Barristers' Chambers

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INTERIM POWER OF SALE AND POSSESSION: *WICKS* REVISITED – [2016] FAM LAW 194

Ashley Murray, Ashley Murray Chambers

Wicks v Wicks [1998] 1 FLR 470 and its determination that there was no effective interim power of sale of the former matrimonial home (FMH) for divorcing parties pending a final hearing has been a source of injustice, mainly for wives, for almost two decades. Arguably, the Court of Appeal could, on the facts then before it, have determined the issue entirely differently with a view to providing the divorce court with greater interim flexibility to meet by sale the real and often urgent needs of the weaker financial party who can too often be forced by such circumstances to an unwise early settlement.

The most recent decision of Mostyn J in *BR v VT (Financial Remedies: Interim)* [2015] EWHC 2727 (Fam), [2016] 1 FLR (forthcoming and reported at [2015] Fam Law 1458) (assisted, it would seem, by the combined experience in this area of the law of the very senior counsel appearing before him) is, at least, a valiant attempt to at least dilute the effect of the *Wicks* restriction. However, the decision must be set against its particular facts before being seen as a general mandate for interim sale relief in other cases – although, once again, where a decision attempts to break new ground, the practitioner will be struck by the irony that in this case on its facts the more usual situation met in practice is reversed. Here it was the application by the husband, who solely owned the matrimonial home, for possession of the property from the wife and children to enable the same to be sold before a final divorce financial remedy hearing in order to meet considerable indebtedness. His Lordship had before him H's three applications, namely that there should be:

(1) an order terminating W's rights of occupation under s 33 of the Family Law Act 1996 (FLA 1996) in respect of the FMH where she and the children of the family resided;
(2) an order under Sch 4(i) to the FLA 1996 vacating W's FMH rights notice; and
(3) an order for vacant possession of the FMH.

The decision

Against the background of the limited interpretation of the court's powers (following *Wicks*) preventing an interim sale before final orders had been otherwise made under ss 23 and 24 of the MCA 1973, save where required under a legal services payment order (s 22ZA), the court identified its existing jurisdiction to make interim sale orders relating to the marital home in certain circumstances as arising under:

(1) s 17 of the MWPA 1882;
(2) ss 13 and 14 of the TOLATA 1996 (TOLATA) (but only where each party holds a beneficial interest); and
(3) FPR 2010, r 20.2(1)(c)(v).

With some ingenuity, these routes of interim sale together with supplemental power to order possession were identified by His Lordship in the following ways:

SECTION 17 OF THE MWPA 1882

(1) The court pointed out that s 17, as clarified by s 7(7) of the Matrimonial Causes (Property and Maintenance) Act 1958, provided not only a power of sale by the court but also a power to order possession (ie to make such order as it thinks fit, 'in any question between husband and wife as to the title to or possession of property').
(2) Indeed, Mostyn J further considered that, supplemental to a power of sale, it must follow on first principles that the court also had the power to order an occupant of the relevant property to give up possession to give effect to that sale order.
(3) In regard to this reasoning, he held that in the light of the much earlier determination by, 'a strong Court of Appeal' in *Short v Short* [1960] 1 WLR 833 (where that court unanimously confirmed the court's jurisdiction under s 17 to order a party to give up vacant possession of a property) Ward LJ, when giving the leading judgment in *Wicks*, could not

literally have intended to have held the opposite when he stated that, ‘the power to order a sale of the former matrimonial home will not include a power to order possession of it'.

SECTIONS 13 AND 14 OF TOLATA 1996

(1) The court also confirmed that, as long as both parties were beneficially entitled to a property, the combined provisions of ss 13 and 14 of the 1996 Act not only provided a power to sell the property, but also provided the court with a power to order vacant possession, as set out in *Miller-Smith v Miller-Smith* [2009] EWCA Civ 1297, [2010] 1 FLR 1402, where Wilson LJ (as he then was) found that the correct reading of ss 13 and 14, where each party held a beneficial interest, ‘enabled the court in effect to order that a beneficiary should give vacant possession of land'.
(2) Of interest, Mostyn J observed that Wilson LJ had also gone on to state that:
‘… if the claim for interim relief is formulated under TOLATA then the exercise under s 33 of the [FLA] 1996 . . . can be bypassed.'
(3) This view His Lordship considered to be incorrect and he highlighted the fact that Wilson LJ had in fact been misled by an incorrect concession to this effect by counsel before that court. However, in His Lordship's view, this apparent mistake was of academic interest only since Wilson LJ had gone on to state:
‘… it would be surprising if an order that, in effect, a spouse should give vacant possession of a matrimonial home under TOLATA were to be made in circumstances in which the applicant could not have secured an occupation order'.
(4) Mostyn J, however, fully agreed with Ward LJ in *Wicks* that, where the court has an application for an interim order for sale of the FMH in which the other spouse continues to reside then, whether under ss 17 of the MWPA or ss 13 and 14 of TOLATA or the procedural rules of the court – the court cannot order vacant possession of it without first undertaking the specific exercise required in such circumstances (in this instance by s 33(6)) under the FLA 1996). Indeed, as Ward LJ had stated, to do otherwise, ‘… would be to by-pass specific legislation on the point'.
(5) Hence, undertaking that balancing test in this instance, under s 33(6) of the FLA 1996, because of: the high indebtedness of the parties; the fact that W had originally agreed to a sale of the property when pursuing a Children Act application; the fact that H's mother's home was by annexe itself within the curtilage of the FMH and, without a sale, she was effectively confined to living at the marital home in unhappy circumstances; because the parties otherwise faced financial ruin if monies were not released to meet debts including those owed to the Inland Revenue; because insolvency would be psychologically damaging for the family and particularly the children (aged 14 and 10); and because of the parties' respective conduct towards one another and otherwise – then the court would, with the intent of bringing some ‘financial sanity' to the situation, under s 33(3) (e) of the FLA 1996 terminate W's occupation rights in this instance and vacate her matrimonial home notice in order to enable the FMH (valued at £2.47m) to be sold and the parties to meet their indebtedness and realise an eventual debt free surfeit of just £105,864.

FPR 2010, R 20.2(1)(C)(V)

(1) The court observed that the third interim power of sale was expressly provided for under r 20.2, as above, which provides that the court may make the order as an interim remedy, ‘for the sale of relevant property which is of a perishable nature or which for any other good reason it is desired to sell quickly'. ‘Relevant property' is defined under the rule as, ‘property (including land) which is the subject of an application or as to which any question may arise on an application'.
(2) However, as His Lordship clarified above, this was only to be ordered as regards an FMH where the required FLA 1996 assessment had been undertaken and the indication was that it was appropriate to make such an order.

Commentary

The reader is reminded that s 33(6) of the FLA 1996, for the purposes of an order under s 33(3)(e) terminating a party's right to occupation, provides that the court is to consider:

(a)the housing needs and housing resources of each of the parties and of any relevant child;
(b)the financial resources of each of the parties;
(c)the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3), on the health, safety or well-being of the parties and of any relevant child; and
(d)the conduct of the parties in relation to each other and otherwise.

On the basis of this case, if the route chosen for an interim sale order and vacant possession of an FMH is to be FPR 2010, r 20.2(1)(c)(v), then it will be necessary also to file an application to terminate the other party's rights of occupation under the relevant provisions of the FLA 1996. The merits of the interim application will be dependent upon the merits, essentially, of the occupation application on usual principles (as above, where there is no finding otherwise of significant harm).

As to the effectiveness of the s 17 route highlighted above, this clearly remains dependent upon whether there is to be further endorsement of Mostyn J's explanation of the view to be taken of Ward LJ's seeming rejection of a power of possession supplemental to a power of sale under the 1882 Act. The remaining TOLATA route is itself limited since it

applies only where both parties hold a beneficial interest in the property in question. Certainly, overall, Mostyn J's application of the FLA 1996 to any application, however framed, seeking interim relief where a marital home possession is sought is consistent with the approach adopted by Ward LJ in *Wicks* and would appear to be correct.

Practitioners are only too well aware of the pressure which frequently arises upon the weaker financial party to cut an early and often disadvantageous deal in a financial remedy application following divorce, where the other party has emerged from the breakdown of the relationship endowed with title to most, if not all, of the resources and intent on building up litigation costs to force capitulation before judgment. The emergence of the legal services order has mitigated this position to some extent, but its exception to the 'no order' rule and the potential risk of failure and meeting the costs order, which would inevitably follow, can be a considerable psychological barrier to the potential claimant spouse whose lack of finances are the very reason why the application is being considered in the first place. In this same context, however, Mostyn J's judgment is a useful reminder generally in relation to assets other than the FMH of the potential width of the powers of sale of the court, particularly under the FPR 2010, r 20.2(1) in relation to assets of the parties pending the resolution of a financial remedy application upon divorce.

Wicks remains a low point in family law. Its demise is long overdue and it serves as a reminder that when faced with an obvious injustice, good judges apply the law – great judges re-interpret it.