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The Impact of FPR 2010 Part 4.6 on Financial Remedy Applications for Permission to Appeal out of time - MG v AG (APPEAL OUT OF TIME) (2020) EWFC B49

Introduction:

The process of an application to proceed out of time – has long been presented in family cases as a review of "*all the circumstances*", not least, the merits of the substantive application succeeding. **MG v AG** now coalescences the **CPR** and **FPR** approaches when dealing with such applications in financial remedy cases.

Facts:

This was H's application before David Salter sitting as a Recorder in the Family Court in Newcastle for permission to appeal out of time against a final order made in financial remedy proceedings after divorce where the judgment was handed down on 27.07.18. H's notice of appeal was dated 21.11.19 - ie over 15 months out of time.

Former H was (51) and former W was (52) The parties had married in 2006 and divorced in 2016. Including cohabitation (2002), their relationship had been over 14 years duration and they had had 2 children together. W had not been employed outside the home and H had been MD of one of two companies he and a third party held shares in with W also holding minority shares in each company. The assets included the Fmh sale net proceeds (£405k) and the company values of c £6.2m net.

W had initially commenced proceedings for financial relief and at a final hearing the reserved judgment was handed down on 27.07.2018. H was ordered to pay W a lump sum of £3.09m by 2023 and, in the interim, W was to receive 75% of the Fmh sale proceeds and to be paid by H 4% interest on the outstanding lump sum plus ppo of £4.75k pm plus 25% of any bonus paid to H, her car loan instalments paid plus 50% of dividends H received.

Without filing a formal notice, H's solicitors in August 2018 by letter requested permission to appeal from the judge only as to the term of the ppo and the order relating to paying interest on the lump sum. The judge refused the application without a hearing. Some two days later, the time for appealing expired on 17.08.2018.

There were then negotiations between the respective solicitors and by the following May 2019 the parties lodged a consent order – which was not then sealed because H instructed new solicitors, who then requested the Court to reconsider only the ppo in the draft order submitted. On this basis, the judge in October 2019 duly reconsidered the provision as to W's entitlement to that element of the ppo relating to dividends and varied the same so that payment would be set off against the lump sum to her due as long as such dividends were paid within 2 months of receipt.

The parties then sought clarification of aspects of the judgment given, followed in November 2019 by H's application for permission to appeal the judgment initially in relation to ppo, bonus and interest. However, following H's change of solicitor again, this was followed by a further notice seeking permission to appeal also against the original July 2018 order and a stay.

Because the application for appeal against the July 2018 order was out of time (21 days from judgment handed down), H sought relief from sanctions, pursuant to **FPR 2010 r 4.6.**

Decision:

The Recorder reminded himself he was only able to give permission to appeal where the same had "*a real prospect of success or there is some other compelling reason why the appeal should be heard*" (**Part 30.3.7**) In regard to "*real prospect of success*", this would be "*where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the proceedings before the lower court*" (**Part 30.12 3)**.

Relief from Sanctions – Test:

FPR 2010 4.5 provides that, where a party has failed to comply with a rule, any sanction for failure to comply has effect unless the party in default applies for and obtains relief from the sanctions. Relief from sanctions is in turn dealt with by **FPR 2010, r 4.6,** which directs the court, on an application for relief from sanctions, to consider "*all the circumstances*", including **a checklist** of matters specifically set out in **FPR 2010, r 4.6(1)**. Such an application must be supported by evidence (**FPR 2010, r 4.6(2**)). If relief from sanctions is obtained, the court may extend the time for compliance with any rule, even if an application for an extension is made after the time for compliance has expired (**FPR 2010, r 4.1(3)(a)).**

The Recorder noted "*all the circumstances*" included him considering the underlying merits of the appeal and he observed that in **Re H (Children) (Application to Extend Time: Merits of Proposed Appeal)** (2015) EWCA Civ 583, the Court of Appeal had stated that it had been held that other circumstances should be given less weight than the considerations specifically mentioned and, in most cases, the merits of the appeal

will have little to do with whether it is appropriate to grant an extension of time, unless without much investigation the court could see that the grounds of appeal are either very strong or very weak.

The Recorder reviewed each party's contentions as to the merits of their cases on any appeal. For H these included, amongst others, an assertion that he could no longer afford to now meet the terms of the 2018 order, the lack of discount for risk to H in retaining the companies, the alleged double accounting of the order made, the ppo made being in excess of W's needs and the substantive part (July 2018 to May 2019) of the delay engaged being the result of H relying on the advice of his then solicitors. For W, amongst other objections, it was claimed the appeal was hopelessly out of time and simply a tick box exercise before a claim for professional negligence and H, despite his claimed impecuniosity, had managed to pay almost £2m for extra shareholding in the interim.

Checklist:

The Recorder then addressed **the checklist**:-

(a) The interests of the administration of justice	H claimed this related to the merits of the proposed appeal and H could not afford the order made. W claimed it related to the danger of opening the floodgates and making the time limit stipulated an irrelevance
(b) Whether the application for relief has been made promptly	H had to accept application was late. W claimed it was woefully late
(c) Whether the failure to comply was intentional	H claimed his delay was not intentional. W claimed it was intentional in that in August 2018 the advice had been "*no appeal*" and H did not instruct new solicitors until May 2019 and H's present solicitors did not issue their application delayed until November 2019.
(d) Whether there is a good explanation for the failure	W asserted there had been no discussion re an appeal by H between October 2018 and March 2019 and then,

	whilst aware of a right of appeal, no action until November 2019
(e) The extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol	n/a
(f) Whether the failure to comply was caused by the party or by the party's legal representative	W asserted H and his solicitors been at fault
(g) Whether the hearing date or the likely hearing date can still be met if relief is granted	n/a
(h) The effect which the failure to comply had on each party	H accepted "*effect*" on both parties. W asserted greater on her since not aware of intention to appeal July 2018 order for 15mns
(i) The effect which the granting of relief would have on each party or a child whose interest the court considers relevant	H claimed would mean a rehearing but without such could not meet order. W claimed would have devastating impact as limited finances in rented accommodation.

The Recorder considered H's challenge to the lump sum made was undermined by there being no formal challenge for 15 months and, as set against W's case, how the judge came to make such an order at the hearing. "*All the circumstances*" had to involve consideration of the specific factors above and the alternatives open to H being an application to vary the ppo and an action for negligence.

Overall, the Recorder was struck by the extensive delay in the case, which he found in part intentional by H when aware of his right to appeal:-

> *"[51] An application for permission to appeal is not something which can be stored up in case it might be of future use. It is for this very reason that the rules contain specific time limits for the commencement of appeals."*

W had been unable to move on with her life and the delay had been prejudicial to her. The interests of the administration of justice could not permit an application for permission to appeal so far out of time against a background of intentional unexplained delay. H's application was dismissed

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Commentary:

This decision is a useful and important example of the application of **Part 4.6 FPR 2010 "relief from sanctions"** in a financial remedy case.

It is clear since **Altomart v Salford Estates** (2014) EWCA Civ 1408 that procedural rules, which do not have an explicit sanction will nevertheless in certain cases, including an application for permission to appeal out of time, be construed as carrying an implied sanction under **CPR 3.9,** which deals with civil applications for relief from sanctions

The **CPR 3.9** is more limited in the considerations to be considered for relief than those set out (as above) in **FPR 2010 4.6,** but the purpose of both rules is the same. Clearly, Ryder LJ anticipated such an approach in the **Cooper-Hohn** case ((2014) EWCA Civ 896 at para [44])

> "*a sanction or refusal to allow relief against a sanction in the Rules can be inferred where a party shall not be entitled 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's cases and in civil litigation generally*".

In **B v L (Divorce: Jurisdiction and Forum Conveniens) (2016) EWFC 67,** Francis J closely followed **FPR 2010 r 4.6** when refusing to allow a husband's application to set aside a judge's certificate and to defend a wife's petition for divorce. The decision in the present decision now applies this approach to financial remedy cases.

It is to be noted that the Judgment of the Recorder in this matter did not expressly refer to the Court of Appeal guidance concerning applications for relief from sanctions under the **CPR 3.9** in **Denton & Others v TH White Ltd & Others** (2014) EWCA 906. Nevertheless, it should be borne in mind that the Court of Appeal in that case gave guidance as to the approach to be adopted by the court upon an application of relief from sanctions under the **CPR** provision as involving a three-step approach. The first step being to determine the seriousness and significance of the failure in question. If the failure is serious or significant then to go on to consider steps 2 and 3. Step 2 being the reasons for the failure occurring and step 3 to consider all the circumstances of the case so as to be able to deal justly with the application.

The Court of Appeal cautioned that it was inappropriate to take advantage of mistakes upon such applications which were not serious or significant or where a good reason for the same was shown or it was clear relief from sanction would be granted – contested cases upon such applications should be exceptional. However, in the ordinary case, it should not be appropriate upon an application for relief against sanctions for a court to undertake an assessment of the merits of the substantive case (see **Prince Abdulaziz v Apex Global Management Ltd & Another (2014) UKSC 64**).

It is to be anticipated that the use of an application for relief against sanctions under **FPR 2010 Part 4.6** will now be an important part of any application for permission to appeal or set aside a financial remedy final order where the application for permission is made outside the time provided under the relevant **FPR** provision.

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