in their capacity as beneficiaries are represented by Mr Weale; and the fourth defendant, who is a solicitor executor, and, as I understand it, the other defendants in their executor capacity, were represented during the hearing by Ms Lister. I should record that Ms Lister entirely appropriately did not make any submissions. The claimant's application under section 5 was made for a payment of £155,000 for the purpose of meeting legal fees to trial. The substantive claim was lodged in October 2017.

12. The background, briefly, to this case is that the claimant had known the deceased, since 2001. She has undoubtedly been in a relationship of some form with him for parts at least of the period since then up to his death on 26 June 2016. The claimant's case is that she was in a sustained romantic relationship with him throughout the period with significant periods of cohabitation. It is her case that the deceased supported her financially and that she meets the terms of section 1(1)(e) of the 1975 Act.

13. The defendants, although accepting that the claimant was in a relationship with the deceased at various times, dispute large parts of the claimant's case and submit that she does not meet the terms of section 1. I am very conscious that I need to be careful not to prejudge issues for the trial of this matter, which, as I have said, is listed for five days and where oral evidence will be heard.

14. The statute, as relevant, is as follows, section 1.1:

> "Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons ... (e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly by the deceased; that person may apply to the court for an order under section 2 of this Act on the ground 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 as to make reasonable financial provision for the applicant."

15. Section 5 as relevant states, it is headed Interim Orders:

> "Where on an application for an order under section 2 of this Act, it appears to the court - (a) that the applicant is in immediate need of financial assistance, but it is not yet possible to determine what order (if any) should be made under that section; and (b) that property forming part of the net estate of the deceased is or can be made available to meet the need of the applicant; the court may order that, subject to such conditions or restrictions, if any, as the court may impose and to any further order of the court, there shall be paid to the applicant out of the net estate of the deceased

such sum or sums and (if more than one) at such intervals as the court thinks reasonable; and the court may order that, subject to the provisions of this Act, such payments are to be made until such date as the court may specify, not being later than the date on which the court either makes an order under the said section 2 or decides not to exercise its powers under that section."

16. The claimant advances her application on the basis of her need to pay legal fees. The defendants accept that section 5 can be used to cover the cost of legal fees on the basis of the case of *Smith v Smith [2011] EWHC 2133 (Ch)*, a case which I will refer to below. The passage in respect of legal fees is at paragraph 41. There are, certainly as far as this case is concerned, two requirements under section 5. The first which I will deal with is that the claimant is in immediate need of financial assistance. And the second is that there must be some form of merits test or threshold level as to the claimant's substantive claim.

17. There is little case law on section 5 and the test to be applied when an application is being considered. The starting point, certainly on the facts of this case, is that the section 5 application is for a mandatory order to pay money which the claimant may ultimately be found not to be entitled to and where there is no possibility of a cross undertaking in damages. It is therefore a very draconian order.

18. On the facts of this case, Ms Allardice very fairly accepts that there is a real likelihood that, if the claimant loses the case ultimately, any money paid under section 5 will not be repaid. It must, therefore, be right that I approach the application under section 5 with considerable caution and that the evidence the claimant puts forward is very carefully scrutinised. It must follow from that that there is a strong onus on the claimant to present all the relevant evidence to support her application.

19. In the case of *Smith*, which I have referred to above, Mann J considered an application under section 5 and he emphasised the need for clear evidence and, in particular, clear supporting evidence of financial need before an application under section 5 should be acceded to. I am conscious, as Ms Allardice pointed out to me, that the factual issues in *Smith* were rather different and the context was different, but Mann J's comments on the type of evidence requirements under section 5 hold good in the present case.

20. The most relevant paragraphs in *Smith* are as follows.

Paragraph 24:

"The case of the claimant on the basis of the witness statements relied on for the purpose of this application (which numbered six, including one filed this morning) presents a thin case on need. In fact, the principal focus of most of those witness statements is not her financial need, but the testamentary capacity or incapacity of the deceased. She sets out in amounts what she says her present income is, but does

no vouching, produces no documents and produces no explanation of things which obviously require an explanation and which at least in one respect has been demonstrated to be significantly deficient."

Paragraph 30:

"She claimed to have one bank account with Barclays. She has not produced any statements from which a limited investigation of her financial means would no doubt be possible. How far it would take one, one does not know, but she did not produce them. True it is she was not challenged to produce them, but it seems to me it behoves an applicant in an application under section 5 to proffer to the court and to the other side convincing evidence of the case that there is immediate financial need. Mere statements of fact are not necessarily going to be sufficient and, on the facts of this case, they are certainly not sufficient."

Paragraph 38:

"I am, therefore, not satisfied on the basis of her evidence and her cross-examination that she has made out the immediate financial need which success on an application under section 5 requires her to establish. I do not think that the evidence presents a sufficiently clear picture for me to come to that conclusion, and the fault is hers. She could have made a clearer picture had she been clearer in her evidence and clearer and more convincing in her cross-examination."

And, 41:

"The need to pay for lawyers to conduct this litigation may undoubtedly be viewed as a need and, in the absence of other assets, might be viewed as an immediate financial need for the purposes of section 5. The need to repay friends' loans which they have let outstanding for many years, if her evidence is right, is not an immediate financial need, at least not in the absence of indications that they are seriously pressing for repayment and really did require repayment. In the circumstances that further weakens her evidence."

Before leaving the case of *Smith*, I should just make clear that there was no application to cross-examine in the present case.

21. The other case that provides some assistance on this application is that of *Rubin v Rubin [2014] EWHC 611 (Fam)*, a judgment of Mostyn J concerning the powers to make a legal services payment order under section 22ZA of the Matrimonial Causes Act 1973. Although the statutory basis is different, there are pointers to the approach in a sectio5 application.

22. At paragraph 13 of Mostyn J's judgment, he sets out a long list of the applicable principles to be applied to an application for an LSPO and, although not all of those principles arise, it does appear to me that they provide some assistance; in particular (iii) and (iv):

> "Where the claim for substantive relief appears doubtful, whether by virtue of a challenge to the jurisdiction, or otherwise having regard to its subject matter, the court should judge the application with caution. The more doubtful it is, the more cautious it should be."

(iv):

> "The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings."

23. Mostyn J then goes on to consider the likelihood of an applicant in those type of proceedings being able to fund litigation through some other means. Ms Allardice suggests that there will be very significant problems, if not insuperable problems, with obtaining any such funding in an Inheritance Act case such as this. I am not in a position to reach a judgment on that, although I do note, as I will return to, that there is no evidence of any attempt to achieve funding by any other means.

24. Returning to the case of *Rubin*, Mostyn J made clear in that case at paragraph 15 that, in his view, the principles that he had set out above would apply to applications under the Inheritance Act 1975.

25. In terms of the correct approach, Mr Weale sought to rely by analogy on the provisions in CPR 25.6 and the very strict requirements in that rule that need to be met before an interim payment under that rule is made.

26. However, I do not think it is appropriate to apply the approach under CPR 25.6, because the rules there set out express requirements as to the level of merits of the case before any payment is ordered. Similar provisions are not set out in section 5 of the Inheritance Act. However, I do accept Mr Weale's general argument that, given the very nature of such an interim order, considerable caution must be applied. This cautious approach can be analysed under Article 1 Protocol 1 of the European Convention of

Human Rights and the requirement for proportionality in a decision to effectively deprive someone of property after an interlocutory hearing, but almost certainly with a permanent effect. I therefore consider that the cautious approach which I should adopt involves ensuring that any order that I make is proportionate under A1P1.

27. Although Ms Allardice submitted that some care was required in applying the *Rubin* factors because of the difficulty of getting alternative funding, as I understand it she does dispute the point made at paragraph 13(iii) by Mostyn J that caution will be required where the claim for substantive relief seems doubtful. She does, as I understand it, also accept that the merits of the substantive claim must have some relevance to whether a section 5 order is made.

28. I will deal, first - although it is not essential that they are in this order - with the question of whether the claimant has satisfied me that she is in immediate need of financial assistance. It is my view that her evidence is far from sufficiently clear or comprehensive on this matter.

29. The deceased left the claimant 50 per cent of a SIPP, which amounted to some £196,000, which she received in January 2017. Her witness statement of 8 January 2019- that is her fourth witness statement - gives little detail of how a large part of this money has been spent.

30. I note that her evidence on financial need relevant to this application is limited to six paragraphs in that fourth witness statement, paragraphs 13 through 18. She has produced no bank statements and no supporting evidence in respect of how that money has been spent or any breakdown either of the legal fees she has already spent or those to be owed in the future.

31. She says in the witness statement that she has spent £52,000 on legal fees and owes a further £80,000 and that she now has £64,000 only in her bank account. She makes reference in the witness statement to charitable donations and support for individuals in Ghana, but there is neither any detail as to these payments nor anything from any bank accounts, nor is it at all clear to me why that type of expenditure should ultimately be paid by the estate rather than by the claimant if she chooses to do so. And, as I have said, there is no documentary evidence supporting the nature of any of those payments.

32. It is, in my view, clear from the above that the claimant has not come close to satisfying the kind of evidence that Mann J was looking for in the *Smith* case and this is particularly important given the nature of the claim and the onus on her to justify the making of a section 5 order. I also note that there is no evidence from her solicitors suggesting that they would refuse to act if they were not paid the outstanding sum, nor was there any evidence of attempts to get either legal insurance or enter into any form of conditional fee agreement.

33. It may be that it would not be possible to reach such an arrangement in a case such as this but I would have expected to see evidence on the point. Mr Weale also submits that, if the claimant had genuinely needed financial assistance to pay her legal fees, then it seems reasonable to expect that she would have made the application under section 5 well before 8 January 2019. I agree with this argument.

34. This application has been made very late in the day both in respect of the proceedings overall but also after the indication from Mostyn J at the previous interlocutory hearing that if an application was to be made it should be done so by early December 2018. Ms Allardice says that the claimant has been unwell and that is why the application was delayed but, yet again, I have no supporting evidence for that. I only have Ms Allardice's submissions. I should make clear, I have no doubt whatsoever that Ms Allerdice does so on instruction but, again, given the strong objections that the defendants were making about the timing of the application, I would have expected to see evidence of ill-health. For these reasons, I do not think that the claimant has satisfied the burden upon her to show immediate financial need within the terms of the statute.

35. In those circumstances, it is not strictly necessary for me to consider whether the claimant would satisfy a merits test under section 5. However, for completeness, I will briefly deal with the point. Given the impact of a section 5 order, particularly in circumstances where, as I have said, repayment is unlikely, a claimant would have to show that they had, at least, in my view, a strong arguable case.

36. It may often be the case that the principle of entitlement under section 5 is agreed and, therefore, the only issue is quantum. In those circumstances, it may be relatively easy to satisfy a merits test for a section 5 application. But, here, the defendants strenuously resist any eligibility under section 1 of the Act.

37. In respect of the entitlement under section 1, the defendants have produced a large number of witness statements disputing much of the claimant's evidence as to the nature and duration of the relationship with the deceased and as to the degree of financial support.

38. Ms Allardice submits that much of this evidence is unimportant or irrelevant because there is a draft will and attendance note from 2014 which sets out the deceased's view of his relationship with the claimant. It would not be appropriate for me to express any detailed view on that evidence or to prejudge the issues at trial, but it is quite clear from the evidence that has been submitted that the defendants will raise arguments about the weight to be attached to the 2014 evidence. Further, and, in any event, those 2014 documents relate, self-evidently to 2014 and consideration under section 1 will have to be given to events thereafter.

39. All that that material shows is that there are clearly arguable points on both sides and that the defendants have arguable points to be made against the claimant having an entitlement. In those circumstances, I think that it would, in any event, be wrong to make an order under section 5 for such a large sum where there is absolutely no security or even very much likelihood that it would be repaid.

40. In my view, making an interim payment under section 5 would effectively be prejudging a part of the section 1 issue in a manner that would not be right on the facts of the case. For these reasons, I reject the application.

MRS JUSTICE LIEVEN:

41. On costs, I will deal with the principle of costs on both orders and whether they can be dealt with by summary detailed assessment. Dealing, first, with the section 5

application, the defendants won that application, plain and simple. They won in large part because the claimant simply did not produce the relevant evidence despite the fact that she was professionally represented and her representatives were well aware of what Mann J had said in *Smith*.

42. In my view, it is, therefore, appropriate to make an award of costs in the defendants' favour in respect of that application. I am not going to defer that payment of costs. I have considered the guidance in paragraph 37 but, really for the same reasons that I rejected the application itself, I just do not think I have the evidence to reach a conclusion that it would stifle the litigation if I did not make the normal order, which is that somebody who has lost an interlocutory application such as this should pay the defendants' costs within 14 days.

43. If she wishes to produce the proper evidence to say it would stifle the litigation, that is a matter for her. In respect of the Part 18 claim, again the defendants won virtually all of that. I accept Ms Allardice's submission that there almost certainly would have ended up being a pre-trial review in the matter, which has some relevance to the quantum of costs I should award.

44. And I think, rather than trying to pick out of any summary assessment or detailed assessment what might or might not have been incurred in any event, I am going to make a reduction in respect of the Part 18 application, a reduction of 20 per cent on any costs.

MS ALLARDICE: Sorry, your Ladyship, sorry to interrupt but, as I understand it, actually where we had got to was simply the ---

MRS JUSTICE LIEVEN: I know, I am going to come to that, Ms Allardice, do not worry, I have probably done things in the wrong order.

MS ALLARDICE: Right.

MRS JUSTICE LIEVEN: I am sorry. But I am still going to keep going and doing them.

MS ALLARDICE: Yes, I am sorry.

MRS JUSTICE LIEVEN:

45. So I am going to make an order for costs in respect of the Part 18. For the same reasons as the section 5, I am not going to defer it. It is appropriate to proceed to summary assessment, even though it is 4.20pm, because I think that, otherwise, simply more costs will be spent on detailed assessment and that does not seem to me to be appropriate.

MRS JUSTICE LIEVEN: The normal rule is that if a case is listed for a day or less, summary assessment is what should be done and it is what is going to be done in this case. I am afraid at this point I am going to bring my administrative court experience to this division. Summary assessment means summary. I am not prepared to go through every figure line by line. I will take a reasonably broad brush approach and, if you are not prepared to take a broad brush approach, I am afraid I will judicially put my pen down.

The costs in respect of the overall action are all relatively small, so I expect both of you to cooperate now in a broad brush approach to the figures.

MR WEALE: I will try and confine myself to one minute, if it ---

MRS JUSTICE LIEVEN:

46. Is there anything else I need to deal with on principle? I have dealt with the principle of both costs orders. I have dealt with not deferring them and I have made clear that, in respect of the Part 18, I will make a holistic reduction for the fact that I think there probably would have been a PTR in any event and I was going to make that in the sum of - in the percentage of 20 per cent.

MR WEALE: Yes.

MRS JUSTICE LIEVEN: So a day's hearing, which would be five hours, would effectively be reduced by one hour by the 20 per cent reduction.

MS ALLARDICE: (inaudible) your Ladyship (inaudible) can I just understand that. Only in relation to though to the Part 18?

MRS JUSTICE LIEVEN:

47. Only in relation to the Part 18. The section 5 claim should, in my view, never have been brought on that evidence. I am not going to make any reduction. It is a broad brush approach.

MS ALLARDICE: I understand but, forgive me, your Ladyship; if, in a sense, you are feeding in the fact that there would have been a PTR, does that not have to be fed in against both?

MRS JUSTICE LIEVEN:

48. No, I do not think so. In my view, the section 5 claim should not have been brought and should not have been brought on that evidence. It came close to being misconceived and I am going to award the defendants, therefore, the unaffected costs of that, albeit we will look at summary assessment to see whether there are any specific figures that you say are too high, Ms Allardice.

MRS JUSTICE LIEVEN:

49. So in terms of the summary assessment, let us see, I am going to just explain briefly my reasoning on the global issues before I - before I turn to the two different schedules. Firstly, it seems to me that the hourly rates for the solicitors are perfectly reasonable. As has been noted, they are less than those for BDB Pitmans Solicitors.

50. I think the split between partner and associate, so far as I can tell, also looks perfectly reasonable. I think one has to accept that partners are going to carry out some supervisory function. And it is holistically important to remember that not just was the section 5 application for a very considerable sum, £155,000, but the main substantive

application, I cannot find the particular figure, was for a very large sum, so it seems to me ensuring that a partner is properly supervising is wholly appropriate.

51. So far as counsel's fees are concerned, it is so difficult to tell when context is all but I cannot see anything unreasonable in Mr Weale's figures. I am sure Ms Allardice is right that, if one did it on an hourly rate, the figures would fall but, as I said in argument a moment ago, apart from work for the Government Legal Service and maybe some other Government agencies, brief fees are still accepted on detailed and summary assessments and the level of brief fees here do not appear to me to be at all unreasonable given the value of the overall claim.

52. As far as new counsel being instructed, again, the amounts for advice, conference, documents do not appear to me to be at all unreasonable and I would expect in a case like this that there would be a duplication of fees between solicitors preparing witness statements and applications and counsel reviewing them and drafting them.

53. I was sufficiently recently at the Bar as to know that in many cases one has that kind of duplication. These fees could maybe perhaps could have been lower, Ms Allardice, but they could have been a very very great deal higher, so I cannot see anything unreasonable or disproportionate given the nature of the litigation.

54. In terms of the specific figures, as far as the Part 18 requests are concerned, I said I would make a 20 per cent reduction because I think there would have been a PTR in any event, although it might have been a half hour hearing; it might have been an hour; it might have been largely agreed.

55. In my view, the vast majority, if not all, of the Part 18 requests should have been responded to properly and promptly and, if that had happened, almost all of these costs could have been avoided. So I think 20 per cent is probably slightly erring on the generous side. So that would, if - Mr Weale can I leave you to do the maths as to taking 20 per cent off the 1200 and 808.

MR WEALE: It is (inaudible) nine six sixty.

MRS JUSTICE LIEVEN: Yes. Well, I am going to ask you to draw up the draft order afterwards.

MR WEALE: Yes.

MRS JUSTICE LIEVEN: So if there is any disputes about the maths, it can be taken up at that stage.

56. So far as the section 5 claim is concerned, section 5 application, as I have said, the holistic points still apply, even more here for a very considerable interim relief application in circumstances where, effectively, it would have amounted to deprivation of property on an interlocutory hearing.

57. I think supervision from the partner was wholly appropriate and counsel having a significant role, as the law is not by any means straightforward. But I am going to make a deduction, and this is completely off the cuff but I am going to make a deduction of £1,000 for Ms R's witness statement. That may be too much, it may be too little, but

summary assessment is supposed to be broad brush. So, again, Mr Weale, can you do the ---

MR WEALE: That will be before VAT then, will it not, so ---

MRS JUSTICE LIEVEN: That will be before the ---

MR WEALE: 12,389.

MRS JUSTICE LIEVEN: And then you will have to re-do the VAT.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge