Neutral Citation Number: [2017] EWHC 283 (Ch)

Claim No: HC-2015-002464

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Building
Fetter Lane,
London EC4A 1NL

Date: 17 February 2017

Before :

MR S MONTY QC (SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)

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Between :

(1) LAUREL MARILYN ROBERTS **(2) FRANCESCA MILBOUR**	**Claimants**
- and -	
LUANNE FRESCO	**Defendant**

- -
- -

Mr Alexander Learmonth (instructed by **Slater + Gordon LLP**) for the **Claimants**
Mr Mark Baxter (instructed by **Pearson Hards LLP**) for the **Defendant**

Hearing date: 15 February 2017

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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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Mr S Monty QC (sitting as a Deputy Judge of the Chancery Division)

Mr S Monty QC:

Introduction

1. The Claimants' application raises the question of whether a potential Inheritance Act claim by a surviving husband against his deceased wife's estate abates on the death of the husband.

2. On 10 November 2016 Master Clark directed the hearing of this question as a preliminary issue in this action, which comprises as matters presently stand claims under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act") by the First Claimant as a child of the family of the late Mrs Pauline Milbour or as a person who was, before Mrs Milbour's death, being wholly or partly maintained by her; and by the Second Claimant as a person who was being maintained by Mrs Milbour.

The factual background

3. Mr and Mrs Milbour were married in 1973. Each had a child or children from a previous marriage. The First Claimant is Mr Milbour's daughter. The Second Claimant is Mr Milbour's granddaughter, her father (Mr Milbour's son) having died in 2004. The Defendant is Mrs Milbour's only child, and the claim is brought against her in her capacity as sole personal representative of Mrs Milbour's estate.

4. Mrs Milbour died on 5 January 2014. Mr Milbour died in 20 October 2014.

5. In that short period of time, Mr Milbour did not bring a claim under the 1975 Act against his late wife's estate.

6. Mrs Milbour's estate was of considerable value. It was sworn for probate with a net value of £16,776,054. In addition, there was a property at 101 Bayswater Road, which had been the matrimonial home, and which is worth in the region of £9m. The property did not form part of Mrs Milbour's estate as it was bought in the name of trustees who held it on trust for Mrs Milbour for life with remainder to the First Claimant.

7. By her will dated 29 October 1993, Mrs Milbour left Mr Milbour a pecuniary legacy of £150,000 and an interest in the income of £75,000. Nothing was left to the First Claimant or to Mr Milbour's son (the Second Claimant's father).

8. On the death of Mrs Milbour, Mr Milbour could have brought a claim under the 1975 Act for reasonable financial provision to be made for him out of Mrs Milbour's estate, and that would have been under sections 1(a) and 2(a) of the 1975 Act for

   "such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance."

9. However, no such claim was brought before Mr Milbour died.

10. Mr Milbour's gross estate was £320k including the £150k he inherited under his late wife's will. By his will, Mr Milbour left his estate to the Claimants, and they were

appointed as his executors. By a codicil to his will, executed a few months after his wife's death, the Defendant and her husband Mr Carlos Fresco were appointed as his executors; the Claimants remained the sole beneficiaries.

The present claim and this application

11. On 17 June 2015, the Claimants issued this present claim against the Defendant.

12. On 4 November 2016, as amended by the order of Master Clark of 11 November 2016, the Claimants applied to amend the claim form (so far as remains relevant)

    a) To bring the claim under section 1(1)(a) of the 1975 Act against Mrs Milbour's estate that Mr Milbour did not himself bring before his death in 2014;

    and

    b) To bring a claim in relation to Mr Milbour's estate so as to vary the settlement of the former matrimonial home under section 2(1)(f) of the 1975 Act.

13. Pursuant to Master Clark's order of 11 November 2016, this is the hearing of first, the preliminary issue in relation to the proposed claim against Mrs Milbour's estate, and secondly and more widely, the Claimants' amended application.

Part 1: the proposed claim against Mrs Milbour's estate

14. On a claim by a surviving spouse, section 3(2) of the 1975 Act requires the court to

    "have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce".

15. Whilst the financial provision which can be ordered under the 1975 Act is not limited by that requirement to what might have been awarded on a notional divorce (see for example *Cunliffe v Fielden* [2006] Ch 361 at [21]), the starting point in matrimonial proceedings would have been equality between the spouses (see *White v White* [2001] AC 596). From this it is apparent that any claim Mr Milbour had against his late wife's estate would potentially have been of considerable value. Can his estate now bring that claim?

16. The difficulty in the way of the Claimants bringing the 1975 Act claim against Mrs Milbour's estate which Mr Milbour did not bring in his lifetime is that there is High Court authority which says that a claim under the 1975 Act, like a claim for financial provision in matrimonial proceedings, does not survive the death of the applicant.

17. In *Whytte v Ticehurst* [1986] Fam 64, Booth J held that a surviving widow, who applied under the 1975 Act but had died before the substantive hearing, had no enforceable right against the deceased's estate and hence no cause of action that could survive her death and be enforced by her personal representatives.

    a) The claim of a surviving spouse under the 1975 Act is in many respects similar to a claim for financial relief by a spouse under the Matrimonial Causes Act 1973

("the 1973 Act").

b) An application under the 1973 Act does not subsist against the estate of a deceased spouse; the matrimonial legislation is based upon the premise that both parties to the marriage are alive. For example, a claim for secured maintenance by a divorced wife does not survive against the husband's estate: *Dipple v Dipple* [1942] P 65; and an order for unsecured maintenance for children comes to an end upon the death of the father and cannot be enforced against his estate save for payments due at the date of his death: *Sugden v Sugden* [1957] P 120.

c) Section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 ("the 1934 Act") abolished the common law rule that personal actions die with the person and provided that

"all causes of action subsisting against or vested in [the deceased] shall survive against, or, as the case may be, for the benefit of, his estate."

It is therefore imperative, for the personal representatives to bring a claim, that a cause of action has vested in the deceased before his death.

d) In *Sugden* (*supra*) Denning LJ said at pp 134-5 that the meaning of "causes of action" extends

"to rights enforceable by proceedings in the Divorce Court, provided that they are really rights and not mere hopes or contingencies."

In the Divorce Court,

"there is no right to maintenance, or to costs, or to a secured provision, or the like, until the court makes an order directing it. There is, therefore, no cause of action for such matters until an order is made. … The only thing which takes a case out of the [1934] Act is the absence of an enforceable right at the time of death."

e) The purpose of the 1975 Act was to place the surviving spouse in the position he or she would have been in had a matrimonial decree been granted during the lifetime of the other. The foundation of the jurisdiction is the relationship of the two parties to the marriage, and the only right that the 1975 Act gives is the right to the survivor to apply for relief against the estate of the deceased spouse.

f) The principles enunciated by Denning LJ in *Sugden* apply in the context of 1975 Act cases, and no enforceable right exists until an order is actually made.

g) Further, both the 1973 Act and the 1975 Act by their explicit terms and by the very purposes for which they were enacted restrict the claim for financial relief to a spouse or surviving spouse; neither Act created a cause of action which in so far as it related to provision not required for maintenance survived for the benefit of his or her estate.

h) The claim that may be made under both the 1973 Act and the 1975 Act is personal to the survivor and ceases to exist on the death of both parties to the marriage. There is no enforceable cause of action until an order is made on a

claim.

18. In *Re Bramwell* (deceased) [1988] 2 FLR 263, Sheldon J reached the same conclusion.

    a) It was clear from the authorities that in matrimonial proceedings a claim for financial provision neither gives rise to nor becomes a cause of action unless an order has been made in respect of it before the death of the deceased; until that time, it remains a mere hope or contingency which survives neither against nor for the benefit of the deceased's estate. His Lordship referred to *Dipple* and *Sugden* as well as *D'Este v D'Este* [1973] Fam 55 where it was held that the right to apply for variation of a post-nuptial settlement was not a cause of action within section 1(1) of the 1934 Act and did not survive for the benefit of the husband's estate, and to *Barder v Caluori* [1988] 1 AC 20 in which Lord Brandon cited these cases as having been correctly decided in a speech with which the other members of their Lordships' House agreed.

    b) *Whytte* was correctly decided.

    c) A claim under the 1975 Act is not a cause of action within section 1(1) of the 1934 Act unless an order is made before the death of the surviving spouse; until then it remains a hope or contingency of no surviving value to a deceased claimant's estate.

    d) The provisions of the 1975 Act which set out the matters which the court is directed to have regard supports that conclusion. It would be difficult to assess the basis of such a claim, as the court is directed to do, if the claimant had died. Further, if an applicant died unexpectedly soon after an order had been made, it would be open to the respondents to reopen the matter in accordance with the principles set out in *Barder*, on the basis that new events had occurred since the making of the order which invalidated the basis on which the order had been made (in that case, the death of the wife and children for whom provision had been made in the order for a suitable home).

19. Mr Learmonth says that any court approaching this question untrammelled by previous authority would inevitably hold as follows:

    a) The 1934 Act did not define "cause of action", and whilst some actions (for example, defamation claims) were expressly said not to survive, the phrase should be given the widest possible meaning; had Parliament intended to introduce further exceptions, it would have done.

    b) There is nothing in either the 1975 Act or indeed its predecessor the Inheritance (Family Provision) Act 1938, itself enacted only 4 years after the 1934 Act, which expressly limits claims to those brought by living persons or which prevents the estate of a deceased from bringing a claim.

    c) The claim which a person has under the 1975 Act is clearly a cause of action when one applies Lord Diplock's definition of a cause of action as being

    "simply a factual situation the existence of which entitles one person to obtain

from the court a remedy against another person."

Letang v Cooper [1965] 1 QB 232, 242-3.

d) Those matters to which the court is directed to have regard under section 3 of the 1975 Act which are applicable to living persons cannot of themselves limit the section to living applicants; if any of those matters do not apply, the court would say so and disregard them.

e) The purpose of the 1975 Act was to rebalance family finances on death in the event that no reasonable financial provision was made; why should the jurisdiction to do so be taken away (as Mr Learmonth put it, in a puff of smoke) simply because the applicant died, for example, the day before the trial, or just before an order was made?

f) The authorities which say that the claim abates on death are decisions which are of persuasive authority only and are not binding on this court; in any event, those authorities are not persuasive and should not be followed.

20. Mr Learmonth contends that both *Whytte* and *Bramwell* were wrongly decided and that the reasoning behind both judgments has been superseded, for two main reasons.

(1) The Human Rights Act

21. First, the decisions pre-date the Human Rights Act 1988 ("the HRA"), section 3 of which states that

"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

Thus, the court is under a statutory duty to interpret legislation in accordance with the European Convention on Human Rights. One of those rights is protection of property.

22. Under Article 1 of Protocol 1, which appears at Part II of the HRA,

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

23. Before his death, Mr Milbour had a reasonable expectation of succeeding in his 1975 Act claim, and that expectation was a possession within the meaning of Article 1: see *Maurice v France* [2006] 42 EHRR 42 at [63], and Lester, Pannick & Herberg, Human Rights Law and Practice, at paragraph 4.19.2 which states that "possessions" includes "claims". Any decision which has the effect of depriving a claimant in the position of Mr Milbour would need to be revisited in the light of the HRA and read in a way which is compatible with Article 1. This is what the ECHR did in the case of *Inze v Austria*, [1987] EHRR 394, which held that legislation that accorded priority to legitimate over illegitimate heirs in claims over the estate of a person who died intestate was contrary to the right of non-discrimination contained in Articles 14 and 1 of the European

Convention on Human Rights.

24. In my view, this argument is flawed, for the reasons pointed out by Mr Baxter. For Article 1 rights under the HRA to be engaged, there must be a "natural or legal person" who is entitled to peaceful enjoyment, and whose Article 1 rights have been infringed. Mr Milbour is now deceased, and his estate is neither a natural or legal person. In my judgment, there is no scope for arguing that Article 1 rights are engaged in the present case. It is to be noted that the claimants in *Inze* were not deceased.

(2) The construction of the 1975 Act

25. Mr Learmonth referred to the test set out by Lord Brandon in *Barder* at p37D-F. Having reviewed the authorities (including *Dipple*, *Sugden* and *D'Este*), His Lordship stated his conclusions as follows:

    a) "First, there is no general rule that, where one of the parties to a divorce suit has died, the suit abates, so that no further proceedings can be taken in it."

    b) "Secondly, it is unhelpful, in cases of the kind under discussion, to refer to abatement at all. The real question in such cases is whether, where one of the parties to a divorce suit has died, further proceedings in the suit can or cannot be taken."

    c) "Thirdly, the answer to that question, when it arises, depends on in all cases on two matters and in some cases a third. The first matter is the nature of the further proceedings sought to be taken. The second matter is the true construction of the relevant statutory provision or provisions, or of a particular order made under them, or both. The third matter is the applicability of section 1(1) of the Act of 1934."

26. Taking the approach set out at c) above, the proceedings sought to be taken in the present case are a claim by the estate of Mr Milbour under the 1975 Act. The next question is whether on a true construction of the 1975 Act the claim survives the death of Mr Milbour so as to enable his estate to bring it. Finally, one must (in my view, in this case) consider the applicability of the 1934 Act.

27. Mr Learmonth says there is nothing in the wording of the 1975 Act itself to suggest that claims cannot in principle be brought after the applicant's death, particularly in the case of a claim by a spouse which is not limited to reasonable financial provision for his maintenance.

28. Mr Learmonth refers to the reasoning behind Denning LJ's decision in *Sugden* that matrimonial claims were not causes of action being that these were "proceedings in the Divorce Court." I have already referred to that section of Denning LJ's judgment. But it is important to note this.

    a) First, Denning LJ allowed the appeal because the order did not provide for continued payments to be made after death. That was the ratio of the decision with which both other members of the Court of Appeal agreed.

    b) Secondly, the comments in Denning LJ's speech about the 1934 Act were obiter,

and were made to deal with the decision of the judge below which was wrongly in the view of Denning LJ influenced by the view that section 1(1) of the 1934 Act made the sums for maintenance continue after death; as Denning LJ pointed out, that section only applied to "causes of action" and there was no right or liability subsisting against the father at the date of his death as all payments had been made and there were no arrears. There was nothing which fell within the 1934 Act at all.

c) Thirdly, as I have indicated, both of the other members of the Court of Appeal agreed and allowed the appeal because of the construction of the order. Hodson LJ said that it was unnecessary to consider the provisions of section 1(1) of the 1934 Act and that the question of whether there was a cause of action or not depends entirely on the construction of the order which the court had made before the death. That order contemplated payments being made by a living person to the petitioner during their joint lives. There was no authority for the proposition that an order could be made requiring a man to pay to his wife periodical payments extending beyond his death. Morris LJ also agreed and held that this case can "primarily" be decided on a construction of the order, thereby in terms agreeing with Hodson LJ. Morris LJ held that it was not strictly necessary to express an opinion on other matters, but very much doubted whether the court had power to make an order which would extend so as to bind a man's estate to make periodic payments; there was no room for the application of the 1934 Act in this case (and I would observe that was because in *Sugden* an order had in fact been made).

29. A claim under the 1973 Act for financial provision does not survive the death of both spouses. There is clear Court of Appeal authority for that proposition.

30. In *Harb v King Fahd Bin Abdul Aziz* [2006] 1 WLR 578, the Court of Appeal considered the question of whether first a claim under the 1973 Act could be brought after the death of the defendant, and secondly whether such a claim was a "cause of action" under the 1934 Act.

31. The appeal was determined in relation to the first question. Dyson LJ said,

"If it had been intended that all or any applications for, or in relation to, financial relief made before death by a party to the marriage should continue for or against the estate of the deceased person, one would have expected that to be stated explicitly in a statute which contains some express provisions in relation to death."

It followed that an application for an order under section 27(6) of the 1973 Act abates on the death of the party to the marriage.

32. In relation to the second question, the Court of Appeal expressed some misgivings about the line of authority (to which I have referred above) which held that such a claim was not a cause of action.

33. Dyson LJ said this:

"I do not see why a claim for financial relief under the 1973 Act is any more a 'hope or contingency' than a claim for damages in tort or for breach of contract. In each

case, I would say that there was no enforceable right until the claim has been established to the satisfaction of the court."

Nevertheless, His Lordship would not have departed from "such a clearly established line of authority" (*Dipple*, *Sugden* and *Barder*) and would have held that the claim was not a cause of action.

34. Wall LJ thought that the position was

"now firmly established that a claim for financial provision between living spouses or former spouses is not a cause of action under section 1 of the 1934 Act which survives the death of either spouse."

His Lordship referred to the criteria to which the court is to have regard in assessing any claim for financial relief under the 1973 Act as demonstrating the need for the respondent to be alive for any claim to be effective.

35. Thorpe LJ also referred to the long line of authority, including *Bramwell*, as supporting the conclusion that the claim could not have extended beyond joint lives. As to the 1934 Act, his Lordship referred to Lord Diplock's definition of a cause of action as being "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person": *Letang v Cooper* (*supra*), 242-3. Whilst it is true, as Mr Learmonth observes, that Thorpe LJ expressed "some misgivings in perpetuating a view expressed by Hodson J nearly 50 years ago on a statutory provision now 80 years distant", the fact is that His Lordship said that reliance on the section 1(1) argument was "plainly vain".

36. I would agree with Mr Learmonth that the wording of the 1975 Act does not, of itself, expressly preclude a claim being brought by the estate of a person who before his death fell within the section 1 definition of a person who could bring a claim. However, I note and agree with what Dyson LJ said in *Harb* that had it been intended that a claim under the 1973 Act should survive for the benefit of the estate of a potential claimant, the statute would have expressly so provided. It seems to me that a similar point can be made in respect of claims under the 1975 Act; the 1975 Act does not expressly provide for such claims to enure for the benefit of a deceased's estate. Whilst I note the doubts expressed by Dyson LJ I also note that His Lordship would have followed that line of authority and would have held that the claim was a personal one which did not amount to a cause of action.

37. It is also to be noted that whilst it is not determinative of this question, the leading textbooks cite either *Whytte* or *Bramwell* or both with apparent approval (subject to one exception) and state that a claim under the 1975 Act is personal to the claimant and thus does not survive death. See for example Francis, Inheritance Act Claims: Law Practice and Procedure (2003) para [16]; Ross, Inheritance Act Claims (3rd Edn, 2011) at [7-090 to 7-092]; Pearce, Inheritance Act Claims (2nd Edn, 2011) at 12.4.5; Williams Mortimer & Sunnucks on Executors, Administrators and Probate (20th Edn, 2013) at 58-18; Theobald on Wills (18th Edn) at 11-007.

38. It is right to note that the learned authors of Chapter 11 of Theobald (Mr Learmonth is one of the editors of that textbook, although not the author of that chapter) criticise both cases as being logical where the application is for maintenance, because after death

there is no longer a need for maintenance, but less compelling where the applicant is a spouse or civil partner:

"One of the matters to which the court is directed to have regard in applications by spouses or civil partners … is the provision the applicant might reasonably have expected to receive had the marriage or civil partnership been ended by divorce or dissolution rather than death. The inclusion of this factor is justified in these cases because the applicant would otherwise miss the opportunity to obtain a fair share of the family assets in the family proceedings. Logically, therefore, to whatever extent an order on divorce or dissolution represents a fair division of assets, to that extent the denial of a right to personal representatives to pursue the deceased applicant's claim constitutes an unjustified appropriation of assets from one estate and a corresponding unjust enrichment of the other."

Nonetheless, the quote from that paragraph continues,

"The approach is nevertheless in line with that generally adopted in ancillary relief proceedings, and is perhaps an instance of two wrongs not making a right but ensuring consistency of approach."

39. Under the 1975 Act, at the date of the death of the deceased, if a person falls within section 1 "that person may apply to the court for an order". The question one is driven back to is whether the right to apply for an order for financial provision under the Act is a "cause of action" (which would survive the death of the applicant or potential applicant) or whether it is a mere "hope or contingency" (in which case it would not).

40. What is a cause of action?

    a) I have already referred to Lord Diplock's definition in *Letang v Cooper* of a cause of action as "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".

    b) In *Sugden*, Denning LJ said the question was whether there "are really rights and not mere hopes or contingencies".

    c) I have also referred to Dyson LJ's observations in *Harb* that "I do not see why a claim for financial relief under the 1973 Act is any more a 'hope or contingency' than a claim for damages in tort or for breach of contract."

    d) Booth J in *Whytte* held that no enforceable rights exist until an order is made, because the matrimonial approach governed awards for provision under the 1975 Act.

    e) Sheldon J in *Bramwell* held that a claim under the 1975 Act was a hope or contingency, again by analogy with matrimonial claims because that was the reasoning behind the "notional divorce" approach.

41. Mr Baxter says that on its true construction a claim under the 1975 Act is not a cause of action at all.

    a) Section 1 gives the right to a person within one of the stated categories to apply for an order under Section 2 on the ground that reasonable financial provision

was not made for the applicant on the death of the deceased.

b) Section 3 provides

"Where an application is made for an order under section 2 of this Act, the court shall, in determining whether the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters…"

c) The court is thus required under section 3 to determine whether reasonable financial provision had been made for the applicant. This has been described as a "value judgment" or "qualitative decision" (*Re Coventry* [1984] 1 CH 461 at 487A-B and 492-4) based on the trial judge's assessment of the factors at section 3(1) (*Ilott v Mitson* [2011] EWCA Civ 346 at [27] and [42]). It is not until the trial judge carries out the section 3 exercise, and determines whether or not reasonable financial provision was made for the applicant, that the applicant has something which could properly be described as a cause of action. Until then, it is a mere hope or contingency.

d) Further, it is impossible to apply the section 3 matters in the case of a deceased applicant. The court is mandated by section 3 to take the listed matters into account, and in doing so "shall take into account the facts as known to the court at the date of the hearing": section 3(5).

(i) The first matter is "the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future". A deceased applicant has no such resources or needs. His estate is merely a property fund to be distributed to the beneficiaries.

(ii) Likewise, in respect of the sixth matter, "any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased"; a deceased's estate cannot have a disability.

(iii) And under section 3(2)(a), the court must have regard to the age of the applicant; a deceased's estate has no age.

It is therefore impossible for the court to carry out the section 3 exercise as mandated by the 1975 Act on the facts as known to the court at the date of the hearing in the case of a deceased's estate.

e) It must follow that on its true construction, the potential claim under the 1975 Act is not a cause of action, and is personal to the applicant.

42. I agree with Mr Baxter, for the reasons summarised above. The 1975 Act gives a personal right to bring a claim, but that right is not itself a cause of action; it is a hope or contingency which falls short of being a cause of action in the sense of a state of facts which if true enable the applicant to get a remedy from the court (to paraphrase Lord Diplock's definition). The facts are not determined until the court carries out the

stage 3 exercise; until that point, the claim remains a hope. It seems to me that Denning LJ's comment albeit *obiter* in *Sugden* that "The only thing which takes a case out of the Act is the absence of an enforceable right at the time of death" is entirely correct. In the present case, for the reasons I have set out above, there was no enforceable right at the time of death and thus no cause of action.

43. I think the contrast Mr Baxter drew with the Civil Liability (Contribution) Act 1978 is instructive. Under that Act, "any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)." An applicant for contribution ("A") has to show (i) that A is liable in respect of damage suffered by B, and (ii) that C is liable in respect of the same damage. Those are facts which A must show before the claim gets off the ground. Those facts establish the cause of action. There is no fact-finding exercise which the court must carry out, equivalent to the section 3 exercise under the 1975 Act, which is designed to establish those facts, without which the claim is a mere hope or contingency.

44. I also agree that the section 3 exercise, in the context of a deceased applicant, would be in the words of Booth J in *Whytte* a "well-nigh impossible task" as many of the factors "are clearly based upon the fundamental assumption that one of the parties to the marriage survives at the date of the hearing." A similar point was made by Sheldon J in *Bramwell*.

45. In my judgment, the analogy with claims under the 1973 Act is correct, and that the potential claim under the 1975 Act is indeed personal to the applicant. Unless the applicant brings the claim and obtains an order, it remains a hope or contingency.

46. In my view, Mr Learmonth's reliance on *Lilleyman v Lilleyman* [2013] Ch 225 as requiring *Whytte* and *Bramwell* to be questioned is misplaced. Briggs J held at [45]:

> "To a chancery judge, for whom the jurisprudence about financial relief on divorce is not the bread and butter of his daily fare, the divorce cross-check introduces a range of additional legal complications, arising from the still developing principles originating in the epoch-making decision of the House of Lords in *White v White* [2001] 1 AC 596. Quite separately, there arises the difficulty of applying those principles, as required by the divorce cross-check, to the undeniably different circumstances surrounding the termination of a marriage by death, rather than breakdown of the relationship. In that respect, the chancery judge may suffer from a lesser disadvantage."

47. Mr Learmonth says that the application of the equality principle enunciated in *White v White* to 1975 Act cases might not have been so clear in the 1980s when *Whytte* and *Bramwell* were decided; see for example the approach of the Court of Appeal in *Cunliffe v Fielden* (supra) where it was held *per curiam* that there is no reason why the *White v White* principles should not be applied to 1975 Act proceedings. It seems to me that this point goes to the second stage of the section 3 exercise. Whether or not the claim by Mr Milbour was of substantial value is in my view not relevant to the question raised by the preliminary issue in this case. I do not accept Mr Learmonth's argument that *Whytte* and *Bramwell* are founded on an anachronism, namely that a spouse's claim on divorce is limited to maintenance. It is in my view wrong to read Booth J's

judgment in that way: see particularly page 69B-70A.

48. Nor do I accept as correct the argument that the decisions in *Whytte* and *Bramwell* were based on the idea that the right to apply for a discretionary remedy is not a cause of action. Again, it would be wrong in my view to read Booth J's judgment in that way. Denning LJ's judgment in *Sugden*, cited extensively in *Whytte*, says in terms, "I do not think that the fact that a cause of action is discretionary automatically takes it out of the [1934] Act" and goes on to say, as I have already cited above, "The only thing which takes a case out of the Act is the absence of an enforceable right at the time of death."

49. In my judgment, both *Whytte* and *Bramwell* remain good law. I am not bound to follow these decisions as they are decisions of a court of equivalent jurisdiction. But in my view, they were correctly decided.

50. I do not think it is necessary to draw any conclusions about what would happen if an applicant died after the court had carried out the section 3 exercise and before an order was made in the applicant's favour. I rather think that since as I have concluded the claim is a personal right, the claim could not be maintained by the estate, and even if were arguable that at that point the claim might have matured into a cause of action which would survive the death of the applicant because of the 1934 Act, that would be contrary to the authorities; however, this point does not arise in the present case and I do not need to decide it.

51. In my view, therefore, the claim which Mr Milbour had did not survive his death. I therefore answer the preliminary issue accordingly, and find that the claim did abate on his death. In the light of Lord Brandon's speech in *Barder* (see paragraph 25 above) it would in fact be more accurate to say that no proceedings should be permitted by the estate of Mr Milbour under the 1975 Act; the result is the same.

52. The test for whether permission should be given for an amendment to a claim form under CPR 17.3 is summarised at paragraph 17.3.6 of the White Book as being the same as under Part 24 (Summary Judgment) and is whether there is a real rather than a fanciful prospect of the claim succeeding. In my view, the application to amend the claim form to enable the claim which Mr Milbour had before his death stands no real prospects of succeeding and should be dismissed.

53. It is therefore not necessary to decide the ancillary question of how in the context of this action such a claim would be constituted. Such a claim, had it existed, would have been vested in the Defendant and Mr Fresco as executors of Mr Milbour's estate, and would have to be brought against the Defendant in her capacity as executrix and beneficiary of Mrs Milbour's estate. It would have been necessary to substitute the Defendant and Mr Fresco as executors of Mr Milbour's estate or to pass over them to make a grant to some other person (Mr Learmonth proposed appointing the Claimants as administrators in place of the Defendant and Mr Fresco for this purpose). Had I found that the claim did survive Mr Milbour's death, I would have made such an order.

Part 2: the proposed new claim against Mr Milbour's estate

54. The second part of the application relates to a claim by the Claimants in their respective capacities as child and dependant in relation to Mr Milbour's estate. The question here is whether there is a reasonable prospect of success for the claim that the Court can

exercise its power under section 2(1)(f) of the 1975 Act to vary the settlement of the former matrimonial home.

55. Under that section the Court has the power to vary

> "any ante-nuptial or post-nuptial settlement (including such a settlement made by will) made on the parties to a marriage to which the deceased was one of the parties, the variation being for the benefit of the surviving party to that marriage, or any child of that marriage, or any person who was treated by the deceased as a child of the family in relation to that marriage."

56. A "nuptial settlement" includes "all arrangements making continuing provision for one or both spouses qua spouse": See Williams Mortimer & Sunnucks on Executors, Administrators and Probate (20th Edn, 2013) at 59-27. A settlement which holds the matrimonial home is a nuptial settlement regardless of whether the husband or wife or neither is a beneficiary and regardless of where the purchase price came from: see *HN v AN* [2005] EWHC 2908 (Fam) at [34]. It is clear that the relevant settlement here is a nuptial settlement and this is indeed not in dispute.

57. It is conceded by Mr Learmonth that the Second Claimant does not fall within section 2(1)(f). The question is whether the proposed claim by the First Claimant has a real prospect of success, which turns on whether the First Claimant can bring herself within that section.

58. The power to vary can only be where it is

> "for the benefit of the surviving party to that marriage, or any child of that marriage, or any person who was treated by the deceased as a child of the family in relation to that marriage."

59. There is no surviving party to the marriage following Mr Milbour's death (the other party was Mrs Milbour, but she predeceased him). The First Claimant does not of course fall within that category.

60. The First Claimant is not a child of the marriage between Mr and Mrs Milbour.

61. Mr Baxter says that it would be nonsense to suggest that she was treated as a child of that marriage by her father when the relationship between the First Claimant and her father was the natural one of father and daughter, because she was a child of his former marriage, and to hold that the First Claimant was treated as the child of her father's second marriage would be a false construct.

62. The First Claimant has provided two witness statements in which she explains the nature of her relationship with her father and Mrs Milbour. The First Claimant says she lived with them for 2 years from when she was 17 and after she moved out (to live with her mother) she maintained a relationship with them both. It appears that this may be wrong, because the First Claimant was born on 3 April 1955; Mr and Mrs Milbour married on 29 August 1973, when the First Claimant was 18½. The First Claimant goes on to describe – it has to be said, not in any great detail – her continued relationship with both her father and her stepmother. No doubt the Claimant would wish in due course, if the amendment is permitted, to put in further evidence in respect

of this new claim.

63. Once again, I take into account the test to be applied on an application to amend a claim form to add a new claim (see paragraph 52 above). As the notes to the White Book state, an application for permission will be refused if it is clear that the proposed amendment has no prospect of success and the court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation. An application to amend is not a mini-trial, any more than is an application for summary judgment, and I must consider the merits of the proposed claim only to the extent necessary to determine whether it has sufficient merit to proceed to trial: see the notes in the White Book at para 24.2.3.

64. Having read both statements, as well as the other witness statements filed to date, it seems to me that there is a real prospect of the First Claimant being able to establish that she was treated by Mr Milbour as a child of his marriage to Mrs Milbour. The word "child" does not of course refer to a minor, but defines the nature of the relationship between the deceased and the First Claimant. I can see no conceptual difficulty in the First Claimant having being treated by Mr Milbour as a child of both his first and second marriages, depending on the facts, and indeed in the context of the 1973 Act "one individual child may well be a 'child of the family' in relation to more than one marriage": Butterworths Family Law Service para [944]. Whether the First Claimant was, or was not, treated by her father as being not only a child of his first marriage, but also of his second marriage, is a question of fact in relation to which there is a real prospect of success. I do not regard the proposed claim as lacking reality; in my view, it has sufficient prospects to be allowed in as a new claim.

65. I will therefore allow the amendment in respect of this second head of the application. In order for this claim to be maintained, someone other than the Claimants needs to represent Mr Milbour's estate, and it seems to me that Mr Bishop and Mr Fresco should be joined as defendants to this action in their capacity as trustees of the settlement.

(End of judgment)