Neutral Citation No.: [2009] NIFam 6 | *Ref:* **MOR7440**

Judgment: approved by the Court for handing down | *Delivered:* **06-03-09**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

FAMILY DIVISION

_____

PROBATE AND MATRIMONIAL OFFICE

_____

Between:

MG McG

Petitioner;

-and-

B McG

Respondent.

_____

MORGAN J

Background

[1] The petitioner and respondent were married in September 1990 and lived together until June 2004. There were four children of the marriage. The respondent obtained a degree nisi on a cross petition alleging two years separation and consent in October 2007. The petitioner's ancillary relief application came on for hearing on 3 April 2008. There were 2 principal assets. The parties agreed that the value of the jointly owned former matrimonial home was £800,000 at the date of settlement and that the value of the respondent's interest in a family business was just over £600,000. The parties entered into an agreement on the date of hearing whereby provision was made for various other assets, the respondent agreed to pay petitioner a further lump sum of £650,000 on or before 3 October 2008 with interest accruing at court rate in the event of default in consideration of which the petitioner agreed to relinquish her entire legal and beneficial interest in the former matrimonial home and the petitioner agreed to relinquish whatever beneficial interest she may have had in the respondent's business. The purpose of the agreement was to effect a clean break between the parties to enable them to get on with their lives independently and jointly care for their

children. The agreement was made a rule of court by consent on the day on which it was made.

[2] Within that portion of the agreement dealing with the payment of the lump sum of £650,000 there was the following sentence.

> "In the event that the house sells for more than £800,000 within the six-month period it is agreed that the respondent shall retain any surplus."

This may have reflected the fact that at one stage the property had been valued at approximately £1.2m and at the time of the settlement the respondent hoped that he might achieve a figure in excess of the agreed valuation so as to pay off not just the lump sum and the outstanding mortgage of approximately £80,000 but also a substantial portion of his legal costs which I am advised have now reached approximately £180,000. The petitioner at all material times has been legally assisted. In fact the respondent's hopes have been disappointed. Despite the fact that the property has been actively marketed it has not yet been sold and the best offer that has been achieved is one of £500,000. The parties are in agreement that this offer should be accepted and after payment of the mortgage and the costs of sale this should release approximately £400,000.

[3] The present valuation of the business has given rise to more controversy between the parties. Historically the business has been operated through a family company in which the respondent and his two brothers were shareholders and a partnership between the same brothers also existed. Unfortunately one of the brothers died in 2005 and the financial arrangements in relation to his estate have not yet been resolved. In recent months the respondent's other brother has suffered from illness requiring some hospital treatment as a result of which the respondent has essentially been running the day-to-day operation of the business on his own. The assets include a substantial area of farmland and some land with a hope value for development purposes. Although there is no up-to-date valuation of the land it is suggested by the respondent's accountant that its value might have depreciated by some 20% in recent months. Of more importance is the report of the respondent's accountant in relation to the ability of the respondent to generate a loan on the basis of his business interests. The accounts of the company indicate that there are substantial shareholders funds and the petitioner points to these as a source of funding for the settlement. I am satisfied, however, that these funds are necessary to the conduct of the business and that they do not provide a liquid asset which can enable the respondent to meet his obligations. I am also satisfied that the respondent has investigated the possibility of obtaining a loan against his business interests but that the bank have been unwilling to provide him with a facility on that basis. The evidence before me indicates that consideration has been given to

selling some of the land held by the business but the surviving brother objects to that course on the basis that it would be disadvantageous to the company taking into account the state of the market. It appears that he has consulted solicitors and obtained advice to that effect and without his agreement a sale could not proceed. Despite, therefore, the protestations of the petitioner I am satisfied that the only additional cash available to the respondent is the sum of £2500 per month which he draws from the business and that at present he is not in a position to satisfy the order of 3 October 2008 by payment of the outstanding lump sum.

The Applications

[4] On 24 November 2008 the petitioner issued a summons seeking directions pursuant to article 25 (6) of the Matrimonial Causes (Northern Ireland) Order 1978 requiring the petitioner to pay the outstanding sum. On 4 December 2008 the respondent issued a summons claiming the following relief:

(a) that the agreement of 3 April 2008 and the Order of the Court made thereon are set aside;
(b) further and in the alternative that leave is granted to appeal out of time the agreement of 3 April 2008 and the Order of the Court made thereon.

The summons had originally sought a downward variation of the lump sum of £650,000 but the parties now agree that there is no power to make any such variation (see article 33(2) of the Matrimonial Causes (Northern Ireland) Order 1978 and Jenkins v Livesey [1985] AC 424)

Setting aside a consent order

[5] I will deal first with the application to set aside. The jurisdiction to set aside a consent order in ancillary relief proceedings was considered by the Privy Council in an opinion delivered by Lord Diplock in de Lasala v de Lasala [1980] AC 546. That was a case in which the husband and wife had entered into an agreement which was made a consent order on 23 May 1970. In 1975 the wife applied inter alia to set aside the agreement on the basis that she had been induced to agree to the consent order by misrepresentations by the husband as to his financial position at the time and by the bad advice she had received from then her legal advisers as to what her tax position would be. Lord Diplock dealt firstly with the relationship between the agreement and the consent order.

> "Financial arrangements that are agreed upon between the parties for the purpose of receiving the approval and being made the subject of a consent

> order by the court, once they have been made the subject of the court order no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order"

He then went on to consider the options open to a party seeking to challenge an order on the ground that it was obtained by fraud or mistake.

> "Where a party to an action seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issues raised between the parties, the only ways of doing it that are open to him are by appeal from the judgment or order to a higher court or by bringing a fresh action to set it aside."

The importance of these observations lies in the fact that they identify the jurisdiction of the court to set aside orders otherwise regularly made. Whereas an application for a variation under article 33 (2) of the 1978 Order clearly constitutes an application in the original ancillary relief proceedings, the attempt to set aside the order in de Lasala was dependent for its validity on a cause of action based on fraud or misrepresentation. That was why a fresh action was required. Such proceedings are clearly distinct from the original ancillary relief application.

[6] The next relevant decision is that of the Court of Appeal in England in Robinson v Robinson [1982] 1 WLR 786. That was a nondisclosure case in which the Court of Appeal was asked to set aside a consent order for financial provision. Ormrod LJ dealt with the issues of jurisdiction and practice in the following passage.

> "There is no doubt that both the Court of Appeal and the judge at first instance have jurisdiction in the situation with which we are faced in this case, where the application is to set aside a final order. Lord Diplock said so in *de Lasala v. de Lasala* [1980] A.C. 546, 561: 'Where a party to an action who seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issues raised between the parties, the only ways of doing it that are open to him are by appeal from the judgment or order to a higher court or by bringing a fresh action to set it aside.' There are many references in the books to separate actions to set

> aside a judgment on the ground of fraud. In the Family Division, as has been said many times, this power to set aside final orders is not limited to cases where fraud or mistake can be alleged. It extends, and has always extended, to cases of material non-disclosure. … A distinction has to be drawn between the restrictions imposed by the Matrimonial Causes Act 1973 on varying lump sum orders or property adjustment orders which cannot be varied, and the power to set aside an order which has been obtained by fraud or mistake, or by material non-disclosure. The essence of the distinction is that the power to vary usually reflects changes of circumstances subsequent to the date of the order, whereas the power to set aside arises when there has been fraud, mistake, or material non-disclosure as to the facts *at the time the order was made* [my emphasis]. From the point of view of convenience, there is a lot to be said for proceedings of this kind taking place before a judge at first instance, because there will usually be serious and often difficult issues of fact to be determined before the power to set aside can be exercised. These can be determined more easily, as a rule, by a judge at first instance. Moreover he can go on to make the appropriate order which we cannot do in this court. I think that these proceedings should normally be started before a judge at first instance, although there may be special circumstances which make it better to proceed by way of appeal."

[7] This passage gains further authority from the fact that it was approved by the House of Lords in Jenkins v Livesey [1985] AC 424. In that case the parties were divorced on 1 March 1982. On 12 August 1982 their solicitors reached final agreement about the form and terms of a proposed consent order for financial provision and property adjustment. On 18 August 1982 the wife became engaged to another man but did not disclose that fact to her own solicitors, the husband or his solicitors. On 2 September 1982 the court made the consent order on foot of which the husband conveyed property on 22 September 1982. On 24 September 1982 the wife remarried. The husband discovered the state of affairs on 10 October 1982 and sought leave to appeal out of time and to set aside the original order. Lord Brandon delivered the opinion of the House with which the other members of the court agreed. He concluded that the obligation of the court pursuant to article 27 of the 1978 Order to consider the matters therein set out established a legal duty on each party concerned in claims for financial provision and property adjustment to make full and frank disclosure of all material facts to the other party and the

court. The wife had failed to do so and the consent order should be set aside. The importance of the approval of the passage from Robinson lies in the emphasis given by Lord Brandon to the words in italics in the quoted passage. On an application to set aside the focus is on the situation *at the time the order was made*.

[8] The next case that I want to mention is Re C (Financial Provision: Leave to Appeal) [1993] 2 FLR 799. That was an appeal based on fraudulent misrepresentation. Thorpe J gave leave to appeal on the basis that the appellant had demonstrated a clear prima facie case. He went on to suggest, however, that in family proceedings an application to set aside could be made by summons in the original proceedings. He stated that this was clearly what was contemplated by Ormrod LJ in Robinson. In light of the passage set out above I respectfully disagree. Ormrod LJ firmly rooted himself in the observations of Lord Diplock. Thorpe J suggested that this was an appropriate procedure having regard to the fact that a writ action could not be commenced in the Family Division so that it would be necessary to issue a writ in the Queen's Bench Division and then transfer the proceedings to the Family Division. I have considerable difficulty with this procedure since it seems to ignore the analysis of Lord Diplock that on the making of the order it becomes the source of the court's power in the original proceedings. The summons contemplated in Re C was clearly not for the purpose of implementing the order and I can see no other jurisdictional basis on which such a summons could be issued in the original proceedings. This issue was revisited by Ward LJ in Harris v Manahan [1997] 1 FLR 205. He was clearly unhappy about the procedure envisaged in Re C and was not persuaded that there was any significant or material procedural disadvantage in following the course suggested by Lord Diplock. I agree. Once a final order by consent has been made I do not consider that there is jurisdiction to set it aside by way of a summons in the original application.

[9] The next relevant decision is Benson v Benson [1996] 1 FLR 692. The parties were married in 1953 and lived together until 1990. Subsequently a decree nisi issued and in December 1992 on the wife's application for ancillary relief a consent order was made whereby the husband agreed to transfer the former matrimonial home to the wife and make a lump sum payment in instalments. Shortly after the making of the consent order the wife was diagnosed as suffering from terminal cancer from which she died in June 1993. The husband sought leave to appeal out of time and also made an application by writ in the Queen's Bench Division to set aside the consent order which was transferred to the Family Division. Bracewell J decided that the original agreement should not be disturbed but then went on to make some observations as to the procedure to be followed in such cases. Although the learned judge correctly stated that the review of a consent order may be triggered by allegations of fraud, mistake or material nondisclosure as in de Lasala and Jenkins or by a new event invalidating the basis of the order

giving rise to an appeal as in Barder v Calouri [1988] AC 20 she then went on to suggest that in any of these cases it was open to a party aggrieved to litigate the matter by way of a fresh action to set aside or by the issue of a summons in the original proceedings. I have already indicated that I cannot accept that a summons in the original proceedings gives jurisdiction to reopen the agreement leading to the order. I further do not accept that there is jurisdiction to issue fresh proceedings in a new event case to set aside the order because in a new event case, unlike cases of fraud, mistake or Jenkins nondisclosure, there is no cause of action grounding the fresh proceedings. A new event case is not one which is concerned with the facts *at the time the order was made.* Accordingly I consider that in a new event case the only avenue for a party aggrieved is by way of an application for leave to appeal.

[10] Finally I want to turn to the decision of Gillen J in Maginn v Maginn NI Fam 15. That was a nondisclosure case in which it appears that the parties were agreed that the Re C procedure was appropriate. There was no contrary argument although Gillen J noted that in Benson Bracewell J had misstated Ormrod LJ at 697E when she had suggested that he postulated that most cases should normally be started by way of summons. He might also have noted that at 695F she had incorrectly suggested that Re C was concerned with new event cases. It does not appear that any submissions were advanced in relation to the jurisdiction issues arising from de Lasala and Jenkins. Maginn was not a new event case so I consider myself free to distinguish it on that basis. In any event for the reasons set out above I respectfully take a different view about the availability of the Re C procedure. None of this calls into question the availability of the procedure under Order 25 Rule 20 of the County Court Rules relating to the setting aside of Orders in the County Court.

Leave to appeal

[11] The basis of the application in this case is that there have been new events since the making of the order, namely the dramatic reduction in property prices and the inability of the respondent to generate the cash to pay the lump sum, which have invalidated the basis of which the order had been made. I have concluded that there is no jurisdiction to set aside a consent order in a new event case either by way of the Re C procedure or by separate action so I now turn to whether I should grant leave to appeal. The seminal decision in this area is the decision of the House of Lords in Barder v Calouri [1988] AC 20. That was a tragic case in which a consent order was made awarding care and control of the two children to the wife and ordering the transfer to her of the legal and equitable interest in the former matrimonial home. After the time for appeal had passed the wife killed the children and committed suicide. The husband's application for leave to appeal out of time was resisted by the wife's mother. The court gave leave to appeal and Lord

Brandon set out the circumstances in which the court may do so in new event cases at 43B.

> "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. To these three conditions, which can be seen from the authorities as requiring to be satisfied, I would add a fourth, which it does not appear has needed to be considered so far, but which it may be necessary to consider in future cases. That fourth condition is that the grant of leave to appeal out of time should not prejudice third parties who have acquired, in good faith and for valuable consideration, interests in property which is the subject matter of the relevant order."

[12] The reference to the "basis or fundamental assumption" is important because it focuses attention on those things which were foreseeable at the time at which the order was made. These principles were put into effect by Hale J in Cornick v Cornick [1994] 2 FLR 530. That was a case which an order was made on 18 December 1992 that the wife receive a lump sum of £320,000 on sale of the former matrimonial home. The husband retained shares in a company of which he was deputy chairman. The effect of the order was that the wife received 51% of the joint assets. The husband's shares then dramatically increased in value and in November 1993 the wife applied for leave to appeal out of time. By that time the shares had trebled in value and the wife's lump sum represented 20% of the net assets. Hale J reviewed the case law and considered the likely causes of a change in value of assets.

" 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.

In my judgment this case clearly falls within the first category. There was no misvaluation or mistake at the trial. Nothing has happened since then other than a natural albeit dramatic change in the value of the husband's shareholding. The wife's case amounts in effect to saying that it is all terribly unfair."

[13] The English Court of Appeal has consistently applied that approach in cases concerning dramatic changes in value of assets. B v B (ancillary relief: appeal out of time) [2008] 1 FLR 279 is a recent example. In this jurisdiction price fluctuation has been considered by Master Redpath in S v S (30 January 2009) where he declined to interfere with an order for a lump sum payment of £300,000 in circumstances where the value of an inherited farm had decreased in value from £1.2 million to £800,000. In this case the circumstances set out in paragraph 2 above demonstrate that there had already been a dramatic price fluctuation in respect of the former matrimonial home immediately prior to the order being made so each of the parties must have foreseen the possibility of a further such fluctuation. Indeed it is clear from the rider added on behalf of the respondent and set out at paragraph 2 above that he hoped for some fluctuation, albeit upwards instead downwards. I do not consider, therefore, that there is any basis for a contention that it was a fundamental assumption of this agreement that prices would not fluctuate and the fact that they did so dramatically was foreseeable as a result of what had happened prior to the order and in any event would not, on the authorities, assist the respondent.

[14] It appears that since the making of the order three of the four children have now decided that they wish to change residence so as to live with the respondent. It was suggested to me that this constituted a new event which would entitle the respondent to reopen the agreement. I reject that argument. There is nothing in the agreement to indicate that the place of residence of the children was material to the terms of order. No matter which parent provides the principal residence of the children each of them ought to be in the position to have a home which enables the children to spend time with both of them. This is particularly acute in this case where one of the parties lives in Northern Ireland and the other in England.

[15] By virtue of section 35(2)(f) of the Judicature (Northern Ireland) Act 1978 leave to appeal a consent order made in the High Court to the Court of Appeal can only be granted with the leave of the court or judge making the order. Unlike the position in England and Wales where there has been a change to the practice the appellant is not entitled to renew his application before the Court of Appeal. Leave will normally be granted unless the grounds of appeal have no realistic prospect of success. For the reasons set out above I do not consider that the appellant has satisfied this test. I am satisfied, however, that this case raises issues which are likely to arise before different courts dealing with ancillary relief matters. If I grant leave to appeal the appellant will then have to apply to the Court of Appeal to extend the time for appeal. That application would provide an opportunity for the court to consider the general merits of the appeal in the course of determining whether to extend time. Such a hearing might provide an opportunity for an authoritative indication in this jurisdiction of the approach which courts

should take to these applications. I am persuaded, therefore, that I should grant leave to appeal in this case despite my view about the merits.