

Neutral Citation No: [2021] NIMaster 2

Ref: 2021NIMASTER2

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

ICOS No:

Delivered: 04/02/2021

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

M

Petitioner;

and

M

Respondent.

(Application for Interim Lump Sum)

Master Bell

The parties are requested to consider the terms of this judgment and to inform the Matrimonial Office in writing within two weeks as to whether there is any reason why the judgment should not be published on the JudiciaryNI website or whether it requires any further anonymisation prior to publication. If the Office is not so informed within that timescale then it will be published in its present form.

INTRODUCTION

[1] The parties in this case have been married for over 17 years. In happier times the marriage led to three children all of whom are currently minors. Sadly, difficulties later arose and the parties decided to end their marriage. A *decree nisi* was granted on 12 November 2020. Litigation between the parties is ongoing on two fronts. Firstly, there are the ancillary relief proceedings which are currently before me. The stage that they have reached is that I have conducted a Financial Dispute Resolution Hearing in an attempt to assist the parties to reach a negotiated settlement. As is the usual practice, if the parties cannot reach a negotiated settlement, a final hearing will take place before a different Master. Secondly, there are proceedings concerning contact arrangements in respect of the children. Counsel have described these in a way which leads me to understand that these are bitter and acrimonious.

[2] In this application, the respondent (whom I shall refer to as “the wife”) applies for the release of a lump sum of £400,000 in order to be able to move house and to furnish her new home. The petitioner (whom I shall refer to as “the husband”) does not oppose the application *per se* and will consent to the wife having such a sum from funds held in their joint names as long as he receives a similar sum. He is, however, opposed to her having funds released to her alone without a balancing sum being released to him. She is opposed to this.

[3] No affidavit has been sworn by either party for the purpose of this application. The issue was raised by counsel during the Financial Dispute Resolution Hearing and then during a separate listing characterised as urgent by counsel for the wife.

[4] The wife is represented by Miss Robinson of counsel and the husband by Mr Devlin of counsel. I am grateful to both of them for their oral submissions and for their written submissions provided at short notice.

[5] The point before me is whether I have the power to release an interim lump sum and if I do, whether I should agree to the application. Given the need to produce a speedy decision this judgment will necessarily be in a briefer style than would otherwise be the case.

FURTHER CONTEXT

[6] As Lord Steyn famously said in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, in law context is everything. For a proper understanding of the issue, some more factual detail requires to be outlined. However, in order to avoid identification of the children, that detail will be described circumspectly.

[7] The husband is professionally qualified. The wife is also professionally qualified but to a lesser degree. Together they operated a business via a

limited company of which they were the directors and the shareholders. This appears to have operated from 2003 to 2017. The business, and the premises it operated from, were sold a few years ago and approximately £850,000 of proceeds from the sale of the premises are currently being held by the wife's solicitor. For the avoidance of doubt I should state that an undertaking has been given by the wife's solicitor that these funds will remain untouched unless both parties agree to a transaction.

8[] The matrimonial home has a value of some £495,000 and is mortgage free. It is currently on the market for sale and an offer has been accepted. Completion is due in a period of between 4 and 6 weeks. The contents of this extensive property, including apparently suits of armour and Star Wars memorabilia, are in the main due to be auctioned. The wife and two of the children currently reside in the matrimonial home. The husband and the eldest child now reside in a property which the husband purchased post-separation. Although the husband is willing to agree to the proceeds of the former matrimonial home to be used by the wife to purchase a new property, the wife submits that she cannot wait that long as she wishes to complete a house purchase next week.

[9] The other financial and property assets belonging to the couple are significant. During the Financial Dispute Resolution the total net value of the assets was suggested to be £2.87 million.

SUBMISSIONS

[10] On behalf of the wife, Miss Robinson candidly acknowledged that she was unable to point to a particular decision of the courts or a particular provision within the Matrimonial Causes (Northern Ireland) Order 1978 which allowed for the granting of an interim lump sum to one of the parties. Rather she made an appeal to the broad discretion of the court simply for a stop-gap measure to address an immediate need.

[11] On behalf of the husband, Mr Devlin pointed to Article 25(3)(a) of the 1978 Order, which, although it allows the court to make an order granting a lump sum, restricts the purposes for which lump sums may be awarded:

“(a) an order under this Article that a party to a marriage shall pay a lump sum to the other party may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making an application for an order under this Article in his or her favour;”

[12] Mr Devlin noted that the textbook 'Ancillary Relief Handbook by Roger Bird' states at paragraph 4.6:

“The court does, however, have limited powers to provide for payments of sums of money on an interim basis for immediate needs. ... This is a little used provision, but its utility is clear. It could be used where for some reason a periodic order was inappropriate, but the applicant had some pressing need, for example some school fees, a council tax bill, or a major car repair which could not be met out of income. It would seem that the purpose for which the lump sum would be required must be limited to the maintenance of the applicant or a child, and so the subsection could not be used for major housing requirements; perhaps however it could be used to require the payment of a deposit on rented accommodation.”

[13] In addition Mr Devlin referred me to the authority of *Wicks v Wicks* [1999] Fam 65 CA which he submits is authority for the proposition that the court has no power to order an interim lump sum. This somewhat conflicted with his submission which I have just referred to, namely that the court does have the power to order interim lump sums but only for restricted purposes. The question I must therefore examine is what is what propositions the decision in *Wicks v Wicks* is authority for.

CASELAW

[14] In *Wicks v Wicks* Ward LJ posed the question before the court in the following way:

“Ancillary relief proceedings sometimes advance at the slowest pace, often as a deliberate tactical ploy. The wife and children may be left in pressing need of capital in order to be rehoused. What, if any, power does the court have to make some capital or property provision for her pending the determination of her claims for lump sum and property adjustment orders? That, stating it very broadly, is the interesting and important question which arises on this appeal.”

[15] The facts in *Wicks* were as follows. Mr and Mrs Wicks married in 1985. He was a property developer and they had two children. At the time of the marriage he owned a large house which was sold whereupon Mr Wicks purchased another house in his name and improved it. That was then sold at a profit and from the proceeds of sale he purchased another property. With creditors pressing, he immediately transferred that property to his wife and declared her to be entitled to the whole legal and beneficial interest therein. That notwithstanding, he claimed that the property was bought as a business venture, the object of which was to carry out substantial improvements to it and make substantial profit. The marriage broke down in November 1995 and the wife left. She was admitted to the Priory Hospital, Roehampton for treatment for alcoholism. She and the two children then moved into rented accommodation in March 1996. She presented a petition for divorce and

sought ancillary relief. A decree nisi was granted and after a contested hearing there was an order that the children reside with the wife. She was receiving no financial support from the husband and claimed income support. The Benefits Agency informed her she had to sell the matrimonial home. The husband objected to the sale and refused to give possession. The wife then launched these proceedings seeking an order that the matrimonial home be sold and she receive not less than £250,000 or alternatively not less than 40 per cent., whichever should be the greater, such sum to be applied solely in purchasing a property for the occupation of herself and the children of the family pending the final resolution of her ancillary relief claim. Judge Pearlman, sitting as a judge of the Family Division, made an order in those terms, upon the wife undertaking, pending the final hearing of her ancillary relief application, not to mortgage, charge or otherwise dispose of her interest in the property that she purchased and also ordered her to set down her ancillary relief application for final hearing. Mr Wicks then appealed Judge Pearlman's order and the Court of Appeal for England and Wales which overturned the decision of Judge Pearlman.

[16] It would, of course, be a superficial reading of the decision in *Wicks v Wicks* to understand its scope as meaning simply that a court has no power to order a party to give vacant possession of a house and to order it to be sold in order to provide a lump sum for the other party to purchase another property. What then is the *ratio decidendi* of the decision?

[17] When hearing the case of *Wicks v Wicks* Judge Pearlman had been referred to a number of previous decisions where judges, faced with an immediate need of an applicant, had decided that lump sum orders were possible. Of these cases, the one which bears the closest resemblance to the facts before me in this case, was the case of *Barry v Barry* [1992] Fam. 140. In *Barry* the net proceeds of the sale of the former matrimonial home, which had been in the wife's name, were held in the joint names of the parties' solicitors. Her claims for ancillary relief were thought to be due to be heard three months later. When a house came on the market which the wife was anxious to buy as a matter of urgency, she applied for an order that a proportion of the fund be paid out to her and applied in the purchase of that new home in her own name solely for occupation by herself and the children. The wife submitted, however, that when her application was examined for its full terms and effect, the relief for which she was asking was not properly to be regarded as an immediate application of capital for her absolute and exclusive enjoyment. She asked for nothing at that stage to be paid over to her absolutely or unconditionally. When the new home had been bought and occupied, she agreed to treat it as still being subject to the full play of the court's discretion under the Matrimonial Causes legislation, accepting that its face value would have to be taken into account in the final allocation of assets between the parties at the main hearing; and in the event of her being ordered to make a capital payment to the husband for which any liquid funds taken

by her are insufficient, she submitted to a charge being placed on her equitable interest in the new home to secure it. Meanwhile she undertook not to subject the equity to any encumbrances. When her application was qualified in that way, the wife submitted, the relief she claimed was not to be seen as an order for interim lump sum payment but rather as a purely administrative direction approving what amounts in reality to no more than a change of investment for an asset which, despite its transformation from cash to reality, would still remain subject every bit as much after the change as it was before to the dispositive powers of the court under the Matrimonial Causes legislation. The court in *Barry* was satisfied that the wife's application was of a kind that the courts not only had the jurisdiction to entertain, but should in suitable instances encourage.

[18] The Court of Appeal in *Wicks v Wicks* saw no justification for the idea of creating an administrative power, whatever that may be, to reallocate property and property rights between the parties contingent upon the final hearing, absent some other power to do so. Ward LJ crushed that possibility when he said:

“Notwithstanding the very great attraction of a practical means of attaining a desirable objective, I, for my part, and most unhappily, feel compelled to hold that *Barry v. Barry* cannot be regarded as good law, even in the limited circumstances where the assets to be reallocated are in a joint account.”

[19] It will be remembered of course that Miss Robinson acknowledged that there existed no specific provision within the Matrimonial Causes (Northern Ireland) Order 1978 which allowed for interim lump sums to purchase property and instead seeks to rely on the general discretion of the court. What then about the inherent jurisdiction of the court? Might it allow such a lump sum to be ordered? Unfortunately for Miss Robinson's argument, *Wicks v Wicks* also blocks any successful argument on this basis. Ward LJ noted that Sir Jack Jacob, the former Senior Master in the Royal Courts of Justice, wrote in his well-known article, "The Inherent Jurisdiction of the Court" (1970) 23 C.L.P. 23 at p. 51:

"The inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

Nevertheless Ward LJ concluded:

“There is powerful authority rejecting the contention that the inherent jurisdiction of the court confers a general residual discretion to make any order necessary to ensure that justice be done between the parties. This is too wide and sweeping a contention to be acceptable: see Lord Hailsham of St. Marylebone's curt dismissal of Lord Denning M.R.'s attempt to do justice in *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210, 262 and, also, Ackner L.J.'s comments in *A. J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923, 942. The fact that these were cases dealing with the impact of inherent jurisdiction on the power to make injunctions does not seem to me to devalue the strength of the critical observations. In my judgment it seems, upon proper analysis, that the power the applicant wives were inviting the court to assume was not a procedural power to control the court's process but a substantive power affecting the right of the applicant to the relief which she was seeking. The need to distinguish between procedural rights and substantive rights was clearly drawn in *Moore v. Assignment Courier Ltd.* [1977] 1 W.L.R. 638. Here, the claims were for possession of demised premises on the ground of forfeiture for breaches of covenant and, also, for mesne profit. The issue raised was whether, pending a determination of the landlord's forfeiture action, the landlord was entitled to be paid a periodic interim sum for the use of the land. Section 20 of the Administration of Justice Act 1969 had empowered the court to make rules requiring a party to make an interim payment of debt or damages. No rules had yet been made. The claim was, therefore, brought under the inherent jurisdiction relying on a dictum of Lord Denning M.R. in *Tiverton Estates Ltd. v. Wearwell Ltd.* [1975] Ch. 146, 156: "These courts are masters of their own procedure and can do what is right even though it is not contained in the rules." Of that Sir John Pennycuick said, at p. 642:

"I think that in its context that sentence is plainly addressed to matters of procedure and is not intended to say that the court can, in matters of substantive right, do whatever the court thinks fair, apart from the principles applicable under either the general law or the Rules of the Supreme Court."

The same reasoning applies here. Under the cloak of ensuring fair play, the judge was in fact making orders affecting the parties' substantive rights and that must be governed by the

general law and rules, not by resort to a wide judicial discretion derived from the court's inherent jurisdiction."

The reality here is that the wife is seeking the enforcement of rights which the Matrimonial Causes Act 1973 does not grant her. She wants an order for sale before section 24A allows the court to order it. She wants money to spend on a house before the financial and property adjustments can be made under sections 23 and 24. To submit, as Mr. Wood does, that she only seeks the "use of certain assets [the matrimonial home and the money] pending trial," and that this is not an interim lump sum order or an interim property adjustment order or an interim order for sale, because they confer "upon the recipient no absolute or exclusive ownership of the asset," is disingenuous. She wants the money to buy a new home in her name, under her control, for her sole enjoyment to the exclusion of the husband. If the substantive law laid down by the Matrimonial Causes Act 1973 does not permit that to happen, then the court has no inherent jurisdiction to do that which Parliament has not granted it power to do.

Once again with regret, for there is no doubting the need to do justice in the individual cases, I come to the unhappy conclusion that there is no inherent jurisdiction in the court to grant the petitioner any of the reliefs she seeks."

[20] Ward LJ's overall conclusion of the arguments presented to the Court of Appeal in *Wicks v Wicks* was therefore as follows:

"I conclude that the judge was wrong to assume jurisdiction on any of the grounds which she was urged to seize to found the exercise of her discretion. It is by now obvious that this is not a happy conclusion. Three experienced judges of the Family Division each saw the need on the facts of the case before them to have some power to grant some interim relief. In each case, as in this, the result arrived at by the judge met the demands of justice and fairness, to achieve which the judges had to resort, imaginatively, to expediency to found their jurisdiction. ... the judge was beguiled by the authorities, and, having been invited to approach the matter incorrectly, she fell into error and the appeal against her order must be allowed."

[21] That was not, however, the end of the story in *Wicks v Wicks* because Ward LJ went on to say:

“In the appeal before us, there was, however, no need to be so creative. Here an application of established principles could have produced the desired result perfectly satisfactorily, though perhaps not as peremptorily as the wife would have desired. On the face of the title to the property it was the wife's to sell and she did not need an order for sale to be able to do so. The burden would have fallen on the husband to prevent her doing so. ... Whilst, therefore, in the circumstances of this case, there were remedies available to the wife to achieve the end she desired, there will be other cases of which *Barry v. Barry* [1992] Fam. 140, *Green v. Green* [1993] 1 F.L.R. 326 and *F. v. F. (Ancillary Relief: Substantial Assets)* [1995] 2 F.L.R 45 are examples where, unfortunately in my judgment, no relief can be given to the wife in distress. Such a conclusion really is nothing short of unfortunate. ... Perhaps, therefore, all I can do is endorse the comment of Professor Stephen Cretney (1993) 23 Fam.Law 120 that "the legislative restrictions on the courts' powers...are beginning to cause inconvenience" and to join with him in a call for legislative reform.”

[22] This court echoes that call for legislative reform.

[23] Although the application put to the court must therefore fail for the reasons I have set out above, this does not conclude the issue in this case. Simply because I do not have the power to grant the wife's application to release a lump sum does not make the husband the “winner” and the wife the “loser”. It is, of course, well known that the court has the power to order periodical payments. In the event that the wife is prevented from purchasing a home, I would be willing to grant an order for periodical payments to enable her to pay rent and purchase any necessary furnishings for an unfurnished rental property until such time as the ancillary relief proceedings have concluded and she is in a position to purchase the house she plans to. This would be likely to deplete the matrimonial funds available for distribution between the parties and lead to the husband receiving less than he might otherwise do so. Hence, although the husband wins this particular legal battle, it may turn out to be something of a Pyrrhic victory.