Neutral Citation No.: Master 63

Ref:

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

***Delivered:* 30.01.09**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION (PROBATE AND MATRIMONIAL)

BETWEEN:

S

Petitioner;

v

S

Respondent.

MASTER REDPATH

[1] The facts of this case can be fairly simply put.

[2] In April 2007 Mr S (the Respondent) agreed a settlement of his ancillary relief proceedings whereby he agreed to pay Mrs S (the Petitioner) the sum of £300,000 within 4 months. The only real matrimonial asset was the Respondent's inherited farm which was worth at the time of settlement £1.2m. It is now worth only £800,000.

[3] Since the date of settlement the Respondent initially tried to raise money against the security of his farm. Given his modest income I do not believe that that

was ever going to be a realistic option. He then tried to sell parts of the farm in order to satisfy his wife's entitlement and at one stage received an offer of £250,000 for a portion of the farm but refused to accept it as he felt it did not represent the value of the lands being sold.

[4] Accordingly some 18-20 months later the Petitioner has still not been paid any money and the Respondent has come back to court to launch a three pronged attack on the settlement. The Petitioner has also applied to the court under Article 25(6) of the Matrimonial Causes (Northern Ireland) Order 1978 for consequential directions pursuant to the agreement made.

[5] Prong one of the attack was to ask the court to vary the lump sum order that had been agreed. Prong two was an application to vary the settlement downwards as a result of intervening factors and prong three was an application to extend time for appeal of the original orders.

[6] Due to the collapse in property prices in the province in the last 18 months (and in particular during the course of 2008) there are numerous such cases presently pending.

[7] When the case was opened in front of me the first limb of the application was abandoned as counsel accepted that the court had no power to vary downwards a lump sum order payable in one instalment.

[8] In relation to the second point pursued it was contended on behalf of the Respondent that the change in circumstances caused by the collapse in house and land prices was such that the court could properly take it into account in deciding whether or not to reduce the lump sum that had been agreed. It was conceded in this case that only one of the well known considerations taken into account in the case of Edgar v Edgar [1981] 2 FLR at 19 potentially applied: that is the intervention of an unforeseen

event (in this case the drop in property prices) which might potentially permit a court to reopen a matrimonial agreement.

[9] Many of the cases in this field relate to estates that have actually risen in value rather than reduced in value. One such case is Cornick v Cornick [1994] 2 FLR at 530.

[10] In the Cornick case the price of shares in the husband's company rose dramatically within a short period of time so that by 1994 the net effect of the 1992 order gave the wife only twenty percent of the total value of the couples' assets rather than the fifty-one percent based on the valuation at the time of the original ancillary relief. Mrs Justice Hale (as she then was) remarks at page 532:-

> "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 a 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 in 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 party's circumstances which has taken place since the order. This would not normally give rise to any case for re-opening 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 and they have to be based upon a snap shot 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 Section 25 of the 1973 Act, to take into account at the time. Under Section 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 when 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 Lord's decision in Livesey v Jenkins [1985] AC 424".

Another case where the value of property had considerably increased was Edmonds v Edmonds [1990] 2 FLR at 202. This case involved an appeal against the District Judge's refusal to allow for an appeal out of time and Lady Justice Butler-Sloss at page 206 repeats the portion of Lord Brandon's speech in Barder v Calouri [1988] AC 20 which I will refer to later.

[11] A case which could be argued to support the Respondent's argument is Heard v Heard [1995] 1FLR 970. In that case the Court at first instance proceeded on the wife's valuation of £67,500 which proved deeply flawed. The husband provided no valuation of his own and did not question the valuation provided by the wife. In the event the best offer that could be achieved was £33,000 more than 50% less than the wife's valuation. The Court allowing the husband's appeal on the basis that the valuation was unsound, or alternatively that the house could not be sold at its assumed value, held that that could constitute an intervening event permitting an order to be set aside. In this instant case of course the valuation was agreed and all parties accepted that at the time of the settlement it was a realistic one. Furthermore, in Heard the Order was made in April 1992, and the realisation that the property was worth less than anticipated came in June 1992, less than three months later.

[12] The Heard case also considered the issue of leave to appeal out of time, and quoted Lord Bandon's judgment in Barder v Calouri at page 940:-

> "My Lords, the result of the two lines of authority to which I have referred appears to me to be this. 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 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 invalidated the basis of any fundamental assumption, upon which the order is made, so that, if leave to appeal out of time would 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".

[13] There have been some other cases on this point but each of them seems to have involved either a failure to provide a proper valuation which can then be challenged or examples such as <u>Hope-Smith v Hope-Smith</u> [1989] 2 FLR 56 where because of deliberate obstruction by the husband of the sale of the property the price of the home increased from £116,000 to £200,000 and the wife's appeal claiming a greater share was allowed on the basis of that obstruction.

[14] It seems to be me that where there is an agreed valuation considered to be accurate at what Lady Hale describes as "a snap shot taken at the time of the trial", and the Respondent does not timeously take steps to satisfy the agreement there can be little grounds for setting the agreement aside.

[15] In this case the Respondent turned down an offer which would almost have satisfied the Petitioner's claim and furthermore has not acted in any sense expeditiously in regard to bringing this matter back before the court.

[16] Lawyers in general are loath to pursue the "thin end of the wedge" or "floodgates" argument. Consider this however: were the Respondent to be successful in his application, virtually every ancillary relief judgment or settlement made in the last two years in this jurisdiction would be open to question. Say the Respondent had raised the £300,000 and his wife had spent it on a new house, could he now come back to court and claim a portion of that new house on the basis that she had got a

greater proportion of the matrimonial estate than had been planned as a result of a sudden drop in property prices? I think not.

[17] Furthermore, let us say for the sake of argument, that the price of the Respondent's farm goes up in the next two years. Would that permit the Petitioner to return to court yet again seeking an uplift in her original figure which had already been downgraded?

[18] It is essential that the parties involved in legal proceedings have finality to their litigation and that anyone wishing to challenge settlements in cases such as this should do so swiftly.

[19] In this case there was no issue of bad advice, inequality of arms, failure to disclose, fraud or misrepresentation or any of the other Edgar v Edgar principles other than as I have already stated. The fact that at one stage the Respondent had a portion of the land agreed for sale at £250k and decided that this was not sufficient does not assist his case either. Accordingly, having taken all of that into account, and being of the view that any appeal is not certain or very likely to be successful, I must hold that all three prongs of the Respondent's attack on the settlement that he entered into must be dismissed, although it is difficult not to feel a certain sympathy for him.

[20] Accordingly I will adjourn this matter for one month to deal with the Petitioner's application for consequential directions and to see how best this matter may be progressed. I will deal with the issue of time for appeal of this order when these matters come to be considered and will deal also at that stage with the matter of costs.