Full and frank disclosure or no appeal: recent English Court of Appeal decision highlights pitfalls to avoid when making applications for permission to appeal

Key points to note

In *Kovarska v Otkritie*[1], the Court of Appeal upheld an application by Otkritie to set aside an earlier ex parte order of that court which had granted Ms Kovarska permission to appeal and had been decided on the papers. Citing serious misrepresentations and material non-disclosures, the Court of Appeal found that it had been misled and that there were compelling reasons to set aside its previous order.

Following changes to the Court of Appeal's procedure in October 2016 whereby applications to appeal are to be determined on the papers unless the court considers that an application should be heard at an oral hearing, the judgment provides useful guidance on avoiding certain pitfalls which could result in permission to appeal being set aside.

Specific points arising from the judgment:

1. where an application for permission to appeal is made under CPR 52.3 and is decided on the papers under the usual "essentially 'without notice' procedure" to the respondent, the applicant has a duty to make full and frank disclosure of all the material facts;
2. under the old rule CPR 52.9 (now CPR 52.18), the court may set aside permission to appeal, in whole or in part, where there is a compelling reason to do so. In its judgment, the court held that material non-disclosure and serious misrepresentations were compelling reasons for setting aside permission to appeal; and
3. in any event, the court also has the power under CPR 3(7) to vary or revoke any aspects of orders made in circumstances where it is misled as to the correct factual position, for example because of material non-disclosure or serious misrepresentations.

Background to the dispute

In two judgments, the High Court found that Otkritie had been the victim of a fraud involving Ms Kovarska, among other defendants. The deadline for Ms Kovarska to file an appeal was 1 April 2014, and at no stage did Ms Kovarska ask for an extension of time, despite being represented by solicitors.

Some two years later on 1 April 2016 Ms Kovarska applied for (a) a two-year extension of time for her application for permission to appeal, (b) permission to appeal on nine grounds and (c) permission to adduce what was claimed to be "new" evidence. Among other things, Ms Kovarska claimed that she:

1. was impecunious and had been unable to afford and obtain legal advice and assistance within the time limit for lodging an appeal because she now resided in Israel;
2. had obtained important new evidence "conclusively" demonstrating that one of the judge's findings in 2014 as regards her power of attorney over a particular bank account had been wrong;
3. had been deprived of the opportunity to make enquiries as regards certain key correspondence considered during the 2014 trial; and
4. should be granted permission to appeal on a technical point of law, in respect of which two of the other defendants in the substantive action had sought and obtained permission to appeal.

In November 2016, Ms Kovarska's application was decided on the papers and an order was given granting her permission to appeal on the basis that a reasonable explanation for the delay in applying for permission

1 *Maria Kovarska v Otkritie International Investment Management Limited and Others* [2017] EWCA Civ 1485

had been given, the grounds of appeal had a real prospect of success, and the "new" evidence appeared to be highly relevant (although no explanation had been provided as to why it was not available at trial).

Otkritie subsequently applied to set aside the November 2016 order, contending that it was procured by serious misrepresentations of, and omissions to disclose, highly material facts going to the merits of Ms Kovarska's applications, the evidence on which they were based, and the stated reasons for her two year delay in making them.

In its recent judgment, the Court of Appeal held that it had indeed been misled by the materials presented by Ms Kovarska, and by the absence of reference to certain critical facts which were relevant to Ms Kovarska's application:

1. whilst represented by counsel and solicitors, Ms Kovarska did consider an appeal in time (and had in fact already in February 2014 sought and obtained a five week extension which was not disclosed in her application for permission to appeal);
2. the allegedly "new" evidence – a power of attorney over a particular bank account – had in fact been received by Ms Kovarska in February 2014. Ms Kovarska failed to draw the court's attention to various highly material facts concerning the timing of receipt of this information and what she/her lawyers knew about the error in the judge's 2014 findings;
3. Ms Kovarska's own submissions at trial showed that she had taken the opportunity to make the relevant enquiries about certain key correspondence which the judge concluded in 2014 she had tampered with;
4. Ms Kovarska had failed to disclose that her own leading counsel had conceded at a hearing in the substantive action that the technical point of law did not apply to her and this point was recorded by the judge as having been abandoned by Ms Kovarska; and
5. contrary to any claims of impecuniosity, the evidence showed that Ms Kovarska led an expensive lifestyle in Israel and was able to procure the services of experienced lawyers and engage in extensive and costly litigation in at least three jurisdictions. The picture presented to the court by Ms Kovarska was misleading and incomplete in this respect.

The court held that had it been aware of the full facts, it would not have granted any of Ms Kovarska's applications when deciding them on the papers. Consequently, the court's previous order was set aside and Ms Kovarska's application for permission to appeal was dismissed.

Conclusions

The judgment provides a useful insight into the Court of Appeal's approach to granting and setting aside permission to appeal. The court's findings in relation to material non-disclosure and serious misrepresentation should be borne in mind particularly in light of the shift to deciding applications for appeal on the papers as a result of new rules for appeals to the Court of Appeal coming into effect on 3 October 2016.

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