



Neutral Citation Number: [2020] EWHC 207 (Ch)

Case No: PT-2019-BRS-000113

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: 06/02/2020

Before :

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

Between :

Ronald Philip Johnson
- and -
No named defendant

Claimant

Matthew Wales (instructed by Walsh & Co) for the Claimant
No other persons were present or represented

Hearing date: 5 February 2020

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. On 5 February 2020 I heard and determined a claim under the Presumption of Death Act 2013 by Ronald Philip Johnson for a declaration that his brother Norman Reginald Johnson (“Norman”) was presumed to have died. In so doing, I exercised the court’s management powers under this CPR rule 3.1(2)(b), (m), to accelerate the final or disposal hearing of this matter on the basis that all the formalities had been complied with, and that there was no one who having been given notice of the proceedings wished to intervene or provide any further evidence.
2. At the conclusion of the argument I gave an oral judgment, explaining why I would make the declaration sought. The reason for providing this short written judgment in addition is simply to highlight the difficulties with the provisions of section 2 of the 2013 Act previously pointed out by Chief Master Marsh in the case of *CD, re AB* [2019] EWHC 2785 (Ch). Accordingly, in this judgment I do not deal with all the facts of this case, but only those which are relevant to this point.

Facts

3. Norman was a retired manager, aged 70 years at the time of his disappearance, who lived with his civil partner Colin Sweeney (“Colin”) in Bolton. He was suffering from early-stage dementia, for which he was receiving medication, but was still able to drive his car. He was last seen for certain at a dance class in Hindley, about 10 miles from home, on the evening of 29 March 2011, but he never came home. He spoke later to his partner by mobile telephone to say that he thought his car had been stolen, although his partner considered that he had simply forgotten where he had parked it, and indeed it was found subsequently parked about 500m from the dance class venue. He said he was walking to Hindley. Given Norman’s age and medical condition, Colin immediately reported this to the police, and searches were made for him, not only by the police, but also in subsequent days by members of the public.
4. The only other sighting of Norman was at about 8:50 PM on 30 March 2011 when a passenger on an InterCity train from London Euston to Birmingham showed a ticket inspector Norman’s driving licence, because he was unable to pay a penalty fare on the train. The railway authority subsequently wrote to Norman at his home address to claim this fare. The passenger left the train at Birmingham in order, apparently to catch a train to Bolton, but if it was Norman he never arrived. Norman’s disappearance was covered in local newspapers and was also registered with the UK Missing Persons Bureau. His disappearance has never been matched to any body subsequently found, and no one (including the claimant and Colin) who might have been expected to hear from him has ever done so.
5. Because of Norman’s illness, he did not have a credit card, and Colin managed his finances, operating his (Norman’s) bank account and providing him with necessary cash. When he disappeared, Norman did not have his medication, nor did he have any clothes or other personal effects than those he had with him at the time. The only non-automated operations on Norman’s bank account after his disappearance were those conducted by Colin himself. His pensions continued to be paid into his account.

6. Norman had made a will in 1996, but that would have been revoked by the civil partnership entered into in 2008: see the Wills Act 1837, section 18B(1). So at the time of his disappearance he would have been intestate. So far as is known, he had no children. The property in which Norman and Colin lived together in Bolton was jointly owned by them. In 2016, presumably on advice, Colin severed the beneficial joint tenancy in that property. Sadly, in December 2017 Colin died. He left a will appointing a lady called Dora Vanderpuye as his executrix. (I add that no manual operation on Norman's bank account is recorded after Colin's death.)
7. In the circumstances, if Norman is to be presumed to have died, it is critical to establish the date at which his death is presumed to have taken place. If it is prior to the severance of the joint tenancy in their house, then Colin (and now his estate) would be entitled by survivorship to the whole of the beneficial interest in that property. If it is after the severance of the joint tenancy but before Colin's death, then Colin as surviving civil partner (and now Colin's estate) would be entitled to Norman's estate on intestacy. If it is after the death of Colin then the claimant and a third brother, Brian, would be entitled on intestacy.

Law

8. Section 2 of the 2013 Act provides as follows:

“(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."

Conclusion on evidence

9. Although there is no direct evidence in the present case that Norman has died, all the circumstantial evidence points in that direction, and I am satisfied on the balance of probabilities that Norman is dead. That means that subsection (4) cannot apply so as to provide that Norman is presumed to have died at the end of seven years beginning with 30 March 2011, *ie* 30 March 2018. I must therefore apply subsection (3).

Although I am satisfied that Norman has died, I am uncertain as to at what point between the date of his disappearance and the date of the hearing he died. In cases of this kind where vulnerable persons disappear and are not heard of again, there is in the nature of things a greater likelihood of death at an earlier stage than at a later, such that I consider that the probability that Norman died in the last few days before the hearing as extremely remote. But the problem is that I cannot identify a point between the disappearance and the hearing when the balance of probabilities crosses the line.

CD, re AB

10. In *CD, re AB* [2019] EWHC 2785 (Ch), Chief Master Marsh said this about the provisions in section 2:

“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.”

11. *CD, re AB* was a case about a British hostage in Yemen. Some of the evidence was provided by the Foreign and Commonwealth Office, including an assessment

concluding that AB had died by June 2010. Having considered all the evidence available, the Chief Master concluded as follows:

“18. The evidence placed before the court about AB's disappearance and what may have happened to him was inevitably circumstantial; 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.”

12. I respectfully agree with what the Chief Master says about the difficulties in section 2, and in particular subsections (2) and (3). In the present case, the facts are such that, almost whatever date is selected as the date of presumed death, it will make a significant difference, first as to the liability of pension providers to pay pensions (or of personal representatives' liability to pay back pension payments that were never due), and second as to the devolution of the assets in Norman's estate.

Decision

13. Nevertheless, the 2013 Act in terms requires the court upon being satisfied that Norman is dead to make a declaration of presumption of death (section 2(1)(a)), including a finding as to the date and time of Norman's death (section 2(2)), which

must be the end of the period during which the court is uncertain at what moment Norman died (section 2(3)). Since I am satisfied that he is dead, but uncertain at what moment Norman died after his disappearance until the hearing (when, on the assessment of the evidence, I was satisfied that he *had* died), I must include a finding that he is presumed to have died at the time of my decision, that is at 11:30 AM on 5 February 2020. I do not regard this as according with common sense. But in my judgment it at least accords with what the law requires of me, and at the hearing I made an order containing a declaration accordingly.