Barristers' Chambers

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Issue 48
Time Out on Delayed Application for Expert Valuation. An analysis of Cooper-Hohn v Hohn [2014] EWCA Civ 896

Introduction:

This was an application for leave to appeal a case management decision made by Coleridge J in financial remedy proceedings in April 2014 some 3 months before the listed final hearing. The Judge had refused the wife's request made in the previous March to adduce expert evidence as to the value of management entities by which the husband received payment for his hedge fund management.

Facts:

The husband was a hedge fund manager in which there were investments worth not less than $1.15bn. The wife's claim sought to ascertain the value of the husband's interests in what was known as the 'TCI management entities', which he owned and through which he channelled his income from his services within the Fund. The income stream he derived from these entities therefore relied on his willingness and ability to manage the overall Fund and the Funds' willingness for him to do so as opposed to a new fund manager. Because of the claimed dependency which the husband maintained the Fund had of his services and the fact that the Fund would have to be wound up if he did not manage it, then he maintained the value of the entities was in terms of the income stream produced only and not the value of the individual entities, which he had given a base investment value to (ie no goodwill) at the outset of the disclosure in the proceedings brought by the wife of $109m in capital terms.

There had been a consent timetable through to the final hearing and Eleanor King J had approved the consent directions in June 2013 when there had been no application for the valuation of the management entities. There had been a disclosure and questionnaire process and an FDR.

The wife's case was now that an expert report of the enterprise value of the entities was required to assess the percentage share she was to claim as a fair distribution under s 25. The wife maintained the relevant value of the entities was between $513m and $872m.

Appeal:

Ryder LJ, giving the leading judgment of the Court of Appeal, having considered the overriding objective in **FPR r 1.1**, the case management and expert provisions in **FPR r 1.4** and **Part 25** which stated that expert evidence is to be permitted:

> "Only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings."

Ryder LJ observed that there were a number of factors set out in FPR 2010 Rule 25.5(1), in regard to this decision, specifically including:

> "Any failure to comply with rule 25.6 or any direction of the court about expert evidence."

His Lordship was of the view that a valuation of every asset is not always required:-

> *"Some assets cannot sensibly be ascribed a capital value. It is a fallacy that every asset must be valued in every case or even in every sharing case. Of course, the court will need to draw a balance sheet or asset schedule, but that does not lead to the conclusion that every asset must be valued in order for the court's statutory duty to be complied with. The valuations sought in this case would likely be theoretical. It would not be a valuation of assets available for distribution between the parties."*

In His Lordship's view, the core factor the valuation sought would be merely hypothetical capitalisation of the entities involved and not a valuation on the basis that the husband was leaving the fund at the date of the trial. Accordingly, a court, it would be unnecessary and irrelevant as it would not affect the court's final assessment on distribution.

Indeed, His Lordship observed that had the case been settled before this issue had been raised by the wife, then the basis of any such settlement would have been of the original value asserted by the husband of the entities. Indeed, the FDR had been undertaken on the basis that both sides were willing to seek a settlement if possible on the information then available. It was noteworthy that the wife in the hearing had not been able to advance whether it was possible to sell the entities without the husband's ongoing involvement. Hence any expert report of valuation would only be able to value the husband's entities earning capacity, which in this case would be irrelevant.

Once again, as the President had already done, His Lordship reiterated that 'necessary' within the expert provisions of FPR 2010 Part 25 meant:

> "Lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand", having "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable", per Sir James Munby P in ***Re H L (A Child)*** [2013] EWCA Civ 655.

His Lordship also underlined the importance of the timing of the wife's application when set against **FPR r 25.6** which provides the mandatory timetable for seeking expert evidence:

> *"...parties must apply for permission... as soon as possible;*
>
> *(d) in proceedings for a financial remedy, no later than the first appointment..."*

In this context, Ryder LJ considered that the wife's application fell foul of this provision and should have been made no later than the hearing before Eleanor King J. His Lordship cited in this regard the President in *Re* ***W (A Child), Re: H (Children)*** [2013] EWCA Civ 1177:-

> *"The court is entitled to expect – and from now on family courts will demand – strict compliance with all such orders. Non compliance with orders should be expected to have and will usually have a consequence."*
>
> *"....A sanction or a refusal to allow relief against a sanction in the Rules can be inferred where a party shall not be permitted to do something if the Rule is not complied with. Parties to financial remedy litigation should expect that approach to be followed as much in their cases as it is in children cases and civil litigation generally."*

Commentary:

The New Rules are quite clear that the application for expert evidence now has to be made as soon as possible and no later than the First Appointment.

In this case, the FDR had already been run and the parties were just months away from the listed final hearing. No doubt it was the size of the suggested enterprise value held within the husband's entities as assessed by the shadow accountant which encouraged this belated application. The Court of Appeal took the view as Coleridge J had done that the value canvassed was entirely dependent upon the husband remaining in control of the hedge fund or there being a buyer prepared to purchase the entities at more than their face value and as a going concern without him – in short this basis was considered highly unlikely – hence Appeal dismissed.

The lesson here is if there are considerable funds at stake, a shadow accountant will be required from the outset to steer the conduct of the case and if there is to be an expert value needed that is required to be made at the First Appointment at the latest.