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Case No: FA-2023-000209

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2024

Before :

MR JUSTICE FRANCIS

- -

Between :

	MA	**Applicant**
	- and -	
	ROUX	**Respondent**

- -
- -

MR N FAIRBANK and MS A HALLIDAY for the **APPLICANT**
MS G LINDFIELD for the **RESPONDENT**

Hearing dates: 16 - 17 January 2024

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Approved Judgment

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MR JUSTICE FRANCIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR JUSTICE FRANCIS :

1. This case today is concerned with whether the court has the power to strike out an application to set aside a consent order in financial remedy proceedings. Put another way, is there a power of summary determination of such an application in financial remedy proceedings? Or is the power to strike out limited to the category simply of legally unrecognisable claims?

2. In this case the appellant, to whom I shall refer as the wife (forgive me for using that noun, given that you are divorced, but it seems easier to refer to you in those ways rather than appellant and respondent) has been represented by Mr Fairbank and Ms Halliday of counsel. I am told by Mr Fairbank that they are acting for her *pro bono* in this case. The court is always grateful to lawyers that take cases on on that basis and I express my gratitude to them for doing that.

3. The husband has been represented by Ms Gemma Lindfield. She is instructed on a direct access basis and I am aware that, to the husband, funding these proceedings has been really very difficult for him indeed. I will return to say a little more about their financial circumstances later.

4. It is sensible to start by looking at the order that is under appeal. The order under appeal was made Her Honour Judge Reardon on 22 August 2023 sitting in the family court at East London. The order contains these two recitals:

> "Upon the court hearing an application on behalf of the respondent for the application to be dismissed pursuant to FPR 4.1.3(m) and PD 9(a) para 13.8 and upon the court refusing the respondent's application and indicating that reasons would be provided the following day in writing and would be emailed to counsel".

5. Then there are various orders which make no reference to the refusal of the respondent's application. It seems to me that this an error of drafting because what I cannot do is to hear an appeal against a recital. A recital is simply a record of something that has taken place. Indeed, the judges of this division deprecate the increasing use of recitals in orders where people seem to want to recite all manner of things these days that really do not need to go into the order.

6. I asked Mr Fairbank what part of the order he was appealing, and he was forced to concede that what he was actually seeking to appeal was this recital which he has no possibility of doing. I am not going to refuse to deal with the matter on that basis. It seems to me that what I must do is invite Her Honour Judge Reardon to agree to an amendment to her order pursuant to the slip rule so that instead of, or perhaps as well as, the recital there is an order saying that the respondent's application is refused.

7. It seems to me that that would meet the justice of what I am trying to do this afternoon and I think it would be unduly technical of me simply to close my books and say, "I cannot hear an appeal against a recital" and counsel very sensibly and helpfully agreed with me that that is the appropriate thing to do. Whatever the decision is going to be in this appeal, I am going to invite Judge Reardon to do that. If she does not agree then we may have a problem but I am sure that she will.

8. What the judge did was to make her order on that date and then, true to her promise, she supplied reasons very soon thereafter and it helps for me to look at those reasons because that effectively amounts to the Judgment which supports the decision which is under appeal. The Judge gave her reasons the following day, that is 23 August 2023.

9. The judge has stated that during the course of the hearing she determined that she did not have the power to strike out or otherwise summarily determine the application. She says that the husband issued his application as a litigant in person in May 2023. That application by the husband was to set aside the consent order, the grounds being, to summarise, that the wife had been guilty of non-disclosure.

10. The husband filed a witness statement and the wife filed a statement in answer. Although the wife had not formally applied for the husband's application to be struck out, the court treated her as if she had made one because it had been referred to in solicitor's correspondence and in the skeleton argument filed on her behalf.

11. The judge referred to FPR 2010 Rule 4.4(1) and she referred in particular to the Supreme Court decision in *Wyatt v Vince* [2015] UKSC 14. In that case the court held that the absence from the FPR 2010 of the power to give summary judgment meant that Rule 4.4(1) should be construed strictly and that the Court of Appeal had been wrong to insinuate into the concept of abuse of process in Rule 4.4(1)(b) of the Family Rules, an application for a financial order which has no real prospect of success. In fact, what Lord Wilson said was that the touchstone for such an application to strike out was whether the application was legally recognisable and he gave an example of that which might be an application made after an applicant had remarried, which of course would be an application that will be bound to fail.

12. Nobody in this case of course had suggested that the husband's application to set aside is legally unrecognisable. Judge Reardon then referred to the decision of *Roocroft v Ball* [2017] 2 FLR 810. In that case the Court of Appeal held that the approach set out by the Supreme Court in *Wyatt v Vince,* applied to applications to strike out and applications to set aside a financial remedy order in the same way as it applied to a substantive application for a financial remedy order.

13. An attempt in that case to distinguish strike out applications in the context of applications to set aside from those made within full ancillary relief claims failed. King LJ accepted that the former were not "Subject to the same imperatives as are imposed by the application of section 25 MCA 1973". Nevertheless, the Court of Appeal held that "the principles enunciated in *Wyatt v Vince* apply equally to an application to set aside a consent order in financial remedy proceedings as to applications for the making of a financial remedy order".

14. Mr Fairbank argued before the judge, as he argues before me today, that the decision of the Court of Appeal in *Roocroft v Ball* has been superseded, if not overruled, by the subsequent introduction into FPR 2010 of Rule 9.9A which created, with effect from 3 October 2016, a new streamlined procedure for applications to set aside orders including consent orders when no error of the court is alleged. That procedure was of course not in place when *Roocroft v Ball* was decided.

15. Judge Reardon was sufficiently impressed with the arguments that were being put to her by Mr Fairbank that she took the view that she should give permission to appeal her decision. It is unusual for a judge to give permission to appeal against their own decision but in

circumstances where there appears to be a point of law which needs to be determined, it is sometimes of course the correct thing to do and it is what Judge Reardon did in this case. By paragraph six of her order of 22 August 2023, Judge Reardon provided “The respondent’s application for permission to appeal the decision to refuse the strike out/otherwise dismiss the application is granted”.

16. The issue was debated whether the appeal against Judge Reardon’s decision should be heard by a judge of the Family Division in the High Court, which is now the normal route for appeals from decisions of circuit judges in financial remedy cases, or whether in fact the appeal should go to the Court of Appeal because of the issues that I just identified, and in particular to the suggestion that the decision in *Roocroft v Ball* was incorrect. In the event, the judge ordered that it should come before the Family Division judge and that is the matter that I have been dealing with yesterday and today.

17. On 25 September 2023, Williams J gave directions for the hearing of this appeal. His direction included an order that the bundle must not exceed 250 pages save with permission of the judge during the application. I am grateful to him for making that order because it is well known that we are inundated at the moment with a number of appeals and restricting the bundle is almost always necessary. In fact, in this case I have found it necessary to look at documents that were not originally in the bundle because I wanted to see what the arguments had been in the court below in relation to the financial remedy application.

18. In particular, I have read the FDR position statements that were filed respectively on behalf of the husband and the wife for the FDR which is what led to their settlement and to the consent order (it is not in issue that I am entitled to see the FDR position statements since the case was resolved by consent following the FDR). Without criticising counsel or solicitors in this case at all, I would like to suggest that if the representatives do think that the judge should have more documents in the bundle than the order has allowed then it is appropriate for them to get in touch with the judge’s clerk. We all vary in our approach but so far as I am concerned now that bundles are always electronic I do not mind how many pages are in the bundle, I mind how many pages I have got to read and in this case, as is so often the case, some of them are documents, big ones, that were not in the original bundle. As I say that is not meant to be a criticism of anybody.

19. Mr Fairbank in his presentation before Judge Reardon and before me has gone further than simply to suggest that the decision in *Roocroft v Ball* has been superseded by the new Rules. He actually goes so far as to saying that King LJ wrongly interpreted the decision in *Wyatt v Vince* and that I should therefore follow the guidance of the Supreme Court in *Wyatt v Vince* rather than of the Court of Appeal in *Roocroft v Ball.*

20. As a simple proposition of the application of the doctrine of precedent, if I have a conflicting decision between the Court of Appeal and the Supreme Court then of course I am bound to follow the decision of the Supreme Court. What we have here is, I find, something rather more nuanced. What we have is King LJ’s interpretation in the Court of Appeal of *Wyatt v Vince* and whatever my view of her interpretation of *Wyatt v Vince* it seems to me to be absolutely clear that I have to follow what the Court of Appeal have said in relation to that interpretation. But it is important that I set out the nature of Mr Fairbank’s argument, not only in fairness to him, but because it is going to be relevant to what I come on to deal with shortly.

21. Following the short reasons for her decision which were circulated to counsel on 23 August 2023, Judge Reardon sent an email on 30 August 2023 in relation to this case and she said as follows:

> "Permission to appeal is granted.
> 1. I consider that the appeal has a real prospect of success. The respondent may be able to argue either a) that the decision in *Roocroft v Ball* was superseded by Rule 9.9A and PD 9A which postdated that decision or b) that *Roocroft v Ball* was wrongly decided. I am less convinced about the "floodgates" argument. I consider that the power to strike out an application as an abuse of process, which clearly subsists, will address most of the scenarios outlined by the respondent under ground three. However, this point is less a ground of appeal than an argument employed to add weight to the other grounds and so I would not seek to restrict the respondent's ability to pursue this argument on appeal.
> 2. Alternatively, I consider there is a compelling reason for the appeal to be heard, that is a need to clarify the application of *Wyatt v Vince* and *Roocroft v Ball* following the Rule changes which introduced Rule 9.9A.
> 3. I do not propose to transfer to the Court of Appeal under Rule 30.13. Ground five (point (b) above) is only one of several grounds pursued by the respondent and the appeal may be capable of being determined without the need to trouble the Court of Appeal. The High Court as the appeal court also has the power to transfer to the Court of Appeal under Rule 30.13 if it considers it appropriate and I think this decision is better taken by the judge who gives directions on the appeal".

22. Williams J listed this to be heard before me and neither party has sought to assert before me yesterday or today that I should have transferred this matter to the Court of Appeal and so I have dealt with it. I am going to pause here to turn to some of the salient facts of the background of these parties but I do not need to do it at any great length.

23. The parties met in 2009, there seemed to be some debate about the nature and strength and commitment of the relationship but what is clear that in 2016 they married. The husband's case is that they separated in October 2020; the wife's case is that they separated in April 2021. The marriage therefore lasted only about four or five years plus an element of pre-marital cohabitation and I am not going to make any determination of any facts of course. I do not need to and I am not able to, I am merely reciting what I think is common ground.

24. There are no children of the marriage, a *decree nisi* was pronounced in June 2021. The wife had, I am told and have read, articulated a case at the FDR that this was a long marriage case. I am bound to say I find that to be completely perplexing, given the facts that I have just asserted and it is important to note that there are no children of their marriage.

25. I do not need to say very much about the financial circumstances for the purposes of this hearing. The wife was earning about £2,500 net a month. The husband was running a company and took a low salary as a director. He might have had total net income of about

£40,000 per year. There were limited resources and this was obviously a case which the parties needed to settle. Vast sums would have been spent in costs and those would of course be monies that would never be recovered.

26. There is a property in London, the former matrimonial home. The husband had bought that property before the parties met. The wife did not make any capital contribution to it. There was equity in that property at the time of the FDR I am told of about £133,000. The husband had some modest investments of about £38,000 but there was a jointly owned investment property with equity of about £37,000 and there were some modest pension assets.

27. Unsurprisingly, the wife contended through her counsel that the former matrimonial home took centre stage and it should be treated as a jointly owned asset in equal shares. Reference was made of course to the decisions in the House of Lords, *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 in that regard. I am not going to express any view either way as to how the case was argued at first instance, but I can understand the wife putting her case that way. I can also understand the husband putting his case on the basis, "I bought this property before we met and I should have a greater share of it".

28. In the end, the parties split the assets more or less 50/50. I am told, and I think it is accepted, that during the marriage the wife would be receiving monies from her family in Hong Kong, not vast amounts but an amount of money that would have made their living arrangements more comfortable. The husband had asserted in the proceedings that the wife came from a fabulously wealthy family in Hong Kong and that she would in due course receive monies from her family. The wife denied that.

29. The basis of the set aside application made by the husband is that in due course the wife did receive substantial sums from her family. The wife says that although some money was received post-separation, the majority is her father's investment, so is not hers. It is neither necessary nor appropriate for me in this judgment to set out the extent of those sums but they were substantial and I can understand that had she had that money at the time of the FDR a very different outcome might have pertained. I have formed no conclusion whatsoever as to whether the wife made honest or dishonest representations about the monies that later came from her family. She might have had no idea at all that they were going to send her money. On the other hand, she might have known full well that they were going to do that. That is not the issue before me today and it is very important that the parties know and that the judge who later deals with this case, if anybody does, knows that I express no view either way on the merits.

30. What I can see is that if the husband is right that the wife lied about these monies, it would have made a very significant difference indeed to the settlement that he would have been likely to enter into and I can understand, looking at it from his perspective, him feeling pretty fed up that the wife received the money that she did when she did. Being fed up is not enough, he has got to show and the burden of proof is on him that the wife was dishonest about this. I say no more about it that aspect of the case.

31. I turn then to look at the grounds of appeal, articulated by Mr Fairbank in his extremely helpful document. Ground one is that the learned judge erred in law in following the Court of Appeal decision of *Roocroft v Ball* upon an application to set aside a financial remedy order. Mr Fairbank correctly identifies that *Wyatt v Vince* was dealing with the summary determination of applications for a financial remedy order.

32. In that case, the parties had been divorced for decades when the wife brought her claim for financial provision. In the time that had passed between their separation and the claim, the wife had remained impecunious and the husband had become extremely wealthy. When hearing that case at first instance, I decided that it would be inappropriate to knock out at that point the wife's claims, which she was entitled to have heard on their merits. The Court of Appeal disagreed with that but the Supreme Court decided unanimously that it would be inappropriate to strike out the wife's claims without a hearing.

33. The detailed reasons for this were set out in paragraph 27 of the judgment of the Supreme Court articulated by Lord Wilson. Lord Wilson said as follows:

> "It is clear to me that, with respect, Jackson LJ was wrong to insinuate into the concept of abuse of process in Rule 4.4(1)(b) of the family rules an application for a financial order which has no real prospect of success. The learned Lord Justice did not (and could not) suggest that the omission from the family rules of any rule analogous to Rule 24.2 of the civil rules was accidental. It was deliberate; and so it was bold for him to say that nevertheless the effect of that rule was to be discerned elsewhere in the family rules. Although the power to strike out under Rule 4.4(1) extends beyond applications for financial remedies, for example to petitions for divorce, no doubt it is to such applications that the rule is most relevant. The objection to a grant of summary judgment upon an application by an ex-spouse for a financial order in favour of herself is not just that its determination is discretionary but that, by virtue of section 25(1) of the 1973 Act, it is the duty of the court in determining it to have regard to all the circumstances and, in particular, to the eight matters set out in subsection (2). The determination of an application by a court which has failed to have regard to them is unlawful: *Livesey (formerly Jenkins) v Livesey* [1985] AC 424 at 437, Lord Brandon of Oakbrook. The meticulous duty cast upon family courts by section 25(2) is inconsistent with any summary power to determine either that an ex-wife has no real prospect of successfully prosecuting her claim or that an ex-husband has no real prospect of successfully defending it. Indeed, were the latter conclusion to be appropriate, how should the court proceed to quantify the ex-wife's claim? For in applications for financial orders there is no such separation as exists in civil proceedings between issues of liability and those of quantum. Procedures for the court's determination of applications for financial orders, which both respect its duty under section 25(2) of the 1973 Act and yet cater for such applications as may be fit for an abbreviated hearing, are now well in place: see para 29 below. I suggest that Rule 4.4(1) of the family rules has to be construed without reference to real prospects of success. The three sets of facts set out in paragraph 2.1(c) of Practice Direction 4A exemplify the limited reach of Rule 4.4(1)(a), valuable though no doubt it sometimes is. The touchstone is, in the words of paragraph 2.1(c) of the Practice Direction, whether the application is legally recognisable. Applications made after the

> applicant had remarried or after an identical application had been dismissed or otherwise finally determined would be examples of applications not legally recognisable.
>
> Since the greater includes the lesser, it is no doubt possible to describe applications which fall foul of Rule 4.4(1) as having no real prospect of success. Nevertheless paragraph 2.4 of the Practice Direction remains in my view an unhelpful curiosity which cannot override the inevitable omission from the family rules of a power to give summary judgment".

34. Mr Fairbank asserts, and I agree with him, that on the set aside application, the court is not deciding whether to exercise its powers under sections 23, 24, 24A, 24B or 24E of the Matrimonial Causes Act 1973. It is deciding whether to set aside an already made order and if so on what grounds. King LJ quoted in her judgment in the *Roocroft v Ball* case part of the words of paragraph 27 which I have just read out. Mr Fairbank asserts, and I agree, that Lord Wilson's decision regarding the lack of any power of summary judgment was very clearly limited only to final financial remedy order applications.

35. Ms Lindfield, in her very helpful document filed in response in relation to this appeal, disagrees with the assertions that I have just indicated Mr Fairbank has made and with which I agree. Ms Lindfield asserts that Judge Reardon was correct in all the circumstances to hold that the Court of Appeal in *Roocroft and Ball* applied *Wyatt v Vince* correctly because she says the principles enunciated applied equally to an application to set aside as well as an application for financial remedy order. She said this must be correct given Lord Wilson's comments at paragraph 27 of *Wyatt v Vince*, that the power to strike out under Rule 4.4 applied equally to other applications that were not an application for a financial remedy order.

36. I disagree with Ms Lindfield's submission there. I do not think that that is determinative of the matter because I do take the view, as articulated by Mr Fairbank, that the key to the reasoning in paragraph 27 is the duty that is imposed on the court to consider all of the matters set out in section 25 and that is not something that can be summarily determined. I have to consider very carefully where that places me because what I have effectively just said, and I say it with the very greatest of respect, is that I disagree with King LJ's interpretation of this passage of *Wyatt v Vince*. Having considered this very carefully I have no doubt at all that I have to yield to the decision of the Court of Appeal on this.

37. As a judge of the High Court I am of course bound by the doctrine of precedent and although Mr Fairbank asserts forcefully that where there is a conflict between the Court of Appeal and the Supreme Court, I have to follow the Supreme Court, what I actually have here is an interpretation by the Court of Appeal of a decision of the Supreme Court with which I disagree. However, I am bound by that interpretation of the Court of Appeal of that Supreme Court decision.

    I turn therefore to ground two. Ground two is that the learned judge further erred in law by not distinguishing *Roocroft v Ball* on the basis that FPR 2010, Rule 9.9A and PD 9A came into force after *Roocroft v Ball* was decided and there is no reference to those provisions therein. The way that Mr Fairbank puts his case on behalf of the wife is as follows: *Wyatt v Vince* considered the Family Procedure Rules as they then stood. He says that *Wyatt v Vince* was a consideration of Rule 4.4(1), including an explanation of the rationale behind the absence of a power of summary judgment in the context of a financial remedy order application. Since then, he says, Rule 9.9A and its associated Practice Direction, have come into force and the effective date was 3 October 2016. Rule 9.9A provides as follows

"Application to set aside a financial remedy order 9.9A

(1) In this Rule—

(a) 'financial remedy order' means an order or judgment that is a financial remedy, and includes—

(i) part of such an order or judgment; or

(ii) a consent order; and

(b) 'set aside' means—

(i) in the High Court, to set aside a financial remedy order pursuant to section 17(2) of the Senior Courts Act 1981 and this Rule;

(ii) in the family court, to rescind or vary a financial remedy order pursuant to section 31F(6) of the 1984 Act".

38. Both parties have agreed that this was an order made in the Family Court, that is the order of the District Judge who made the order and the order of Judge Reardon who heard the applications to which I have referred. The Rule then continues:

> "(2) A party may apply under this Rule to set aside a financial remedy order where no error of the court is alleged.
> (3) An application under this Rule must be made within the proceedings in which the financial remedy order was made.
> (4) An application under this Rule must be made in accordance with the Part 18 procedure, subject to the modifications contained in this Rule.
> (5) 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".

39. In the Supreme Court cases of *Sharland v Sharland* [2015] UKSC 60 and *Gohil v Gohil* [2015] UKSC 61 which were heard together, consideration had been given by the court and considerable court time was taken up with discussing the conflicting views that then pertained as to the way in which one should seek to apply to set aside a financial remedy order. That debate was resolved by the introduction of this Rule.

40. The relevant Practice Direction to the Rule that I have just read out is PD9A, paragraph 13.8 which reads as follows:

> "In 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 will 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".

41. Mr Fairbank correctly asserts that no Rule or Practice Direction can take precedence over a statute or indeed judge-made common law. He referred me to the decision of Sir James Munby as the then President of the Family Division in the case of *CS v ACS and BH* [2015] EWHC 1005 (Fam), although if we delve back into history we can go far further behind that to find support for that same proposition.

42. Mr Fairbank asserts that both *Wyatt v Vince* and *Roocroft v Ball* were concerned with interpretation of a Rule 4.4(1) and that neither Rule 9.9A nor paragraph 13.8 were, or could have been of course, considered in *Wyatt v Vince* because they were not in force. Mr Fairbank goes on to assert, and this really is crucial to ground two: "Had they been in force, it is inconceivable that the same principles would have been applied to their interpretation in the context of a set aside application. That is because the whole rationale behind Lord Wilson's opinion was that the court's obligation to exercise its wider purview, as Lord Brandon enunciated in *Livesey (formerly Jenkins) v Jenkins* [1985] 1 AC 424, arose in the context of a final financial remedies order. It is the last stage of the court's quasi-inquisitorial jurisdiction on such an application. Had Lord Wilson felt inclined to comment upon an in-force rule 9.9A/ PD9A, such comment would have been *obiter* (and thereby not binding on King LJ in *Roocroft*) and very obviously limited in scope by Lord Wilson, careful as he is."

43. I am not going to make a decision after such a detailed hearing on the basis that something said in the Supreme Court was *obiter*. I need to look in rather more detail than simply to use that way around any difficulties.

44. Mr Fairbank further asserts that paragraph 27 of *Wyatt v Vince* makes clear that Lord Wilson is speaking only of applications for a financial remedy, not Part 18 applications raised within or around such proceedings. Having removed paragraph 2.4 of PD 4A, says Mr Fairbank, the addition of Rule 9.9A and the associated Practice Direction to which I have just referred, he says makes it explicitly clear that a power of summary dismissal of an unmeritorious application arises in the case of a set aside application".

45. Mr Fairbank continues by asserting that Practice Direction 9A, paragraph 13.8, which I have just recited, was inserted deliberately, not by accident. It must be correct, he says, otherwise the floodgates would fling wide open. Mr Fairbank asserts that the husband's application to set aside the final order on the grounds of material non-disclosure, whilst not frivolous, scurrilous or obviously ill-founded, nevertheless has no reasonable prospect of success. He says that this is a non-matrimonial contribution received post-separation and post-settlement. He says without a filtering stage, the court is obliged to subject the parties, here the wife in particular, to the incidence of legal costs, the stress, the upheaval in her life and that cannot have been intended.

46. At the outset of this judgment, I stated that the issue before the court is as follows:

This case today is concerned with whether the court has the power to strike out an application to set aside a consent order in financial remedy proceedings. Put another way, is there a power of summary determination of such an application in financial remedy proceedings? Or is the power to strike out limited to the category simply of legally unrecognisable claims?

47. In my judgment, the appropriate test to be applied in such cases is as follows:

1. *When considering whether to strike out an application to set aside a financial remedies order made under FPR 9.9A, the court may have regard to all matters set out in FPR 4.4(1) (a) to (d) and is not constrained in the same manner that an application to strike out an application for a final financial remedies order is, pursuant to Wyatt v Vince [2015] UKSC 2015. This means when exercising its powers under 4.4(1)(a) the Court may consider whether the application has a real prospect of success.*

2. The Court retains its full range of case management powers as set out in the PD9A para. 13.8 which includes, where appropriate, the power to strike out or summarily dispose of an application to set aside a financial remedies order made under FPR 9.9A and these powers may be exercised with reference to [real] prospects of success.

48. Applying that test to the facts of this case, I find myself here in a position that will really result in disappointment for both parties. I agree with Mr Fairbank's interpretation of the legal position. I agree that the position is now different from that which pertained when the Court of Appeal considered the position as they did in *Roocroft v Ball*. I have already said that I think, with the greatest respect, I might have come to alternative conclusion about that but that is irrelevant as that I am bound by a decision of the Court of Appeal. However, I am dealing here with the interpretation of new Rules and a new Practice Direction that did not exist at that time and so I find that am entitled to say that these new Rules and this new Practice Direction are different; and that, accordingly, I agree with Mr Fairbank's assertion that the judge erred in law by not distinguishing *Roocroft v Ball* on the basis that FPR 2010, Rule 9.9A and PD 9A came into force after *Roocroft v Ball* was decided and there is no reference to those provisions therein.

49. I disagree with Mr Fairbank's assertion that the husband's application has no reasonable prospects of success. I have already said that I am not going to make any finding and cannot make a finding as to whether the wife was honest or not. However, it is likely that, if it had been known that the wife was going to receive those monies, the husband would have stuck to his guns, which was to say that the former matrimonial home was pre-marital property, that after a relatively short childless marriage the assets should be split in his favour rather than equally. That was an argument that he abandoned and I have already indicated that the principal reason why he abandoned it, I suspect, although I cannot know, was because the cost of fighting the case was completely disproportionate to the amount of money at stake.

50. We have this afternoon therefore, reached a situation where it is a bit of a "score draw" because Mr Fairbank has won clearly in the way he seeks to interpret the new Rules and the new Practice Direction. However, as indicated above, it would in my judgement be incorrect and wrong to describe the husband's case as frivolous or hopeless or ill-founded.

51. I am not making any order about this. My task today is limited to whether I set aside and allow the appeal, and I do. But this matter is then going to be referred back, I suspect either to the district judge or the judge in the Family Court at East London. And whilst that district

judge or judge is not bound by my clear steer that the husband's application raises an arguable case, it is up to the judge or the District Judge to make that decision having heard argument. I strongly encourage the parties to reflect on whether they really want to go and spend a day or two arguing about the strike out, which I have now determined the court has the power to do, when what I think needs to be done is the application itself needs to substantively heard.

52. Of course, the most sensible thing of all for them to do would be to enter into negotiations to see whether they cannot arrive at some accommodation. I do not wish to imply in that that either party's case has more prospect of success than the other because I have very clearly said that that is not my function to do that; in fact it would be wrong for me to give any steer on that.

53. What I do give a steer on is that I disagree with Mr Fairbank's assertion that the amount of money that his client received really makes no difference because it is non-matrimonial. Yes, it is correct that money received by one side from an external source, after the marriage is over, is what we call non-matrimonial in character. But what we all know is that in the overwhelming majority of cases up and down England and Wales, as opposed to the significant money cases that we mostly hear in this division, it is the parties' needs that rule the day. As we all know it is perfectly permissible to invade non-matrimonial property and to redistribute the capital of the marriage for the purposes of meeting those needs.

54. Therefore, I disagree with the suggestion that just because it is non-matrimonial and received after the marriage, it is irrelevant, particularly if the husband can prove that the wife knew that this money was coming and I have already indicated the burden of proof is on him in regard to that and it may be a very difficult task indeed. I, again, am going to express no opinion in relation to that.

55. There is a third ground of appeal, which is that if the learned judge was bound by *Roocroft v Ball* then this appeal should be determined at Court of Appeal level so that the appeal court is not bound by that incorrect decision. I think with respect to Mr Fairbank that ground contains a misunderstanding because the Court of Appeal in fact is the only Court in the jurisdiction of England and Wales which is bound by its own decisions. I am supposed to follow decisions of my fellow High Court judges, but I do not have to if I disagree with them. But if I disagree with them, I have to say why.

56. The Supreme Court of course can always change previous decisions of the Supreme Court (or its predecessor, the House of Lords) but the Court of Appeal is bound by its own decisions. Therefore, ground three of Mr Fairbank's grounds of appeal, it seems to me, is doomed. However, I do not need to say more about it because I have allowed the appeal under grounds one and two for the reasons indicated.

End of Judgment