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## **Indemnities and Consequential Orders – the Avoidance of Sterile and Technical Objections – CH v WH [2017] EWHC 2379: Mostyn J.**

**Ashley Murray Barrister-at-Law, Ashley Murray Chambers, Liverpool**

### **Introduction:**

The courts exercising family jurisdiction have a long tradition of not being constrained by the limits of the specific application placed before the court. A master of the matrimonial law, Lord Justice Ormrod in *Ward v Ward & Greene* (1980) 1 AER 176 observed, at the end of an appeal in which it had been suggested that the court could not under the (then un-amended) s 24 of the *Matrimonial Causes Act 1973* make an order for sale without there also being a pro form summons before the Court under s 17 of the *Married Women's Property Act 1882*, as follows:-

‘Before leaving the appeal finally, however, there is one point with which I want to deal... For my part, I have never understood the advantages of multiplying pieces of paper intituled in particular statutes named at the head of the summons. It seems to me to be quite clear that s 17 of the 1882 Act gives the court power to order a sale (certainly as clarified by the *Matrimonial Causes (Property and Maintenance) Act 1958*) in proceedings between husband and wife in connection with property. *Section 30 of the Law of Property Act 1925* gives the court power to order a sale whether there is a trust for sale, and to my mind it cannot matter what the nature of the proceedings are; what matters is whether the circumstances are such as to bring the case within one or other of those Acts which give the necessary power to the court to order the sale. So I think it may be helpful if we were to say that it is not necessary to intitule proceedings as being under the *Married Women's Property Act 1882* or the *Law of Property Act 1925*, or to issue pro forma summonses to enable the court to exercise its powers to order a sale where the circumstances justify it under one or other of those Acts.’

In the Family Court sitting in Southampton, it appears that this wider recognition of the powers and jurisdiction of the court when dealing with matrimonial issues was overlooked and the court made the mistake, when rejecting a request for approval of an order, which included orders for the provision of indemnities between two parties in divorce proceedings, of suggesting that the powers of the court under the *Matrimonial Causes Act 1973* did not permit such orders to be made.

### **Referral to the High Court:**

In the face of the repeated rejection over a number of months at district judge level of the parties' request for the Family Court's approval of a draft consent order concluding their divorce financial remedy proceedings, the wife's solicitors referred the matter to Mostyn J.

The route of the referral was confirmed by his Lordship (para 2) to be by way of allocation within the Family Court to High Court judge level, pursuant to *rules 14 and 15(2) of the Family Court (Composition and Distribution of Business) Rules 2014 (S.I. 2014 No. 840)*:-

#### **'Persons who may exercise jurisdiction of the family court**

**14.** Subject to the provisions of this Part or of any other enactment, any jurisdiction and powers conferred by any enactment on the family court, or on a judge of the family court, may be exercised by any judge of the family court.

#### **Allocation of proceedings in Schedule 1**

**15.(1)** An application in a type of proceedings listed in the first column of the table in Schedule 1 shall be allocated to be heard by a judge of the level listed in the second column of that table.

(2) Paragraph (1) and the provisions of Schedule 1 are subject to the need to take into account the need to make the most effective and efficient use of local judicial resource and the resource of the High Court bench that is appropriate given the nature and type of the application.'

### **Basic Issue:**

The parties jointly owned two properties, which were subject to mortgages. The draft order provided for the parties to respectively retain one property each and ordered that they each use their best endeavours to secure the other's release from the mortgage involved on the property to be transferred and, in any event, to give a full indemnity in that respect.

The deputy district judge and then on review the district judge determined that such a provision, in the absence of an undertaking or recital to like effect, could not be the subject of an order under the 1973 Act. The fact that such draft order provisions were in the standard form of financial order approved and adopted by the *Financial Remedies Working Group* chaired by Mostyn J was found by the deputy district



judge “not (to) overrule the requirements and parameters of the *Matrimonial Causes Act*”.

### **Mostyn J Guidance:**

Revisiting the decision of the lower court, His Lordship entirely rejected (paras 5 to 10) the notion of a lack of jurisdiction in the court to make the orders requested for a number of reasons, as follows:-

i) The Financial Remedies Working Group in its first report of 31 July 2014 (at para 84 of that report) had already addressed this very issue in some detail and having obtained the view of Mostyn J on the court’s powers in this respect had in its final report dated 15 December 2014 specifically reiterated and maintained its recommendation on the form of order that could be made;

ii) As disseminated from the view expressed by Mostyn J to the Group:-

a) Under the new *s31E(1)(a) Matrimonial and Family Proceedings Act 1984* (inserted by the Crime and Courts and Act 2013 s 17(6), Sch 10, Pt 1, para 1) in any proceedings in the family court, the court may make, subject to limited exceptions, any order which could be made by the High Court if the proceedings were in the High Court:-

#### **‘31E Family court has High Court and county court powers**

(1) In any proceedings in the family court, the court may make any order –

(a) which could be made by the High Court if the proceedings were in the High Court, or

(b) which could be made by the county court if the proceedings were in the county court.’

b) The High Court has power as an equitable remedy to order or decree an indemnity. Such a remedy was originally vested in the Court of Chancery which was subsumed into the High Court by the Supreme Court of Judicature Act 1873. An example of such a relief was to be seen initially ordered in *Salomon v A Salomon and Co Ltd* [1897] AC 22 (but which was later set aside by the House of Lords as offending the rule about the separate legal personality of companies);

c) As to mortgage and other outgoings, the power to order A to make payment to B plainly includes the power to order A to make payments on behalf of B. The greater includes the lesser.

d) It had been necessary to spell out the power to order the payment of mortgage and other outgoings in *Part IV Family Law Act 1996* proceedings (see *s40(1)(a)*) because the wider direct power does not exist in those proceedings.

**'40. Additional provisions that may be included in certain occupation orders.**

(1) The court may on, or at any time after, making an occupation order under section 33, 35 or 36 –

(a )impose on either party obligations as to –

(i) the repair and maintenance of the dwelling-house;

or

(ii) the discharge of rent, mortgage payments or other outgoings affecting the dwelling-house;...'

It would, therefore, be anomalous if the only power to order payment of outgoings existed in *Part IV* but not otherwise. The court must out of necessity have these powers if only to cover the position if someone is not prepared to give the necessary undertakings or is not participating in the proceedings.

iii) Whilst it was elementary that the court cannot make orders outside its powers: see *Livesey v Jenkins* [1985] AC 424 at 444G, where Lord Brandon found that neither ss 23 or 24 of the *1973 Act* directly empowered the court to make an order requiring a party, following the transfer of the matrimonial home, to be solely responsible for the mortgage and all other outgoings on it. The subsequently inserted terms of **s 24A(2)**, explicitly granted a power to make such consequential orders when making an order for the sale of property.

iv) Further, His Lordship observed that **s 30** of the *1973 Act* had also given the court power when making a property adjustment order to direct a referral to one of the conveyancing counsel of the court to settle a proper instrument to be executed by all necessary parties. Although that provision was now



virtually obsolete, such an instrument could contain terms, which included all necessary indemnities and the obligations to pay instalments in relation to a mortgage secured on the property. It followed that the court therefore did have the requisite power to make the order in issue within the “parameters” of the *Matrimonial Causes Act 1973*.

His Lordship further observed that, once the court made, as part of its equitable jurisdiction (as above), an indemnity order, the same represents a legal right in favour of the person so indemnified. The court can award an injunction in support of a legal right. To order someone who has been ordered to indemnify the other party in respect of a mortgage to use his or her best endeavours to keep up the payments on that mortgage is of the nature of an injunction in support of a legal right. His Lordship had no doubt this fell squarely within the power of the High Court to order, and was therefore within the power of the Family Court also.

#### **Commentary:**

Mostyn J concluded that such ‘*sterile, technical objections to orders in these terms*’ had to cease. He observed that the same had caused ‘*needless delay and have no doubt increased costs and caused other inconvenience*’.

Clearly, there are in many instances unavoidable costs to the litigant occasioned directly and indirectly by the process of law, not least in that exemplified by the not infrequent challenge to orders under the appeal procedure wherein a higher court ultimately determines that the lower court simply got it wrong.

However, here, it would appear that both sides had persistently returned the draft order in question in front of the lower court in an effort to persuade the judge that the orders proposed were of the type already considered and approved by the *Financial Remedies Working Group*. Indeed, as Mostyn J further observed over ‘*the last three years the orders in question have been made routinely*’. See also ‘*Recitals, indemnities and third-party orders: overturning old orthodoxies of orders*’ David Hodson OBE MICArb, Oct 2015 contributions by Marina Faggionato, barrister, ([http://www.familylaw.co.uk/news\\_and\\_comment/recitals-indemnities-and-third-party-orders-overturning-old-orthodoxies-of-order](http://www.familylaw.co.uk/news_and_comment/recitals-indemnities-and-third-party-orders-overturning-old-orthodoxies-of-order)).

The persistence of the stance taken by the lower court in such circumstances of rising delay and cost was unfortunate and did not reflect the attributes of the court’s own overriding objective ‘*of enabling the court to deal with cases justly and at proportionate cost*’. *FPR 2010 Part 1.1*.