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Case No: Appeal No 8 2022
WU18D05382

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2023

Before :

MRS JUSTICE LIEVEN

- -

Between :

BF

Appellant

and

LE

Respondent

- -
- -

Dr Charlotte Proudman (instructed on a **direct access** basis by) the **Appellant**
Mr Jonathan Nosworthy (instructed by **Jordans Solicitors**) for the **Respondent**

Hearing dates: **21 June 2023**

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 July 2023 by circulation to the parties or their representatives by e-mail.

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MRS JUSTICE LIEVEN

This judgment is being handed down in private on 31 July 2023. It consists of 83 paragraphs. The judge gives leave for it to be reported in this anonymised form. Pseudonyms have been used for all of the relevant names of people, places and companies.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by his or her true name or actual location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mrs Justice Lieven DBE :

1. This is an appeal against the decision of District Judge Solomon dated 9 September 2020 not to set aside a decision of DJ Parry dated 10 September and 24 October 2019. I ordered that I would hear the permission to appeal application and the substantive appeal together as a rolled up hearing.

2. BF, the Wife ("W"), was represented by Dr Charlotte Proudman on a direct access basis and LE, the Husband ("H"), was represented by Jonathan Nosworthy.

3. Dr Proudman raises two Grounds of Appeal: (a) W lacked capacity at the material time of the final hearing and the signing of the consent order; and (b) there were no participatory directions/special measures in force pursuant to Practice Direction ("PD") 3AA and Part 3A Family Procedure Rules 2010 ("FPR").

4. Throughout this judgment I will refer to participatory directions and special measures interchangeably.

5. The parties had started living together in 1991 and had separated and reconciled on a number of occasions, finally separating in June 2018. They have two children. They were at the relevant time both professionals with salaries of over £100,000. The W was a solicitor. Their principal asset was the former matrimonial home, which had equity of £570,000.

6. Financial remedy proceedings commenced between the parties in 2018. On 15 March 2019 the W made a long and detailed witness statement alleging domestic abuse, including coercive and controlling behaviour. Some of her allegations included violent behaviour, and a threat to kill. There is therefore no doubt that the fact that she had said she was a victim of domestic abuse was before the Court.

7. A Financial Dispute Resolution ("FDR") hearing was held before DJ Khan on 4 April 2019. He made an order preventing either party relying on "conduct" issues.

8. The W submitted a psychological report by Dr Barker dated March 2019 in which he referred to her report of domestic abuse and set out his opinion that it had impacted on her mental health. There was also a report from Dr Ward, her GP, again setting out the impact that the alleged domestic abuse had had upon her.

9. I note, and Dr Proudman confirmed this, that those medical reports were submitted in relation to the financial dispute between the parties, and therefore to the W's earning capacity. There is nothing on the face of them that raises issues about the W's mental capacity to conduct litigation (or indeed in any other regard) nor to support any application for participatory directions in the proceedings.

10. The final hearing was before DJ Parry on 10 September 2019. The W represented herself at that hearing and the H was represented by Mr Nosworthy. The format of the hearing was that the W, as a litigant in person, had to cross examine the H and was herself cross-examined. There were no special measures put in place. It is accepted by the W that she did not request any special measures. However, not having special measures at the final hearing meant that the W had to cross-examine the H, who she

had alleged abused her, and when the W was cross-examined by his counsel, she could see H in the room.

11. Before that hearing the W had submitted a witness statement setting out both her financial situation but also her allegations of domestic abuse, including controlling behaviour.

12. At the end of the hearing on 10 September DJ Parry gave an ex tempore judgment in which he set out his conclusions as to the division of the former matrimonial home and when it should be sold.

13. There was a further hearing on 24 October 2019 to finalise the terms of the order. At that hearing the W was represented by a solicitor, Ms Davies. I understand that this further hearing was necessary because the terms of the order could not be agreed even though DJ Parry had set out his conclusions in an oral judgment on 10 September. The final order recorded DJ Parry's orders and certain matters as being "by agreement"; for example in respect of the child periodical payments order. I note that the order for the sale of the former matrimonial home was not said to be "by agreement" and followed from DJ Parry's judgment. The order is signed by both parties and their legal representatives.

14. The W applied for leave to appeal that order. I have not seen the Grounds, but Dr Proudman told me that she believed they related to alleged material non-disclosure by the H. HHJ Rowland refused permission to appeal on 24 January 2020.

15. The W then applied to set aside DJ Parry's order on a date in the first week of September 2020 (i.e. almost a year after the final order). I understand, although again I have not seen the documents, that the H applied for enforcement of the order, and a few days before the hearing the W made her application to set aside. On 29 August 2020 Dr Schaapveld, a clinical psychologist, produced a report. The scope of that report is very clear as it states at paragraph 1.1:

> *"This report has been provided on the instructions of [BF]. [BF] has provided the author with a bundle of documents related to divorce proceedings. The instructions were to prepare a medico/legal report addressing the issue of your Mental Capacity at the time [BF] signed the Consent Order on 24 October 2019."*

16. Section 6 is headed "Account of 24 October 2019" and states at para 6.2:

> *"On the night before her Court appearance [BF] reported that her ex-husband's barrister and solicitor had not acknowledged any of the points she had made at Trial and refused to include it in the court bundle. She reported that she had also received number of "very aggressive" correspondences from her ex-husband's lawyers and was "still traumatised" the Trial. She said she stayed up at night due to acute anxiety. She reported that a work colleague had contacted her and was very concerned about her. She eventually got to sleep at 3am on the day of the hearing. She slept for two hours till 5am. She took a diazepam (5 mg diazepam) 5am and then took another dose at 9am. Between 5am and 9am she checked the bundle of documents. She was highly anxious.*

> *[BF] recalled that she went elsewhere to pick up her morning coffee on way to the court for the agreeing of the Consent Order as she "was worried that he (ex-husband) had arranged for a waitress to put something in my coffee as he had in the past and may have done before the earlier Trial hearing and, I have been drugged before by him". She described her mental state as "completely confused". She met her solicitor and had a coffee. She reported that she was given legal advice that an appeal would be very difficult and she was discouraged from going down this route. She told her solicitor "my mental well-being would not stand an appeal". At the hearing, she felt that she was, "on a conveyor belt, a machine". She remarked "it was almost as if I was watching someone else and not part of it". She reported a feeling of 'de-realisation' and feeling "numb" for the day. She said she signed the order at the end of the day at 3:30pm. She reported that she didn't read the document thoroughly, and "...felt compelled to" sign the document and commented, "I assumed I had no say in anything."*

17. In Section 8 Dr Schaapveld refers to the W having traits of Borderline Personality Disorder, and the impact that the alleged coercive control had on her mental health.

18. Section 9 is headed "Issues relevant to capacity" and states:

> *"9.1 [BF] has requested that the author consider retrospectively her Mental Capacity at the time she signed the Consent Order on 24 October 2019. In order to do this I have considered her psychological background, her mental state on the day and her account of her decision making process in relation to the Consent Order she signed on 24 October 2019.*
>
> *9.2 In terms of the psychological background [BF] possessed psychological vulnerabilities due to Attachment related abnormalities in childhood, the trauma of sexual abuse her mother's suicide. Due to the abuse she suffered in her marriage and her marriage breakdown, by August 2018 she had sought formal psychological therapy. In October 2019 she was very stressed due to working day and night. On the night before the Consent Order signing she had only slept two hours. Her recollection of the day includes the presence of acute anxiety but also contains elements of paranoid ideation and dissociative phenomena. Her account appears to be one of acting without autonomy and agency. She didn't read the document thoroughly and said she 'felt compelled' to sign the document.*
>
> *9.3 In terms of formal aspects of Mental Capacity I am of the view that [BF] was suffering from an abnormality of mind at the material time consisting of clinically significant anxiety together with the para-psychotic features of dissociative phenomena (derealisation, depersonalisation) and paranoid ideation. My view is that represents an impairment of mind at the material time. Her account of her decision making at the material time indicates that she was most probably not able to understand, retain and weigh up the information before her on the day and lacked the necessary personal autonomy and agency in*

> *relation to the decision before her. In this sense her signature on the document in my view most probably does not represent the end product of a decision underpinned by Mental Capacity."*

19. In my view, it is beyond argument that this report is purporting to deal with capacity on one specific date, namely 24 October 2019; it is not dealing with whether the W had capacity at the earlier hearing when DJ Parry made the critical decisions and heard the evidence. The report does refer to her having a possible mental disorder before that date, but it is important to have closely in mind that having a mental disorder, let alone being anxious or depressed, does not on its own mean a person does not have mental capacity, see sections 2 and 3 of the Mental Capacity Act 2005 ("MCA").

20. On 9 September 2020 the application to set aside came before DJ Solomon. The W was represented by counsel (Ms Wilson). The argument advanced was that the W had not had capacity in the hearings before DJ Parry. Ms Wilson raised a concern as to whether the W had capacity at the time of the hearing before DJ Solomon. The DJ then suggested that if the W did not have capacity, whether she should report this issue to the Solicitors Regulation Authority. The W apparently told DJ Solomon that the capacity issue only related to the specific date in October 2019 by reason of the stress that she was then under.

21. The critical parts of the transcript of DJ Solomon's hearing are as follows:

> *"JUDGE SOLOMON: ... I appreciate I have not spoken to [BF] and obviously I am not medically qualified, but I see nothing before me to suggest that there was a lack of capacity at any of these times, and I do not accept, on the face of it, subject to, of course, your submissions and any that Mrs Jordan might have to – might wish to make. But that psychological report, produced by psychologist, not a psychiatrist, not in any of – anywhere in the report does it refer to the test of capacity. It simply makes some general observations towards the end of that report. Furthermore, you will be aware, I am sure, that in a number of these documents, the grounds of appeal, the skeleton argument, the notes for trial, [BF], on numerous occasions, included when represented, had made references to her health conditions, which I am not minimising, going back for many years. And at no point prior to Monday of this week was there any issue in relation to capacity ever suggested. So, I think your client has a very steep hurdle to overcome to seek to satisfy that an order made over a year ago, or literally a year ago today, on the basis that it is now being suggested that she does not have capacity."*

22. There was no in time application for permission to appeal DJ Solomon's decision.

23. On or about 20 March 2022 the W applied for permission to appeal out of time.

24. On 24 June 2022 HHJ Ingram considered the matter on the papers and made various case management directions. At paragraph 12 she said *"permission to file the appellants notice out of time is granted". I note that the heading of the order recorded that this was an appeal against a decision of DJ Solomon "made on 9th September 2021".* That was of course incorrect and DJ Solomon's order had been

made a year earlier in 2020. I have not seen, and Dr Proudman did not produce, the original Appellant's Notice so it is not possible to be confident as to why HHJ Ingram's order records the wrong date.

25. There was then, for various reasons, a considerable delay before the matter was allocated to myself as Family Division Liaison Judge for the Midlands. I issued a case management order on 5 April 2023 which included a direction that the Appellant's skeleton argument was to address the issue of delay.

26. The matter then came before me for a hearing on 22 June 2023.

Submissions

27. Dr Proudman submits that DJ Solomon erred in her approach to capacity on the lines set out above. She submits that the DJ was wrong to focus on whether the W could work as a solicitor and did not properly address the fact that whether someone has mental capacity is a decision specific decision, see section 3 MCA. There was evidence before DJ Solomon that the W did not have mental capacity at the relevant date.

28. Dr Proudman submits that DJ Solomon should have set the decision aside on the grounds of the W's lack of capacity. There is an issue about whether this was a matter that could be dealt with under the set aside power, or whether it should have been raised on appeal.

29. The power to set aside a decision in a Financial Remedy case is in FPR9.9A. The relevant Practice Direction, D9A states:

> *"13.5. An application to set aside a financial remedy order should only be made where no error of the court is alleged. If an error of the court is alleged, an application for permission to appeal under Part 30 should be considered. The grounds on which a financial remedy order may be set aside are and will remain a matter for decisions by judges. The grounds include (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made."*

30. Dr Proudman submits that the Grounds here fall either within (iii) "mistake" or (iv) "a subsequent event", and therefore it is appropriate to appeal DJ Solomon's refusal to set aside.

31. The Red Book has extensive notes to FPR9.9A and refers to *Akhmedova v Akmedov (no 6)* [2020] EWHC 2235 where Gwynneth Knowles J said at [131]:

> *"Whilst the categories of cases in which r. 9.9A can be exercised are not closed and limited to those identified in paragraph 13.5 of PD9A, the jurisdiction to set aside is to be exercised with great caution, not least to avoid infringing upon the finality of judgements, subverting the role of the Court of Appeal, and undermining the overriding objective by permitting re-litigation of issues."*

32. Mostyn J set out a detailed analysis of the history and extent of the power to set aside in Financial Remedy cases in *CB v EB* [2020] EWFC 72. He held that the power traditional and well-established grounds, as previously understood. At [21] he said:

> *"The Crime and Courts Act 2013 created the single, unified Family Court. This came into existence on 22 April 2014. Prior to that date financial remedy proceedings had since 1968 been heard in the county courts or, in a few exceptional cases, in the High Court. For those cases heard in a county court the County Court Rules 1981 ("CCR 1981") applied as modified by the Family Proceedings Rules 1991 ("FPR 1991" – see rule 1.3). Before 1991 the Matrimonial Causes Rules 1968 and 1977 had applied the County Court Rules 1936 ("CCR 1936") to financial remedy cases."*

33. Mostyn J then goes through the subsequent changes in the FPR, the PD and the caselaw and said at [55] and [57]:

> *"55. My historical excursus above demonstrates that the set aside power in section 31F(6) was not a brand new break with the past. It did not usher in a brave new world. It was no more than a banal replication of a power vested in the divorce county courts from the moment of their creation in 1968. That power had been confined by the law to the traditional grounds for decades. Interpreting section 31F(6) purposively and with regard to its historical antecedents leads me to conclude clearly that in the field of financial remedies its lawful scope, or reach, starts and ends with the traditional grounds. Mr Feehan QC is not able to point to any kind of emanation from law reformers, or from Parliamentarians at the time that the Crime and Courts Bill was being debated, urging that the time had come to push back the frontiers and to allow far more financial remedy orders to be capable of challenge. Were anyone to have done so I am quite sure that there would have been a chorus of objections that such a reform would open the floodgates to speculative litigation years after the implementation of a clean break and would completely subvert that key principle.*
>
> *...*
>
> *57. In my judgment the language of FPR PD9A para 13.5 is misleading. It should not be read literally. There is no lawful scope for imaginative judges to unearth yet further set aside grounds. The available grounds are the traditional grounds, no more, no less."*

34. As I set out below, Mr Nosworthy submits that the Grounds now raised by the W do not fall within the power to set aside and should have been raised on the appeal to HHJ Rowland.

35. Dr Proudman's second Ground is that DJ Parry had erred by not putting in place participation directions, and DJ Solomon should have set aside his decision on this Ground. She accepted that this issue was not raised before DJ Solomon, or indeed DJ Parry. However, she submits that it was incumbent upon the Court to consider of its own volition whether a party was vulnerable and whether they required participation

directions and therefore DJ Solomon, and before her DJ Parry should have raised this issue proactively

36. She submits that the W was plainly vulnerable, both on the basis of the alleged domestic abuse, and her mental health issues. These factors were apparent before DJ Parry, and therefore would have been grounds to set aside his decision.

37. Dr Proudman relies upon FPR 3A which was in force as at the hearings in September and October 2019. This sets out the duties of the Court in respect of participation directions, and to consider whether a party is vulnerable. The whole of the Practice Direction is relevant, but the key provision is r.3A.5, which states:

> *"**3A.5 Court's Duty to consider how a party or a witness can give evidence***
>
> *(1) The court must consider whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.*
>
> *(2) Before making such participation directions, the court must consider any views expressed by the party or witness about giving evidence."*

38. Dr Proudman's Skeleton Argument also referred to s.3 of the Domestic Abuse Act 2021, but it is relevant to note that that Act was not in existence at the date of either DJ Parry or DJ Solomon's decisions.

39. Dr Proudman relies on a series of cases where High Court Judges have overturned decisions of the Family Court on the grounds that the judge failed to make participatory directions, even though the alleged victim of domestic abuse had been legally represented at the relevant hearing and the representative did not raise any issue around such directions. Dr Proudman relies on those decisions to submit that DJ Parry had a proactive duty to consider such measures, and his failure to do so should have led to his decision being set aside by DJ Solomon.

40. I will refer to each of the cases below, however it is important to have regard to the point made by Peel J in *GK v PR* [2021] EWFC 106 at [31] that much depends on the context and on the issues of the particular case.

41. The application of participatory directions is the way that the Court ensures a fair trial when a party has particular vulnerabilities that prevent her/him from being able to fully participate in the hearing; or to put it another way, to ensure that the terms of Article 6 European Convention on Human Rights ("ECHR") are met. The vulnerability in issue impacts on the individual in such a way that there would be a possible breach of natural justice if participatory directions were not made. However, it is a trite proposition that there is no such thing as a technical breach of natural justice and therefore it is necessary in the individual case to consider whether there has been unfairness leading to a breach of natural justice. There is no automatic consequence that a lack of participatory directions, even if they might have been

appropriate under the relevant Rule and Practice Direction, will lead to a decision being quashed.

42. This analysis is entirely supported by the Court of Appeal in *Re S (Vulnerable Party: Fairness of Proceedings)* [2022] EWCA Civ 8 where Lord Justice Baker said the following:

> *"41. We have focused on the issue of vulnerability in cases like the present involving parties or witnesses with limited understanding. There are other equally important provisions in Part 3A applying to victims or alleged victims of abuse and intimidation. All such provisions are a key component of the case management process which ensures compliance with the overriding objective of enabling the court to deal with cases justly. As King LJ observed in N (A Child) [2019] EWCA Civ 1997 at [53] :*
>
> *"Part 3A and its accompanying Practice Direction provide a specific structure designed to give effective access to the court, and to ensure a fair trial for those people who fall into the category of vulnerable witness. A wholesale failure to apply the Part 3 procedure to a vulnerable witness must, in my mind, make it highly likely that the resulting trial will be judged to have been unfair."*
>
> *42. It does not follow, however, that a failure to comply with these provisions, whether through oversight or inadvertence, will invariably lead to a successful appeal. The question on appeal in each case will be, first, whether there has been a serious procedural or other irregularity and, secondly, if so, whether as a result the decision was unjust. We are alive to the fact that many witnesses will give their evidence in a way which falls short of the standard that they would have wished for, or their advocates had hoped. Sometimes, this may be because of the very nature of human frailty, at other times it may be because a witness was deliberately deflecting or obfuscating or, worse still, lying."*

43. Therefore, whether or not in any particular case a decision was unfair because of the lack of participatory directions will necessarily depend on the facts of the particular case, including the issues, and whether the failure to provide for participation directions led to an unjust decision.

44. In chronological order the cases that Dr Proudman refers to are, firstly, *K v L v M* [2021] EWHC 3225 Fam, a decision of Judd J. The decision under challenge in that case pre-dated the Domestic Abuse Act 2021, but post-dated PD3AA, see [25]-[26]. Judd J said at [60]:

> *"The provisions of rule 3A and PD3AA are mandatory. The word used is 'must' and the obligation is upon the court, even though the parties are required to cooperate."*

45. However I note what she said at [63] and [66]:

> *"63. This was a very sensitive case where there were allegations of the utmost seriousness. They were of two rapes whilst the mother was under the influence of sedation and either drink or drugs respectively, and a third of anal rape when she was eight months pregnant. She also made overarching allegations of controlling, manipulative and intimidating behaviour on the part of the father.*
>
> *...*
>
> *66. It must be clear from the matters I have set out above that this was a case which cried out for participation directions and a ground rules hearing, not just for the sake of the mother, but for the integrity of the court process itself. The purpose of the rules and Practice Direction is to avoid the quality of the evidence being diminished. Here, the need for directions went beyond the need to consider whether the parties should not come into physical contact in the court room or building. Matters, such as whether the mother should be visually shielded from the father as she gave her evidence, and what topics should be covered in cross examination, were highly relevant."*

46. At [72] she said:

> *"I should make it clear here that whilst there is a continuing obligation upon the court to apply the rules, this judge came to the case fresh at the fact finding hearing. The matter was not raised by anyone including counsel at earlier hearings before different judges. What happened here is a stark reminder to us all that these matters need to be addressed to avoid the risk that the integrity of the trial will be undermined."*

47. The next case is *B v P* [2022] EWFC B18, a decision of HHJ Levey, where again the Mother was represented and there were no participatory directions. At [44] the judge followed the approach of Judd that *"the obligation to consider whether special measures are necessary, and if so what they should be lies with the court. ... it does not matter that the appellant was represented and that it appears that the court was not asked to consider special measures…."*

48. *CM v IP* [2022] EWHC 2755, a decision of Morgan J which post-dated the Domestic Abuse Act, where she said:

> *"Although I understand why, as an unrepresented party at these proceedings, the respondent makes those submissions, it is the case that the obligation to consider vulnerability in the sense required by the legislation is one which rests on the court. The obligation is to consider it, so it might have been in this case that had the judge considered the question of special measures at a ground rules hearing, and heard from counsel for each of the parties, the conclusion reached as to what was necessary, or the extent of the duty on the court to investigate further in the face of whatever submissions were made by either side, would have been dependent on that which was explored at that ground rules hearing. The obligation on the court to consider participation directions*

> *should not be taken to mean that unless the court accedes exactly to all that is asked for it has failed in its duty.*
>
> *30. Regrettably, there was no ground rules hearing, either separately and distinct from the hearing on 20 December or as a preliminary aspect of that hearing. Yet more regrettably, when I turn to the judgment, it is entirely silent as to any consideration of special measures at all and, indeed, there is no mention of Part 3A of FPR 2010, PD3AA or PD12J."*

49. Dr Proudman submits that the W here was plainly a vulnerable witness both by reason of the alleged domestic abuse and her mental health. There was a duty on DJ Parry to have considered her vulnerability and whether she required participatory directions. There is a strong public policy, as evidenced by the Rules and Practice Directions and the subsequent Domestic Abuse Act, to ensure that vulnerable witnesses can fully participate in hearings.

50. Finally, and at the prompting of the Court, Dr Proudman dealt with the issue of delay. She referred to HHJ Ingram's decision in the order dated 24 June 2022 but accepted that appeared to have proceeded on the basis of the wrong year for DJ Solomon's decision.

51. The W's only explanation for the delay in seeking to set aside DJ Solomon's decision, from 9 September 2020 to March 2022, is set out in a witness statement dated 28 February 2022. She referred to having been hospitalised for a seizure after the hearing but as far as I can tell from that report, she attended hospital on 11 October 2020 and was discharged the same day. She also refers to the extreme stress she was under at the time of the hearings and the level of the H's alleged coercive control.

52. Mr Nosworthy's submissions fell under five broad headings.

53. Firstly, the Court should focus on what decision is being appealed. It is the decision of DJ Solomon not to set aside, not the decision of DJ Parry. There was an application for permission to appeal against DJ Parry's decision and permission was refused by HHJ Rowland. If it was to be argued that DJ Parry's decision was made in breach of natural justice by reason of the lack of special measures or the alleged lack of mental capacity, then those are issues that should have been raised on appeal. Therefore that decision is now res judicata.

54. Further, the power to set aside does not arise in this case. It is limited in the terms set out in FPR9.9A and the PD and should not be used as an alternative to appeal.

55. Secondly, that there has been inordinate and inexcusable delay in this case. He submitted that the approach that I should apply to allowing an extension of time for making an application to set aside is that set out in *Denton v White* [2014] 1 WLR 3296. Although that is a case concerning relief from sanction, the principles have been made applicable to applications for extension of time to appeal, see *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472. The *Denton* principles are extremely well known and are summarised in the White Book (2022) at 3.9.3 as follows:

> *"The guidance given in Denton may be summarised as follows: a judge should address an application for relief from sanction in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages r.3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including r.3.9(1)(a)(b). The court also gave guidance as to the importance of penalising parties who unreasonably oppose applications for relief from sanctions."*

56. Thirdly, and in any event, he submitted that DJ Solomon made no error in her decision. There was no evidence before her that the W did not have capacity on 9 September 2019 before DJ Parry. The report of Dr Schaapveld was entirely focused on the hearing of 24 October 2019 and whether the W had capacity to sign the order, not whether she had capacity at the earlier hearing. In any event, the order that was made was not underpinned by the W's signature. It was not a consent order. The only reason she signed the order was that there were certain, essentially side issues, which were agreed. The substantive order was a court order, not an order by consent.

57. Further, and in any event, DJ Solomon made a lawful decision on capacity in respect of the evidence before her.

58. Fourthly, the absence of special measures had no impact either on the decision of DJ Parry, or critically for present purposes, on the hearing before DJ Solomon. The W was represented at that hearing and her case was fully and appropriately put.

59. Fifthly, the ultimate outcome of the case, namely the order for sale, was wholly predictable and there is nothing to suggest that the outcome was unfair.

Conclusions

60. The application for permission to appeal falls under FPR30.3(7). I grant permission to appeal under subparagraph (b), that there is a compelling reason to hear the appeal rather than because I consider the appeal has a real prospect of success. The compelling reason is that the appeal raises important issues about appealing a set aside decision, very far out of time, inter alia on the grounds of lack of participation directions.

61. I refuse the appeal for the reasons set out below.

62. The first issue is that of delay. The decision under challenge was made on 9 September 2020. The application for permission to appeal was made in March 2022, although Dr Proudman could not confirm the precise date. The period given for appeal in the FPR is 21 days. Therefore, the appeal is at least 16 months out of time.

63. The tests for allowing an extension of time for an appeal are those set out in *Denton v White*. Firstly, the seriousness and significance of the delay. Here there is a very lengthy delay. Importantly, during the period of the delay the former matrimonial

home was sold and the H necessarily moved on with his financial affairs. Therefore, in my view the delay is both serious and significant.

64. Secondly are the reasons why the delay occurred. The W has set out in her witness statement, as referred to above, her reasons for the delay. In my view these do not amount to good reason for any delay, let alone one as long as in this case. She was represented at the hearing before DJ Solomon, and therefore would have had access to legal advice about either appeal or set aside. The issues that she now seeks to raise were all well known to her. There is no new information of which she was not aware which would justify any delay.

65. Further, the matters she raises in her witness statement do not to my mind show good grounds for the delay. She refers to ill health and having been on holiday, but there is no suggestion that the direct effect of this stretched throughout the period, nor has any medical evidence in support been submitted. The only medical evidence relevant to delay was the hospital discharge summary which indicates she was discharged the same day. She then says she was moving house and was stressed. However sympathetic I might be to the W in having these difficulties, they cannot amount to good grounds to extend time for appeal by 16 months.

66. Looking at all the issues together, and considering the fairness of the position, as the third stage of the *Denton* test, I do not consider justice requires an extension of time in this case. To allow an application such as this on the basis of evidence of this type is effectively to drive a coach and horses through the time limits set out in the FPR. Time limits matter because they impose some finality on proceedings and allow parties to move on with their lives, including their financial affairs. To allow a time limit for appeal to be extended for a prolonged period on the basis of such flimsy evidence would be effectively not to apply a time limit at all.

67. It would be very unfair to the H to allow this case to be reopened almost 4 years after DJ Parry's decision when the H must have believed that the financial position between him and the W had been completed. I come to this position in the full knowledge and consideration of the allegations that have been raised by the W, and her case that she did not have a fair trial because she did not have mental capacity and by reason of the lack of participatory directions. It is however clearly established that even where there is an alleged breach of natural justice, or Article 6, the Court can impose time limits and require them to be abided by. But one example of such a decision is *Ghirea v Moldova App. No 15778/05*, where the European Court of Human Rights ("ECtHR") found that the domestic court's acceptance of the prosecution's appeal out of time, where the limitation period was suspended on account of the prosecutor being on holiday, infringed the principle of legal certainty and violated Article 6(1):

> *"35. The Court further considers that the domestic courts' interpretation of the statutory provisions applicable in the present case had an effect that was incompatible with the principle of legal certainty as safeguarded by Article 6 of the Convention. The domestic courts' interpretation allowed the State, represented by the public prosecutor's office, to lodge an appeal even though the time allowed for doing so had expired. The courts examined the public prosecutor's appeal and convicted the applicant, thus altering a legal situation that had become*

> *final. The reopening of the proceedings, leading to the quashing of a final decision in the applicant's favour, undermined the principle of legal certainty (see Dacia SRL, cited above, § 77).*
>
> *36. There has therefore been a violation of Article 6 § 1 of the Convention."*

68. A consideration is that HHJ Ingram in her order appeared to extend time. However, that order was based on an apparent misunderstanding of the relevant dates. Dr Proudman did not submit that I was bound by HHJ Ingram's order to allow time to be extended. I am confident there is no injustice to the W in my making this decision because I made clear in my order dated 5 April 2023 that I would consider the issue of delay and wanted submissions upon it.

69. However, given that I heard full argument, and granted permission to appeal because of the wider issues, I will now deal with the substantive Grounds. Ground One is that DJ Solomon should have set aside the decision on the grounds that the W lacked mental capacity at the hearing of 9 September 2019.

70. In my view this is a Ground that can and should have been raised on appeal from DJ Parry. The W did appeal, and HHJ Rowland refused permission to appeal. A hearing that proceeded in circumstances where one party lacked mental capacity would be an error of law and would therefore fall under the right of appeal rather than the power to set aside in FPR9A. I do not consider this was an issue which could properly be described as a "mistake", nor was it something the W only became aware of later. I would therefore dismiss the appeal on this Ground as well.

71. Further and in any event, I do not consider the substantive Ground has merit. This is an appeal and the test is therefore whether DJ Solomon's decisions was "wrong" or unjust because of serious procedural or other irregularity, see FPR30.12. Her principal reason for not setting aside the decision on the grounds of lack of capacity was that Dr Shaapveld's report only purported to say that the W may not have had capacity at the hearing on 24 October 2019. In my view DJ Solomon was plainly correct on this point. Dr Shaapveld's report says on a number of occasions that he is addressing capacity at that later date. He makes no reference to capacity at the hearing of 9 September. I do not accept Dr Proudman's submission that he must be taken to be also addressing capacity at the earlier hearing given the express language of his report.

72. It cannot simply be assumed that the W did not have capacity at the earlier hearing on the basis of Dr Shaapveld's later opinion. Capacity is decision specific and there is a presumption in favour of a person having capacity, see s.1(2) MCA. Dr Shaapveld was focusing not simply on the one specific date, but also on whether the W had capacity to sign the agreement. That is not the same question as whether she had capacity during the earlier hearing and when she was giving evidence.

73. It is highly relevant to the issue of capacity at the earlier hearing that DJ Parry, who was an extremely experienced DJ, did not appear to have any concerns about whether the W had capacity. Although the consideration of whether participatory directions are required in cases where domestic abuse is alleged has developed considerably in the time since DJ Parry's hearing, any experienced DJ would have been well aware of

the need to consider whether a litigant, and particularly a litigant in person, might not have capacity.

74. Further, I agree with DJ Solomon that the fact that the W was continuing to work as a solicitor throughout the period is relevant to whether she had mental capacity. Dr Proudman refers to the evidence that the W was suffering from a mental disorder, or at least the traits thereof, and that she was under a great deal of stress. But there is a significant difference between having a mental disorder and not having capacity to conduct litigation. Very many people with mental disorders still have mental capacity, as is apparent from the fact that many of those detained under the Mental Health Act 1986 continue to have capacity to instruct lawyers.

75. Finally, the MCA creates a presumption in favour of capacity. I do not consider there was any error in DJ Solomon in not considering there was any evidence to find that presumption had been rebutted before DJ Parry.

76. The second Ground is that DJ Solomon should have set the earlier decision aside on the grounds that the W required participation directions. This is in legal terms an argument that the decision was made in breach of natural justice as I have set out above. Again, this is a matter that can and should have been raised on appeal rather than in an application to set aside. However, I understand Dr Proudman also to be arguing that DJ Solomon should have had participation directions.

77. Although the Domestic Abuse Act 2021 was not in existence as at September 2019, and at the date of DJ Solomon's hearing, PD3A as set out above was. The caselaw is clear that there is a proactive duty on judges to consider whether special measures are required. The fact that the alleged victim of abuse does not request them, even if represented, does not relieve the judge of that proactive duty, see the caselaw cited above. FPR3A, although perhaps not in quite such strong terms as subsequent Rules and the Domestic Abuse Act, still imposes a proactive duty on judges to consider the need for participation directions.

78. However, the fact that the W had raised the allegations of domestic abuse before the hearing before DJ Parry, and that she might have benefited from special measures, does not lead to an automatic conclusion that the decision should have been set aside and therefore DJ Solomon erred in her decision. It is necessary to consider all the relevant factors, see Baker LJ in *Re S*.

79. The fact that neither the W at the hearing on 9 September, nor her representative on 24 October, nor her representative before DJ Solomon raised the issue, does indicate that it certainly was not obvious that the W needed such measures.

80. In determining whether the absence of special measures should lead to the overturning of a decision, it is useful to analyse what the legal reason is for the measures. Participation directions are needed to ensure that an alleged (or determined) victim of domestic abuse has a fair trial, or to put it alternatively, that there is no breach of Article 6. Even if it is accepted that in principle it would have been appropriate for the Court to have put in place such measures, the legal question must be whether the failure to do so amounted to a breach of natural justice. In determining that question, it is necessary to have regard to the particular issues in the case and the relevance of the absence of the special measures. As Peel J put it in *GK v PR*, much depends on the

context of the case. It is plain from [66] of Judd J's decision in *L v M* that crucial to her decision to allow the appeal was the fact that the allegations of domestic abuse and the need for the Mother to give her best evidence with the benefit of special measures was absolutely central to the issues in the case.

81. The present case is quite different. There is nothing to suggest that there was an unjust outcome, or that the lack of special measures would have had any impact on the outcome. As Mr Nosworthy says, in the context of a fairly standard financial remedies dispute, this was a very standard and expected outcome, namely that the former matrimonial home would be sold. There is in my view an important difference between this case and the cases cited by Dr Proudman. They were all cases where the allegations of domestic abuse were central to the issues that the judges (at first instance) had to decide. That was not the case before DJ Parry. DJ Khan had already ruled that neither party could rely on "conduct". The allegations of domestic abuse, although doubtless of the greatest importance to the W, were at best tangential to the issues DJ Parry had to decide.

82. Dr Proudman submits that special measures may be just as important in a financial remedies case where it may be the same parties as in a Children Act dispute. That may well be correct in some cases, but it does not go to the issue at the heart of this Ground of Appeal. The question must be whether there was a breach of natural justice which would have required DJ Solomon to set aside the earlier decision and which led to an unjust outcome. Dr Proudman's submissions come very close to the proposition that wherever there is a case where special measures would have been appropriate and they have not been imposed, that should lead to the decision being set aside. But that is not the correct approach. It is only if the lack of special measures led to a breach of natural justice, which itself impacted on the outcome of the case, that a decision might be set aside.

83. Further, and in any event, I agree with Mr Nosworthy, that these are issues that should have been raised in the appeal before HHJ Rowland. There is some tension in the caselaw under FPR9A and the degree to which a Ground could go beyond the four categories referred to in PD9A paragraph 13.5. However, both the Grounds here are ones that were well known to the W at the time of the appeal, both amount to alleged errors of law, and yet neither were raised. In those circumstances they are issues that should have been raised on appeal.