Neutral Citation No: [2023] NIFam 2 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **ROO12026** *ICOS No:* *Delivered:* **10/01/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION
MATRIMONIAL OFFICE

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Between:

LOUIZE NEELY

Appellant:

and

KARL NEELY

Respondent:

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Ms Jackie Simpson KC and Ms Lisa Jennings BL (instructed by Francis Hanna & Co, Solicitors) for the Appellant
Mr Frank O'Donoghue KC and Ms Melanie Rice BL (instructed by Thompson Crooks, Solicitors) for the Respondent

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ROONEY J

Introduction

[1] The appellant wife (hereinafter "the wife") and the respondent husband (hereinafter "the husband") separated on 14 April 2014. Pursuant to the provisions of the Matrimonial Causes (Northern Ireland) Order 1978, the wife issued an application for ancillary relief.

[2] At the contested ancillary relief proceedings before Master Bell, both parties gave evidence. In a detailed written judgment which analysed the facts, the relevant statutory provisions and the applicable case law, Master Bell gave his decision relating to the fair division of the matrimonial assets. Master Bell's decision was delivered on 12 November 2018 (see *N v N* [2018] NI Master 11).

[3] The matter comes before this court as an appeal from the said decision of Master Bell. Whether the appeal is governed by Order 55 or Order 58 of the Rules of the Court of Judicature (Northern Ireland) 1980 (hereinafter "RsCJ") will be considered in more detail below. The substance of the appeal, according to the wife,

is that the husband gave misleading and/or inaccurate evidence at the hearing which materially impacted on the master's assessment of the husband's income, the ownership of other assets, the valuation of all the matrimonial assets, particularly in relation to the main asset, namely, Storm Xccessories Limited ("the company") in which the husband and wife each own a fifty percent shareholding.

[4] Following the hearing before Master Bell in 2018, the wife obtained reports from Michael Jennings, BDO Chartered Accountants. The reports have been disclosed to the husband and his legal advisers. The wife's legal team submit that the analysis conducted by BDO regarding the matrimonial assets and financial matters confirms the wife's allegations that the husband gave misleading and/or inconsistent evidence which materially impacted on the valuation of the company, the identification of other potential assets and the husband's claimed lifestyle, income and expenditures. These matters will be considered in more detail below.

[5] The wife submits that if full and accurate disclosures had been made to Master Bell, there is a real possibility that he would have reached different conclusions. Accordingly, based on representations made in the BDO reports, the wife seeks an order that the husband makes full and true disclosures of all material facts, documentation, resources and assets as identified in the said reports.

[6] The husband opposes the wife's application for further disclosure for the following reasons:

(i) The appeal from the master to the High Court is governed, it is claimed, by Order 55 RsCJ 1980. It is argued that pursuant to Order 55, Rule 22 RsCJ 1980, the provisions of Order 59, Rule 10 applies not only to appeals to the Court of Appeal but also the High Court. The significance is, according to the husband, in the matter of an appeal from a judgment after trial or hearing in any cause or matter on the merits, no further evidence shall be admitted by the appellate court except on special grounds.

(ii) The respondent husband argues that, although the appeal is a rehearing, no new evidence is to be admitted outside of the evidence presented before the master and any additional evidence which the appellate court, in the exercise of its discretion, considers to be properly admissible.

(iii) The respondent husband argues that one of the central issues before the master was the valuation of the matrimonial assets as at the date of the hearing in 2018. Accordingly, if any evidence is to be admitted at the discretion of the appellate court, it must relate only to valuations at the date of the original hearing and not valuations relevant to 2022/23.

[7] The appellant wife makes the following counter-arguments:

(i) Appeals from the master to the High Court are governed by Order 58 RsCJ 1980 and not Order 55 RsCJ 1980.

(ii) The appeal is a de novo hearing and the appellate court, in the exercise of its discretion, may admit further and additional evidence. Although the appellate court will have regard to the previous decision of the master, it is in no way bound by the decision.

(iii) The appellate court has an absolute discretion as to whether or not to admit additional evidence and it is not bound by any requirement to find special reasons or special circumstances. A party seeking to adduce such additional evidence carries the burden of establishing that the interests of justice will be better served by the admission of such evidence rather than by refusing to admit it. Since the appellate court treats the matter as though it came before it for the first time, it is proper, fair and reasonable that the valuation of the matrimonial assets pertains to the date of the appeal hearing.

[8] Ms Jackie Simpson KC and Ms Lisa Jennings, BL appear on behalf of the appellant wife. Mr Frank O'Donoghue KC and Ms Melanie Rice BL appear on behalf of the respondent husband. The matter was initially listed for hearing on 20 October 2022. Following oral submissions, the matter was relisted for hearing on 6 December 2022. I wish to express my gratitude to counsel for their comprehensive legal submissions and the quality and focus of their oral arguments in this protracted matter.

[9] Following consideration of counsels' written and oral submissions, I consider it appropriate to deal with the relevant issues under the following headings:

(a) Appeals from the master to the High Court.

(b) The ambit of Order 58, Rule 1 RsCJ - de novo hearing or not?

(c) Discretion of the appellate judge to admit additional evidence.

(d) The appropriate date for valuation of the matrimonial assets.

(a) Appeals from the master to the High Court

[10] It is the decision of this court, as confirmed by the relevant authorities discussed below, that the appeal from Master Bell is governed by Order 58 RsCJ 1980. Order 58 Rules 1(2) to (4) apply to an appeal from a master. Order 58 Rule 1 provides that an appeal shall lie to a judge in chambers from any judgment, order or decision of a master. The exceptions in Order 58 Rules 2 and 3 make express provision for a direct appeal from the master to the Court of Appeal. The exceptions, which deal with decisions made pursuant to Order 36 and Order 37, do not apply to the facts of this case. Order 58, Rules 2 and 3 deal with direct appeals from the master to the Court of Appeal in specified cases, by way of exception to an appeal to the judge, rather than as an additional right of appeal. Beyond the specified cases, the Court of Appeal does not have jurisdiction to entertain an appeal from the master.

[11] Order 55, Part 1 RsCJ 1980 applies to appeals from the County Court. Order 55, Part 2 RsCJ 1980 applies to appeals to the High Court *"pursuant to the provisions of any statutory provision."* Accordingly, Order 55, Part 2 RsCJ 1980 is not relevant to this appeal. The appeal from Master Bell is not pursuant to any statutory provision. In the absence of any relevant authority, the court does not accept the respondent husband's argument that the appeal has been brought pursuant to the Matrimonial Causes (Northern Ireland) Order 1978 ("the 1978 Order). Plainly, with regard to the merits of the appeal, the court will give consideration to the master's application of the relevant provisions of the 1978 Order. However, the 1978 Order does not provide for a statutory route for an appeal from the master to the High Court.

[12] In fairness to Mr O'Donoghue KC, following oral submissions, he was prepared to make the concession that, for the purpose of this hearing, the appeal was governed by Order 58 RsCJ rather than a combination of Order 55 and Order 59 RsCJ.

(b) The ambit of Order 58, Rule 1 RsCJ - de novo hearing or not?

[13] In *McCracken v James Mackie & Sons Ltd* [1990] Lexis Citation 3813, Campbell LJ quoted from the Supreme Court Practice 1988 in relation to the application of Order 58 and stated as follows -

> "An appeal from the Master or Registrar to the Judge in Chambers is dealt with by way of an actual rehearing of the application which led to the order under appeal, and the Judge treats the matter as though it came before him for the first time, save that the party appealing, even though the original application was not made by him but against him, has the right as well as the obligation to open the appeal. The Judge 'will of course give the weight it deserves to the previous decision of the Master; but he is in no way bound by it' (per Lord Atkin in *Evans v Bartlam* [1937] AC 473, p.478."

[14] It is noted that the above passage is repeated in the 1999 Edition of the Supreme Court Practice.

[15] In the recent decision of the Court of Appeal in *Department of Finance, Land and Property Services v Foster* [2022] NICA 19, Treacy LJ stated at paragraph [15]:

> "[15] The appellant repeatedly came back to his assertion that he did not receive a fair hearing before the Master. We are in full agreement with the Trial Judge that an appeal from the Master is a de novo rehearing and accordingly such a hearing cures any alleged defects in respect of the hearing at the lower court. Accordingly, the Trial Judge was correct that she did not have to determine the complaints made by the appellant regarding the hearing before the Master. As the Trial Judge pointed out this did

not mean she accepted his complaints but was simply confirming that it was unnecessary for her to adjudicate upon those matters as the case was heard de novo."

[16] Confirmation that an appeal from the master to the High Court is a *de novo* hearing is gleaned from the decision of the Court of Appeal in *Anthony Quinn v Madonna Quinn* [2020] NICA 41. It is relevant that the facts of this case related to an acrimonious matrimonial appeal from Master Sweeney to McBride J. McCloskey LJ, delivering the decision of the Court of Appeal, stated at paragraph [42]:

> "[42] The fifth and final element of the first ground of appeal is encapsulated in the headline "*Serious procedural or other irregularity in the proceedings before Master Sweeney.*" The foundation of this complaint rests on [16]–[17] of the judgment of McBride J:
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> *"[16] Appeals from the Master are generally dealt with by way of a rehearing. As noted by Girvan J in National & Provincial Building Society v Williamson & Another [1995] NI 366 at 372, however:*
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> > *'The judge 'will of course, give the weight it deserves to the previous decision of the master, but he is in no way bound by it' (see Evans v Bartlam [1937] AC473 at 478 per Lord Atkin). The judge is not fettered by the previous exercise by the master of his discretion.'*
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> *[17] In the present appeal the court permitted new evidence to be admitted which consisted of additional affidavits, details of additional assets and updated valuation evidence. In light of the admission of this new evidence and in light of the general rule that this appeal is a 'de novo' hearing I consider that it is unnecessary for this court to make any determination regarding the complaints made by the husband in respect of the hearing which took place before Master Sweeney."*
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> The ingredients of this discrete ground entailed the oft repeated complaint that the order of the Master was not based upon any judgment and there is no available transcript of the relevant hearing.

> [43] We consider the fundamental question for this court to be whether the approach formulated by the judge in [16]–[17] of her judgment (supra) discloses any error of law. We are unable to identify any such error."

[17] Pursuant to the above authorities, it is clear that appeals from a master to the judge in chambers under Order 58 RsCJ are dealt with by way of an actual re-hearing de novo. As stated above, the appellate judge will give the weight it deserves to the previous decision of the master but the judge is in no way bound by the decision. However, I remind myself of the dicta of Girvan J in the unreported decision *Barbara MacRandall v Dermott MacRandall* [2000] Lexis Citation 6622 at p.3:

> "On an appeal to the Judge from the Master the matter comes before the court de novo. Nevertheless, the Judge must give due weight to the Master's decision. Particularly in a case of an appeal in matrimonial ancillary relief applications proper weight should attach to the experience of the masters who are dealing day and daily with such matters and are able to call on a reserve of expertise not available to a Judge who does not regularly hear such cases. In such ancillary relief applications there is rarely a straightforward right or wrong solution to the financial problems posed by the breakdown in the marriage. Those problems raise deep emotions which call for the exercise of a balanced assessment of what is fair and proper in all the circumstances. It will rarely be the case that greater justice will be done by trailing a second time over the same factual scenario (which may be surcharged with deep emotional upset on both sides). Such appeals necessarily are lengthy and expensive. This appeal fortifies me in my view that a court should be slow to upset a Master's balanced judgment in such cases."

(c) ***Discretion of appellate judge to admit additional evidence at the appeal hearing***.

[17] The principles emanating from the authorities discussed below are, firstly, on appeal from the master pursuant to Order 58 RsCJ, the appellate judge has an absolute discretion to admit fresh evidence and is not constrained to find special reasons or special circumstances [see *Bailie v Cruickshank* [1995] NIJB 47; *Evans v Bartlam* [1937] AC 473, p.480; *Krakauer v Katz* [1954] 1WLR 278].

[18] Secondly, since the appeal from the master is a de novo hearing, i.e. an actual re-hearing of the application which led to the order under appeal, the appellate judge deals with the matter afresh as though it came before him/her for the first time [see

Department of Finance, Land and Property Services v Foster [2022] NICA 19, para [15]; *McCracken v James Mackie & Sons Limited* [1990] Lexis Citation 3813].

[19] Thirdly, as stated by Girvan J in *Lough Neagh Exploration Limited v Morrice* [1999] NIJB 43 at p.45:

> "a party seeking to adduce such additional evidence carries a burden of establishing that the interests of justice would be better served by the admission of additional evidence rather than refusing it" and "should advance a sound reason for the failure to adduce the evidence before the Master."

[20] The application to adduce new evidence was refused in the *Lough Neagh* case due to the flagrant breaches of the parties seeking to admit the evidence. As stated by Girvan J at p.45,

> "The attempt to introduce additional further evidence came within a matter of hours before the actual hearing of the appeal before this court. The affidavit is very much linked into the late application to amend the proceedings, a proposed amendment which radically changes the nature of the case. If the court is not minded to accede to any application to amend the proceedings at this stage the inability to adduce the additional evidence would lead to no injustice to the plaintiff since it would be open to the plaintiff to issue separate proceedings against the defendant (which may or may not raise issues common to the issues raised in the present application). Bearing in mind the duty on the parties by 1 October 1998 to lodge an agreed bundle of documents the plaintiff was or should have been aware of the court's imposed timetable for getting its tackle in order."

[21] Fourthly, as endorsed by the Court of Appeal in *Quinn v Quinn* [2020] NICA 41 (an appeal which concerned acrimonious ancillary relief proceedings) the appellate court in the exercise of its discretion is entitled to admit new evidence which "consisted of additional affidavits, details of additional assets and updated valuation evidence" (see paragraph [42] citing approval of the decision of McBride J [2019] NI FAM 14 at paragraph [17]).

[22] Of course, new or additional evidence will not generally be admitted unless the parties seeking to adduce the evidence can show that it is relevant, and it could not with reasonable diligence have been adduced before the master.

[23] Fifthly, in the exercise of its discretion, the appellate court should take into consideration that in family proceedings there is a duty of full and frank disclosure. In the Supreme Court decision in *Sharland v Sharland* [2015] UKSC 60, Baroness Hale

quoted with approval from the judgment of Lord Brandon of Oakbrook in *Jenkins v Livesey (formerly Jenkins)* [1985] AC 424 at p.437:

> "Unless a court is provided with correct, complete and up to date information on the matters to which, under section 25(1), it is required to have regard, it cannot lawfully or properly exercise its discretion in the manner ordained by that subsection."

[24] Accordingly, as stated by Baroness Hale at paragraph 22:

> "Hence each party "owes a duty to the court to make full and frank disclosure of all material facts to the other party and the court" (p.438). This principle applied just as much to the exchanges of information leading up to a consent order as it did to contested hearings.

Application of the principles to the facts of this case

[25] At the original hearing before Master Bell, Goldblatt McGuigan, Chartered Accountants, who had been engaged by the appellant wife agreed a valuation of the company with the respondent husband's experts, Hill Vellacott. It appears that the final valuation was influenced by a 2012 Share Purchase Agreement ("SPA"), where it was claimed that a Mr McKeown had loaned the company £72,000. If not repaid (with interest) by October 2014 it was suggested that Mr McKeown was entitled to 49 percent of the respondent husband's shareholding. The decision of Master Bell records that the appellant wife was extremely unhappy with the agreed valuation, particularly the claim that the company had "reduced" profits. The appellant wife also gave evidence that she believed the SPA was "fake", that credit card statements had been altered to disguise the fact that the respondent husband had been "running personal expenses through the business account", (ie depleting assets otherwise available to it).

[26] Ms Simpson KC, on behalf of the appellant wife, submits that the analysis carried out by BDO in its reports confirms that the respondent husband appears to have given misleading and/or inconsistent evidence and that this had a material impact on the valuation of the company. Referring to the BDO draft report, Ms Simpson gave the following examples:

(i) BDO acknowledged the husband's evidence to Master Bell regarding the reduced 'profitability' of the company. However, BDO stated that:

> "*at the date the husband gave his evidence to Master Bell*, he should have known that information was wrong and that the "*profit after tax figure had increased considerably …"*

(ii) This information was contained in monthly management accounts of which the husband should have been aware.

(iii) These accounts now reveal that profits had risen considerably in the previous two-year period by over 90%.

(iv) In the intervening period, the net asset position of the company had also increased substantially, despite the 'anticipated downturn' (due to loss of key contracts, Brexit, the geographical location of the company etc.,) ie the 'concerns' discussed by Mr Nichol and Mr Burns.

(v) As a matter of fact, it is now clear that none of these concerns had any negative impact on the profits of the company. For example, "lost contracts" have been "*replaced with other sources of revenue*" and the growth of online 'shopping' (during and after 'Covid' restrictions) has *assisted* the company, negating any disadvantages of its geographical location.

(vi) In 2019 the company made an application for 'Research and Development Tax Relief.' In this supporting documentation, the company represented that (a) UK sales comprised over 60% of its turnover (b) the company now had a strong 'on-line' presence and (c) that it was opening new premises in England. Employee numbers had also increased.

[27] On the basis of the above, BDO concluded that the valuation which had been agreed in 2016 "*was not appropriate at the date of hearing in 2018"* (see paragraph 3.26 of BDO report). According to BDO, the interim assessment of the company's current valuation would be £1,400,937 rather than the previous valuation of £475,000.

[28] Again, referring to the BDO draft report, Ms Simpson KC stated that the respondent husband's lifestyle analysis showed that it had not been funded solely by his salary from the company and the company's loan account. In other words, the respondent husband's lifestyle expenditure must also have been funded from other sources. Also, according to Ms Simpson KC, the BDO draft report also confirms that the respondent husband owns or did own potential assets which were not disclosed to the court. Furthermore, it is alleged that the company had sufficient income/liquidity to repay the SPA, and BDO cannot reconcile the alleged payments from the company accounts to Mr McKeown (SPA).

[29] For the purpose of this decision, it is not necessary for me to consider in detail the full extent of the BDO report. Suffice to state that, having read the draft BDO report, I am satisfied that there is prima facie evidence that the respondent husband has not made full and final disclosure and I would be concerned that the respondent husband gave misleading and/or inconsistent evidence to Master Bell during the course of the original hearing.

[30] As emphasised by the Court of Appeal in *Department of Finance, Land and Property Services v Foster* [2022] NICA 19 at paragraph [15], the purpose of a de novo re-hearing is to cure any alleged defects in respect of the hearing at the lower court. It is axiomatic that in its consideration of the issues afresh, the appellate court is entitled to receive all disclosures relating to the alleged matrimonial assets.

Accordingly, I direct that all the information and documentation requested by BDO in its draft report must be obtained by the respondent husband and disclosed to the appellant wife's legal representatives and BDO.

[31] On receipt of the information and documentation, it will be necessary for the appellant wife to make an application to adduce any additional evidence and to satisfy the court that the interests of justice will be better served by the admission of the additional evidence rather than by refusing to admit it. At this stage, the respondent husband will have an opportunity to oppose the application to produce some or all of the additional evidence. Following submissions, the court will exercise its discretion whether to admit or to refuse to admit the additional evidence.

(d) ***The appropriate date for valuation of the matrimonial assets.***

[32] Mr O'Donoghue KC argues that the valuation of the matrimonial assets should be as at 2018, namely, the date of the hearing before Master Bell. He states that it would be perverse if the appellate court permitted a re-valuation of all the matrimonial assets, particularly since many were agreed prior to the Master's hearing. Mr O'Donoghue submits that the inevitable consequence would be that disproportionate costs would be incurred in the context of a limited pot of matrimonial assets.

[33] I am not inclined to accept Mr O'Donoghue's submission. Based on the report from BDO, as stated above, I am persuaded that there is prima facie evidence that the respondent husband has given misleading and/or inconsistent evidence and that such evidence has had a material impact on the valuation of the matrimonial assets, particularly the valuation of the company. The appellant wife argues that such misrepresentation and non-disclosure has induced her expert to agree an incorrect valuation of the company. Clearly, if evidence is produced which ultimately convinces the court that full and frank disclosure was not made and that the respondent husband was guilty of misrepresentation, then such vitiating factors would have the potential to undermine any previous valuation of the company and the matrimonial assets. Accordingly, if the appellate court comes to a finding that that the husband's evidence was dishonest or misleading, following a rehearing de novo, the appellate court is entitled to make a decision based on the newly disclosed facts and documentation, including the updated valuation of the company and the matrimonial assets. In coming to this decision, my view is fortified by the reasoning of the Supreme Court in *Sharland v Sharland* [2015] UKSC 60.

[34] I should say that I am in agreement with Mr O'Donoghue's concern relating to the continuing potential for increasing and significant costs. It seems to me that it would be in the interests of both parties for this matrimonial claim to be settled by agreement rather that by further adversarial proceedings, thereby reducing financial and emotional resources on legal costs and family conflict.