



Neutral Citation Number: [2019] EWHC 297 (Ch)

Case No: PT-2018-000852

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 21/02/2019

Before:

CHIEF MASTER MARSH

IN THE MATTER OF ALEXANDER SHEDDEN NINIAN (deceased)

AND IN THE MATTER OF THE FORFEITURE ACT 1982

Between:

SARAH MARIE NINIAN

Claimant

- and -

(1) GRAHAM ALEXANDER FINDLAY

(2) ALASTAIR IAN FINDLAY

(3) MATTHEW DAVID MILLER

Defendants

John Critchley and Toby Bishop (instructed by **Bolt Burdon Solicitors**) for the **Claimant**

Hearing date: 5 February 2019

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.

.....

CHIEF MASTER MARSH

Chief Master Marsh:

1. The claimant (“Mrs Ninian”) is the sole beneficiary of the residue of the estate of her late husband (“Mr Ninian”) under his will dated 9 November 2017. Mr Ninian died on 16 November 2017 with the assistance of Dignitas in Switzerland by committing suicide. Mrs Ninian was with him throughout the trip to Switzerland, his assessment by representatives of Dignitas and the occasion of his suicide.
2. By a Part 8 claim issued on 9 November 2018, Mrs Ninian applied for relief against forfeiture under section 2 of the Forfeiture Act 1982 on the basis that steps taken by her may have amounted to encouraging or assisting her husband to commit suicide which brought in play the forfeiture rule. The claim came before the court for hearing on 5 February 2019 when an order was made in the terms sought by Mrs Ninian. This judgment provides my reasons for granting relief.
3. It is not unlawful to commit suicide, but it is a serious offence to encourage or assist the suicide or attempted suicide of another with a maximum penalty of 14 years imprisonment. Sections 2, 2A and 2B of the Suicide Act 1961 provide:

“2. Criminal liability for complicity in another’s suicide

(1) A person (“D”) commits an offence if—

(a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and

(b) D's act was intended to encourage or assist suicide or an attempt at suicide.

(4) . . . no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.”

2A.— Acts capable of encouraging or assisting

(1) If D arranges for a person (“D2”) to do an act that is capable of encouraging or assisting the suicide or attempted suicide of another person and D2 does that act, D is also to be treated for the purposes of this Act as having done it.

(2) Where the facts are such that an act is not capable of encouraging or assisting suicide or attempted suicide, for the purposes of this Act it is to be treated as so capable if the act would have been so capable had the facts been as D believed them to be at the time of the act or had subsequent events happened in the manner D believed they would happen (or both).

(3) [omitted]

2B. Course of conduct

A reference in this Act to an act includes a reference to a course of conduct, and a reference to doing an act is to be read accordingly.”

4. Sections 1 and 2 of the Forfeiture Act 1982, so far as material, provide:

“s.1 the “forfeiture rule”

(1) In this Act, the "forfeiture rule" means the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing.

(2) References in this Act to a person who has unlawfully killed another include a reference to a person who has unlawfully aided, abetted, counselled or procured the death of that other and references in this Act to unlawful killing shall be interpreted accordingly.

S.2 Power to modify the rule

(1) Where a court determines that the forfeiture rule has precluded a person (in this section referred to as "the offender") who has unlawfully killed another from acquiring any interest in property mentioned in subsection (4) below, the court may make an order under this section modifying [or excluding] the effect of that rule.

(2) The court shall not make an order under this section modifying [or excluding] the effect of the forfeiture rule in any case unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified [or excluded] in that case.

...

(4) The interests in property referred to in subsection (1) above are—

(a) any beneficial interest in property which (apart from the forfeiture rule) the offender would have acquired—

(i) under the deceased's will ...;

(ii) ...;

(b) any beneficial interest in property which (apart from the forfeiture rule) the offender would have acquired in consequence of the death of the deceased, being property which, before the death, was held on trust for any person.

(5) An order under this section may modify [or exclude] the effect of the forfeiture rule in respect of any interest in property to which the determination referred to in subsection (1) above relates and may do so in either or both of the following ways, that is—

(a) where there is more than one such interest, by excluding the application of the rule in respect of any (*but not all*) [or all] of those interests; and

(b) in the case of any such interest in property, by excluding the application of the rule in respect of [all or any] part of the property.

(6) ...

(7) ...”

5. Section 1 of the Forfeiture Act provides a definition of the ‘forfeiture rule’ for the purposes of the Act. However, the definition has that limited function and it does not purport to codify the rule. This is clear from the general words that are used. It is a rule that “in certain circumstances” (the circumstances are not provided) precludes a person who has unlawfully killed another from benefitting from their estate. Section 1(1) merely provides a definition of the rule for the purposes of describing the circumstances in which relief may be granted.
6. The exact scope of the principle is uncertain in some respects and at one time there was some doubt about whether the principle invariably applied in cases of unlawful killing. In *Beresford v Royal Insurance* [1938] AC 586 at 598 Lord Atkin recognised as

authoritative the statement of the principle by Fry LJ in *Cleaver v Mutual Fund Life Association* [1892] 1 QB 147 at 156:

“... no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.”

7. I consider the forfeiture rule as it applies in this case, is now settled following the decision in the Court of Appeal in *Dunbar v Plant* [1998] Ch 412. The case involved a suicide pact between the defendant and her fiancée. After two unsuccessful attempts, the fiancée succeeded in killing himself, whereas the defendant survived. The members of the Court of Appeal were in agreement about the scope of the forfeiture rule and its application to the facts in that case. However, they disagreed about the extent to which relief from forfeiture should be granted with the majority decision on that issue being given by Phillips LJ with whom Hirst LJ agreed; Mummery LJ dissented.
8. Phillips LJ suggested that had the Forfeiture Act not been passed, it is unlikely the forfeiture rule would have survived unvaried (page 435F). He went on to say, however, that the Forfeiture Act has given the court a greater degree of flexibility than could have been achieved by judicial modification of the rule and there was no longer a rationale for an attempt to modify the rule. “The appropriate course where the application of the rule appears to conflict with the ends of justice is to exercise the powers given by the Act.” (436H)
9. After a full review of the authorities, Phillips LJ summarised his conclusion in the following way:

“Thus far, apart from the motor cases, there has been no instance of the court failing to apply the forfeiture rule to a case of unlawful killing. So far as the rule is concerned, it is hard to see any logical basis for not applying it to all cases of manslaughter.”
10. Both Mummery LJ and Phillips LJ concluded that the rule applies equally to cases involving aiding and abetting suicide contrary to section 2(1) of the Suicide Act 1961: 425 F – G and 437 D – G.
11. Phillips LJ went on to observe:

“When the Act is considered, however, it gives clear indication that the circumstances in which the offence is committed may be such that the public interest does not require the imposition of any penal sanction. This, in my judgment, is the logical conclusion to be drawn from the provision in section 2(4) of the Act that “no proceedings shall be instituted under this section except by or with the consent of the Director of Public Prosecutions”. Where the public interest requires no penal sanction, it seems to me that strong grounds are likely to exist for relieving the person who has committed the offence from all effect of the forfeiture rule.”¹
12. The passages cited above from the judgment of Phillips LJ were considered and approved by Patten J (as he then was) in *Dalton v Latham* [2003] EWHC 796 (Ch)

¹ In February 2010, the Director of Public Prosecutions issued a “Policy for prosecutors in respect of cases of encouraging or assisting suicide.”

saying they "... must now be taken to be a binding statement of the law as to the application of the rule of public policy. It applies to all cases of unlawful killing ...".

13. In a case such as this, where there has not been a criminal conviction, it is right to approach the application for relief in two stages:
 - (1) To consider whether on the balance of probability there has been an unlawful killing. This first stage is required by section 2(1) of the Forfeiture Act as a prerequisite to considering relief.
 - (2) To consider whether the court should exercise its power under section 2(1) of the Forfeiture Act, applying the criteria set out in section 2(2).

Background

14. The source of the information which follows in this judgment is largely based on witness statements made by Mr and Mrs Ninian. His statement was made a few days before his death. Mrs Ninian's statement made for the purposes of this claim is modelled on the voluntary statement she provided to the police at her interview. Mrs Ninian's evidence has not been tested in cross-examination but I have no reason to doubt the veracity of anything either she or Mr Ninian say.
15. Mr Ninian was born on 9 February 1933. He obtained a BSc from Glasgow University and subsequently spent time studying at the Massachusetts Institute of Technology. He was a successful businessman and became the managing director of a subsidiary of Borthwicks plc. Mr and Mrs Ninian met when she was aged 22 and they married in 1983 when she was aged 28 and Mr Ninian was aged 49. They have no children or dependants. It is plain from the evidence that they had a long and loving marriage.
16. Mr Ninian retired from business in about 1992. He became a prolific and successful travel writer and then obtained a PhD in Sports Management, completing his 50,000 word thesis, at the age of 80.
17. Mrs Ninian describes her husband as being a highly intelligent and decisive person throughout his life. He described himself as a 'fiercely independent individual'.
18. In 2013 Mr Ninian was diagnosed with Progressive Supra-nuclear Palsy ("PSP") which is a progressive incurable disease.
19. Mr Ninian first decided to go through with an intended accompanied suicide in about August 2016. He contacted Dignitas himself without his wife's knowledge or assistance. She became aware of his decision a few months later when she noticed he had looked at the Dignitas website several times and she saw letters addressed to Dignitas as she posted his mail. She did not raise the subject with him immediately but, in November 2016, he told her of his decision and requested that she did not tell anyone else. Initially that arrangement held good. Mrs Ninian actively tried to dissuade her husband from going through with his plan. She says he was firm in his decision although she hoped that he would change his mind or that he would not complete all the steps that Dignitas required.

20. Mrs Ninian was then asked by her husband to help him with some of the administration required by Dignitas. This mainly comprised:
 - (1) obtaining and providing to Dignitas a notarised copy of his birth certificate, their marriage certificate and his passport;
 - (2) the provision of a written statement about his decision to commit suicide and his home circumstances;
 - (3) the provision of a copy of his passport and medical records; and
 - (4) making a payment by bank transfer to Dignitas.
21. Mrs Ninian persuaded her husband that his doctors should be made aware of his decision. She says she hoped they would offer him alternative options and he would change his mind. They saw Dr Kathryn Richardson who is a Specialist Registrar in Palliative Care on 13 January 2017. Dr Richardson's letter of that date records the discussion that took place. Mr Ninian said he found life intolerable. He said he was not depressed and did not wish to trial an anti-depressant treatment. It is clear from the letter that Mr Ninian was resolute in his decision at that stage and there was nothing to suggest he had received any encouragement from Mrs Ninian.
22. Although it was contrary to her husband's wishes, Mrs Ninian informed a close friend and her niece of Mr Ninian's decision and the contemporaneous emails she has provided bear out her evidence that she had tried to persuade Mr Ninian not to go through with his plan.
23. Mr Ninian was seen at home on 2 August 2017 by Dr Jonathan Martin who is a Consultant in Palliative Medicine and Vaz Francis, the Islington Community Team Leader for palliative care. Dr Martin says in his follow-up letter:

“... I was particularly keen to meet you in light of your strong desire to go to Dignitas in the near future. You and Sarah explained that you have had a provisional “green light” from Dignitas and you are in the final stages of preparation before going to Switzerland.”
24. The letter goes on to record several other matters of importance:
 - (1) Dr Martin explained that it was illegal for anyone to support Mr Ninian in going to Dignitas and if Mrs Ninian accompanied him to Dignitas that could be construed as assisting him to commit suicide.
 - (2) Dr Martin gave advice about what the future might hold in terms of the progression of his disease and the palliative care that could be provided. He also advised about the risk that some patients might find themselves on an apparent ‘conveyer belt’ to Dignitas that they felt they cannot get off.
 - (3) Dr Martin records that Mrs Ninian was very clear about not wanting her husband to go to Dignitas.
25. By this time Mr Ninian's condition had deteriorated. He had lost some mobility in his fingers, he had increasing difficulty with swallowing and was unable to move his

eyes. His general mobility was poor and he had had several falls. He rarely spoke and his ability to communicate by hand written notes became more limited. He found communication using an iPad with a communication app difficult.

26. Mrs Ninian instructed Bolt Burdon to advise her about her husband's wish for her to accompany him to Dignitas. They had previously been instructed to act for both of them and had drafted Mr Ninian's will made in 2013. By that will he left a conditional legacy of £50,000 to his sister with the entire residue of his estate left to Mrs Ninian subject only to default terms which would apply in the event of her predeceasing him. In that event two charities would benefit from the residue.
27. Mr Ninian wished to record his reasons for deciding to end his life and he also wished to make a minor change to his will. Very properly, Bolt Burdon referred Mr Ninian to an independent firm of solicitors, Dixon Ward. Mr Gregory White of that firm provided advice and assistance to Mr Ninian. Mr White prepared Mr Ninian's statement dated 10 November 2017, to which I have referred, and drafted a new will which was duly executed. Under the new will, the legacy to Mr Ninian's sister was removed, although she received a lifetime gift of £50,000 in its place. The default terms in relation to the residue were also changed to substitute Mrs Ninian's brothers in place of the two charities. The thinking was that it was preferable to remove the risk of them opposing an application for relief. The change reflects Mr Ninian's meticulous preparation of his affairs in the days before going to Zurich.
28. Arrangements were made for Mr Ninian to be assessed by Dr James Warner who was chair of the Faculty of Old Age Medicine at the Royal College of Psychiatrists between 2012 and 2016 and is currently the National Professional Advisor for the Care Quality Commission. Dr Warner produced two reports dated 11 November 2017. The first expressed his opinion that Mr Ninian had testamentary capacity. The second expressed the opinion that Mr Ninian had the capacity to decide about significant treatment options such as attending Dignitas. It is unnecessary to set out the thorough review and analysis that led Dr Warner to reach those conclusions.
29. Arrangements for travelling to Switzerland were made on 9 September 2017. Mr and Mrs Ninian went to travel agents in Islington close to their home. Mrs Ninian dealt with the travel agent because Mr Ninian was unable to speak. They reserved flights to Zurich for 13 November 2017; a return flight for her and a one-way flight for him. Mr Ninian paid for the flights although payment was made with Mrs Ninian's help.
30. On 13 November 2017 they flew together to Zurich. Mrs Ninian says she accompanied her husband because he was unable to travel unaided. They stayed in a hotel in Zurich. Mr Ninian then had two appointments with Dr Joachim Burkhardt of Dignitas on successive days, the 14 and 15 November 2017; on each occasion Mr and Mrs Ninian travelled to the appointment together by taxi. Approval to the accompanied suicide was given on 15 November 2017 and the following day they both went by taxi to the Dignitas apartment on the outskirts of Zurich. It is unnecessary to say more than that no direct assistance in the consumption of the substances that killed Mr Ninian was provided by his wife. However, it is clear that Mr Ninian could not have travelled either to Switzerland or to the three appointments with Dignitas without the assistance she provided.
31. Mr Ninian says in his statement that:

- (1) His wife had been opposed to his decision from the moment she found out about it.
- (2) She never pressurised him to take his life.
- (3) She organised the trip to Zurich and accompanied him for the sole reason that he cannot travel unaided.
- (4) There was no history of violence between them.

32. Mrs Ninian speaks eloquently about her motivation in undertaking the acts that I have summarised:

“46. For a man of such intelligence, dignity and grace, being unable to speak made life insufferable for Alex. Alongside this his mobility was bad, leading to frequent falls and his swallow was showing the first signs of going. The thought of losing his swallow as well as his speech terrified Alex. A few months before his death, I asked him if he got any enjoyment out of life at all and he gave me the thumbs down. I spent a year trying to get Alex to change his mind but he was solid in his decision that he wanted to be dignified to the end which is why he chose to end his life. He faced a future that he did not want.

47. Alex was my soul mate for 40 years and it is very hard to cope with losing him. Everything that I did for him I did because he asked me to, and because I loved and cared for him too much to refuse.”

33. Helpful witness statements have been provided by Mrs Ninian’s brothers who are the first and second defendants. They support their sister’s claim. I do not need to summarise what they say.
34. The third defendant is Mrs Ninian’s co-executor, Mr Miller, under the 2017 will and he remains neutral about the application.

The police investigation

35. On 29 November 2017, about two weeks after Mr Ninian’s death, Mrs Ninian instructed Kingsley Napley LLP to assist her in reporting the circumstances to the police. Kingsley Napley made contact with the police and Mrs Ninian was interviewed under caution at Kingsley Napley’s offices on 22 March 2018. The interviewing officers then provided a report to the Crown Prosecution Service to be considered in accordance with the DPP’s Policy Statement issued in February 2010. On 20 June 2018, Mrs Ninian was informed that although the CPS was satisfied the evidential stage of the Code test had been passed, it was not considered that a prosecution would be in the public interest. This was a reference to paragraphs 13 and 14 of the 2010 Policy Statement which requires prosecutors to apply the Full Code Test as set out in the Code for Crown Prosecutors in cases of encouraging or assisting suicide. The test has two stages; first an evidential test and secondly a public interest stage.

The estate

36. A grant of probate was taken out on the basis that the assets held jointly by Mr and Mrs Ninian pass to Mrs Ninian by survivorship. Mr Miller explains that this was an administrative error by his firm and was not intended to connote an assumption that Mrs Ninian's application for relief from forfeiture would succeed.
37. Estate accounts have now been prepared on two alternative bases. The estate includes jointly owned assets with a value of £1,589,059. If forfeiture affects the jointly owned assets, the value of Mr Ninian's net estate is £1,840,557.24. If the estate is not affected by forfeiture, or Mrs Ninian is granted relief, the value of the estate is £251,498. The assets and investments held in Mrs Ninian's sole name amount to approximately £6.2 million.

Forfeiture and joint property

38. It is necessary briefly to deal with the effect of forfeiture on jointly owned property. The claim has proceeded on the basis that the effect of forfeiture on joint property is to sever the joint tenancy in equity. Authority for this proposition can be found in the judgment of Vinelott J in *In re K Deceased* [1985] Ch 85 at 100 F – G. In that case, the defendant widow held a property jointly with her husband whom she had accidentally shot. The judgment records and approves a concession made by counsel for the defendant widow that there had been a severance.
39. In *Dunbar v Plant* [1998] Ch 412, Mummery LJ noted it was not in dispute that the forfeiture rule applied to effect a severance of the joint beneficial tenancy in a house. The point is not mentioned in the judgments of Phillips and Hirst LJ's but it is clearly the premise upon which the appeal proceeded and severance underlies the decision of the court about forfeiture. The proposition is also supported by strong Commonwealth authority and no doubt the reason why it has not led to more detailed judicial analysis is that it is regarded as being trite. It is notable that in both the cases I have mentioned it was conceded.

Does the forfeiture rule preclude Mrs Ninian from benefitting under the will?

40. Section 2 of the Suicide Act was considered by the House of Lords in *R (Purdy) v Director of Public Prosecutions* [2010] 1 A.C. 345 before the section was substantially amended with effect from 1 February 2010 into its current form.² Until 31 January 2010, the offence was simpler and chimed with section 1(2) of the Forfeiture Act:

“(1) A person who aids, abets, counsels or procures the suicide of another ... shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.”

41. In *Purdy*, Lord Hope was in no doubt about the scope of this offence.

“As Lord Judge CJ said in the Court of Appeal [2009] 1 Cr App R 455 , para 2, this provision is clear and unequivocal. The offence which it describes is an offence in itself. It is not ancillary to anything else. Its language suggests that it

² The amendment was introduced by section 59 of the Coroners and Justice Act 2009.

applies to any acts of the kind it describes that are performed within this jurisdiction, irrespective of where the final act of suicide is to be committed. So acts which help another person to make a journey to another country, in the knowledge that its purpose is to enable the person to end her own life there, are within its reach. Its application cannot be avoided by arranging for the final act of suicide to be performed on the high seas, for example, or in Scotland. Otherwise it would be all too easy to exclude the vulnerable or the easily led from its protection. Furthermore it does not permit of any exceptions.” [my emphasis]

42. The editors of *Blackstone’s Criminal Practice* at B1.147 express the view that the changes made to section 2 of the Suicide Act “... were designed to state the existing law more clearly and unambiguously rather than to make any particular changes ...”. This view is shared by the editor of Volume 12(1) *Halsbury’s Statutes* (2017 Reissue) at 406. However, in light of the substantial redrafting, it is necessary to consider the replacement offence because there are a number of specified elements that must be present. For example, it separates the actus reus from the necessary mens rea in section 2(1)(a) and (b).
43. The elements of the offence under section 2(1) of the Suicide Act were the subject of submissions during the hearing. Since then I have been provided with helpful written submissions by Mr Critchley and Mr Bishop. Although it is a convenient shorthand to describe the offence as ‘assisting suicide’ that is not an accurate summary of the offence. It involves an act which is capable of encouraging or assisting a suicide; and an act may comprise a course of conduct (section 2B). Acts that are capable of encouraging or assisting a suicide are explained in section 2A. There are two elements of the offence. First, the carrying out of an act that is capable of encouraging or assisting the suicide. Secondly, that the act was intended to encourage or assist the suicide. It is not necessary that the act actually encourages or assists the suicide. It must merely be capable for doing so. Thus, the actus reus is objective whereas the second element of the offence is subjective. And clearly, encouragement and assistance are separate matters; encouragement is unlikely to amount to assistance, whereas assistance may amount to encouragement.
44. If the offence is broken down into its constituent elements, as if for a direction to a jury, it seems to me that the following questions need to be considered:
 - (1) Did Mrs Ninian do an act that was capable of encouraging or assisting Mr Ninian’s suicide? An act can mean a course of conduct such that, when looked at together the actions were a course of conduct that was capable of encouraging or assisting the suicide.
 - (2) The act, including a course of conduct, is to be looked at objectively. It is not relevant whether it did encourage or assist the suicide. It is a question of whether it was capable of encouraging or assisting the suicide.
 - (3) The act of encouragement or assistance may be part of a chain of events; but a single act of encouragement or assistance will suffice.
 - (4) If she did an act that was capable of encouraging or assisting Mr Ninian’s suicide, did Mrs Ninian intend to encourage or assist the suicide of her husband?

45. In this case, Mrs Ninian has at all times made it clear that she did not wish her husband to go to Switzerland to take advantage of the local laws under which Dignitas operates. She never provided any encouragement to her husband to commit suicide and I do not consider that her acts could be construed as doing so. However, she provided assistance to him ranging from what are described as acts of administration to more fundamental acts such as travelling with Mr Ninian to Switzerland and then to meetings with Dignitas on three occasions. Her involvement was essential to enable him getting to Zurich and getting to his appointments with Dignitas. Looked at objectively, such acts were plainly capable of assisting his suicide. It is equally plain that although she did not wish him to commit suicide, she intended to assist him in that enterprise.
46. It is only necessary for me to be satisfied on the balance of probabilities that the forfeiture rule is engaged by virtue of Mrs Ninian's acts. I need only add that in reaching the conclusion that the offence under section 2 of the Suicide Act was committed, I am not expressing any view about whether individual elements of the assistance she provided may be sufficient to amount to the actus reus of the offence. It is not necessary for me to decide whether, for example, the acts of assistance in dealing with matters of administration concerning Dignitas are relevant acts or a course of conduct. I have viewed the totality of her assistance and, taken with her state of mind, it amply satisfies the requirements of the section.

Relief from forfeiture

47. Section 2(1) of the Forfeiture Act provides that the court may make an order modifying or excluding the effect of the forfeiture rule. However, under section 2(2), the court must not make such an order unless it is satisfied that the test set out there is satisfied. The court must have regard to the conduct of the 'offender' and to such other circumstances as appear to the court to be material and be satisfied that the justice of the case requires the effect of the rule to be modified or excluded. Although the court is given a discretion it is one, as it appears to me, that is limited.
48. Once the court is satisfied that the forfeiture rule applies, the court may have regard to both conduct and other material circumstances. I can see no justification for putting a constraint upon the circumstances that the court may regard as being material. Mummery LJ dissented from the majority decision in *Dunbar v Plant* about the application of the court's discretion under the Forfeiture Act. However, his observations about the scope of the discretion are of assistance:
- “The court is entitled to take into account a whole range of circumstances relevant to the discretion, quite apart from the conduct of the offender and the deceased; the relationship between them; the degree of moral culpability for what has happened; the nature and gravity of the offence; the intentions of the deceased; the size of the estate and the value of the property in dispute; the financial position of the offender; and the moral claims and wishes of those who would be entitled to take the property on the application of the forfeiture rule.”
49. It seems to me that it will also be helpful to have regards to paragraphs 43 and 45 of the DPP's Policy Statement where a decision has been made, applying the principles it sets out, that a prosecution is not in the public interest. Paragraph 43 sets out factors tending in favour of prosecution and paragraph 45 the factors tending against

prosecution. There are, of course, differences between a decision not to prosecute and the exercise of a discretion under the Forfeiture Act but both involve consideration, amongst other things of the degree of moral culpability and the motivation of the ‘offender’.

50. The court is greatly assisted in this case by the quality of the evidence with which it has been provided and by having a statement from Mr Ninian that was the product of independent legal advice. The factors that are particularly pertinent in this case are:

(1) Of the sixteen factors set out in paragraph 43 of the Policy, only one is engaged, namely that Mr Ninian was unable to undertake himself at least some of, and possibly all of, the acts that amounted to assistance provided by Mrs Ninian.

(2) Five of the six factors in paragraph 45 of the Policy are present.

(i) Mr Ninian had reached a voluntary, clear and settled and informed decision to commit suicide;

(ii) Mrs Ninian was wholly motivated by compassion;

(iii) Mrs Ninian had sought to dissuade her husband from committing suicide.

(iv) Mrs Ninian’s actions may be characterised as reluctant assistance in the face of a determined wish on the part of her husband to commit suicide.

(v) Mrs Ninian reported the suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide.

(3) It is not possible, however, to characterise Mrs Ninian’s actions as being “minor assistance” in circumstances where the suicide could not have taken place without her assistance, particularly in helping Mr Ninian travel to Zurich.

51. It is also helpful to consider the factors set out by Mummery LJ in *Dunbar v Plant*:

(1) Mr and Mrs Ninian were married for 34 years. It was a first marriage for both of them and all the evidence points towards a strong and loving relationship.

(2) The degree of moral culpability on the part of Mrs Ninian is limited. I have concluded, applying the civil standard of proof, that she committed an offence under section 2 of the Suicide Act. It is a serious offence with a maximum term of imprisonment of 14 years. However, it is I think fair to say that what she did was to assist her husband, who was a man with a strong independent will, who had been assessed by an eminent consultant as having capacity, to fulfil his wish to undertake a lawful act. On one view, although not a course of action the court can endorse, she did what many persons would do for a loved one.

(3) I have already remarked on the nature and gravity of the offence. Mrs Ninian took steps to positively discourage her husband from committing suicide and the help she provided was removed from the immediate steps that were the cause of his death.

(4) Mr Ninian's intentions were clearly recorded and were unambiguous.

(5) The size of Mr Ninian's estate is not small but when measured against Mrs Ninian's independent wealth it is not significant. There could be no suggestion that Mrs Ninian was motivated by money in the assistance she provided.

(6) Mrs Ninian's brothers would be entitled to take the forfeited property if relief is not granted. They have no wish to do so and have supported her application.

52. No one factor is determinative and the factors are not of equal weight. However, when considering an application for relief, the decision of the Crown Prosecution Service not to prosecute Mrs Ninian is a powerful factor in favour of the grant of relief. I am satisfied that the circumstances of this case provide a compelling case for the court to exercise its power to grant full relief such that Mr Ninian's share of jointly owned property and her interest as the beneficiary of the residue of Mr Ninian's estate, that would otherwise be forfeit, will pass to Mrs Ninian.
53. Like relief against forfeiture in the context of leases³, the effect of the grant of relief relates back to the date of Mr Ninian's death. The severance of the jointly owned property is treated as not having taken place. The joint property will as a result of the court's order pass to Mrs Ninian by survivorship. This is clear from section 2(4)(b) of the Forfeiture Act which expressly includes in the definition of property in relation to which relief may be granted, a beneficial interest in property which, apart from the forfeiture would have been acquired in consequence of the death.

Afterword

54. The claimant's application has been greatly assisted by the careful and methodical way in which this claim was prepared. The exercise of the court's discretion under the Forfeiture Act is a sensitive one due to the interaction between different elements of the justice system. The court will wish to be informed about the background to the claim with complete candour. A decision by the CPS not to prosecute, because it is considered not to be in the public interest to do so, is an important factor for the court to take into account. It is, however, but one factor and it is necessary for the court to be informed of the full background.
55. In this case, there was no opposition to the order the claimant sought. Due to the careful way in which the claim had been prepared, it was possible to deal with it at a disposal hearing lasting not much more than an hour. Whether it is possible to deal with similar cases at a short hearing will depend upon the view the court takes about the evidence. It is unlikely that the court will ever feel able to deal with a claim of this type without a hearing due the benefit that is obtained from oral submissions from counsel.
56. There may be some unopposed cases in which the court will find it helpful for the claimant, and possibly other witnesses, to provide oral evidence. Whether that is necessary may depend upon the view taken by the court about the degree of candour displayed in the witness statements.

³ Woodfall – Landlord and Tenant 17-175

57. Where the claim is opposed, it is likely that a directions hearing will be needed for the court to determine whether any witnesses will be required to attend for cross-examination and whether the disposal hearing should be before a Master or a High Court judge. Cases heard outside London will follow local practice.