Stopping the cycle

Could this be an end to the wash-spin-repeat of financial remedies litigation? Nicholas Fairbank considers the decision in *MA v Roux*

IN BRIEF

- *MA v Roux* focuses on the legal issue of whether or not the court has the power to strike out an application to set aside financial remedy consent orders.
- The judgment concluded that applications to set aside a consent order shouldn't be dismissed without a hearing taking place.
- This has wide-reaching implications for practitioners and means the court can now weed out unmeritorious applications at an early stage.

Picture yourself having emerged from your divorce with a final financial remedies order to hold and to cherish. It was not a pleasant experience, even if you ended up agreeing the order, and whatever the outcome, you can't help feeling you've rather been taken to the cleaners.

Imagine now that some time later, your embittered ex makes an application to set aside that order, under the Family Procedure Rules 2010 (FPR 2010), r 9.9A. No longer need they apply to appeal out of time; this provision allows an applicant to set aside a consent order where no error of the court is alleged.

The grounds relied upon may seem spurious to you. They allege 'material non-disclosure' because you had an old savings account with £100 in it, which you'd opened back in the 1990s, hoping to benefit from a windfall mutualisation of a building society. Or, you had a life assurance policy with nil surrender value, but which, in the event of your death, would yield sufficient (for example) to redeem your modest mortgage for the benefit of your heirs, which here includes your new spouse towards whom your ex (somewhat inexplicably to you) holds great animus.

Whatever it is, it was of negligible value in the context of your divorce and you had forgotten all about it. Or, even worse, they falsely allege you held an asset which never even existed. You seem destined to be washed out for a second time, spun through the litigation machine which so effectively rinses all parties of their resources, not least by the legal costs incurred (although this time your ex is acting in person—maybe they couldn't find solicitors to take the case on, or maybe they've run out of money and you're the most likely target for some more funds). Surely you could apply to strike out the application on the grounds it is entirely without merit?

Dead & buried

Not according to the Court of Appeal decision in *Roocroft v Ball* [2016] EWCA Civ 1009, [2016] All ER (D) 91 (Oct). In that case, which was heard just prior to FPR 2010, r 9.9A coming into force, Lady Justice King, delivering the lead judgment with which LJJ Elias and Kitchin agreed, held that the reasoning (as she interpreted it) of Lord Wilson in the Supreme Court decision of *Wyatt v Vince* [2015] UKSC 14, [2015] 2 All ER 755 meant that any (apparently express) power by FPR 2010, r 4.4(1) to strike out a set aside application under **[AUTH QUERY: wording OK?]** was dead and buried.

In his decision in *MA v Roux* [2024] EWHC 1917 (Fam), Francis J sets out why he disagrees with King LJ's reasoning. He goes on to find a route to hold that just such a power of summary determination is very much alive and kicking.

Wyatt determined that there was no summary power to determine a full financial remedies application for want of real prospects of success; there was power only to strike out such a claim for abuse of process, which includes it not being legally recognisable. In *Roocroft*, counsel for the respondent had submitted that the reasoning in *Wyatt* only applied to full financial remedy order applications. King LJ, however, dismissed that argument at para [43]:

> '43. [I]n his speech at paragraph [27] Lord Wilson said:
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> "…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…"'

It follows that the rule, and therefore Lord Wilson's observations, apply equally to an application to set aside a financial remedy order on the grounds of material misrepresentation/non-disclosure as to an application for financial remedy.'

That, with respect, reads as something of a logical non sequitur: Lord Wilson was explaining that the lesser is a part of the greater. He was not saying that his reasoning *excluding* that power extended beyond applications for a final financial remedy order. Nonetheless, the Court of Appeal's decision meant that absent earlier settlement, such set aside applications were thereafter destined to traverse the full financial remedy procedure to a contested final hearing, likely listed for several days, at great stress and expense to the parties, not to mention the drain on court resources.

Moreover, given the absence of any power of summary determination, when negotiating settlement, the balance would be heavily tipped in favour of the applicant, no matter the strength of their claim.

Discretionary determination

It is important to look at the fuller quotation from para [27] of Lord Wilson's opinion, of which King LJ only quoted one small part in her para [43] (above). The quoted passage continues as follows:

> '"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 s 25(1) of the [Matrimonial Causes Act 1973], 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 subs (2). The determination of an

application by a court which has failed to have regard to them is unlawful: *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424, [1985] FLR 813, at 437 and 822 respectively, Lord Brandon of Oakbrook. The meticulous duty cast upon family courts by s 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...

"I suggest that FPR 2010, r 4.4(1) has to be construed without reference to real prospects of success... The touchstone is, in the words of paragraph 2.1(c) of the Practice Direction, whether the application is legally recognisable."'

In that same paragraph, Lord Wilson also emphasised that there is no power of summary judgment akin to that in civil proceedings under the CPR 1998, r 24.2:

'[I]t is clear to me that, with respect, Jackson LJ was wrong to insinuate into the concept of abuse of process in FPR 2010, r 4.4(1)(b) 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 FPR of any rule analogous to CPR 1998, r 24.2 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 FPR.'

The decision in *Roocroft* meant that all set aside applications which were 'legally recognisable' must be allowed to continue, no matter their merit. The door was thrust wide open to, for example, unscrupulous litigants to launch unmeritorious claims so as to attempt to leverage 'ransom' settlements. Moreover, while in civil litigation it is well established that a party cannot raise any claim that they ought properly to have raised the first time around (*Henderson v Henderson* (1843) 3 Hare 100, [1843-60] All ER Rep 378), here we face the horrifying spectre of potentially unlimited applications by a disgruntled party. That cannot have been what was intended by the Supreme Court (or, indeed, the Court of Appeal).

Roocroft was heard by the Court of Appeal on 5 July 2016. FPR 2010, r 9.9A and its associated Practice Direction, PD 9A, did not come into force until 3 October 2016, some three months later. This new rule codified a bespoke mechanism for applying to set aside a financial remedies order 'where no error of the court is alleged'.

Para 13.8 to PD 9A states as follows:

'13.8 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, eg, 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...'

That highlighted passage flies in the face of the decision in *Roocroft*. It most certainly seems a desirable power for the court to possess given the public interest in finality of litigation. By analogy, permission to appeal is a valuable filtering stage which weeds out unmeritorious appeals at an early stage. Surely there must be some parallel mechanism for set-aside applications?

MA v Roux was an appeal from a circuit judge who found herself bound by *Roocroft* to allow Mr Roux's application to proceed (without commenting here upon its underlying merits). Francis J held otherwise. As a starting point, he interpreted *Wyatt* differently to King LJ. He dealt with this aspect of the case as follows:

'[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.'

However, continuing at para [36], he held that such thinking alone would not permit the appeal to succeed:

'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.'

Interpretation of a decision

The doctrine of precedent requires careful consideration as to which decision the court is following, where two higher courts have on the face of it made differing decisions on the same point. Francis J dealt with this as follows. He held that while Supreme Court decisions were binding on all lower courts, *Roocroft* was an *interpretation* of a decision of the Supreme Court, and hence, even though he disagreed with that interpretation, he was bound by it (para [37]).

Francis J therefore went on to consider the effect of FPR 2010, r 9.9A and PD 9A, which post-dated *Roocroft*. Holding that these provisions make clear that there is indeed a power of summary determination of applications to set aside a final financial remedies consent order, at para [47], he set out the court's powers when considering such an application:

'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 PD 9A 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.'

This is a welcome decision of the Divisional Court which will have wide-reaching effect. The court can now weed out unmeritorious applications at an early stage without the stress and cost of further proceedings and there is a realistic hope of finality and avoiding a wash-spin-repeat cycle in financial remedies litigation. NLJ

Nicholas Fairbank, barrister at 4PB (4pb.com). Newlawjournal.co.uk