



Neutral Citation Number: [2019] EWHC 2785 (Ch)

Case No: PT-2019-000689

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: 29/10/2019

Before:

CHIEF MASTER MARSH

**IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF THE
PRESUMED DEATH OF 'AB'**

CD

Claimant

Michael Furness QC (instructed by Hogan Lovells International LLP) for the Claimant

Hearing date: 18 October 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.

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CHIEF MASTER MARSH

Chief Master Marsh:

1. On 18 October 2019, I heard a claim made under the Presumption of Death Act 2013 (“the Act”) and granted a declaration that I was satisfied AB has died and that for the purposes of section 2(2) and 2(3) of the Act AB is presumed to have died at 11.30 on 18 October 2019. In the course of the hearing I received helpful submissions from Mr Furness QC about the workings of the Act as they apply to the tragic circumstances of this case. One particular issue warrants consideration in a judgment.
2. The background to this claim has already caused immeasurable distress to the claimant “CD”. Although the hearing took place in open court, I directed that my judgment should be anonymised in order to avoid further publicity that might be caused solely due to the need to publish a judgment dealing with the workings of the Act. I also directed that access to the documents filed in connection with the application can only be obtained by a third party with the permission of the court on making an application on notice to CD.

Background

3. AB was a British citizen. At the age of 16 he joined the armed services until he was discharged with an exemplary conduct certificate in 1993. He married CD in 1975. From 1993 onwards, AB and CD lived in the north-east of England. They were both domiciled in England and Wales. BC was a midwife in the NHS until she retired in 2007. They lived and worked in a number of countries between 2003 and 2008 when they returned to live in the north-east of England.
4. In May 2009 both AB and CD travelled to the Yemen to work with an NGO providing healthcare services. On Friday 12 June 2009 AB was taken hostage by unknown persons. The circumstances in which this occurred, and the aftermath, are dealt with in witness statements from CD, a friend of CD’s and Julia Longbottom the Director of Consular Services of the Foreign and Commonwealth Office (FCO).
5. There is limited evidence about what may have happened to AB after his abduction. However, by June 2010 the FCO had assessed that AB was believed to be dead although his body had not been found. This view was repeated by Tobias Ellwood, the FCO Minister, in 2015.
6. Ms Longbottom has no first-hand knowledge of the facts; and she does not provide any description of the sources of information relied on by the FCO or the machinery for gathering information. The statement asserts, and I accept, that the primary sources of information, and the machinery for gathering information, are confidential and cannot be disclosed on the grounds of national security. Although the reasons for the presentation of the evidence provided on behalf of the FCO in this form are understandable, the weight that can be given to evidence that amounts to mere assertion by a person who has no knowledge of the primary facts, and who is unable to refer to the sources of her information, is inevitably limited.

The Act

7. The court’s powers under the Act to grant a declaration of presumed death derive from section 1. The effect of section 1(1) and 1(2) is that an application can be made

to the court for a declaration that a missing person is presumed to be dead where that person is either (a) thought to have died or (b) has not been known to be alive for a period of at least 7 years. It is clear that an application may be made on the first ground without the elapse of a minimum period following the person having gone missing. There may be cases in which the evidence points convincingly to the missing person having died, although no body has been found, within a short period of having gone missing. In *Greathead v Greathead* [2017] EWHC 1154 (Ch) HHJ Paul Matthews (sitting as a Judge of the High Court) was able to conclude that the missing person had died on the same day he went missing. The application was not in fact made until over 11 years after that date due in part at least to the Act only coming into force in 2014. Leaving that point aside, it would have been possible for the application to have been made much sooner albeit that the missing person's family may often be reluctant to make the application while a glimmer of hope about the missing person exists.

8. The provisions of section 2(2) of the Act add a layer of complication that can create difficulties for the court. The section set out in full provides:

“2 Making declaration

- (1) On an application under section 1, the court must make the declaration if it is satisfied that the missing person –

- (a) has died, or
- (b) has not been known to be alive for a period of at least 7 years.

- (2) It must include in the declaration a finding as to the date and time of the missing person's death.

- (3) Where the court –

- (a) is satisfied that the missing person has died, but
- (b) is uncertain at which moment during a period the missing person died,

the finding must be that the missing person is presumed to have died at the end of that period.

- (4) Where the court –

- (a) is satisfied that the missing person has not been known to be alive for a period of at least 7 years, but
- (b) is not satisfied that the missing person has died,

the finding must be that the missing person is presumed to have died at the end of the period of 7 years beginning with the day on which he or she was last known to be alive.”

9. It is clear the burden of proof under section 2(1) is on the balance of probabilities (see *Greathead* [21]). The cogency of the evidence that will be required under section 2(1)(a) (the missing person has died) is likely to be greater than under section 2(1)(b) (the person has not known to be alive for a period of at least 7 years). The test under the former is a positive one whereas under the latter is to establish the absence of knowledge of the person being alive.
10. If the court is satisfied that the missing person has died and the date of death is clear (as in *Greathead*) it will not be difficult to fix a time of death. The position is less straightforward where there is sufficient evidence to support a finding that the missing person has died but little or no basis for determining when it occurred. The Act has fixed on a period of 7 years as the minimum period to enable a declaration to be made where the missing person has not been known to be alive. The date of presumed death, if the court is not satisfied that the missing person has died, is taken to be the end of the 7 year period. This makes good sense. However, if the court is satisfied that the missing person has died, the provisions in section 2(3) must be applied and they may lead to an anomalous result.
11. Section 2(3) applies because the court is satisfied that the missing person has died but does not know the date and time of death. The way it is put in the Act is that the court is uncertain at which moment “during a period” the missing person died. However, the Act gives no clue about how “the period” may be established. The court is required to decide upon a period but may commonly have very little to go on other than that the end of the period can be fixed having regard to the fact that the passage of time makes it increasingly likely that the missing person is dead. It is certainly possible, perhaps illogically, for the “period” in the case of section 2(3) to be longer than 7 years where the available evidence shows little more than the passage of time.
12. This is not merely a theoretical problem because if the missing person has a pension in payment, or was in receipt of benefits, a substantial sum may have been received during the period in which the person was missing and the estate may face a claim for repayment.

Jurisdiction

13. For the court to have jurisdiction one of the provisions of section 1(3) and (4) must be satisfied. In this case AB was domiciled in England and Wales on 12 June 2009 (section 1(2)(a)), that being the last day he was known to be alive, and CD was domiciled in England and Wales on the day the claim form was issued (section 1(2)(c) and 1(2)(4)). The court has jurisdiction to hear the application on the basis of either qualifying ground.

Procedure

14. Section 9(1) of the Act and CPR 57.20 require the applicant to notify the missing person’s spouse or civil partner, parent, child or siblings, or the nearest relatives. In this case there are no steps that were required for the reasons that are explained in the evidence. The requirement under CPR 57.20(f) to notify other persons who have an interest has been complied with. This has included notification to the Armed Forces Pension Scheme because AB had had a pension in payment from 2009 onwards. The Scheme opted not to respond to the claim.

15. Section 9(2) of the Act requires that an application must be advertised in accordance with rules of court and CPR 57.21 specifies that the advertisement must in a newspaper circulating “in the vicinity of the last known address of the missing person”. The provision may serve no purpose in the case of a person taken hostage abroad and the comparable provision in the Guardianship (Missing Persons) Act 2017 and CPR 57.29 may even put the life of the missing person at risk. However, whether the requirement of the Act and the rules is one that can be waived by the court is not an issue that arises in this case. The provision has caused difficulty because AB’s last known address was taken to be his address in the Yemen, albeit that he had only been resident at that address for just over a month and the period of time he was due to reside there was only 5 months. With some difficulty, an advertisement has been placed in a newspaper called Al-Ayyam that is based in Aden. I am satisfied that this fulfilled the requirements of the Act.
16. However, it seems to me that it would have been sufficient to have advertised the claim in a newspaper circulating in the vicinity of AB’s address in England. This was his permanent address and one to which he had intended to return within a matter of months. The purpose that lies behind the requirement to advertise is to ensure both that persons who may have knowledge of the missing person’s whereabouts, or when they may have died, and those who may be interested in the making of an order under the Act have notice of the proceedings. There will be cases in which a person goes missing in a war zone or in a very isolated part of the world where an advertisement locally is not a practical proposition. It is unlikely that an inability to advertise in such an area was intended to thwart the claimant’s ability to make an application. If, however, the missing person has moved to reside abroad on a permanent basis, local advertising may be essential.
17. Paragraph 1.4 of Practice Direction 57B makes it mandatory for the court to hold a hearing for case management directions in every case. This does not accord with the normal practice in Chancery Division in London where many cases are listed for a disposal hearing as the first hearing of the claim. In *Irish* [2019] EWHC 2508 (Ch) HHJ Paul Matthews (sitting as a High Court Judge) determined that it was open to the court exercising its case management powers under CPR 3.1(2)(b) and (m) to hear and dispose of the claim at the first hearing and I adopted the same course of action. I would observe, however, that paragraph 1.4 of PD 57B serves little or no useful purpose. It is far better that the court should be able to determine on a case by case basis whether in the very stressful circumstances that inevitably arise in applications under the Act it is really necessary for the CPR to specify that there should be directions hearing in every case. I would invite the CPRC to consider whether a change to the Practice Direction should be made to remove a procedure that is on its face inflexible.

Disposal

18. The evidence placed before the court about AB’s disappearance and what may have happened to him was inevitably circumspect; and the evidence provided by the FCO was understandably short on detail. When the evidence is taken as a whole, however, it is sufficient to satisfy the court that AB has died.
19. It is then necessary to deal with the troubling provisions in section 2(2). The words “during a period” seem to me to add nothing. If the court is uncertain at which

moment the missing person died, it will often be artificial for the court to reach a conclusion about a date by which uncertainty disappears, even on the balance of probabilities. In this case, the FCO formed the view, based on intelligence that has not been revealed to the court, that AB's death had occurred before June 2010: but there is no way of knowing how that view was reached or how reliable it is. It is one thing in the overall context of this case to accept the FCO's evidence about the likelihood of death, but another to take May 2010 as being the end of the period for the purposes of section 2(2) of the Act.

20. The court is not permitted to take the default 7 year period under section 2(4) which applies where the court is not sure that the missing person has died. Even though the court is satisfied for the purposes of section 2(3) that the missing person has died, in the absence of an earlier date that emerges from the evidence, it seems to me that the date of the hearing will be the end of the period. This is consistent with the court's power to grant a declaration of presumed death at any time after the date when the person becomes missing, if there is evidence that is sufficient to satisfy the court that the person has died.
21. The evidence here does not provide any clear indication about when AB died. I do not think it is right to accept the assessment by the FCO that AB had died by June 2010 as being sufficiently convincing, whether taken on its own, or with the other evidence, to provide a period that ends earlier than the date of the hearing. And I can see no basis for the court fixing an earlier date taking that evidence with the passage of time. On the evidence in this case, the period for the purposes of section 2(2) ends with the date of the hearing and the time of death is to be fixed at the time in the hearing when the court confirmed that a declaration of presumed death would be granted.