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Neutral Citation Number: [2008] EWHC 1929 (Fam)

Case No: FD05D06577

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2008

Before:

THE PRESIDENT

Between :

E.J.M.-D.
- and -
G.L.D.

Petitioner

Respondent

Matthew Firth (instructed by **Raydens Solicitors LLP**) for the Petitioner
Michael Glaser (instructed by **Ottaways**) for the Respondent
Hearing dates: 21 May 2008

Judgment

Sir Mark Potter P :

Introduction

1. This is the appeal of a wife petitioner against the judgment and order of District Judge Robinson in respect of her application for ancillary relief. The wife appeared in person below, although on this appeal she is represented by Mr Matthew Firth. The husband respondent was represented below, and is represented on this appeal, by Mr Michael Glaser.
2. The evidence and submissions below lasted for three days and the District Judge handed down a written judgment on 13 July 2007.
3. Mr Glaser has taken a preliminary point on this appeal that it should be dismissed as having been made out of time. The time allowed for issue of an appeal is five days from judgment (RSC Order 58 Rule 1). In fact the appeal was not brought until 12 days after judgment, namely upon 24 July 2007. I indicated to the parties early at the hearing of the appeal that I proposed to exercise my discretion to hear the appeal out of time, given that the point was only taken at the last moment and in particular was not taken before Coleridge J when the matter was before him on 19 October 2007 and he gave directions for the hearing of the appeal.
4. The parties were married on 11 February 2001 after some months of cohabitation and they separated after 4½ years in September 2005. When they married, the husband was 64 and the wife 48. It was a second marriage for each of them and there were no children of the marriage.
5. At the time of their marriage, the husband was a Circuit Judge, having previously been a solicitor. The wife was a trainee barrister; she had turned to that profession comparatively late in life, having previously had a successful career as a social worker in the Probation Service. The husband is a retired circuit judge but since his retirement has continued to sit regularly as a deputy circuit judge. The District Judge found that, the husband's sittings as a deputy were unlikely to continue for much longer, as he was now 70 years old and he would have to cease at age 72.
6. Following the marriage the parties lived at Bronllys Castle in Breconshire. It was in fact a large farm house rather than a castle and jointly owned by the husband with other members of his family in different parcels. The husband owned and lived in the lower flat. The wife moved there before the marriage and put a great deal of work into decorating and renovating the flat and its garden. She also started in practice in a set of chambers in Wales which did not work out. In January 2002 the parties jointly purchased a property at 1, Laurel Edge, St Albans which became the matrimonial home, albeit the flat in Bronllys Castle was retained. The husband sat regularly as a deputy circuit judge in the Hertfordshire area and the wife joined a set of chambers in St Albans where she has been somewhat more successful. The purchase of 1 Laurel Edge was funded as to £100,000 by the wife, who also contributed £10,000 to the cost of works, and as to £60,000 from the husband, together with a mortgage of £120,000, the husband making the interest only mortgage payments of £6,720 per annum. It was the sole asset of the marriage held jointly.

The party's capital assets

7. The value of 1 Laurel Edge was £420,000, yielding a net equity after the discharge of the mortgage and costs of sale of £287,400.
8. In addition, as found by the Judge, the husband held the following assets, all acquired before the marriage:
 - i) The lower flat at Bronllys Castle. Its value was £230,000 which, after deduction of the mortgage (£100,000) costs of sale (£6,900) and CGT (£67,000), yielded a net equity of £56,100.

[NB It seems to me clear that, since it was accepted in the proceedings that the husband would not be selling the flat but would be going to live there as his principal residence, the deduction of CGT resulted in practical terms in an undervalue of the flat in the hands of the husband, the net equity available to him being, in reality £113,000. However that point is not relied on in the appeal so far as the valuation of the parties' assets is concerned].
 - ii) The Coach House Flat, Bronllys Castle valued at £210,000, with a net equity after costs of sale of £203,700.
 - iii) A two thirds interest (one third interest being owned by the husband's sister) in the Freehold of the Castle. The husband's net equity was valued at £87,300.
 - iv) A 47.83% interest in an investment property at 109/111/113 Hatfield Road, St Albans, ("Hatfield Road") owned jointly with the husband's brother and a Mr Akhtar. The property was valued at £440,000, with the husband's net equity after deduction of costs of sale (£13,200) and CGT (£22,000) being £171,616.
 - v) The husband had additional monies in bank accounts, shares, policies and premium bonds totalling £47,534 and two sailing yachts worth together £31,500.
9. After deduction of the husband's liabilities (£35,033) his net assets totalled £562,272, leaving aside the value of his pension.
10. Apart from her interest in 1 Laurel Edge, the wife's assets were:
 - i) A small property at 2 Dane Court, College Road, St Albans. The property was valued at £125,000 with a mortgage of £77,774 giving a net equity after costs of sale (£3,750) of £43,476. The property was let at a modest rent. [The wife had acquired the property during the marriage in a property transaction with her son which gratuitously favoured him to the extent of £20,000 - odd. The District Judge took this into account when reaching his decision].
 - ii) Money in bank accounts and premium bonds totalling £9,072.
 - iii) The wife had liabilities of £7,069.
11. The wife's net assets, excluding her pension, were therefore £45,479.

12. Excluding the value of the parties' pensions, the total of the jointly owned matrimonial house (£287,400), the husband's separate assets (£562,272) and the wife's separate assets (£45,479) was £895,151.
13. So far as pensions were concerned the wife had an accrued pension CETV of £33,852. from her time as a social worker.
14. The husband's pension position was that, in addition to a state pension of £5,367 per annum and three other pensions yielding £2,514 per annum, he received a judicial pension of £38,918 in respect of which he did not have CETV figures. However, as an indication, reference to conventional assumptions about the cost of purchase of an annuity gives a figure of £660,000 in respect of an annuity of £40,000 per annum with index linking for a 71 year old (see At a Glance Table 21 (2007-1008 edition)).
15. The unfortunate position so far as the judicial pension is concerned is that, upon marriage, the husband agreed to forfeit a substantial part (over £40,000) of the lump sum due to him on retirement, in order to provide the wife with a widow's pension, partly because the wife felt vulnerable as a result of losing her pension entitlement on her first divorce. Unfortunately, the parties did not consider what the position would be if they divorced, upon which the widow's rights would be lost. In the result, the benefit of the widow's pension, and of the £40,000 advanced by the husband to acquire it, were lost to both the husband and the wife and could not be recovered once the divorce was made final. There was a suggestion in the course of the proceedings that, if the decree absolute were not pronounced, the parties could remain married in order to retain the widow's rights, but the District Judge could not make an order on that basis in the light of the parties' desire for a clean break. He observed:

“My conclusion is that I should not attach any special weight to the value of the pension rights that the Wife will lose in this divorce because of the facts behind the first divorce, or the attempt by the husband to compensate. I do have to look at the pension situation as it will be and the loss by the wife of her pension entitlement, without any added complications.”

The Parties' incomes

16. The income of the husband as found by the Judge at the time of the hearing included as its largest element his income from regular sittings in his retirement. His gross income was as follows:

Sitting	£65,357
State pension	£5,367
Judicial pension scheme	£38,918
Other pensions (3)	£2,514
Rent Coach House flat	£3,245
Rent Hatfield Street	£15,399

17. This gave the husband a gross income of £130,800 = £82,375 net as against his current needs put at £44,000. However, this net figure was expected to reduce in a year or so to about £40,000 per annum once the husband's sittings cease and his outgoings would reduce. The Judge noted that the husband did not have cash

equivalent transfer values for the pensions which were obviously substantial (see para. 14 above). However, as the judicial pension was not the product of a pension fund, and could not be made the subject of a pension sharing order, its relevance simply lay in its assurance to the husband of a guaranteed RPI linked annual income stream until his death.

18. As to the income of the wife, although she received rent in respect of a property at 2 Dane Court, she made a net loss on the property of £2,781 as a result of the amount of mortgage payments, maintenance and other costs. Her gross earnings from the Bar for the year up to June 2007 were some £38,000 out of which she paid 20% chambers expenses. However, in the light of the upward trend in her earnings, the annual figure taken was £41,000 reduced to £32,800 after chambers expenses and before tax. Her net income was therefore about £20,000, but gradually increasing. She put her needs at £38,000 per annum and it was not suggested that this sum was excessive.
19. At the time the matter came before the District Judge, the wife was seeking the transfer of 1 Laurel Edge into her sole name and a lump sum payment of £120,000 to enable her to pay off the mortgage, together with periodical payments at the rate of £20,000 per annum for three years and thereafter an earmarking order on the husband's judicial pension for life at the rate of £10,000 per annum. In opening her case, however, she changed her position in order to seek a clean break by increase of the lump sum to £200,000 to cover maintenance of 1 Laurel Edge and to build up a pension fund.
20. The husband on the other hand proposed that Laurel Edge be sold and the proceeds divided so that the wife should retain $\frac{2}{3}$ and the husband $\frac{1}{3}$, he paying a lump sum of £70,000 or alternatively periodical payments of £12,000 per annum for 6 years with a bar to any extension of the term. The Judge pointed out, that as a proportion of the available assets, leaving out of account income or pension disparity, the wife sought 73% and the husband offered 34%.
21. In the event, by a route and reasoning somewhat different from that suggested by the husband, the District Judge nonetheless divided the available assets very much in the proportion advocated by the husband, namely by a transfer to the wife of 1 Laurel Edge subject to mortgage. He calculated that the equity of £287,400, when added to her existing assets amounted to £332,879 i.e. 37% of the available assets. He found that she was "over housed" in 1 Laurel Edge and should be expected to relocate to a property of lesser value which he did not quantify. In addition, he made provision that during the next three years, which he put as the period within which the wife might find a smaller property and achieve self-reliance, the husband should make periodical payments sufficient to cover the current mortgage at the rate of £20,000 in the first year, £15,000 in the second year and £10,000 in the third year. The District Judge stated that that should be sufficient to enable the wife to maintain an appropriate life-style while she built up her earnings and that thereafter there should be a clean break and the dismissal of all claims between the parties.
22. It is the principal complaint of the wife on this appeal that, having made clear in the course of his judgment that the wife had a need to supplement her pension provision for the future, as well as to provide for her housing needs (albeit reduced), his award was wholly inadequate to enable her to do so. The situation was one where fairness dictated a lump sum contribution of capital from the husband towards such provision,

particularly in the light of his own (secure) pension provision, out of which the Judge made no provision for the wife. It is argued for the wife that close examination of the judgment reveals errors both in the methodology and figures underlying the Judge's view that he was making fair or sufficient provision for the wife. Upon that basis it is necessary to look closely at the methodology of the judgment in applying the section 25 criteria.

The judgment

23. At paragraph 9 of the judgment the District Judge identified the most important issues for the exercise of his discretion as being (1) the parties' respective housing needs (2) the parties' respective future incomes (3) the duration of the marriage (4) the consequences of the marriage for the parties' financial positions (5) the parties' respective contributions and (6) their pension provisions. It has not been suggested otherwise on this appeal.
24. Having dealt with the evidence (which he accepted as honest and intended to be helpful from both parties) and having dealt with various issues canvassed in respect of the parties' relative contributions, the Judge dealt at paragraph 16 with what he called the "pension promise" which the wife said had induced her to accept a reduced overall settlement in her first divorce. He concluded that he should not attach any special weight to the value of the pension rights which the wife would lose in this divorce because of the facts surrounding her first divorce. He simply accepted that the money which had been deducted from the lump sum payment to which the husband was entitled on his retirement in order to acquire a widows pension was lost to both of the parties and concluded that:

"I have to look at the pension situation as it will be and the loss by the Wife of her pension entitlement without any added complications."

It has not been argued before me that he was wrong to do so.

"Housing Needs"

25. The Judge recorded that the husband would have a home at Bronllys Castle, albeit he would have to make arrangements to pay off or replace the £100,000 mortgage in August 2008. So far as 1 Laurel Edge was concerned, he took its value as £420,000 and stated that he was satisfied the wife could relocate to an alternative property worth less than that amount. Having seen details put forward on behalf of the husband in respect of properties at prices ranging from £240,000 to £260,000, the District Judge expressed the view that, while it would be reasonable for the wife to live in a property that was smaller or less desirable "for reasons of affordability", the properties suggested in the price range fell below what was appropriate in the light of the standard of living enjoyed by the family before the breakdown. He did not, however, take a definite figure to which he worked. He simply stated:

"I felt that the properties which were suggested fell below what was appropriate in the light of the standard of living enjoyed by the family before the breakdown of the marriage. They were

not so far below, to persuade me that she could not relocate to an alternative property worth less than £420,000”.

“The wife’s future income”

26. The District Judge recorded, without any criticism, that the wife had been unlucky with her various chambers and had underestimated the difficulties of a career at the Bar after a successful career in the Probation Service. So far as her present earnings were concerned, her present net income of just over £20,000 was only just enough to live on. He referred to the possibility floated for the husband that she could obtain employment either as a lawyer by return to some occupation for which her previous experience qualified her and earn a salary of £35,000 per year (apparently gross). However, the Judge regarded this as having a substantial element of uncertainty and treated her, at age 54, as able to work until 65:

“... but I think that it may be a few years before she will feel confident of supporting herself from her earnings.”

“The husband’s future income”

27. The District Judge stated that the husband was currently reaching the upper end of his ability to sit as a Deputy Circuit Judge and thought it more likely than not that he would continue for one more year.

“This is relevant to his ability to afford an order for periodic payments in the short term”.

Contributions

28. The District Judge accepted the wife’s assertion that she had brought £187,000 into the marriage from her previous marriage settlement, contributing £110,000 to 1 Laurel Edge (£100,000 for the purchase and £10,000 for improvements). The remainder had gone on a car, subsidising her son on the property swap, holidays, medical treatment and general expenses, bearing in mind that her own earnings were low. The remainder of the assets came from the husband.

The consequences of the marriage for the parties’ financial positions

29. The District Judge stated that the marriage had not been financially beneficial to neither save that 1 Laurel Edge had increased in value. A substantial sum was lost to both parties from the husband’s retirement lump sum and the wife had started a new career, not solely because of the marriage but linked with it, which had been “difficult”.

30. He stated of the wife:

“She is now left at 54 with uncertain earnings, poor pension provision, and is dependent on my decision for her housing. At the time of her last divorce she would probably have been able to buy a reasonable property in St Albans”.

He said of the husband:

“[He] will undoubtedly find that his retirement will be less comfortable than he would have expected.”

Pensions

31. The District Judge stated:

“There can be no doubt that the wife will lose her valuable benefits on divorce. She has some pension provision, but she does need to supplement this provision, and her income at present does not provide a lot of scope to do so.”

My comment in respect of that last observation is that, if the wife was “only just making enough to live on” and “it would be a few years” before she could be confident of supporting herself from her earnings (see para. 26 above), her income presented no scope for further pension provision without substantial funds being made available for that purpose in one way or another.

The s.25 criteria

32. The District Judge added under this heading:

“Applying these findings to the section 25 criteria, I think that the husband has underestimated the wife’s needs in all the circumstances, but the wife has not taken sufficient account of the relatively short duration of the marriage and the size of the relative contributions”

Conclusion

33. This was succinctly stated in two paragraphs as follows:

“24. I think that the wife’s most pressing need is for a home. The property at 1 Laurel Edge is more than she needs, but I think that the properties put to her are at the bottom of the range of acceptability and not sufficient given the parties’ standard of living. She has some pension provision: she needs more; she needs more, but the sums she has sought are unrealistic. I see no reason why some of her pension pot should not be contained in her property, so she will be able to choose the time and location to trade down and make her own decision as to the balance between housing and future provision. I think that she must become self sufficient in terms of income, either at the Bar or otherwise, but that it is right that she should have some support for the next 2 years. The husband’s needs will be provided for, but he needs to have a continuing income and a home.

25. I propose to transfer the property at 1 Laurel Grove (*sic*) to the wife, subject to the mortgage. This is equivalent, with her existing assets, to £332,879 or 37% of the available assets. I

take into account all the factors I have mentioned. In addition, I think that she should receive periodical payments for the next three years at a rate sufficient to cover the current mortgage and allow her to achieve self reliance, at a declining rate of £20,000 (£1,666.66 per month) in the first year, £15,000 (£1,250 per month) in the second year and £10,000 (£833.33 per month) in the third year. This should be sufficient to enable her to maintain an appropriate life style while she builds her earnings. Thereafter there should be a clean break, in life and death. I will not order a bar under section 28 (1) (a) but there would need to be exceptional circumstances to extend the terms.”

34. The thrust of Mr Firth’s argument for the wife on this appeal is as follows. First of all he takes the point that the Judge failed for the purposes of calculating the wife’s present and future needs, to consider adequately or at all the impact of the 1 Laurel Edge mortgage and other debts on the wife’s ability (a) to rehouse at the level it was reasonable for her to expect or (b) to make any meaningful provision for her pension needs which the Judge expressly recognised. Having found that the wife needed significantly more than the sum of £260,000 suggested by the husband for her housing needs, but less than the £420,000 taken as the value of 1 Laurel Edge, the Judge failed to give any proper consideration to the fact that, (putting the wife’s reasonable housing needs at anything over £280,000 plus costs of purchase) she would need *all the net proceeds of sale and more* (i.e. a sum to be financed by way of mortgage), leaving nothing for investment in her pension. Mr Firth points out that, having accepted the absence of scope for the wife to make the contribution to her own pension on her present income and having assessed the likely increase in her future earning power in modest terms, the District Judge nowhere identified what the order he was making was intended to produce for the wife. On this score, all he said was that the wife could “make her own decision as to the balance between housing and future [pension] provision.”
35. The District Judge did no calculations, Mr Firth submits that, had he done so, such calculations would have demonstrated the deficiency of the order and the shortfall in the provision made. He points out that, even if the order had provided, say, £100,000, on top of her housing need (which it did not), such an order would produce an annual income of only £6,687 on retirement at age 65.
36. Mr Firth also submits that, although the Judge stated that he took into account the value of the husband’s judicial pension and the loss by the wife of her pension entitlement, there is nothing to demonstrate that he did so. He simply provided for a transfer of to the wife of 1 Laurel Edge subject to mortgage without making any provision for her pension needs. Thus, submits Mr Firth, the net effect of the order as to housing, pension and income in retirement is plainly unfair and reflects a failure by the Judge properly to consider s. 25 (2) (b) of the Matrimonial Causes Act 1973 (“the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future”) or to apply s.25 (A) (2) of the Act by making a periodical payments order “sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.”

37. In relation to the latter point, Mr Firth submits that although the husband's pension could not be subject to a pension sharing order, the fact of its existence and the security which it gave to the husband should have resulted in a requirement for him to make provision out of his capital assets to ease the wife's pension provision. In this respect, realisation of the husband's interest in the Hatfield Road flats would provide the wherewithal for him to satisfy either a lump sum order (if necessary allowing time for the realisation of value) although that interest could be subject of an order for transfer to the wife. Mr Firth also points out that the husband owns the Coach House flat at Bronllys Castle mortgage free, the value of which is just over £200,000 but which yields only a modest rent to the husband of £3,245.
38. Finally, whereas Mr Firth acknowledges that the District Judge, when effecting his redistribution exercise, gave weight to the fact that the marriage was of "a relatively short duration" and that there was disparity in the size of the relative contributions, he should have had regard to the comments of Lord Nicholls of Birkenhead in *White v White* [2000] 2 FLR 981 at 994(g) to the effect that in respect of property owned by one spouse before the marriage, "this factor can be expected to carry little weight, if any, in a case where the claimants' financial needs cannot be met without recourse to this property."
39. Mr Glaser, for the husband, submits as follows. First he relies on the well known principles to be applied on appeal from a district judge, such appeals being limited to a review of that decision: see Family Proceedings Rules 1991 r. 8 1 (3); *Cordle v Cordle* [2002] 1 FLR at 213; *Piglowska v Piglowska* [1999] 2 FLR 763 at 783-784. He submits that, albeit the calculations of the Judge were not precise or formulaic, it cannot properly be said that his methodology was wrong, or that any error of principle is demonstrable or that the result is plainly wrong.
40. He points out that this was a childless marriage of relatively short duration and that the assets of the parties individually owned were all acquired and owned prior to the marriage. The only property which can properly be described as a "matrimonial acquest" was 1 Laurel Edge to which the wife contributed £110,000, as against the £60,000 contribution of the husband together with the mortgage payments which he has since made. In relation to this property she has been awarded the entire net equity of £287,000 whereas, on equal division of the matrimonial acquest the equity would have been split with £144,000 going to each party. Mr Glaser relies upon observations of Lord Nicholls in *White v White* and Hale LJ (as she then was) in *Foster v Foster* [2003] EWHC Civ 565 at paras. 20 and 21 to submit that the remainder of the assets on each side, having been derived wholly outside the marriage, should remain where they are save for any 'relationship generated need'. He also relies upon the observations of the Court of Appeal in *B v B (Ancillary Relief)* [2008] EWCA Civ 543 at para. 24 *per* Hughes LJ, that *White and White* and *Miller v Miller* and *MacFarlane v MacFarlane*:

"do not establish any rule that equal division is the starting point in all cases. On the contrary, the starting point in all cases is the financial position of the parties and section 25 MCA 1973: see Sir Mark Potter P in *Charman v Charman* [2007] EWHC Civ 503 at paragraph 67. In all cases the objective is fairness, which requires an individual assessment of each case: see *White* *per* Lord Nicholls at 604 and *Miller* *per* Lord

Nicholls at paragraph 9, and Baroness Hale at paragraphs 134 and 136.”

41. Finally, he emphasises that in this case the parties required a clean break, the aim being to give the wife a fair start on the road to independent living in the light of the observation that, since the introduction of s.25 (A), the aim has been to “ensure that, where there were short-term marriages, one party should not get what was described as a meal ticket for life upon the dissolution of such a marriage.” (*Scallon v Scallon* CA [1990] 1 FLR 194,201).
42. So far as the pension of the husband is concerned, Mr Glaser submits that the husband’s pension was derived almost exclusively from contribution made prior to the parties’ marriage, the wife having made no contribution to it. The nature of the pension is that of deferred income in the form of a benefit arising from employment prior to the marriage. In so far as there is any “relationship generated need” in this case, it has been adequately provided for by the allotment of the equity in the matrimonial home and the periodical payments order.
43. In broad terms, Mr Glaser submits that, on the basis that the husband has lived and saved for 52 years of his adult life, he should not, after a marriage of 5 years have to share his by no means generous pension (reduced by the well-intended but abortive effort to provide a widow’s pension for the wife). Neither is it fair, following a short second marriage in the parties’ later life, to embark on a redistribution of the husband’s pre-acquired assets which are themselves producing income to subsidise his pension.
44. As to the wife’s ability to supplement her own previously acquired and very modest pension provision, Mr Glaser accepts that the District Judge took the view that her income *at the time of the proceedings* did not provide scope for her to contribute. He also accepts that no detailed calculations were carried out. However, he submits that it is plain that the District Judge (a) anticipated the wife’s income increasing and (b) made provision to tide her over the interim by making the order which he did for periodic payments. Mr Glaser drew my attention to a passage in the transcript of proceedings where he urged upon the District Judge that if the wife’s position was that of “living effectively or very close to a mortgage free property ... that means ... that she has a not insignificant amount of money on a monthly basis which she can pay into a pension scheme”. He also points out, although the District Judge did not deal with this aspect in his judgment, that the wife was the owner of 2 Dane Court which (since it was effectively non-income producing) could be sold to produce a net equity of £40,000-odd.
45. In summary, Mr Glaser submits that the Judge took into account the wife’s prospects, considered that she could rehouse herself effectively mortgage free; that in the three “interim” years as she built up her practice she should receive assistance by way of periodical payments to tide her over any difficulties, during that period, and thereafter, out of her own earnings, she could make her own provision for pension payments. By way of long-stop, (see para. 24 of the judgment quoted at paragraph 33 above) part of her “pension pot” was to be regarded as contained in 1 Laurel Edge, in relation to which she could and should time her disposal and make her own decision as to how far she traded down to release capital towards her pension provision should she see fit.

46. Since hearing final submissions in this appeal, I have received further correspondence from the parties' solicitors which shows (as I was not made aware in the course of the argument) that, prior to the hearing of the appeal, the wife sold 1 Laurel Edge for £470,000 (c.f the valuations placed upon it of £420,000 eight months earlier), moving to an address at 16 Albert Street St Albans in March 2008, purchased property for £415,000 (£431,000 after adding the costs of purchase). She paid for her new house, in round terms, out of the equity from the sale of Laurel Edge, plus a mortgage of £150,000.
47. There has been a difference in the correspondence as to whether or not the husband was aware of this position as at the date of the appeal. He asserts that he was not (as the wife appears to accept in a personal e-mail dated 8 September 2008 sent to my office). The husband complains that the Court was kept in ignorance of the matter because of the effect of the new transaction upon the parties' asset position as it existed before the District Judge and was argued before me.
48. The wife's response is to the effect that, following the order of the District Judge, she had to increase her mortgage upon 1 Laurel Edge to meet her liabilities, which left her struggling and obliged her to "downsize" to a smaller property i.e. a 2-bedroomed terrace house costing £415,000. She contends that, on the basis of the £150,000 mortgage she required to make the purchase, her overall asset position deteriorated rather than improved, as compared with that calculated by the District Judge. In order to make good that assertion, the figures she sets out involve to some extent reliance upon matters of detail, not least an £18,000 credit card liability said to have been ignored in error by the District Judge but not relied on within the grounds of appeal.
49. It is of course the case that, frequently on appeal, the figures, and in particular property valuations worked to before the Judge, are rendered inaccurate to a greater or lesser degree by events which take place between the two hearings and that, in this respect, property transactions in a volatile, and at that time rising, property market are peculiarly vulnerable. I do not consider that the subsequent developments now brought to my attention should affect the arguments raised before me on the hearing of the appeal. In particular, I have no reason to suppose that the price of properties in the St Albans area did not rise (and no doubt have recently fallen) proportionately across the board since the hearing before the District Judge, at which he was obliged to proceed on the best figures available at the time in a situation where the parties' assets, such as they were, were almost entirely in property, where the future career prospects of the wife were speculative and the fortunes of the parties essentially diminished rather than enhanced as a result of a relatively short marriage. Not only was the District Judge obliged to adopt a broad brush basis to the wife's future prospects, but the appeal before me has been argued upon an "order of things" basis, by which I mean that the nub of the appellant's argument is simply that, on the broad approach which the District Judge himself adopted, fairness required that the husband "kick start" the wife's pension provision for the future by ordering a capital sum which, in her financial position and at the age of over 50, she was in no position to provide herself and for which the level of her future earnings would be unlikely to enable her to make up to lost ground.
50. Whether that argument is correct does not seem to me to be affected to any substantial extent by the subsequent developments to which I have referred, save that they appear to confirm that, if the wife was to achieve the position whereby she could and should

rehouse herself effectively mortgage-free, she would have had to move to a property (presumably a flat) much less expensive than the terrace house in central St Albans which she has since purchased.

51. However, as the District Judge recognised, in relation to her need to “trade down” from 1 Laurel Edge, the extent to which the wife gave preference to her housing need over her need to make provision for her future was a matter for her, he having made clear that there was no reason why some of her “pension pot” should not be contained in her property. In my view, her choice in that regard following the hearing below should not be treated as relevant in assessing the adequacy of the District Judge’s decision, when considering the overall level or value of the pension provision to be made in addition to the capital represented by the equity in 1 Laurel Edge.
52. I have considerable sympathy with the District Judge in this case, in that he was faced with a situation where there were insufficient monies available to provide for the reasonable needs of both parties without a substantial reduction in the expectations on both sides, whether by comparison with their previous standard of living, (the husband’s income was likely to be halved in about a year) or as advanced by both parties though the submissions of counsel. He was dealing with a short and childless marriage which had not proved financially beneficial to either of the parties, save for an increase in value in 1 Laurel Edge to which both parties had contributed more or less equally and in relation to which the Judge decided it would be fair to award the entire equity to the wife, protected from the liability to make mortgage payments for three years while she took steps to establish and expand her career, and timing her necessary “downsizing” to whatever moment she judged most advantageous. In this respect, he considered that the amount the wife would need to rehouse herself was a sum significantly more than £260,000, but he failed to consider or at any rate specify, what figure would be appropriate on the information before him. In that respect, it seems to me he was in error for the purposes of the exercise to be conducted which he had identified as the necessity to provide a sufficient sum to rehouse the wife *as well as* making provision for her pension additional to the small amount available to her from previous employment: see paragraphs 30 and 31 above.
53. I consider that, having so identified his task, the District Judge should have carried it through on the basis of at least rough calculations in order to see whether or not he was achieving fairness as between the parties. For that purpose the focus had to be upon their minimal future needs rather than observing and applying the distinction, urged on behalf of the husband and accorded considerable weight by the Judge, between the matrimonial property or “acquest” and what each of the parties brought to the marriage by way of pre-acquired property. As it seems to me, it was a classic case for application of the observation of Lord Nicholls in *White and White* referred to at paragraph 38 above.
54. In that context, if the Judge had followed though his plain intention to provide sufficient for the wife to have a mortgage-free future in downsized accommodation, together with a meaningful contribution towards her pension, he would and should have done his sums accordingly. In this respect he quantified her housing on the basis of a valuation “significantly more than £260,000,” the value suggested by the husband. For this purpose, in the absence of a finding by the Judge, it seems to me appropriate to take as a minimum the figure of £310,000 (i.e. an uplift of 20% on the figure put forward by the husband. Given an equity of £287,000 in 1 Laurel Edge, that

would leave a further £23,000 to be found out of the wife's own assets which would have necessitated a sale of 2 Dane Court in order to realise its net equity of £43,000, leaving the wife with a net sum of some £20,000 for deployment in pension provision if she thought fit.

55. On any view, that seems to me to be an inadequate sum for the purpose, even assuming the wife were in reality in a position to deploy it. Given that the District Judge found that, after three years, the wife should have reached the position where she could support herself in a reduced but sufficient lifestyle but, by clear implication not till then, the question is therefore whether he could or should, as Mr Glaser submits, be treated as having made sufficient pension provision by means of the three year periodical; payments order. I do not consider that he can. Mr Glaser has urged that the sums ordered by way of periodical maintenance over three years should be treated as in part maintenance and in part capital redistribution i.e. a short period of high level maintenance to deal with both capital and income. It seems to me that in principle he is right in that respect. However, again, the figures are not broken down in any way so one cannot see what "split" if any the Judge was envisaging. Again, if one tries to put numbers on the exercise, it seems clear to me that adequate provision was not made and, in order to be fair to the wife, this situation should be rectified.
56. The Judge clearly acknowledged the inadequacy of the wife's current income (£20,000 net), whether measured against her stated needs (£38,000) or some unspecified reduced figure for future need on the basis of the necessity for her to cut her cloth. The annual rate of £20,000 for the first year, which the husband's net income was going to continue at the rate of £82,000 – odd) would have to cover a continuing mortgage payment on 1 Laurel Edge of £6,700 – odd, the balance of £12,300 being insufficient to meet the gap between the wife's net earnings and her then current (uncriticised) needs. Thereafter, the second and third year payments of £15,000 and £10,000 respectively were said to be the amount which the wife required to be "sufficient to enable her to sustain an appropriate lifestyle while she builds her earnings" after which there was to be a clean break. Assuming, as the Judge did, no more than a gradual build-up of the wife's practice before self sufficiency could be achieved, I can see little scope for her to make her own pension contributions other than by a much more severe cut in her cloth than the Judge appeared to think appropriate or fair.
57. If one works to the intention and structure of the District Judge's order, more closely examined with respect to the monies necessary and available to provide her with accommodation at a level anticipated by the Judge, whilst also making a meaningful pension provision for her beyond that which she was reasonably able to provide herself, and if one acknowledges that the sums ordered by way of periodical maintenance were in part intended to be a contribution to that end, it seems to me that, at best, the Judge was ordering a total contribution to the wife's pension of £15,000 spread over three years at a notional rate of £5,000 per annum. Viewed as a capital provision, that seems to me inadequate. In the circumstances of this case, it seems to me that it was impracticable to provide the wife with a pension even approaching her eventual needs, given the joint asset situation as between the parties. However, it seems to me that a fair order, based on the Judge's overall approach (with which I do not in general find fault), would have been for the husband to provide £50,000 by way of a kick-start to the wife's future pension provision. I note that the effect of such an

order would have been to provide the wife with 41% of the joint assets, to be contrasted with the figure of 37% awarded by the Judge. In the circumstances of this case I consider that such proportion is necessary in order to achieve overall fairness to the wife in accordance with the Judge's intentions. In the light of the restricted resources available and the modest future income prospects of the wife, I do not regard it as an order which grants to the wife a meal ticket for life; nor do I regard it as unfair to the husband who has available significantly more valuable capital assets than the wife

58. I therefore allow the wife's appeal and would order that, in addition to the amount payable to the wife under the order of the District Judge, the husband pay to her a lump sum of £35,000. Bearing in mind the current difficulties in the financial and property markets, I consider that the sum should be paid within 18 months of the date of the order.