

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 5th November 2003

BEFORE:

MR JUSTICE WILSON

R

PETITIONER

- V -

R

RESPONDENT

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(Official Shorthand Writers to the Court)

MISS J. RAYSON appeared on behalf of the PETITIONER HUSBAND

MISS S. STAITE appeared on behalf of the RESPONDENT WIFE

J U D G M E N T

(As Approved by the Court)

Section A: Introduction

1. Both the husband and the wife, as it is convenient to call them notwithstanding their divorce, appeal against the order of a district judge of the Romford County Court dated 8 May 2002 in financial proceedings brought by the wife ancillary to divorce proceedings in which, as it happens, the husband is the petitioner.
2. The judgment of the district judge which lies behind the order was in written form and was distributed to the parties in January 2002. The judgment proceeds over 22 closely typed pages. Counsel have confirmed to me what was already obvious from the judgment, namely that the district judge, took enormous pains in the conduct of the case.
3. This is a farming case; and ancillary relief farming cases are notoriously difficult to resolve. As I observed to counsel at the outset, the case is almost, although I believe not quite, insoluble. It is a case where it is far easier to criticise a suggested solution than to devise one.
4. At the outset of the hearing I was obliged to consider Rule 8.1 of the Family Proceedings Rules 1991 as amended with effect from 24 February 2003 and specifically to determine whether in the circumstances it would be in the interests of justice to hold a rehearing of the application rather than to conduct a review of the district judge's order. I decided, certainly without opposition from counsel and I think in effect with their support, that it would be in the

interests of justice to hold a rehearing. The unfortunate lapse of time since the order was made, for which I am sorry to say the court system is largely responsible; the quantity of fresh evidence, written and oral, which each party aspired to adduce; the nature of the challenges to parts of the district judge's judgment; and the possible need to approach the problems presented by the case in ways entirely different from that favoured by the district judge: all these militated in favour of my arrogating to myself the great flexibility inherent in a rehearing. That does not mean, however, that I should not afford the district judge's judgment the greatest respect; nor does it disable me from borrowing liberally from his findings of fact and his analysis of the issues.

5. It would be conventional at this early stage of a judgment on appeal to recite the terms of the order made, But I consider that the order would be more readily intelligible if I were first to set the scene and to explain the nature of the parties' resources.

Section B: The husband's current circumstances

6. The husband is 46 years old. He lives upon F Farm near Romford. He is a farmer and runs his farming activities through a long-established family company. There are two strands to the company's business: the farming strand, directed by the husband and a strand referable to warehousing and to the sale of potatoes referable to his cousin.
7. The farm is conducted upon two sites. There is the F Farm site near Romford and there is the B Farm site in a village situated 10 miles southeast of F Farm towards Basildon. The company rents the farmhouse at F Farm and about 500 acres adjacent thereto from the Crown Estates Commissioners. The company owns the property at the B Farm site, which comprises a farmhouse, a second substantial house, two cottages and 380 acres of land.
8. There are 8,000 issued shares in the company. They are presently parcelled up in five ways:
- (1) the husband owns 495 shares, ie 6.18 per cent of the company;
 - (2) his cousin owns 2,000 shares;
 - (3) his uncle owns 1,235 shares;
 - (4) his mother owns 5 shares; and
 - (5) his late father's executors own 4,265 shares on trust for the husband's mother for life and then as to five-eighths to him and three-eighths to his sister. Thus the husband has a vested, not a contingent, interest, albeit in remainder rather than in possession, in relation to five-eighths of the shares held by the executors.
9. The husband's mother is active but aged 77. Five-eighths of 4,265 shares amounts to 2,666 shares and, when the husband comes into possession of them, his total shareholding of 3,161 shares will amount to 39.5 per cent of the company. As things stand, he would then become the largest single shareholder.
10. The company has, I believe, never declared a dividend upon its shares and there is no reason to think that it will do so in the foreseeable future. The audited accounts of the company for the year ended 31 October 2002, being accounts obviously not available to the district judge, show the assets of the company at a figure of £851,000. The equivalent figure in the latest set of accounts available to the district judge was little different. But the real property owned by the company is legitimately entered into the accounts at cost and indeed is depreciated year by year. There was in effect agreed evidence before the district judge that the property owned by the company was massively more valuable than as shown on the balance sheet. Even the tenancy of F Farm and of the surrounding acreage, being a tenancy of an agricultural holding, is of significant value. The district judge found that the real value of the assets of the company amounted to about £3,800,000. There is no need for me to seek to discern any other figure.
11. The farmhouse at F Farm in which the husband lives is a very attractive three-bedroom period property in which indeed, prior to 1995, the whole family lived. It is a condition of the tenancy that that house be occupied by whoever works or manages the adjacent farm. The husband intends to live at F Farm indefinitely; and I consider it perfectly possible that he will live there until the end of what I hope will be a long life.
12. Before the district judge evidence was given that the husband's gross income from the company for the year most recently ended was £41,309 per annum. It may now be seen that, for the year ended 31 October 2002, his income was the same. But to use a well-worn cliché, that income is only the tip of the iceberg for, as the district judge found, this husband, like many other farmers, quite legitimately enjoys payment by the company directly on his behalf in the form of benefits in kind of very many expenses which the rest of us have to meet out of our net income. Thus, of course, he pays no rent for the farmhouse; and the company pays water rates, council tax, electricity bills, gas bills, telephone bills and property insurance referable to that house. It also pays his mobile telephone bills, pays for health insurance and supplies him with a car, although the husband implies in an affidavit that at least some of its running expenses, perhaps those not considered to relate to farm use, are met by himself. All these benefits in kind are taxable but only at a value identified by the district judge at £4,038 per annum. The district judge accepted that the real value of the benefits in kind was much greater, indeed, as I would say, vastly greater. My experience would lead

me to place a value of at least £20,000 per annum gross upon all these benefits but their precise quantification is unnecessary and has not been the subject of submission.

13. Apart from his shares in the company, in possession and in remainder, the husband has few assets. He has liquid assets of about £41,000 and several old cars of nominal worth. His costs of these proceedings, including of these appeals, amount to about £39,000, of which he has paid £24,000 on account and thus owes the balance of £15,000. But, of the £24,000 paid, £10,000 was raised by him in the form of a bank loan, which he has not yet repaid.
14. The husband has three personal pension policies, one of nominal value, a second valued at £41,000 and a third valued at £24,000. The husband's petition for divorce was presented before the facility for the court to direct a sharing of pensions was introduced. But the district judge exercised his power to make earmarking or attachment provisions in favour of the wife in respect of 50 per cent of the two policies which carry significant value. There is no appeal against the earmarking provisions and it will be unnecessary to refer to them again.

Section C: The wife's current circumstances

15. The wife is 43 years old. She and the two children of the family occupy the farmhouse at B farm, being the major house owned by the company on its second estate. It is a lovely Georgian house, renovated by the company upon the family's arrival in it in 1995 and taken by the district judge to have a value of over £600,000.
16. In very close proximity to that farmhouse, in other properties owned by the company, live the husband's mother, a farm worker and, I believe, some tenants not related to the business. In that the separation between these parties occurred in February 1998, when the husband returned to the farmhouse at F Farm, it follows that for almost six years the wife, with the children, has been living in the midst of the husband's family operations and in very close proximity to a former mother-in-law with whom she is now on bad terms. Such has been a highly unpleasant, demoralising situation for the wife; and the delays of our legal system in bringing her case (whatever its complexities) to a conclusion does it no credit.
17. Of course the wife pays no rent for her accommodation at B Farm. Among the benefits in kind for which the husband pays tax is the benefit of the current occupation by his dependents of that farmhouse. I am not clear whether that benefit in kind is included in the figure to which I have referred of £4,038 per annum; but at all events the benefit is charged to him at a very low value. The company is continuing to pay a number of the running expenses referable to that farmhouse and the husband is presently paying sums to the wife at the rate of £600 per month. I do not regard the present level of his support, even though it is a source of complaint on the wife's part, as of any significance to my enquiry.
18. The wife has liquid assets which total £9,000. She is publicly funded in these proceedings and her total costs of the proceedings, including of the appeals, are £65,000 upon an indemnity basis or £37,000 upon the fixed rates applicable to public funding.
19. The wife has a one-third interest in a block of 2,800 shares in a small trading and property company run by members of her family. The 2,800 shares represent 24 per cent of the issued shares in the company. There was evidence before the district judge that on a pro rata asset basis those shares had a value of £89,000 but that in the light of their minority status they might be saleable only for £24,000. Dividends amounting to £9,600 per annum are currently declared on the 2,800 shares but it has long been the practice of the wife and her two sisters, who are the other joint holders with her of that block of shares, to waive receipt of the dividends in order apparently that their parents should receive them instead. The only straightforward factual mistake visible in the long judgment is that the district judge slipped into thinking that, were receipt of the dividends not waived, the wife's income therefrom would be £9,600 per annum rather than one-third thereof and that her shares had values of £89,000 or £24,000 rather than of one-third of those respective figures.
20. During the wife's oral evidence I sought to explore whether there was any way in which the waiver of receipt of the dividends could now reasonably be withdrawn. But the wife said, and on balance I accept, that her parents need the benefit of that waiver in order to live at a reasonable level. At all events, as the district judge pointed out, it is unclear whether the wife could withdraw the waiver other than with the consent of both or perhaps at least one of her sisters. I do not ascribe to the wife any current income from her shares but, despite his slip as to the amounts, the district judge was right to consider that her interest in these shares remains an asset for the wife in the background, likely at some future date to provide some welcome expansion of her deployable resources.
21. Living with the wife in the farmhouse at B Farm are both the children of the family, namely a girl, who was born on 30 January 1984 and so is almost 20 years old, and a boy, who was born on 9 October 1986 and so has just become 17 years old. At the time of the hearing before the district judge both children remained at school; and, as I will explain, he made an order for periodical payments inclusive of maintenance for them. But in this regard circumstances have changed. The girl is now working in a solicitor's office at an annual salary of £10,500 gross, soon to be increased. He left school as recently as last July, is now working as a ceiling fitter and earning wages of much the same amount. The boy, left school without significant qualifications and the wife hopes that in September 2004 he might return to college and secure some qualifications. Whether or not he will do so is an open question. The situation at present is that, in that both children are in full-time work, this court is no longer able to include periodical provision for them in any orders against the husband, although the wife's need is for a home large enough, albeit perhaps only for the next few years, to accommodate them.
22. Like many loving mothers dealing with children who have just begun to enjoy the fruits of earnings, the wife is in a difficult position. She is most reluctant to ask them to contribute out of their earnings a sum towards household expenses

which matches the extra costs which she bears referable to them. But the advice so often given in this court has to be given again: cash will be in such short supply in her household that she must steal herself to demand from them something approaching a proper contribution towards their keep.

23. Prior to the marriage in 1982 the wife was a hairdresser but she did not work during the marriage. Her contribution as a wife, a mother and a homemaker was however no less valuable than if it had been directly, as opposed to indirectly, productive of income for the family. There is no challenge to the district judge's finding that the contributions of the husband and the wife were, though different, nevertheless equal, even though, also importantly, the vast bulk of the capital is represented by shares which have come to the husband by gift and inheritance.
24. Predictably in the light of the young age of the wife and the growth of the children towards adulthood, there was considerable debate before the district judge as to the wife's earning capacity. She gave evidence to him that she intended to re-train as a hairdresser and his finding was that she could earn £7,800 per annum net in 2002 on the basis of part-time freelance hairdressing work and could earn more than that thereafter as she became able to move into full-time work.

Section D: The district judge's order

25. The grave conundrum which faced the district judge, as it faces me, is how in the above circumstances to contrive a raft of arrangements which enable the wife with the children to vacate the farmhouse at B Farm, to move to other accommodation and to live there at a reasonable level without disabling the husband from also living at a reasonable level. The bulk of the husband's shares are not yet in possession and, even when they fall into possession, they will represent a minority interest in a long-established family company which provides the husband with his livelihood. Thus there are substantial question marks about the husband's ability to realise the proportionate value of the very substantial assets which may on paper be ascribed to the shares. The cash resources of the parties are almost nominal and their respective earnings are low.
26. The substantive hearing before the district judge took place on 21 November and 5 December 2001. On the first day the district judge raised the question whether the company would be prepared to invest in a home of which the wife might, regardless of any remarriage on her part, be granted a right of exclusive occupation during her life. That suggestion led to Miss Rayson's arrival in court on the second day with an open offer which on behalf of her husband she placed before the court, namely an offer by the company to buy a home, mortgage-free, for £200,000 to be chosen by the wife and to be occupied by her during her lifetime. Such was the principal plank of Miss Rayson's proposal; but there were other parts of it, principally that the husband should pay to the wife a lump sum amounting to virtually all his liquid capital, namely to £30,000, and that he should make periodical payments for the wife and the children in the global sum of £15,000 per annum.
27. When it was disseminated to the parties in January 2002 the written judgment of the district judge made clear to them that he had resolved to adopt the central plank of the husband's proposals, namely that the company should provide £200,000 for the purchase of a home for the wife for life, of which it would be either the landlord or, as the district judge seems ultimately to have preferred, the licensor. Thus, in recognition of the fact that the company could not be the subject of any actual order of the court, the district judge's order, as ultimately approved at a hearing on 8 May 2002, was the subject of an elaborate preface which recited the agreement of the company to fund the wife's new home and which included supplementary terms to which it is unnecessary for me in detail to refer, whereby, for example, the wife might call on the company to sell the first home and buy an alternative one.
28. The district judge also adopted the husband's proposal that the order for periodical payments for the wife including for the children should be at the rate of £15,000 per annum. Although the district judge made no order as to costs referable to the substantive application for ancillary relief, he did make an order, in the teeth of opposition from Miss Rayson, for the wife's costs of the hearing on 8 May 2002 to be paid by the husband. The husband is aggrieved by that order for costs, however small its value, and a minor part of his appeal is a challenge to it.
29. In one very substantial respect the district judge departed from the husband's proposal placed before him on 5 December 2001. Instead of ordering the husband to pay a lump sum of £30,000, the district judge ordered him to pay a lump sum of £110,000 and indeed to do so within 28 days of 8 May. The district judge said:
- "[On 5 December 2001] I indicated to the parties ... that I would have been prepared to approve an order in terms that the husband provide a house for the wife's occupation for life with no strings attached, together with a lump sum of £30,000, maintenance of £15,000 and to earmark both pensions. I had hoped that the parties would have been able to have come to an agreement and I know that they attempted to do so.
- I have now had the opportunity to reflect on the parties' respective positions and needs. As I have said, it is to the husband's credit that he made the enquiries and obtained the agreement of his business and family colleagues to buy a home for his wife and children. The proposal makes commercial sense. The company should be no worse off in terms of profit and will in fact have the benefit of what should be an appreciating asset. From the husband's point of view, therefore, it will cost him nothing and indeed in the long term he should benefit from the arrangement. It will leave him able to pay maintenance and fund a lump sum in the way that I have indicated above. I have to say that the proposal does have some logical appeal. In effect the wife will be in a similar position in terms of housing to the husband. Neither will actually own their home but both will be completely secure in their homes. However, upon reflection, I do feel that from the point of view of fairness, the wife should have more capital. I think that there is an argument to say that she should still have £265,000 if resources allowed it. After all the purchase by the company of the house will not reduce the value of the company. On the other hand the wife would not have a need in these circumstances for all the capital and could, if she wished, invest a significant portion of it. I feel that I would be happier if the husband were to increase the lump sum to £110,000, which he could readily afford. After deducting the wife's net needs of £16,500 as set out above and her costs of £18,000, that would leave her with about £75,000 for investment, perhaps a little more since she will not have legal costs and stamp duty to meet."

Section E: The district judge's lump sum order

30. Miss Rayson makes two complaints about the order that her client should make a lump sum payment to the wife in the sum of £110,000. Though I do not wish to disparage it, her first objection is less substantial than her second.
31. Her first is that the company, without legal obligation, made an offer to help to resolve the parties' problems, which was in the context of and indeed part and parcel of the other offers made on behalf of the husband; and that, if the district judge was not prepared to accept the offer of a lump sum of only £30,000 (and instead he increased it by 350 per cent), the company's offer did not remain on the table for him to pick up and adopt. It certainly seems from the passage which I have quoted that the district judge was himself commending to the parties a settlement upon the basis of the husband's raft of proposals. But it seems to me that, although his later departure from those proposals would be likely to engender grievance in the husband, it does not necessarily follow that it was made clear to the district judge that the company was making its offer on the basis that it was part of a package open only to wholesale acceptance or to wholesale rejection.
32. In the circumstances I propose to leave Miss Rayson's first objection at large for it is in effect superceded by my view about her second objection: this is that the district judge was wrong to order the husband to pay £110,000 by way of a lump sum; that the husband could not and cannot afford to pay it; and that there was no evidence before the district judge to suggest otherwise. The district judge's view was that the husband would be able to raise a loan of more than that magnitude upon the security of his shares in the family company. This is what he said:
- "I would have thought that a bank would have been willing to accept the shares both vested and contingent as security for a loan. It is most unfortunate that no investigation has been carried out by the husband as to his ability to raise money. He told me that he had made no enquiry of his bank nor indeed of any other lender. He seems to have simply assumed that he would not be able to borrow. It is to be noted to his credit that he has no debts and, as I understand it, has never had to borrow. He is accordingly unfamiliar with borrowing as a concept.
- Mr Surman, the husband's accountant, says at page 5 of his report:
- 'The husband currently earns a salary of approximately £40,000 per annum as farm manager. The position is full time and the level of salary is reasonable, particularly after considering the other benefits received ie accommodation. The husband would be able to obtain personal borrowings on this level of income. The amount of these borrowings would however be limited in the absence of any security. The husband has no assets which would be accepted as security by bankers and even after the inheritance of further shares a holding in a private company is not normally sufficiently liquid to satisfy the security criteria of bankers.'
- On the question of security I do not find this brief comment very helpful. It is a generalisation and no attempt has been made to consider whether a bank may be prepared to consider these shares in this particular private limited company as security for borrowing. It is to be remembered that the principal value of this company is its land and I would have thought that a bank may well be prepared to lend to someone of the husband's background and pedigree. How much would they lend? This is the crucial question and because no investigation has been undertaken and relying on the passage which I have quoted from Waite LJ's judgment [in Thomas v Thomas [1995] 2 FLR 668], I consider that I am entitled to draw an inference that the husband could indeed borrow monies against the shares, both those held by him now and held for him in reversion. Other factors which I have taken into account in drawing my conclusion include the husband's salary at the figure of £55,000 which, I have imputed to him, the substantial values of the shareholders funds, the current willingness of banks to lend substantial sums unsecured to respectable borrowers. The conclusion that I have come to is that the husband could borrow against the security of the shares £150,000. I would expect him to be able to borrow that from the company bankers at the advantageous rate of 2 per cent over base presently enjoyed by the company. That would result in interest only payments of £9,000 per annum. I surmise that the bank would require in addition repayments to capital of £5,000 - £6,000 making the likely total annual repayment £14,000 - £15,000."
33. There is good authority for saying that, where the husband has assets of whatever nature, the onus is upon him to establish that he cannot borrow upon the security of them: Newton v Newton [1990] 1 FLR 33 and Thomas v Thomas cited by the district judge. In this case, however, the husband's accountant had made the general proposition - with great respect, unsurprising to myself - that the husband would be unable to borrow on the security of his shares, indeed almost all of which are presently in remainder. The proposition of the husband's accountant was never challenged by the wife's accountant. So, in my view, the district judge was standing on very shaky ground in considering that the husband could borrow upon such security. For the purpose of the appeal, however, the matter has been put beyond doubt. The husband has approached various lenders with a request for a substantial loan upon the security of the shares and he has accompanied it with an apparently accurate presentation of his current income and benefits in kind. All responses to him have been in the negative. Furthermore the husband's accountant and a fresh accountant instructed on behalf of the wife, each instructed for the purposes of giving written, and in accordance with my request limited oral, evidence in these appeals, specifically agree that the husband's shares will not be accepted as security for a loan.
34. I am driven to the conclusion that the order for the husband to pay a lump sum of £110,000 cannot stand. Indeed, had I been conducting a review of the district judge's order rather than a re-hearing, I would have held with regret that his lump sum order was plainly wrong.

Section F: Main factors relevant to provision for the wife

35. Having toppled the district judge's edifice, I face the peculiarly difficult task of constructing my own. There are, as both counsel have ultimately agreed, two routes for providing the alternative accommodation for the wife now long

overdue. The first is to continue with the idea of provision by the company of accommodation for the wife held by her on a tenancy or licence for life. Miss Rayson makes clear that the company's offer remains on the table for me to adopt provided that I refrain from the cherry-picking of that offer out of the husband's other proposals, in particular for a lump sum, as before, of only £30,000 of which the district judge stands accused.

36. The second route is to provide for the wife to purchase accommodation in her own name but, in the light of the absence of significant cash resources, such would have to be purchased with a very substantial mortgage to be funded, if such were possible, by the husband out of his income.

37. Miss Rayson commends the first route. It is a major plank of Miss Staite's cross-appeal on behalf of the wife that I should favour the second. Miss Rayson submits, rather as the district judge indicated in the passage which I have quoted, that the family always occupied homes owned by the company; that it seems probable that the husband will continue to do so, perhaps for the rest of his life; and that there is both symmetry and fairness in a result which leads to the wife continuing to do so too. The submission is neatly made but I am not drawn to it.

38. The husband is the owner in possession and in remainder of shares which the district judge valued on a pro rata asset basis at £1,500,000 and on a basis discounted for a minority holding, albeit not apparently for the mother's life interest, at £448,000. For this wife to exit from a 16-year marriage, following a full contribution on her part, with her own exiguous resources plus a lump sum of only £30,000 would seem to me, even in the context of life-long, rent-free accommodation, to be wholly contrary to principle. Although in their oral evidence both the husband and the wife came across as particularly pleasant, reasonable people, the wife is not on good terms with the other members of the husband's family; and for her to be condemned to a life-long relationship with the husband's family company, whether under tenancy or under licence, would seem to me to be a miserable resolution, one of only very last resort. I reach these conclusions even prior to considering whether the company's offer of £200,000, plus the husband's proposed lump sum of £30,000, would be sufficient to secure reasonable accommodation for the wife.

39. I turn therefore to examine whether the second route is viable. Its viability requires compendious regard to five features

(1) The cost of accommodation for the wife.

40. Following extensive evidence and submission the district judge concluded that the wife's need for alternative accommodation could be met by the purchase of a three-bedroom house for between £225,000 and £250,000. I believe that he was looking, just as I have been looking, at the cost of properties in the area bordered by Brentwood in the northwest, Billericay in the northeast, Basildon in the southeast and Upminster in the southwest.

41. There is no doubt that since his judgment was disseminated in January 2002, property prices in that area have increased; and I would have been assisted by statistics as to the general level of increase. Instead, however, the parties have supplied me with particulars of a number of three-bedroom properties on the market within that area. Those relied upon by the husband have an asking price between £180,000 and £235,000 and in her final submissions Miss Rayson contended for a cost of £220,000. The particulars relied upon by the wife have an asking price between £260,000 and £360,000 and in her final submissions Miss Staite contended for a cost of £290,000. It is clear that even the most expensive of the properties contended for by the wife is vastly inferior in quality to the farmhouse at B Farm; but the wife readily accepted the inevitability of so substantial a reduction.

42. I listened with care to the wife's comments on the area and the type of properties which are the subject of each side's collection of particulars. My impression was that the wife was in no way avaricious. Her heartfelt plea not to be condemned with the children to live in such parts of Basildon as Laindon and Burnt Mills was powerful and I intend, if at all possible, to devise an order which pays heed to it. My conclusion is that the present cost of reasonable accommodation for the wife is between £250,000 and £275,000.

(2) The husband's income.

43. Exclusive of the benefits in kind, the husband's present income is £41,309 per annum gross. I have promoted a considerable amount of debate as to whether that figure might reasonably be subject to substantial increase. Of course the level of directors' remuneration is fixed by the directors, no doubt usually following advice from the auditors, and is subject to the overall approval of the shareholders. Nevertheless the husband's voice - and the extent of his financial obligations under English law - would play a big part in any reasonable deliberation on the subject.

44. The husband explains that it is company policy for his remuneration to be linked to the results of the farming aspect of the business, while that of his cousin would be linked to the results referable to warehousing and potatoes. It seems to me that any decision about his future remuneration should reasonably have regard to the following factors among others:

- (a) his remuneration has not been increased for at least three years;
- (b) even when, following the separation, the wife ceased to be nominally employed by the company for tax purposes, there was no corresponding adjustment in his favour;
- (c) in the year ended 31 October 2002 the farming business, after allowing for his remuneration, made a loss of £6,000 as opposed to a loss during the preceding year of £103,000;
- (d) in the same year the consolidated figures for both strands of the company's business indicated a pre-tax profit of £80,000 as opposed to a loss in the preceding year of £72,000;
- (e) as at 31 October 2002 the company held cash at the bank in the sum of £168,000 and felt able to leave outstanding a loan of £390,000 owed to it by a wholesaler of soft drinks, being a transaction not directly related to any aspect of the company's core business;
- (f) the husband expects the farming results for the year 31 October 2003 to be broadly similar to those for the previous year;
- (g) on vacation by the wife of the farmhouse at B Farm the husband will cease to be subject to any tax levy referable to that particular benefit in kind; and
- (h) more importantly, upon her vacation of it, the company will be able to let the property and, to the extent that such is relevant, the rental income will be included in the farming side of the company's results. The district judge adopted a possible annual figure for rental of £15,000. In that the farmhouse was valued at about

£600,000, a rental equivalent to 2.5 per cent of value seems extraordinarily low. Perhaps, being situated in or near the middle of a working farm, its rental value would suffer but I take the suggested figure of £15,000 per annum as an absolute minimum.

45. The combination of these eight factors leads me to the confident conclusion that, as the husband virtually conceded, he could probably secure a substantial increase in his remuneration. I believe that it could reasonably be increased to above £60,000 per annum gross but, erring perhaps on the side of caution, I propose to work upon that gross figure, which amounts net to £38,350 per annum, on top of which he will continue to enjoy the substantial benefits in kind.

(3) The husband's needs.

46. In the light of those benefits, the district judge assessed the husband's cash needs for his own maintenance at only £9,600 per annum. I see little wrong with that figure; indeed, it included a significant sum referable to holidays for the children, which in my view they can now basically fund for themselves. It is true that the husband has placed before me a revised schedule of expenses. It is, with respect, not a particularly helpful schedule because it includes all his present funding for the wife at B Farm and indeed substantial, continuing funding for the children. It is also swollen by substantial repayments referable to the loan for costs. I accept that such a liability and indeed his residual liability to his solicitors for costs are not items which I can ignore. But I propose to place them outside the district judge's figure for his ordinary maintenance needs.

(4) The wife's earning capacity.

47. The wife has not yet achieved earnings even at the rate of £7,800 per annum envisaged for her on a part-time basis by the district judge. Her present earnings are in the sums of £4,368 per annum referable to work for two days a week in a shop and of £2,184 per annum, inclusive of tips, referable to work for one day a week in a hair salon, ie a total of £6,552 per annum. By modern standards this is almost a nominal income. But the combination of the wife's evidence and Miss Staite's advocacy has persuaded me not to be critical of the wife's efforts to date to earn for herself. I am convinced that the wife is not a lazy person and that she readily accepts the need to work to the maximum. After so long a spell without work during the marriage, it has not been easy for her, despite her young age and attractive appearance, to slip back into remunerative work. And the long pendency of the appeals has left her in a state of limbo, not settled into a new home nor even clear as to the location or nature of her new home. Through Miss Staite, the wife accepts that in due course, say after two years, she should be able to earn about £10,000 net per annum, whether by full-time shop work or by full-time freelance hairdressing work or otherwise; but she contends that during the next two years her income cannot reasonably be increased above its present level. I find, however, that the wife's capacity to earn should presently be yielding her £8,000 per annum net and that, after one year (but only one year) from the date of her likely move into alternative accommodation, her earnings should increase to Miss Staite's own figure of £10,000 per annum.

(5) The wife's needs.

48. The district judge considered that, while the children remained dependent upon her, the wife's overall annual household needs in a rent-free or mortgage-free home would amount to about £23,000. In the light of the children's move away from dependency, I need to revisit this matter. In a recent affidavit the wife set out her needs at £19,000 per annum. But it emerged that certain items in the list, particularly in relation to housekeeping, included food et cetera for the children and, excluding those items her total, was reduced to £16,000 per annum. This is a modest figure but appropriately so in the light of the modesty of the husband's living expenses and of the cash shortage which afflicts the family. I propose to adopt it.

Section G: Conclusions

49. I believe that a highly delicate balance of the above factors just yields a solution which provides the wife with reasonable accommodation and a reasonable income, while leaving the husband in a reasonable financial situation and satisfying the overarching criterion of fairness to each of them in the light of all the circumstances, particularly those referred to in section 25(2) of the Act of 1973.

50. The solution works in this way:

(a) The wife will choose a property at a price of about £250,000. That figure, I am sorry to observe, is right at the bottom of my bracket of the reasonable cost of alternative accommodation for her. But, for reasons which will become apparent if they are not already so, the figure has to be at the bottom. I find that, at that figure, she will not be condemned to life in the less pleasant parts of Basildon.

(b) The wife will face expenses of moving into the new property. I adopt the district judge's figure of £7,500 in this regard.

(c) The wife, who presently runs a large vehicle belonging to the company, will return it to the company and buy a new car. The district judge allowed £10,000 in that respect. In my view that figure has now to be reduced to £6,500: the wife will have little need from now onwards to carry the children in her car.

(d) So the wife will face a total expenditure of £264,000. A deduction in respect of her existing capital of £9,000 yields a requirement for £255,000.

(e) As still offered by the husband, the wife will receive an immediate capital payment from him of £30,000, thereby further reducing her requirement to £225,000.

(f) This balance, which neatly amounts to 90 per cent of the proposed purchase price of the property, will be borrowed by her on a 20-year repayment mortgage. The annual instalments payable on such a mortgage are currently in the sum of about £19,343.

(g) The husband will pay these mortgage instalments. He will pay them as the second part of a frankly unusual order for a lump sum payment. The first part will provide for the initial instalment of £30,000. The second part will provide for him to pay 240 further instalments, monthly over 20 years, in a sum equivalent to the wife's obligations under the mortgage. The beauty of including this obligation in a lump sum order rather than somehow in an order for periodical

payments is that it will endure beyond the wife's remarriage, ie will in that regard equate to conventional capital provision, and will bind the husband's estate in the unlikely event of his death within the 20-year period.

(h) The orders to be made today should, in my view, enable the wife to secure a mortgage of about £225,000. But mortgagees might insist upon the provision of a guarantee. In her final submissions Miss Rayson indicated that, in the event of my favouring this type of disposal of the appeals, her client, being responsible **de facto** for the mortgage instalments, would also be prepared to stand as the wife's guarantor. Although it should not incur him in extra expense to stand as guarantor, the husband's offer to do so is a significant gesture of goodwill, which I trust that the wife will appreciate and somehow reciprocate.

(i) The husband's protracted obligations to the wife under the lump sum order will be secured, pursuant to the powers specifically included in section 23(3)(c) of the Act, by her holding a first charge over his shares in the company, both those in possession and those in remainder, it being agreed that the latter are as a matter of jurisdiction as amenable thereto as are the former. Miss Rayson has opposed this provision of security and in particular has reminded me of the doubts expressed by the wife's own accountant in oral evidence as to precisely what, in the event of default in payment of any instalment of the lump sum, the wife would achieve with any charge over the shares, not only before the death of the husband's mother but also afterwards. But minority shareholders do have rights, including not to be oppressed. The husband's shares have substantial value which, if so minded, the family could unlock for him. For example the wife's accountant has suggested that even today the company could, if so minded, properly buy back the husband's few shares in possession at a price which, net of tax, would have yielded him £155,000. That would have been a wonderful contribution to the resolution of the problems presented by this case but the company has shown no interest in entering into any such purchase. It remains one example of what the company could have done and could still do to resolve the husband's problems; and it seems to me to be perfectly legitimate for the court, if thereby required to take a different route, to provide that, in the event that the husband becomes in breach of its provisions, the wife should be able to enforce her rights not only in the normal ways but by assuming, as chargee, the role of an active minority shareholder taking all possible steps to squeeze cash value out of the shares. In the words of Waite LJ in Thomas v Thomas (cited by the district judge) at 670, such would be no more than:

"... judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice of the case."

I do not intend or envisage that the charge should have any effect on the husband's enjoyment of the shares other than in the event of breach. Furthermore the whole order for the husband to pay a lump sum by instalments, including the supplementary provision for security, is variable under section 31(2)(d) of the Act; and, if any unforeseen problem occurs for one party or the other by reason of any part of this order, application should be made - I suggest, straight to myself - for the problem to be addressed and resolved.

(j) The husband will also make periodical payments to the wife. They will run at the rate of £8,000 for one year from the date of her likely move into her new home (for which it may be convenient to take an arbitrary date, say, 1 April 2004) and at £6,000 per annum thereafter during joint lives until her remarriage or further order. Those figures, coupled with my estimates of her present and future earning capacity, namely £8,000 and £10,000 per annum, will yield her the sum £16,000 per annum which I have concluded properly to represent her needs. Of course this order is also variable; and any substantial alteration in the sums payable by the husband referable to the mortgage under the lump sum order might have to prompt variation of it as an alternative to variation of the lump sum order.

(k) The effect of the above on the husband's disposable income will be to reduce his reasonable net income not only by the sums payable by him referable to the wife's mortgage, presently estimated at £19,343 but variable, but also by the payments to be made by way of periodical payments. Between, say, 1 April 2004 and 1 April 2005 his reasonable net annual income of £38,350 per annum is thus reduced to £11,007 and thereafter to £13,007. The modesty of this residue seems unfair to the husband only until one remembers the astonishing width of the expenses met for him directly out of the company.

51. After protracted thought and, let me acknowledge, exceedingly helpful and constructive submissions made by each counsel, I am convinced that this is the only fair result for each party.

Section H: The appeal against the order for costs

52. The district judge's order for costs referable to the hearing on 8 May 2002 was made in the exercise of his discretion and Miss Rayson needs to jump a high hurdle if she is to establish that his exercise of discretion was flawed. There is no doubt that the contents of the written judgment received in January 2002 took the husband's advisers by surprise and, for reasons which I have found to be valid, they soon came to the view that the order for a lump sum was misconceived and would need to be the subject of an appeal. That, of course, should not have disabled them from co-operating with the wife's advisers into translating the judgment into the form of an order. I also accept that the district judge's adoption of the company's offer to purchase accommodation for the wife needed careful and early thought; and I am not convinced that the company's submission to the wife's advisers of a draft 60-year lease on the basis of an assured tenancy was as inapt a way of proceeding as Miss Staitte would have me consider. In the end, however, the fact is that Miss Rayson has not begun to persuade me of the error of the district judge's apparent view that the husband had been responsible for the need for the further hearing. I have not seen the relevant correspondence between January and May and there is no material upon which I can properly consider that the exercise of his discretion was in some way wrongful. The husband's appeal against that order lies dismissed.