Neutral Citation Number: [2016] EWCA Civ 1009

Case No: B4/2014/2552

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Chester Civil and Family Justice Centre
His Honour Judge Barnett

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2016

Before :

LORD JUSTICE ELIAS
LORD JUSTICE KITCHIN
and
LADY JUSTICE KING

- -

Between :

Helen Louise Roocroft	**Appellant**
- and -	
Moya Margaret Ball **(Personal Representative of the Estate of Carol Ann Ainscow (Dec'd))**	**Respondent**

- -
- -

Sally Harrison QC and **Samantha Hillas** (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Richard Todd QC and **Charles Eastwood** (instructed by **Glaisyers Solicitors**) for the **Respondent**

Hearing date : 5 July 2016

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Approved Judgment

Lady Justice King :

1. This is an appeal against an Order made by His Honour Judge Barnett sitting at the Family Court at Chester on 11 July 2014. By his order the judge dismissed the application of Helen Roocroft (the appellant) to set aside a Consent Order made in financial remedy proceedings following the dissolution of her civil partnership with Carol Ainscow, deceased, (the deceased).

2. The basis of the application to set aside the consent order (which was made after the death of the respondent) was that the deceased had been guilty of material non-disclosure in the financial remedy proceedings. The judge refused the application of the deceased acting through her personal representatives (the estate) to strike out the application to set aside the order. The judge choose instead to use his case management powers under Family Proceedings Rules 2000 r.1.4, r4.1(3) and r.4.4 (FPR) to dismiss the appellant's application, which he regarded as being "without merit", and "doomed to failure". The judge said that allowing the case to proceed would be contrary to the court's overriding objective and his (the judge's) duty actively to case manage an application.

3. The issues before this court are:

   (i) whether the judge was wrong in law in summarily dismissing the appellant's claims and

   (ii) if not, whether he nevertheless failed to consider the correct test in the context of an application to set aside an order on the grounds of material non-disclosure.

The Facts

4. The appellant and the deceased were in a same sex relationship for a number of years prior to entering into a civil partnership in December 2008. The appellant's case is that the relationship began in 1991 when she was 17 years old and when the deceased was 33 years old. There is some dispute as to the nature of the relationship in the early years, but it seems common ground that by 1999 the couple were in a stable and enduring relationship which ultimately led to a civil partnership.

5. The deceased was the breadwinner, being a businesswoman with commercial interests in property investment and development. The deceased paid for the luxurious lifestyle that the couple enjoyed. The appellant was notionally employed by the deceased but took no day to day role in the company. The "salary" paid by the respondent's company represented a personal allowance of £2,300 per calendar month and was paid from 1999 until the couple separated ten years later.

6. Between July 2005 and April 2009 the couple underwent what was, ultimately, unsuccessful fertility and IVF treatment in both the UK and abroad.

7. The couple separated in September 2009. The appellant moved out of the matrimonial home in October 2009 and her "employment" by the deceased was terminated.

8. In August 2010 the civil partnership was dissolved. The appellant has been in a new relationship since the time of the separation and there is a child born to that relationship following IVF treatment.

9. In the immediate aftermath of the separation and during the proceedings set out below feelings inevitably ran high as between the appellant and the deceased. There was however a rapprochement prior to the deceased's death to the extent that they had resumed their friendship and the appellant says that the deceased once again provided financial assistance to the appellant. The respondent disputes this and the matter will await determination at the new hearing. The deceased died intestate aged 55 on 19 September 2013.

The Proceedings

10. In September 2009, following their separation and at a time when neither party had instructed legal representatives, the deceased made the appellant an offer to settle future financial remedy proceedings. She proposed to give the appellant a lump sum of £200,000, together with maintenance of £35,000 per annum for four years. The appellant, without the benefit of legal advice, refused the offer, saying that she had no way of knowing whether the offer made was fair. Accordingly, on 5 December 2009 the appellant issued her petition to dissolve the civil partnership followed, on 7 July 2010, by an application for financial remedy and maintenance pending suit, which interim sum she fixed at £4,000 per calendar month to include provision for her legal costs.

11. On 19 August 2010 the deceased filed her statement in response to the maintenance pending suit claim. Her statement said that her capital assets amounted to £628,917 net. She said that she had a gross income of £55,312 per annum and a pension with the CETV value of £250,000. For her part the appellant, in her statement of 16 July 2010, asserted that the deceased was a woman of considerable wealth and made reference to her inclusion in the 2009 "Times Rich List".

12. On 23 August 2010 the maintenance pending suit application came before DJ Newman. He ordered the deceased to pay the appellant £1,250 per calendar month and made no provision for legal costs. Whilst Mr Todd QC, on behalf of the estate, sought to make submissions as to why, in his submission, the failure to provide for legal costs had been appropriate, he was unable to tell the court the actual reasons given by the District Judge and no note or transcript of the judgment is available.

13. The appellant filed a Notice of Appeal against DJ Newman's decision, which appeal was listed to be heard before HHJ Barnett on 2 December 2010. In the absence of any funding for legal services on 5 November 2010, the appellant filed a notice for acting in person. In the meantime negotiations continued between the appellant and the deceased and led, on 26 November 2010, to the deceased's solicitors writing to the court to say that the parties had reached an agreement and were seeking an order by consent. The terms of the proposed order were that the deceased would pay the appellant a lump sum of £162.000 by way of instalments and periodical payments of £18,050 per annum for two years, with a dismissal of the appellant's claims thereafter. The order was to include provision that, upon termination of the periodical payments order, the appellant agreed not to make any claims against the deceased's estate upon her death.

14. As is required by FPR 2010 r9.26, a statement of information was filed on behalf of the deceased, accompanied by the application for a consent order. The statement of information was broadly in accordance with the statement which had been filed for the maintenance pending suit application. The deceased's gross income was stated to be £55,312 per annum with net assets of £766,000 and pension assets of £285,000.

15. The draft consent order was put before HHJ Barnett. As set out in his judgment, the judge had a number of reservations about the proposed order, one being that the draft order was silent as to the outstanding appeal but, more importantly, the judge was concerned in relation to what "appeared to be the relatively modest nature of this proposed award" in circumstances where he was aware that it had been central to the appellant's case that the deceased was a wealthy woman. The judge was also conscious that he was being asked to approve this consent order when the appellant was no longer professionally represented.

16. The judge made these concerns known to the parties, (in what way is unclear from the judgment). In response, on 1 December 2010, the deceased's solicitors wrote to the court enclosing an amended draft order with a letter saying that they believed that, whilst the appellant continued to act in person, she had sought advice on the agreement. The deceased's solicitor's letter said that both parties were anxious to conclude matters. The appellant also wrote to the court. This letter, whilst written in the first person as from the appellant, was in fact drafted by the deceased's solicitors. The letter confirmed that the appellant was aware that she could seek independent legal advice on the terms of the order and that she had "had legal advice on the content of the documentation". She too, the letter said, had wished to conclude matters.

17. The order was approved and sealed by the judge on 1 December 2010. On 6 December 2011 the deceased signed off accounts for the year ending 30 June 2010, the draft of which accounts had not been disclosed in the financial remedy proceedings. The appellant says that these showed shareholder funds of £5.5m and an annual salary for the deceased of £150,000. The respondent disputes this.

18. Following the deceased's death on 19 September 2013, Moya Ball, (the estate), the personal representative of the deceased, obtained Letters of Administration, *Ad Colligenda Bona,* permitting them to administer her estate. On 1 May 2014 the appellant issued an application to set aside the consent order on the basis of material non-disclosure at the time of the making of the order.

19. Three days before the listed directions hearing, counsel's note prepared on behalf of the estate was filed and served; in it the estate 'applied' for the application to be struck out by the court's own motion. On 9 June 2014 the parties duly appeared before the judge for the directions. As indicated in paragraph [2] above, following submissions from counsel, the judge, in a judgment promulgated on 11 July 2014, dismissed the appellant's claim, refused permission to appeal and ordered the appellant to pay the deceased's costs in the application.

20. On 18 September 2014 Vos LJ refused permission to appeal on the papers. Matters had moved on considerably however by the time the matter came before Lady Justice Black on 30 January 2015 for an oral renewal of the appellant's application for permission to appeal as by then it was known that the Supreme Court was soon to

give judgment in three relevant cases, namely Wyatt *v Vince (Nos1 and 2)* [2015] 1 WLR 1228(*Wyatt v Vince)*; *Sharland v Sharland* [2015] UKSC 60 *(Sharland)* and *Gohil v Gohil* [2015] UKSC 61 (*Gohil).*

21. As was anticipated by Black LJ, since the granting of permission to appeal on 30 January 2015, the Supreme Court has addressed the issues which arise in this case by way of two decisions relating to setting aside on the basis of non- disclosure, (*Sharland* and *Gohil)* and a decision on striking out and summary dismissal in cases brought under the Family Procedure Rules 2010, *(Wyatt v Vince).* This has been followed by a consequential amendment to FPR rule 4.4 in respect of applications to strike out together with a corresponding amendment to FPR Practice Direction 4A. The decisions in these three cases have provided much needed clarification of the law in relation to applications such as the present and accordingly they were the focus of oral submissions before the court. It was agreed by all that the appeal should be determined against the backdrop of these three important decisions. It must be borne in mind that the judge had had to approach the case at a time when the law lacked the clarity now found in the speeches of the Supreme Court in the three cases cited above.

The Judgment

22. The judge concluded that although the appellant had dispensed with the services of her solicitors as she was unable to afford to continue to engage them absent a legal fees order, she had nevertheless had some advice about the content of the consent order. In reaching that conclusion the judge can only have been relying on the reference in the letter drafted by the deceased's solicitors which referred to her having had "legal advice on the content of the documentation", a phrase which may or may not have been deliberately ambiguous and which, in my view is open to a number of interpretations. It was against that backdrop that he considered the case in support of the appellant's application to set aside the consent order on the basis of the deceased's alleged 'material non-disclosure at the time'. The judge emphasised that:-

> [36] ….It is clear that Ms Roocroft was "concerned at the time of the agreement was made that the disclosure made by [Ms Aisscow] was inadequate and possibly inaccurate", but nevertheless, and, with the advantage of legal advice, she agreed the terms of the settlement and the Order.'
>
> "[37] This is not the territory of "unknown unknowns". Rather it is, at its highest, a case of a "known, unknown". It was known or at least asserted, that Ms Ainscow was a wealthy woman; what was unknown was the precise extent of her wealth."

23. The judge then quoted a passage from Court of Appeal judgment in *Gohil v Gohil* [2014] EWCA Civ 274 which held that, in the absence of admitted non-disclosure, a judge needs to conduct a fact finding exercise and make a finding of material non-disclosure. When applying this to the present case the judge said:

> "[38]…. In my judgment a separate finding of fact exercise is wholly unnecessary in this case. In my judgment I can proceed on the basis of Ms Roocroft's own case as it was presented for

> the purposes of the MPS [Maintenance Pending Suit] Application, namely that Ms Ainscow was a multi-millionaire business woman and the £30m+ referred to in The Times was an indicator of the substance of the assets and income. "

24. The judge went on:

> "[40] In my judgment the present application was doomed to failure. It is important to emphasise that mere non-disclosure is insufficient: the non-disclosure must be material. Frankly I cannot understand how it can be said that there was material non-disclosure. Certainly there had not been full disclosure but Ms Roocroft was aware of all the salient facts and, at risk of repeating myself, the essence of her case was that Ms Ainscow was a very wealthy woman. Nevertheless with the benefit of legal advice from an experienced and able team, Ms Roocroft accepted a settlement and agreed the Order the terms of which can best be described as incongruent with what Ms Roocroft was alleging to be the extent of Ms Ainscow's wealth. Further 3 ½ years have passed since the Order was made, and save as to £7,000, its terms have been fully implemented."

25. At the end of the day the judge's expressed view that the appellant had had advice from an "experienced and able legal team" at the time of the settlement has no effect on the outcome of this appeal. I am however uneasy about this aspect of the judgment as, on my reading, it is far from clear the extent to which the appellant was advised on the settlement and it is hard to see how, if she had the benefit of such a team, she was able to pay for their services and why it was necessary or appropriate (on any view) for the deceased's solicitors to have drafted the letter she sent to the court in reply to the judge's enquiries about the proposed consent order.

26. The judge then turned to consider the invitation of the deceased to strike out the appellant's application at this the directions hearing. The judge declined to do so but instead he dismissed the application by an alternative route saying:

> "[43]…..I do not consider that the present application can be characterised as "frivolous" or scurrilous". In my judgment not only does it have no prospects of success, the present application is doomed to failure. The application could, therefore, be struck out. However, I prefer to approach the matter in a slightly different way. I bear in mind firstly the overriding objective in rule1.1 of the FPR and, in particular the need to save expense and deal with cases proportionately.. Secondly, I have regard to my duty to actively manage cases including references in rule1.4(2) of the FPR to (a) deciding promptly which issues require a full investigation (b) deciding the order in which the issues are to be resolved, and (c) the need to deal with as many aspects of the case that I can at this hearing. Finally, I have regard to my general powers of case management as set out in particular, in rule 4.1(3) of the FPR."

27. Whilst the judge did not refer in his judgment to the jurisdictional basis for striking out an application, in choosing the words "frivolous" and "scurrilous" he was undoubtedly referring to FPR PD4A 2.2 (see below).

28. The judge thereafter reiterated that he had all the evidence he needed to determine the matter as he was "content" to approach the matter as advanced by the appellant in the MPS hearing (i.e. that the deceased was a woman of significant wealth). The judge, whilst noting that the matter had been listed for directions, said that the hearing he had conducted had taken substantially longer and was "no mere directions hearing".

29. The judge concluded that :

> "[43]..... In my judgment the present application is without merit and, therefore, doomed to failure. In my judgment, it would be contrary to the overriding objective and my duty to actively manage this case to allow it to proceed further. Accordingly I use my case management powers and dismiss the application.

The Grounds of Appeal

30. The appellant's grounds of appeal in summary are:

    i) (Grounds 1 – 4) that the judge was wrong in law and on the facts, summarily to dismiss the application in any event and certainly not without notice.

    ii) That the judge failed to apply the correct test of materiality in the context of an application to set aside an order on the grounds of material non-disclosure

    iii) The judge misdirected himself in respect of the competing interests: (a) to ensure that the parties do not mislead the court (b) to uphold agreements freely entered into and (c) in ensuring the finality of litigation.

31. The estate has filed a respondent's notice seeking to uphold the order on the additional grounds that:

    i) The application should have been struck out pursuant to FPR 4.4

    ii) The appellant failed in her duty promptly to apply for the order to be set aside.

32. The appellant's case, presented by Miss Harrison QC with economy and skill, is, that regardless of the recent developments in the law, the judge erred in a number of key respects. The recent Supreme Court pronouncements however now render any opposition to the appeal unarguable.

33. Mr Todd QC on behalf of the estate submits that the Supreme Court decisions have no impact on the case and the judge was entitled to conduct what Mr Todd called an 'abbreviated hearing' which should not be confused with summary judgment. Further, he says, the delay in issuing the proceedings meant that the appellant had failed in her

'duty of promptitude' and that in itself entitled the judge summarily to dismiss the application.

Strike out and Summary Judgment

34. The material part of FPR r 4.4(1) provides:

> "(1) … the court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the application;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings …"

35. The accompanying Practice Direction FPR PD4A has, since 17 July 2015, provided at paragraph 2:-

> "Examples of cases within the rule
>
> 2.1 The following are examples of cases where the court may conclude that an application falls within rule 4.4(1)(a) –
>
> (a) those which set out no facts indicating what the application is about;
>
> (b) those which are incoherent and make no sense;
>
> (c) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable application against the respondent.
>
> 2.2 An application may fall within rule 4.4(1)(b) where it cannot be justified, for example because it is frivolous, scurrilous or obviously ill-founded.
>
> 2.3 An answer may fall within rule 4.4(1)(a) where it consists of a bare denial or otherwise sets out no coherent statement of facts.
>
> 2.4 (omitted)
>
> 2.5 The examples set out above are intended only as illustrations.
>
> 2.6 Where a rule, practice direction or order states 'shall be struck out or dismissed' or 'will be struck out or dismissed' this means that the order striking out or dismissing the proceedings will itself bring the proceedings to an end and that no further order of the court is required.

36. Prior to that date (namely 17 July 2015) paragraph 2.4 had contained what was intended to provide further assistance with interpretation:

> "2.4 A party may believe that it can be shown without the need for a hearing that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document). In such a case a party concerned may make an application under rule 4.4"

37. In Wyatt *v Vince (Nos1 and 2)* [2015] 1 WLR 1228, the Supreme Court considered the scope of applications to strike out in financial remedy proceedings against the backdrop of FPR r4.

38. In the leading speech Lord Wilson discussed the way in which FPR 4.4(1) had been modelled on CPR 3.4(2) and the accompanying practice direction PD4A.2(1) (2) modelled on CPR PD 3A (4) (5).

39. Lord Wilson then went on to identify what is a critical divergence in the powers provided under the two sets of rules, namely that CPR r 24.2 expressly confers upon the court an additional power to give summary judgment in appropriate cases. There is no such equivalent power under the FPR 2010. Lord Wilson regarded such an omission as having been 'deliberate' (para [27]) given the nature of (in particular) financial remedy proceedings. He said:

> "[36] ……..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 p 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."

40. Lord Wilson explained [para24] that CPR PD 3A links the power to strike out and to give summary judgment in civil cases. Paragraph 1.7 of PD3A provides as follows:-

> "A party may believe that it can be shown without the need for a hearing that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document). In such a case a party concerned may make an application under rule 3.4 or Part 24 (or both) as he thinks fit.

It can be seen then that the active part of the paragraph is in identical terms to FPR PD4A 2.4 notwithstanding that the family rules have no power of summary judgment analogous to CPR r 24.2

41. Lord Wilson went on to identify the proper construction of the rule as follows:-

> "[27] 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 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."

42. Lord Wilson, in recognising the "limited reach" of rule 4.4(1), was not ruling out the possibility, in appropriate circumstances, for there to be a form of abbreviated hearing saying:

> "[29] Although, however, the wife's appeal against the strike-out should succeed and her application should proceed, it is essential at this stage to conduct a provisional evaluation of the issues. For, by rule 1.4(1) of the Family Rules, the court must further the overriding objective by actively managing cases, which, by rule 1.4(2)(b)(i)(c), includes promptly identifying the issues, isolating those which need full investigation and tailoring future procedure accordingly. This exercise will dictate the nature, and in particular the length, of the substantive hearing….."

43. Mr Todd reminds the court that *Wyatt* v *Vince* was concerned with a strike out application in the context of a full ancillary relief claim. The present application is not therefore, he submits, subject to the same imperatives as are imposed by the application of section 25 MCA 1973 (matters to which the court is to have regard in deciding how to exercise its powers) as was the wife's application in *Wyatt v Vince.* Whilst that is undoubtedly the case, in his speech at paragraph [27] Lord Wilson said:

> "……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….."

44. 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.

45. The following matters can therefore be drawn from *Wyatt v Vince* for the purposes of the present case:

    i) 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.

    ii) The Court's power to strike out an application pursuant to FPR 4.4(1) is of 'limited reach' and has to be construed without reference to "real prospects of success", it follows that an application is not an abuse of process for the purposes of FPR r 4.4(1)(b) simply by reason of the fact that it has no real prospect of success.

    iii) An application has 'no reasonable grounds' for the purpose of FPR r 4.4(1)(a) if it is not legally recognisable in the sense that it is incoherent or the applicant has remarried.

    iv) There is no summary judgment procedure under the Family Proceedings Rules. That does not however mean that the court is constrained from exercising its case management powers to direct there to be some form of abbreviated hearing following a provisional evaluation of the issues.

Conclusions as to Strike out / Summary judgment

46. In his judgment the judge concluded that the application to set aside could be struck out as it "not only has no real prospect of success" but was "doomed to failure". In the light of *Wyatt v Vince* that was undoubtedly an error of law. The judge however cannot possibly be criticised for believing that PD4A2.4 which was then part of the practice direction, gave him power to strike out a claim where he believed there to be no real prospect of success. In the event, the error was not in itself fatal as the judge declined to follow the 'strike out' route and rather proceeded down the case management/summary judgment route.

47. Mr Todd sought to persuade the court that the judge had not gone beyond the powers given to him by FPR r 4.4(1) submitting that the judge had not been guilty of granting the estate summary judgment, but had conducted an abbreviated hearing, a procedure endorsed by Lord Wilson. With respect to Mr Todd, the difficulty he has with that submission is that, whilst the judge spoke of using his case management powers, the reality was that he couched his judgment in the language of summary judgment in terms deprecated by Lord Wilson by saying "In my judgment not only does it have no real prospects of success, the present application is doomed to failure". Further he said that as the application was in his view "without merit and doomed to failure" it would be "contrary to the overriding objective and my duty actively to manage this case to allow it to proceed further".

48. In my opinion the appellant is right to characterise the decision as "summary judgment", and accordingly a course for which the judge had no jurisdiction under the rules. In my judgment the outcome cannot be salvaged by applying the nomenclature of 'abbreviated hearing' to what took place at the directions hearing. If a cross check is needed it can be gained from a consideration of what is in fact the proper approach to be adopted by the courts when faced with an application to set aside on the grounds of material non-disclosure. If an abbreviated hearing is to be appropriate and fair not only must proper notice be given to the parties allowing them the opportunity to make submissions as to the issues to be considered and the form such a hearing should take, but it must be shown to have satisfied the requirements of *Sharland v Sharland* [2015] UKSC 60 *(Sharland)* and *Gohil v Gohil* [2015] UKSC 61 (*Gohil)* discussed below.

Material Non-Disclosure.

49. The court will only set aside a consent order following either a finding or admission of material non-disclosure. The Supreme Court recently considered the impact of fraud on a financial settlement (*Sharland*) and (having first considered the role of the rule in *Ladd v Marshall* [1954] 1 WLR 1489), confirmed the proper approach to be taken by courts in cases of alleged material non-disclosure (*Gohil).*

50. The cases speak for themselves and what follows does not purport to be any form of guidance or gloss on the clear statement of principle found in the cases, Lady Hale having confirmed that the observations made by her apply equally to same sex partners in a civil partnership as to a husband and wife in divorce proceedings, *Sharland [1.]* I have simply attempted to set out, against the backdrop of the speeches of Lady Hale (*Sharland)* and Lords Wilson and Neuberger (*Gohil*), the key features against which the judge should have approached the appellant's application to set aside the consent order when faced with the allegation of non-disclosure.

51. It is a well-known rule of public policy that a financial agreement reached between the parties following separation cannot oust the jurisdiction of the court to make orders about their financial arrangements. Whilst the court will inevitably be heavily influenced by what the parties have agreed, nevertheless the court conducts an independent assessment to enable it to discharge its statutory function under the Matrimonial Causes Act 1973 (MCA 1973).

52. The principle that each party owes a continuing duty to the other party and to the court to make full and frank disclosure applies just as much to exchanges leading to a consent order as to contested hearings. Without such full and frank disclosure the court cannot discharge its duty under section 25(2) MCA 1973. *Sharland [22]* and *Gohil [22]* when approving a proposed consent order.

53. It follows that one party cannot "exonerate" the other from complying with his or her duty to make full disclosure to the court and a recital such as that found on the face of the order in *Gohil* (Recital 14), will be of no legal effect. The recital in that case said in uncompromising terms: "the [wife] believes that the [husband] has not provided full and frank disclosure of his financial circumstances (although this is disputed by the [husband]), but is compromising her claims in the terms set out in the consent order despite this, in order to achieve finality." *Gohil [7][22]*

54. Before a case for setting aside an order can be made good, the court must be satisfied that there was non-disclosure and that the misrepresentation or disclosure was material to the decision made at the time, resulting in the making of an order which was substantially different from the order it would have made if disclosure had taken place. *Sharland[24] & [32]*

55. Lord Neuberger said in *Gohil:*

> "[49] The issue as to whether there has been non-disclosure is a question of fact "involving an evaluative assessment of the available admissible evidence. Such a question is, of course, common in civil, and family litigation and under our common law system the rule is that it can only be answered by a judge after hearing from live witnesses as well as looking at the documents……"

56. Lord Neuberger went on to identify possible exceptions to the rule identifying as relevant "cases where the evidence is so clear that there is no need for oral testimony" saying:

> "[49] …..attempts to seek summary judgment in relation to such disputed issues often fail even when the evidence appears very strong, because experience shows that a full investigation at trial with witnesses occasionally undermines what appears pretty clearly to be the truth when relying on documents alone: see e.g. Sir Terence Etherton C in *Allied Fort Insurance Services Ltd v Creation Consumer Finance* Ltd [2015] EWCA Civ 841 at [81], [89], [90] and the cases which he cites. Accordingly in practice it is only when the documentary evidence is effectively unanswerable that "summary judgment" can be justified.
>
> "[50] there is also a principled reason behind this rule, namely that, at least where there is a bona fide dispute of fact upon which oral testimony is available, a party is normally entitled to a trial where he and his witnesses can give evidence, and he can test the reliability of the other party and/or her witnesses by cross-examination."

57. The use of the expression "summary judgment" by Lord Neuberger in this passage should, in my judgment, be regarded as having been a generic term to cover a way of dealing with a range of cases in short form across civil and family jurisdictions and should not, in my judgment, be confused with the technical term as found in CPR Part 24 and discussed in paragraph 39 above. As I have already observed, in *Wyatt v Vincent* the Supreme Court made it clear that under the FPR there is no summary judgment procedure of the type found in the Civil Procedure Rules and Lord Neuberger was plainly not intending to suggest otherwise.

58. The court can however as endorsed by Lord Wilson in *Sharland*, use its case management powers to direct that there be some form of abbreviated hearing. Earlier in *Wyatt v Vince* Lord Wilson identified this type of active case management as including "promptly identifying the issues, isolating those which need full investigation and tailoring future procedure accordingly". (para [29]). An abbreviated hearing is however precisely that, and does not avoid the need for the court to be satisfied on an application to set aside a consent order, that there has (or has not) been non-disclosure and, if so, whether it was material in the sense that it had led to the making of a substantially different order from that which would have been made following full disclosure.

59. The non-disclosure must of course be material, but the burden of establishing the necessary materiality shifts depending upon the court's finding as to the nature of the disclosure. Lord Neuberger said in *Gohil*:-

> "[44]……. where a party's non-disclosure was inadvertent, there is no presumption that it was material and the onus is on the other party to show that proper disclosure would, on the balance of probabilities, have led to a different order; whereas where a party's non-disclosure was intentional, it is deemed to be material, so that it is presumed that proper disclosure would have led to a different order, unless the party can show, on the balance of probabilities that it would not have done so.

See also *Sharland [33]*.

It follows that the nature of the non-disclosure, i.e. deliberate or inadvertent, may have a significant impact upon the outcome of the case. Whilst establishing deliberate non-disclosure presents an example of the type of case suggested by Lord Wilson as being suitable for an abbreviated hearing where the documents present an overwhelming case, equally it may well be an area which needs specific investigation through oral evidence and cross examination even though it has already been established per adventure that there has in fact been non-disclosure.

60. The task facing the judge in the present case was therefore to:

i) Decide if there had been non-disclosure on the part of the deceased and if so whether it was deliberate on the one hand or innocent/inadvertent on the other. Such a finding would ordinarily be reached by the judge having heard oral evidence as well as considering the documents although in certain circumstances the court may use its case management powers to conduct some form of abbreviated hearing

ii) If the non-disclosure was found to be deliberate, then it is presumed to be "material" and the original consent order would be set aside unless the party who has failed to disclose can prove, on the balance of probabilities, that the order would have been substantially the same even had full disclosure been made.

iii) If on the other hand the non-disclosure is found to have been inadvertent or innocent, the burden is on the party seeking to set aside the order to prove that the non-disclosure was 'material', that is to say that had proper disclosure been

> made the court would have made a substantially different order justifying the setting aside of the consent order.

What then was the judge's approach in this case?

61. The judge sought to cut through the investigation as to whether there had been non-disclosure on the part of the deceased by declining to conduct a finding of fact hearing, finding it to be "wholly unnecessary". He did this by saying that he was approaching the application of the appellant 'at its highest' by proceeding on the basis of the case as presented by the appellant at the MPS hearing, namely that the deceased was a multi-millionaire. He confirmed this approach in a further judgment on the issue of costs when he said "I have been prepared to make assumptions for the purposes of my analysis and conclusions without deciding what the extent or otherwise of disclosure had been…"

62. The judge having declined to conduct a finding of fact hearing indicated his approach to the non-disclosure determined the application, saying:

> "[40] In my judgment the present application is doomed to failure. It is important to emphasise that mere non-disclosure is insufficient: the non-disclosure must be material. Frankly I cannot understand how it can be said there was material non-disclosure. Certainly there had not been full disclosure but [the Appellant] was aware of all the salient facts and, at risk of repeating myself, the essence of her case was that [the deceased] was a very wealthy woman. Nevertheless and with the benefit of legal advice from an experienced and able team, [the Appellant] accepted a settlement and agreed the Order the terms of which can best be described as incongruent with what [the Appellant] was alleging to be the extent of [the deceased's] wealth"

63. In seeking to support the judge's approach Mr Todd submits that the judge was right to have dealt with the case by what he termed an abbreviated hearing. The case, he submits, is wrongly categorised as a non-disclosure case; rather he submits that the appellant's grievance is with her own decision not to challenge the value of the deceased's corporate interests. Mr Todd says that, all in all, the entire appellant's case is that it is "all terribly unfair". Mr Todd's submission reflected precisely the approach adopted by the judge who had accepted a submission made by counsel on behalf of the estate that, whilst up-to-date accounts showing a different picture from those disclosed in the financial remedy proceedings had not been disclosed, they could have been obtained at modest cost from companies house. This approach cannot in my judgment be right and wrongly had the effect of relieving the deceased of her obligation to disclose by placing the burden on the appellant to investigate.

64. Miss Harrison submits that the judge lost sight of the continuing duty of full and frank disclosure and instead became focused upon the fact that, notwithstanding that the appellant was dissatisfied with the disclosure, she had, with the benefit of some unascertained level of legal advice, agreed to the making of the order.

65. I accept Miss Harrison's submission. The judge seems to have regarded the fact that the appellant had agreed to the making of the order, notwithstanding her reservations about the honesty of the deceased's disclosure, as fatal to her application to set aside. On any view that was an error of law. *Gohil* is unequivocal in saying that one party cannot exonerate the other from complying with his or her duty to make honest disclosure to the court. The judge in effect approached the analysis on the basis that, as the appellant did not believe that the deceased had made full disclosure but had nevertheless consented to the order, her consent had rendered the deceased's lack of disclosure irrelevant, not 'material' and therefore not being susceptible to being set aside.

66. In my judgment the judge fell into error in part because he conflated the law in relation to non-disclosure with the *Edgar v Edgar* [1981] 2 FLR 19 line of cases where a party seeks to avoid a bargain, ordinarily for reasons other than non-disclosure. Had the judge not regarded the fact of the agreement having been made by the appellant as effectively fatal to her case, the judge would have appreciated that, prior to determining whether the court would have made an order substantially different absent the non-disclosure, it was necessary to determine whether there had in fact been non-disclosure and, if so, the extent of the same and whether it was deliberate of inadvertent. If, as was undoubtedly being put in this case, the deceased had been guilty of unscrupulous and deliberate non-disclosure to defeat/reduce the claim of the appellant, it would then have been for the estate to satisfy the judge, on the evidence, that even had proper disclosure been made and the appellant been aware of the true extent of her wealth, the order made would nevertheless have been the same.

67. The extent to which the judge did or did not rely on his assumption that the appellant received legal advice from her 'able and experienced team' is unclear although it would seem clear that it was a factor at the forefront of his mind. On my reading of the judgment the extent to which the appellant received legal advice is based on supposition. If the parties still find themselves unable to reach a compromise following this judgment, I would not wish any further proceedings to be conducted upon the basis that a finding of fact that the appellant had received legal advice at any particular stage was a finding which binds a court of first instance.

68. Miss Harrison submits that the judge had to investigate the evidence as it was presented by the deceased at the time of the consent order and by failing to do so the appellant had been deprived of an opportunity of satisfying the court that there had been material non-disclosure justifying the setting aside of the order.

69. I agree. The appellant put before the judge evidence that suggested that, regardless of the capital position, the deceased's income at the time of the consent order was three times that which she had stated in her MPS statement or her Statement of Information. The judge himself had had reservations about the terms of the original court order and the quantum of settlement. Further, the letter of reassurance sent at his behest and which opened the door to the making of the consent order, had been drafted not by the appellant herself or by her legal advisers but by the solicitors for the deceased. These features alone should in my opinion have alerted the judge to the need to investigate whether there had in fact been non-disclosure and if so whether it was fraudulent or innocent.

70. Mr Todd submits that the delay in making the application should on its own prove fatal to the application. I do not agree. The application is not an appeal subject to time limits and as such mere delay cannot justify the striking out of an application pursuant to FPR r 4.4(1)(c) (failure to comply with a rule, practice direction or court order). Further, it is hard to see how, in the event that a finding was made that the deceased deliberately misled the appellant and the court, that conduct could be saved by a delay on the part of an appellant to have discovered the fraud. In the present case the appellant denies there was any delay once she became aware of the alleged non-disclosure.

71. Mr Todd further reminds the court of the importance of encouraging agreements between parties and the need of finality in litigation. No one could gainsay such a proposition but it should be put in context as it was only a matter of months ago in *Hayward v Zurich Insurance Company* [2016] UKSC 48 in a case concerning a fraudulent personal injuries claim that Lord Clarke said:

> "[22] I am not persuaded that the importance of encouraging settlement, which I entirely agree is considerable, is sufficient to allow [the respondent] to retain moneys which he only obtained by fraud."

Conclusion

72. In my judgment the appeal must be allowed, the judge having erred in summarily dismissing the application. This was not an abbreviated hearing but rather had all the hallmarks of summary judgment, a disposal which was not open to the judge. In any event, any true abbreviated hearing could only have taken place against the backdrop of the factors identified in *Sharland* and *Gohill*. For the reasons set out above, in my judgment, the judge did not intend to conduct an abbreviated hearing and did not have the facts available to him which would have allowed him to have adopted such a course in this case, no matter how much such an approach is to be encouraged in order to promote the overriding objective.

73. Whilst the judge rightly held that he did have jurisdiction to strike out the claim, the test that he would have applied when he looked at the case prior to *Wyatt v Vince (*namely no reasonable prospect of success) was wrong and it is now clear that this case was not one where making an order striking out the claim would have been right.

74. The judge was wrong not to have made findings of fact as to the non-disclosure. By approaching the case as he did on the basis of taking the appellant's case at its highest, he failed to put in place the necessary building blocks prior to a consideration of materiality, namely identifying the fact and extent of disclosure. Without that information how can the court determine whether, with the benefit of full disclosure, the outcome would have been substantially the same?

75. Finally the judge failed to address the issue of materiality against a finding of whether the non-disclosure was deliberate or inadvertent, with the consequent failure to consider the proper evidential approach to ascertaining whether the outcome would have been substantially different absent the non-disclosure; rather the judge

peremptorily dismissed any question of the non-disclosure having been material on the basis that the appellant had agreed the order knowing there had been non-disclosure and in doing so fell into the trap of exonerating non-disclosure on the respondent's part.

76. For all these reasons I would allow the appeal and remit the case to be listed in the first instance for directions before a High Court judge. Unhappily, given the costs implications of the order, there is no alternative to such an outcome because, as Lord Wilson said in *Gohil " [18(a)]* The Court of Appeal has long recognised that it is an inappropriate forum for inquiry into disputed issues of non-disclosure raised in proceedings for the setting aside of a financial order "

Lord Justice Kitchin :

77. I agree.

Lord Justice Elias :

78. I also agree.