Neutral Citation Number: [2021] EWHC 1791 (Fam)

Case No: ZC17F00548

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 July 2021

Before :

MR JUSTICE MOSTYN

- -

Between :

NAFISA HASAN	**Applicant**
- and -	
(1) MAHMUD UL-HASAN (deceased)	
(2) LAMYA AL SHAIBAH	**Respondents**

- -
- -

Brent Molyneux QC (instructed by **Dawson Cornwell**) for the **Applicant**
Richard Tambling (instructed by **Aramas Law**) for the **Respondents**

Hearing dates: 21 June 2021

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published

Mr Justice Mostyn:

1. The parties married in Pakistan in 1981. They separated in 2006, and the husband obtained a divorce in Pakistan in 2012. During the course of their long marriage the wife says that very significant sums were accumulated.

2. The wife was given leave to bring these proceedings under Part III of the Matrimonial and Family Proceedings Act 1984 ("Part III") in August 2017. There have been several interlocutory hearings since that date, principally about the husband's disclosure. However, on 18 January 2021, the husband died at the age of 81. The wife is now aged 74.

3. The core question is whether the unadjudicated claim by the wife under Part III survives the death of the husband and can be continued against his estate.

4. Mr Molyneux QC argues that the authorities under Part II of the Matrimonial Causes Act 1973 ("Part II"), as well as those under the Inheritance (Provision for Family and Dependants) Act 1975, on this subject do not bind me as they relate to different statutes. The question has never before been considered under Part III; it is, he says, a blank canvas.

5. I do not agree that I am not bound by the Part II authorities. I agree with Mr Tambling that the Part II jurisprudence is clearly applicable to this Part III application. Section 17 of the 1984 Act imports all the powers under ss.23 and 24 of the 1973 Act. Section 18(3) requires the court to exercise those powers in accordance with the terms of s.25 of the 1973 Act. In such circumstances it would be the height of artifice to suggest that, for the purposes of the decision I have to make, the exercise is not identical under the two statutes. Therefore, the Part II jurisprudence is clearly applicable in this case, and inasmuch as it emanates from the Court of Appeal or the House of Lords (and is not *obiter dicta*), is binding on me.

6. That jurisprudence unambiguously states that a financial claim made during marriage or following divorce expires with the death of the respondent. In my judgment, this principle applies equally whether the claim proceeds under Part II following a domestic divorce or under Part III following an overseas divorce.

7. I turn to the authorities.

8. In *Sugden v Sugden* [1957] P 120 the husband had been ordered to pay maintenance to the children of the family at the rate of £300 per annum until the age of 21. He died when the children were aged 18 and 14. There were no arrears at the time of his death. The wife sought to make his estate liable to continue the payments until the children were 21. She argued that s.1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 applied so as to make the maintenance continue after the death of the husband. At that time s.1(1) provided:

> 'Subject to the provisions of this section on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this section shall not apply to causes of action for defamation or

> seduction or for inducing one spouse to leave or remain apart from the other or to claim under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 189, for damages on the grounds of adultery.'

9. The Court of Appeal ruled that his estate was not so liable.

10. Denning LJ held at 134-135:

> 'Karminski J was much influenced by s 1(1) of the Law Reform (Miscellaneous Provisions) Act, 1934, which he thought applied so as to make the sums for maintenance continue after the father's death. I do not agree with this view. The sub-section only applies to "causes of action" which subsist against the deceased at the time of his death. The legislature had particularly in mind causes of action in tort which used to fall with the death of either party under the old common law maxim *actio personalis moriturcum persona*. "Causes of action" in the sub-section means, I think, rights which can be enforced, or liabilities which can be redressed, by legal proceedings in the Queen's courts. These now survive against the estate of the deceased person. "Causes of action" are not, however, confined to rights enforceable by action, strictly so called - that is, by action at law or in equity. **They extend also to rights enforceable by proceedings in the Divorce Court, provided that they really are rights and not mere hopes or contingencies.** They include, for instance, a sum payable for costs under an order of the Divorce Court, or a right to a secured provision under an order already made against a man before his death: see *Hyde v Hyde* ([1948] 1 All ER 3621 and *Mosey v Mosey & Barker* ([1955] 2 All ER 391). It must be noticed, however, that the sub-section only applies to causes of action "subsisting against" the deceased on his death. This means that the right or liability must have accrued due at the time of his death. There is no difficulty in an ordinary action in determining when the right or liability accrued due; but there is more difficulty in proceedings in the Divorce Court. **In that 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.** In order that the cause of action should subsist at the death, the right under the order must itself have accrued at the time of death. Thus a cause of action subsists against a husband for arrears of maintenance due at his death, but not for later payments. This view of proceedings in the Divorce Court is supported by the decision of Hodson J in *Dipple v Dipple* ([1942] 1 All ER 234) where he pointed out that all that the wife had was the hope that the court would in its discretion order a secured provision. She had no right to it at all until the order was actually made, and hence she had no cause of action at his death. Whilst I entirely agree with

> that decision, I do not think that the fact that a cause of action is discretionary automatically takes it out of the Act. An injunction is a discretionary remedy, but, if a cause of action for an injunction subsisted at the death, I should have thought that it would survive against the personal representatives. **The only thing which takes a case out of the Act is the absence of an enforceable right at the time of death.'** (Emphasis added).

The essential reasoning is found in the passages I have highlighted. Denning LJ was of the view that there is no right to maintenance. Rather, a claimant has merely a personal right to approach the court in the hope that the discretion will be exercised in her favour. A right to maintenance will only arise when an order has been made. The benefit of that order will only accrue in respect of arrears under it – future payments will not be recoverable. The right to seek maintenance from the court is not a cause of action covered by s.1 of the 1934 Act. It expires with the death of the respondent.

11. This reasoning was followed in *D'Este v D'Este* [1973] Fam 55. There, the matrimonial home had been conveyed to the husband and the wife during the marriage jointly on trust for sale. They were later divorced. The husband remarried and applied to the court for variation of the post-nuptial settlement constituted by the purchase of the matrimonial home. He died before the application was heard, and his second wife sought to carry on the application in her capacity as his personal representative. Ormrod J held that the court had no jurisdiction to deal with the application, because on the true construction of s.4 of the Matrimonial Proceedings Act 1970 (now s.24(1)(c) of the Matrimonial Causes Act 1973), an application for variation of the settlement could only be made and proceeded with by one spouse against another while both remained alive. Section 4 gave power to the court to vary "for the benefit of the parties to the marriage…any ante-nuptial or post-nuptial settlement…made on the parties to the marriage…" At 59B, Ormrod J said:

> "In my judgment, the real answer to this application is this, that the whole of the matrimonial causes legislation, right back to 1857, is essentially a personal jurisdiction arising between parties to the marriage or the children of the marriage. The death of one or other of the parties to the litigation has nothing whatever to do with the old common law rule which was abrogated by the Act of 1934. The fact that these applications abate by death derives, in my judgment, from the legislation which created the rights, if they are rightly called "rights" and from no other source. If that is correct, then it is not necessary to examine very closely whether or not the administratrix in this case has something which could be called, by any stretch of imagination, a cause of action."

12. I move on to *Barder v Barder (Calouri intervening)* [1988] AC 20. The facts are well known. A consent order was made by a county court registrar whereby the husband was to transfer to the wife his interest in the former matrimonial home was made in February 1985. The following month the wife killed herself and the children. The county court judge granted the husband leave to appeal out of time, allowed the appeal and set aside the consent order. Thus, the husband's half share in the home was restored to him; the wife's half share devolved to her estate.

13. Lord Brandon first considered whether the effect of the death of the wife was to abate the proceedings so that an appeal could not be heard. The issue, therefore, was rather different to that which I have to address where the wife's claim has not been adjudicated at first instance. He held at 37-40:

> 'I would state the conclusions to which I think that these authorities lead in this way. Firstly, 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. The passage in the judgment of Shearman J in *Maconochie v Maconochie* [19161 P 326 at 328, in which he stated that such a general rule existed, cannot be supported. 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. Thirdly, the answer to that question, when it arises, depends in all cases on two matters and in some cases also on 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 s 1(1) of the 1934 Act.
>
> In *Purse v Purse* [1981] 2 All ER 46, [1981] Fam 143 the nature of the further proceedings sought to be taken was an appeal out of time to the Court of Appeal against decrees nisi and absolute pronounced in a divorce county court. The statutory provisions giving the right to such an appeal, whether in time or out of time, were ss 108 and 109 of the County Courts Act 1959 (now s 77 of the County Courts Act 1984). The power of the Court of Appeal to extend the time for appealing was given by RSC Ord 3, r 5. The question for decision therefore was whether, on the true construction of s 108 and s 109 as amended of the 1959 Act, and of RSC Ord 3, r 5, the jurisdiction of the Court of Appeal to entertain an appeal out of time by the wife lasted only so long as the husband was alive and lapsed on his death. I can see no good reason for putting such a limited construction on the statutory provisions and rule of court concerned. **The purpose of the statutory right of appeal is to enable decisions of a county court which are unjust to be set aside or varied by the Court of Appeal**. The fulfilment of that purpose is not made any the less necessary or desirable by the death of one of the parties to the cause in which the decision was made. In a case other than a matrimonial cause I do not think that it would even be suggested that the statutory right of appeal would lapse because of the death of one of the parties to it. I cannot see why a matrimonial cause should be different in this respect. Where an appeal is brought or continued after the death of one of the parties to a cause, procedural steps have to be taken to substitute another party for the party who has died.

> …
>
> I turn now to the present case. The nature of the further proceedings sought to be taken is an appeal out of time to the judge of a divorce county court against an order made in a divorce suit by the registrar of that court. The right to bring such an appeal is given by r 124(1) of the Matrimonial Causes Rules 1977, SI 1977/344. That rule was made under s 50 of the Matrimonial Causes Act 1973 and the right given by it is, therefore, in effect a statutory right.
>
> … **where the order or decision appealed against is discretionary, it is the duty of the judge to exercise his own discretion in place of that previously exercised by the registrar**: see *G (formerly P) v P (ancillary relief: appeal)* [1978]1 All ER 1099, [1977] 1 WLR 1376. In my view, however, those differences are not of any decisive significance in relation to the question of jurisdiction, although they may have a marginal bearing on the question of leave to appeal out of time.
>
> …
>
> The question for decision in the present case, therefore, is whether, on the true construction of r 124(1) of the 1977 rules, and CCR Ord 13, r 4(1), the jurisdiction of a judge to entertain an appeal out of time by one party to a divorce suit against an order or decision made or given by a registrar only lasts so long as the other party to the suit is alive and lapses on the latter's death. For the reasons which I have already given in relation to the comparable question in *Purse v Purse*, [1981] Fam 143 I can see no good ground for putting such a limited construction on the rules of court concerned.
>
> …
>
> I would therefore hold, on what I have called the question of abatement, that the judge had jurisdiction to entertain an appeal out of time by the husband against the registrar's order notwithstanding the intervening death of the wife. It remains for consideration whether the judge, having that jurisdiction, exercised it rightly in the circumstances of the case by giving the husband leave to appeal out of time, and, having done so, allowing the appeal and setting aside the registrar's order.' (Emphasis added)

14. It can be seen that Lord Brandon did not address the question whether s1(1) of the 1934 Act was engaged as he was satisfied that the matter did not arise given the nature of the proposed proceedings - an appeal out of time - and the construction of the relevant rules. In his opinion the death of the wife did not prevent an appeal out of time being mounted in order to correct a decision which had become unjust. Lord Brandon was careful to

confine his opinion to that scenario. I do not consider that he expressed a definitive opinion on the correctness of *Sugden.*

15. I will consider later in this judgment Lord Brandon's statement that, where the order or decision appealed against is discretionary, "it is the duty of the judge to exercise his own discretion in place of that previously exercised by the registrar".

16. In *Harb v King Fahd Bin Abdul Aziz* [2006] 1 WLR 578, [2006] 1 FLR 825 the putative wife had claimed non-divorce maintenance under s.27 Matrimonial Causes Act 1973. The husband died before the claim could be heard. The Court of Appeal held that the claim did not survive the husband's death. This was hardly surprising. I recently analysed at some considerable length in *Villiers v Villiers* [2021] EWFC 23 the history and scope of the right to claim non-divorce maintenance under s.27. I sought to explain that this statutory provision facilitates the implementation of the common law duty imposed on a man to maintain his wife. A fundamental jurisdictional requirement is that a marriage must subsist both at the time that the application is made and at the time that the order is made. If at the time that the application is made the parties were already divorced, or if by the time the order came to be made the parties had divorced, then the court would have no jurisdiction to make an award under s.27. So too, obviously, if the marriage had been dissolved by the death of the respondent. The dissolution of the marriage, whether by death or divorce, completely shuts the door on the claim proceeding as a matter of fundamental jurisdiction. I agree fully with Wall LJ in *Harb* at [57] where he stated:

> "She is a party to a former marriage which has been brought to an end by the death of her husband. For Matrimonial Causes Act 1973 section 27 to apply there must be a subsisting marriage. Mrs. Harb's alleged marriage to the King no longer subsists, and the death of the King deprives the court of jurisdiction to grant Mrs. Harb any relief under MCA 1973 section 27. That, to my mind, is the short and simple answer to the issue before us."

17. But at [58] Wall LJ continued:

> 'Unlike rights of action at common law, the rights enjoyed by spouses or former spouses to make claims for financial relief against each other are exclusively derived from statute, and wholly dependent for their prosecution on the status of the applicant as spouse, or former spouse whose marriage has been dissolved by judicial decree and who has not re-married. There is, in my judgment, no such thing as a right of action at common law enabling one spouse or former spouse to claim financial relief against the other.'

18. For the reasons I laboriously explained in *Villiers* I cannot agree with this. Section 27, and its counterpart under the Domestic Proceedings and Magistrates Courts Act 1978, are not "exclusively derived from statute". They have their origin in the common law duty to maintain. Their predecessors were passed because the means of satisfying the duty – pledging the husband's credit for necessaries – was an inadequate remedy: see *Northrop v Northrop* [1968] P 74 per Diplock LJ at 116. The legislation was essentially procedural. It enabled a married woman to receive a speedy summary adjudication of

her right at common law to be maintained by her husband. And, as I explained in *Villiers*, the statutory right to claim post-divorce alimony and other forms of financial relief has been explained by Lord Atkin in *Hyman v Hyman* [1929] AC 601 at 629 as providing a "substitute for the husband's [common law] duty of maintenance" which disappeared on divorce.

19. Therefore, while it is true that all claims for maintenance are now made pursuant to statute, it must be recognised that they have their origin in the common law duty to maintain. That common law duty has a vestigial existence as s.198 of the Equality Act 2010, which abolishes it, has never been brought into force.

20. Although the decision in *Harb* is strictly concerned with the narrow question whether a claim for non-divorce maintenance under s.27 survived the husband's death, there are swathes of dicta concerning the status of a post-divorce claim following the death of the respondent. All three judges followed *Sugden* and *D'Este*, although, as I will explain below, Thorpe and Dyson LJJ did so with considerable misgivings. Dyson LJ was clearly of the view that Lord Brandon in the passages which I have cited above implicitly endorsed the correctness of those decisions, although, as I have explained above, Lord Brandon carefully confined his reasoning to the powers of the court on an appeal against an order which had been shortly followed by the death of the payee.

21. In *Harb* at [52] Dyson LJ expressed the view that the observations of the Court of Appeal in *Sugden* were all *obiter dicta*. If that is correct, then there is no authority which is binding on me, as, for the reasons set out above, neither *Barder* nor *Harb* concern the question before me, namely whether an unadjudicated claim for financial relief following divorce survives the death of the respondent. *Barder* concerned an appeal against an adjudicated claim. *Harb* concerned an application for non-divorce maintenance.

22. However, I am not so sure that the observations of the Court of Appeal in *Sugden* were *obiter dicta*. On the contrary, they seem to me to be the very ratio of the decision: that the estate of the husband could not be liable for future child maintenance as that was not a cause of action which survived his death.

23. Accordingly, I accept that *Sugden* is binding on me, and that I must find that the wife's claim for financial provision following the overseas divorce expired with the death of the husband.

24. However, being bound by the decision does not mean that I have to agree with it. Indeed, with the greatest possible respect to Denning LJ, I disagree with it, for three reasons on which I will expand below. The reasons are:

    i) A fair textual interpretation of s.1 of the 1934 Act leads to the conclusion that post-divorce ancillary relief is recognised as a cause of action and is not excluded from the scope of the section;

    ii) The nature of the claim, especially where it is framed as a sharing claim, is not a mere *spes* that discretion will be exercised in the claimant's favour. It is (or may be) a valuable claim, with objective solidity which is in many ways less speculative than a personal injury claim or a claim for an injunction; and

iii) Post-death relief has been awarded following the set-aside of an financial remedy order at the suit of the payer where the payee has died shortly after the making of the order. In this scenario it will be seen that the court, without any inhibition, exercises the statutory discretion under s.25 of the Matrimonial Causes Act 1973. This can only be explained if the right to apply to set aside the order and to seek a full rehearing is a cause of action within the scope of s.1 of the 1934 Act.

25. I will set out my reasons in some detail because I have concluded that if I am bound by *Sugden* then the Court of Appeal is also. Therefore, because I consider the present binding caselaw to be wrong I propose to grant a certificate permitting a leapfrog appeal to the Supreme Court pursuant to s.12(1) of the Administration of Justice Act 1969, should either party apply for that. It will then be for the Supreme Court under s.13 of the 1969 Act to decide if it grants leave for an appeal to be brought directly to that court.

Interpretation of section 1 of the 1934 Act

26. Section 1(1), as enacted in 1934, is set out at para 8 above, but I repeat it here for convenience:

> 'Subject to the provisions of this section on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this section shall not apply to causes of action for defamation *or seduction* <u>or for inducing one spouse to leave or remain apart from the other or to claim under the Supreme Court of Judicature (Consolidation) Act 1925, s. 189, for damages on the grounds of adultery</u>.'

27. The words <u>underlined</u> were repealed by the Law Reform (Miscellaneous Provisions) Act 1970, and the words in *italics* were repealed by the Administration of Justice Act 1982.

28. Thus in 1934 Parliament identified in s.1(1), and then excluded from its scope, four specific causes of action, viz:

i) Defamation;

ii) Seduction;

iii) Inducing separation; and

iv) Claim for damages for adultery under s.189 of the Supreme Court of Judicature (Consolidation) Act 1925.

29. Section 189 is in Part VIII of the 1925 Act entitled “Matrimonial Causes And Matters”, grouped under “Miscellaneous”. It immediately precedes the ancillary relief powers: alimony (s. 190); settlement of wife's property (s.191); application of settled property (s.192).

30. Section 189 stated:

> **'Damages.**
>
> (1) A husband may on a petition for divorce or for judicial separation or for damages only, claim damages from any person on the ground of adultery with the wife of the petitioner.
>
> (2) A claim for damages on the ground of adultery shall, subject to the provisions of any enactment relating to trial by jury in the court, be tried on the same principles and in the same manner as actions for criminal conversation were tried immediately before the commencement of the Matrimonial Causes Act, 1857, and the provisions of this Act with reference to the hearing and decision of petitions shall so far as may be necessary apply to the hearing and decision of petitions on which damages are claimed.
>
> (3) The court may direct in what manner the damages recovered on any such petition are to be paid or applied, and may direct the whole or any part of the damages to be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife.'

Section 189 replaced s.33 of the Matrimonial Causes Act 1857 which was in very similar terms. The common law action for criminal conversation (known universally as crim con) was abolished by s.59 of the 1857 Act albeit that, as s.33 made clear, the principles and procedure of the statutory claim replicated those of the old common law action. At the same time Parliament either invented new forms of post-divorce financial relief (e.g. s.45 - settlement of property) or put relief previously awarded by the ecclesiastical court on a statutory footing (e.g. ss.24 and 32 - secured alimony). Thereby Parliament created a menu of statutory claims. Other forms of relief were later added to the menu (e.g. variation of nuptial settlement in 1859 and unsecured alimony in 1866). They were all grouped together for the first time in the 1925 Act. It seems highly unlikely that the framers of either the Act of 1857 or the Act of 1925 would have conceived that some of these claims did not amount to “causes of action”.

31. I have received submissions from Mr Molyneux QC as to the principles and procedure that would have been applied on an action for crim con before 1857. I have also re-read chapter IX of Lawrence Stone’s magisterial work *Road to Divorce* (OUP 1990). The underlying themes were, of course, male honour, female purity and revenge. Acquittals were rare. Juries rarely took more than a short time or a few minutes to make up their minds both as to liability and damages. Vast sums of damages were awarded. In assessing damages the following factors were in play: the status and wealth of the plaintiff; the plaintiff’s loss of comfort and society of his wife’s body which was his property; the moral responsibility, and conduct, of the plaintiff; the moral turpitude of the adulterous couple; and the status of the defendant. What was not relevant was the capacity of the defendant to pay, as the doctrine was described not as one about civil damages, but about sheer vengeance. It was from first to last a discretionary exercise.

32. It was a clear principle that men of high rank were more open to public scorn as cuckolds and therefore deserved more compensation. Thus in a 1730 case (*Lord Abergavenny v Lydell* (Crim. Con. Gaz 2:14)) the jury was urged by the plaintiff’s counsel to make an award that represented “a retribution for life for an injury for life”

and duly awarded damages of £10,000, a sum which was clearly intended to put the defendant in debtor's prison for life.

33. In *Butterworth v Butterworth and Englefield* [1920] P 126, McCardie J, in a penetrating and compendious judgment, attempted to rationalise the basis on which damages for adultery should be awarded. At 132 - 135 he explained that the exercise was fundamentally discretionary:

> "The origin of the action need not be traced. It began at a time when the wife was in substance regarded by the common law as the property of her husband. The benefits of her fortune went to him at common law upon marriage. His power of personal control was great. Even her earnings could be seized by him. She was viewed as a child, and was therefore subject to physical punishment at his hands, provided it was moderate in extent …
>
> It seems to me, therefore, that the common law found its technical basis for the action for criminal conversation in the strict view it took as to the power of a husband over the person and the property of a wife. … But I conceive it well to suggest that beneath this technical and somewhat sordid basis there lay perhaps a cogent moral foundation. The law has ever regarded the sanctity of married life as a matter of grave moment. It may be, therefore, that one of the original objects of the action was to maintain the purity of married life, and to defend the honour of husband, wife and children. The risk of damages might well have been deemed a check to the wanton inclinations of an intending adulterer. Whether the action has achieved its purpose I do not inquire. The matter is one for debate elsewhere. It may perhaps be regarded by many as a strong determent. It will suffice to say that the claim to damages for adultery is peculiar to Anglo-Saxon countries, and … foreigners cannot understand how the English law allows it.
>
> Now, what are the principles on which damages should be awarded? At the outset there arises the question whether the Court is bound, upon proof of the adultery and the grant of a resultant decree, to assess any damages at all against the co-respondent. In my humble opinion the Court is under no such obligation. Sect. 33 [of the Matrimonial Causes Act 1857] requires that claims for damages be tried on the same principles and subject to the same rules as an action for criminal conversation. That action, as I have ventured to point out, was in substance an action on the case. It was not a strict action for trespass. It follows therefore, I think, that the jury were entitled, although adultery was proved, and although the defendant had failed to establish a technical defence (e.g., privity of the plaintiff to the adultery), to find that the plaintiff had suffered no damage at all. This view seems to be agreeable to the trend of the old decisions and text-books. …

> If then the jury could before 1857 refuse to award damages in an action for criminal conversation, it follows that they possessed the same right when acting in the Divorce Court after 1857, in a petition for compensation for adultery. …
>
> I need only add two observations on this point. First, that it is desirable that the discretion of a judge as to damages should be as wide as that of a jury. Secondly, that the discretion of the judge as to costs under s. 34 of the Act of 1857 perhaps renders immaterial the distinction between a finding of nominal damages and a finding of no damages at all."

34. At 149 McCardie J brought the defendant's means and rank into an already highly fluid exercise. He stated:

> 'In my opinion both the rank and the fortune of the co-respondent are relevant for consideration in so far as either may give assistance in ascertaining the value of the wife or measuring the extent of the injury inflicted on the husband.'

35. This drew a mordant response from Diplock LJ in *Pritchard v Pritchard and Sims* [1967] P 195, at 212-213:

> 'In the 18th and early 19th centuries, when the gulf between the classes was so wide, it may have been plausible to hold that a poor man's resentment was justifiably increased if the adulterer used his superior wealth or station to deprive the poor man of his chattel-wife, and so to award as compensatory damages which were in truth exemplary. When, however, McCardie J in *Butterworth v Butterworth* in 1920 accepted the use of wealth or station by an adulterer as still being a factor in aggravation of damages, he was taking his psychology from the Victorian novelette and not from life in the 1920s, and social norms have not stood still since then. I find it impossible to accept that, in these egalitarian and materialistic days, the feelings and pride of a reasonable man are more affronted if his wife commits adultery with an opulent baronet rather than with an impoverished dustman, a young Adonis rather than an elderly Caliban. The lower the material and physical attractions of his supplanter, the more wounding the comparison, and the greater the blow to his own self-esteem."

It is extraordinary that such comments could have been made as recently as 1967 but they do, nonetheless, emphasise that the exercise is discretionary from first to last.

36. Six weeks after giving judgment in *Butterworth v Butterworth and Englefield* McCardie J returned to the subject in *Ewer v Ewer and Charlton* (1920) 36 TLR 517. In a piece of invective revealing his true views on the subject, he used a vivid metaphor to illustrate just how personal to the claimant, and discretionary for the judge, was a claim for damages under s.33 of the 1857 Act. He stated:

> "The claim for damages is founded on the notion that a husband has a property in the body and services of his wife. It rests on the same juristic basis as the right of a citizen in the days of the Roman Empire to bring an action for physical injury caused to his slaves by the wilful or negligent act of another. The legal foundation of the claim to damages for adultery has not changed from its inception over 200 years ago to the present time, and a Judge of the Divorce Court in fixing damages may well feel that his position when ascertaining the value of a wife is closely akin to that of an assessor in some of the markets of the Eastern world."

37. This is not the place for an extensive discussion of the remarkable history of the action crim con or its statutory successor. Suffice to say that it is hard to imagine an action which is more personal, more discretionary and more obviously needful of living actors than the statutory successor to crim con. As McCardie J pointed out, crim con was an action on the case rather than a strict common law action for trespass. An action on the case allowed more indirect injuries, provided they were proved, to be redressed in a flexible and discretionary manner.

38. As has been seen, Parliament had no difficulty in explicitly categorising the statutory successor to crim con as a "cause of action" in s.1 of the 1934 Act, yet having done so it went on to provide that that particular cause of action, together with the three named others, would not be covered by the section. But if something as personal and discretionary as an claim under s.189 qualified as a "cause of action", then it is to me inconceivable that Parliament is to be taken as not having so designated a claim for post-divorce alimony or other ancillary relief. There would be no logic at all in categorising the claim under s.189 as a cause of action, but not so categorising a claim under ss.190, 191 or 192.

39. The same reasoning must apply to the common law actions which lay for knowingly seducing away a wife from cohabitation with the husband, or for harbouring a wife after gaining notice that she had left her husband without his consent. These too were actions on the case: see *Winsmore v. Greenbank* (1745) Willes 577. I note that in that case the jury, in its discretion, awarded damages against the defendant in the vast sum of £3,000. These actions were also personal, discretionary and obviously required living actors. But they were "causes of action" nonetheless, albeit excepted from the scope of s.1 of the 1934 Act.

40. It is therefore clear to me that Parliament must have regarded a claim for post-divorce ancillary relief as a cause of action for the purposes of s.1 of the 1934 Act. Once that has been accepted it can be seen that Parliament specifically decided not to include a claim for post-divorce relief in the list of excluded causes of action.

41. It thus seems to me that an application of conventional textual and contextual canons of construction to the 1934 Act leads to the conclusion that a claim for post-divorce relief is unquestionably covered by the section. The principle of statutory construction *inclusio unius est exclusio alterius* surely applies. In specifying crim con as well as seduction, inducing separation and defamation as causes of action not covered by the section, Parliament must be taken to have included other supposedly personal and discretionary forms of application within the scope of the section.

The nature of the claim

42. Section 1 of the 1934 Act does not define what is meant by a "cause of action", although, for the reasons set out above, it plainly encompasses processes which are speculative, personal and discretionary. In *Letang v Cooper* [1965] 1 QB 232, Diplock LJ, at 242, defined a cause of action thus:

> 'a cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.'

43. Similarly, in *Mercedes-Benz AG v Leiduck* [1996] AC 284 Lord Nicholls stated at 310:

> 'A cause of action is no more than a lawyers' label for a type of facts which will attract a remedy from the court. If the court will give a remedy, ex hypothesi there is a cause of action …
>
> Two preliminary points are to be noted. First, practising lawyers tend to think in terms of the established categories of cause of actions, such as those in contract or tort or trust or arising under statute. They do not always appreciate that the range of cause of action already extends very widely, into areas where identification of the underlying "right" may be elusive. For instance, a writ may properly be issued containing nothing materially more than a claim for an injunction to restrain a defendant from continuing proceedings abroad on the ground that this would be unconscionable: see *British Airways Board v Laker Airways Ltd* [1984] QB 142 and, [1985] AC 58. In such a case, the underlying right, if sought to be identified, can only be defined along the lines that a party has a right not to be sued abroad when that would be unconscionable. This formulation exemplifies the circular nature of the discussion.'

44. Therefore, if there is a right which gives rise to a remedy from the court then there is a cause of action. This takes us back to *Ashby v White* (1702) 2 Ld Raymond 938. In that case Ashby, a burgess of Aylesbury, was entitled under the borough charter to vote at parliamentary elections. White, a returning officer, maliciously refused to allow him to vote. Ashby thereupon sued White. Lord Chief Justice Holt said in one of caselaw's most famous dicta:

> "If the plaintiff has a right he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy for want of a right and want of remedy are reciprocal. … My brother Powell indeed thinks that an action upon the case is not maintainable, because there is no hurt or damage to the plaintiff: but surely every injury imports a damage though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous

> words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury ... But in the principal case my brother says, we cannot judge of this matter, because it is a Parliamentary thing. O! by all means be very tender of that. Besides it is intricate, and there may be contrariety of opinions."

45. On this analysis it is very difficult to see why a claim for post-divorce relief is not a "cause of action". It is a right, at the very minimum, to apply to the court, which will award a remedy if the necessary facts are proved.

46. This was certainly the view of Thorpe and Dyson LJJ in *Harb*. At [27] Thorpe LJ compared an application for ancillary relief to a personal injury claim, and held:

> 'The vast majority of financial claims are currently determined under section 23 and 24 of the Matrimonial Causes Act 1973. Section 27 is very rarely invoked. But under whichever section the court adjudicates its first task is to establish the basics. In relation to section 23 and 24 applications, has there been a decree of divorce? Has the applicant a subsisting right of application which has not been exhausted or previously dismissed? In the case of section 27 applications, is the applicant married to the respondent and has she suffered financial neglect? Once the foundations to the right of application are established then, and only then, does the court exercise a discretion expressed in the conventional statutory language thus, "may make any one or more of the following orders." But that discretion is confined by a statutory duty to apply specific statutory criteria in search of, as originally enacted, a statutory objective. These characteristics seem to me to be more common to, rather than distinguishing from, the essential characteristics of a claim for damages for personal injuries sustained as a result of the negligence of a tortfeasor.'

47. Dyson LJ compared a claim for ancillary relief to an application for an injunction (which Denning LJ in *Sugden* had conceded amounted to a cause of action for the purposes of s.1 of the 1934 Act). At [51] he held:

> 'In *Sugden*, it was accepted that the fact that the relief sought involves the exercise of discretion by the court is not sufficient to prevent it from being a cause of action. If, as Denning LJ thought, a claim for an injunction made against a person before his or her death can survive against the personal representatives by operation of section 1(1), then why should a claim for financial relief not also survive? It seems to me that the person seeking an injunction has no more or less of an enforceable right than a former spouse seeking financial relief. Expressing the point slightly differently, 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 is no enforceable right until the claim has been established to the satisfaction of the court.'

48. I am in full agreement with the reasoning of both Lords Justice. Like them I struggle to understand why a claim for damages following personal injury or a claim for an injunction are causes of action when a sharing claim earned over many years and which might be quantified in tens of millions of pounds is not.

49. I do not doubt that back in 1957 a claim for ancillary relief was regarded as a mere *spes*, the satisfaction of which depended on the court benevolently deciding to exercise discretion in the applicant's favour. But the law has substantially developed since then. In *Haines v Hill & Anor* [2007] EWCA Civ 1284, [2008] Ch 412, the husband was ordered to transfer his share in the family farm to the wife. Before he had completed the transfer he was made bankrupt on his own petition. The question was whether the transfer was an undervalue pursuant to s.339 of the Insolvency Act 1986 and as such void against the trustee in bankruptcy. The Court of Appeal held that wife's ancillary relief claim was a thing of value which was relinquished in exchange for the transfer. After citing *White v White* [2001] 1 AC 596 and *Miller v Miller and McFarlane v McFarlane* [2006] 2 AC 618 Sir Andrew Morritt C stated at [29]:

> 'I do not suggest that the reference to "an entitlement" indicates any sort of proprietary right before the relevant court order is made. But, whatever the position may have been in earlier days, it is, in my view, self-evident that the ability of one spouse to apply to the court for one or more of the orders referred to in ss. 23 to 24D is a right conferred and recognised by the law. Further it has value in that its exercise may, and commonly does, lead to court orders entitling one spouse to property or money from or at the expense of the other. That money and property is, prima facie, the measure of the value of the right'.

50. Rix LJ put it even more strongly at [77]:

> "After all, a claim in contract for damages for breach of contract or a claim in tort for damages for personal injury may be very difficult to measure in financial terms. As long as the loss in question is not entirely speculative, however, the court is required to do its best to put a monetary value on it. Such a claim is plainly measurable in money's worth, and the compromise of such a claim likewise. A judgment for damages is the court's assessment of the claim in monetary terms; and a compromise of such a claim is the parties' best estimate of the monetary value of such a claim, taking into account the additional uncertainties of the absence of the court's assessment. The compromise or release of such a claim is plainly consideration in money's worth, and measurable as such. The only question is whether a claim for ancillary relief under section 24 is *for these purposes* a claim like any other. *Abbott* is a decision, founded in terms on *Pope* (in the pre 1973 Act days when what was being talked about was a claim for maintenance), that a section 24 claim is like any other: that is

> to say that it can be assessed for its monetary value, even if its award lies peculiarly in the discretion of the court. The result is that its compromise or release can also be assessed in monetary value, even if such compromise is itself subject to the supervision and ultimately the imprimatur or not of the court. It matters not, therefore, that the nature of a section 24 claim may differ from a contractual or tortious claim, in that it is founded entirely in statute and in the exercise of the court's discretion. It shares with such non-statutory causes of action the ability to be assessed in monetary terms. That is irrespective of the firmness of the modern view of the discretionary right, as now described, for instance, by Lord Nicholls in *Miller v. Miller* (see at para 28 above)."

51. So, an ancillary relief claim is to be regarded in a bankruptcy dispute as a thing of potentially significant value. It was a "claim like any other". But the analysis does not stop there. The modern law of ancillary relief directs the court to the concept of sharing as its first port of call. The concept is well known and does not need to be elaborated here. While it is true that there is no formal legal community of property under the law of this country, the arrival of the concept of sharing since the momentous decisions of the House of Lords in the early part of this millennium means that the so-called unfettered discretion is now highly fettered. If the marriage is not short then on proof of the generation of things of value during the span of the marriage the discretion will almost invariably be exercised to share the acquest equally. This is subject to the question of need, which is the second port of call. But if the sharing award meets needs then the exercise stops there. So while it is true that there is no deferred community of property in this country *de jure*, there is something very similar to it applied by the judges.

52. I will discuss later those cases where the right to share has survived the death of the beneficiary of the sharing award. At this point I refer to *Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244. In that case the applicant wife died just over two months after judgment was given and the order made in ancillary relief proceedings. The judgment required the husband to pay the wife a lump sum of just over £3.3 million. At the time of death £1.6 million was outstanding. Munby LJ refused to allow the husband to reopen the award because of the unexpectedly early death of the wife. At [19] he held:

> "The magnetic, indeed overwhelming, factor in this case, which in my judgment dominates above all else, is that the wife, by her labours over many years, both as a wife and as the husband's active business partner, had *earned* her equal share in the matrimonial assets. True it is that the matter inevitably and appropriately came before the court as a claim in the Family Division for ancillary relief and not by way of a claim in the Chancery Division for relief under either the Partnership Act 1890 or the Trusts of Land and Appointment of Trustees Act 1996, but this forensic incidental must not blind us to the underlying realities. This was a wife who had earned her share

> and was entitled to have that recognised by the Family Division, as it correctly was by Judge Raynor." (original emphasis)

53. Having regard to these various matters I am convinced that a claim for ancillary relief is clearly covered by s.1 of the 1934 Act. Indeed I would suggest that such a claim is more solid, less conjectural and less speculative than a civil claim for damages for personal injury. In a personal injury claim, negligence or breach of statutory duty has to be proved. The court then has to grapple with extremely controversial factual disputes about the quantification of loss, as well as potential evidence concerning contributory negligence. By contrast, in an ancillary relief claim there is no requirement to prove liability, and once proof has been made of the scale of the acquest the decision to divide equally is almost mechanical.

Do both parties need to be alive?

54. As has been seen above, in *D'Este v D'Este* Ormrod J dismissed the application principally for the reason that in order to make an order for the variation of a postnuptial settlement both parties, by the terms of the statute, had to be alive. This view was followed by Dyson LJ in *Harb*. Wall LJ was categorical that this was decisive: see his judgment at [60] – [64].

55. Yet we have also seen Lord Brandon state in *Barder* that:

> "the purpose of the statutory right of appeal is to enable decisions of a county court which are unjust to be set aside or varied by the Court of Appeal"
>
> and that
>
> "where the order or decision appealed against is discretionary, it is the duty of the judge to exercise his own discretion in place of that previously exercised by the registrar".

Now, these statements were made in the context of the case before him where the wife, the beneficiary of the consent order, was dead.

56. I can see in such circumstances that the appeal court is able to exercise what might be termed an appeal power to set aside the disposition made by the order and to return the parties to their proprietary positions immediately before the order was made. But Lord Brandon goes further than that. He refers to the Court of Appeal <u>varying</u> the order and speaks of the appeal judge <u>exercising his own discretion</u> in place of that exercised by the registrar. So my question is: what power is the appeal court applying when it makes by way of variation an alternative disposition to that made by the trial judge? And when the appeal court exercises its discretion in place of that previously exercised by the trial judge, what discretionary power is it wielding?

57. The appeal court has (subject to any specific enactment) all the powers of the lower court (FPR r.30.11(1)). It can affirm, set aside or vary any order of judgment of the lower court; refer any application or issue for determination by the lower court; order a new hearing; make orders for the payment of interest; and/or make a costs order (FPR

r.30.11(2)). The power to "vary" obviously has to lie within the powers of the lower court.

58. In my judgment there can only really be one answer to these questions. If the appeal court does more than merely set aside the disposition of the trial judge and makes an alternative disposition, then it must be applying the powers in ss.23 and 24 of the Matrimonial Causes Act 1973, those being the powers of the lower court. When exercising its discretion as to how those powers should be applied in place of the trial judge it can only be doing so under s.25 of the Matrimonial Causes Act 1973. There are no other available powers and there is no other available source of discretion.

59. In *Smith v Smith* [1992] Fam 69 an order was made by the registrar that the husband pay the wife a lump sum of £54,000 on the clean break basis. The lump sum was paid. Within six months of that order the wife died. In the Court of Appeal Butler-Sloss LJ held that where an order for ancillary relief was reconsidered following changed circumstances which invalidated the basis of the original order, the court would take account of the facts as known at the date of the reassessment and reach a fresh decision having regard to all the criteria set out for consideration by s.25 of the Matrimonial Causes Act 1973. Exercising the discretion afresh and having regard to all the criteria set out in s.25, in particular to the length of the marriage and the significant contribution made to it by the wife, and to the husband's current and future needs and resources, the court would award the sum of £25,000 to the wife and vary the judge's order accordingly.

60. It could be argued that in making the alternative disposition of £25,000 the Court of Appeal was not exercising a power derived from s.23 of the Matrimonial Causes Act 1973. Rather, it was exercising an appeal power to set aside £29,000 of the lump sum of £54,000. However, that would be a false way of looking at what the Court of Appeal did. What it clearly did was to set aside the £54,000 lump sum, wipe the slate clean, and then redo the entire s.23, 24 and 25 exercise, coming up with a new lump sum of £25,000.

61. This decision completely belies the doctrine that both parties have to be alive in order for the powers and discretion embodied in ss.23, 24 and 25 to be exercised.

62. The same inconsistency is found in the case of *Reid v Reid* [2004] 1 FLR 736. In that case a consent order provided for a sale of the former matrimonial home and division of the proceeds 40% to the wife and 60% to the husband. Two months after the order was made the wife died. The house was later sold and 60% of the proceeds were paid to the husband. By agreement, the wife's executors received 25% of the proceeds; the remaining 15% (about £37,000) was held on deposit pending the outcome of the husband's *Barder* appeal. That was heard by Wilson J who at [26] "without hesitation" followed *Smith v Smith*. He ordered the wife (sic) to pay the husband the £37,000 held on deposit. This award was justified by reference to the husband's real needs.

63. This award cannot be cast as a partial set-aside. On any view it was a positive order for a lump sum which could only have been made under s.23(1)(c) of the Matrimonial Causes Act 1973. Yet, the payer of this lump sum was dead. That seemingly insuperable impediment, so emphatically propounded by Ormrod J in *D'Este*, was not mentioned in the judgment, or, it seems, in any of counsel's submissions.

64. A further instance of this inconsistency is *WA v Executors of the Estate of HA & Ors* [2015] EWHC 2233 (Fam). In that case a consent order was made providing for the wife to pay the husband a lump sum of £17.34 million in two tranches of £8.67 million. After the payment of the first tranche, but before the payment of the second tranche, the husband died. The wife launched a *Barder* appeal. The appeal judge, Moor J, set aside the second tranche and ordered a repayment from the first tranche of £3.67 million, leaving with his executors £5 million along with his own assets. That repayment could be characterised as a partial set aside of the original order made pursuant to the court's inherent appeal powers. However, that would be a false presentation. The court arrived at the figure of £5 million as being the right amount to be retained by the husband's estate having regard to the husband's need from beyond the grave to support members of his family, and to his sharing entitlement. At [69] Moor J stated that "an award of £5 million simply seems right applying the section 25 criteria". Therefore this was an entirely fresh exercise of the s.25 discretion by the appeal court judge in place of that previously exercised by the first instance judge when making the consent order.

65. How could the court in each of these cases have applied the powers and exercised the discretion specified in Part II of the Matrimonial Causes Act 1973 when one of the parties was dead? Mr Molyneux QC submitted, correctly in my judgment, that the only logical and lawful way in which this could have been done is if in each case, in the words of s.1(1) of the 1934 Act, "a cause of action subsisting against …him [has] survive[d] against …his estate". That cause of action is the appeal which if allowed triggers the ss.23 - 25 powers and discretion.

66. Up to 2016 *Barder* applications were almost invariably undertaken by way of appeal. However, since 3 October 2016 such applications must be made to the court of first instance. On that day FPR 9.9A and FPR PD 9A para 13 took effect. FPR 9.9A(2) allows a party to apply to set aside a financial remedy order where no error of the court is alleged. FPR 9.9A(5) provides that where the court decides to set aside a financial remedy order, it shall give directions for the rehearing of the financial remedy proceedings or make such other orders as may be appropriate to dispose of the application. FPR PD para 13.5 stipulates that where no error of the court is alleged an application to set aside an order must be made to the court of first instance. Para 13.6 confirms that an application may be made to set aside a financial remedy order. Para 13.8 provides:

> 'On applications under rule 9.9A, the starting point is that the order which one party is seeking to have set aside was properly made. A mere allegation that it was obtained by, e.g., non-disclosure, is not sufficient for the court to set aside the order. Only once the ground for setting aside the order has been established (or admitted) can the court set aside the order and rehear the original application for a financial remedy. The court has a full range of case management powers and considerable discretion as to how to determine an application to set aside a financial remedy order, including where appropriate the power to strike out or summarily dispose of an application to set aside. If and when a ground for setting aside has been established, the court may decide to set aside the whole or part of the order there and then, or may delay doing so, especially if there are third party

> claims to the parties' assets. Ordinarily, once the court has decided to set aside a financial remedy order, the court would give directions for a full rehearing to re-determine the original application. However, if the court is satisfied that it has sufficient information to do so, it may proceed to re-determine the original application at the same time as setting aside the financial remedy order.'

67. The scheme of the rules and the accompanying practice direction is that almost invariably the court will order a full rehearing where it has set aside all or part of an order. That will be a rehearing where the court applies the powers in ss.23 and 24 and exercises the discretion in s.25 of the Matrimonial Causes Act 1973. If the reason for the set-aside is the unforeseen death of the recipient of an award, then at the full rehearing the court will nonetheless apply those powers and exercise that discretion notwithstanding that the recipient party is dead. This is only capable of being explained if a cause of action subsisting against that party has survived against his estate. The cause of action is the right to seek a set-aside and a rehearing if the recipient's circumstances substantially change shortly following the order. There is no other legal or logical explanation for the existence of the power.

68. There is therefore a clash on the authorities between those cases where the death has occurred shortly before trial and those cases where death has occurred shortly after trial. That clash is illogical, arbitrary and capable of meting out great injustice.

Conclusion

69. For the reasons I have given I must dismiss the wife's application where her former husband died before her claim for financial provision following the overseas divorce could be adjudicated.

70. I am satisfied that I am bound by the decision in *Sugden*, and that the Court of Appeal is also bound by that decision. In such circumstances I am satisfied that it would be appropriate for there to be a leapfrog application for leave to appeal to the Supreme Court. I am satisfied, in relation to my decision, that there is a point of law of general public importance involved which relates wholly or mainly to the construction of an enactment, which has been fully argued in the proceedings before me and which has been fully considered in my judgment: see s.12(3)(a) of the Administration of Justice Act 1969. I am further satisfied pursuant to section 15(3) of the Administration of Justice Act 1969, in circumstances where permission to appeal would be required to appeal to the Court of Appeal, that this would be a proper case for the grant of leave to the Court of Appeal.

71. Accordingly, if either party were to apply for it, I would grant a certificate under s.12(1) of the Administration of Justice Act 1969.

72. If there is to be an application to the Supreme Court then in my judgment the dismissal of the wife's claim should be stayed, and all injunctions should stay in force, until the application for leave has been heard.

73. That is my judgment.