2009 Master 75

Ref:

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **27/10/09**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

PROBATE AND MATRIMONIAL

BETWEEN:

D

Petitioner;

and

D

Respondent.

(Post-Agreement Windfall)

Master Bell

[1] Thirteen years ago the parties in this case separated and signed an agreement regulating their financial affairs. Recently the husband has had a £10.0 million "windfall" (as counsel for the wife referred to it) and she now applies to the court for a share thereof. The issue for decision is whether she is entitled to such a share. The wife seeks Ancillary Relief pursuant to a summons dated 16 October 2007 issued in the County Court for the Division of Fermanagh and Tyrone. The application was transferred, on consent, to the High Court on 14 December 2007 under Rule 2.76(2) of the Family Proceedings Rules (Northern Ireland) 1996.

[2] I have anonymised this judgment in order to avoid the identification of the youngest child of the family. The parties are requested to consider the terms of this judgment and to inform the Matrimonial Office in writing within one week as to whether there is any reason why the judgment should not be

published on the Court Service website or as to whether it requires any further anonymisation prior to publication. If the Office is not so informed within that timescale then it will be submitted to the Library for publication in its present form.

[3] At the hearing neither party gave oral evidence. An affidavit had been sworn by the wife on 11 September 2007 for the purpose of these proceedings and an affidavit had been sworn by the husband on 29 February 2008. However the application proceeded on the basis of oral and written submissions by counsel. Mr Toner QC and Miss Alexander appeared on behalf of the wife and Miss McGrenera QC and Miss Cunningham appeared on behalf of the husband.

[4] The matter was listed at the instance of the husband to argue that, given the existence of the 1994 agreement between the parties, the wife was not entitled to any share of the windfall.

THE FACTS

[5] The parties were married on 1 May 1989 and separated in late 1994. On 28 November 1994 the parties entered into a separation agreement ("the agreement"). On 5 December 1994 an order for child and spousal maintenance was made in the Magistrates Court under Article 8 of the Domestic Proceedings (Northern Ireland) Order 1980. On 16 June 2000 the wife petitioned for divorce and a Decree Nisi was granted on 5 March 2001. No decree absolute has yet issued. On 1 October 2007 a summons for ancillary relief was issued.

[6] The agreement provided that the parties would have joint custody of their three children (now aged 20, 19 and 15). It provided for a sum of maintenance in the amount of £400 per month (£100 per month to the wife and £100 per month to each of the children.) It provided that the matrimonial home would be sold and the net proceeds would be divided between the parties. It also provided that :

> "Prior to the division of the net proceeds of sale as indicated above the Respondent shall pay to the applicant the sum of £5,000 (Five Thousand Pounds) and the payment of such sum shall be in full and final settlement of the Applicant's entitlement to financial provision whether by way of lump sums, periodical payments, secured provision orders and property adjustment orders now or at any time in the future, pursuant to the Married Women's Property Act 1882, Partition Acts, Matrimonial Causes (N.I.) Order 1978, The Matrimonial and Family Proceedings (N.I.) Order 1989, The Inheritance

(Provision for Family and Dependents (N.I.) Order 1979 or any subsequent enactment thereof or in Equity or at Common Law, or any other claim to entitlement whatsoever, whether of an income or capital nature."

[7] Following this agreement having been signed by the parties, the Magistrates Court made an order on 5 December 1994 under Article 8 of the Domestic Proceedings (Northern Ireland). That order dealt with the issues of custody in respect of the three children, spousal maintenance and maintenance in respect of the children.

[8] In 1998 the husband's father died intestate, with the result that the husband and his three sisters inherited farmland. Between 1998 and 2002 the four attempted to sell this farmland. Their attempts were unsuccessful, as no offers matching or exceeding the asking price of £1.2 million were received.

[9] On 20 November 2000 the wife issued a divorce petition which led to the grant of a Decree Nisi on 7 March 2001.

[10] In 2002 the husband reached an agreement with his three sisters that he would buy their shares of the farmland. He raised the necessary finance to do so by means of a bank loan.

[11] In 2006 the husband sold the farmland to a buyer for a sum of approximately £10.0 million as the future site of a local amenity.

[12] In 2007 the wife commenced the ancillary relief proceedings.

HUSBAND'S SUBMISSIONS

The Consent Order Argument

[13] In written submissions made on behalf of the husband it was initially suggested that what the wife was attempting to do was set aside a consent order. Such an attempt, Miss McGrenera argued, should founder on a jurisdictional point, as Morgan J, as he then was, observed in the recently handed down, but not yet publicly released, decision in *MG McG v B McG* (Miss McGrenera had appeared in that case and hence had a copy of the judgment). However not all the terms of the agreement were incorporated into the order of 5 December 1994 and, of course, the Magistrates Court had no jurisdiction to make orders such as a Property Adjustment Order. This initial argument was therefore quickly abandoned on behalf of the husband.

The Edgar and Edgar Argument

[14] The second argument advanced was that the court should rely on the principle enunciated in the seminal decision of *Edgar v Edgar* (1981) 2 FLR 19

that, other than in unusual circumstances, courts will uphold agreements freely entered into at arms length by parties who were properly advised.

[15] Miss McGrenera referred me to paragraph D1[25] of Duckworth's "Matrimonial Property and Finance" which states :

> "… Still it is no part of the Court's duty to upset agreements fairly and freely entered into by individuals possessing the requisite degree of competence. Provided there has been independent legal advice and the parties have acted at arms length – and provided, of course, there has been proper financial disclosure – the Court will rarely intervene.
>
> > 'Men and women of full age, education and understanding, acting with competent advice available to them, must be assumed to know and appreciate what they are doing …'
> >
> > 'I respectfully agree … that other than in unusual circumstances, courts will uphold agreements freely entered into at arm's length by parties who are properly advised.' "

[16] Miss McGrenera submitted that, although a number of factors had been identified in *Edgar*, the existence of which could lead to a court setting aside an agreement, none of these factors namely :

(i) undue pressure by one side,

(ii) exploitation of a dominant position to secure an unreasonable advantage,

(iii) inadequate knowledge,

(iv) possibly bad legal advice,

(v) an important change of circumstances, unforeseen or overlooked at the time of making the agreement

were present in the instant case.

[17] In terms of the "important change of circumstances" factor, Miss McGrenera observed that no proceedings were initiated by the wife at the point when the husband's father died and he inherited a quarter share in the land. Nor was an application made at the time the divorce was granted. Rather, the trigger for the application was apparently that a higher price than might have been expected had been gained for the land.

[18] Miss McGrenera argued that under *Edgar* the court should only intervene in rare circumstances. Something totally unforeseen must occur and not just a change in share values or property prices. She submitted that parties who enter into an agreement are entitled to rely on it and get on with their

lives. Otherwise, she argued, where is the certainty for parties ? She submitted that the husband had taken the risk of buying the other portions of the property and he was entitled to the benefit of having done so. Miss McGrenera raised an inevitable "floodgates" argument, stating that every other businessman who acted entrepreneurially and entered into investments would be liable, on the position advanced by the wife, to have any separation agreement reopened. She submitted that the wife was simply seeking to latch onto the husband's good fortune and argued that there was nothing that categorised this case as exceptional.

The Barder v Barder Argument

[19] Counsel submitted that I should also apply the principles emerging from *Barder v Barder (Caluori Intervening)* [1987] 2 FLR 480 to this case. In Barder the court had made a consent order transferring the husband's interest in the matrimonial home to the wife. The wife, however, committed suicide one month later, before the order was executed. The judge gave leave to the husband to appeal out of time and allowed the appeal on the basis that the order had been vitiated by a fundamental common mistake by the parties that for an appreciable period after the orders the wife and children would continue to live and would benefit by its terms. The intervener appealed from the judge's decision contending, *inter alia*, that the matrimonial proceedings had been brought to an end by the death of one of the parties to the marriage and therefore that the judge had had no jurisdiction to give leave to appeal or to entertain the appeal. The Court of Appeal allowed the appeal by a majority decision. The husband then appealed to the House of Lords. In *Barder* Lord Brandon's speech summarised the position **:**

> "A court may properly exercise its discretion to grant leave to appeal out of time from an order for financial provision or property transfer made after a divorce on the ground of new events, provided that certain conditions are satisfied. The first condition is that new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed. The second condition is that the new events should have occurred within a relatively short time of the order having been made. While the length of time cannot be laid down precisely, I should regard it as extremely unlikely that it could be as much as a year, and that in most cases it will be no more than a few months. The third condition is that the application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case."

[20] Following the decision in *Barder*, these principles have subsequently been applied in *Cornick v Cornick* [1994] 2 FLR 530, *S v S* [2009] NIMaster 63, *Dixon v Marchant* [2008] EWCA Civ 11, and *Myerson v Myserson* [2009] 2 FCR 1. Counsel referred me in particular to the following passage from *Cornick v Cornick* :

> "Where such a dramatic change in the comparative wealth of the parties takes place very shortly after a capital settlement in divorce proceedings, it is not surprising that the disadvantaged party should want the settlement set aside in some way. But it is not possible to do this in very limited circumstances and it is important not to allow one's natural sympathy for the position in which the wife finds herself to colour the application of those principles to the facts of the particular case.
>
> There are three possible interpretations of a situation such as this. The first is that it is simply a change in the parties' circumstances which has taken place since the order. This would not normally give rise to any case for reopening matters. The Matrimonial Causes Act 1973 does not allow for the variation of capital settlements, including lump sum orders save as to instalments. Capital settlements are by their nature intended to be final. They have to be based upon a snapshot taken at the time of the trial. The court has to do its best with the evidence available to apply the considerations which the court has, under s 25 of the 1973 Act, to take into account at the time. Under s 25(2)(a), these include the assets which each party has or is likely to have in the foreseeable future.
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> The second possibility is that the court proceeded on a mistaken basis at the trial, so significant that had it known the true facts it would have made a substantially different order. Such mistakes usually arise from a misrepresentation or material non-disclosure to the court, such that the matter may be reopened under the principle laid down in the House of Lords' decision in *Livesey v Jenkins* [1985] AC 424."
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> On analysis, therefore, there are three possible causes of a difference in the value of assets taken into account at the hearing, each coinciding with one of the three situations mentioned earlier:
>
> > (1) An asset which was taken into account and correctly valued at the date of the hearing changes

> value within a relatively short time owing to natural processes of price fluctuation. The court should not then manipulate the power to grant leave to appeal out of time to provide a disguised power of variation which Parliament has quite obviously and deliberately declined to enact.
>
> (2) A wrong value was put upon that asset at the hearing, which had it been known about at the time would have led to a different order. Provided that it is not the fault of the person alleging the mistake, it is open to the court to give leave for the matter to be reopened. Although falling within the *Barder* principle it is more akin to the misrepresentation or non-disclosure cases than to *Barder* itself.
>
> (3) Something unforeseen and unforeseeable had happened since the date of the hearing which has altered the value of the assets so dramatically as to bring about a substantial change in the balance of assets brought about by the order. Then, provided that the other three conditions are fulfilled, the *Barder* principle may apply. However, the circumstances in which this can happen are very few and far between. The case-law, taken as a whole, does not suggest that the natural processes of price fluctuation, whether in houses, shares or any other property, and however dramatic, fall within this principle."

[21] Mrs McGrenera therefore submitted that the wife had to meet this higher test. As authority for this submission counsel referred me to paragraph D1[32] of Duckworth's "Matrimonial Property and Finance" :

> "The doctrine of *Barder*, which allows escape from consent orders on proof of a fundamental change of circumstances, must apply with equal if not greater force to agreements."

Duckworth, however, provides no explanation as to why this statement should be correct and counsel was not able to provide any authority as to why it might be so.

WIFE'S SUBMISSIONS

The Edgar and Edgar Argument

[22] Mr Toner submitted that the application of the principles in *Edgar and Edgar* allowed the wife to ask the court to set aside the agreement between the parties. He sought only to rely on the "important change in circumstances" factor in *Edgar*.

[23] Mr Toner argued that it was irrelevant how the change of circumstances had come about. He submitted that if the husband had won the National Lottery, then the wife would be entitled to have the agreement reopened. Mr Toner's position was that the agreement only brought "a certain amount of certainty" to the parties. When pressed, he did not, however, have any authorities following on from the decision in *Edgar* to show how courts have dealt with the matter of unforeseenness. He argued, however, that the "unforeseen" in *Edgar* must include unforeseen *financial* circumstances and not just unforeseen *life* circumstances. He acknowledged that his position was that it was not the *inheritance* of the land which was unforeseen, it was the sale of the inherited land for such a high *price* which was unforeseen.

The Barder v Barder Argument

[24] Mr Toner submitted that there was a world of difference between "agreement" cases and "court order" cases. He therefore argued that the assertion in paragraph D1[32] of Duckworth was completely unsound. He submitted that the caselaw provided different tests for different situations. In respect of agreements between the parties which had not been made a Rule of Court, the court should apply the principles laid down in *Edgar v Edgar*. Where, however, an agreement had been made a Rule of Court, the court should apply the test laid down in *Barder v Barder* and its subsequent line of decisions.

CONCLUSION

The Consent Order Argument

[25] The consent order argument was, quite properly, not proceeded with by counsel. The order made by the Magistrates Court on 5 December 1994 certainly gave effect to a number of aspects of the agreement but the court had no jurisdiction to deal with property division matters and was not invited to give its approval of the agreement which had been reached between the parties.

The Barder Argument

[26] In *Barder* Lord Brandon said that the question whether leave to appeal out of time should be given on the ground that assumptions or estimates made at the time of the hearing of a cause or matter have been invalidated or falsified by subsequent events is a difficult one. He described the problem as follows :

> "The reason why the question is difficult is that it involves a conflict between two important legal principles and a decision as to which of them is to prevail over the other. The first principle is that it is in the public interest that there should be finality in litigation. The second principle is that justice requires cases to be decided, so far as practicable, on the true facts relating to them, and not on assumptions or estimates with regard to those facts which are conclusively shown by later events to have been erroneous. "

[27] This quotation illustrates why the *Barder* argument in this case is misconceived. At the point the agreement was entered into, there was no ancillary relief litigation to which it brought an end and in respect of which the finality principle needs to be respected. What there was, was a free-standing agreement between the parties, some of the terms of which were incorporated into a court order dealing with a limited range of issues such as residence arrangements in respect of the children and spousal and child maintenance.

[28] The concept underlying *Barder* is that the fundamental basis on which *a court order* has been made has proved to be invalid. *Barder* and the line of subsequent authorities following it only applies in a situation where there has been an order of the court which one of the parties now seeks to have set aside. This is not that type of case.

[29] In respect of the reference at paragraph D1[32] of Duckworth's "Matrimonial Property and Finance", it may be that the unstated assumption here is that the author is referring to agreements which have been made a Rule of Court and hence form a part of a Court Order. If so, this underlines the point made by Thorpe LJ in *Xydhias v Xydhias* [1999] 2 All E R 386 of the importance of applications to the court for agreements to be made a Rule of Court and that such are not a rubber stamp. Rather, there is an independent exercise of the court's judgment in the light of the Article 27 factors and the current case law. Once agreements have been made a Rule of Court, the impact is that they can only be set aside by satisfying the more onerous *Barder* test rather than the *Edgar* principles.

The Edgar Argument

[30] In *Edgar* Oliver LJ stated " the court must, I think, start from the position that a solemn and freely negotiated bargain by which a party defines her own requirements ought to be adhered to unless some clear and compelling reason, such, for instance, as a drastic change of circumstances, is shown to the contrary."

[31] Ormrod LJ stated :

> "Under s. 25(1) it is the duty of the court to have regard to all the circumstances of the case, and, in particular, to the matters detailed in paragraphs (*a*) to (*g*), and to exercise its powers so as to place all parties, so far as practicable, and having regard to their conduct, just to do so, in the financial position they would have been in had the marriage not broken down. The ideal, of course, is rarely if ever, attainable; so, inevitably, in most cases, the phrase "so far as practicable" dominates the issue, modified, where relevant, by conduct.
>
> To decide what weight should be given in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel, *all* the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue."

[32] The matter of agreements was further dealt with in *MacLeod v MacLeod* [2008] UKPC 64. The decision in *MacLeod* concerned a married couple who had entered into a pre-nuptial agreement and then subsequently entered into a post-nuptial agreement which affirmed, with some important variations, their previous agreement.

[33] In *MacLeod* Baroness Hale said :

"41. The question remains of the weight to be given to such an agreement if an application is made to the court for ancillary relief. In *Edgar v Edgar*, the solution might have been more obvious if mention had been made of the statutory provisions relating to the validity and variation of maintenance agreements. One would expect these to be the starting point. Parliament had laid down the circumstances in which a valid and binding agreement relating to arrangements for the couple's property and finances, not only while the marriage still existed but also after it had been dissolved or annulled, could be varied by the court. At the same time, Parliament had preserved the parties' rights to go to court for an order containing financial arrangements. It would be odd if Parliament had intended the approach to such agreements in an ancillary relief claim to be different from, and less generous than, the approach to a variation application. The same principles should be the starting point in both. In other words, the court is looking for a change in the circumstances in the light of which the financial arrangements were made, the sort of change which would make those arrangements manifestly unjust, or for a failure to make proper provision for any child of the family. On top of that, of course, even if there is no change in the circumstances, it is contrary to public policy to cast onto the public purse an obligation which ought properly to be shouldered within the family.

42. The Board would also agree that the circumstances in which the agreement was made may be relevant in an ancillary relief claim. They would, with respect, endorse the oft-cited passage from the judgment of Ormrod LJ in *Edgar v Edgar*, at p 1417, in preference to the passages from the judgment of Oliver LJ, both quoted above at paragraph 25. In particular the Board endorses the observation that "it is not necessary in this connection to think in formal legal terms, such as mispresentation or estoppel". Family relationships are not like straightforward commercial relationships. They are often characterised by inequality of bargaining power, but the inequalities may be different in relation to different issues. The husband may be in the stronger position financially but the wife may be in the stronger position in relation to the children and to the home in which they live. One may care more about getting or preserving as much money as possible, while the other may care more about the living arrangements for the children. One may want to get out of the relationship as quickly as possible, while the other may be in no hurry to separate or divorce. All of these may shift over time. We must

> assume that each party to a properly negotiated agreement is a grown up and able to look after him- or herself. At the same time we must be alive to the risk of unfair exploitation of superior strength. But the mere fact that the agreement is not what a court would have done cannot be enough to have it set aside."

[34] In the absence of undue pressure, unfair exploitation of superior strength, inadequate knowledge or possibly bad legal advice, it is not sufficient, where a party seeks to have an agreement set aside, to show a mere change of circumstances. The circumstances of parties' lives are in a continual state of flux and change. Bank balances, property prices and the stock market rise and fall. Health may improve or decline. Change is ongoing and inevitable for all. As Timothy Scott QC wrote in *"MacLeod v MacLeod : Pre-nups, Post-nups and s 35 of the MCA"*, an article referred to by Mr Toner, :

> "In practice of course the longer the period of time which has passed since any separation agreement, the more likely it is that a material change of circumstances will have occurred."

Does this mean that a party has only to wait for a sufficient time from the making of an agreement until the circumstances have changed sufficiently to constitute a material change ? In my view, this is not the position. As Ormrod LJ indicated in Edgar, it is only an exceptional change of circumstances *unforeseen or overlooked at the time of the making of the agreement* that justify the reopening of an agreement. At the time the wife entered into the agreement she knew that the husband would, if the natural course of events followed, be pre-deceased by his father. She knew the husband would inherit some land from his father. She knew the land would have value and that the husband might sell it and thereby gain a sum of money. She did not know at the time of the agreement that the husband would make a speculative investment by buying his sisters' portions and that he would be extremely fortunate in that a buyer would find the site desirable for a local amenity. She also did not know the massive amount of the sum which the buyer would pay.

[35] Mr Toner based his application on behalf of the wife on the argument that while the inheritance of the land was foreseen, it was the sale price which was unforeseen. In *Myerson* Lord Justice Thorpe said

> " I echo the words of Hale J that the natural processes of price fluctuation, whether in houses, shares, or any other property, and however dramatic, do not satisfy the Barder test."

In my view the natural processes of price fluctuation also do not amount to "an important change of circumstances, unforeseen or overlooked at the time of making the agreement" as required by *Edgar*. In addition, the amount

received by the husband was due to the fact that he had engaged in post-separation, entrepreneurial activity which involved him in taking an investment risk of entering into a loan arrangement to purchase his sisters' shares in the land. In the circumstances of this case, no proper application of the *Edgar* principles could deprive a party of the benefit of such an investment.

[36] As the wife's ancillary relief application stands or falls on whether the agreement may be reopened, I therefore dismiss her application.