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Judgment: approved by the Court for handing down | *Delivered:* **18/08/11**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

Margaret Anne McVeigh

Petitioner;

and

Patrick James McAleer

Respondent.

Master Bell

Introduction

[1] The legal issue which now arises in these proceedings is in what circumstances a party who has signed a written agreement dividing matrimonial property, which has then been made a Rule of Court, can be successful in having that agreement set aside.

[2] The background to this case is as follows. Miss McVeigh (the former Mrs McAleer) issued a summons for ancillary relief. On 2 March 2010 the case was listed for a Financial Dispute Resolution Hearing (FDR) before Master Redpath. As is usual, the Master, having considered the core issues submitted by the parties, gave them an indication of how he saw the case and what he thought might be a fair outcome. Although a considerable number of cases usually settle between the parties on the FDR date, that was not possible in this instance and Master Redpath was asked by the parties to refer the case to a different Master for hearing. I then subsequently listed the case for a full hearing on 25 May 2010. However a full hearing proved unnecessary as on 25 May 2010, after negotiations, the parties each signed a written agreement which counsel for both parties then invited me to make a Rule of Court. After consideration I did so and the agreement was therefore deemed to be part of

the order of the court and what is sometimes referred to as a "consent order". (I shall henceforth refer to the order of 25 May 2010 as "the consent order".)

[3] Despite this agreement, however, troubled waters lay ahead. In compliance with the agreement Mr McAleer forwarded the sum of £35,000 to Miss McVeigh's solicitor. He also executed the property transfer documentation which the agreement required him to do. Miss McVeigh, however, failed to execute the documentation which the agreement obliged her to do. In the light of this failure, Mr McAleer issued a summons dated 27 October 2010 for an order that the documentation be executed by another person on her behalf. This summons remains outstanding as it was overtaken by a summons issued by Miss McVeigh on 23 March 2011 asking that the consent order be set aside. Miss McVeigh's summons was listed before Mr Justice Weir on 23 March 2011 and he ordered that the application be transferred back to me for further enquiries to be made in respect of the agreement and the consent order. This written judgment deals with those enquiries.

[4] At the hearing Miss McVeigh appeared as a personal litigant and made submissions and gave oral evidence on her own behalf. Mr McAleer was represented by Miss Robinson, instructed by the Elliott Trainer Partnership. Miss Robinson did not call her own client to give oral evidence but instead called Miss Kerr who had represented Miss McVeigh earlier in the proceedings. Miss Robinson also tendered Mrs Scott, Miss McVeigh's former solicitor who was then questioned by Miss McVeigh. In respect of both these witnesses Miss McVeigh had waived privilege.

[5] At the hearing, mindful of the difficulties facing personal litigants, I invited Miss Robinson to address me first on the issue before the court.

Mr McAleer's Submissions

[6] Miss Robinson submitted on behalf of Mr McAleer that there were four categories of circumstances in which an agreement could be set aside.

(a) Material Non-Disclosure

Miss Robinson submitted that, where one of the parties to a consent order has failed to disclose to the other party a matter which is material, then both the original court making the order, and a court having jurisdiction to hear an appeal from that order, each have jurisdiction to set aside the consent order and the agreement which is a part of it. As authority for this proposition she referred me to *Vicary v Vicary* [1992] 2 FLR 271. In *Vicary* a consent order was made on 28 March 1988 which provided that the husband should pay to the wife a lump sum of £250,000 in full and final settlement of the wife's ancillary relief claim. The husband also agreed to pay the wife's costs on an indemnity basis. The wife agreed to the terms of the order on the basis of evidence from the husband that his holding in a certain company was worth about £347,000

and that his net assets amounted £430,000.The husband did not disclose that negotiations were taking place for the sale of his shares in that company (of which he must have been aware). The sale was completed shortly after the making of the consent order for a consideration worth £2.8 million. On 22 March 1989 the consent order was set aside by Judge Roberts. On 6 July 1990 Rattee J made an order for a lump sum of £450,000. The husband appealed this order to the Court of Appeal which dismissed his appeal.

(b) Fraud or Misrepresentation

Miss Robinson referred me to the decision of *McG v McG* [2009] NIFam 6. She submitted that where a consent order has been obtained by fraud or misrepresentation that either the original court or a court on appeal can set aside that order.

(c) A "Barder Event"

Miss Robinson submitted that the third circumstance in which a consent order could be set aside was if a "Barder event" had occurred. A "Barder event" is so called following the decision of the House of Lords in *Barder v Calouri* [1988] AC 20. Barder 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 opposed 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:

> "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."

Miss Robinson submitted that where a "Barder event" occurs, it is only on appeal that the consent order can be set aside.

(d) Undue Pressure Influence

Miss Robinson submitted that there was a fourth category of circumstance where a consent order could be set aside, albeit again by an appeal court only, and that was in circumstances where there had been undue pressure on a party to enter into an agreement or undue influence on a party entering into the agreement which was then subsequently made a consent order. She could offer no authority for this proposition.

[7] Miss Robinson submitted that the evidence was insufficient to satisfy a court that any of the four grounds for setting aside the consent order were met.

Miss McVeigh's Submissions

[8] Miss McVeigh submitted that she agreed with Miss Robinson's submissions and that a consent order could be set aside on each of the four suggested grounds. She also submitted that it could be set aside in a fifth set of circumstances, namely where a party's own legal team had acted negligently which had led that party into agreeing to a consent order. She could offer no authority for this proposition.

[9] Miss McVeigh's position was that all five of the grounds on which a consent order could be set aside were met.

The Evidence of Miss McVeigh

[10] Miss McVeigh gave evidence that on 25 May 2010 she made repeated references to "going into Court" in discussions with her legal team. She stated that she "wasn't listened to". She said she found the experience very distressing. As negotiations progressed Miss Kerr told her "I've got him up to two properties plus £35,000.00". Miss McVeigh's answer was "That's what you wanted. I don't need two houses". Eventually a document was presented to her and Miss McVeigh was told to sign it. Miss McVeigh asked whether she should read it and she was told she did not need to, that the

agreement gave her two properties plus £35,000.00 and that her legal team needed to have it typed up once it had been signed. Miss McVeigh gave evidence that, as she was signing it, she said "That's that sorted. Now what about the caravan, the car and the contents of the matrimonial home?" Discussions were then held between counsel about these matters. Miss McVeigh said she believed that the signed agreement was only part of a full and final settlement because issues over the car, house contents and caravan were still to be resolved.

[11] In respect of the issue of non-disclosure, Miss McVeigh gave evidence that Mr McAleer did not disclose his business assets. She stated that she had believed he had an involvement with a gift company named Genesis Ltd. However her solicitor had advised her that to delve into the matter would require a solicitor to make enquiries in the Republic of Ireland and that that would incur costs. Miss McVeigh's evidence was that Mr McAleer had, since the making of the consent order, started a new business. In her view, given that Mr McAleer could afford to open a shop and employ staff, he must have concealed assets from her and from the Court. She also offered as evidence that she had, prior to the proceedings, had a conversation with him during which he said: "You do your best. I have my money sorted".

[12] In respect of possible "Barder events", Miss McVeigh emphasised that Mr McAleer had opened a shop since the making of the consent order. She also stated that her husband was now "very flush with money" and was able to buy a new television. He had also been "extremely generous" to their daughter at her wedding. These, she suggested, met the *Barder* criteria.

[13] Miss McVeigh gave evidence that she was under undue pressure to settle the case from her legal team. She said that after negotiations she told Miss Kerr that she wanted to go into court. She stated that Miss Kerr informed her that the negotiations had taken such an amount of the time allotted for the hearing that the court would only have time to hear her evidence on that day and that her husband's evidence would have to be given in September. However she was warned that her husband had been called for an interview with his employer and was probably going to lose his job. Hence, if the proceedings were adjourned until September, it was highly possible that the assets available for distribution would have depleted by then. Miss McVeigh stated in her evidence "if that is not duress, then I don't know what is".

The Evidence of Miss Kerr

[14] Miss Kerr filed a comprehensive affidavit dealing with her involvement in the proceedings on 25 May 2010 and thereafter and gave oral evidence, having been called on behalf of Mr McAleer. Her evidence was that at all times she was fully prepared to run the case at a full hearing. This matter was the only matter Miss Kerr was involved in that day. She made it

quite clear to Miss McVeigh that the agreement presented for her signature was a full and final settlement. She stated that she found Miss McVeigh "forceful, strong-willed, assertive and determined" to resolve her case one way or another on 25 May 2010. Miss Kerr described Miss McVeigh as "a demanding client".

[15] Miss Kerr stated that discovery was vigorously pursued. She noted that Mr McAleer's discovery was voluminous and indexed in lever arch files. Miss Kerr drafted a questionnaire to address Miss McVeigh's concerns and this was replied to. However Miss McVeigh was not satisfied with the replies and, accordingly, Miss Kerr made an application for a Discovery Order. Following the granting of the Discovery Order, Mr McAleer provided further discovery. Nevertheless Miss McVeigh was not content with the discovery provided and instructed her legal team to subpoena a Mr McGarvey to attend on 25 May 2010 for the hearing. Miss Kerr observed that the agreement signed by the parties contained a paragraph which stated that there were no matters on which they required further information of the other.

The Evidence of Miss Scott

[16] Miss Scott's evidence was given in similar terms to Miss Kerr. She stated that Miss McVeigh "presented in very robust confrontational form and well able to stand up for herself". Miss Scott further described her former client as a very strong willed, dominant figure who attempted to put her under stress to waive fees over the following months and who had sought to try to bully and threaten her with the possibility of complaints to the Law Society.

Conclusion

[17] There is a significant difference between an agreement between the parties and an agreement between the parties which has been made a Rule of Court. In respect of agreements between the parties which have not been made a Rule of Court, the court applies the principles laid down in *Edgar v Edgar*. In respect of setting aside an agreement which has been made a Rule of Court, the authorities appear to suggest that the circumstances in which it may be set aside are much more restrictive.

Material Non-Disclosure

[18] I am not entirely persuaded by the legal submissions made by the parties on this issue which were that if a Master is satisfied that one of the parties to a consent order has failed to disclose to the other party a matter which is material, then a Master has jurisdiction to set aside the consent order and the agreement which is a part of it. Likewise, such an order can be set aside on appeal.

[19] The authority put forward for this proposition was *Vickery*, the facts of which I have outlined earlier. In *Vickery* the sale of the shares was completed

shortly after the making of the consent order for a consideration worth £2.8 million. The Court of Appeal judgment does not address the issue of what submissions were made before Judge Roberts which caused him to set aside the consent order. It may very well be that Judge Roberts set aside the consent order purportedly on the basis that a Barder event had occurred.

[20] Nevertheless, even assuming that there is a jurisdiction for a Master to set aside a consent order on the basis of material non-disclosure, the evidence in this case does not provide me with a sufficient basis for acting under this head. Miss McVeigh has at best offered a suspicion that her husband has made a material non-disclosure. She offered no clear or convincing evidence, documentary or otherwise, that Mr McAleer had failed in his duty to disclose. The comment allegedly made by Mr McAleer "Do your best. I have my money sorted." was not tested in cross examination as Miss Robinson did not call her client as a witness. As a result I am left not knowing whether there is substance to the remark or whether it was simply bravado in the midst of a hot-tempered argument.

Fraud or Misrepresentation

[21] I do not accept the legal submissions that, in the event of proof or fraud or misrepresentation, the original court has jurisdiction to set aside a consent order. In *McG v McG* Morgan J referred to Thorpe J's decision in *Re C (Financial Provision : Leave to Appeal)* 1993 2 FLR 799 where Thorpe J had suggested that in family proceedings an application to set aside could be made by summons in the original proceedings. Morgan J respectfully disagreed, stating that once a final order by consent had been made, he did not consider that there was jurisdiction to set it aside by way of summons in the original application. He based this view on the analysis of Lord Diplock in *de Lasala v de Lasala* [1980] AC 546 where Lord Diplock said:

> "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."

[22] However, even if I am incorrect in this conclusion, the evidence given by Miss McVeigh is insufficient to satisfy me that there has been fraud or misrepresentation perpetrated by Mr McAleer.

A "Barder Event"

[23] *McG v McG* is clear that, where there is a *Barder* event, a court with an appeal jurisdiction from the court which made the consent order may set the order aside. It is also clear that the original court does not have jurisdiction to set aside its own order on the basis of a *Barder* event.

[24] However, even if I had been persuaded that I did have such a jurisdiction, there was no evidence that any event which met the criteria in *Barder v Calouri* had occurred. The events offered by Miss Mcveigh as *Barder* events fall manifestly short of the legal criteria.

Undue Pressure/Influence

[25] I am not persuaded by the legal submissions that I have jurisdiction to set aside a consent order on the basis of undue pressure or influence. However, given the professional implications of the allegations made by Miss McVeigh for the members of her former legal team, I shall make findings of fact in relation to the allegations.

[26] I accept the evidence of Miss Kerr and Mrs Scott that Miss McVeigh was not placed under undue pressure to sign the agreement. The word "undue" is important. As Thorpe LJ observed in *Xydhiasv Xhdhias* [1999] 2 All ER 386:

> "Litigants in ancillary relief proceedings are subjected to great emotional and psychological stresses, particularly as the date of trial approaches."

In any litigation where a party is faced with a proposal from the other side to settle a legal action, there will be pressure. This is not necessarily pressure from their own legal team. It is the pressure of events and the pressure inherent in being a participant in adversarial litigation. What is the right thing to do? If I run the case to a final hearing is the end result likely to be better or worse than what is on offer ? Do I risk paying the costs of the other side? Such pressure is not capable of being removed by counsel, no matter how much they may wish to do so for their client and does not amount to "undue pressure" in terms of any legal principle for negativing voluntariness in order to justify setting aside an agreement.

[27] However even on Miss McVeigh's own evidence it is clear that she entered into the agreement voluntarily and not, as she subsequently claims, under coercion. Her evidence under oath to me was that, after signing the agreement, she said "That's sorted. Now what about the caravan, the car and the contents of the matrimonial home." At best, the only argument she can make is that at the time she entered into the agreement, she did so on the basis of a mistaken belief, namely that, at the time she signed, she believed that it covered only part of the settlement that was intended. Mistake is not, however, a ground upon which a party may seek to have a consent order set aside.

[28] Miss McVeigh knew she was attending court in respect of the division of the matrimonial property owned by her and her former husband. She was

legally advised by experienced matrimonial practitioners. She was presented with a document the first paragraph of which states that it represents a full and final "clean break" settlement of all and any claims of any financial nature which one party has against the other. She was invited to sign it .As an adult with full competence she must be taken as understanding the importance of signing one's name to a legal document. She did sign the document. That she made her decision in a stressful environment does not entitle her to resile from the agreement which she entered into.

Negligence of a Party's Legal Team

[29] I do not consider that there is any legal principle, either in statute or in case law, which allows me to set aside a consent order in circumstances where a party's legal team has acted negligently in providing advice. Even if there was such a principle, however, the evidence before me does not reach the necessary level to satisfy me that Miss McVeigh's legal team were negligent in any way.

Further Submissions by Miss McVeigh

[30] After the hearing of this matter, and while I was preparing this judgment, the court office received a letter from Miss McVeigh dated 12 July 2011. The letter made two points. Firstly, Miss McVeigh stated that she had seen documentation concerning an account opening agreement with a certain bank in the Republic of Ireland dated 20 February 2009 which had been signed by Mr McAleer. Miss McVeigh stated that this account had not been disclosed. Secondly, Miss McVeigh questioned why her legal team had asked her to request a valuation in respect of the mobile home from Northern View Caravans if they did not consider it to be a matrimonial asset.

[31] I have not been able to give either of these points any weight. In relation to her first point, I do not know whether Miss McVeigh has a copy of the account opening documentation (her letter merely states that she has seen it). If she does have a copy of it, I do not know in what circumstances she has obtained it and whether such circumstances might have implications for whether it is admissible in evidence. If she does not have a copy of it, I do not know when she claims to have seen it or in what circumstances. For example, did she view it at her leisure or only for a fleeting moment? Could she be mistaken as to the date of the account opening or did she take a reliable note of the details? Her statement in relation to the document has not been given under oath or tested in cross-examination. It would therefore be inappropriate to rely upon it. In relation to her second point, it is an assertion which is of little relevance to the issues before me. The critical issue is that, regardless of what was or was not matrimonial property, Miss McVeigh's former legal team negotiated with their opposite numbers and obtained the best offer they could from Mr McAleer. It was this offer which Miss McVeigh agreed to.

[32] Having made the enquiries ordered by the judge, I now refer the matter back to him for his determination of Miss McVeigh's summons.