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Case No: PT-2019-BRS-000060

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN BRISTOL**  
**PROPERTY TRUSTS AND PROBATE LIST (ChD)**

Bristol Civil Justice Centre  
2 Redcliff Street, Bristol, BS1 6GR

Date: 28 February 2020

Before :

**HHJ PAUL MATTHEWS**  
**(sitting as a Judge of the High Court)**

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**IN THE MATTER OF LESLIE ROGER IRISH**

**AND IN THE MATTER OF THE PRESUMPTION OF DEATH ACT 2013**

**(1) RUTH HELEN IRISH**  
**(2) DAVID ROGER IRISH**  
**- and -**  
**NO DEFENDANT**

**Claimants**

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**Gilbert Stephens LLP for the Claimants**

Application on paper

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**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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**HHJ Paul Matthews :**

**Introduction**

1. Last autumn, in the case of *Re Leslie Roger Irish* [2019] EWHC 2508 (Ch), I made a declaration of presumption of death, dated 23 September 2019, under the Presumption of Death Act 2013. This is my judgment on an application in the same proceedings, by application notice in Form N244 dated 24 February 2020, to amend an entry in the Schedule of Prescribed Information attached to my order. I emphasise at the outset that this application for amendment does not in any way affect the declaration of presumption of death itself, or for that matter the presumed date or place of death. All that is untouched. It concerns only the *date of birth* of the missing person, which information is required to be supplied in the claim form (see CPR PD 57B, para 1.1(2)(d)), and then is reproduced in an annex to the order of the court (which is prescribed in Form CH42).
2. The claim form in these proceedings, originally issued on 29 July 2019, gave details of the claim, including (as required by PD 57B, para 1.1(2)(d)) the statement that the missing person had been born on 17 July 1939. The details of the claim were verified by a statement of truth by the claimants' solicitor on behalf of the claimants (the missing person's children). By virtue of CPR rule 8.5(7), matters set out in a claim form may be relied on as evidence in a claim under CPR Part 8, such as a claim under the 2013 Act is (see CPR rule 57.19(1)).
3. Having now read a witness statement dated 24 February 2020 made by Sukhjit Kaur Mills, the claimants' solicitor, who has exhibited a copy of the birth certificate of the missing person, I am satisfied that the date of birth was incorrectly stated in the claim form. It was not 17 July 1939, but 17 July 1940. As it happens, this mistake is not due to anything done by the claimants, but instead appears to have been an error made by one of the lawyers involved at an earlier stage. I emphasise, however, that this mistake makes no difference whatever to the validity of my order for the declaration of presumption of death contained in it. But it appears from the evidence of Mrs Kaur Mills to have caused difficulties in the administration of the estate, in that financial institutions holding assets to be collected in for administration have refused to do so without a correction first being made to the date in the annex to my order.
4. Obviously, I have not heard from any of the institutions concerned, but I have to say that I am disappointed by this reaction. As long as the relevant institutions are satisfied that this declaration of presumption of death relates to the person who owned the assets which they hold, it should be no impediment that there is a small error in the date of birth (day and month being correct, year being one out). And, in circumstances where these assets have lain untouched since Mr Irish disappeared, all the other details match, including his names and address, and the solicitors applying to the institutions have all the correct details of his assets, I can see no reason why they should not be satisfied that my order relates to the former owner of these assets. The chances of there being anyone else with the same names, born on the same day and month, and with the same address, owning exactly the same assets, are vanishingly small. Nevertheless, that is the stance which they have adopted. The claimants now seek to deal with the matter pragmatically, by obtaining an amendment of the Schedule of Prescribed Information, rather than seeking coercive orders against

the institutions concerned to require them to pay over the assets on the footing that the owner is conclusively presumed to have died (see section 3 of the 2013 Act).

### **Jurisdiction to amend the order**

5. The question therefore is how such an amendment can be obtained from the court. Because claims under the 2013 Act are in effect claims *in rem*, effective against the world, and brought against no defendant (although certain persons must be notified of the proceedings and have the right to take part if they wish), this application has not been served on any other person. In one sense this is unfortunate, because it means that I have only heard the claimants' side of the relevant evidence and argument. I have therefore considered whether it would be desirable for some other person to be notified.
6. So far as concerns the persons entitled to be notified of proceedings under the 2013 Act, none expressed no wish to take part in the main claim, and, frankly, the trivial nature of the error means that they can have no interest in opposing the application. On the contrary, the interest of the estate beneficiaries and creditors must lie the other way. I have also considered whether I should ask for the appointment of a friend of the court to offer appropriate arguments. However, looking at the material placed before me and the relevant authorities, I think it is unnecessary to take such an elaborate step, and I have decided to deal with this matter on the papers.

### *The 'slip' rule*

7. In her witness statement, Mrs Kaur Mills refers to the jurisdiction of the court to deal with clerical errors under the so-called "slip rule", under CPR rule 40.12. The relevant part of that rule provides:

"The Court may at any time correct an accidental slip or omission in the judgment or order."

She concludes however that this jurisdiction is not available to the court in the present case, because the declaration which I made "reflected the Court's intention based on the information before it". In other words, even though the court was unintentionally given the wrong information, nevertheless what the court intended to do was to make a determination based on that incorrect information, and therefore it is not a *clerical error* in recording the court's order. It is for that reason, no doubt, that the application has been made in Form N244, supported by evidence.

8. For myself, I am not sure that the slip rule jurisdiction is so limited. For example, in *Riva Bella SA v Tamsen Yachts GmbH* [2011] EWHC 2338 (Comm), Eder J held that the jurisdiction was available to correct an incorrect statement of the amount of money for which judgment was to be given, which was the result of a mistake made by counsel for one party in calculating the sum due. The mistake was not noticed by the other counsel, and the information was presented to the court as accurate and found its way into the order made by the judge. Eder J said:

"23. ... For the avoidance of doubt, the fact that the slip or omission may arise from the accidental omission of counsel does not mean that CPR 40.12 is not engaged nor that there is any bar to the exercise of the discretion under the slip

rule... In the present case, it was never the court's intention to award the defendant sums which it had already received. Rather, the court's intention was to award the defendant those sums which it was owed and which were still outstanding. No more, no less."

However, for reasons which I will come to, I consider that I do not need to reach a final decision on this point.

*Power to vary orders made*

9. There is also the power of the court under CPR rule 3.1(7):

"A power of the court under these Rules to make an order includes a power to vary or revoke the order".

The extent and effect of this rule was considered by the Court of Appeal in the leading case of *Tibbles v SIG plc* [2012] EWCA Civ 518. There, the claimant/appellant argued that the district judge had failed to make a special order that certain costs be dealt with according to fast track and not small claim track rules, and that the court had power under rule 3.1(7) to vary its order, as indeed the district judge subsequently did. The defendant/respondent successfully appealed this variation order to the county court judge, and the claimant/appellant was given permission to make a second appeal to the Court of Appeal.

10. The Court of Appeal considered the relevant case law at some length. Rix LJ (with whom Etherton and Lewison LJJ agreed) said:

"39. In my judgment, this jurisprudence permits the following conclusions to be drawn:

(i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.

(ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.

(iii) It would be dangerous to treat the statement of these primary circumstances, originating with Patten J and approved in this court, as though it were a statute.

That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.

(iv) Thus there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. In my judgment, this debate is likely ultimately to be a matter for the exercise of discretion in the circumstances of each case.

(v) Similarly, questions may arise as to the whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, also factors go into discretion: but where the facts or arguments known to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly in the case where the decision not to mention them is conscious or deliberate.

[ ... ]

(vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such as the interest of justice in the finality of the court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation.”

11. In this case, I made a final rather than an interlocutory order last September, so other considerations do come into play. As I said in *Prompt Motor Co Ltd v HSBC Bank plc* [2017] EWHC 1487 (Ch), [50], [51], in cases of final orders the bar is deliberately placed higher for policy reasons, and at present I doubt whether anything less than fraud will justify setting aside a final order under rule 3.1(7). I accept that this is a case of an unwitting misstatement, but I do not think that that that is enough.

#### *Variation orders*

12. For completeness, I add that the 2013 Act itself provides, by sections 5-8, for the variation or revocation of a declaration of presumption of death, by a further order called a “variation order” (see section 5(1)). However, a variation order can only be applied for by issuing a fresh claim form under CPR Part 8 (CPR rule 57.19(1)), and notifying a similar range of other persons who would be entitled to be notified of the original claim for a declaration (CPR rule 57.20(2)). It is thus a more cumbersome and expensive application to make than one under the slip rule or by application notice in Form N244. In any event, it is not what has been done here by the claimants, and I can put this possibility on one side.

#### **What is being amended?**

13. But there is a wider point in the present case which needs to be considered. What the court did last September was to make a declaration under section 1 of the 2013 Act. This declaration was concerned *only* with (i) a presumption that the missing person was dead (section 1(2)) and with (ii) a finding as to the date and time of his presumed

death (section 2(2)). Paragraph 1(1) of Schedule 1 to the Act requires that, once the period for bringing an appeal against the declaration has expired without such an appeal being brought, or any appeal or appeals have been ultimately unsuccessful, the court should send to the Registrar General, not only a copy of the declaration, but also “any prescribed information”. For this purpose, “prescribed” means prescribed by regulations made by the Registrar General with the approval of the Secretary of State (paragraph 1(3)).

14. The relevant regulations are the Register of Presumed Deaths (Prescribed Information) Regulations 2014. Regulation 2(1) provides that:

“The information prescribed for the purposes of paragraph 1(1)(b) and 1(2)(a) of Schedule 1 to the Act so far as such information is determined by the court in a particular case, is set out in the Schedule”.

Among the information set out in the schedule is the date of birth of the missing person. As I have said, Form CH42 is the form officially provided for the declaration and ancillary orders. This form has an annex, called “Annex A”, in which the prescribed information is to be set out. It is clear from paragraph 2 of the ancillary orders in the template that the annex is *not* part of the court’s order, but is simply attached to it. It is not therefore obvious that the court’s jurisdiction to amend orders under CPR rule 40.12 or rule 3.1(7), or section 5 of the 2013 Act, extends to information contained in a mere annex to the order which is not part of it, and which is included only for the benefit of the General Register Office.

### **Correction of the Register of Presumed Deaths**

15. More relevantly, perhaps, the 2013 Act contains provisions relating to the Register of Presumed Deaths which, by section 15, has to be maintained by the Registrar General. These include provisions for the *correction* of entries in that register. So far as relevant, paragraph 5 provides as follows:

“(1) Where it appears to the Registrar General that there is a clerical error in the Register of Presumed Deaths, the Registrar General may authorise a person to correct the error.

(2) Where it appears to the court that there is an error in the Register of Presumed Deaths, the court may direct the Registrar General to secure that the error is corrected.”

16. Accordingly, the legislation draws a distinction between clerical errors and errors of substance. The former may be dealt with internally, by direction of the Registrar General. The latter may be dealt with only pursuant to an order of the court. However, both provisions concern errors in the Register itself, and not in the annex to the court order which is sent to the Registrar General, the information in which is then copied over into the Register. Since it is the Register of Presumed Deaths which provides official evidence of the presumption of death, the legislation concentrates on making sure that *that* is right. So it seems to me that what the claimant is in the present case is really seeking is an order under paragraph 5(2) of Schedule 1 to the 2013 Act, to direct the Registrar General to secure that the Register is corrected.

17. There is nothing in the Act, rules or practice directions to require this application to be made by a new originating process. In my judgment it can be done by application in Form N244 in the original proceedings. In all the circumstances, I do not think it is necessary to require the claimants to issue a fresh application notice, or even to amend their existing application notice. It is obvious that the relief which is sought is an order that the error be corrected, and the proper place to correct it is obviously in the Register. It is after all an official copy of an entry in that Register which demonstrates the presumed death to all who need to know about it. An order under paragraph 5(2) of Schedule 1 to the 2013 Act, directing the Registrar General to secure the correction of the Register will in any event show what the error was and what the correct information should be. So I will treat the application notice in the present case as seeking that relief.

### **Conclusion**

18. As I have already said, I am entirely satisfied on the evidence before me that an error was made in relation to the year of birth of the missing person, and that Mr Irish was born in 1940 rather than 1939. Accordingly, I will make an order under paragraph 5(2), which will ensure that the Register is corrected. A copy of the entry as corrected will be sufficient evidence for any financial institution to be satisfied that Mr Irish is presumed dead. (Of course, my order directing the correction may prove enough on its own, but I am not concerned with that.) I would be grateful if the solicitors would supply me with a draft order for my approval.