

# MESHER ORDERS – HOW USEFUL ARE THEY

OR

## THE RETURN OF THE MESHER

### INTRODUCTION

Mesher orders, named after the case **Mesher v Mesher [1980] 1 All ER 126**, have been around for over 20 years. But through those 20 years there have been ups and downs. Generally up in the 1980's down in the 1990's and back up in the new millennium, following **White v White [2001] 1 AC 596**.

The original case some **facts and figures**

- the case report runs to just over 2 pages (those were the days)
- the FMH was worth between £16,000 - £22,000 (less mortgage £3,500)
- the total annual income of the H and his new partner was £2,500
- both H and W planned to remarry and had similar financial resources
- W had care of their 9 year old daughter
- Original court decided outright transfer of FMH to W
- H appealed on the basis that it would be unfair and unreasonable to deprive him of the whole of his interest in the FMH
  
- **decision** “I would set aside the judge’s order so far as concerns the house and substitute instead an order that the house is held by the parties in equal shares on trust for sale but that it is not to be sold until the child reaches a specified age (17 years) or with leave of the court.”

And from little acorns.....

### A THE BASICS

A.1 In essence a Mesher order provides for the **postponement of the sale** of the FMH allowing the occupying party to remain there, usually with the child(ren) of the family. The non-occupying party has then to wait to realise his/her interest in the FMH.

A.2 In the period of deferment the FMH can either be transferred to the occupying party with a **charge-back** to the other or the FMH is held in the joint names of the parties on **trust for sale** (as in the original case of Mesher v Mesher).

A.3 The most common way of dealing with these cases is by way of charge back as it represents more finality between the parties. With a trust for sale it is thought that there is

an ongoing need for joint decisions to be made about the property although this fear maybe exaggerated.

A.4 Whichever route is taken the level of the non- occupying party's interest is almost without exception set on the basis of a **percentage** rather than a **fixed figure**.

A.5 The percentage can be expressed as of the **net** or **gross** proceeds of sale. In getting to the figure you want to have by way of a charge it has usually been calculated on the basis of the net proceeds, so if it were to be represented as of the gross an easy calculation can be done :-

gross value of FMH	£300,000
net value	£150,000
non-occupying party share	£ 75,000
that is 50% of net	= £75,000
or 25% of gross.	= £75,000

A.6 The advantage of expressing the share as of the gross proceeds is that it gives flexibility to the occupying party in that s/he can then pay off more of the mortgage or indeed increase it subject, of course, to the charge the non-occupying party.

A.7 Once determined and ordered the level of the share cannot be changed.

A.8 The sale of the property is therefore postponed until the first of the specified **trigger events**. The original case of Meshers v Meshers kept it nice and simple - the sale of the FMH was postponed until the child attained the age of 17 or further order. Now there are a whole host of possible trigger events that can be included in an order.

A.9 The **standard** trigger events are :-

- i) death or remarriage of the occupying party;
- ii) youngest child attaining the age of 18 years or ceasing full-time secondary education (whichever shall be later)

A.10 The **variations** are :-

- i) the cohabitation of the occupying party;
- ii) the youngest child attaining the age of 18 years or ceasing full-time tertiary education which ever is the later;

A.11 If minor children live at the FMH it is now common for there to be a provision that there should not be a sale of the FMH in the event of remarriage or cohabitation without **leave of the court**.

A.12 A more contentious trigger event is the **earlier sale of the property**. If this is included it restricts the flexibility of the occupying party to move if their circumstances change but they still need all or a most of the proceeds of sale to purchase a substitute property. Of course if you are acting for the non-occupying party you will be saying that

that is occupier's choice and the non-occupier should not be denied their interest in the FMH in that event.

A.13 If the non-occupying spouse is retaining a significant interest in the property then s/he should also retain an equally significant **obligation** for the property. Of course this obligation should not extend to gold-plated taps in the bathroom or bronze statuettes in the garden but should include a contribution to essential structural repairs. So the occupying party may want the non-occupier to contribute to the buildings insurance and structural repairs in equal shares or in proportion to the shares they will hold. If this point is not agreed between the parties it is sometimes difficult to get the court to make an order to this effect. The court is often reluctant to force an ongoing financial obligation of this sort upon the non-occupying party and would rather deal with it by saying that the occupying party will have the greater share. Of course if there an ongoing claim for periodical payments then any costs in respect of the property could be dealt with in that way. There is also the potential to claim under the Trusts of Land and Appointment of Trustees Act 1996.

A.14 There should also be provision for the occupying party to **buy out** the others share at any time.

A.15 It is generally (but rather vaguely) thought that a deferred sale under a trust for land is less likely to invoke **CGT** than a deferred sale under a charge-back.

## **B TO USE OR NOT TO USE ?- that is the question.**

B.1 Meshers orders are particularly **useful** where :-

- there are children in the family of secondary school age;
- the occupying party needs to stay in the FMH because s/he could not rehouse otherwise;
- there is strong evidence that the non-occupier will not contribute to the family in the future (that is a wilful non-contributor rather than someone who genuinely can't afford to contribute)

B.2 They are **not particularly useful** where :-

- the children of the family are very young and the non –occupying party may have to wait long time to realise his/her interest;
- the longer the deferment period the more uncertainty there is for the occupying party and the more difficult it is to predict the parties respective financial positions at the time of sale;
- the amount of net equity is modest and is not likely to be sufficient to rehouse the occupying party let alone both of them.

## **C In the red corner**

In the red corner and **for** the Mesher order we have :

**White v White [2001] 1 AC 596**

- treat equality not as a starting point but as a cross check
- ask yourselves why depart from equality.
- this case has given Mesher orders a new and invigorated lease of life non-occupiers are now able to say that there is no reason to depart from equality (or more likely accept a reasonable reduction) but they accept that their share should be deferred and a Mesher order made.

**Elliott v Elliott [2001] 1 FCR 477 CA**

*Facts*

- married 20 years
- 2 children 16 and 18
- value of FMH unknown
- H's current income (police pension) not much greater than W's but his earning capacity "potentially far stronger" further £12,000 p.a.

*DJ decision*

- FMH to W with charge back to H of 45%
- Trigger events i) death or remarriage of W  
ii) cohabitation of W  
iii) W selling or vacating FMH  
iv) youngest child attaining age of 18 or finishing full-time tertiary education whichever the later  
v) further order
- nominal pp

On appeal to CJ he allowed appeal by removing trigger event (iv) therefore W could live at FMH for as long as she wanted. PP order terminated.

*Decision Thorpe LJ*

- original order of DJ was correct
- the H has "...a reasonable entitlement to deploy capital to house himself at the end of a long marriage during which he has worked hard.. and has contributed his earning to the building of family capital.

- “The Husband had a reasonable and discernable need for his share of the family capital at the earliest time that the needs of the children permit. As soon as the Wife’s responsibilities as the home-maker for the children reach a point of natural termination at that point clearly the husband is entitled to his capital share.”

NB Presumably after the H received his “entitlement” the W was able to rehouse! – there is no reference to this s.25 factor.

### **Dorney-Kingdom v Dorney-Kingdom [2000] 2 FLR 855**

#### *Facts*

- married 17 years
- 3 children 14, 12 and 9
- net value of FMH £230,000, policies of £33,000
- H’s net monthly income £2,500 W’s £1,225
- decision of DJ outright transfer of FMH to W

#### *Decision Thorpe LJ*

- Thorpe LJ recognised that Mesher orders can be criticised for producing a “harsh situation in which the primary carer having discharged her responsibility to the children is then left in a position when she is unable to rehouse herself as an independent person probably at a relatively vulnerable stage of life.”

- But in this case the value of the FMH is “sufficiently great to allow its proceeds on an uncertain future sale, not only to provide comfortably for the wife’s independent needs, but also to make some fair release to the husband.”

- In considering the **level** of the H’s share Thorpe LJ looked at :
  - W’s future housing needs
  - W’s likely future financial resources
  - W’s ongoing financial contribution to the children and to the FMH
  - Mesher order of 25%

### **Clutton v Clutton 1991 1 FLR 242**

“.. the family assets are amply sufficient to provide both parties with a roof over their heads if the matrimonial home were sold, but, nevertheless, the interests of the children require that they remain in the matrimonial home.”

#### **D In the blue corner**

In the blue corner and **against** the Mesher order we have

## **B v B (Mesher Order) [2003] 2 FLR 285**

### *Facts*

- Married 1 year
- 1 child aged 1 year
- Value of FMH unknown
- other assets unknown
- Order DDJ - LS to W £175,000 and PP £1,650 p.m.
- H appeal on the basis LS should be reduce to £80,000 and should be subject to Mesher order of 30% and PP to be reduced to £370.00 p.m.

### *Decision of Munby J*

- Dismissed H's appeal and said Mesher order was not appropriate. This case is a bit difficult to use in practice because the relevant figures are not provided. A careful reading of the report does tell us that the W did not bring any capital into the marriage (at best she made a modest contribution p.295). Further without the child of the family the W would have had no claim against H for any form of capital relief.

The decision that Mesher order was inappropriate was based on the following arguments :-

- the W will make a very significant future contribution by bringing up the child
- because of that contribution her own income and earning capacity will be adversely affected
- H will be able to recreate within a relatively short period of time the capital he will lose under the order

## **B v B (Financial Provision : Welfare of Child and Conduct) [2002]1FLR 555**

### *Facts*

- married 6 years
- 1 child of 4
- conduct issues against H he had abducted the child and he had removed £37,000 from a BS account
- Net Value of FMH £124,000
- DJ ordered transfer of net proceeds to W to rehouse
- H appealed on the basis that he should have a Mesher order

### *Decision Connell J*

Dismissed the appeal on the basis that there should be this departure for equality on the basis of the W ongoing contribution to the family and because of the H's conduct.

**Mortimer v Mortimer –Griffin 1986 2 FLR 315**

*facts*

- married 10 years
- 1 child of 14
- net value of fmh £70,000
- W's income £10,000 p.a.
- H was not making a proper or any financial contribution to the family nor had he done for some years
- Decision of DJ Mesher order to H of 20%
- W appealed

*Decision C of A*

W succeeded and Mesher terms removed on the basis that the W had made and would go on to make a significant financial contribution.

**E CONCLUSION**

E.1 The Mesher debate occurs mostly in small and modest money cases and it highlights the tension in those cases between the “yardstick of equality” and “a fair outcome”- not always the same thing. It is unlikely that in *Elliot v Elliot* it was a fair outcome and in *B v B* it is likely to have been a long way from equality.

## **PRECEDENTS**

### **Transfer with charge back**

## **UNDERTAKING**

Upon the Applicant/Respondent undertaking

(a) to use his/her best endeavours to have the Applicant/Respondent released from his/her covenants under the mortgage with effect from the date of this order and in default to indemnify him/her from all liabilities, costs, claims and demands thereunder;

(b) not to borrow any further money on the security of the property nor to create any further charge over the property without the Applicant's/ Respondent's written consent;

(c) to keep the property in good repair; and

(d) to observe all the borrower's covenants under the mortgage and under any mortgage or charge replacing the same.

## **ORDER**

1. The Applicant / Respondent shall on or before \_\_\_\_\_ transfer to the Applicant / Respondent all his / her legal and beneficial interest in the property situated at \_\_\_\_\_ subject to the mortgage secured thereon in favour of \_\_\_\_\_ on condition that as from the date of the said transfer the said property do stand charged by way of a legal charge as security for the payment to the Applicant / Respondent of \_\_\_\_\_ % of the actual/gross proceeds of sale.

PROVIDED ALWAYS that such charge shall not become exercisable until :

- A the youngest surviving child of the family shall attain the age of eighteen years or completes his / her full time secondary undergraduate education which ever shall be the later; or
- B the death of the Applicant / Respondent; or
- C the remarriage or cohabitation with another person as man and wife for a period of \_\_\_\_\_ months in any \_\_\_\_\_ month period of the Applicant / Respondent; or
- D voluntary vacation of the property by the Applicant / Respondent for a period in excess of \_\_\_\_\_ months in any twelve month period; or
- E any sale of the property by the Applicant / Respondent

whichever shall first occur or further order of the court provided that in any event the said legal charge shall not be exercisable without leave of the court while any child of the family in occupation of the said property is still a minor or of full age but receiving full time education or training.

2. The cost of insuring the said property and of any structural repairs shall be shared between the parties as to provided that no works of structural repairs shall be carried out to the said property save by agreement between the parties or by further order of the court.

3. The term “actual proceed of sale” referred to above shall mean the open market value of the property with vacant possession between willing seller and purchaser at the date of redemption of the said legal charge or, if the said property is to be sold, on completion if the sale of the property the actual sale price, including any consideration paid for fixtures and fittings. The open market value of the property as between willing seller and purchaser as at the date of redemption of the said legal charge shall in default of agreement between the Applicant and the Respondent be determined by a chartered surveyor appointed on the application of either party by the President for the time being of the Royal Institution of Chartered Surveyors who shall act as expert and not as an arbitrator and whose costs shall be borne equally by the parties.

4. In the event of the Applicant/ Respondent selling the said property prior to any of the events set out above then he/she shall be entitled to apply the net proceeds of sale of the property to the purchase of a substitute property to be agreed by the parties or in default of agreement to be specified by the court upon the following terms :

(i) upon sale of the property, any of the net proceeds of sale thereof which are not used for the purchase of the substitute property shall be divided between the parties in the following proportions;

(ii) the substitute property shall be bought in the sole name of the Applicant/Respondent subject to the charge specified in paragraph (iii) below in favour of the Applicant/Respondent;

(iii) the charge referred to in paragraph (ii) above shall be :

a) for such proportion of the gross value of the purchase price of the substitute property as is represented by the outstanding amount due under the charge in favour of the Applicant/Respondent as at the time of the sale of the property [save that in calculating the amount under the charge , the costs and fees of sale of the property shall be ignored on the basis that they shall be born by the Applicant/Respondent; and

b) enforceable on the happening of the first of the events in paragraph 1 A-C above or upon sale of the substitute property.

5. On or before the determining event the Applicant Respondent shall have the right to purchase the Applicant/ Respondent interest in the property at an open market valuation to be agreed or in default of the agreement to be determined by a valuer nominated by court

6. Liberty to apply as to implementation

## **Trust for land**

### **UNDERTAKING**

Upon Applicant/Respondent undertaking

a) To pay all mortgage instalments in respect of the property or any substitute property she may purchase under the terms of this order and to keep the Applicant / Respondent indemnified from all costs, claims and liabilities in relation thereto.

### **ORDER**

1. With effect from the property at \_\_\_\_\_ under title number \_\_\_\_\_ shall be held by the Applicant and the Respondent upon trust for land for themselves as beneficial tenants in common [in equal shares / in the following shares] and upon the following terms and conditions:

A. The Applicant/Respondent shall be entitled to occupy the said property rent free to the exclusion of the Applicant / Respondent until sale/determining event as hereinafter defined;

B. The property shall not be sold without prior written consent of both parties or further order until the first to happen of the following events (“the determining events”) namely:

- i) The youngest surviving child of the family attaining the age of eighteen years or completing his/her full time secondary/ tertiary education which ever shall be the later;
- ii) the death of the Applicant / Respondent
- iii) the remarriage or cohabitation with another person as man and wife for a period of \_\_\_\_\_ months in any \_\_\_\_\_ month period of the Applicant / Respondent

C. The Applicant/ Respondent shall with effect from the date of this order be solely [or as appropriate] responsible for all payments of capital and interest on the mortgage secured on the said property in favour of \_\_\_\_\_ and the Applicant Respondent shall on the sale of the property repay to the Applicant respondent from his/her share of the net proceeds of sale one half of (or as appropriate) the element of repayment of capital comprised in such payments made by his/ her from \_\_\_\_\_ to the date of sale.

D. The Applicant /Respondent shall be responsible for all routine maintenance and decorative repairs to the said property;

E The cost of insuring the said property and of any structural repairs shall be shared between the parties

provided that no works of structural repairs shall be carried out to the said property save by agreement between the parties or by further order of the court.

2 In the event of the Applicant / Respondent wishing to move to another property with agreement of the Applicant / Respondent such agreement not to be unreasonably withheld during the subsistence of this trust:

i) The Applicant / Respondent shall be entitled to direct the trustees to sell the said property and to apply the proceeds in the purchase of such other freehold or leasehold dwelling as he/ she shall direct for his / her occupation;

ii) the costs of an incidental to such sale and purchase shall be borne by the Applicant / Respondent;

iii) the new home shall be held on the same trusts, terms and conditions as the said property and the trustees shall have full power as if they were beneficial owners thereof to execute such mortgage deed as may be necessary to enable the purchase thereof to be completed

iv) if the purchase price excluding stamp duty, Land Registry fees and conveyancing costs of the new home shall be less than the net proceeds of sale of the said property the difference shall be divided equally between the parties [or as appropriate];

v) if the purchase price excluding stamp duty, Land Registry fees and conveyancing costs of the new home shall be greater than the net proceeds of sale of the said property then the excess (based on the proportion which the excess bears to the eventual sale proceeds of the new home) shall be returned to the occupying spouse on sale of that property.

3 If the Applicant / Respondent shall remain in occupation of the said property for more than months after the determining event he/she shall pay to the Applicant/ Respondent from the date thereof such sum by way of occupation rent as may be agreed or in default of agreement as determined by the court.

4 On or before the determining event the Applicant Respondent shall have the right to purchase the Applicant/ Respondent interest in the property at an open market valuation to be agreed or in default of the agreement to be determined by a valuer nominated by court

5 If either the Applicant of the Respondent shall die during the currency of the trust, the power of appointing a substitute trustee shall be exercised by his or her personal representatives.

6. Liberty to apply as to implementation.