Supreme Court

New South Wales

Case Name:	Guo v Gao
Medium Neutral Citation:	[2021] NSWSC 1059
Hearing Date(s):	19 August 2021
Date of Orders:	24 August 2021
Decision Date:	24 August 2021
Jurisdiction:	Equity
Before:	Hallen J
Decision:	See Paragraph [135]-[137]
Catchwords:	PRACTICE AND PROCEDURE - Determination of separate question - Whether declaration should be made that person who has been missing for over 20 years, upon presumption of death, is no longer alive SUCCESSION – Probate and administration – Where missing person last seen in April 2001 – Extensive searches and enquiries conducted in an attempt to locate missing person, including by NSW Police, which attempts unsuccessful – Where missing person has not been located – No evidence that missing person is alive or dead – No contact with persons with whom the missing person would have been likely to communicate, including family members, being her daughter, her siblings, her parents, her husband, and her former husband, the father of the daughter - Whether presumption of death may be relied upon to make declaration that the missing person is not alive
Legislation Cited:	Civil Procedure Act 2005 (NSW) s 56 Probate and Administration Act 1898 (NSW) ss 40A, 40B Real Property Act 1900 (NSW) s 45D

	Succession Act 2006 (NSW) Ch 3 Uniform Civil Procedure Rules 2005 (NSW) r 28
Cases Cited:	Allman & Co v M'Cabe [1911] 2 Irish R. 398 Application by Walsh & Anor (Estate of Robert Charles Walsh (deceased)) [2020] NSWSC 976 Axon v Axon (1937) 59 CLR 395; [1937] HCA 80 Chard v Chard [1956] P 259 Combis & Staatz as joint and several liquidators of RB Hospitality Holdings Pty Ltd (in liq) v Lee [2020] NSWSC 960 Elaraby & Ors v Minister for Immigration & Anor [2018] FCCA 1101 Estate of Howard (1996) NSWLR 409 In re Margarete Maria White [2001] TASSC 7 In the Estate of Peter Dale Hills [2009] SASC 176 Loretta Craig v Anthony Johnson [2020] NSWSC 430 M'Mahon v M'Elroy (1869) 5 IR Eq 1 Prudential Assurance Co v Edmonds (1877) 2 App. Cas. 487 Re Curran [2010] VSC 455 Re Estate of Howard (1996) 39 NSWLR 409 Southwell v Bennett [2010] NSWSC 1372 Sydney Local Health District v Macquarie International Health Clinic Pty Ltd [2020] NSWCA 274 The Estate of Alan Bruce Beeby [2020] NSWSC 1512 Watson v England (1844) 60 ER 266; 14 Sim 28
Texts Cited:	Stephen Janes, David Liebhold and Paul Studdert, Wills, Probate and Administration Law in New South Wales (2nd ed, 2020, Lawbook Co) Leslie G Handler and Richard Neal, Mason and Handler Succession Law and Practice: New South Wales (LexisNexis Butterworths) R A Sundberg, Griffith's Probate Law and Practice in Victoria (3rd ed, 1983, Lawbook Co)
Category:	Principal judgment
Parties:	Sijia Guo (Plaintiff) Yong Wei Gao (Defendant)
Representation:	Counsel: T J Morahan (Plaintiff) K Morrissey (Defendant)

Solicitors:
Chen Shan Lawyers (Plaintiffs)
GHS Legal (Defendant)

File Number(s): 2019/306478

Publication Restriction: Nil

JUDGMENT

Introduction

1 People disappear - maybe as a result of a tragedy, maybe for other reasons, or, sometimes, for reasons unknown. It may be impossible, at a particular time, to say, with certainty, in relation to a particular person, that she or he, is, in fact, no longer alive. If a person has disappeared, leaving no trace behind, but leaving property, both real and personal, in New South Wales, and it is not known whether she, or he, has died, how is the law to deal with her, or his, assets, deal with representation to be granted of her, or his, estate, and then the distribution of that estate? When, and in what circumstances, can the person, who cannot be located, be presumed dead? These are some of the questions that will need to be answered in the present proceedings.

The Proceedings

2 By Summons filed on 1 October 2019, the Plaintiff, Sijia Guo, who is the daughter of Wiehong Guo (to whom I shall refer, hereafter, without disrespect, as "WG"), sought various forms of relief, including for a family provision order under Chapter 3 of the *Succession Act 2006* (NSW). The relief claimed was based upon the premise that WG was dead.

3 The Defendant named in the Summons was Yong Wei Gao, the husband of WG (but not the father of the Plaintiff). They were married to each other in about March 2000 and remained married at the date of WG's disappearance.

4 The proceedings were commenced in the Equity General List, and were referred into the Succession List following an application for substituted service upon the Defendant. (Nothing needs to be said about that application other than to note that it was necessary for the Plaintiff to seek orders for substituted service.) The reasons why the proceedings had not been commenced in the

Probate List (as the Succession List then was), and explaining the delay in transferring it to the Succession List, were not elucidated.

5 On 7 September 2020, at the first directions hearing in the Succession List, counsel appeared for each of the parties. Due to the nature of some of the relief sought, an order was made that the matter continue by pleadings and directions were made in respect of those pleadings.

6 By Statement of Claim filed on 14 September 2020, the Plaintiff sought various orders in relation to WG, including the declaration referred to, and a declaration that she had died intestate. Presumably, this was done in order to enable a grant of administration to be made relating to the estate of WG and so that the other claims for relief in the Statement of Claim could be determined.

7 In discussion with the Court, at an early directions hearing, the relief sought by the Plaintiff was refined to seek, amongst other relief, a declaration that WG should be presumed to be dead.

8 On 9 October 2020, the Defendant filed a Cross-Claim in which he sought certain relief by way of a declaration of trust in relation to real property at Carlingford, of which property he and WG are registered proprietors as joint tenants. As well, he sought a family provision order under Chapter 3 of the *Succession Act*. The relief that he sought was also based upon the premise that WG was, or should be presumed to be, dead.

9 On 9 October 2020, directions were made for the filing and service of affidavits. Further directions were made, on a number of occasions, to enable additional evidence to be filed and served.

10 On 1 March 2021, the parties' legal representatives informed the Court that the evidence was complete (other than evidence relating to some property in China). How the Court should deal with the relief claimed, in circumstances where there was no evidence that WG had died, was then the subject of some debate.

The separate question

11 On 22 March 2021, counsel for the parties, jointly requested the Court to deal, by way of a separate question, with the declaratory relief going to whether WG

should be presumed to be dead, upon the basis that there was no dispute, between them, that the declaration sought should be made. Neither had filed a notice of motion and the application was made orally. As it was a joint application, I dispensed with the requirement to file a notice of motion.

12 Uniform Civil Procedure Rules 2005 (NSW) rule 28, relevantly, provides that the Court may make orders for the decision of any question separately from any other question, whether before, at, or after, any trial, or further trial, in the proceedings. A "question" includes any question or issue in any proceedings, whether of fact or law, or partly of fact and partly of law, and whether raised by pleadings, agreement of parties or otherwise.

13 I have stated a summary of the principles to be applied on whether a separate question should be permitted to be determined in *Southwell v Bennett* [2010] NSWSC 1372 at [15] - [17]. The principles stated in that case were referred to, more recently, by Lonergan J in *Loretta Craig v Anthony Johnson* [2020] NSWSC 430 at [26]–[28] and by Davies J in *Combis & Staatz as joint and several liquidators of RB Hospitality Holdings Pty Ltd (in liq) v Lee* [2020] NSWSC 960 at [27]. Davies J also referred to *Crawley v Vero Insurance Ltd & Ors* [2012] NSWSC 593, in which Beech-Jones J adopted the principles and made five further points. I shall not repeat what was stated in each of the cases.

14 Despite "the high hurdle that needs to be overcome to secure an order for a separate question" (*Sydney Local Health District v Macquarie International Health Clinic Pty Ltd* [2020] NSWCA 274, at [187]), I was satisfied, in this case, that an order for the determination of a separate question should be made.

15 My reasons for doing so were as follows. I considered that the application was a joint application made by the parties; that the judicial determination of the separate question would involve a conclusive, or final, decision, based on concrete and established facts and, if applicable, a presumption of law; that the overriding purpose of s 56 of the *Civil Procedure Act 2005* (NSW), namely the just, quick and cheap resolution of a real issue in the proceedings, would be achieved; the separate question would be able to be resolved, more expeditiously; that the hearing of the balance of the proceedings would then be

able to proceed; that there would not be likely to be a significant overlap between the evidence adduced on the hearing of the separate question and at a trial of the remaining questions; and that the determination of the separate question would enable a sensible re-assessment of litigation risks, which, generally, is likely to encourage some form of settlement discussions and may contribute to the settlement of the balance of litigation.

16 Before the separate question was listed for hearing, it was necessary to also consider whether a proper contradictor was required as the Plaintiff and the Defendant were not in dispute on the issue. I have recently dealt with a similar issue in *The Estate of Alan Bruce Beeby* [2020] NSWSC 1512 at [55] – [61] as follows:

> "It is to be remembered that the Plaintiff has sought declaratory relief. Declaratory relief is addressed in s 75 of the *Supreme Court Act 1970* (NSW), which provides a wide power to the Court to make a declaration.
>
> As has recently been written by the Full Court of the Federal Court (Jagot, Kerr and Anderson JJ) in *Clarence City Council v Commonwealth of Australia* (2020) 382 ALR 273 at 294 [58], 296 [67]; [2020] FCAFC 134 at [58], [67]:
>
> > 'Broadly defined, a declaratory judgment is 'a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs': Lord Woolf and Woolf J, *Zamir & Woolf's The Declaratory Judgment* (Sweet & Maxwell, 4th ed, 2011) (*Zamir & Woolf's The Declaratory Judgment*) p 1. Such relief 'conclusively' establishes the situation it declares to exist between the parties: *Parramatta City Council v Sandell* [1973] 1 NSWLR 151 at 167 per Hutley JA.
>
> …
>
> > An applicant for declaratory relief must also have standing (or *locus standi*), which is the metaphor adopted to describe the interest required to obtain relief: *Allan v Transurban City Link Ltd* [2001] HCA 58; 208 CLR 167 at [15] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ. Furthermore, even if a party has standing, there remains the residual question as to whether the Court ought award declaratory relief in the circumstances of the particular case.'
>
> As written, a declaratory order is a discretionary remedy. Before a declaration is made, the Court, ordinarily, needs to be satisfied of the factual, and legal, basis for the declaration sought. The majority of the High Court in *Bass v Permanent Trustee Company Limited* (1999) 198 CLR 334 at 359 [56]; [1999] HCA 9 at [56], stated:
>
> > 'It is contrary to the judicial process and no part of judicial power to effect a determination of rights by applying the law to facts which are neither agreed nor determined by reference to the evidence in the case.'

In *Crawford v Davidson-Crawford* [2019] NSWSC 728, Ward CJ in Eq wrote, at [32]:

> 'In order to obtain a declaration, a party must satisfy the requirements articulated in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582; [1992] HCA 10 per Mason CJ, Dawson, Toohey and Gaudron JJ:, namely that: there be a controversy between the parties for determination and not abstract or hypothetical questions; the person seeking relief must have a 'real interest'; and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' or if 'the Court's declaration will produce no foreseeable consequences for the parties'. Their Honours also stated (at 583) that 'where a person's rights or liabilities will or might be affected by the exercise or non-exercise of a statutory power following upon an inquiry, that person is prima facie entitled to be accord natural justice in the conduct of the inquiry'.'

The Court should, usually, be satisfied that there is a proper contradictor, being 'someone presently existing who has a true interest to oppose the declaration sought': *Russian Commercial and Industrial Bank v British Bank for Foreign Trade, Limited* [1921] 2 AC 438 at 448 (Lord Dunedin), quoted with approval by Gibbs J (as his Honour then was) (McTiernan, Walsh, Stephen and Mason JJ agreeing on this issue) in *Forster v Jododex Australia Pty Limited* (1972) 127 CLR 421 at 437–438; [1972] HCA 61; P W Young, *Declaratory Orders* (2nd ed, 1984, Butterworths) at 15–16 [210].

In *Zetting v Müller* [2017] NSWSC 659, at [13], Parker J pointed out that there was 'room for debate about whether [the requirement for a proper contradictor] is an essential requirement before a declaration can be made, or is merely a matter of discretion: *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* at [19-115] to [19-125]'.

Zetting v Müller was referred to by Bell P, with apparent approval, in Church of the Foursquare Gospel (Australia) Ltd v New Hope Church Swansea Inc [2019] NSWSC 519 at [16]."

17 As in *The Estate of Alan Bruce Beeby*, I was satisfied, here, that there is no need for a contradictor on the separate question, mainly because the evidence, to which I shall refer, appears to be all one way. The material before the Court, which goes to establishing the necessary elements to enable the question to be answered, will be considered in order to determine whether it provides a proper basis for making the declaration sought by the parties. In any event, there is not any person who, or entity which, would have a sufficient interest to oppose the making of the declaration, or be able to add anything to the evidence that the parties, themselves, have adduced.

18 There was also sufficient evidence that the next of kin of WG have been notified, or, at least, are aware, of the proceedings. As already stated, the Plaintiff is the only child of WG; the Defendant is WG's husband; WG's first

husband is a witness in the proceedings and he has given evidence of having had discussions with WG's parents since WG's disappearance in 2001. WG's brother is also a witness.

19 (There was no evidence that WG was insured at the time she was last seen or heard from. If she had been, evidence would need to be given that the insurer had been notified at least seven days before the hearing: see, Leslie G Handler and Richard Neal, Mason and Handler Succession Law and Practice: New South Wales (LexisNexis Butterworths) at 9234 [5067]; Stephen Janes, David Liebhold and Paul Studdert, Wills, Probate and Administration Law in New South Wales (2nd ed, 2020, Lawbook Co) at 641.

20 In all the circumstances, I was satisfied that it would be appropriate to determine, by way of a separate question, what was sought, without the need for a contradictor.

21 By these reasons, because the question posed has been decided as a separate question, I shall give, or make, such judgment or order as the nature of the case requires.

Other relief sought

22 Following the request made by counsel for the determination of the separate question, the Court made directions regarding an agreed statement of issues to be subsequently determined by the Court (a) that were not disputed by the parties and (b) that were in dispute. On 22 April 2021, counsel forwarded to the Court a joint document setting out certain agreed facts as well as matters in issue. I shall refer to the agreed facts later in these reasons. One fact, however, was that "Weihong Guo disappeared on or about 11 April 2001".

23 The matters in issue, which went to the substantive remaining dispute between the parties, were:

> "B. Issues That Are in Dispute
>
> • Who provided the purchase price for the Carlingford property.
>
> • Whether the Defendant holds the Carlingford property on trust for the estate of Weihong Guo.
>
> • Whether Weihong Guo held her interest in the Carlingford property on trust for the Defendant.

- Whether the Defendant should account to the estate of Weihong Guo for half of the net rent received from the Carlingford property.
- Whether a Family Provision order should be made in relation to the Plaintiff, Sijia Guo.
- Whether a family provision order should be made in relation to the Defendant.
- Whether an Administrator should be appointed."

24 Following receipt of the email to which the Statement of Issues was attached, my Associate, at my request, sent an email, in the following terms, to counsel for the parties:

> "His Honour has read the recent email correspondence sent by Mr Morrissey and thanks you for the list of issues.
>
> As his Honour recollects it, before many of the matters identified as issues (whether in dispute or otherwise), the first matter to be determined is whether the Court is satisfied, upon presumption of death, that Weihong Guo is dead. If the Court is so satisfied, the next question is whether administration of her estate on intestacy should be granted, and, if so, to whom.
>
> Any claims in relation to her estate should not be determined until those matters have been resolved by the Court.
>
> As a claim is being made by each of the Plaintiff and the Defendant, perhaps consideration could be given by the legal practitioners to the appointment of an independent administrator (assuming the Court is satisfied, upon presumption of death, that administration should be granted).
>
> Please consider the above before the listing on 26 April 2021."

25 Despite my suggestion that if the declaration sought were made, an independent administrator of WG's estate might be appointed, the Defendant, by his counsel, prior to the hearing of the separate question, did not agree to that course. Presumably, this response prompted the Plaintiff, on 16 June 2021, to file a notice of motion, in which she sought, amongst other interlocutory relief, an order that Mark Henrick Peoples, a solicitor, be appointed as an independent administrator of WG's estate.

26 At the hearing of the separate question, the Court again raised the question whether, if the separate question were determined as sought by the parties, a grant of administration of WG's estate could be made, and if so, to whom the grant should be made, before the other issues existing between the parties were determined.

27 An opportunity was given to the legal practitioners to discuss this issue and to also consider how the balance of the proceedings should continue. When the Court adjourned to further consider the evidence and the oral submissions, the parties were able to agree that upon a declaration being made, and the Court being satisfied that WG died intestate, there should be a grant of administration of her estate, on intestacy, to Mr Peoples.

28 I commend the legal representatives of both parties, and the parties themselves, for adopting the sensible, and practical, course of having an independent solicitor seek the grant of administration. The Plaintiff resides in China, the Defendant in Western Australia, and the Carlingford property, the subject of one of the remaining disputes, is in Sydney, New South Wales. The agreement is one that is in the interests of the parties.

29 It will be necessary to remit the matter to the Senior Deputy Registrar in Probate to deal with the application for the grant following these reasons being published.

The hearing of the separate question

30 The separate question was listed for hearing on 19 August 2021. Mr T J Morahan of counsel appeared for the Plaintiff and Mr K Morrissey of counsel appeared for the Defendant.

31 Prior to the hearing, in accordance with directions made, the Court was provided with a document dated 30 March 2021 headed “Joint Submissions on the Presumption of Death of Weihong Guo”. Subsequently, on 10 August 2021, each counsel provided an outline of written submissions.

32 The Plaintiff read the following affidavits:

(a) The affidavits, affirmed 3 July 2020 and 3 November 2020 respectively, of the Plaintiff;

(b) The affidavits, affirmed 13 July 2020 and 13 May 2021, of Xian Guo, the brother of WG;

(c) The affidavit, affirmed 13 May 2021, of Jin Hua Guo, the former spouse of WG and the father of the Plaintiff;

(d) The affidavit, affirmed 4 June 2021, of Zhi Li, an employed solicitor in the firm of solicitors representing the Plaintiff, to which was annexed relevant documents.

33 In addition, counsel tendered a copy of the Statement of Police of Senior Constable Steven McAlister, which was marked as Exhibit P1.

34 The Defendant only read his affidavit affirmed 30 November 2020.

35 There were no objections to any parts of the affidavits and none of the deponents was cross-examined.

36 Following an adjournment of the hearing, the Court indicated that orders and directions in terms similar to those that appear at the conclusion of these reasons would be made. A draft form of orders (which, subsequently, was amended slightly) was provided to counsel, with which orders and directions they agreed. I stated that reasons for making those orders and notations would be published. These are the reasons.

Facts relied upon

37 It is necessary, first, to state some of the relevant facts relied upon by the parties. Because of the significant time that has passed between the date on which WG disappeared and the date of the hearing, I shall divide the facts to cover a period that occurred before, and then after, the date of her disappearance. What follows is taken from the agreed facts, or admissions in the pleadings, and a consideration of the affidavits, so far as they are relevant only to the issue to be determined as a separate question.

Events before April 2001

38 WG was born in September 1968, in the Sichuan province in Southwest China. She completed her schooling in 1987, and between 1987 and 1991, she studied at the South West Finance and Economics University, a national university in Chengdu, Sichuan province, in the Peoples Republic of China. At the time she was last seen, she was almost 33 years old. There was no evidence that she was, then, suffering ill-health.

39 WG is the youngest of three children, the other two being her brother, Xian, and her sister, Wenjun Guo.

40 Between 1991 and 1999, WG was employed in various finance roles in China.

41 The Defendant was born in Qing Sheng, a small town in China, in April 1963. He finished his schooling in 1986, having achieved a degree majoring in English and international marketing. Thereafter, he worked, first, as a teacher and then as a manager in import and export companies for about 4 years.

42 WG and the Defendant commenced communicating by letters and telephone calls in about 1990. They commenced a relationship and began living together in February 1992.

43 In December 1992, the Defendant emigrated from China to Australia, having been granted an Australian student visa to study computing at a business college in Sydney.

44 In about 1994, the Defendant applied for permanent residency in Australia.

45 WG and the Defendant kept in contact until, in 1993, she told him that she was getting married. Their relationship then ended.

46 WG married Jin Hua Guo in 1994. (It is merely a coincidence that he and the Defendant share the same family name.)

47 The Plaintiff was born in March 1995.

48 WG and Jin Hua Guo separated in 1999. They were divorced in about January 2000.

49 Whilst custody was granted to her father, after the divorce, the Plaintiff went to live with her maternal grandparents in Luzhou City, Sichuan Province, until about 2003, when she returned to live with her father.

50 On 15 June 1999, the Defendant travelled to China and, whilst there, he met WG again. She told him that her marriage had ended and she expressed an interest in returning, with him, to Australia.

51 In October 1999, WG obtained a tourist visa and travelled to Sydney for about one month.

52 In 1999, WG had a conversation with her brother, Xian, in which she spoke of taking money to Australia and bringing the Plaintiff and also their parents to Australia, at some time in the future.

53 In January 2000, the Defendant and WG met, again, in China. On about 15 February 2000, by which time she was divorced, they returned, together, to Australia.

54 WG remitted the amount of Chinese Yuan Renminbi 6,000,000 to Australia at that time.

55 The Plaintiff also recalled being told, by her grandmother, that WG had travelled to another country, and that her mother would take the Plaintiff to live with her there. The Plaintiff also recalled WG regularly telephoning her and saying words to the effect of "Mummy is waiting for you to come here. Mummy has prepared you a big house and a big swimming pool": Affidavit, Sijia Guo, 3 July 2020 at par 13.

56 Apparently, on 29 February 2000, WG withdrew AUD$15,000 from a joint bank account that was conducted with the Defendant and travelled to Hong Kong. She returned to Australia on 12 March 2000.

57 On 18 March 2000, WG and the Defendant were married to each other in accordance with the laws of Australia.

58 On 6 June 2000, WG travelled to China. She returned in July 2000.

59 WG obtained permanent residency in Australia in 2000.

60 The Defendant went to China in December 2000 and returned in late December 2000. He went there, again, in January 2001 and returned a short time later.

61 The Defendant and WG purchased a property at Edinburgh Avenue, Carlingford ("the Carlingford property"), as joint tenants, on 3 October 2000. The purchase price was $470,000. There is a dispute as to the source of the purchase price. (That is one of the issues in dispute that is yet to be determined.)

62 At the date of the Contract for the purchase of the Carlingford property, WG was overseas. She had travelled to China, again, in September 2000. She returned to Australia in October 2000.

63 In February 2001, WG enrolled in two English courses, which she attended from 8 February 2001 until early April 2001.

64 The evidence reveals that until April 2001, WG would write to the Plaintiff and to her parents to express her desire that they should all come and live in Australia:

(1) In a letter dated 18 February 2000, WG wrote "When the time is ripe, I hope you could also live here": Ex SJG-3.

(2) In a letter dated 29 November 2000, WG wrote "If Jiajia could go to the schools here, the conditions and facilities would be excellent": Ex SJG-4.

(3) In a letter dated 9 January 2001, WG wrote "[Gao] is also very supportive of my idea of taking Jiajia to Australia. Jiajia is attending primary school this year. If she could come to Australia for study, it would be no cost for her study. Moreover, there is one of the vest [sic] public primary schools of Sydney near where I live… at first I wanted you three to visit Australia in July when Jiajia is on school holiday. You can get used to the environment here before deciding whether to stay or not… after reading this letter, I hope you could make early preparation and apply for passports": Ex SJG-6.

(4) In a letter dated 8 February 2001, WG wrote "it would be best if [Jiajia] could complete Year One or Year Two study in a primary school in China before coming here, but I do miss her so much… Besides, you two are already of old age, I don't think I should trouble you with taking care of Jiajia, so I think it's best if you and Jiajia could come to Australia together and Jiajia could get used to the life here… you should just apply and get your passports": Ex SJG-8.

(5) In a letter dated 15 March 2001, WG wrote "If you have already got your passports, you may commence applying for a visa… Jiajia is the key here. I don't have her custody and I can't take her to Australia. I can only commence the matter of changing her custody after GUO's matter comes to an end": Ex SJG-10.

(6) In a birthday card to the Plaintiff dated 15 March 2001, WG wrote "Mommy misses you so much… come here to be with mommy as soon as possible": Ex SJG-11.

(7) On 28 March 2001, the Plaintiff received a gift of clothing from WG.

(8) On 28 March, and again on 2 April, 2001, WG sent an email to her family in China. In neither of these emails, did she mention any intention to return to China. The email on 2 April 2001 was the last email received from her.

65 There is no evidence of any letters or emails having been received by the Plaintiff from WG since April 2001.

66 WG's brother, Xian, stated that he usually received an email from WG every four or five days. He did not receive any email correspondence from her after April 2001.

67 (Xian said he received an email dated 11 April 2001, from WG's email address, indicating that she would be travelling to Hong Kong and then to China, on a false passport. He said that he did not think that the email had been written by WG. The Defendant, during the Coronial Inquest, denied that he had sent the email: CIT68.44-46. It is not possible to determine this issue, but as will be read, no other emails, subsequently, have been received.)

68 The Defendant stated that, occasionally, when WG went to China, she would not tell him her plans, or when she was going, but would merely ask to be dropped off somewhere. However, in April 2001, WG told the Defendant that she wanted to go back to China to (amongst other things) to "see about getting her daughter to Australia": Affidavit, Yong Wei Gao, 30 November 2020 at par 65.

69 On 11 April 2001, WG withdrew $1,000 from her bank account. Subsequently, she asked the Defendant to drop her off at a bus stop, with a handbag and one suitcase, at Pennant Hills Road, Carlingford, which he did. He said that it was the last time he saw her.

70 The last time a neighbour in Carlingford saw WG was in about April 2001.

Events after April 2001

71 In about May 2001, the Defendant was hospitalised at Royal North Shore Hospital.

72 There is an extremely detailed written Statement, dated 10 November 2009, of Inspector Darren Newman of NSW Police, a copy of which is annexed to the affidavit affirmed 4 June 2021, of Zhi Li, solicitor. In the Statement, Inspector Newman details the investigations, searches, and enquiries, made by members of the NSW Police following the making of a missing person's report in late 2001 (to which I shall refer) until about 2009.

73 There is also a Statement of Police dated 22 December 2011 by Senior Constable S McAlister (Ex P1), in which he sets out the enquiries made by him,

including with the Department of Immigration and Citizenship, with banks and financial institutions, with the Australian Police Service, including with the State Coroner's Office, with Centrelink and with the Health Insurance Commission. The enquiries were unsuccessful.

74 A relatively short summary of what is revealed in the two Statements is as follows.

75 WG's brother, Xian, attempted to contact WG by telephone and by email for two months after early April 2001.

76 The Defendant forwarded a letter dated 31 December 2001, by facsimile transmission to NSW Police stating that he had not seen or spoken to WG since April 2001, had travelled to China to make enquiries of members of her family, without success, and "was very confused on what may happen to her. I have tried all my efforts and am still trying but so far I have not got the information regarding her whereabouts".

77 In about January 2002, Stephen Kwok Kan Yu, a friend, on behalf of the family of WG in China, reported her as a missing person to the Police Service of New South Wales at City Central Police Station.

78 Attempts to involve the Missing Persons Unit of NSW Police have not resulted in locating WG. As at 4 October 2011, the Missing Persons Unit conducted inquiries (through Senior Constable McAllister) with the Department of Immigration and Citizenship. Its records revealed no movements into, or out of, Australia, by WG, following her re-entry into Australia on 22 October 2000.

79 Enquiries were also made with all Police Missing Persons Units throughout Australia. It was requested that each State and Territory make inquiries with all known information sources, in the respective State or Territory, including inquiries with the State Coroner's Office for records relating to WG and all unidentified bodies. Each State and Territory Missing Persons Units replied that it had no information in respect of WG.

80 WG's Medicare card had expired on 22 March 2003. On 4 October 2011, NSW Police inquired with Medicare for updated information. On 22 December 2011, Medicare records indicated that there had been no medical services for which

a Medicare, or PBS (Pharmaceutical Benefits Scheme), benefit, had been claimed since WG's disappearance in April 2001.

81 On 4 October 2011, NSW Police checked the New South Wales Police mainframe in relation to the COPS (which I assume is Community Oriented Policing Services), RTA and the integrated licensing system, and there had been no entry into any of the systems for WG, since her disappearance. (WG had obtained her driver's licence in the latter part of 2000).

82 On 6 October 2011, requests were made by the Police to St George, CBA, NAB and Westpac inquiring whether any of those banks held any accounts under the name of WG. A reply received from each Bank stated that no accounts were held.

83 On 6 October 2011, NSW Police also contacted Centrelink. The reply stated that, as at 14 October 2011, WG had not been a "customer" of that organisation.

84 Other NSW Police searches and enquiries made, including those of, and with the Defendant, and other persons, in 2002, 2003, 2005, and 2006, are stated in meticulous detail.

85 The Statement made by Inspector Newman concluded:

> "238. Since the disappearance of Wei Hong GUO was reported in January 2002 there has not been any information received by police as to Wei Hong GUO's whereabouts, the recovery of human remains, or physical evidence, which concludes that she is deceased.
>
> 239. The nature and circumstances in which Wei Hong GUO disappeared are suspicious.
>
> 240. The versions by Xian GUO and Yong Wei GAO is vastly different, particularly on what arrangements had been made to report Wei Hong GUO missing. It is apparent from the evidence provided by Xian GUO and Yong Wei GAO that there is grave mistrust between both parties.
>
> 241. It has been established that the last attendance by Wei Hong GUO at Macquarie Community College Carlingford was on 5th April 2001. This date was also the last date that her mobile telephone was actively used.
>
> 242. A version provided by Yong Wei GAO indicates that Wei Hong GUO was dropped to a bus stop in Carlingford on the morning of the 11th April 2001. The version indicates that GUO was to travel to the airport and return to China. It has been established that there are no travel records for Wei Hong GUO departing Australia on this day or anytime in April 2001, with the last known movement recorded by DIMIA being in October 2000.

> 243. In conversations with a friend MAO, Wei Hong GUO had made no indication she would be travelling to China and made a request of her to purchase items for her daughter whilst she (MAO) was in China during March/April 2001.
>
> 244. Emails provided by Yong Wei GAO to police indicate that Wei Hong GUO was to travel to China on a false passport. The emails are exchanges between Xian GUO, Qu Jiang and Wei Hong GUO discovered by Yong Wei GAO after Wei Hong GUO disappeared. The fact that Wei Hong GUO's former husband was arrested by Chinese Authorities (same period Wei Hong GUO disappears) for what is described as a corruption/bribery matter the travel on a false passport cannot be excluded. There is information contained in the emails suggesting that Wei Hong GUO and her former husband were making attempts to migrate to Canada. Inquiries with Chinese Authorities to date have failed to obtain any information which can either prove or disprove this assertion of Wei Hong GUO travelling on a false passport.
>
> 245. In my opinion the fact there was a significant delay in reporting Wei Hong GUO missing (8 months later) to the NSW Police severely hindered the investigation.
>
> 246. Whilst there was an incident between He HUANG and Wei Hong GUO reported to police involving an act of violence and alleged failed financial dealings, there is no evidence to link He HUANG with the disappearance Wei Hong GUO.
>
> 247. Whilst there was a significant delay in reporting Wei Hong GUO missing, questions regarding his movements and communications on the 11th April 2001 (and prior), questions regarding his relationship with He HUANG during the marriage and questions over his financial dealings with Wei Hong GUO there is no evidence to link Yong Wei GAO with the disappearance of Wei Hong GUO, albeit the behaviour exhibited from April 2001 onwards is considered highly unusual for a person whose wife is missing.
>
> 248. In my opinion, in the event that Wei Hong GUO did not travel on a false passport, then she has met with foul play. The fact that she has not made contact with her family, including a daughter in China is out of character."

86 Despite what may have been the suspicions of the NSW Police, and others, no charges were ever brought against any person.

87 On 10 September 2012, the then State Coroner, M Jerram, following an inquest into the missing person report relating to WG, handed down an:

> "…open finding that Wei Hong Guo who has been missing since 11 April 2001 from the suburb of Carlingford in New South Wales cannot be found to be dead or alive from the evidence which has been heard by me today."

88 In that Coronial Inquest, the Defendant gave evidence. He said that he did not know where WG was, that he did not know whether she was alive or dead, that neither he, nor any person he knew, had anything to do with her disappearance, and that he had not killed her.

89 In May 2013, the Defendant lodged an Application for Possessory Title in respect of the Carlingford property with the Registrar General under s 45D of the *Real Property Act 1900* (NSW).

90 On 22 May 2017, the Plaintiff lodged a caveat with the New South Wales Land and Property Information division prohibiting the grant of any application for possessory title.

91 The Plaintiff has stated that she has not seen, or heard, from WG since 2000. More recently, she has been in contact with NSW Police to ascertain whether there had been "any updates on [WG's] disappearance" and was told "there were no further updates". Although the Plaintiff has not specifically stated that she has not heard from WG, it is the only inference that can be drawn in all the circumstances of the case.

92 Xian, WG's brother, stated, in his affidavit affirmed 13 May 2021, that he has had:

> "no news of my sister. There was no contact from her to the family. I have contacted her friends and classmates to make enquiries of her whereabouts and found no clue. All family members including our parents, Sijia GUO and me, are currently residing in China and have no connections in foreign countries."

93 In his affidavit affirmed on 13 May 2021 Jin Hua Guo, the former husband of WG and the father of the Plaintiff, confirmed that since April 2001, he has not heard anything from WG. He adds that he has kept in contact with WG's parents, and that they have told him they have not heard from her either. He has also searched through WG's belongings, in his possession, that she left in China, but has not found "any will or documents of such nature".

94 The Defendant has stated, in an affidavit affirmed on 30 November 2020, that he has not had any contact with WG since he dropped her off at the bus stop. He states that she "has not made any transactions on any bank accounts and credit cards known to me… since that time". He adds that after she disappeared he has "spent a lot of time and money trying to locate her. I went to China, Hong Kong, Canada and USA to look for her." He has also contacted various identified banks and has found "no record of any account being held either by my wife or myself with those banks".

95 The Defendant formed a new relationship, and between 2004 and 2019 was in a de facto relationship with Shaorong Zhan. He moved to New Zealand in 2004 and moved to Perth in 2009 where he lived with Ms Zhan until 2019, when she returned to China. He currently lives in Woodvale, Western Australia.

96 Finally, in the Statement of Claim, at paragraph 14, the Plaintiff asserted that "[S]ince 2002, despite all reasonable search and enquiry, [WG] has not been found". This paragraph is admitted in the Paragraph 14 of the Defence.

97 There is no reliable information adverted to by any deponent which suggests that she, or he, has heard of, or from, WG, since April 2001.

98 Searches have not revealed any Will made by WG. The parties agree that she left no Will or other testamentary instrument. Without more, and if the declaration sought is made, WG's estate would be distributed under the operation of the rules of intestacy.

99 The parties are the only persons who are, or who may be, entitled to WG's estate under the operation of the rules of intestacy.

100 Each of the Plaintiff and the Defendant is an eligible person for the purposes of Chapter 3 of the *Succession Act*, as is Jin Hua Guo, the former spouse of WG who is resident in China.

The presumption of death

101 It is fundamental to any application for probate, or letters of administration, to show that the person whose estate would be the subject of the proposed grant of probate or administration is dead. That is usually satisfied by the presentation of a death certificate. No death certificate has been issued in this case. However, as will be read, the Court can also make a grant of probate or administration where the person's death can be presumed.

102 The test to establish the death of a person is a positive one based upon direct evidence of death. In relation to presumed death, the test is one dependent upon an absence of knowledge of the death of the missing person.

103 In *Application by Walsh & Anor (Estate of Robert Charles Walsh (deceased))* [2020] NSWSC 976 at [33]-[35], I wrote:

> "In *Re Parker* [1995] 2 Qd R 617, Lee J wrote at 621:
>
> > 'When it becomes necessary in a legal proceeding to establish the death of a person, the party on whom the burden of proving that issue lies may do so directly, circumstantially or presumptively: cf *Axon v Axon* (1937) 59 CLR 395 at 403 per Dixon J.'
>
> The standard of proof is the balance of probabilities.
>
> Where a court is unable to draw an inference of death from facts given in evidence, it may have resort to what has been described as 'the presumption of death' ...

104 It has been written that "[a]n application for a grant on presumption of death occurs in all cases where the body is not found … This is the case even though a certificate of death may have issued": Mason and Handler Succession Law and Practice: New South Wales at 9234 [5067]; Wills, Probate and Administration Law in New South Wales at 636.

105 It is important not to confuse the process of inferring death from the evidence available, and the application of the presumption of death at law. The learned authors of Wills, Probate and Administration Law in New South Wales write at 637:

> "Care needs to be taken not to confuse proof of death by inference from proof of death by presumption of law. With the former there is evidence from which the court may infer that it is more probable the person has died rather than be living. In the latter there is no evidence of death at all.' (citations omitted)"

106 Section 40A(1) of the *Probate and Administration Act 1898* (NSW) provides, relevantly, that where the Court is satisfied, whether by direct evidence or on presumption of death, that any person is dead, the Court shall have jurisdiction to grant administration of the person's estate, notwithstanding that it may subsequently appear that the person was living at the date of the grant.

107 Section 40B applies where a grant is made on presumption of death. Relevantly, it provides:

> (1) If a grant of probate or administration is made on presumption of death only, the provisions of this section shall have effect.
>
> (2) The grant shall be expressed to be made on presumption of death only.
>
> (3) The estate shall not be distributed without the leave of the Court.
>
> The leave may be given in the grant of probate or administration or by other order, and either unconditionally or subject to such conditions as the Court deems reasonable, and in particular, if the Court thinks fit, subject to an undertaking being entered into or security being given by any person who

takes under the distribution that the person will restore any money or property received by the person or the amount or value thereof in the event of the grant being revoked.

108 I turn next to the principles that relate to the presumption of death.

109 In *Elaraby & Ors v Minister for Immigration & Anor* [2018] FCCA 1101, Judge Manousaridis wrote at [38] – [43]:

> "The common law presumption of death
>
> The word 'presumption' carries a number of meanings depending on the context in which it is used. One meaning equates 'presumption' with an 'inference' or a 'conclusion' that is drawn as a matter of probability on the basis of evidence that is accepted. That is the meaning of 'presumption' given by Best in 1844:
>
> > And when the conclusion of the existence of the principal fact does not necessarily follow from the facts proved, but is deduced from them by probable inference, the evidence is said to be presumptive, and the inference drawn a presumption; which, therefore, in this restricted legal sense, may be defined as 'an inference, affirmative or disaffirmative of the existence of a disputed fact, drawn by a judicial tribunal by a process of probable reasoning, from some one or more matters of fact, either admitted in the cause or otherwise satisfactorily established'. . . .
>
> Another meaning of 'presumption' is a conclusion of fact (presumed fact) that, as a matter of law, must be drawn when certain facts are proved (basic facts), unless there is evidence that, if accepted, proves the non-existence of the presumed fact or the existence of a fact that is inconsistent with the presumed fact. Such presumptions are often, and for many years have been, referred to as presumptions of law. The distinction between presumptions based on probable inference (presumptions of fact) and presumptions based on a rule of law (presumptions of law) was identified by Best:
>
> > It is clear, that presumptive evidence, and the presumptions or proofs to which it gives rise, are not indebted for their probative force to any rules of positive law. When inferring the existence of a fact from others that have been already established, courts of justice (assuming the inference properly drawn) do nothing more than apply, under the sanction of the law, a process of reasoning which the mind of any intelligent reflecting being would have applied for itself under similar circumstances; and the force of which, when the inference is not of a conclusive kind, rests altogether on the experience and observation of the ordinary course of nature, the constitution of the human mind, the usual springs of human action, the usages and habits of society, &c. All such inferences are called by jurists, presumptions of fact, or natural presumptions; and also by the civilians, praesumptiones hominis in order to distinguish them from others of a technical kind . . . known as . . . presumption of law.
>
> The so-called presumption of death is a presumption of law. It is a conclusion a court is required to make on the proof of a number of basic facts, provided there is no evidence that is contrary to the conclusion. The presumption, and the basic facts that must be found to exist before it can be drawn, were identified by Dixon J (as his Honour then was) in *Axon v Axon*

…

There are two matters to note about the common law presumption of death. First, although the presumption is based on the proof of basic facts that are capable of supporting a finding of death, the presumption is not a principle of common-sense reasoning that may be applied to fact-finding. It is a rule of law the common law courts formulated, largely in the course of the nineteenth century, to overcome difficulties that arose when the death of a person was in issue and there was no direct evidence about the person's being dead or alive.

The second matter to note is that the common law presumption of death does not preclude a court from finding that a person has died where one or more of the basic facts are not proved. In other words, the presumption of death is not the only means by which the death of a person whose fate or whereabouts are not known may be proved. That is illustrated by a number of cases. In In *Re Beasney's Trusts*, for example, the question was whether a person who was last heard of in 1860 died by November 1860. The common law presumption of death applied because the proceeding in which the question arose was commenced more than seven years after 1860. The presumption, however, only permitted the conclusion that the person was dead at the time the proceeding was commenced. Sir R Mallins VC, however, concluded on the basis of the evidence before him that the person had died by November 1860. In other cases the courts found a person was deceased even though enquiries as to the existence or death of the person in question had been undertaken.

That the presumption of death does not prevent the court from finding that a person has died where one or more of the basic facts that are necessary to give rise to the presumption are not proved was recently affirmed by Atkins J in *Maynard v The Estate of Maynard*:

> The jurisdiction in section 6 [of the *Succession Act 1981* (Qld)] is very wide, but depends on the Court being satisfied that the person for whom probate or the administration of the estate is sought is, in fact, deceased. This usually requires the presentation of a death certificate. In some circumstances, however, as Dal Pont and Mackie set out in *The Law of Succession*, 'it may be difficult to conclusively determine whether or not the person has in fact died'. The common law, in dealing with that issue, has recognised what is termed a 'presumption of death'; that is, following a person's disappearance for at least seven years, the person may be presumed to be deceased. However, whether or not a person is deceased is a question of fact and as such, it is not always necessary to wait seven years for a person to be held to be deceased, even where that person's body has not been found."

110 In the present case, there is no acceptable, affirmative, or direct evidence that WG is dead. Nor is there proof of death by inference. For these reasons, the parties rely upon proof of death by presumption of law. That presumption, which is a common law evidentiary presumption, applies when it is established that the person (termed the propositus) has been absent, and not been heard of, or from, by those who might have been expected to hear of, or from, her, or him, for a period of seven years up to the commencement of the relevant legal proceedings.

111 The determination of the presumption is a matter of fact: *Axon v Axon* (1937) 59 CLR 395; [1937] HCA 80 at 412-413. The onus of establishing the presumption rests on the party who seeks it and it is found on the balance of probabilities: *Estate of Howard* (1996) 39 NSWLR 409 per Cohen J.

112 The Court will "approach the question of proof of death with a great deal of caution because there are all kinds of unknown factors which will influence a person to move from his ordinary environment for no apparent reason whatsoever; and yet people do that very thing": R A Sundberg, Griffith's Probate Law and Practice in Victoria (3rd ed, 1983, Law Book Co), at 13-14. Yet, the burden of proof remains on the balance of probabilities.

113 In *Axon v Axon*, the Court was required to determine whether the first husband of the appellant was presumed to be dead as at the date of the appellant's second marriage to the respondent. The appellant's first husband had left her in 1923 and she had not seen him or heard from him again. The appellant then married the respondent on 6 January 1932. The respondent later claimed that his marriage to the appellant was not valid, because the appellant's first husband was still alive at the time it took place.

114 The Court held that if a person has not been heard of by persons who might have been expected to hear of him for a period of not less than seven years, he may be presumed to be dead at the time when the question arises in legal proceedings. It should be stressed that the important facts are that "at least seven years have elapsed since [the person] was last seen or heard of by those who in the circumstances of the case would according to the common course of affairs be likely to have received communication from him".

115 Dixon J wrote at 404-405:

> "When it is proved that a human being exists at a specified time the proof will support the inference that he was alive at a later time to which, having regard to the circumstances, it is reasonably likely that in the ordinary course of affairs he would survive. It is not a rigid presumption of law. The greater the length of time the weaker the support for the inference. If it appears that there were circumstances of danger to the life in question, such as illness, enlistment for active service or participation in a perilous enterprise, the presumption will be overturned, at all events when reasonable inquiries have been made into the man's fate or whereabouts without result. The presumption of life is but a deduction from probabilities and must always depend on the accompanying facts.

…

If, at the time when the issue whether a man is alive or dead must be judicially determined, at least, seven years have elapsed since he was last seen or heard of by those who in the circumstances of the case would according to the common course of affairs be likely to have received communications from him or to have learned of his whereabouts, were he living, then, in the absence of evidence to the contrary, it should be found that he is dead. But the presumption authorizes no finding that he died at or before a given date. It is limited to a presumptive conclusion that at the time of the proceeding the man no longer lives. In *Lal Chand Marwari v. Mahaut Ramrup Gir* (1925) L.R. 53 Ind. App. 24, at p.31; 42 T.L.R. 159, at p.160 Lord Blanesburgh, speaking for the Privy Council, said that there is only one presumption and that is that at the time when the suit was instituted the man there in question was no longer alive. 'There is no presumption at all as to when he died. That like any other fact is a matter of proof.' "

116 The High Court also made it clear that there is no presumption as to the time of the person's death prior to the institution of the proceedings. Latham CJ wrote at 401:

> "… the application of the rule does not establish death at any particular time (*In re Phené's Trusts*). It only produces the result that, if a person has not been heard of by persons who might have been expected to hear of him for a period of not less than seven years, he may be presumed to be dead at the time when the question arises in legal proceedings. The rule does not bring about the result that the person is deemed to be dead at the end of a seven-years' period (cases cited in *Halsbury's Laws of England*, 2nd ed., vol. 13, pp. 630, 631)."

117 Evatt J wrote at 411-412:

> "It is true that, apart altogether from the presumption of death prior to remarriage which, in my opinion, is required by the bigamy enactment, there exists the presumption which Stephen calls 'the presumption of death from seven years' absence.' Such presumption is of general application, and its nature and history are fully discussed in *Re Phené's Trusts* (1870) 5 Ch. App. 139. In that case, Giffard L.J., in a judgment which has since won frequent approval, quotes the case of *Doe v. Nepean* (1833) 5 B. & Ad. 86; 110 E.R. 724, where the Court of Exchequer Chamber had laid emphasis on the fact that the Act 18 & 19 Car. II c.11 (misquoted as c.6) distinctly points to the presumption of the fact of death, but not the time of death. As is pointed out in *Stephen's Digest of the Law of Evidence*, Art. 99, the general presumption of death carries with it no presumption as to the time of death, and the burden of proving death at any particular time is on the person who asserts it. Such general presumption operates so as to prove the fact of death at the time of the institution of the legal proceedings where the fact giving rise to the presumption is proved. Of course, in many cases, such presumption is sufficient to carry the person who relies upon it the necessary distance, e.g., in cases under an insurance policy, where the fact of the termination of the life is sufficiently proved if death can be presumed as at the time when the writ is issued (*Prudential Assurance Co. v. Edmonds* (1877) 2 App. Cas. 487). In many cases, however, where death must be shown to have occurred at some point of time anterior to the curial proceedings, the presumption may carry the

party relying upon it only a certain distance, or no distance at all (*Re Phené's Trusts* (1870) 5 Ch. App. 139)."

118 In *Chard v Chard* [1956] P 259 at 272, Sachs J wrote:

> "… By virtue of a long sequence of judicial statements, which either assert or assume such a rule, it appears accepted that there is a convenient presumption of law applicable to certain cases of seven years' absence where no statute applies. That presumption in its modern shape takes effect (without examining its terms too exactly) substantially as follows. Where as regards 'A.B.' there is no acceptable affirmative evidence that he was alive at some time during a continuous period of seven years or more, then if it can be proved first, that there are persons who would be likely to have heard of him over that period, secondly that those persons have not heard of him, and thirdly that all due inquiries have been made appropriate to the circumstances, 'A.B.' will be presumed to have died at some time within that period. (Such a presumption would, of course be one of law, and could not be one of fact, because there can hardly be a logical inference from any particular set of facts that a man had not died within 2,555 days but had died within 2,560.)"

119 This passage of Sachs J's judgment was quoted, with apparent approval, by Holt M in *In re Margarete Maria White* [2001] TASSC 7 at [10], by Gray J in *In the Estate of Peter Dale Hills* [2009] SASC 176 at [6], and cited by Ferguson J (as her Honour then was) in *Re Curran* [2010] VSC 455 at [8].

120 In *In the Estate of Peter Dale Hills*, leave to swear to death was granted where the propositus had been missing for 13 years without any contact with his family. Gray J reviewed the authorities and then observed at [7] and [8]:

> "An automatic presumption of fact does not arise even if seven years have elapsed without any sign of the person in question. As Legoe J noted *In re Westover* (1987) 139 LSJS 115 at 117:
>
> > 'The mere fact that a person has not been heard of for seven years does not of itself raise any presumption of fact. But if circumstances exist such that a particular person should have been heard of within that time then the presumption of continuance of life which is the only presumption which the law makes in such circumstances may be displaced.'
>
> In *Westover*, Legoe J followed the recommendations set out in Mortimer on Probate Law and Practice, as to the practice to be followed in these matters. According to this practice, the applicant wishing to displace the presumption of continuance of life and seeking a finding that the presumed deceased is dead, should provide evidence including the description, age and circumstances of the presumed deceased and the circumstances of disappearance or departure. The evidence should depose to the applicant's belief in the death of the presumed deceased, and the basis of that belief, including any evidence of persons relevant to a finding of death. The applicant should demonstrate that advertisements seeking information concerning the presumed deceased have been inserted in newspapers, identifying the newspapers utilised, and the result of those advertisements. The evidence should include whether any

> letters have been received from the presumed deceased since their disappearance or departure and, if not, the last date of communication. It should further be established what other enquiries have been made, and any other facts that render the presumed deceased's death probable, such as an awareness of an entitlement to a fund without any claim being made. Whether the presumed deceased was insured should be established. Further matters to be established include whether the presumed deceased died intestate or testate. If intestate, the application should state the names of the next of kin and of the potential heir at law, and if testate, the will should be filed. Particulars of the value and nature of the estate of the presumed deceased should be ascertained. The requirement to establish these matters is not definitive. Other matters of relevance may also be deposed, and a failure to establish any of these matters will not necessarily defeat the application."

121 The party seeking to rely on a presumption of death must prove absence from the last place of residence (or, if this is not known, absence from the last place in which the missing person resided): *M'Mahon v M'Elroy* (1869) 5 IR Eq 1 at 12; *Allman & Co v M'Cabe* [1911] 2 IR 398 at 426-427.

122 In *Allman & Co v M'Cabe*, Boyd, J also wrote at 402:

> "In the case of persons of whom no account can be given, the law presumes their death at the expiration of seven years from the time they were last known to be living: Nepean v. Doe d. Knight 2 M. & W. 894; Doe d. George v. Jesson 6 East, 84; Doe d. Lloyd v. Deakin 4 B. & Ald. 433. In the case of Doe v. Nepean 5 B. & Ad. 86, approved of and followed in In re Phené's Trusts L.R. 5 Ch. App. 139, it was decided that where a person goes abroad and is not heard of for seven years the law presumes the fact that such person is dead, but not that he died at the beginning or end of any particular period during those seven years; that if it be important to anyone to establish the precise time of such person's death, he must do so by evidence."

123 To rely upon this presumption, it will be necessary to establish, on the balance of probabilities, the following essential matters, namely that WG has not been seen, or heard of, for a continuous period of seven years, or more, after she was last seen alive; that there are persons who would be likely to have heard of, or from, her, over that period; that those persons have not heard of, or from her; and that all due inquiries have been made appropriate to the circumstances.

124 In *Prudential Assurance Co v Edmonds* (1877) 2 App. Cas. 487, a case, initially, tried before a Judge sitting with a jury, the House of Lords suggested that a person is not "heard of" if no reliable information concerning the missing person is received by persons likely to have heard from her or him.

125 There is, of course, a distinction between missing and not being in communication. The people with whom the missing person would be likely to communicate if she, or he, were alive, would be persons who would be more likely than not in contact with the missing person if she, or he, were alive, and who she, or he, would have had access to by ordinary means of communication. One would not expect the group to include every fellow resident or relative, or friend, with whom the missing person, from time to time, had communicated with in the ordinary course of daily life. In this case, such persons would be those who were likely to, and who did, worry about, or wonder what had become of WG, and who have also made searches for her, including approaching the NSW Police.

126 Whilst not an essential matter to be established, one of the circumstances that the Court may take into account is whether there is a valid explanation why a person has not been heard of for that period: *Estate of Howard* (1996) 39 NSWLR 409 at 413 (Cohen J). Where the missing person had a reason for not communicating with a person who would be likely to have heard of, or from, them, the presumption will not be invoked: *Watson v England* (1844) 60 ER 266; 14 Sim 28; *Estate of Howard* at 414 per Cohen J.

127 As Cohen J also noted, at 415:

> "Although there is a certain artificiality in raising presumptions when facts are not really known, the law relating to the presumption of death has grown out of the necessity to have a finding which will give a practical solution where otherwise there would be only continuing uncertainty for an indefinite period."

128 If there is evidence that the missing person has died, and the date of death is clear, and it will not be difficult to fix that date. The position is less straightforward where there is evidence to satisfy the Court that the missing person has not been heard of for at least seven years.

129 If relevant matters are established, there arises a rebuttable presumption of law that WG died at some time within that period, and the party upon whom the burden falls of proving her death may rely upon that presumption: *Chard v Chard* at 272 (Sachs J).

130 Thus, if a grant of probate or administration is made on presumption of death, it will not be possible for the date of death of the propositus to be recorded on the

grant. In particular, death is not presumed at the end of the seven year period: *Halbert v Mynar* [1981] 2 NSWLR 659 at 664 (Waddell J).

Submissions

131 Both counsel submitted that WG was, ultimately, setting up a home in Australia for herself, her parents, and her daughter, the Plaintiff. They pointed to the sums of money which WG bought from China to Australia, her joint purchase of the Carlingford property, her enrolment in an English course, and her stated intentions to bring her family to Australia: Tcpt, 19 August 2021, p 13(38)-14(03).

132 Counsel further submitted that there was no evidence that WG set up "her disappearance to abscond and set up a new life somewhere else": Tcpt, 19 August 2021, p 14(14-15).

133 In regard to due inquiries conducted since 2012, counsel for the Plaintiff submitted that "apart from monitoring whether there is any activity there comes a time when people draw a line under it and say 'She disappeared. We cannot find her'. If a red light appears that she made some sort of contact with a friend or if she has accessed some sort of financial institution or made a claim somewhere, that would come up and we can restart some investigations, but there comes a time when you say 'She has gone. She is missing. We cannot do much more about it except monitor" and that is exactly what has happened here': Tcpt, 19 August 2021, p 14(24-31).

134 Counsel for the Plaintiff pointed to "the utility of making such a declaration now because there is obviously - there is no real contradictor. There is no interested person who may come forward in the future to screen the information or make any submissions to the contrary at the moment, and there does not appear to be any interested person who would have an interest to have a contrary result so there is utility in making the declaration": Tcpt, 19 August 2021, p 15(15-20).

135 Counsel for the Plaintiff submitted that any evidence that WG was not dead (being the evidence of a false passport, WG's alleged connection to Canada and her intention to return to China on the day she disappeared) came from the Defendant, rather than WG herself: Tcpt, 19 August 2021, p 13(05-21).

Determination

136 In this case, having carefully considered the evidence and the submissions of counsel, I am satisfied, on the balance of probabilities, that:

(1) WG has been missing for more than 7 years; indeed, she has been missing for over 20 years.

(2) WG's disappearance was unexpected and unexplained.

(3) The body of WG has not been discovered or identified.

(4) WG has not been heard of since her disappearance in April 2001.

(5) The persons who would have been likely to have heard from her, being most importantly, the Plaintiff, WG's siblings, her parents, the Defendant, and to a lesser extent, WG's former husband, have not heard from her. Each appears to have had a close and loving relationship with WG. She had remained in regular contact with her parents and brother and with the Plaintiff. She was living with the Defendant in 2001.

(6) All due inquiries were made, particularly between 2002 and 2012. WG has not been known to be alive for a period of at least 7 years. Monitoring since then has not altered the position.

(7) Even though there was no public finding that she has died, there are no established facts that provide a reason, financial or otherwise, for WG to have wished not to be heard of for the last 20 years.

(8) There is no evidence to raise an issue that WG is alive and neither of the parties have any reason to believe that she was alive, at any time during the last 20 years, or that she is currently alive, which would rebut the presumption of death.

137 While the law has provides the period of seven years as a yardstick to displace the inference that the missing person remains alive, the period during which WG has been missing is substantially longer. The effect of the presumption is to give rise to a conclusion that, at the time of the proceedings, WG is no longer alive.

138 The Court makes the following orders and notations:

(1) Orders, pursuant to Uniform Civil Procedure Rules rule 28.2, that the Court determine, by way of separate question, and prior to the final hearing of the proceedings, whether it is satisfied that Weihong Guo, on presumption of death, is no longer alive.

(2) Declares that the Court is satisfied that Weihong Guo, on presumption of death, is no longer alive.

(3) Declares that the Court is satisfied that Weihong Guo left no Will.

(4) Notes that the Plaintiff and the Defendant, the only persons who are, or who may be, entitled to share the estate of Weihong Guo under the operation of the rules of intestacy, each consents to an independent administrator being appointed to administer the estate of Weihong Guo on intestacy.

(5) Notes the agreement of the parties that there are special circumstances, namely that it is in the best interests of the administration of the estate of Weihong Guo, for an independent administrator to be appointed.

(6) Notes that the parties consent to Mark Henrick Peoples, solicitor, ("Mr Peoples"), being appointed as the independent administrator.

(7) Notes the consent of Mr Peoples to being appointed as the independent administrator.

(8) Orders, subject to compliance with the Probate Rules of Court, that administration on presumption of death only of the intestate estate of Weihong Guo be granted to Mr Peoples.

(9) Orders that the matter be remitted to the Senior Deputy Registrar in Probate to complete the grant.

(10) Orders that the requirement of an administration bond and sureties be dispensed with.

(11) Orders that the estate shall not be distributed without the leave of the Court.

(12) Notes the agreement of the Defendant that he will not sell, mortgage, charge, or in any way encumber, or deal with, the property described as Lot 22 in Deposited Plan 231885, being the land situated at, and known as, 22 Edinburgh Avenue, Carlingford ("the Carlingford property"), until further order of the Court.

(13) Notes that the Defendant is currently receiving the net rent from the Carlingford property, and that, in the event it becomes necessary, an accounting of the rent received by him will be undertaken.

(14) Orders that the costs of each of the parties of the determination of the separate question be paid out of the estate or notional estate of Weihong Guo.

(15) Notes that the legal representatives of the parties have agreed to attend a settlement conference in Chambers at 11:00 a.m. on 24 August 2021, at which the lawyers only, will attend, initially, and if they are able to reach a joint position that each is prepared to recommend to the party they represent, then with the parties attending by Skype, other form of video-conferencing, by telephone, or as otherwise agreed, to see if the recommended position will be accepted by her and him respectively.

139 It will be necessary for the matter to be relisted by arrangement with my Associate after 24 August 2021.

****