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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	21/03/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
MATRIMONIAL OFFICE

Between:

McG

Appellant/Petitioner:

and

McG

Respondent/Respondent:

Ms Bláithin Cleland (instructed by Cleaver Fulton Rankin, Solicitors) for the Appellant/Petitioner
Leanne Kelly (instructed by Meyler McGuigan, Solicitors) for the Respondent/Respondent

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FOWLER J

Introduction

[1] The appellant and respondent were married on 18 August 2008 and lived together until 20 July 2015. There are two children of the marriage now aged 12 and 13 years. The children live with the appellant who is their primary carer. It appears that maintenance for the children is paid through statutory agency arrangements in accordance with the respondent's income. The respondent is presently in receipt of universal credit and not in a position to pay child maintenance since September 2022. The appellant obtained a decree nisi on 1 October 2019 alleging two years' separation with the respondent's consent. The appellant's ancillary relief application was issued on 17 February 2019 and listed for financial dispute resolution hearing ("FDR hearing") on 16 January 2020. The principal assets were as follows:

- the former matrimonial home;

- 27 acres of land in folio 9XXX County Tyrone; and

- 18 acres of land in folio 9XXX County Tyrone.

[2] A joint valuation report dated 18 December 2019 prepared by Gourley Estate Agents valued the former matrimonial home at £120,000 with an equity of £102,000. The 27 acres of land were valued at £135,000 and the 18 acres of land valued at £68,000. This gave a total valuation of £323,000 in respect of matrimonial assets.

[3] Following receipt of the valuation report, the appellant's then legal representatives raised concerns regarding the joint valuation. She articulated concerns that the valuation of the land was too low, the description of the matrimonial home was incorrect and there was a potential conflict-of-interest with Mr Gourley acting as a joint valuer given his previous working relationship with the respondent and the respondent's late father. These issues were raised at the FDR hearing review on 9 January 2020 and the Master sought clarification on these issues raised and adjourned the FDR hearing to 16 January. A letter of clarification from the estate agent was provided on 15 January. It is the appellant's case that this provided confirmation that the valuer relied on the respondent to identify the correct areas to be valued. That the respondent told the valuer that he did not think that the matrimonial home was to form part of the valuation report and no internal inspection of the property occurred. Despite this he nevertheless valued the matrimonial home. It is the appellant's case that there was a failure to breakdown the value of the land, farmyard and buildings comprised within Folio 9XXX Co Tyrone or give detailed breakdown of comparables. This correspondence omitted to confirm whether or not the valuer walked the land.

FDR hearing

[4] The hearing proceeded on 16 January despite the suggested inadequacies in the clarification correspondence from the valuer. At the FDR hearing the appellant made no application to adjourn or seek leave to instruct her own expert to challenge what she perceived was an inappropriately low valuation. In these circumstances the matter proceeded on the basis of the joint valuation of Mr Gourley which was relied upon by the Master.

[5] It appears the Master characterised the marriage as a short marriage with the available assets inherited by the respondent a number of years prior to the marriage. It was indicated by the Master that the appellant should receive 40% of the equity in the matrimonial home and 30% of the value of the lands. That the appellant should be bought out of the assets with reliance being placed by the Master on the valuation report before the court. The aim of the court being to provide the appellant with a lump sum to purchase a property of similar value to the matrimonial home. It is suggested by the appellant that the Master did not consider the appellant's concerns about the valuation of Mr Gourley indicating he was considered by the court as a reputable estate agent and valuer.

[6] Following the Master's indication, the parties negotiated a Matrimonial Agreement allowing for a lump sum payment of £100,000 to the appellant to be paid

within a six month period to allow the respondent to place the land on the open market for sale. The agreement was signed as a clean break, full and final settlement of all financial matters as between the parties. The Master approved the terms of this Agreement, and it was made a rule of court by consent on the same date 16 January 2020.

Sale of land comprised in Folio 9XXX Co Tyrone

[7] In February 2020, the respondent placed the 18 acres of land contained within Folio 9XXX Co Tyrone, previously valued at £68,000 during the ancillary relief proceedings, on the open market for sale with Pollock & O'Kane Auctioneers. The guide price was £125,000 almost twice what the court and parties had relied upon as being the market value of the lands just one month previously. The lands sold at auction on 27 February 2020 for £206,000 achieving three times the valuation relied upon by the court and parties on 16 January 2020. The appellant was only able to confirm independently the sale price for the lands after she obtained folio documentation from the Land Registry in August 2020. It is suggested that several local farmers bid the land up with approximately 70 bids received by the auctioneer.

The application

[8] The appellant seeks leave to appeal out of time the consent order granted by the Master on 16 January 2020, making a matrimonial agreement entered into between the parties on the same date a Rule of Court.

[9] The appellant issued a notice of appeal on 2 December 2021 and an amended notice of appeal was further issued on 28 July 2023 and served on 3 August 2023. The notice of appeal claims that:

> "… The terms of FDR hearing were based upon the wrong value having been placed upon the assets in the case and further had this been known that it would have brought about a substantial change in the balance of the assets brought about by the consent order."

Issue on appeal

[10] The appellant argues that the valuation relied upon by the Master and the parties in respect of the lands at the FDR hearing in January 2020 was wrong. The appellant argues that expert evidence now obtained shows that the 27 acres of land was undervalued by £150,000 and that the 18 acres of land were undervalued by £67,000. This issue is further compounded by the fact that the 18 acres of land were placed on the market for sale by the respondent using a different auctioneer/valuer within a month of the FDR hearing at almost twice the value that had been relied upon for the purposes of the FDR hearing and thereafter sold for £206,000; three times more than the value attributed by the expert relied upon in the proceedings.

[11] The appellant argues that the Master's indication given at FDR hearing was based upon the evidence which was before the court. The valuation report was a critical piece of evidence relied upon by the court and the parties. The figure agreed upon by the parties in the consent order reached, was agreed upon on the basis of the FDR valuation report and in accordance with the Master's percentage indication. In turn, the Master approved the terms of the consent order which provided on the basis of the valuation report and her percentage indication, a £100,000 lump sum payment to the appellant. The Master deemed this to be a fair and equitable resolution to the case and the appellant's matrimonial entitlements.

[12] The appellant seeks to make the case that the guide price attributed to the 18 acres of land, the subsequent sale of the land for consideration of £206,000, and the content of a valuation report obtained from Maneely & Co Estate Agents, invalidates the basis, or fundamental assumption upon which the court order was made.

Legal considerations

[13] It is agreed that the original Appeal Notice and amended Appeal Notice issued in this matter are out of time. In these circumstances the appropriate legal procedure to challenge the consent order is to seek leave to appeal out-of-time. Order 58 (3) of the Rules of the Court of Judicature (Northern Ireland) 1980, sets the timeframe in which an appeal should be made and provides that:

> "unless the court otherwise orders, the notice must be issued within 5 days after the judgment, order or decision appealed against, was given or made and served not less than 2 clear days before the day fixed for hearing from appeal."

[14] The question that arises in this case is whether or not I should exercise my discretion to grant leave to appeal. The seminal decision in this area is the decision of the House of Lords in *Barder v Barder (Caluori intervening)* [1987] 2 FLR 480 where Lord Brandon set out a four strand test to be applied as follows:

> "… 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 <u>third condition</u> 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 <u>fourth condition</u> 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."

[15] The principles in the decision in Barder were followed in *Edmonds v Edmonds* [1990] 2 FLR 202 where a wife valued the matrimonial home at £70,000 and a husband, who disputed that figure and contended that a higher figure was appropriate, had acquiesced in the wife's valuation. When the house was eventually sold at a higher figure, the husband sought to reopen the matter, the court held that he should not be entitled to do so because in those facts there was no new event, the valuation being known to the husband throughout. The court took the view that he should have persisted in his contention as to the value and not sought to reopen the matter with the benefit of hindsight.

[16] However, shortly after the *Edmonds* case, a decision of Mustill LJ in *Thompson v Thompson* [1991] 2 FLR 530 revisited this issue and determined that the mere fact that a valuation was agreed at the time when an order was made cannot be conclusive for or against an application to reopen it later, if the interests of justice so require.

[17] The application of the *Barder* principles were also considered in the decision of in *Cornick v Cornick* [1994] 2 FLR 530 where Hale J, summarised the principles that should be considered where there has been a rise in the value of an asset, she stated that:

> "On analysis, therefore, there are three possible causes of a difference in the value of assets taken into account at the hearing …
>
> (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 that matter to be re-opened. 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 substantial change in the balance of assets brought about by the order. Then, provided that the other 3 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."

[18] Finally, the decision in *Heard v Heard* [1995] 1 FLR 970 recognised that a dramatic change in the value of a property may constitute a "*Barder*" event. In the *Heard* case, the district judge ordered that on the basis that the former matrimonial home was valued at £67,500, it should be sold, with the wife receiving £16,000 of the equity and the husband retaining the reminder. However, it transpired that the property was not worth £67,500 but much less. The best offer that could be achieved on the house was £33,000. As a result, the husband was not left with sufficient capital to rehouse himself, which ultimately on appeal, the court held fundamentally undermined the basis under which the court order was made.

Application of the legal principles

[19] The respondent argues, that in principle there has been no new event which satisfies the first condition in *Barder* having occurred since the making of the order which invalidated the basis or fundamental assumption on which the order was made, or such that if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed. Evidently, events can take many forms and the event which the appellant says took place is that she found out as proof positive after the auction of the land that the valuation used at the FDR hearing was a gross undervaluation compared with the Maneely Estate Agents values subsequently obtained. The practical realities being that on one view of the valuations the respondent retains assets with a value of £608,000 whilst the appellant only received £100,000. Even on a more modest assessment the 18 acres sold in February 2020 one month after the order was made on the basis of Gourley's valuation the land was marketed for

approximately twice the valuation the Master relied on and sold for three times the valuation in just over four weeks from the order being made.

[20] I am satisfied that the valuation appears to be unsound and did amount to a new event and the court could never have intended the respondent to retain assets with a potential value of £608,000 whilst the appellant only received £100,000. It seems inconceivable the Master would have made the order she did if she had known the valuation paced on the 18 acres by the auctioneers selling the land or Maneely's subsequent values.

[21] In terms of the second condition as per Barder the fact the land was marketed with another auctioneer within four weeks from the date of the agreement at £125,000 and sold for £206,00 within 42 days from the date of the court order, persuades me that the second "*Barder*" condition is satisfied.

[22] In terms of the third condition the respondent argues that the appellant failed to act with sufficient alacrity when she became aware of the gross disparity between the valuation and the price realised for the land. The events were clearly unfolding during the early days of the Covid-19 pandemic, at a time of great restrictions, uncertainty and reduced ability to access many services. The appellant has set out her difficulties during this period and subsequently, in obtaining documents and indeed legal representation. She was self-representing and from February 2020 the appellant was using her best endeavours to seek new representation. I accept the appellant required legal advice so that she could be informed as to the legal options available to her in order to challenge the circumstances that had arisen. I have considered the chronology of events and the impact of the pandemic and I consider she did all that could reasonably be expected of her in very difficult circumstances.

[23] As far as the fourth condition is concerned, I am satisfied no third party will be prejudiced by any appeal. There appears to be significant property retained by the respondent which will avoid any impact on third parties.

[24] I have considered all the submissions made with very considerable skill by counsel for both parties I consider that the overarching consideration in the exercise of my discretion is one of justice to both the appellant and respondent. While finality is important in cases of this type, I have determined that in weighing the competing arguments I am persuaded that in all the circumstances of this case it is right that the appellant should be granted leave to appeal the decision of the Master.

[25] I will now fix the case for re-hearing and reserve costs to the conclusion of the appeal.