Hilary Term
[2015] UKSC 14
On appeal from: [2013] EWCA Civ 495; [2013] EWCA Civ 934

JUDGMENT

Wyatt (Appellant) *v* Vince (Respondent)

before

Lady Hale, Deputy President
Lord Clarke
Lord Wilson
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

11 March 2015

Heard on 8 and 9 December 2014

Appellant	*Respondent*
Philip Cayford QC Simon Calhaem Miriam Foster (Instructed by Mishcon de Reya)	Martin Pointer QC Simon Webster Rebecca Bailey-Harris (Instructed by Schillings)

LORD WILSON: (with whom Lady Hale, Lord Clarke, Lord Hughes and Lord Hodge agree)

INTRODUCTION

1. It will be convenient to describe the appellant and the respondent as the wife and the husband even though they were divorced 22 years ago.

2. The circumstances of the case are highly unusual. The suit for divorce proceeded in the Sunderland County Court and, within weeks of the grant of the decree absolute on 26 October 1992, the court file was transferred to the Gloucester and Cheltenham County Court. But that court has either destroyed or mislaid the file. The current internal instruction to courts is to retain divorce files for 100 years but to allow them to strip them of most documents (including, oddly, the petition) after 18 years from the date of the final order. The fact that not even a stripped file has been found suggests that the whole file has been mislaid. Furthermore neither party presently holds any document relating to the divorce proceedings other than the decree absolute. In 2011 the wife issued an application within the proceedings for financial orders, in particular for an order that the husband should make payment of a lump sum to her in satisfaction of all her claims. She also applied for an order that the husband should make interim periodical payments to her in sums equal to her estimated costs of the substantive application pursuant to the decision of the Court of Appeal in *Currey v Currey (No 2)* [2006] EWCA Civ 1338, [2007] 1 FLR 946. The husband cross-applied for an order that the wife's substantive application, which had been fixed to be heard for three days beginning on 15 April 2013, be struck out pursuant to Rule 4.4 of the Family Procedure Rules 2010, S1 2010/2955, ("the family rules"). On 14 December 2012 Mr Nicholas Francis QC, sitting as a deputy judge of the High Court, Family Division, dismissed the husband's cross-application and, on the wife's application, ordered the husband to make interim periodical payments to her, indeed "directly to [her] solicitors", at the rate of £31,250 per month for four months (ie a total of £125,000) beginning on 2 January 2013 ("the costs allowance order"). The husband appealed to the Court of Appeal against both orders. By orders dated 13 June 2013 that court (Thorpe, Jackson and Tomlinson LJJ, [2013] EWCA Civ 495, [2013] 1 WLR 3525), set aside the orders of the deputy judge; struck out the wife's substantive application; and ordered that, of the £125,000 which by then the husband had paid in full, the wife should repay to him such sum as exceeded the state of her account with her solicitors on 17 January 2013, which amounted to an order for repayment of £36,677 ("the repayment order"). The court explained

its striking-out order and its repayment order in judgments delivered on 8 May and 13 June 2013 respectively.

3. The wife appeals against the orders made by the Court of Appeal and thus seeks the reinstatement of the orders of the deputy judge. Her appeal raises the following questions:

   (a) What is the extent of the jurisdiction to strike out a spouse's application for a financial order under Rule 4.4 of the family rules?

   (b) In the light of the factors relevant to the determination of the wife's application did the Court of Appeal err in striking it out?

   (c) If the answer to (b) is yes, what case management directions would be proportionate to the unusual circumstances of the wife's application?

   (d) Irrespective of the answer to (b), did it err in setting aside the costs allowance order and/or in making the repayment order?

THE PARTIES' PRESENT CIRCUMSTANCES

4. The wife is aged 55. According to her written evidence, which (as the husband accepts) should be assumed to be true for the purposes of his strike-out application, she is in poor health. She lives in a house with three or four bedrooms in Monmouth which in 2010 she purchased from the local authority on a discounted basis under the Right to Buy scheme for £60,000 by virtue of a mortgage in that amount. The house is in a poor state of repair.

5. The wife has the following four children.

   (a) Emily, who is aged 36. Emily was born to the wife prior to the marriage by a man other than the husband. Emily's father never maintained her. Upon the marriage the husband and the wife treated her as a child of the family. Throughout her life Emily has encountered difficulties which the wife has tried to help her to surmount. Emily lives in the house in Monmouth. She has a daughter, aged four, who lives mid-week with the wife's mother and at weekends and during holidays in the house in Monmouth.

(b) Dane, who is aged 31. He is a child of the marriage. Thirteen years ago, when he became 18, Dane moved from the house in Monmouth in order to live with the husband and to work for his company.

(c) and (d) Robin, who is aged 21, and Jessie, who is aged 18. They were born to the wife long after her separation from the husband by a man who has never maintained them. They live with the wife in the house in Monmouth.

6. The wife subsists partly on her wages generated during periods of low-paid employment, albeit punctuated by periods of ill-health, and partly on state benefits. The three adult children resident in her household appear to make no more than modest contributions to its running expenses.

7. The husband is aged 53. He has achieved brilliant success and is clearly a remarkable man. For several years following the breakdown of the marriage he was, as I will explain, a new-age traveller, protesting loudly against nuclear weapons and, generally, in favour of green solutions to society's needs. His long-standing interest in green energy, together with his innate scientific ingenuity, led him in due course, and from the smallest beginnings, to develop the commercial supply of wind power. He is now the sole shareholder of Ecotricity Group Ltd, a company which, through others, provides green electricity to at least 70,000 homes and businesses in the UK from its fleet of turbines. The value of his company is at least £57m. He lives with his second wife, their small son and Dane in a Georgian hill fort overlooking Stroud.

THE HISTORY

8. Early in 1981, when she was aged 21, the wife met the husband, who was aged 19. He and some friends were renting a house in Stafford. In the summer 1981 the wife moved with Emily, then aged two, into the house and began to cohabit with him. She enrolled on a degree course at North Staffordshire Polytechnic but, after one term, abandoned it. She says (but he denies) that he persuaded her to abandon it.

9. On 18 December 1981 the parties were married. Thereafter they largely subsisted on state benefits. Late in 1982 they moved to Norfolk. By then the wife was pregnant. She says (but he does not recall) that she enrolled on a degree course at the University of East Anglia but was constrained to

withdraw from it when unable to make arrangements for the care of Emily and the coming baby.

10. On 2 May 1983 Dane was born. Late in 1983 the family moved to rented accommodation in Lowestoft but early in 1984 the husband moved into a bed-sitting room elsewhere in the town. If brief subsequent reunions alleged by the wife (but denied by the husband) are ignored, their marital cohabitation then came to an end: it had subsisted for just over two years.

11. Then began the husband's life as a traveller. It was to continue for about eight years. In 1984 he left Lowestoft in an old ambulance which had been converted into a camper van. Although the circumstances are disputed, it seems that, during that first year of separation, Dane, albeit aged only one, was spending much of his time with the husband on the road rather than with the wife and Emily in Lowestoft. The wife says (but the husband disputes) that in the summer 1984 she and Emily joined the husband and Dane in the ambulance on a site in Bath and that in the following summer, after Dane had on any view gone back to live permanently with her, she and the children joined the husband at Stonehenge for the summer solstice. Then she moved with the children to Sunderland.

12. From 1985 to 1995 the life of the wife and children, and indeed of the husband, was profoundly unsettled.

    (a) In 1985 the wife obtained work in a women's refuge in Sunderland.

    (b) In 1985/86 the husband drove to Spain with a new partner in a 30 year old fire engine which he had converted so as to burn diesel rather than petrol. He stayed there for a year.

    (c) Following his return to England, the husband rejoined the travelling community but visited Sunderland on various occasions in order to see the children.

    (d) In 1988 the wife moved with the children to Durham and makes an assertion (about which the husband has no recollection) that she then enrolled on a course at Durham University but had to withdraw from it for lack of his financial support of herself or the children.

(e) In June 1989 both the husband and the wife and children attended the Glastonbury festival. The wife introduces it as a "reconciliation" but on any view they did not resume cohabitation there.

(f) At around the same time, allegedly at the husband's request, the wife left Durham with the children in order to live on a local authority travellers' site in Swindon. The husband describes the site as akin to a rubbish tip. When not travelling during the summer, he had begun to live with his partner on a site in Stroud, to which the wife and children moved for a few weeks.

(g) For almost two years between 1989 and 1991 the wife and children occupied travellers' sites in the west country. The three of them lived from hand to mouth. In the autumn 1991 the wife obtained a job picking fruit for a fortnight and this (so she says but the husband disputes) explains why the children went temporarily to live with him in a trailer on another site near Stroud. The wife says that, at the end of the fortnight, the husband refused to return them to her and it seems that, by a ruse and with the aid of her stepfather, the wife spirited them back to Sunderland, where she and the children set up home again.

(h) In 1992 the wife and children moved to a house in the Forest of Dean. Shortly afterwards the wife struck up a relationship with the father of Robin and Jessie, who was working there temporarily. He returned to his home in Somerset prior to Robin's birth and, when late in 1995, he went to the wife's home in order to visit Robin, Jessie was conceived. In his judgment delivered on 8 May 2013, Thorpe LJ described the wife's relationship with the father of Robin and Jessie as "tantamount to marriage" and therefore suggested that, during its currency, any claim by the wife against the husband would have carried little credibility; but, with respect and as the husband accepts, that description by the learned lord justice represented a substantial misunderstanding of the evidence.

(i) Early in 1994 Emily, who was then aged 15 and who was beginning to present the difficulties which have since beset her, moved to live with the husband and his partner. But, after about a year, she returned to live with the wife.

(j) Shortly after Emily's departure from it, the wife, Dane and Robin were evicted from the house in the Forest of Dean and, according to the wife

(as to which the husband has no recollection), moved to live in a shelter for the homeless.

(k) In 1995 the local authority let to the wife the house in Monmouth which she has since bought from it. There she, Emily, Dane, Robin and, following her birth in 1996, Jessie all began to reside; and there they continued to live from hand to mouth, largely on state benefits. A Hazard Awareness Notice issued by the local authority in 2010 stated that the house was heated by only two electric fires; that there was no hot water in the kitchen; that the house was damp; and that the back door could not be locked.

LEGAL PROCEEDINGS

13. Meanwhile, in 1991, there had been legal proceedings between the parties. They were precipitated by the wife's removal of the children back to Sunderland. The husband issued an application in the Sunderland Family Proceedings Court for an order that both children should reside with him. No copy of the court's order survives but it is agreed that early in 1992 the justices instead ordered that the children should reside with the wife. It may also have made an order for contact, perhaps for reasonable contact, in favour of the husband. The parties agree that the justices also ordered that the husband should make nominal periodical payments to the wife for the benefit of the children. For the general removal of the ability of a court to exercise its jurisdiction to make an order for child maintenance was not to take effect until a year later: section 8(3) of the Child Support Act 1991.

14. Early in 1992, in the Sunderland County Court, the wife issued the petition for divorce which resulted in the decree absolute dated 26 October 1992. Did she include in her petition applications for the full range of financial orders for the benefit of herself? In the absence of any copy of it, we can make only an educated guess – which is that she did so. Such was the usual practice. But it matters not for, in the absence of her remarriage (which would have precluded her doing so: section 28(3) of the Matrimonial Causes Act 1973 ("the 1973 Act")) it was open to her to initiate applications for them in 2011 or at any time. Then the potentially important further question arises: assuming that in her petition she included applications for financial orders, what orders, if any, were then made upon them? The husband asserts a clear recollection that, following the transfer of the proceedings to the Gloucester and Cheltenham County Court, it ordered that "[he] did not have to pay [the wife] any money". His asserted recollection is of course, consistent with each of three hypotheses:

(a) that the court made only a nominal order for the husband to make periodical payments to the wife; or

(b) that its order on her applications was "no order" or (which amounts to the same thing) that it never addressed them; or

(c) that it dismissed all the wife's applications; in that event it would not be open to her to bring the present proceedings.

The Court of Appeal considered it "likely" that no order was sought or made, ie it favoured hypothesis (b). I agree. The court added that hypotheses (a) and (c) were possible. Hypothesis (a) is indeed a significant possibility but in my view hypothesis (c) is so remote a possibility as entirely to be discounted. Notwithstanding the shortness of the marital cohabitation and its expiry eight years previously, I cannot imagine that the court would have dismissed the financial applications of the wife (who was also a young mother) in the absence either of her consent or of a capital payment by the husband, neither of which is suggested to have been forthcoming.

FAILURE TO SUPPORT THE CHILDREN

15. The wife strongly relies on the husband's lack of financial support of Dane until 2001. She also relies on his failure to support Emily from 1984 onwards save during the year when she lived with him. But in respect of Emily, treated as a child of the family, the husband would be able to point out that the extent of his obligation to maintain her at any time during her minority would have been influenced by the extent, if at all, to which he had at an earlier time assumed responsibility for maintaining her: section 25(4)(a) of the 1973 Act.

16. The wife contends that, from about 1994, the husband gave pocket money to Dane during periods of contact; that once he bought a computer and a desk for him; but that, despite repeated pleas on her part, he never made payments to her for the support of Dane or indeed of Emily. The husband's case differs only in degree. He contends that he made occasional cash payments to the wife of up to £200; that from time to time he provided her with second-hand cars; and that there was a period of unspecified length during the later years when he provided her with regular monthly cash payments of £200.

17. Although for present purposes the wife's case must be taken at face value, it happens in any event to be virtually common ground that during all those years the husband did not provide the wife with any substantial payments of

maintenance for either of the two children; and that she struggled to maintain a home for them in circumstances of real privation bordering upon poverty. For most of those years the husband's failure to pay maintenance reflected his inability to pay it. It is clear that, in making only a nominal order in favour of the children the justices in Sunderland in 1992 were satisfied that he was unable to provide support. Equally in March 1997 the Child Support Agency, to whom the wife had applied for support, assessed the husband's liability to support Dane at nil. The wife adds that both in 1994 and in 1996 she consulted solicitors in an attempt to extract maintenance for herself and the children from the husband but that, no doubt for the same reason, nothing came of it.

18. Meanwhile the husband was taking those first steps which, in retrospect, can be seen to have led to his phenomenal success. One year early in the 1990s, at the Glastonbury festival, he fixed a windmill to the top of an old pylon, installed batteries at its foot, plugged in four large mobile telephones and offered festival-goers a wind-powered phone service. Then he went to Cornwall to inspect Britain's first wind turbines. Thereupon he and a partner began to make wind-monitoring equipment. Then in 1996, following the grant of planning permission and with the aid of a substantial bank loan, he and two others, through a limited company, erected a wind turbine on the top of a hill at Nympsfield, near Stroud, by which they generated and sold electricity. Suddenly the company began to generate a substantial net pre-tax profit: it was £236k in 1997 and it doubled within the following three years. There is no need to chart the later expansion of the husband's businesses. The fact is, therefore, that it was only in the final years of Dane's minority that the husband was in a position to pay substantial maintenance for him.

STRIKE-OUT IN FAMILY PROCEEDINGS

19. Rule 4.4 of the family rules, which contains the power to strike out an application in family proceedings, has no parallel in any of the preceding sets of rules which governed what are now called family proceedings. There has always been an inherent jurisdiction, at any rate in the High Court, to protect the court by striking out material abusive of its process; but there is no value in today considering its extent. Paragraph (4) of Rule 4.4 provides that paragraph (1) does not limit any other power of the court to strike out a statement of case but no one suggests that the deputy judge had an inherent jurisdiction to strike out which went wider than that set by paragraph (1). In my view family courts may, like civil courts, now safely proceed on the footing that, were their power under the rules not to go so far as to enable them to strike out the statement, their inherent jurisdiction, if any, would go no further: *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004, para 42. The family rules came into force on 6 April 2011 and, prior to the decision of the Court of Appeal in the present case, there was no

reported authority on the construction of Rule 4.4. So far as is material, the rule, which does not apply to proceedings in relation to children, 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 …"

20. Rule 4.4(1) is modelled upon Rule 3.4(2) of the Civil Procedure Rules 1998, S1 1998/3132, ("the civil rules"), which came into effect on 29 April 1999. Indeed, of the words in Rule 4.4 quoted in para 19 above, only one differs from those in Rule 3.4(2), which refers at (a) to bringing or defending the "claim" rather than the "application". It would be odd if in family proceedings the words in Rule 4.4(1) extended to a situation to which, if transposed to civil proceedings, the words in Rule 3.4(2) would not extend.

21. Although the principal task is to construe the words "no reasonable grounds" and "abuse of the court's process" in (a) and (b), Rule 4.4(1) poses a preliminary conundrum. The power is to strike out a "statement of case" if that statement is an abuse or (which in particular generates the conundrum) if it "discloses" no reasonable grounds. Rule 4.1(1) provides that, in Part 4, "statement of case" means the whole or part of an application form or answer. The form to be used in applying in divorce proceedings for a financial order is Form A: see Rule 5.1 and Table 2 in Practice Direction 5A supplementary to that rule.

22. The conundrum stems from the fact that Form A in effect requires the applicant to do no more than to identify the names and addresses for service of herself and the respondent and to specify the financial order or orders for which she is applying. The form does not enable the applicant there to set out the grounds of her application. Instead she will no doubt do so in her financial statement, which, save as otherwise directed, must be in Form E and must be filed and served at least five weeks prior to the first appointment: Rules 9.14 and 5.1 and Table 2 in Practice Direction 5A. It would therefore make no sense to ask, as a literal construction of the rules would require, whether the

Form A discloses reasonable grounds for bringing the application: for it never discloses any grounds at all. We must do our best to make the rules operate sensibly and I suggest that, pending possible reconsideration by the Family Procedure Rule Committee either of Rule 4.1(1) or of Rule 4.4(1)(a) and (b), the phrase "statement of case" in (a) and (b) should be taken to refer to the statement in support of the application for a financial order as well as to the application in Form A itself.

23. So, then, to the principal task, namely the construction of the words "no reasonable grounds" and "abuse of the court's process". In this respect subparagraphs 1 and 2 of paragraph 2 of Practice Direction 4A, which supplements Rule 4.4, are helpful. They say:

> "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."

Subparagraphs 1 and 2 are closely modelled on subparagraphs 4 and 5 of paragraph 1 of Practice Direction 3A, which supplements Rule 3.4 of the civil rules. Apart from having, intriguingly, chosen to replace "vexatious" with "frivolous" in subparagraph 2, the makers of the family rules chose to adopt the examples given by the makers of the civil rules in effect word for word. One might, in the light of this parallel, even more confidently have inferred that the makers of the family rules intended that their reference to "no reasonable grounds" and "abuse of the court's process" should carry the same meaning as in the civil rules.

24. The civil rules, however, expressly confer a further power, namely to give summary judgment. Rule 24.2 empowers the court in civil proceedings to give summary judgment if it considers that the claimant or defendant has no real prospect of successfully prosecuting or defending the claim and if there is no other compelling reason why the case should be disposed of at a trial. In the civil rules Practice Direction 3A draws a link between the powers to strike out and to give summary judgment in civil proceedings. Paragraph 1.2 explains that they are two distinct powers which may be used to achieve the summary disposal of issues which do not need full investigation at trial. Paragraph 1.7 is as follows:

> "A party may believe he can show without a trial 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 the party concerned may make an application under Rule 3.4 or Part 24 (or both) as he thinks appropriate."

It is indeed common practice in civil proceedings to join an application to strike out under Rule 3.4 with an application for summary judgment under Rule 24.2. But in *Swain v Hillman* [2001] 1 All ER 91 at p 92 Lord Woolf MR observed that the power under Rule 24.2 was wider than the power under Rule 3.4 and that under the latter, unlike the former, the general focus of the court was only upon the statement of case which was alleged to disclose no reasonable grounds for bringing the claim. Or, as my Lady, then Hale J, crisply put it three months later, "the essence of a strike out is that one does not look at the evidence on the claim": *Bridgeman v Brown*, Court of Appeal, 19 January 2000, All England Official Transcript, p 4.

25. Now arises the complication. On the one hand the family rules contain no power analogous to Rule 24.2 of the civil rules to give summary judgment. On the other hand paragraph 2.4 of Practice Direction 4A, which supplements Rule 4.4 of the family rules, provides:

> "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 the party concerned may make an application under rule 4.4."

The paragraph is of course modelled on paragraph 1.7 of Practice Direction 3A in the civil rules, set out at para 24 above.

26. In giving the leading judgment in the Court of Appeal, with which Jackson and Tomlinson LJJ agreed, Thorpe LJ based the decision to strike out the wife's application on Rule 4.4(1)(a), namely on the absence of any reasonable grounds for bringing it. But, in giving a concurring judgment with which in turn Thorpe and Tomlinson LJJ also agreed, Jackson LJ identified an alternative basis for the decision. He suggested that it was unfortunate that the family rules contained no rule equivalent to Rule 24.2 of the civil rules; that the effect of the omission could not be that an application for a financial order which had no real prospect of success had to proceed to trial; that the solution lay in Rule 4.4(1)(b), namely that an application which had no real prospect of success was an abuse of the court's process; and that the wife's application was a classic example of it.

27. As a result of the fuller argument with which this court has been presented, 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 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. 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 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.

28. Rule 1.2 of the family rules requires the court to seek to give effect to the overriding objective when it interprets any of the rules or exercises any power thereby given to it. Rule 1.1(1) defines the overriding objective as enabling the court to deal with a case justly, which, by rule 1.1(2)(b) and (e), includes dealing with it in ways proportionate to the nature of the issues and allotting to it an appropriate share of the court's resources. Such should therefore be the court's objective in determining whether the wife's statement of case falls foul of Rule 4.4(1)(a) and/or (b) and if so whether (being perhaps only nominally a separate question) to exercise its resultant discretion to strike it out. No one argues that the wife's Form A and supporting affidavit represent an abuse of the process of the court save in the extended sense proposed by Jackson LJ; if his proposal is wrong, subparagraph (b) does not apply. In my view subparagraph (a) is equally inapplicable: for, keeping closely in mind that it does not encompass inquiry into the existence or otherwise of a real prospect of success, one cannot say that the form and the affidavit fail to disclose either a legally recognisable application or, in any other relevant sense, reasonable grounds for bringing it.

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) and (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. No doubt the High Court judge who, in the present case, directed, even prior to the filing of evidence on either side, that the wife's application should be fixed to be heard for three days was seeking to help the parties to procure an early fixture. But, by so doing, he was not

discharging his duty under Rule 1.4. Family courts have developed specific procedures for the determination of certain types of financial application. The obvious example is the determination of an application on a summons to a respondent to show cause why the order should not be in the terms with which, prior to an attempt to resile from them, she or he had agreed either following the separation *(Dean v Dean* [1978] Fam 161) or prior to the marriage (*Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467). In both cases, however, the court stressed that the show-cause procedure did not obviate the need for the court to discharge its duty under section 25 of the 1973 Act, powerful though the effect of the agreement would, within that exercise, probably prove to be. Indeed Sir James Munby, President of the Family Division, has recently directed that a spouse attempting to reject an award made following her or his submission to arbitration by a member of the Institute of Family Law Arbitrators should also be subject to the show-cause procedure: *S v S (Arbitral Award: Approval*), *Practice Note,* [2014] EWHC 7 (Fam), [2014] 1 WLR 2299. I do not suggest that the wife's application is suited to the show-cause procedure but, in the light of the analysis of the issues to which I now turn, it may well be suited to tight directions pursuant to Rule 1.4.

ANALYSIS OF THE ISSUES

30. The wife's application faces formidable difficulties.

(a) The marital cohabitation subsisted for scarcely more than two years.

(b) It broke down 31 years ago.

(c) The standard of living enjoyed by the parties prior to the breakdown could not have been lower.

(d) The husband did not begin to create his current wealth until 13 years after the breakdown.

(e) The wife has made no contribution, direct or indirect, to its creation.

31. Furthermore, (f), the wife's delay in bringing the application appears to be inordinate. She can explain the first 13 years of it: there was no point in pressing financial applications against the husband while he had no money. But what about the delay for the 14 years from say 1997 until 2011, when her

application was issued? She says that, for the first several of those years, she did not realise that the husband was becoming wealthy and that, for example, his continued failure to maintain Dane led her to assume that there was no significant change in his financial circumstances. But that point takes the wife to no further than 2001 when, on becoming an adult, Dane went to live with the husband. She points to the legacy of discouragement from seeking financial provision from the husband which arose from the justices' nominal order in 1992, from the agency's nil assessment in 1997 and from unproductive consultations with local solicitors in 1994 and 1996. But there is no explanation for much of the more recent delay.

32. Consistently with the potentially life-long obligations which attend a marriage, there is no time-limit for seeking orders for financial provision or property adjustment for the benefit of a spouse following divorce. Sections 23(1) and 24(1) of the 1973 Act provide that such orders may be made on granting a decree of divorce "or at any time thereafter". Yet there is a prominent strain of public policy hostile to forensic delay. The court will look critically at explanations for it; and, even irrespective of its effect upon the respondent, will be likely, by reason of it and subject to the potency of other factors, to reduce or even to eliminate its provision for the applicant. Nevertheless it remains important to address its effect upon the respondent. In some cases, albeit not in the present, a respondent can show that he has assumed financial obligations or otherwise arranged his financial affairs in the belief that the applicant would make no claim against him and that he has done so in a way which, even if it were possible, it would not be reasonable for him to put into reverse. Sometimes, instead, he can point to factual issues of which the dimming of memories or the disappearance of witnesses over the period of the delay no longer permits accurate determination. But, were this wife's application to proceed to substantive determination, the need for resolution of factual issues would be slight. All that is said on behalf of the husband in the present case is that the delay has deprived him of the chance of establishing that, around 1992, the wife's financial applications were dismissed; but, as already indicated, a dismissal is so unlikely that it should be entirely discounted.

33. Confronted by the difficulties identified at (a) to (f) in paras 30 and 31 above, what might the wife assert so as to carry her application forward to possible success? It is, standing alone, insufficient that the husband is now so wealthy that (as has readily been agreed) he can meet whatever award, if any, might reasonably be made in her favour and there is no need for any exploration of his financial circumstances. But the wife asserts needs, both for a better home for herself and her family and, in the light of the severe limitations on her earning capacity, for a fund out of which to maintain herself for the rest of her life. These, with questionable forensic wisdom, she quantifies at £0.55m

for the home and £1.35m for the fund, and thus at a total of £1.9m. Even at this stage one can say that, in the light of the negatives, an award approaching that size is out of the question. It is a dangerous fallacy, albeit currently propounded by those who favour reform along the lines of the Divorce (Financial Provision) Bill currently before the House of Lords, that the current law always requires rich men to meet the reasonable needs of their ex-wives. As Thorpe LJ said in *North v North* [2007] EWCA Civ 760, [2008] 1 FLR 158, at para 32, "… it does not follow that the respondent is inevitably responsible financially for any established needs… [h]e is not an insurer against all hazards…" In order to sustain a case of need, at any rate if made after many years of separation, a wife must show not only that the need exists but that it has been generated by her relationship with her husband: see *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, para 138 (Lady Hale). Apparently the wife aspires to argue that, but for the thwarting of her attempts in 1981, 1982 and 1988 to secure a degree and thereby to raise her earning capacity, her needs would not have reached their current level. In this regard she would also argue that her responsibility for the care for Dane and Emily over the years has inhibited her establishment of a higher earning capacity; but the husband would counter by reference to her responsibility for the care of her two younger children and to her poor health over the years. It is not at this stage clear to me that the wife will be able to sustain her claim on the basis of need.

34. But the wife has a point which may prove to be much more powerful. The deputy judge addressed it in detail but unfortunately the Court of Appeal omitted to refer to it. In the discharge of its duty under section 25 of the 1973 Act the court will be required, by subsection (2)(f), to have regard to "the contributions which each of the parties has made … to the welfare of the family, including any contribution by looking after the home or caring for the family". Such contributions are not limited to those made prior to the separation or even during the marriage. The wife strongly relies on

    (a) her care of Dane from 1985 to 2001;

    (b) her care of Emily from 1984 to 1994, from 1995 to her becoming an adult in 1997, and perhaps in the light of her difficulties even thereafter;

    (c) the absence of any significant financial or other contribution on the part of the husband to their care during those years; and

(d) the conditions of poverty in which she was constrained to provide such care to Dane and Emily during those years.

The wife suggests that it is no answer to this part of her case for the husband to point to his inability to make significant payments for the children for most of those years, as recognised by the justices in 1992 and by the agency in 1997. The husband (so she contends) mischaracterises her case as one in which she seeks either to investigate the amount of child support that he should have paid during those years or indirectly to appeal against, for example, the determination of the agency in 1997. Her case is no more than that, for whatever reason, the heavy burden fell upon her and, in effect, upon her alone.

35. In *Pearce v Pearce* (1980) 1 FLR 261 the parties separated in 1969 and for nine years the wife cared single-handedly for the three children. Until 1977 the husband was an undischarged bankrupt and made no financial contribution to the running of the wife's household, which was sustained by state benefits. In 1978 the husband inherited from his father a house worth £19,000 and liquid capital of £15,000. The wife then applied for an order for a lump sum. The Court of Appeal upheld an award to her of a lump sum of £12,000. Ormrod LJ, with whom Orr LJ agreed, said, at p 264, that courts would not encourage applications long after the divorce but that the justice of the case might require an award notwithstanding a lapse of time. He continued:

> "One has here a husband who has never paid a penny piece for the maintenance of his former wife or his three children since, at the latest, 1969 and it means that the wife has lived in great difficulty on social security with all the responsibilities for bringing up these three girls unaided, all that length of time, so that on the merits, in my judgment, she has a strong case. Her claim on the merits certainly goes a long way to eliminating the contrary factor, the lapse of time."

Ormrod LJ added, at p 266:

> "The husband has never attempted to discharge his obligations in relation to these three children. The whole responsibility has been placed on the wife, whose life must have been made very difficult all these years. Is there any reason whatever why, now that the husband has come into a certain amount of money, she

> and the children should not have the opportunity of benefiting to some extent from it?"

Finally Ormrod LJ held, at p 267, that, in the light of his lack of contribution to the wife's household, the fact that the husband's capital had come to him by inheritance long after the separation was no ground for exempting it from partial redistribution to the wife and that the award gave her "an opportunity of perhaps living in something a little bit better than the poverty which she has been living in all these years". For another example of a short marriage, a substantial contribution on the part of the wife in caring for the children, a 30-year delay in her bringing her application (following an overseas divorce) and a significant capital award, see *M v L (Financial Relief After Overseas Divorce*) [2003] EWHC 328 (Fam), [2003] 2 FLR 425.

36. In my view this court should direct the swift referral of the wife's application to a Financial Dispute Resolution ("FDR") appointment before a judge of the Family Division, who, in the absence of settlement, will indorse or impose the time estimate of the substantive hearing and, in accordance with Rule 9.17(9)(b) of the family rules, will direct the fixing of dates for it. Subsequently, at the Pre-Trial Review, the allocated trial judge will decide "which issues need full investigation and hearing" for the purposes of Rule 1.4(2)(c)(i) and, in the light of his decision, will insert the time for cross-examination of each party (to be measured, surely, in hours rather than days) into the template prepared in accordance with the Statement on the Efficient Conduct of Financial Remedy Final Hearings issued, in relation to the High Court, by Mostyn J, with the authority of the President, on 5 June 2014. It may however be helpful to suggest that the major issues requiring limited investigation by way of oral evidence seem at this stage to be the wife's delay on the one hand and the disparate contributions to the care of the children on the other. These are, to my mind, the two magnetic factors. They pull in opposite directions and the question may ultimately prove to be whether, in the light also of the five difficulties identified in para 30 above, the wife's delay is so potent a factor as not just to reduce but even to eliminate what might otherwise have been awarded to her by reference to contributions and possibly also to needs. Had it been relevant, as Jackson LJ considered, to ask whether the wife's application had a real prospect of success, my opinion would have been that it had a real prospect of comparatively modest success, perhaps of an order which would enable her, like the wife in the *Pearce* case above, to purchase a somewhat more comfortable, and mortgage-free, home for herself and her remaining dependants.

THE COSTS ALLOWANCE ORDER

37. If, as the Court of Appeal held, the wife's application should be struck out, it followed, subject to consequential issues about whether to make a repayment order, that the husband's appeal against the costs allowance order should be allowed. But the husband had argued to the Court of Appeal, and, albeit faintly, continues to argue before this court that, even were her application not to be struck out, the deputy judge should not have made that order.

38. The court now has a statutory jurisdiction to order a party to an application for financial orders in divorce proceedings to make payments to enable the other to pay for legal services for the purposes of pursuing or defending it. It is set out in section 22ZA of the 1973 Act, inserted by section 49(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and it came into force on 1 April 2013. Such provision no longer has to be cast in the form of maintenance pending suit or interim periodical payments. It is a free-standing jurisdiction under which the court can order payment of a capital sum albeit, if it so directs, to be made by instalments. Under subsection (3) of section 22ZA the court cannot make an order unless satisfied that otherwise the applicant for it would not reasonably be able to obtain appropriate legal services and, under subsection (4), that in particular she (or he) is not reasonably able to secure a loan to pay for the services and is unlikely to be able to obtain them by granting a charge over any assets recovered as a result of the application.

39. But the deputy judge made his order prior to 1 April 2013. So he was exercising the jurisdiction which was first recognised by Holman J in *A v A (Maintenance Pending Suit: Payment of Legal Fees)* [2001] 1 WLR 605 and the existence of which was indorsed by the Court of Appeal in the *Currey* case cited at para 2 above. There I said, at para 20:

> "In my view the initial, overarching inquiry is into whether the applicant for a costs allowance can demonstrate that she cannot *reasonably* procure legal advice and representation by any other means. Thus, to the extent that she has assets, the applicant has to demonstrate that they cannot reasonably be deployed, whether directly or as the means of raising a loan, in funding legal services. Furthermore … she has also to demonstrate that she cannot reasonably procure legal services by the offer of a charge upon ultimate capital recovery."

So there is a close parallel between the criteria articulated in the *Currey* case and those set out in section 22ZA (3) and (4) of the 1973 Act.

40. The evidence accepted by the deputy judge was that the wife's solicitors had agreed to extend credit to her for services rendered to her until his determination of her application for a costs allowance order but that, were the application to fail, the partners of the firm would meet in order to determine whether, and if so on what basis, they could continue to act for her. According to the husband, this evidence should have led the deputy judge to decline to be satisfied that the solicitors would not continue to act for her until the determination of her application, at any rate in the event that she were to execute a charge in their favour upon whatever she might recover of the sort held to be lawful in *Sears Tooth (A Firm) v Payne Hicks Beach (A Firm*) [1997] 2 FLR 116. I disagree. In circumstances in which the wife already owed the solicitors about £88,000 for their work done on her behalf on an application in which her ultimate recovery from the husband was likely to be comparatively modest and conceivably even non-existent, it was unreasonable to consider that they would, still less should, continue to act for her on that basis against an evidently litigious husband who was causing substantial escalation of the interlocutory costs in a manner which clearly caused him no difficulty.

41. So the deputy judge's costs allowance order should be restored and the Court of Appeal's repayment order set aside. The court has received energetic argument about the repayment order. It was for repayment of such sum as exceeded the wife's liability to her solicitors on 17 January 2013, being the date when the husband filed his notice of appeal and therefore when, in the opinion of the Court of Appeal, her solicitors should have appreciated the vulnerability of their security under the order. The wife's liability to her solicitors on that date was in the sum of £88,323 so the effect of the order was for repayment of £36,677. The four instalments totalling £125,000 paid by the husband between January and April 2013 had been paid into the client account of the wife's solicitors and, by the date of the hearing in the Court of Appeal had, save for £2539, been released into their office account against invoices delivered to the wife both for £88,323 and for the work more recently done on her behalf referable to the husband's appeal.

42. It may be helpful briefly to notice the wife's argument that, even had the Court of Appeal been correct to have concluded that the costs allowance order should not have been made, it was not open to it to direct repayment of any part of the £125,000 other than £2539. The argument is that the wife could not be ordered to make repayment because she had never received any part of the sum paid; that, while it remained in their client account, the wife's solicitors held it for the benefit not of her but of the husband (hence his

entitlement to repayment of £2539); and that, when the balance of the fund was released in stages into their office account, it became the property of the solicitors. In support of this argument the wife cites *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, in which the House of Lords held that a solicitor for a borrower might hold borrowed money in trust not for the borrower but for the lender subject to the solicitor's power to apply it by way of loan to the borrower for such purposes as had, to his knowledge, been agreed with the lender. I cannot accept this analysis of the costs allowance order. It provided for the husband to make interim periodical payments to the wife and indeed to make them directly to her solicitors or, in other words, via them. Had he not duly paid under the order, it would have been for her to enforce it. When the instalments were paid into their client account, the solicitors therefore held them for her benefit albeit subject to the terms of the order. If an order for payment made in respect of legal services under section 22ZA of the 1973 Act or made under the preceding jurisdiction recognised in the *Currey* case has been wrongly made, the appellate court must at least have jurisdiction to order that sums paid under it should be repaid; otherwise such orders would, to the extent implemented, in practice be unappealable. But, as by its order for only partial repayment the Court of Appeal recognised, an appellate court has a discretion whether to exercise its jurisdiction to order repayment in the wake of a successful appeal. Where the payments have been applied to the purchase of legal services in accordance with the order, the court should in that regard carefully consider all the circumstances, including whether the payer, say a husband, should have applied for a stay of the order and whether, in the light of his circumstances and the wife's ability to make repayment to him, it is reasonable to exercise the discretion to order repayment whether unconditionally or subject to a prohibition against enforcement against her without further leave. The exercise should certainly not be equated with that of determining the incidence of costs at the conclusion of an appeal.