Neutral Citation Number: [2020] EWHC 3711 (Fam)

Case No: FD17F00003

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2020

Before:

MR JUSTICE WILLIAMS

- -

Between :

ALEXANDER WILLIAM CHARLES WICKHAM

Applicant

- and -

Respondents

(1) WILLIAM REGINALD CONDUIT RILEY
(2) ROBERT PAUL SIBLEY
(as Personal Representatives of the estate of Anthony John Wickham deceased)

(3) MATTHEW JOHN WICKHAM

(4) PENNY-ANN WICKHAM

(5) LISA JOANNE WICKHAM

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The Applicant appeared in person
Simon Redmayne (instructed by **Leathes Prior**) for the **1st and 2nd Respondents**
April Plant(instructed on Direct access) for the **3rd and 4th Respondents and Mr Catchpole**
The 5th Respondent appeared in person

Hearing dates: 23 -25 November 2020

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JUDGMENT

If this 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.

.....

MR JUSTICE WILLIAMS

This judgment was delivered in private. 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.has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

Williams J:

1. [*Chancery is] ... being ground to bits in a slow mill, its being roasted at a slow fire; it's being stung to death by single bees; it's being drowned by drops; its going mad by grains*."

   Tom Jarndyce, Chapter V, Bleak House.

   This is perhaps unfair to the Chancery Division given that these proceedings are in the Family Division. However, as we are now approaching the fourth anniversary of the inception of these proceedings and like Groundhog Day we may (depending on my decision) be about to start the whole process all over again, it seems apt. I get the impression that none of the parties really want to litigate this but the personal feelings of many of those involved, in particular the fifth defendant who openly expresses them, create a poisonous atmosphere around the case which seems to cloud judgements. What the deceased would make of his widow and three groups of children fighting tooth and claw over his estate I have no idea. I assume that the family parties must have some idea and are either content that this is what he would want or one or more of them have sufficiently little regard for his memory that they are content to continue the fight. Who may be responsible for this situation may eventually come to light, but not in this judgment which deals only with procedural issues.

2. Alexander Wickham, (the claimant) is the son of Anthony John Wickham who died on 13 May 2014. Together with his twin sister Isabelle Wickham (both born on 5 December 2000) they issued a claim on 16 January 2017 by their litigation friend, Ruth Dore, under the Inheritance (Provision for Family and Dependents) Act 1975 against William Riley and Robert Sibley ('the first and second defendants') the personal representatives of the estate of Anthony John Wickham on the basis that reasonable financial provision had not been made for them by Anthony Wickham's will dated 1 April 2010. Matthew John Wickham, Penny-Ann Wickham and Lisa Joanne Wickham were also named as defendants. Matthew and Penny-Ann ('the third and fourth defendants') were sued as beneficiaries of the estate. Lisa, the mother of Alexander and Isabelle, (the fifth defendant) was sued as a trustee of the estate and as a beneficiary of the estate. Subsequently notice was given to Karl Catchpole under CPR 19.8A as a member of a class of beneficiaries under the will. He has subsequently made common cause with the third and fourth defendants and has appeared in these proceedings.

3. On 13 November 2018 the matter came before Mr Justice Cohen. The order records that the claimant's and the 1st to 4th defendants had agreed terms to settle the claim. The fifth defendant indicated that day that she wished to consider her tax position under the agreed terms before consenting to the agreed settlement. Mr Justice Cohen recorded that he was satisfied that the disposition of the estate under the will of 1 April 2010 was not such as to make reasonable financial provision for the claimants and that the agreed terms were for the benefit of the claimants and that the court approved of the agreed terms. The fifth defendant wished to seek tax advice on the consequences of the settlement and was not prepared to sign the terms at that point. Cohen J stayed the proceedings until 27 November 2018 for the purposes of obtaining the fifth defendant's signed consent to the terms and provided that if a further copy of the Agreed Terms bearing the signed consent of all parties, Karl Catchpole and Norwich Developments Ltd that the terms of the settlement would come into effect.

In the event that a further copy of the agreed terms was not filed as provided then the matter was to be listed for further directions.

4. On 21 January 2019 the claimant emailed Leathes Prior, the solicitors for the first and second defendants, informing them that he and Isabelle were withdrawing their claim. On 23 January 2019 Isabelle sent an email to Leathes Prior informing them that she and the claimant were withdrawing their claim. On 1 February 2019, Inspire Law, the solicitors for the claimant's litigation friend issued an application notice seeking a determination by the court of the issue of whether the claimant remained a protected party whereby the appointment of the litigation friend had not ceased.

5. On 11 March 2019 the claimant sent an email to all parties attaching a notice of discontinuance (N279) dated 10 March 2019 in respect of his claim. That same day the claimant sent an email to Leathes Prior attaching a notice of discontinuance from Isabelle also dated 10 March 2019. The notices of discontinuance appeared to bear the signatures of the claimant and Isabelle.

6. On 13 June 2019 the matter came before me for the first time on the application by the claimant's litigation friend. The litigation friend was interested in determining both whether the claimant had capacity to conduct the proceedings without a litigation friend but also whether the notice of discontinuance was effective; that to some degree depending his capacity. I invited the Official Solicitor to act as the claimant's litigation friend for the purposes of obtaining a report as to the claimant's capacity to conduct the proceedings.

7. That assessment was carried out by Dr Chisholm an Education and Child Psychologist based at the school where the claimant was a pupil. She concluded that the claimant had capacity to conduct the proceedings [D5 in the Bundle]

8. The case came back before me on 4 March 2020. On the basis of the report of Dr Chisholm I determined that the claimant had capacity to conduct the proceedings and that the appointment of the litigation friend thereby ceased. However, given the fact that the claimant had by this point decided that he wished to pursue the proceedings the issue arose whether he had had capacity at the time he purported to withdraw the proceedings. An update to Dr Chisholm's report was required to answer that question.

The Issues

9. On the 4 March 2020 I gave directions that the following issues be listed for an Issues Resolution Hearing.

    i) Insofar as any party so contends (no party having contended the same before the court on 4 March 2020), whether the terms scheduled to the consent order presented to Mr Justice Cohen on 13 November 2018 and culminating in an order of the same date, are enforceable and, if so, to what extent? The parties may dispense with this issue if they all agree in writing in advance of the issues resolution hearing that the terms are not enforceable;

    ii) Whether the Claimant had litigation capacity at the time he served notice of discontinuance of his claim;

iii) If the Claimant did have capacity at that time, whether the Claimant validly discontinued his claim pursuant to CPR Part 38;

iv) If discontinued, whether as a matter of law the Claimant is able (or might be permitted) to withdraw such discontinuance;

v) If discontinued and alternatively to (d.) above, whether the Claimant should be granted permission to issue a further claim under the 1975 Act in respect of the provision made in the deceased's will, pursuant to CPR r.38.7; and

vi) What consequential case management directions, if any, will need to be made to dispose of the claim (or any new claim).

10. At the hearing on 4 March the first and second defendant had indicated that they might need to make an application to sell property comprising part of the estate in order to meet the costs of the administration of the estate including costs relating to property maintenance. I made provision for the issues resolution hearing to be heard by a Judge of the Chancery Division if such an application was issued in the Chancery Division. No such application has been made and so the issues resolution hearing has remained for determination with me.

11. The Statement of Issues identifies some further issues as potentially requiring determination.

However, given Isabelle's Wickham's communications with Leathes Prior and the Court (as explained in the Case Summary), the further following issues may also arise for determination:

Issue (7) Whether Isabelle Wickham validly discontinued her claim (by her notice at [E25]) pursuant to CPR Part 38?

Issue (8) If discontinued, whether as a matter of law Isabelle Wickham is able (or might be permitted) to withdraw such discontinuance?

Issue (9) If discontinued and alternatively to (8) above, whether Isabelle Wickham should be granted permission to issue a further claim under the 1975 Act in respect of the provisions made in the deceased's will, pursuant to CPR r.38.7?

12. Further, the Statement of Issues states that;

Given the content of the Position Statement on behalf of the Third and Fourth Defendants for the hearing on 4 March 2020, it appears that in addition to issue 3 (and potential issue (7)) the following further issue also arises

Issue (10) Whether, in the absence of any notice being served pursuant to CPR r21.9(4), the claim should be struck out?

13. Over three days I have conducted a remote hearing in order to determine these issues. The claimant acted in person and participated in the hearing from what appeared to be a room in his home. His mother, the fifth defendant and Isabelle Wickham the former joint claimant were present with him throughout. The first and second defendants were represented by Mr Redmayne counsel. The third and fourth defendants together with Mr Catchpole were represented by Miss Plant, counsel acting on a direct access basis. The fifth defendant represented herself. I also heard briefly from Isabelle Wickham.

Parties Positions

14. As referred to above the claimant acts in person. Although when he appeared before me on 4 March, he indicated a clear intention to seek legal advice he remains unrepresented and as far as I am able to tell has not instructed solicitors or Counsel. He told me that he is on Universal Credit and that he had not been able to find a solicitor to help him as the case was too complicated. Whilst I can accept that securing a solicitor might pose some challenges in terms of funding (whether legal aid or a CFA would still be available I do not know) I find it hard to believe that this case would be regarded as too complicated by a firm practising in this field. He has not filed any documents for this hearing. At E67 in the bundle is a letter, authored I think by Isabelle, but also signed by the claimant. That sets out a proposal to settle the claim but also indicates that Isabelle wishes to advance a fresh claim against the estate. In his brief submissions to me during the hearing he made no reference to the issues of capacity. He focused on his current position and his need for provision from the estate, emphasising that he has not gained maths or English GCSEs, has not managed to secure a college place and is currently living on Universal Credit and struggling to find work. He said he had no savings or other financial resources with which to pay any costs orders. The 5th Defendant added some further information about the Claimant's health problems and how that impacted on his ability to work and study.

15. Although he did not volunteer any submissions about why he withdrew his claim initially and now sought to re-instate it, he did, in answer to my enquiries, confirm that what he had said to Dr Chisholm about the circumstances in which he decided to withdraw the claim and how he came to change his mind were accurate although he said he did not recall talking about his mother's funds being frozen. In his letter he had, in tandem with Isabelle, indicated a willingness to settle the claims for £100,000 each.

16. Not surprisingly given the rather technical nature of the issues that were before me the claimant did not address the interpretation of the CPR or the tests for being granted leave to bring a second set of proceedings. It is unfortunate that he had not obtained legal advice.

17. Isabelle Wickham had been invited to attend the hearing if she so wished. In correspondence with the first and second defendant solicitors she had indicated her wish to reinstate her claim but had not issued any application. In answer to my enquiry she asserted that those solicitors had told her she did not need to do anything more. The letters (including at E33) do not confirm that at all but rather confirm that they indicated that reinstating the claim was not straightforward and she should seek legal advice. She told me she had not done this as she did not have money.

18. The fifth defendant was supportive of Alexander and Isabelle's position in some respects. She did not file any position statement although had written to the court about vacating the three-day hearing. In her submissions to me she struggled to focus on the issues which I was to determine but was preoccupied with allegations of misconduct against the solicitors for the first and second defendant, the third defendant, Mr Catchpole and the solicitor for the litigation friend. She accepted that Alexander had capacity but confirmed some of the educational struggles he had to confront as a result of his condition. She said that 'they' were willing to drop hands on the basis that ownership of Hungate (currently owned 50% by her and 50% by the Estate) was transferred entirely to her with no liabilities attaching. She made clear that she was speaking for her children as well as herself. She did not appear to see that there might be a conflict of interest between herself and the children. She also said that if the proceedings did not end now (on the basis of her proposal) she thought that the costs of pursuing the proceedings further made it 'lunacy' to carry on. She said none of the children wanted to be liable for any future costs.

19. In their position statement the first and second defendants are essentially neutral in relation to each of the issues. They set out the relevant statutory and procedural provisions and refer to some of the relevant evidence. In submissions Mr Redmayne made the following additional points.

    i) The probate valuation provided a gross value of £775,000 odd (and no up-dated valuations have since been obtained). The then net value of around £500,000 has now reduced further as a result of the costs of the administration and legal fees. The current estate available for distribution £420,000 odd although in addition the cost in relation to this hearing totalling £40,000 would need to be deducted from that.[NB These figures duly accord with the values stated in the grant itself at [E16].]

    ii) The estate understands that the legal fees in respect of the litigation friend were around £100,000.

    iii) The cost of a final hearing would be around £25,000 for the estate assuming they did not participate fully.

    iv) The estate owns a majority shareholding in Norwich Developments Ltd but not sufficient to wind the company up and distribute the assets.

    v) The estate owns 50% of the Hungate Road Properties; the fifth defendant owns the other half and receives the rental income. She received property through survivorship, or the will valued at £435,000.

    vi) The original settlement that was approved by Cohen J was worth around £200,000 to the claimants and their costs would have been paid. That is no longer an option.

    vii) Given the passage of time the evaluation of the claimant's need for maintenance from the estate is now different to that which it was when he was a minor and at school. The court would have to consider up to date evidence of his current position in order to determine whether he had demonstrated a need for maintenance.

viii) The order of Cohen J recorded his determination that the will did not make adequate provision for the claimant or Isabelle Wickham.

ix) CPR 21.9(4) requires a notice to be served confirming that the litigation friend has ceased to act, confirming an address for service, and an intention to carry on with the litigation. This was never served by the claimant despite the rules requiring it and despite the order of June 2019 requiring it to be served. The rules provide that an application to strike out the claim may be made in the event that the notice is not served.

x) In respect of Isabelle Wickham's position that she wishes to reinstate her claim, CPR1.4(2)(i) encourages the court to dispose of as many issues as possible at the same hearing but she has not issued an application and there is no evidence before the court on her notional application. She was told to take legal advice.

xi) CPR 38.7 does not make it a condition for the grant of permission to bring a second action that the claimant has paid the defendants costs. . CPR 38.8 also provides that where part of proceedings are discontinued the remainder are stayed until the costs are paid by the claimant. By analogy it would appear that the court could impose a condition on the grant of permission to bring second proceedings that the costs were paid. However, in this case given the impecuniosity of Alexander that might amount in practice to a complete bar.

xii) The estate does seek an order that the claimant pays the costs up to the date of the service of the notice of discontinuance as required by CPR 38.6. Although the estate recognises the impecuniosity of the claimant out of fairness to all the beneficiaries an order should be made. The estate is also likely to seek its costs in respect of the proceedings since the service of the notice of discontinuance. If no costs order is made the estate will of course bear the cost under the indemnity.

xiii) The authorities indicate that the approach to CPR 38.7 is to consider whether there is a sufficient explanation for the reintroduction of the claim to overcome the court's natural disinclination to permit a party to reintroduce a claim which it had abandoned.

xiv) In relation to the application to bring proceedings following the expiry of the limitation period the Act identifies some of the matters to be considered. It is accepted that the claimant is unlikely to have a remedy against the solicitor who acted for his litigation friend given that the deal negotiated was advantageous to him then. It was the actions of the fifth defendant which prevented that being approved.

20. The third and fourth defendants and Karl Catchpole make common cause. In respect of the additional issues identified by the first and second defendants insofar as they relate to Isabelle, they note that she has made no applications and filed no evidence. Their position in respect of her is that she discontinued her claim and there is no basis upon which the court might exercise any discretion to reverse that and by implication that issues 7, 8 and 9 do not arise. In respect of issue 1 they rely on the fact that the fifth defendant did not consent to the terms and that the order of Cohen J makes clear that only if a copy of the agreed terms signed by all parties was lodged with the court

would that order approving it terms become effective. In respect of the six issues identified in the order of 4 March 2020 their position is as set out below. Miss Plant supplemented her written submissions and authorities bundle with her oral submissions.

i) The costs incurred to date of the third and fourth defendants and Mr Catchpole on a direct access basis amount to some £23,500. The estimated costs of a three-day final hearing would be in the region of £13 to 15,000. They seek an order pursuant to CPR 38.6 in respect of their costs prior to discontinuance.

ii) The presumption of capacity in the Mental Capacity Act 2005 has not been displaced by any evidence that shows the claimant lacked capacity at the time he served notice of discontinuance.

iii) The claimant validly discontinued the claim. Although there may have been a minor technical error insofar as each notice of discontinuance did not have the consent of the other claimant attached, they were provided almost contemporaneously, and the court should conclude that this establishes the consent of each claimant to the discontinuance by the other. CPR 3.10 provides they are valid unless the court orders otherwise. In this case there is no reason for the court to hold that they are invalid; to do so would be a victory of form over substance.

iv) They assert that the failure by the claimant to file the notice required by CPR 21.9 (4) should lead to the claimant's claim being struck out. This is issue 10 identified by the first and second defendants

v) They submit that there is no provision in CPR 38 for a claimant to apply to withdraw a notice of discontinuance. CPR 3.10, which allows a court to rectify an error cannot bite as they intended to discontinue.

vi) Neither the claimant or Isabelle should be permitted to issue a further claim relying on CPR 38.7 under the 1975 Act given the six-month time limit for such actions. In respect of the test under CPR 38.7 Miss Plant acknowledged that the ultimate question was the Balance of Justice. She relied on the prejudice to the beneficiaries of the delay in the distribution of the estate and the prejudice in the mounting costs to the estate created by delay.

vii) In respect of the second issue relating to the Grant of Leave; namely that such a claim would be outside the six-month limitation period must plant submitted that

    a) The claimant has not put evidence before the court as to his current position which demonstrates he should be given the opportunity to bring further proceedings. The evidence as to their needs when they were children is of little relevance now.

    b) Section 3 of the Act identifies various matters which the court must have regard to none of which are currently evidenced.

c) Although section 4 of the Act does not set out any statutory checklist as to the factors which should be considered in determining an application for permission to bring proceedings out of time the authorities, in particular Re Salmon [1981] 1 Ch 167. In addition, Begum-v-Ahmed [2019] EWCA Civ 1794 identifies the approach. In this case the defendants rely on the delay that has been caused in the administration of the estate by the first set of proceedings, the way in which these have been progressed or rather not progressed in particular by the claimant failing to abide by orders of the court for the filing of documents or evidence and the likelihood that this will continue. His failure to instruct solicitors means the estate bears more of the costs, for instance in the preparation of the bundle. The beneficiaries may have to introduce funds to keep the properties intact.

d) If permission is granted to the third and fourth defendants and Mr Catchpole are likely to issue an application pursuant to section 9 of the act seeking to add back into the estate property which passed to the fifth defendant under a joint tenancy

Evidence

21. Much of the witness evidence in the Bundle does not seem to bear directly upon the issues for this hearing set the context of the case and is of some assistance to me in evaluating whether the claimant can still demonstrate an arguable case under section 1(2)(b) of the Act. I have read the statements included in the bundle together with many of the other documents and the correspondence.

22. In the Directions for this hearing I made provision for the parties to file further evidence. Only the first and second defendants filed evidence updating the court as to the position of the estate and correspondence which had occurred between March and now.

23. The claimant did not file any evidence nor did the fifth defendant. Some correspondence was exchanged between the parties and sent to the court and is contained in section E.

24. The evidence relating to capacity from Dr Chisholm is contained in two reports. It also has some bearing on the question of the reasons for the withdrawal of the claim. Dr Chisholm took some care in making the arrangements for the assessment both in terms of its location and the presence of one third party. His EHCP identifies that he can struggle to hold verbal information in his working memory and requires time to process information. Although anxious at the beginning of the assessment it became visibly calmer and explained in his own words what he understood the assessment to be about. The salient points would seem to be as follows

Report of December 2019

i) The overarching question is whether Alexander has the capacity to litigate in court proceedings. The decision at the time that the capacity assessment was ordered was Alexander's decision to withdraw his claim against his late father's estate. At the time of the assessment, Alexander informed me that he has since changed his mind and would like to move toward with the claim.

ii) Alexander has a diagnosis of autism spectrum disorder which could amount to an impairment or disturbance in the persons mind or brain.

iii) In respect of the four functional tests.

a) Can Alexander understand information relevant to the decision? Overall, the discussion of the case summary demonstrated that Alexander is able to understand the information relating to the case. There were some points that required further explanation, due to Alexander not having all of the relevant information.

b) Can Alexander retain that information long enough to make the decision? Throughout the assessment, Alexander was able to relay any information that he has about the court proceedings from memory without difficulty. This highlights that Alexander is able to understand and retain information relevant to the case.

c) Can you weigh up that information as part of the process of making the decision? This demonstrates that Alexander has used the information that he currently has about the case to weigh up the options and inform his decision. He understood the consequences of making a decision either way.

d) Can Alexander communicate his decision by any means available to him? Alexander does not have any difficulty in communicating his decisions. He spoke coherently about the proceedings and his own wishes

iv) He told Dr Chisholm this in terms of his reasons for discontinuing and then changing his mind.

> *Alexander understood that a compromise had been reached where a settlement had been offered but spoke of 'tax implications' for his Mother.*
> *Following this, Alexander was asked why he had initially withdrawn his claim. He responded, 'Mum would be liable for the costs and the reality is I would get Mums money anyway.' Alexander was asked if he could explain what he meant by this. He said 'Well eventually when Mum dies, I'll get her money'. So, Mum said to me "What's the point in you going in for money when I would be having a bill. It doesn't make logical sense". In terms of the process of withdrawing his claim, Alexander informed me that he had typed the email but 'Mum told me the legal facts and what to put because I struggle with my English and punctuation'.*
>
> *Alexander was asked what had prompted him to change his mind since making the decision to withdraw the claim. Alexander responded "Because it would have cost my mum but now*
> *her money has been frozen, so it makes perfect sense.'*

v) The school had expressed concern when Alexander first joined about him being influenced by others. It was clear from the assessment that Alexander's

decisions were significantly informed by his mother's position. His school considered that he could still make unwise decisions but not without understanding the consequences of his actions. Dr Chisholm considered it would be beneficial for Alexander to speak to a solicitor to ensure that he was making an informed and objective decision.

vi) Alexander expressed that he wanted the situation over, that had been stressing him out and that he would like to continue with the claim and use the money to buy a house and get on the property ladder.

vii) Dr Chisholm determined that he is capable within the meaning of the mental capacity act 2005 of conducting the proceedings.

Report of April/September 2020.

viii) The Code of Practice of the Mental Capacity Act identifies that some people have fluctuating capacity and identifies that the impairment or disturbance of mine does not have to be permanent.

ix) In considering whether there were any significant factors that would have been sufficient to impact on Alexander's capacity at the time of serving his discontinuance Dr Chisholm considered daily records from the school in February and March 2019, logs of parental contact, his school annual review report of 14 February 2019 and school concern report records.

x) There was nothing in those sources of information to suggest that Alexander's capacity may have been affected at the material time. This was further verified with the Head of Care at the school.

xi) During a discussion on 28th of April 2020 Alexander did not identify anything which might have affected his capacity then. He was doing well at school, taking part in work experience and taking driving lessons. He repeated that the reason for initially withdrawing the claim was his understanding of the financial implications for his mother.

xii) Dr Chisholm did not feel able to give a definitive response as to Alexander's capacity on 11 March 2019 but confirmed that whilst an individual's capacity can fluctuate the information, she had gathered was not indicative of any concerns or events to that effect.

The Law

Mental Capacity Act 2005

25. *Part 1 Persons who Lack Capacity*

The principles

(1) The following principles apply for the purposes of this Act.
(2) A person must be assumed to have capacity unless it is established that he lacks capacity.
…
(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

The Inheritance (Provision for Family and Dependants) Act 1975

26. Section 1 of the Act provides that a child of the deceased may apply for an order on the ground that the disposition of the deceased's estate effected by his will is not such as to make reasonable financial provision for the applicant. The section provides that reasonable financial provision in respect of a child means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

27. Section 4 provides as follows;

Time-limit for applications

An application for an order under section 2 of this act shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out (but nothing prevents the making of an application before such representation is first taken out)

28. In Begum -v-Ahmed [2019] EWCA Civ 1794 the Court of Appeal considered the approach to applications for permission to bring an application out of time. I distil the following points from Lord Justice Floyd's judgment.

i) The act gives an unfettered discretion to the court to extend the time and gives no express guidance on how the discretion is to be exercised. However, it must be exercised in accordance with its statutory purpose and context. Its purpose is to avoid unnecessary delay in the administration of estates and to avoid difficulties which might be occasioned if distributions are made before proceedings are brought.

ii) The discretion should not normally be exercised in a way which undermines the purpose of the time limits. It will always be material to ask whether the bringing of the claim will cause delay in the proper administration of the estate or have the potential to interfere with distributions which have already been made.

iii) The discretion is unfettered but is to be exercised judicially and in accordance with what is just and proper. The onus lies on the claimant to establish sufficient grounds for taking the case out of the general rule. It is not merely a procedural time limit. The burden is not trivial, and he must make out a substantial case for it being just and proper to exercise the statutory discretion to extend time

iv) Four guidelines are material albeit they are not exclusive and nor is any particular one crucial. They are;

a) How promptly and in what circumstances the application has sought the permission of the court after the time limit has expired. This must include the reasons for the delay and the promptitude with which the claimant gave warning to the defendant of the proposed action.

b) Whether negotiations have been commenced within the time limit.

c) Whether the estate has been distributed before the claim has been made or notified.

d) Whether a refusal to extend the time would leave the claimant without redress against anybody.

v) Prejudice to the party seeking the extension if leave is withheld and prejudice to the other party if leave is granted are plainly relevant. Delay during which the estate has been distributed should normally be accorded more weight than delay which has caused no prejudice.

vi) Applications will not be granted where the applicant does not have a real prospect of success on the merits of the claim. The court should not conduct a mini trial at the interim stage to determine the prospects of success where that will turn on disputed issues of fact. Where the court is able to reach a clear view on the merits based on undisputed facts it is right to reflect that view in deciding whether to extend time.

Civil Procedure Rules

29. The following parts of the CPR are relevant;

Rule 1.1 The overriding objective
(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly [and at proportionate cost].
(2) Dealing with a case justly [and at proportionate cost] includes, so far as is practicable—
(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate—
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; . . .
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases [; and
(f) enforcing compliance with rules, practice directions and orders].
Rule 1.2 Application by the court of the overriding objective
The court must seek to give effect to the overriding objective when it—
(a) exercises any power given to it by the Rules; or

(b) interprets any rule [, subject to [rules 76.2, 79.2[, 80.2]]] [, 82.2 and 88.2].

Rule 1.4 Court's duty to manage cases

(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes—

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(b) identifying the issues at an early stage;

(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

(d) deciding the order in which issues are to be resolved;

(e) encouraging the parties to use an alternative dispute resolution (GL) procedure if the court considers that appropriate and facilitating the use of such procedure;

(f) helping the parties to settle the whole or part of the case;

(g) fixing timetables or otherwise controlling the progress of the case;

(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(i) dealing with as many aspects of the case as it can on the same occasion;

(j) dealing with the case without the parties needing to attend at court;

(k) making use of technology; and

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently

Rule 3.1 The court's general powers of management

(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(2) Except where these Rules provide otherwise, the court may—

(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);

(b) adjourn or bring forward a hearing;

[(bb) require that any proceedings in the High Court be heard by a Divisional Court of the High Court;]

(c) require a party or a party's legal representative to attend the court;

(d) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;

(e) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;

(f) stay (GL) the whole or part of any proceedings or judgment either generally or until a specified date or event;

(g) consolidate proceedings;

(h) try two or more claims on the same occasion;

(i) direct a separate trial of any issue;

(j) decide the order in which issues are to be tried;

(k) exclude an issue from consideration;

(l) dismiss or give judgment on a claim after a decision on a preliminary issue;

[(ll) order any party to file and [exchange a costs budget];]

(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective [, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case].

(3) When the court makes an order, it may—
(a) make it subject to conditions, including a condition to pay a sum of money into court; and
(b) specify the consequence of failure to comply with the order or a condition.
[(3A) Where the court has made a direction in accordance with paragraph (2)(bb) the proceedings shall be heard by a Divisional Court of the High Court and not by a single judge.]
(4) Where the court gives directions it [will] take into account whether or not a party has complied with [the Practice Direction (Pre-Action Conduct) and] any relevant pre-action protocol (GL).
(5) The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol.
(6) When exercising its power under paragraph (5) the court must have regard to—
(a) the amount in dispute; and
(b) the costs which the parties have incurred or which they may incur.
[(6A) Where a party pays money into court following an order under paragraph (3) or (5), the money shall be security for any sum payable by that party to any other party in the proceedings. . ..
. . .]
(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order.
[(8) The court may contact the parties from time to time in order to monitor compliance with directions. The parties must respond promptly to any such enquiries from the court.]
Rule 3.10 General power of the court to rectify matters where there has been an error of procedure
Where there has been an error of procedure such as a failure to comply with a rule or practice direction—
(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
(b) the court may make an order to remedy the error.

Rule 21 makes provision for the appointment of litigation friend for children and protected parties which is defined as a person who lacks capacity within the meaning of the 2005 MCA.

Rule 38.2 Right to discontinue claim
(1) A claimant may discontinue all or part of a claim at any time.
(c) where there is more than one claimant, a claimant may not discontinue unless—
(i) every other claimant consents in writing; or
(ii) the court gives permission.
(3) Where there is more than one defendant, the claimant may discontinue all or part of a claim against all or any of the defendants.
Rule 38.3 Procedure for discontinuing
(1) To discontinue a claim or part of a claim, a claimant must—
(a) file a notice of discontinuance; and
(b) serve a copy of it on every other party to the proceedings.
(2) The claimant must state in the notice of discontinuance which he files that he has served notice of discontinuance on every other party to the proceedings.

(3) Where the claimant needs the consent of some other party, a copy of the necessary consent must be attached to the notice of discontinuance.
(4) Where there is more than one defendant, the notice of discontinuance must specify against which defendants the claim is discontinued.
Rule 38.4 Right to apply to have notice of discontinuance set aside
(1) Where the claimant discontinues under rule 38.2(1) the defendant may apply to have the notice of discontinuance set aside (GL).
(2) The defendant may not make an application under this rule more than 28 days after the date when the notice of discontinuance was served on him.
Rule 38.5 When discontinuance takes effect where permission of the court is not needed
(1) Discontinuance against any defendant takes effect on the date when notice of discontinuance is served on him under rule 38.3(1).
(2) Subject to rule 38.4, the proceedings are brought to an end as against him on that date.
(3) However, this does not affect proceedings to deal with any question of costs.
Rule 38.6 Liability for costs
(1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom [the claimant] discontinues incurred on or before the date on which notice of discontinuance was served on [the defendant].
Rule 38.7 Discontinuance and subsequent proceedings
A claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if—
(a) he discontinued the claim after the defendant filed a defence; and
(b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim
Rule 38.8 Stay of remainder of partly discontinued proceedings where costs not paid
(1) This rule applies where—
(a) proceedings are partly discontinued;
(b) a claimant is liable to—
(i) pay costs under rule 38.6; or
(ii) make a payment pursuant to an order under section 194(3) of the Legal Services Act 2007; and]
(c) the claimant fails to pay those costs [or make the payment] within [14] days of—
(i) the date on which the parties agreed the sum payable by the claimant; or
(ii) the date on which the court ordered the costs to be paid [or the payment to be made].
(2) Where this rule applies, the court may stay(GL) the remainder of the proceedings until the claimant pays the whole of the costs which [the claimant] is liable to pay under rule 38.6 [or makes the payment pursuant to an order under section 194(3) of the Legal Services Act 2007].
[(Rules [44.9 and 46.7] contain provisions about applying for an order under section 194(3) of the Legal Services Act 2007.)]

30. In Ward-v-Hutt and others [2018] 1 WLR 1789 [2018] EWHC 77 (Ch) Judge Paul Matthews considered the approach to applications under CPR 38.7; albeit in a very different context to this case. It seems to me that having regard to what is said in that

case and more generally to the general principles underpinning the CPR that the following matters need to be considered in such applications.

i) The application is to be considered in the light of the overriding objective to deal with cases justly.

ii) Applications for permission to bring a new claim made after the expiry of a relevant limitation period should normally be refused whether or not the claim itself was issued before the expiry of the limitation period or afterwards.

iii) The nature of the limitation period will be relevant. If the limitation period is a purely discretionary one the approach will be different to cases where the limitation period is more rigid.

iv) There is a public interest in finality in litigation which must be relevant to the question of whether permission should be granted.

v) The court must consider whether a sufficient explanation has been offered for the reintroduction of a claim which had been abandoned. The circumstances in which the claim was abandoned will be relevant. If the claimant had been misled or tricked by the defendant, where important new evidence had come to light or where there had been a retrospective change in the law it is likely the court would give permission.

vi) The merits of the underlying claim will be relevant. Where the claim has no reasonable prospect of success or is an abuse of process this will be relevant.

vii) Other aspects of the overriding objective will be relevant.

Analysis

31. I turn now then to my evaluation of the matters which bear upon the issues identified.

32. Firstly, I should make clear that I do not consider it appropriate to adjudicate upon the additional issues identified in the statement of issues. No application has been issued by Isabelle Wickham for permission to make another claim against these defendants pursuant to CPR 38.7. There is no evidence before the court which explains her reasons for discontinuing the claim in March 2019 nor her reasons for now seeking to reinstate it. I'm prepared to infer that her reasons are likely to be connected with those advanced by the claimant but that does not mean that they will necessarily be identical or indeed that the court will approach them in the same way. It is clear that the claimant, whilst he has capacity has a degree of vulnerability in respect of his decision making and the court would not necessarily extend the identical approach to the claim by Isabelle Wickham. She has had eight months in which to either seek and obtain legal advice or to undertake some research yourself to advance a claim. The complexity of making such a claim was clearly pointed out to her by the first and second defendant solicitors. Her mother, the fifth defendant is well versed in litigation of this sort. I note that the fifth defendant makes various references to who is apparently also familiar with these sorts of complex disputes. In the absence of an application and in the absence of any evidence I am therefore not prepared to determine that unmade application. If an application is subsequently made it will of

course be relevant to the determination of that application that it was not promptly made after the discontinuation and the proceedings becoming live again but was rather made on the back of this court identifying the possibility of the claim being reinstated in March 2020 nearly a year after Isabelle Wickham filed her notice of discontinuance. She of course played no part in the proceedings from 2019 through to November 2020.

33. Likewise, I am not prepared to adjudicate upon issue 10 identified in the statement of issues. Having regard to my conclusions on the other matters but also bearing in mind that CPR 21.9(5) provides that the court may on application strike out any claim brought by the child and no application has been made.

34. I turn then to the six issues which are live;

35. No party has contended before me that the terms scheduled to the consent order presented to Mr Justice Cohen on 13 November 2018 are enforceable. The order itself identified that the court's approval of the settlement was subject to the fifth defendant agreeing to them by signing them along with each of the other parties. I do not therefore need to consider this any further. I do however observe that the terms agreed provided for a substantial property to be transferred, to the claimant and Isabelle Wickham and for the payment of their costs. Albeit the factual landscape has changed in the two years which have passed since then, in particular the claimant and Isabelle Wickham attaining their majority, the value of the settlement supports the contention that the claimant would still have an arguable case under the Act.

36. The net effect of Dr Chisholm's evidence is therefore that Alexander had capacity in March 2019 to serve his notice of discontinuance. This followed on from his email in January 2019 which indicated the withdrawal of the claim. A consistent position over the two-month period accompanied by the completion and signing of the notice of discontinuance by both Alex and Isabelle would be consistent with his having capacity along with his sister. Inevitably their decision is likely to have been affected by the position their mother was taking but this is part and parcel of family life. Young adults might reasonably expect to receive advice from their parents. Advice that may be unwise or ill-considered does not mean that they have been subject to undue influence or duress. It seems highly unlikely that the fifth defendant was in any way seeking to prejudice the claimant or Isabelle albeit she was certainly on her submissions seeking to protect her interests, but she sees her interests and those of the Claimant and Isabelle as essentially indivisible. It may be that her advice was misguided although making that evaluation is not easy given the passage of time and may have been motivated by seeking to avoid the estate paying the costs of the solicitor for the litigation friend. Given that the settlement provided for the payment of those costs and the fifth defendant has a very strong standpoint on the unreasonableness of those costs it may be that played a role in her advice. It seems that the solicitor for the litigation friend was acting under a conditional fee agreement and non-recovery by the children would very likely have led to no liability for the costs of the solicitor. That would have saved the estate a significant sum but absent some side agreement with the other defendants, of which there is no suggestion, it is not clear to me how the fifth defendant or more particularly the claimant or Isabelle Wickham benefited from the discontinuance. The fact that the advice was taken by Isabelle for whom no issue of capacity arises in respect of any suggestion of undue influence or duress arises would be consistent with the claimant not being subject to duress or undue influence either. Neither the claimant or Isabelle take any issue with their mother's advice in any event. Thus, I am

satisfied that the claimant had capacity at the time he served the notice of discontinuance of his claim and indeed in the period since he attained his majority and that he was not subject to duress or undue influence. With the benefit of hindsight, the decision was almost certainly unwise; indeed, it was probably unwise at the time it was taken but that does not affect the decision on capacity. The presumption of capacity together with the evidence of Dr Chisholm and the evidence of the claimant and the fifth defendant all support the conclusion that the claimant had capacity to conduct the proceedings at the time.

37. The decision to withdraw the claim was first communicated by emails sent on 21 January 2019 by the claimant. This was followed by an email from Isabelle on 23 January 2019 confirming that both she and the claimant were withdrawing their claims. On 11 March the claimant sent a form N279 to the defendants and to the court. Isabelle Wickham also sent a form N279. The forms are signed by the claimant and Isabelle Wickham respectively. Although there may be a minor procedural error in that the notice of discontinuance did not have the consent of the other claimant attached the forms were sent within six minutes of each other. CPR 3.10 would have the effect of rendering the notices of discontinuance as effective unless I hold otherwise. No reason has been advanced by the claimant or indeed anybody else as to why they should be held to be ineffective due to that technical defect. The notices of discontinuance are therefore effective and the consequence of CPR38.5 is that the proceedings ended as against each of the defendants as of March 2019. A consequence of that is that pursuant to CPR 38.6 the claimants are responsible for the defendant's costs up to the date of discontinuance. No suggestion (save by the first and second defendants as set out above) has been made that they should not be.

38. CPR 38 does not provide any mechanism by which the claimant can withdraw a notice of discontinuance. CPR 3.10 is not applicable given that the notices of discontinuance were not sent in error. Whilst the CPR provide a mechanism by which the defendants may apply to set aside the notice of discontinuance no such remedy is provided for the claimant. The likely reason for that is the existence of CPR 38.7.

39. CPR 38.7 provides a mechanism by which on application the court can grant permission to issue a further claim. Although no formal application has been made by the claimant, I do not consider that necessary given that this issue was identified in the order of 3 March 2020 and no party suggested that an application notice should be issued in order to give the court the jurisdiction to consider the application.

40. In a case where the application to issue a further claim is made within a relevant time limit the test will require consideration of the factors set out in paragraph [30] Above. In a case where the application is made after the expiry of a limitation period the court will also be required to consider that application in parallel. There is clearly some interplay between the two; an application to extend a limitation period or to issue after the expiry of a limitation period which is bound to fail would plainly be relevant to the exercise of the discretion whether to grant permission to issue a further claim.

41. In relation to the application for permission to issue an application after the expiry of the time limit set by section 4 of the Act it seems to me that the following are relevant.

    i) The act gives an unfettered discretion to the court to extend the time and gives no express guidance on how the discretion is to be exercised. However, it must

be exercised in accordance with its statutory purpose and context. Its purpose is to avoid unnecessary delay in the administration of estates and to avoid difficulties which might be occasioned if distributions are made before proceedings are brought.

The possibility of a claim and subsequently the issue of the first claim has meant that the estate has not been distributed. There is therefore relating to the distribution of an estate which impacts upon the claimant's claim or the other beneficiaries. However, the administration of the estate has been very significantly delayed as a result of the difficulties which arose following the failure of the settlement which was proposed in November 2018. The management of the estate has been complicated as a result of its illiquidity. However, I note that the management of the limited company has been simplified to some extent as a result of the exclusion of the fifth defendant as a director. Although there are manifestly some ongoing issues with the administration of the assets of the estate in practice the Hungate properties are being managed by the fifth defendant who is receiving the entirety of the rental income. I'm not entirely clear how Norwich Developments Ltd is being operated but the third and fourth defendants own 20% each of the shares and Mr Catchpole 1% of the shares and I believe that the third defendant and Mr Catchpole are directors and it seems that the company is managing. I was told in March 2020 that consideration was being given by the first and second defendants to the need to make an application to the Chancery Division for the sale of state assets in order to generate funds to enable the executors to manage the state assets but that this has not proved necessary. That suggests that a way has been found to deal with Norwich Developments Ltd and the properties it holds. It therefore appears that any prejudice caused by delay in terms of the assets themselves is being managed. The ongoing delay and the generation of expenses in the administration of the estate of course is an additional form of prejudice to the other beneficiaries. The expenses of the administrators will fall roughly 2/3 on those who stand to benefit from Norwich Developments Ltd and roughly 1/3 on the fifth defendant who would stand to benefit from Hungate Street

ii) The discretion should not normally be exercised in a way which undermines the purpose of the time limits. It will always be material to ask whether the bringing of the claim will cause delay in the proper administration of the estate or have the potential to interfere with distributions which have already been made.

See above.

iii) The discretion is unfettered but is to be exercised judicially and in accordance with what is just and proper. The onus lies on the claimant to establish sufficient grounds for taking the case out of the general rule. It is not merely a procedural time limit. The burden is not trivial, and he must make out a substantial case for it being just and proper to exercise the statutory discretion to extend time.

The reason why the limitation period becomes relevant is the need for fresh proceedings to be issued consequent upon the claimant having discontinued his first claim. The fact of a claim against the estate has been part of the landscape for a very long time and of course has been the subject of these proceedings since they were commenced in January 2017. I am satisfied that the claimant

issued his notice of discontinuance following advice from his mother that to do so was more beneficial for her and ultimately for him. However, this seems to have been on the basis that the fifth defendant believed that the settlement and the continuation of the proceedings would have an adverse impact upon her and would thus eat into her estate that she would in due course leave to the claimant. As the fifth defendant observed in submissions, she is in her 50s and could be expected to live for 30 to 40 more years and so any benefit to the claimant is very far down the road and unpredictable. In contrast the benefit to him of the settlement and the benefit to him of any order would be immediate. There is clearly a conflict of interest between the claimant and the fifth defendant in this sense although I appreciate that in reality given that the claimant lives with the fifth defendant and relies upon her the conflict is probably submerged by the reality of their relationship. For reasons which the claimant has not been able to fully articulate he has now come to the realisation that his decision to discontinue was unsound and that there is benefit to him in pursuing the proceedings. That seems to me to be a sufficient ground. I take account of the fact that whilst he has capacity, he has some degree of vulnerability and is to some extent reliant upon the fifth defendant in respect of whom there does exist some conflict of interest.

iv) Four guidelines are material albeit they are not exclusive and nor is any particular one crucial. They are;

a) How promptly and in what circumstances the application has sought the permission of the court after the time limit has expired. This must include the reasons for the delay and the promptitude with which the claimant gave warning to the defendant of the proposed action.

The prospect of a claim against the estate has been part of the landscape for a long time. This particular application was identified in March 2020.

b) Whether negotiations have been commenced within the time limit;

Negotiations and proceedings have long been in place.

c) Whether the estate has been distributed before the claim has been made or notified

See above.

d) Whether a refusal to extend the time would leave the claimant without redress against anybody

As both the first and second and third and fourth defendants and Mr Catchpole acknowledged if the claimant is unable to pursue this claim he has no remedy against anybody else. There does not appear to be any basis for a claim against the solicitors for his litigation friend. They negotiated what appeared to be an advantageous settlement for him and subsequently seem to have properly raised the issue of whether the discontinuance that he served was effective. There is no other form of

redress available to him. Although the actions of the fifth defendant in advising him to withdraw the proceedings may have been motivated by her own assessment of her interest and those of her family and although they may have been in actual conflict with the claimant's interests there is no prospect of the claimant finding any redress in that quarter. Therefore, if the claim does not proceed, he will be left without any form of effective remedy in relation to an estate which the court has already concluded made insufficient provision for him.

v) Prejudice to the party seeking the extension if leave is withheld and prejudice to the other party if leave is granted are plainly relevant. Delay during which the estate has been distributed should normally be accorded more weight than delay which has caused no prejudice.

There is clear prejudice to the claimant if leave is withheld given that he will have no remedy in respect of an estate that made insufficient provision for him.

There is clear prejudice to the defendant's in the further delaying of the administration of the estate and any further costs that will eat into the estate assets. However, the estate has not been distributed and so the delay is of less weight.

vi) Applications will not be granted where the applicant does not have a real prospect of success on the merits of the claim. The court should not conduct a mini trial at the interim stage to determine the prospects of success where that will turn on disputed issues of fact. Where the court is able to reach a clear view on the merits based on undisputed facts it is right to reflect that view in deciding whether to extend time.

The evidence contained in the fifth defendant's first statement together with the evidence from Dr Chisholm and what I was told by both the claimant and the fifth defendant during the hearing support an arguable case that an order should be made for financial provision for his maintenance. Although the claimant did not file up-to-date evidence of his situation, which is Miss Plant submits he could and should have done, I'm satisfied that from what I know of his situation, in particular the impact of his condition, that there is a realistic prospect of success. The terms of the previously agreed settlement would support that evaluation, although I acknowledge that the defendants may have had personal reasons for agreeing to that settlement rather than representing purely a commercial appraisal of the likelihood of the claimant's succeeding. I am also alive to the fact that ultimately the success of the claimant's claim might have a disadvantageous impact on his mother, the fifth defendant. The properties at Hungate Street are the most obvious assets of the estate to raise funds given that the estate only owns 59% of the shares in Norwich Developments Ltd. I note also that the third and fourth defendants and Mr Catchpole may issue an application under section 9 of the Act so that the assets that the fifth defendant received by reason of being a joint tenant of properties with the deceased and this may also have an impact on the fifth defendant and thus an indirect impact on the claimant. However ultimately if the claimant succeeded the award would be to him for his maintenance not to the fifth defendant.

42. In relation to the application for permission to issue a further claim under CPR 38.6 I take into account the following.

i) The application is to be considered in the light of the overriding objective to deal with cases justly.

The claimant has a potentially substantial claim for financial provision under the act. It was valued at about £100,000 2 years ago. Although the claimant is now an adult the evidence from the fifth defendant's first witness statement combined with the contents of Dr Chisholm's reports and what I have been told during this hearing as to the claimant's position point to the claimant having a degree of vulnerability which would tend to promote the viability of his claim.

The first, second, third and fourth defendants and Mr Catchpole have an interest in the estate being administered and distributed. It has been significantly delayed and costs are being incurred by the estate which are eating into the value of the estate. I do not have evidence before me as to the current state of the third and fourth defendants' financial positions or that of Mr Catchpole and so am unable to ascertain the impact of further delay on them financially but am prepared to accept that further delay in the administration of the estate is costly and the continuation of the proceedings is at best a distraction .

ii) Applications for permission to bring a new claim made after the expiry of a relevant limitation period should normally be refused whether or not the claim itself was issued before the expiry of the limitation period or afterwards. The nature of the limitation period will be relevant. If the limitation period is a purely discretionary one the approach will be different to cases where the limitation period is more rigid.

The limitation period under section 4 is a purely discretionary one to be exercised in accordance with the principles set out below. If the court concludes that the application for permission to issue after the expiry of the limitation period should be granted this will carry some weight within the exercise under CPR 38.7

iii) There is a public interest in finality in litigation which must be relevant to the question of whether permission should be granted.

These proceedings have now been ongoing for a considerable period of time albeit fortunately the court and the parties have not been subjected to the frequency of hearings that occasionally occurs. However, the fact that the parties have been unable to reach a conclusion is of weight. However, given the particular and unusual circumstances of this litigation the finality that the defendants might have expected does carry less weight than might be the case in some other forms of litigation. It must have come as some surprise to the defendants when the claimant and his sister withdrew their claim.

iv) The court must consider whether a sufficient explanation has been offered for the reintroduction of a claim which had been abandoned. The circumstances in

which the claim was abandoned will be relevant. If the claimant had been misled or tricked by the defendant, where important new evidence had come to light or where there had been a retrospective change in the law it is likely the court would give permission.

It is clear that the claim was discontinued on the advice of their mother. I have not been able to fully grasp her logic although it seems to have emerged from her anxiety as to the costs of the and her belief that these were manifestly unreasonable. From what was said to Dr Chisholm and from what has been said to me during this hearing it is clear that the claimant relied entirely upon his mother's advice as to what was financially best for the family. As the litigation friend noted at the time it was hard to understand from the claimant's point of view why he took that decision, but it plainly was in reliance upon his mother's advice. That her advice turned out to be inaccurate, ill informed or simply unwise I cannot currently determine but that it has dawned on the claimant that discontinuing was not to his financial advantage is perhaps not a surprise to anybody. I therefore am satisfied that his explanation for having withdrawn and now seeking to reissue is a satisfactory explanation.

v) The merits of the underlying claim will be relevant. Where the claim has no reasonable prospect of success or is an abuse of process this will be relevant.

See above: I am satisfied that there is an arguably meritorious claim.

vi) Other aspects of the overriding objective will be relevant.

I am deeply conscious of the costs that are being incurred by the estate and by those who are represented. I am also conscious of the court time that has been given to this case so far and how that impacts on other cases. If the case continues further costs will be incurred including by the claimant if he does obtain legal representation. The total costs of a further tranche of these proceedings if all parties are represented may get close to or exceed the value of any award that the claimant might achieve. Given the way the proceedings have been conducted to date and the inevitable interaction between the fifth defendant and the claimant there must be a significant chance that the claimant will not be able to pursue the proceedings unimpeded by his mother's involvement.

43. Overall, I am satisfied that the balance weighs in favour of granting permission to issue proceedings under the Act notwithstanding the expiry of the limitation period. Overall the justice to the claimant of allowing his claim against his father's estate to proceed in my view clearly outweighs the prejudice or injustice to the defendants (in particular the third and fourth defendant and Mr Catchpole) in allowing the claim to proceed out of time.

44. In respect of allowing the issuing of a second set of proceedings the balance seems to me to be much finer. The vulnerability of the claimant and the reasons for serving the discontinuance against the backdrop of a substantial settlement or potential claim and the extent to which he was influenced by one of the defendants, the fifth defendant in doing so are significant factors in favour of granting permission. Weighing against the grant of permission to bring a second set of proceedings are all the arguments deployed by the defendants and in particular the concerns about how the proceedings

may be pursued by the claimant given the likely ongoing influence of the fifth defendant and how that may impact upon the costs incurred and the manner in which the proceedings are pursued. Ultimately though the underlying merits of the claimant's case and the possibility of him achieving an award in his name seem to me to outweigh the arguments in support of finality of litigation and prejudice to the defendants. His decision to withdraw was not a decision taken by a commercial entity after careful consideration but was the decision of a vulnerable just 18 year old under the influence of and on the advice of his mother who is his primary carer. I will therefore grant permission to issue a further set of proceedings.

45. I have considered whether any conditions ought to be applied to the grant of permission to bring a further set of proceedings. Mr Redmayne and Miss Plant both acknowledged that conditions could be applied. One of the most obvious conditions would be that the claimant pay the costs of the estate and of the third and fourth defendants and Mr Catchpole arising out of the discontinuance. However, as they both acknowledged the reality is that the imposition of such a condition would in effect create an absolute bar to the claimant pursuing the claim as he is impecunious. In addition, the costs will need to be subject to detailed assessment and so no time limit for their payment could be imposed at this stage.

The Way Ahead

46. Case Management directions will have to be given to provide for the reissue of the claim and any applications made by the defendants. That will need to include timetabling to a direction hearing and a three-day final hearing.

47. That is my judgment.