PTA Template 269C1 - First Appeal

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **CA-2024-001342**

[SEAL] HER MAJESTY'S COURT OF APPEAL CIVIL DIVISION 23 Dec 2024

ZAHMOUL –v– ZAHMOUL

CA-2024-001342

ORDER made by the Rt. Hon. Lord Justice Moylan

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

Decision:

Time is extended and I give permission to the wife to rely on her amended Notice and her Replacement Amended Grounds of Appeal but the application for permission to appeal is refused.

Reasons

The wife applies for permission to appeal from the final financial remedy order made by MacDonald J on 24 May 2024 following his judgment on 18 April 2024.

I can only give permission to appeal if the proposed appeal has a real prospect of success or there is some compelling reason to do so. I also refer to the following principles which are applicable to appeals.

The Court of Appeal gives very substantial weight to a trial judge's findings and evaluative conclusions and there is a high hurdle before it will overturn or interfere with them. For example, in *Volpi v Volpi* [2022] EWCA Civ 464, it was said:

"[2] …. the following principles are well-settled:

(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

And in *Re R (Children) (Reunite International Child Abduction Centre intervening)* [2015] UKSC 35, the Supreme Court said:

"it is relevant to note the limited function of an appellate court … . Where the lower court has applied the correct legal principles to the relevant facts, its evaluation is not generally open to challenge unless the conclusion which it reached was not one which was reasonably open to it".

The wife advances 17 Grounds of Appeal, supported by a Skeleton Argument with attached documents; a further statement also with attached documents and numerous other documents.

The wife's overriding Ground of Appeal is: "The overriding failure of the judgment is that the judge has systematically and exhaustively suppressed all mentions of my mental health disabilities, including my trauma and autism symptoms, how they impacted my evidence and his findings. There is a wholesale failure of the court's duty under Part 3A and PD 3AA to consider my mental health disabilities and to ensure participation measures are in place at all times throughout the proceedings."

Grounds 2 to 10 and 12 raise procedural issues in reliance, in particular, on FPR Part 3A, PD 3A, PD3AA and Part 15.

There is no prospect of the Court of Appeal deciding that there were any procedural or other irregularities which undermined the fairness of the hearing or which undermine the judge's conclusions and decision. The wife contends that there were a number of breaches of FPR Part 3A, PD 3AA and Part 15. It does not appear that any of these points were raised before the judge. It is too late to seek to raise them, for the first time, in support of an application for permission to appeal. Further, in any event, the judge did consider whether to make participation directions and did so. There is no indication that, during the hearing, the judge was asked to make other or further

such directions or that it was submitted that those directions were not adequate. If they were considered to be inadequate, an application should have been made at the time. It is too late for the wife now, after the final hearing has concluded, to seek to argue that other directions should have been made under any of the provisions of FPR r.3A or PD3AA.

Dealing with some of the specific points raised. Contrary to the submissions made by the wife, including under Ground 3, the judge did not fail to consider making participation directions. As referred to above, the judge considered whether to *and* made participation directions. There was no reason for the judge to make further directions for the purposes of completing the terms of the order after the conclusion of the hearing. The wife's email to the judge on 3 May 2024 is headed "Unequal Footing and Unequal Participation in Proceedings" but raised only enforcement of the maintenance pending suit order and did not seek any participation directions. I deal with the issue of maintenance pending suit below.

The reasons for making participation directions do not appear to have been recorded in accordance with the provisions of Part 3A..9. This may be because no order was drawn up. Again, this does not appear to have been raised during the course of the hearing and it is too late to seek to do so now. Further, the absence of any order setting out the reasons does not impact on the fairness of the hearing or of the judge's decision and does not, therefore, justify the grant of permission to appeal.

The judge was not required to refer in his judgment to FPR Part 3A or to the participation directions or any of the matters referred to, for example, at page 16 of the Replacement Amended Grounds. None of those matters undermine the judge's judgment.

In respect of Part 15, there was no evidence to suggest that the wife was or might be a protected party. As the judge noted in paragraph 96, there was no expert medical evidence at all. Further, and again, it does not appear that this issue was raised before the judge.

As to Grounds 1 and 11, there is no merit in the wife's contention that the judge "suppressed" her "mental health disabilities" by not referring to them in his judgment. The wife was represented at the final hearing by leading counsel and solicitors and there is no reference to any of the matters now raised by the wife being raised by them. This includes there being no reference to any of the matters now raised by the wife being raised during the hearing under either under section 25(2)(e) or section 25(2)(g), namely "any physical or mental disability of either of the parties to the marriage" or "the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it". The only issue raised on behalf of the wife was as to the husband's disclosure. The judge's conclusion, as set out in paragraph 64, was plainly open to him.

The final order is as approved by the judge. The asserted procedural irregularities (including Grounds 12 and 14 and the addition of paragraph 34) do not undermine the terms of the order and there is nothing to support the contention that it contains "irregularities, false representations and acts of fraud". The judge was clearly satisfied that it reflected his judgments and that its provisions were appropriate.

As for Ground 13, the maintenance pending suit order was not "unlawfully revoked". The judge had to decide what should happen to that order and any arrears under it following the final hearing. As set out in the order, the judge considered whether the maintenance pending suit order should continue in effect. The judge decided that it should not and remitted any arrears. I would add that the judge's observation, relied on by the wife, in paragraph 69 of his judgment of 9 June 2023, namely that: "Pending the determination of proceedings, the husband must make reasonable provision for the wife's rent" would have meant, pending the final hearing, and in any event did not inhibit the manner in which the judge determined what order to make in respect of maintenance, including maintenance pending suit, as part of his final order. Accordingly, the judge had jurisdiction to make this order and there is no prospect of the Court of Appeal deciding that the judge's decision was not one reasonably open to him. There is, therefore, no merit in the wife's challenge to this decision and the order the judge made in paragraph 34.

In respect of the other Grounds, the wife challenges and disputes a number of the judge's findings. As referred to above, the Court of Appeal gives very substantial weight to a trial judge's findings and will not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong. The judge had extensive evidence including from an expert on cryptocurrency. The judgment is based on the judge's assessment of the evidence. The judge has clearly carefully considered *all* the evidence and, contrary to the wife's submissions, was not "focused on what I knew, how much I knew, and when I knew it". The judge has comprehensively explained and justified his factual conclusions which are clearly based on his assessment of the evidence. This included in respect of the wife's case that the husband had, as the judge described it, "failed to disclose vast hidden assets". The judge considered this case and rejected it as explained in the judgment.

The judge was entitled not to consider evidence sent to him after the hearing had concluded. A judge determines a case on the basis of the evidence at the date of the final hearing.

The wife's assertion that the real estate assets were "grossly undervalued" does not provide any justification for an appeal. The judge's determination was clearly based on the evidence available to him at the hearing.

Other matters relied on by the wife - including that the judge's reasoning is flawed; that the judge's findings were inconsistent with the evidence, that the judgment supresses evidence, for example in respect of the husband's LLC fraud and IRS perjuries; that the husband lacked credibility and was dishonest; and the matters relied on in the transcripts - would not lead the Court of Appeal to decide that the judge's conclusions were not reasonably open to him. In addition, there is nothing to support the conclusion that the judge was biased. As I have said, he can be seen to have carefully and comprehensively considered all the evidence and his reasoning both explains and justifies his conclusions and decision.

The only other matter I consider separately is the wife's contention that the judge failed to take into account the US tax consequences of the division of the US real estate assets. I can, indeed, find no express reference to this tax in the judgment, although in paragraph 54 the judge refers to his approach to "to the tax consequences of the respective positions advanced by the wife and the husband" and in paragraph 89 he refers to the "tax liability assigned to" each of the properties. There are also references in paragraphs 109 and 110 to tax. Further, it does not appear to be an issue that the wife raised with the judge when asking him for permission to appeal. In addition, in his Response which I directed the husband to provide, it is contended that the judge's award did take into account the incidence of tax on the transfers of the various properties. The Court of Appeal is not the right forum in which to determine this factual dispute. If the wife is right that the judge, by mistake, omitted to take into account the incidence of tax on the property transfers effected by the order, as she asserts (and I make clear that I give *no* indication as to the merits of her contention), the remedy available to her is to apply to the judge (pursuant to section 31F(6) of the Matrimonial and Family Proceedings Act 1984 and r. 9.9A(2) of the Family Procedure Rules 2010). Accordingly, this issue is not one which justifies the grant of permission to appeal.

In conclusion, for the reasons set out above, the proposed appeal has no real prospect of success and there is no compelling reason to give permission to appeal.

Information for or directions to the parties

Court of Appeal Mediation Scheme (CAMS)

Where permission has been granted or the application adjourned:

a) Does the case fall within the Automatic Referral Scheme (see below)?

Automatic Referral Scheme categories:

- All cases involving a litigant in person (other than immigration and family appeals)
- Personal injury and clinical negligence cases;
- All other professional negligence cases;
- Small contract cases below £500,000 in judgment (or claim) value, but not where principal issue is non-contractual;
- Boundary disputes;
- Inheritance disputes.
- EAT Appeals
- Residential landlord and tenant appeals

b) If yes, is there any reason not to refer to CAMS mediation under the Automatic Referral Scheme?

c) If yes, please give reason:

d) Cases outside the Automatic Referral Scheme: Do you wish to make a recommendation for mediation?

Where permission has been granted, or the application adjourned

a) time estimate (excluding judgment)

b) any expedition

SIGNED: BY THE COURT
DATE: 23RD DECEMBER 2024

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –
   a) the Court considers that the appeal would have a real prospect of success; or
   b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

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