JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	:	THE COURT OF APPEAL (WA)
CITATION	:	DRAKE -v- BRADSHAW [2018] WASCA 78
CORAM	:	BUSS P MURPHY JA MITCHELL JA
HEARD	:	15 MARCH 2018
DELIVERED	:	24 MAY 2018
FILE NO/S	:	CACV 85 of 2017
BETWEEN	:	ANDREW DRAKE Appellant AND DEBORAH BRADSHAW First Respondent LORRAINE ELIZABETH DODD Second Respondent

ON APPEAL FROM:

Jurisdiction	:	SUPREME COURT OF WESTERN AUSTRALIA
Coram	:	MASTER SANDERSON
Citation	:	DRAKE -v- BRADSHAW [2017] WASC 228
File Number	:	CIV 1261 of 2017

Catchwords:

Family provision - Application for leave to file out of time - Whether strength of applicant's admittedly arguable case is a relevant factor to consider - Turns on own facts

Legislation:

Family Provision Act 1972 (WA), s6, 7, 8, 9
Trustees Act 1962 (WA), s65

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr T M Retallack
First Respondent	:	Mr M Curwood
Second Respondent	:	No appearance

Solicitors:

Appellant	:	Culshaw Miller Lawyers
First Respondent	:	McVay Bates & Associates
Second Respondent	:	No appearance

Case(s) referred to in decision(s):

Andre v Perpetual Trustees WA Ltd [2009] WASCA 14
Clayton v Aust (1993) 9 WAR 364
Devereaux-Warnes v Hall (No 3) [2007] WASCA 235; (2007) 35 WAR 127
Drake v Bradshaw [2017] WASC 228
Hughes v National Trustees, Executors and Agency Co of Australia Ltd (1979) 143 CLR 134
Neil v Nott (1994) 68 ALJR 509
Wheatley v Wheatley [2018] WASCA 34
Young v Kestel [2003] WASCA 190

JUDGMENT OF THE COURT:

1 On 4 August 2017, the master dismissed the appellant's application for leave to bring a claim under the *Family Provision Act 1972* (WA) (Act) in respect of his deceased mother's estate. The appellant now appeals against that decision. For the reasons that follow, the appeal should be dismissed.

The Will and the deceased's estate

2 The deceased, who died on 15 September 2014, was survived by her three adult children: the appellant and the respondents. The principal asset of the deceased's estate was a house in Kewdale. The deceased's Will provided for the first respondent to have the Kewdale house, chattels in the house and the deceased's car. The Will provided for the residue of the deceased's estate to be divided amongst her three children.

3 Probate of the Will was granted on 3 November 2014. On 13 November 2014 the first respondent, who is also the executor of the deceased's estate, distributed the residue of the estate to the appellant and the respondents. Each received about $18,700. In July 2015, the sale of the Kewdale house settled, and the settlement proceeds of about $638,000 were distributed to the first respondent. The deceased's chattels were distributed amongst the appellant and respondents at the same time.

4 On 16 February 2017, the appellant filed an originating summons in the general division of this court in which he claimed to have been left without adequate provision for his proper education, maintenance, support and advancement in life, and sought leave to file a claim under the Act out of time. As probate was granted on 3 November 2014, the 6-month period in which the application could be filed within time ended on 2 May 2015. The application made on 16 February 2017 was filed over 1 year 9 months after the expiry of the relevant time limit.

Legislative provisions

5 The appellant's proposed claim seeks to invoke the jurisdiction of the court under s 6(1) of the Act. That jurisdiction relevantly arises where the court is of the opinion that the disposition of the deceased's estate effected by her Will is not such as to make adequate provision from her estate for the proper maintenance, support, education or advancement in life of a child of the deceased. When the court is of

that opinion, it may, at its discretion, on application made by or on behalf of the child, order that such provision as the court thinks fit is made out of the estate of the deceased for that purpose.

6 The general principles applicable to the exercise of the court's power under s 6(1) of the Act were explained by Buss JA, with whom Pullin JA agreed, in ***Devereaux-Warnes v Hall***.[1]

7 By s 6(3) of the Act:

> The Court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person on the ground that his character or conduct is such as in the opinion of the Court to disentitle him to the benefit of an order, or on any other ground which the Court thinks sufficient.

8 Under s 7(2) of the Act, no application for provision out of the estate of a deceased person shall be heard by the Court unless:

> (a) the application is made within 6 months from the date on which the administrator becomes entitled to administer the estate of the deceased in Western Australia; or
>
> (b) the Court is satisfied that the justice of the case requires that the applicant be given leave to file out of time.

9 Section 8 of the Act makes provision for orders after distribution of a deceased's estate. Section 8(1) relevantly provides:

> On an application for an order under this Act, the Court may make an order under section 65 of the *Trustees Act 1962*, in lieu of an order under this Act, in any case where the estate of the deceased, or part thereof, has been distributed among the persons entitled under the will.

10 Section 65 of the *Trustees Act 1962* (WA) relevantly applies where a trustee has distributed any assets forming part of the estate of a deceased person, and there is nothing in any Act to prevent the distribution from being disturbed.[2] Where the section applies, the court may relevantly make an order on an application under the Act (which is referred to in s 65 as a 'claim').[3] By s 65(3), such an order may provide that:

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[1] ***Devereaux-Warnes v Hall (No 3)*** [2007] WASCA 235; (2007) 35 WAR 127 [66] - [105].
[2] Section 65(1) of the *Trustees Act*.
[3] Section 65(2)(a) of the *Trustees Act*.

> (a) any person to whom any assets, to which the section applies, were distributed … shall pay to the person making the claim or to the trustee a sum not exceeding the value of those assets; or
>
> (b) any person, who has received, otherwise than in good faith and for valuable consideration, any interest in any assets, to which this section applies, from the person to whom they were distributed … , shall pay to the person making the claim or to the trustee a sum not exceeding the value of that interest.

11 An order under s 65 shall not be made on a claim under the Act unless the application is made within the period specified in s 7(2)(a) of the Act or leave to file out of time has been given under s 7(2)(b) of the Act.[4]

12 Section 8(2) of the Act provides that:

> Where the Court, in exercise of the power conferred by subsection (1), makes an order under section 65 of the *Trustees Act 1962*, it shall have the same powers in respect of that order as it has in respect of an order made under this Act.

13 By s 9 of the Act:

> In determining whether, and in what way, provision ought to be made by an order, the Court shall have regard to the provisions of section 65(8) of the *Trustees Act 1962*.

14 Section 65(8) of the *Trustees Act* relevantly provides:

> Where a trustee has made a distribution of any assets forming part of the estate of a deceased person … relief (whether under this section or in equity or otherwise) against any person other than the trustee or in respect of any interest of any such person in any assets so distributed and in any money or property into which they have been converted, shall be denied, wholly or in part, if the person from whom relief is sought received the assets or interest in good faith and has so altered his position in reliance on his having an indefeasible interest in the assets or interest, that, in the opinion of the Court, having regard to all possible implications in respect of the trustee and other persons, it is inequitable to grant relief or to grant relief in full.

Facts found by the master

15 The master made the following findings in the course of his reasons, which were published after the order dismissing the application for an extension of time was made.[5]

[4] Section 65(5)(a) of the *Trustees Act*.

16 Following the death of the deceased, the respondents held a meeting with the appellant. The appellant was aware of his entitlement under the Will, although not perhaps of the precise amount of his entitlement, from Friday, 26 September 2014 - just under two weeks after his mother's death. When told by the first respondent what his entitlement would be, the appellant raised no concerns. He did not suggest he intended to seek further provision from the deceased's estate.[6]

17 On 2 October 2014, the respondents sought legal advice mainly concerning the grant of probate. The solicitor who was consulted pointed out there was a six month time limit within which certain persons could seek further provision from the estate. The solicitor advised the respondents that after the grant of probate they should wait at least six months before they sold the Kewdale property.[7]

18 After receiving that advice, there was a discussion between the appellant and the respondents. There was a conflict in the evidence as to whether the appellant was made aware as at October 2014 that he had six months from the date of the grant of probate of the deceased's Will to seek further provision from the estate. The master said that, in the absence of cross-examination, this was a conflict that he was unable to resolve. However, the master accepted that the appellant did not know of the existence of the relevant time limit.[8]

19 The master accepted that the appellant is in an unfortunate position. He is homeless and living in a rough shanty in the bush. Even prior to that, he was living out of his car until the car was stolen. In those circumstances, the seeking of legal advice was perhaps the furthest thing from his mind. On the other hand, given his financial position, the prospect of further provision from the deceased's estate might have been one avenue to advance his position.[9]

20 The master accepted the first respondent's evidence that she used the distributed proceeds of the sale of the Kewdale house to renovate her own home at a cost of $300,000 and gave the second respondent $110,000. The first respondent retained $100,000 after paying other expenses of the estate, the cost of renovations and making the gift to the second respondent. The first respondent spent money on house renovations and made a gift to her sister based upon her belief as to her

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[5] ***Drake v Bradshaw*** [2017] WASC 228 (Primary decision).
[6] Primary decision [8].
[7] Primary decision [9].
[8] Primary decision [10] - [12].
[9] Primary decision [13].

entitlement from the estate. Had she been aware of the prospect of a further claim by the appellant, she may not have spent the full $300,000 on renovations. In other words, the first respondent has altered her position based upon the appellant's failure to act within the allotted time period.[10]

Master's approach

21 The master said that the principles applicable to applications for extensions of time under the Act were set out by the court in ***Clayton v Aust***.[11] He set out a number of relevant factors drawn from that decision, including that:[12]

> it is relevant to consider whether the plaintiff has an arguable case on the merits but no detailed examination of the plaintiff's claim is warranted.

22 After referring to the affidavits which had been filed in the proceedings, the master observed that the appellant's evidence was in a form that might be expected if leave was granted and an application under the Act was on foot. The master noted that the respondents accepted that the appellant had an arguable case and 'that criteria [sic] was satisfied'. The master said that it was therefore unnecessary for him to summarise most of the evidence in the appellant's affidavits.[13]

23 The master then dealt with the submission that the appellant had a 'strong case'. The master said:[14]

> At first instance in ***Clayton v Aust*** the master had determined that the plaintiff's case was 'weak' or 'barely arguable'. The Full Court said the master was in error in attempting to evaluate the strength of the plaintiff's case. The question was whether or not the case was arguable. If it was, that was sufficient to satisfy the test.
>
> Counsel for the plaintiff maintained that the position was not the same if it could be shown the plaintiff had a strong case. He submitted, in those circumstances, the strength of the case was a factor in favour of granting leave. With respect to counsel, I cannot see that is a correct statement of principle. What must be determined is whether the plaintiff's case is arguable. Once it is, that is a factor to be weighed in the balance in determining whether or not leave ought be granted. Of course, if the case was hopeless so that on the most favourable version

[10] Primary decision [16] - [17].
[11] ***Clayton v Aust*** (1993) 9 WAR 364.
[12] Primary decision [3].
[13] Primary decision [5].
[14] Primary decision [6] - [7].

> of the facts to the plaintiff there was no prospect of the action succeeding, then leave might be refused. But in other cases, there is no warrant for evaluating the strength or otherwise of the plaintiff's claim.

24 After referring to the appellant's personal circumstances, the master said that the difficulty experienced by the appellant was a factor in favour of granting leave.[15] The master noted that the estate of the deceased had been fully distributed, and referred to s 8 of the Act and s 65 of the *Trustees Act*.[16] After referring to the first respondent's evidence of her dealings with the money, the master concluded:[17]

> In my view, the fact of the distribution of the estate was decisive and was largely the reason why I refused the grant of leave. Weighing all factors in the balance, I accept the plaintiff has an arguable case and I accept that there is some explanation for the delay. But it is important to bear in mind, as was said in ***Clayton v Aust***, the time limit is a substantive provision and not a mere procedural time limit. This was not a case where there was some factor which precluded the plaintiff from finding out when he had to issue proceedings. Really what was said was that ignorance of the law combined with the plaintiff's difficult circumstances was a factor in proceedings not being commenced. I accept that proposition.
>
> Weighing all matters in the balance, it seemed to me the fact of the distribution of the estate is decisive. This case provided no better example of beneficiaries who took a cautious approach by waiting six months from the grant of probate before taking any steps to distribute the estate. They acted prudently and with the benefit of sound legal advice. They then acted as they were entitled to do and it would not be in the interests of justice if the plaintiff were now granted leave to issue proceedings.

25 The master accordingly dismissed the appellant's application for leave to file an application under the Act out of time.

Ground 1: failure to take account of the strength of the appellant's case

26 The appellant's first ground of appeal contends that the master erred in law by finding that the strength of an applicant for leave's case is not a factor in favour of granting leave, and that there was no warrant for evaluating the strength of the appellant's claim. The appellant contends that the master erred in law in failing to take into account, in the exercise of his discretion, the strength of the appellant's substantive

[15] Primary decision [13].
[16] Primary decision [14] - [15].
[17] Primary decision [18] - [19].

case as a factor in deciding whether an extension of time should be granted.

27 The principles governing the exercise of the court's discretion to give leave to file an application under s 7(1) of the Act out of time were recently summarised by this court in ***Wheatley v Wheatley***.[18] It is unnecessary to repeat the entirety of that summary here. As the court said in ***Wheatley***:[19]

> [W]here there is an arguable case, the strength of that case *may* be an important factor to be considered in the overall exercise of discretion. However, there will often be cases where it is difficult to undertake a more precise assessment of the merits other than to form an overall conclusion that the case is arguable. That is because the application is conventionally determined on the papers, and the court is not in a position to resolve contested evidentiary matters concerning the underlying merits of any claim. There may, of course, be some cases where the underlying material facts are uncontested, or where admissions have been made, which enable the court to assess with some degree of confidence the strength of the applicant's case. Absent such matters, and where the applicant's own affidavit evidence is not inherently implausible or contrary to the undisputed facts and points to the existence of an arguable claim, the court will often be left in the position where it can do no more than conclude that the applicant has demonstrated an arguable case on the merits. (citations omitted) (original emphasis)

28 In ***Wheatley***, the master was alleged to have adopted the view that, as a matter of law, ***Clayton v Aust*** positively precluded an assessment of the merits in an appropriate case, beyond finding that the claim was arguable. This court held that, to the extent that the master was of that view, he was in error. However, in the particular circumstances of ***Wheatley***, it was held that no material error had been shown.[20]

29 The master expressed a similar view in the present case. We note that the decision of this court, in ***Young v Kestel***,[21] provides some support for the proposition that, once it appears that an applicant has an arguable case, it is inappropriate on an application for extension of time to embark on an evaluation of the strength or weakness of that case. However, those observations of E M Heenan J, with whom McLure J agreed, are inconsistent with the later decision in ***Andre v Perpetual***

[18] ***Wheatley v Wheatley*** [2018] WASCA 34 [54] - [63].
[19] ***Wheatley*** [58].
[20] ***Wheatley*** [67].
[21] ***Young v Kestel*** [2003] WASCA 190 [79], [118].

Trustees WA Ltd,[22] and cases there cited. Those cases include the decision of the High Court in ***Neil v Nott***.[23] In our view, the master erred in approaching the application for an extension of time on the basis that, unless the case is hopeless, there is no warrant for evaluating its strength: see [21] and [23] above.

30 However, we are not satisfied that the master's error was material in the circumstances of this case. That is because, if the master had considered the strength of the appellant's case on all the evidence before him, he could not have concluded that the case was more than arguable.

31 It may be accepted that the appellant had established a strong case that he had needs which could not be met from his own resources. That would be a significant factor for the court to consider on a substantive application, in determining whether the appellant was left without adequate provision for his proper maintenance etc. However, as explained in ***Devereaux-Warnes***, such a need is not the only matter which the court must consider when addressing that question.

32 In the present case, there are at least four other considerations relevant to an assessment of the propriety of the provision under the Will.

33 The **first** is whether the court might refuse to make an order in favour of the appellant on the ground that his character or conduct is such as, in the opinion of the court, to disentitle him to the benefit of an order.[24] The question of whether conduct is sufficient to disentitle an applicant to relief must depend not only on the nature of the conduct itself, but also, to some extent, on the strength of his need or claim to provision from the estate of the testatrix. The stronger the applicant's case for relief, the more reprehensible must have been his conduct to disentitle him to the benefit of any provision.[25]

34 It is unnecessary to canvass the evidence in any detail for present purposes, and inappropriate to attempt to form a view as to the likely application of s 6(3) in all the circumstances of the case. It is sufficient to observe, for present purposes, that the potentially relevant evidence included evidence that:

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[22] ***Andre v Perpetual Trustees WA Ltd*** [2009] WASCA 14 [41] - [42].
[23] ***Neil v Nott*** (1994) 68 ALJR 509, 511.
[24] Section 6(3) of the Act.
[25] ***Hughes v National Trustees, Executors and Agency Co of Australia Ltd*** (1979) 143 CLR 134, 156.

(1) The appellant had lived at the deceased's house for a period of some months in late December 2010 to early 2011, after his release from prison;

(2) Following an argument, the deceased called the police, who issued a move on notice to the appellant;

(3) The appellant was abusive to the deceased;

(4) The deceased subsequently took out a violence restraining order against the appellant;

(5) The violence restraining order against the appellant subsisted until about August 2013, when the deceased effectively withdrew it; and

(6) The appellant also spent some time in prison for breach of a violence restraining order against his ex-partner in 2013.

35 **Secondly**, as the deceased's estate has been entirely distributed, the court, in determining whether, and in what way, provision ought to be made for the appellant by an order under the Act, must have regard to the provisions of s 65(8) of the *Trustees Act*.

36 The evidence of the first respondent deposes to having altered her position in reliance on having an indefeasible interest in the assets distributed from the deceased's estate. She deposes that she paid off her own debts and some of the appellant's debts. She also used some of the money for various surgical procedures. The first respondent spent about $300,000 renovating her home, and gave her sister (the second respondent) the sum of $110,000.[26] The import of the first respondent's evidence is that these sums were expended on the basis that she was entitled to the whole of her inheritance. She deposes that her income is considerably exceeded by her living expenses, and that she owes a substantial amount to an aunt which is being repaid at a very modest rate.[27] If her evidence were accepted, then there is at least an arguable case that she is entitled to the benefit of s 65(8) of the *Trustees Act*.

37 The evidence does not address the question of whether the second respondent has acted in reliance on having an indefeasible interest in the $110,000 gifted to her by her sister. As it appears the second respondent did not give valuable consideration for the $110,000,

[26] Affidavit of first respondent sworn 3 May 2017, par 11.3-11.4.
[27] Affidavit of first respondent sworn 3 May 2017, par 32 - 35.

it is at least arguable that s 65(3)(b) may be applicable to the money she received from the first respondent.

38 **Thirdly**, there was uncontested evidence before the master that the first respondent had loved and supported the deceased over many years. They had a very close relationship and the first respondent had cared for the deceased on a daily basis. This was part of the explanation for the first respondent's inability to work on a full-time basis.

39 **Fourthly**, the net value of the deceased's estate is relatively modest.

40 Having regard to all of the above matters, while the appellant has an arguable case for the grant of final relief under the Act, it cannot in all the circumstances be said that his case is better than arguable. The present is one of the cases, referred to in ***Andre***, where the evidence leaves the court in the position where it can do no more than conclude that the appellant has demonstrated an arguable case on the merits. While the master was incorrect in his view that there was no warrant for examining the strength of the substantive claim on an application for leave to file out of time, the error was not material in the circumstances of this case.

41 For these reasons, the master's error, as identified in ground 1, does not advance the appellant's case.

Ground 2: absence of alternative redress

42 The appellant's second ground of appeal is that the master erred in law by failing to take into account, in the exercise of his discretion, that a refusal to extend time would leave the appellant without redress against anybody. There is no merit in this ground.

43 One of the guidelines referred to in ***Clayton v Aust***, as a matter to which the court would at least ordinarily have regard, is whether a refusal to extend time would leave the claimant without redress against anybody. However, the broad discretion conferred by s 7(2) - to give leave when satisfied that the justice of the case requires it - is not to be supplanted by answers to the questions identified in ***Clayton v Aust***.

44 There was no suggestion in the evidence or submissions in the primary proceedings that the appellant might have had a claim against a third party (such as a solicitor who negligently failed to file an

application within time). There is no basis for apprehending that the master proceeded on the basis that the appellant might have had such a claim, which might ameliorate the prejudice to the appellant if leave to file out of time was refused. In circumstances where the issue was not agitated, there was no error in the master's failure to consider the issue in his reasons.

45 In this case, having regard to the manner in which the parties' cases were presented, it is implicit in the master's reasons that he appreciated that the appellant would not have an alternative remedy if leave was refused. That was the basis on which he exercised the discretion. The error alleged by ground 2 is not established.

Grounds 3 and 4: disbursement of the deceased's estate.

46 Grounds 3 and 4 are related, and can conveniently be dealt with together. They are concerned with the master's conclusion that 'the fact of the distribution of the estate was decisive and was largely the reason why' the master refused the grant of leave.[28]

47 Ground 3 contends that the master erred in law in making this finding when the limitation of tracing remedies in s 65(3) of the *Trustees Act* is made plain by s 65(8) of that Act. Ground 3 also contends that the master erred in law in failing to take into account that:

(1) the first respondent retained a sum of $100,000 received from the estate;

(2) there was no or insufficient evidence to support a finding that she had made any change of position or would suffer hardship in relation to those funds as would make it inequitable to grant the appellant relief under s 65 of the *Trustees Act* in respect of those funds; and

(3) the master made no finding that it would be inequitable to grant relief in respect of the $100,000 retained by the first respondent.

48 Ground 4 contends that the master erred in law in failing to consider the possible application of s 65 of the *Trustees Act* to the sum of $110,000 received by the second respondent as a gift from the first respondent. The ground points to the absence of evidence from the second respondent as to any change of position or hardship in relation

[28] Primary decision [18].

to those funds which would make it inequitable to grant the appellant relief in respect of those funds.

49 The significance of s 65 of the *Trustees Act* to the exercise of the court's discretion to grant leave to file an application under the Act out of time was considered in ***Young***. That case involved a large estate of a deceased with complicated financial affairs, where the quantum of the entitlements of the deceased's wife and adult children under the Will was unclear. In dismissing an application for an extension of time the master in that case had referred to the prospect that the children may have to re-arrange their affairs in light of the distributions made. The court held that the master erred in doing so without addressing s 9 of the Act and s 65 of the *Trustees Act*. EM Heenan J, with whom McLure J agreed, observed:[29]

> In view of the statutory imperative that any order which might be made under the power available under s 65 of the *Trustees Act* should not be inequitable as regards assets already distributed it is difficult to envisage that an order which might eventually be made under the *Act*, would have an unfair or inequitable result upon any of the beneficiaries who had received such a distribution. That is the very consequence which the legislation intends to prevent and, as it is an outcome which is prohibited by statute, it cannot be presumed as a potential result. (citations omitted)

50 EM Heenan J considered the failure to address s 65 revealed a significant omission in the exercise of the master's discretion. His Honour observed:[30]

> Resort to distributed assets of the estate may not be possible in the circumstances of this case, and therefore it could not be regarded as an unequivocal reason to reject the application for an extension of time.

51 Those observations may be accepted as correct in the circumstances facing the court in ***Young***. However, in our view, it cannot be said that s 65(8) of the *Trustees Act* necessarily provides a complete answer to any assertion by a beneficiary of a distributed estate that an extension of time should not be granted because the beneficiary would suffer prejudice if the applicant were permitted to litigate the applicant's claim under the Act.

52 It is axiomatic that an order in relation to distributed assets of the estate will not be made if the court is of the opinion that it would be

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[29] ***Young*** [72].
[30] ***Young*** [73].

inequitable to do so in light of the matters referred to in s 65 of the *Trustees Act*. Accordingly, the respondent to an application for an extension of time, at least where there is a large estate, ordinarily could not successfully invoke the prospect of inequity as a basis, in and of itself, for refusing an extension of time.

53 Nevertheless, the distribution of the estate, and the consequential need to examine issues of potential inequity, mean that the litigation will be more complex and give rise to greater uncertainties than otherwise would be the case. The attendant complexity and uncertainty, together with the costs of investigating such matters, may be of significance in any assessment of the justice of the case in relation to extending time, particularly where the estate is a relatively small one, as here. The court may also consider prejudice arising from the uncertainty which the proposed proceedings will create as to a beneficiary's entitlement to retain the distribution he or she has received, or other matters such as the beneficiary's responsibility for his or her own costs of defending a claim made under the Act without recourse to an undistributed estate.[31] The court must be satisfied that the justice of the case requires that the applicant be given an extension of time.

54 In the present case the master did address s 65 of the *Trustees Act* in the exercise of his discretion. He referred to the first respondent having altered her position. He mentioned that the second respondent had received a gift of $110,000 from the first respondent.

55 In exercising the discretion to grant leave, it is important to bear in mind the public interest identified by Steytler P in ***Andre***,[32] in a passage adopted by this court in ***Wheatley***:[33]

> The time limit provided by s 7(2)(a) is there for obvious reasons. There is a public interest in the prompt administration of estates. Six months is ordinarily more than long enough for a potential claimant to decide whether to bring an application for provision under s 6(1) of the Act. After the lapse of that time, beneficiaries and others who may be affected should ordinarily be entitled to assume that there will be no challenge to the will.

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[31] In an undistributed estate, ordinarily the executor would assume responsibility for upholding the Will, with his or her costs being paid out of the estate: see G E Dal Pont and K F Makie *Law of Succession* (2nd edition) 784 - 785.
[32] ***Andre*** [38].
[33] ***Wheatley*** [54].

56 Considered as a whole and in light of the evidence led in the primary proceedings, the master's reasons indicate that, in circumstances where the estate has been distributed, he was not satisfied that the justice of the case required that the appellant be given leave to file out of time. Statements that the distribution of the estate was 'decisive' did not indicate that the master thought that s 65(8) necessarily precluded the grant of relief. If the master was of that view, he would not have found the appellant to have an arguable case. Nor did the master ignore the effect of s 65(8), to which he expressly referred, on the court's power to grant final relief. Rather, the references to distribution being 'decisive' should be taken as indicating that the distribution of the estate tipped the balance in favour of the respondents. That is, in all the circumstances of the case, including the matters referred to at [53] above and [60] below, the justice of the case did not require that the appellant be given an extension of time. In our view, no material error of law was involved in the master's approach.

57 The lack of evidence from the second respondent as to her assets, liabilities, income and expenses, or as to any change of position or hardship which would flow from the grant of leave, does not undermine the above conclusion. If the appellant is given leave to file an application out of time, his claim will not be confined to the money given to the second respondent. The impact of the pending proceedings on the first respondent will remain, even if any final relief ultimately granted to the appellant is confined to orders in respect of the money given to the second respondent.

58 It may also be noted that, despite the lack of evidence at this interlocutory stage, if leave were granted then the second respondent could still raise the issue of inequity in the subsequent proceedings. In that event, the court would need to consider whether, in its opinion, 'having regard to all possible implications in respect of … other persons'[34] (who would include both the first and second respondents), it would be inequitable to grant the appellant relief, or relief in full, in respect of the money gifted by the first respondent to the second respondent.

59 For these reasons, the appellant has not established that the master made the errors of law alleged in grounds 3 or 4.

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[34] Section 65(8) of the *Trustees Act*.

Exercise of discretion

60 Even if we had been satisfied that the master had made some material error of principle in the exercise of his discretion under s 7(2)(b) of the Act, we would not have exercised that discretion differently in the circumstances of the case. The appellant must persuade the court that the justice of the case, having regard to all relevant facts and circumstances and not merely those applicable to the appellant, requires that the appellant be given an extension of time. The following matters are relevant in addition to the additional complexity and uncertainty of the litigation referred to earlier:

(1) The appellant's evidence was not that he was unaware that he may have a claim under the relevant legislation, but rather that he was unaware of there being any time limit for the bringing of such a claim.[35] Ordinarily, where the claimant has been aware of his rights but merely unaware of the time limits, that has not, in and of itself, been regarded as sufficient for granting an extension of time.[36]

(2) The appellant was allowed to live in the deceased's house for six months after the deceased's death. In other words, he took the benefit of occupation, but left the making of any application to a later time which suited him.

(3) The first respondent has limited income and has incurred other liabilities, and faces the prospect of having to borrow to reimburse the estate to meet an award in favour of the appellant.

(4) There was unchallenged evidence that the prospect of proceedings under the Act is causing the first respondent, who is suffering from medical conditions, real distress.[37]

61 Further, the amount of the proceeds of the estate to which the appellant has an arguable claim (being the residue of about $100,000 retained by the first respondent and the $110,000 given to the second respondent) is a factor counting against the grant of leave to file out of time. If leave were granted, there would be a real prospect that at least a significant proportion of those remaining proceeds would be consumed by legal costs associated with a contested hearing. The

[35] Appellant's affidavit 14 December 2016, pars 6 - 9.
[36] ***Wheatley*** [63] and the cases there cited.
[37] Affidavit of first respondent sworn 3 May 2017, pars 36 - 38; affidavit of second respondent sworn 8 May 2017, par 52.

extent to which the grant of leave to file out of time would actually benefit the appellant, even if he were ultimately successful in showing that he was entitled to some relief, would appear to be limited. We are not satisfied that the justice of the case requires that the appellant be given an extension of time.

Orders

62 We would grant leave to appeal from the master's orders (which while interlocutory had the practical effect of shutting the appellant out of court). However, for the reasons explained above, the appeal must be dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

CR
ASSOCIATE TO THE HONOURABLE JUSTICE MITCHELL

24 MAY 2018