LV21P02918

IN THE FAMILY COURT
SITTING AT LIVERPOOL

In the matter of:

An appeal under Section 111A of the
Magistrates Courts Act 1980 against a
Liability Order made under:
Section 33 of the Child Support Act 1991 and
Regulation 28(1) of the Child Support (Collection and Enforcement) Regs. 1992

35 Vernon Street,
Liverpool, L2 2BX

9 January 2022

Before:

HIS HONOUR JUDGE GREENSMITH

- -

Between:

STEPHEN PETER STALEY	**Appellant**
and	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Respondent**

- -

JUDGMENT

HIS HONOUR JUDGE GREENSMITH :

1. This is an appeal brought by Stephen Staley against the making of a CMS liability order against him by the Magistrates Court sitting in Sefton on 17 August 2021. At this stage the court is not concerned with the merits of the making of the liability order or whether such order is appealable. A preliminary issue has been taken by the respondent that the appeal process is fundamentally flawed, and that as a result the appeal should be struck out. The court has agreed to deal with the preliminary issue and only if the appeal is not struck out to go on to deal with the merits of the appeal at a later date.

2. The matter first came before me on 23 November 2021, when the application was adjourned. The reason for the adjournment was that the appellant presented the court with a substantial bundle of documentation to support the fact that he believed that he had appealed within the time limit, a matter disputed by the respondent. It seemed to me that the appellant's evidence

raised significant questions which justice demanded must be dealt with in order to ensure both parties had a fair hearing.

3. Th essential facts are that the appellant wrote to the court on the day of the liability order being made in an email which contained an outline of his dissatisfaction both with the process and the merits of making an order. There followed a written exchange between the appellant and the court officers to which I will refer in detail, which resulted in the appellant filing an N161, formal notice of appeal, outside of the time limit required him to do so. The respondent asks the court to strike out the appeal essentially on two grounds: firstly, that a valid notice of appeal was not filed within the time limit; secondly, that the rules do not permit an extension of time for the filing of an appeal beyond the statutory time limit of 21 days. The respondent concedes that the court may consider it possible to extend the time limit for lodging a notice of appeal in exceptional circumstances but that the circumstances of this case are not exceptional and that the court should not exercise that discretion, if such discretion exists.

4. The appellant is a litigant in person who has represented himself throughout the original proceedings and this appeal. The appellant has no detailed knowledge of law or procedure, but he does carry a profound sense of unfairness if he is denied the right to appeal against the liability order made by the magistrates.

5. Following the making of the liability order an unfortunate sequence of events ensued. On the day of the making of the order the appellant sent an email to the court dated 17 August 2021. The email was addressed to courtsupport@justice.gov.uk . Relevant parts of the email read as follows:

> *Complaint*
> *I would like to complain about my experience today in court number three. I met with the CMS prior to the court meeting who tried her best to talk me out of going into the court room but obviously I wanted to go in and communicate my position. What was really alarming about this experience is that the lady from CMS clearly identified what the worships needed to grant the liability order. She made it clear: that Stephen was Rupert's father, and that Stephen has failed to make a payment to the CMS.*
> *I couldn't believe it. Firstly, I have never missed a payment to the CMS. So, this liability order cannot legally be granted. Secondly, there was no evidence I was Rupert's father. Nothing. I mean, I hope I am but the truth is my ex partner did cheat on me several times, I guess I have always been scared to get a DNA test through fear that I might not be his father. So on both counts the worships could not be satisfied. But both counts needed to be satisfied. And even if I didn't challenge the evidence of being the father, it cannot be denied that I have ever missed a payment of the CMS. I have paid on time every month, never missed a payment, from the first direction I was sent dated 28 July 2018.*
> *Which brings me to this. The worships looked absolutely lost when I pointed this out. I made it clear that it is legally not possible for you to grant the liability order when the lady from the CMS is clearly identified that you need to be satisfied. The bloke, who sat at the top, quite a big guy, looked out of his depth. He didn't know what to do you could see it on his face. He murmured I feel like I have to grant it.*
> *How on earth can this happen? Where is the protection of the British public? I felt this was a sham experience and a legally kickboxing exercise for the CMS. I am absolutely disappointed. I would like someone with decision-making abilities and someone*

reasonable to escalate my complaint to the highest level possible and reverse this decision when clearly, clearly it should never have been given.

6. Frustrated at not having received a reply to his email the appellant sent several emails to elicit a response to various addressees including court support, admin appeals, the child Commissioner, contact SS CS, and the chief executive of HMCTS.

7. On 7 September the appellant received an email from the Sefton magistrates court sent by the delivery manager which read:

Dear Mr Staley

Thanks you (sic) *for your email. I must apologise for not responding sooner, as my colleague explained to you, these emails were sent to junk items so were not seen by court staff. I will look into your complaint in full and respond in due course.*

The next email the appellant received was from the senior legal manager of Merseyside Magistrates Court. This email is dated 13 September and reads as follows:

Dear Stephen Staley

Thank you for your complaint received on 17 August 2021

I am the legal adviser who sat with the magistrates on the day in question and I'm writing in response to your complaint. Can I start by apologising most sincerely for my delay in responding to your complaint, which I can only put down to a technical issue.

The proceedings in the magistrates court are not recorded so I have to base my response on my own recollection of the case.

Liability order is judicial recognition of a debt which enables CMS to take enforcement action.

You are correct that for a liability order to be granted the CMS would have to satisfy the court that you are the father of the child and there is a debt. As there was no objection to the statement that you are Rupert's father, the magistrates were satisfied the first test was met. I do recall you informing the court that you have never missed a payment to which the CMS responded, from memory, that the debt accrued some time ago when you received a substantial lump sum. After hearing from both parties the magistrates were satisfied that there was a debt and so grant of the liability order.

As I sit in front of the magistrates, I cannot comment on your assertion that they looked absolutely lost when you made your point, nor that the chairman of the bench looked out of his depth. I didn't hear the comment you say he made; had I heard such I would have stood to address the bench to clarify any issues. The magistrates sitting in court three that afternoon were (sic) *an experienced bench of magistrates, well used to dealing with such applications.*

What to do now?

You can appeal the liability order decision. Details of how to appeal the decision can be found by following the link below.

Appeals should be lodged within 21 days of the decision, but as there has been a delay in this response to your initial complaint, you will need to complete part B of section 10 and section 11 of the appeal notification form.

If you are unhappy with my response you can speak to our senior legal adviser to review it just write to her at this address with details of why you're not happy.

8. The appellant filed his N161 two days after receiving the email from the senior legal manager, that being 15 September 2021. The N161 had attached to it a copy of the email sent to the court by the appellant on 17 August 2021. The only difference in content between the original email and the document annexed to the N161 is that the latter document was headed, "Complaint and Grounds of Appeal."

9. It is the appellant's case that the original email headed complaint should be treated by the court as a valid notice of appeal; in default the appellant should be granted an extension of time beyond 21 days to file the form N161.

The Law

The form of the notice of appeal

10. It is contended by the respondent that the notice of appeal must be made on form N161. As the initial document setting out the appellant's grounds of appeal was his email rather than a form N61 it is incumbent upon this court to establish whether the respondent is correct in its contention that the form N161 should have been used in order to validate the appeal.

11. This appeal is brought under section 111A of the Magistrates Courts act 1980:

> 111A Appeals on ground of error of law etc in [child support] proceedings
>
> *(1)This section applies in relation to proceedings under the Child Support Act 1991] in a magistrates' court.*
>
> *(2)Any person who was a party to any proceeding before the court, or is aggrieved by the order, determination or other proceeding of the court, may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by appealing to the family] court.*
>
> *(3)But a person may not appeal under subsection (2) in respect of a decision if-*
>
> > *(a)the person has a right of appeal to the family court against the decision otherwise than under this section, or*
> >
> > *(b)the decision is final by virtue of any enactment passed after 31st December 1879.*
>
> *(4)A notice of appeal under subsection (2) shall be filed within 21 days after the day on which the decision of the magistrates' court was given.*

As the respondent concedes, the relevant section does not define what is meant by notice of appeal. The respondent refers this court to FPR 2010 PD30A 9.3 and 9.4 (c)

> *9.3 Section 111A of the 1980 Act, provides that in proceedings under the Child Support Act 1991 a person may appeal to the family court on the ground that a decision is wrong*

in law or is in excess of jurisdiction. Section 111A(3)(a) provides that no appeal may be brought under section 111A if there is a right of appeal to the family court against the decision otherwise than under that section. Such an appeal is usually heard by a judge of circuit judge level court in accordance with the rules relating to the composition of the court and distribution of business made in accordance with section 31D of the 1984 Act.

9.4 Subject to section 111A of the 1980 Act and any other enactment, the following rules in Part 30 apply to appeals under section 111A of the 1980 Act –

30.1 (scope and interpretation);
30.2 (parties to comply with the practice direction);
30.4 (appellant's notice);
30.6 (grounds of appeal);
30.8 (stay); and
30.9 (amendment of appeal notice).

12. The relevant part of FPR 2010 30.4 is (4):

(4) Unless the appeal court orders otherwise, an appellant's notice must be served on each respondent

13. Practice Direction 5A specifies the forms to be used to make an appeal: different forms are to be used, depending on the court to which the appeal lies. It stipulates the forms to be used:
Part 30 Appeals 14. FP161, FP161A, FP162, FP162A, N161, N161A, N161B, N161D, N162, N162A, N162, N164
14. In answer the question of whether N161 should have been used, the answer clearly is, yes.

15. Where the wrong document has been used to make any application the court may grant relief from the sanctions that would normally follow. The court's powers are contained within Part 4.6 of the FPR 2010:

On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –
the interests of the administration of justice;
whether the application for relief has been made promptly;
whether the failure to comply was intentional;
whether there is a good explanation for the failure;
the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol(GL) ;
whether the failure to comply was caused by the party or the party's legal representative;
whether the hearing date or the likely hearing date can still be met if relief is granted;
the effect which the failure to comply had on each party; and
the effect which the granting of relief would have on each party or a child whose interest the court considers relevant.
An application for relief must be supported by evidence.
4.7
Where there has been an error of procedure such as a failure to comply with a rule or practice direction –

the error does not invalidate any step taken in the proceedings unless the court so orders; and
the court may make an order to remedy the error.

16. There is a significant amount of material regarding how the relief from sanctions rule should be applied in civil law. There is guidance as to how civil case law should be applied in family cases. In Re H (Children) [2015] EWCA Civ 583 McFarlane LJ (as he then was) expressed the view:

41. As I indicated at the start of this judgment it is not my purpose to suggest that the approach in family cases should differ from that applied in the ordinary civil jurisdiction.

17. With this guidance in mind, I turn to the civil case of Denton v White [2014] EWCA Civ 906: in that case the Court of Appeal considered previous authorities on the question of granting relief from sanctions and in a joint judgment, Jackson and Vos LJJ ruled:

A judge should address an application for relief from sanctions 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 rule 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 [25]

18. Regarding the content of whatever document is considered to be the notice of appeal, the document must set out the grounds of appeal. By virtue of FPR 2010 rule 30.6, the appeal notice must state the grounds of appeal.

19. The use of the wrong prescribed form to start an application has been held to be not necessarily fatal. This is demonstrated in Austin v Haynes [2021] EWCA Civ 1919. In Austin v Hayes the applicant to an application to enforce a financial award in private children proceedings filed Form D11 (a divorce form) rather than the correct form, 50K (a Children Act form). In his judgment Moylan LJ says:

Mr Ibrar did not take us to rule 5 of the FPR 2010 which, with PD5A, sets out the forms to be used in family proceedings. D50K is the form stipulated in respect of a general application for enforcement. He also did not take us to rule 4.7 of the FPR 2010 which provides that:
"Where there has been an error of procedure such as a failure to comply with a rule or practice direction

(b) the court may make an order to remedy the error."

The Judge was plainly entitled to decide "to remedy the error" by deeming the mother's 2019 application "to be an application pursuant to Form D50K". If it was an "error", it was a very minor error because the mother's July 2019 application was clearly an application for enforcement in that it sought an order that the father "comply with the

terms of" the 2018 order, including in respect of the provision of the housing fund. It was referred to by Williams J in his judgment of 4 November 2020 as an application "for enforcement" and, indeed, Mr Ibrar's skeleton argument for this hearing referred to the 2019 application as an application "to enforce the agreement contained in the consent order". [63,64]

20. In Austin v Hayes, whilst the wrong prescribed form was used, nevertheless at least the form that was used was a court form, albeit in relation to a different area of family law. In this case the appellant did not lodge any prescribed form until after the time to appeal expired; he sent a letter in the form of an email. On the question of whether a letter (or email) can be considered by the court as a notice of appeal I refer to a previous case where this has occurred without the issue being raised and where no appeal was brought arising from the court's approach. The case is one that I heard in this court, Donaghy v DWP [2018] EWFC B73 which was contested at appeal by the current respondent who was represented by a solicitor advocate with Higher Courts rights. The appeal mirrored this case insofar as it was an appeal under s 111A of the MCA 1980.

21. In Donaghy it was recorded in the judgment that,

> *"Initially Mr Donaghy sent to court a letter which was deemed to be a notice of appeal. The letter was dated 5th April 2017."* [4]

22. I went onto to confirm that the content of the letter contained the precise grounds of appeal which were considered by the court:

> *The appellant's notice of appeal has been accepted by the court as being his letter of 5th April 2017, and the following grounds of appeal can be discerned from that letter: (a) that the appellant was coerced into agreeing to something he did not agree with; (b) the appellant has been misinformed as to his rights to contest the original assessment; (c) the CMS has failed to provide documentary evidence to support the liability; (d) the fees for enforcement should not have been added; (e) that the original assessment has been miscalculated; (f) that the appellant has been misinformed as to the registration of a liability order; (g) that the appellant refuses to make any payments, as to do so would be to accept the debt; (h) that the appellant has been misled by the CMS as to whose liability it was to ascertain whether the parent with care was claiming child benefit; (i) that there was an agreement not to impose fees for enforcement; (j) that due process has not been followed before depriving the applicant of life, liberty or property; and (k) that the whole process has been based on lies by the CMS.*

23. I am not suggesting that I am bound by my own decision. I refer to this case purely as an example of where this respondent has taken what Mr Fraczyk, in his skeleton, described as a "pragmatic course" on a previous occasion when faced with similar circumstances.

Timing of the appeal

24. Section 111A(4) of the 1980 Act provides that the notice of appeal must be filed within 21 days after the day on which the decision of the magistrates' court was given. The court would

normally have the power to extend the time limit under FPR 2010 rule 4.1, however: PD30A 9.5 is specifically prohibits the court exercising a discretion to extend time:

> *Section 111A(4) of the 1980 Act provides that the notice of appeal must be filed within 21 days after the day on which the decision of the magistrates' court was given. The notice of appeal should also be served within this period of time. The time period for filing the appellant's notice in rule 30.4 (2) and (3) does not apply. There can be no extension of this 21 day time limit under rule 4.1(3)(a).*

25. The question then has to be asked whether the 21 day time limit is absolute or whether it may be extended notwithstanding PD30A 9.5?

26. The court has referred itself to a number of domestic, civil decisions on the question of exceptional circumstances, which following the lead to consider civil cases, in Re H, the court considers to be relevant.

27. The Nursing and Midwifery Council v Daniels [2015] EWCA Civ 225 involved a decision where the court was asked to extend the time to lodge a notice of appeal and to find that exceptional circumstances existed in order to grant the extension. The similarity between the Daniels decision and this case is that the time limit within which to serve a notice of appeal was limited in time and there was no ability to extend that time under the rules of the respondent organisation. The relevant law, supported by reference to relevant lead decisions is summarised in the judgment of Jackson LJ:

> *Article 29 (10) of the 2001 Order allows 28 days for commencing an appeal. It contains no provision for extension of time. Nor do the 2004 Rules contain any such provision.*
>
> *It used to be thought that the 28 day time limit was inflexible and would admit of no exceptions. However, the Supreme Court's decision in Pomiechowski v District Court of Legunica Poland [2012] UKSC 20; [2012] 1 WLR 1604 established that an absolute statutory time limit may need to be read down in order to comply with Article 6 of the European Convention on Human Rights.*
>
> *The time limit under consideration in Pomiechowski related to the commencement of an appeal in extradition proceedings, but it was clear that the decision may have wider implications. The Court of Appeal considered the application of Pomiechowski in the context of appeals by nurses under the 2001 Order in Adesina and Baines v Nursing and Midwifery Council [2013] EWCA Civ 818; [2013] 1 WLR 3156. In those two appeals which were heard together two nurses, Ms Adesina and Ms Baines, sought to appeal out of time against decisions of the Conduct and Competence Committee of the NMC. The judge struck out both appeals and the Court of Appeal upheld that decision.*
>
> *Although the Court of Appeal held that there could be no extensions of time in those two cases, it rejected the proposition that the 28 day time limit was absolute and inflexible. Maurice Kay LJ (with whom Patten and Floyd LJJ agreed) held that the principle established in Pomiechowski was applicable to the time limit contained in article 29 (10) of the 2001 Order. He held that time could be extended in exceptional circumstances,*

namely where enforcing the 28 day limit would impair the very essence of the statutory right of appeal.

28. It is therefore established law that such a time limit that exists in the current case can be extended but only where not to do so would impair the very essence of the statutory right of appeal.

The factual matrix

29. The chronology of this case is that the magistrates heard and determined an application for a liability order made by the DWP on behalf of the CMS on 17 August 2021. The appellant attended the hearing and made representations. It is unclear as to whether he was permitted to give evidence. The statutory time to appeal the making of that order was 21 days from 17 August which was the 7th September 2021. On the same day of the decision being made the appellant sent an email to the court complaining about the decision; the contents of that email are set out above. The appellant did not receive a response to his email until 7 September 2021, the very day upon which the 21 day time limit to lodge a notice of appeal expired. The appellant received a follow-up response from the court on 13 September 2021 containing a substantive response. The appellant filed form N161 in court on 15 September 2021, this being eight days outside of the statutory time limit within which to appeal. The N161 had annexed to it a copy of the original email which the appellant submitted as a document containing his "Grounds of Appeal".

Analysis

30. The first question I ask myself is whether the email of 17 September comprises a valid notice of appeal. It is significant that the email contains the precise wording of the grounds of appeal which are annexed to the N161. For the court to find that the appellant is excused from filing the prescribed form the court must consider whether the appellant should be granted relief from sanctions in order to legitimise the email as a valid notice of appeal.

31. Having regard to the criteria to grant relief I make the following findings. In my judgement there is a legitimate interest in granting relief to further the administration of justice. The effect of the liability order on the respondent is substantial. A liability order represents a real interference with the respondents personal and financial life. This is particularly so if it can be demonstrated that the criteria for making the liability order has not been met. The administration of justice demands that if it is possible for the appellant to demonstrate that the liability order has been wrongly made, he should be able to do so unless in doing so the interests of the administration of justice would not be served. I am satisfied that the application for relief was made promptly as it was made by implication within the applicants appeal when he filed the N161 which was filed effectively eight days out of time. I am further satisfied that there is no suggestion that the failure to comply was intentional. Any reading of the email informs the reader that the appellant wished to appeal the order. The words, "*I would like someone with decision-making abilities and someone reasonable to escalate my complaint to the highest level possible and reverse this decision when clearly, clearly it should never have been given",* are without ambiguity as to the intention of the email.

32. In considering whether there is a good explanation for the failure to file the N161, I agree with the respondent that the form is readily available on the Internet and the fact that the appellant is a litigant in person is not an excuse within itself for not following the rules. That said I have regard to the fact that as soon as the appellant became aware of the appropriate form he filed in court as quickly as he could possibly be expected to (two days).

33. Having filed the appropriate form, the appellant has shown the utmost respect of the court process and has complied with all rules and court directions.

34. I turn now to consider the effect the failure to comply with the rule, to use the correct form, has had on each party. It is in my judgement appropriate to have regard to the fact that the respondent is a government agency charged with lawfully administering the collection the correct amount of child maintenance. I cannot find that the respondent will be adversely affected by not granting relief to the appellant if to grant relief would mean that an appeal could proceed and if successful would mean that only an appropriate amount of child support would be collected.

35. Regarding the question of evidence, I am satisfied that the appellant produced evidence in support of his application in the form of the documentation which was provided to the court which in turn has been provided to the respondent.

36. By way of further analysis and by way of a cross check, I have considered the judgement in the Denton case and from my observations above am satisfied that the breach, that is the failure to file the correct form, is neither serious nor significant in the context of this case. For the sake of completeness, I am satisfied that my observations demonstrate that the court has considered the second and third stage as determined by the Court of Appeal.

37. Further to support my findings it is my view that the ruling in Austin and Hayes is supportive of permitting the wrong form to be filed. The respondent's failure to take issue, or to appeal, my decision in Donaghy is evidence that in the past this respondent has adopted a sensible and pragmatic approach and I find it disappointing that the same approach is not been taken in this case. The respondent's failure has in my judgement led to unnecessary delay, and no doubt emotional stress, by causing a resolution of this case to be unnecessarily prolonged.

38. Having determined that I am satisfied that a valid notice of appeal was filed within the time I could allow the appeal to proceed at this stage. For the sake of completeness however it is appropriate for me to address the question of whether time to lodge the notice should be extended on the basis that there are exceptional circumstances for doing so.

39. I am cognisant of the law that to make a finding of exceptional circumstances I must find that I can only do so where failure to extend would impair the very essence of the statutory right to appeal.

40. This is an unusual case which on the question of exceptional circumstances turns on its facts. I have been unable to find an example contained within other reported cases identical or indeed even similar to this case. The unique nature of this case is that the appellant, having made it abundantly clear in an email sent the day of the decision, that he wished it to be reviewed was not responded to until the precise day when the appeal period expired. What compounds the

problem is that in a further email from a "Senior Legal Manager" of the court sent eight days later the respondent was told that he could appeal but that he was out of time and should complete the relevant part of the form asking for time to be extended. Any reading of the email sent by the court would give the recipient the impression that he could apply for the time to be extended and that his application will be successful because of the court's delay in responding to his first email. I acknowledge that court employees cannot and should not give legal advice and I further acknowledge that the author of the email was probably ignorant of the prohibition against extending time contained within the rules. In my judgement it would be wholly wrong to deny the appellant an extension to file his notice of appeal in light of the cumulative facts of this case if the law permits.

41. I am satisfied that the circumstances of this case are exceptional and that not to grant an extension would impair the very essence of the appellant's statutory right of appeal.

42. I am ruling as follows:
    (a) The appellant filed a valid notice of appeal on 17 September 2021
    (b) In so far as it is may be required, the Appellant is granted permission to file a notice of appeal out of time

Order

1. In so far as the Appellant requires leave to appeal such leave is granted
2. The substantive hearing of the Appeal will be considered before myself on a date to be fixed

END