

JERSEY / JUDGMENT

0 -v- 0 [2005] JRC 159 (14 November 2005)

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judgment

deputy bailiff: 1. This is an appeal against a decision of the Registrar of the Family Division in connection with the application of the appellant ("the wife") for financial relief. The factual

background

2. The parties were married in 1987. There are three children aged 17, 14 and 9. They separated after some 16 years of marriage in May 2003. On 14 th July 2004 a decree nisi was granted on the grounds of one year's separation with consent. The wife remains in the former matrimonial home with the children and the husband resides in a combined office and flat. 3. The husband is a builder by trade. At times during the marriage he was employed; at other times he was self-employed. For the few years before the separation he had traded through a company ("the Company"). The shares in the Company were held equally by the husband and the wife. The wife worked throughout the marriage as a nursery assistant. At the time of the separation a monthly sum of £2,350 was paid from the Company's account into the parties' joint account from which all the household bills were paid. The wife was earning approximately £1,165 net per month at the time of the separation. 4. From the date of separation the husband ceased to pay anything towards the maintenance of the wife or children. The wife was able to arrange a six-month mortgage break between July and December 2003 but, apart from that period, she has been responsible for paying the mortgage together with the school fees and all the household bills and expenses for herself and the children. At the date of the separation the parties had approximately £10,000 in a joint National Savings account. The wife has drawn on that since the separation. She used approximately £3,000 for the benefit of the husband, namely payment of £2,075 in respect of his mobile phone account for his business (although it was at that time in her name), £564 for outstanding fuel bills and £360 by cheque to him. Of the balance, £583 was used for a new computer for the children's homework (the husband had taken his with him for work purposes when he left), £2,120 for dental treatment for the wife and one of the children and £282 for fuel. The remaining sum of approximately £3,000 has been retained in a new savings account by the wife, as she considers that this broadly balances out the proportion of the savings used for the benefit of the husband. With interest it had risen to some £3,400 by December 2004. 5. On 20 th August 2003, by consent, the Petty

Debts Court made an order that the husband should pay child maintenance at the rate of £50 per week per child. However he failed to pay any sum pursuant to this order and on 29 th October 2003 the wife obtained judgment in the Petty Debts Court for arrears of £1,200. The Viscount's Department was unable to enforce that judgment as the husband was self-employed and had no realisable assets. On 26 th November 2003 the husband paid £1,950 in respect of the arrears. This was the only sum that he paid until the first hearing before the Registrar on 16 th December 2004. 6. The husband's explanation for his failure to pay maintenance, as given in evidence before the Registrar, was that he could not afford it. His business took a dramatic turn for the worse following the separation. He put this down to a number of factors:- (i) Soon after the separation his mother and sister died in quick succession and he went over to Ireland for five weeks. This resulted in invoices not being sent out when they should have been. (ii) His building estimator under-quoted for three jobs resulting in those jobs being carried out at a loss. (iii) His wife had written to the Company's creditors in July 2003 stating that she was resigning as a director. Although he now accepted that she had done this on legal advice it was not good for confidence in the Company on the part of creditors. (iv) After paying the large mobile telephone bill referred to above, the wife had arranged for it to be disconnected before he had arranged for it to be transferred to him. The result was that business customers thought that the Company had ceased to trade. (v) He had been unable to raise further borrowing against the security of the matrimonial home in order to pay off creditors because the wife had not been willing to agree to this. 7. The matter came before the Registrar on 15 th and 16 th December 2004. Both parties gave evidence. The wife essentially asked for the relief which she is seeking before this Court, namely that the matrimonial home should be sold with approximately 90% of the proceeds being awarded to her so that she may re-house herself and the children. The Registrar adjourned the hearing until 1 st March 2005 in order to see if the husband would and could contribute to the family's support. He ordered the husband to pay £1,000 per month during the adjournment. 8. At the adjourned hearing on 1 st March the Registrar noted that the husband had made the payments. He decided to adjourn the wife's application for a further six months until 6 th September 2005. His reasoning essentially was that he would prefer to make a Mesher order rather than the order sought by the wife but he needed to establish whether the husband could and would make the payments which would be necessary if a Mesher order were to be made. He ordered that, in the meantime, the husband should pay the monthly sum of £1,804.26 to the wife made up as to £650 child maintenance, £350 towards the arrears of child maintenance, £714 in respect of the mortgage and £90.26 for certain endowment policies linked to the mortgage. 9. The Registrar made it clear that one of the reasons that he was adjourning the matter was because the husband's financial position was not clear. He found (and it cannot really be disputed) that the husband had repeatedly failed to comply with various orders of the court for disclosure of his financial position. Thus, in his reasons he said at para 21:- "..... I have no accurate idea of how the husband supported himself at the time of the December hearing or now." And at para 22:- "However, I had no accurate details of the work in hand, of his debts, nor of how he intended to pay creditors. I had no accurate details of his living circumstances or his day-to-

day expenditure." 10. The Registrar, who had the advantage of seeing and hearing the witnesses, said that he did not get the impression that the husband was being deliberately evasive but that he found it difficult to face up to court proceedings in which he felt he was a victim. Having said that, the husband's attitude in relation to the provision of financial information has not changed. Despite an order from the Bailiff in connection with this appeal that the husband should file an affidavit setting out full up to date disclosure of his means, no affidavit was filed by the husband until the evening before the hearing of the appeal, and even then it did not contain all the detailed information which had been ordered. 11. The wife appealed against the Registrar's order of 1 st March on the basis that the Registrar should not have deferred his decision but should have resolved the position between the parties by making the order requested by the wife. Unfortunately the appeal could not be heard in June (the original date) and did not come on for hearing until 29 th September, which was of course after the date fixed for the adjourned hearing before the Registrar. In the circumstances, both parties agreed before us that it would be highly undesirable to delay matters further by sending the matter back to the Registrar. They invited the Court to make a final order dealing with the allocation of the matrimonial assets and we agree that this is the sensible approach. The present financial position 12. The main asset is the former matrimonial home, a 3-bedroomed house in a rural location in St. Peter. The parties have proceeded upon the basis of an agreed valuation of £375,000 as at November 2003. Neither party sought to suggest that there has been any material change since then. There is an outstanding mortgage(s) in the sum of approximately £130,000 leaving equity of some £245,000. If one deducts notional selling costs the net proceeds of any sale would amount to just over £235,000. The other assets of any note comprise two endowment policies with an aggregate surrender value of some £12,000; 189 shares in Aviva Plc valued at £1,146 in December 2004; pension policies taken out by each party; and a savings account containing approximately £3,400 (as referred to para 4 above). In addition each party owns 50% of the issued share capital of the Company. The Company has however been struck off for non-payment of its annual registration fee although the husband has expressed an intention to apply for it to be reinstated. 13. As to income, the wife's current net income from her employment is £1,326 per month, i.e. £15,912 per annum. She has hitherto been receiving family allowance but that will cease when it is re-assessed in the light of the payments currently being made by the husband. She has had to borrow various sums from members of her family in order to pay school fees and for repairs in respect of a broken boiler. She currently owes just over £4,000. There is no prospect of any significant increase in her income from her employment. In addition, since March 2005, she has been receiving the payments from the husband ordered by the Registrar. For most of the hearing it was thought that these had been paid but it emerged on a close examination of the husband's latest affidavit during Mr Winchester's submissions that the bank statements exhibited thereto showed that a standing order in the sum of £1,090.26 (which would appear to be the monthly child maintenance, arrears of child maintenance and life insurance premiums ordered by the Registrar) had not been paid in July and August. During her reply, Miss Fitz asserted on instructions that these sums remained unpaid. 14. The husband's

affidavit gives little detail but he asserts that he is working as a builder in his own name and is content to be treated as having an annual gross income of £45,600. However he has a substantial number of creditors who have obtained judgments. Judgments against the Company total £38,689. Judgments against him personally (excluding that obtained by the wife) total £5,308. However, to this must be added the sum of £14,200 which has been included in the judgments against the Company. This is because that sum is due to Lloyds TSB (Jersey) Limited by the Company but the husband has guaranteed that debt. His total debts therefore amount to £19,508 to which, no doubt, must be added some further accrued interest. Most of these judgments arose in the first half of 2004 save that a judgment of £16,300 was obtained by Norman Limited against the Company in May 2005. The wife is co-guarantor of the liability to Lloyds TSB but she has denied liability in the proceedings brought by the bank. The husband states that he has not made any arrangements with these creditors to pay off their debts but he intends to do so when his finances permit and has informed them of this. 15. As to expenditure, it is clear that the wife has cut her cloth according to her means and has managed her financial affairs extremely prudently. She is to be congratulated upon her efforts. The position as to the husband's expenditure is not clear because his latest affidavit is silent on the topic. His affidavit of December 2004 stated that he was renting a bed-sit and office at a rental of £130 per week, which accommodation also offered the prospect for him to rent further rooms for the children to stay with him overnight. 16. Finally we should record that it is clear that the relationship between the parties is extremely poor. Not only have injunction proceedings been issued by the wife against the husband at one stage, but it is clear from the evidence before the Registrar that the wife blames the husband for failing to provide any support for her and the children since the separation whilst the husband blames the wife for some of his financial difficulties. That antipathy was further evidenced in the hearing before us when the husband walked out of Court at one stage. 17. The reason for mentioning this fact at this stage relates to possible repairs to the matrimonial home. The agreed valuation makes it clear that work may be required to the property. It is accepted by both parties that, if the property is not sold, a fair amount of work will probably need to be carried out at some stage. Mr. Winchester suggested that the husband would be willing to carry out such work in his spare time in order to minimise the cost. However, given the nature of the relationship between the parties and the existence of injunctions, we do not think that this is a practical proposition and accordingly we think that, if the property is not sold, it will be necessary for the work to be undertaken by another builder. The rival contentions 18. Miss Fitz put forward, both before the Registrar and this Court, a very detailed proposal. It can conveniently be summarised as follows - (i) The matrimonial home to be sold and, out of the net proceeds, the sum of £210,183 to be made available to the wife so that, with the benefit of a mortgage of £80,000 and allowing for transaction costs, she could purchase a smaller 3-bedroomed house in St. Helier for £280,000 for occupation by her and the children. (ii) The balance of the net sale proceeds (£25,387 if the property were to be sold for £375,000) to be allocated to the husband but utilised to pay off his personal debts, in particular the amount owed to Lloyds TSB. (iii) There would be a clean break between the parties; the wife would forego the

arrears of child maintenance (currently some £6,000). (iv) Maintenance for the children would be at the reduced rate of £20 per week per child. (v) Each party would keep his or her pension policy. (vi) The wife would keep the £3,400 or so in her savings account and be responsible for repaying the loans from her family. (vii) The wife would transfer her shares in the Company to the husband and forego any claim on his business. (viii) The husband would receive the 189 shares in Aviva plc worth £1,100. (ix) The two endowment policies to be surrendered upon sale of the matrimonial home with the proceeds being divided equally (approximately £6,000 each). (x) The furniture in the matrimonial home to be retained by the wife subject to any personal belongings of the husband being returned to him. Each party to retain his or her existing car. (xi) No order as to costs. 19. In round terms, therefore, the matrimonial home would be divided in the proportion 90% to the wife and 10% to the husband with the husband's 10% being used to pay off his personal creditors and the wife's 90% being used to purchase a new home for her and the children. 20. Mr. Winchester submits that such an order would unreasonably deprive the husband of his half share in the matrimonial home. He submits that the Court should make a conventional Mesher order. In other words, the matrimonial home should be retained in the joint names of the parties with the husband being ordered to continue his present contributions towards the mortgage, insurance premiums and child maintenance and the property being sold upon the youngest child attaining the age of eighteen or completing full-time education, whichever last occurs. The Court should allow the husband to retain his 50% interest or, at worst, reduce it by only a small percentage. The applicable principles 21. Mr. Winchester submitted that the wife's proposal was not consistent with the yardstick of equality referred to in *White v White*

(2001) 1 All ER 1. That appears also to have been the view of the Registrar. 22. In this connection, it is important to consider carefully exactly what conclusions are to be drawn from *White* bearing in mind that it was a so-called 'big money' case where the assets exceeded the parties' requirements. Lord Nicholls, who gave the leading judgment, made it clear that the guidelines he was giving related to such cases. Thus, at page 4, he said - "This appeal raises questions about how the courts should exercise these powers in so-called 'big money' cases, where the assets available exceed the parties' financial needs for housing and income." He went on, at page 6, to say - "I have already noted that this was a clean break case where the children were grown up and independent. The available assets substantially exceeded the amounts required by Mr. and Mrs. White for their financial needs, in terms of a home and income for each of them. The general observations I make later should be read with this in mind." The main thrust of the judgment was that there should be no discrimination between the party who had earned the assets and the party who had cared for the family because this was likely to amount to gender discrimination. It followed that there should be no artificial limitation on the wife's entitlement by reference to 'reasonable requirements'. 23. The case was far removed from the run of the mill case where the assets are barely enough to support one family, let alone having to be divided between two parties. The English Court of Appeal has had to consider the impact of *White* on such cases. In *Cordle v Cordle*

- (2001) WL 1347087 a court comprised of Butler-Sloss P and Thorpe LJ, both judges very experienced in matrimonial law, considered this topic and Thorpe LJ, in a judgment agreed by Butler-Sloss P, said as follows at para 33 - "The second difficulty that needs mention is the impact that the decision of their lordships in *White v White* has had upon what may be described as a routine District Judge case, such as the present. I have heard many reports of confusion and inconsistency between County Courts. The first point, that cannot be over-emphasised, is that there is no rule in *White v White* that District Judges must produce equality of outcome unless there are good reasons to justify departure. The cross-check of equality of outcome is intended to be a safeguard against discrimination. What *White v White* essentially decides (as this Court has emphasised in the more recent decision of *Cowan v Cowan*
- (2001) EWCA Civ 679) is that it is the first duty of the court of trial to apply the section 25 criteria in search of the over-arching objective of fairness. It seems to me that in search of that over-arching objective in the typical ancillary relief case the District Judge will always look first to the housing needs of the parties. Homes are of fundamental importance and there is nothing more awful than homelessness. So in the ordinary case the court's first concern will be to provide a home for the primary carer and the children (whose welfare is the first consideration). Of course in many cases the satisfaction of that need may absorb all that is immediately available. But, as in this case, where there is sufficient to go beyond that, the court's concern will be to provide the means for the absent parent to re-house. 34. These two considerations will apply in many standard cases, but they are, of course, not exclusive. The only universal rule is to apply the section 25(2) criteria to all the circumstances of the case (giving first consideration to the welfare of the children) and to arrive at a fair result that avoids discrimination." 24. Mr. Winchester relied upon the comments of Thorpe LJ in a different case, namely *Elliot v Elliot*
- (2000) EWCA Civ 407 , a decision given shortly after *White* . At paragraph 5, Thorpe LJ said this - "In my opinion, although in his speech Lord Nicholls emphasised that any principle he enunciated was to apply only to those comparatively rare cases where the totality of the assets exceeds the needs of the parties, nevertheless his emphasis upon the need to avoid gender discrimination and the consequential need to treat equality, if not as a starting point, still as a cross-check to be applied to any provisional view formed in a court of trial is valid in a more general sense." In our judgment, the comments in *Cordle* accurately reflect the position. *White* is a timely reminder of the overriding duty to be fair and the need to avoid gender discrimination but its direct relevance in cases of modest means is limited. In such cases the Court must consider first the need to provide homes for the parties, particularly the party having care of the minor children. 25. Although section 25 of the Matrimonial Causes Act 1973 has of course no direct application in Jersey, it is well established and was accepted by the parties that, in exercising the powers to grant financial relief conferred by the Matrimonial Causes (Jersey) Law 1949 , the Court will have regard to the various factors listed in section 25(2) of the 1973 Act. In particular, the Court will give first consideration to the welfare of any minor children of the family. 26.

Miss Fitz referred us to *Baker v Baker*

(1995) 2 FLR 829 as authority for the proposition that, where a party to matrimonial proceedings fails in the duty to give full and frank disclosure of his assets, the Court may draw adverse inferences from that failure in terms of assessment of the extent of his assets. We unhesitatingly accept the validity of that proposition but it must of course be applied fairly and sensibly. Miss Fitz argued that the proposition was applicable in this case because of the failure of the husband to give full and frank disclosure. We accept, as did the Registrar, that there has been such failure but it is clear that there are no hidden assets. On the contrary, both he and the Company are indebted to a number of creditors who have obtained

judgment.

Accordingly, on the facts of this particular case, there is no room for the drawing of any adverse inferences as suggested in *Baker*. 27. Mr. Winchester submits that a Mesher order should be made. We should therefore comment briefly on such orders. In many cases, a Mesher order is an appropriate solution. It preserves the matrimonial home for the parent with care of the minor children but enables the non-resident parent to realise an interest in the property when the children are grown up. However, it is often not an appropriate order. We would quote with approval the following passage from Cretney, Masson and Bailey-Harris, *Principles of Family Law* (7th edition) at para 14-097 - "[Mesher] orders were at one time very popular, since they enabled the court to preserve each party's stake in what was then usually an appreciating capital asset, whilst at the same time preserving a home with their mother for the children. In *Mesher v Mesher* :- The matrimonial home was in joint names and mortgaged (but there was a substantial equity). The husband intended to remarry and had already bought a new house; the wife intended to remarry but wished to stay in the former matrimonial home with the nine-year-old child of the family. The Court of Appeal held that it would be wrong to transfer the house outright to the wife since that would deprive the husband of the whole of his interest in the home; and that the right course was for the wife and child to have a home in which to live ("rather than that she should have a large sum of available capital"). Accordingly, it was ordered that the matrimonial home be held on trust for sale for the parties in equal shares, provided that the house be not sold so long as the child of the marriage was under the age of 17 (or until further order). The wife was to be at liberty to live there rent-free, paying and discharging all outgoings (except that repayments of the capital of the mortgage were to be borne equally). After a time the dangers inherent in such orders became apparent. In particular, such an order would often leave the parties in a state of complete uncertainty as to the future, since they would not be able to predict what would happen when the property came to be sold. Would the money available to each party suffice to re-house him or her? In some cases it was clear that after the period of postponement the wife would inevitably be homeless and in a very weak position to re-house herself; and unless the sum she received were large enough to buy another house outright the wife might find great difficulty in obtaining a mortgage to finance the purchase. Moreover, the use of a trust for sale might have the undesirable consequence that if the wife wished to move

before the end of the period of postponement, she would not be entitled to have the husband's share of the proceeds applied towards the acquisition of a new house for herself and her family. In the result, Mesher orders were no longer regarded as "the bible". A charge realisable on eventual sale may be the fair outcome. However, recent authorities in small money cases emphasise that *White v White* did not create an in principle entitlement of each spouse to some part of the equity either immediately or on a deferred basis. The welfare of the child remains the first consideration, and thus in cases other than those involving big money the housing needs of the parent with care will continue to dominate". Application to the facts of this case 28. We have applied the principles described above to the particular circumstances of this case and have concluded that it would not be right for the matrimonial home to be retained under a Mesher order. On the contrary, we think that the right course is for the matrimonial home to be sold and for the wife to be allowed to purchase an alternative home at the sort of figure suggested by Advocate Fitz. Our reasons are as follows - (i) The first consideration is to secure a home for the wife and children during their minority. We do not consider that this can satisfactorily be achieved if they remain in the matrimonial home. The husband has a number of creditors. If they were to enforce their claims against his share (e.g. by declaring him *en désastre*) there would be great difficulty and uncertainty for the wife and children, notwithstanding the existence of the power conferred upon the Court by article 12 of the Bankruptcy (*Désastre*) (Jersey) Law 1990. (ii) Mr. Winchester accepted that a Mesher order would require the husband to continue to make payments towards the mortgage and other expenses of the matrimonial home. In view of the paucity of the information provided by the husband and the financial difficulties which he has suffered from and continues to suffer from in terms of outstanding creditors, the Court cannot be confident that he would be able to continue to make such payments. Indeed, the fact that the standing order was not paid by the bank on two occasions in July and August because of insufficient funds lends weight to that concern. If he were unable to make the necessary payments, this would place the security of the wife and children's home at risk. (iii) Even if the husband were financially able to make the required payments throughout the period of the Mesher order, the Court cannot be satisfied that he would definitely do so. The fact is that he made no payments at all towards the support of his wife and children from the moment he left in May 2003 until the hearing before the Greffier in December 2004 apart from one payment of £1,950 following the obtaining of a judgment against him. Whilst he was undoubtedly in a poor financial position, even by his own admission his antipathy towards the wife played some part in this non payment. Thus he admitted in cross-examination before the Registrar that he had been 'bloody-minded' about paying because she had been 'bloody-minded'. He went on to say that he was not in a mood to speak to her, or give her anything as she had taken all the savings. In respect of the one payment which he did make he wrote 'the bitch' on the counterfoil of the cheque. Later on, in cross-examination, he accepted that he may have said to the wife that she would never get anything out of his share of the house and would have to live in Housing accommodation. It is true that he has been paying the required amounts since December 2004, but this has been in circumstances where the case has been adjourned specifically to see if he will make such payments and he has no doubt realised that, if he were wilfully to refuse to do so, the Court would be more likely to accede to the wife's suggestion. All in

all, the Court cannot be confident that, if some difficulty should flare up between them in the future, he would not turn off the tap and refuse to make the contributions required under a Mesher order. Given his self-employed status and lack of capital assets, the wife would have great difficulty in enforcing payment of any such sums and any default in the mortgage payments could lead to insecurity and uncertainty for the wife and children. (iv) The parties are agreed that, if the matrimonial home is retained, fairly substantial works will probably need to be done. It is not clear how these could be afforded. The wife would appear to have insufficient funds to pay for them and the husband is indebted to creditors. The husband has suggested that he would carry out the works personally with the result that only the cost of materials would be involved. However, for the reasons given in paragraph 17 we do not believe this to be a practical proposition. There is a suggestion in correspondence supplied since we reserved judgment that insurance might have covered certain works in connection with the drains, but that is no longer the case because of the husband's inaction. We make no finding on this as it was not raised at the hearing and the parties have not had the opportunity of commenting on it. (v) The retention of the matrimonial home would mean that no capital would be released now in order to assist the husband's position in relation to his creditors. The capital would remain tied up in a house in which the wife and children lived. Conversely, the sale of the matrimonial home coupled with the purchase of a cheaper house will, if the figures accord with the agreed valuation and the wife's estimate of the sort of house which she will purchase, free up some capital which can be used to ease the position in relation to creditors. That would benefit the husband as well as the wife and children. We do not criticise the wife for having refused to consent to the giving of further security over the matrimonial home in order to pay off creditors. (vi) We are concerned that, if a Mesher order is made, the wife will be left unable to acquire a satisfactory home when the time comes for the house to be sold. She is aged 39 at present. If the youngest child attends university, she will be in the region of 52 at that time and not in a strong position to acquire housing with only 50% (or something close to it) of the net proceeds. We see no prospect of her being able to increase her income to any material extent. (vii) Conversely, the husband, who is aged 43, will have much greater earning capacity than the wife and should be able to acquire suitable alternative accommodation once he is clear of his creditors. 29. However, we do not think it would be right to confine the husband to any surplus of the net proceeds over £210,000 as suggested by the wife (estimated on her assumptions at some £25,000). Once the children are grown up, we see no reason why the wife should not move to a smaller property, if need be, in order that the husband should be able to realise something from the matrimonial home to which, along with the wife, he has contributed over many years. We think therefore that there should be a charge over the new property which would be realisable at the latest once the youngest child has attained the age of eighteen or completed full time tertiary education (if later). We have considered carefully whether this charge should represent a percentage of the value of the new property but we have concluded that it would not be right to do so because the husband will be making no contribution to the purchase of the property other than his share of the initial capital whereas the wife will continue to contribute through paying the mortgage, carrying out repairs, any improvements etc. Furthermore, we are conscious of the need to ensure that the wife will have sufficient funds upon the sale of the new property to acquire a substitute smaller property.

We accept, of course, that the probability is that there will be some price inflation before the new property has to be sold, but nevertheless we conclude that the fairest order in the particular circumstances of this case is to give the husband a charge over the property in a fixed amount. We have assessed that amount as £45,000. We consider that, if the new house is sold when the children are grown up and fully educated, the wife should be able to find a suitable smaller property at that time for some £45,000 (plus transaction costs) less than the value of the home she will be buying in the near future pursuant to our order. She would therefore be adequately housed. Conversely, given his superior earning power for the period between now and then, we consider that the receipt of £45,000 by the husband at that time will be of material benefit to him either in relation to his housing position or for such other purpose as he may wish to use the funds at the time. 30. As suggested in the cases we have referred to above, we have stood back and tried to assess whether the order which we are proposing to make is non-discriminatory and fair, always having regard to the check against equality. We are satisfied that this is a case where equality cannot be achieved because of the limited assets and the need to house the wife and children. However, if one adds the sum of £45,000 to the projected sum of £25,000 which will be made available to the husband at this stage out of the net proceeds of £235,000, the husband is receiving approximately 30% of the net value of the matrimonial home. He is in addition receiving half of the value of the endowment policies, the shares in Aviva, his own pension policy and is being relieved of the obligation to pay the arrears of child maintenance. 31. We propose to distribute this judgment in draft to the parties and would invite Advocate Fitz to draw up a detailed draft order to reflect what we are proposing in conjunction with a member of the Judicial Greffe. That should be agreed with Mr. Winchester if possible, but we will, of course, sit to hear the parties on any points of disagreement or generally on the form of the order. In summary, our decision is as follows - (i) The matrimonial home shall be sold as soon as practicable at the best available price as advised by Vibert & Bridle or such other estate agents as may be agreed. From the net proceeds of sale after deduction of the outstanding mortgage and selling costs, the sum of £210,183 shall be paid to the wife which she shall apply in the purchase of a new house in her name for occupation by her and the children, the intention being that the purchase price of such property should be in the region of £280,000, with her obtaining a mortgage of approximately £80,000. (ii) Any net proceeds in excess of £210,183 shall be applied for the benefit of the husband in payment of his personal creditors (including Lloyds/TSB). In the event of there being sufficient to discharge his personal debts in full, any surplus shall be applied towards payment of the creditors of the Company. (iii) Ogier & Le Masurier shall have the conduct of the sale of the matrimonial home on the usual terms as to fees and be responsible for disbursement of the sums as aforesaid. (iv) A judicial hypothec in the sum of £45,000 (without interest) in favour of the husband shall be constituted on the property purchased by the wife pursuant to paragraph (i) above. The sum of £45,000 shall become payable to the husband upon the first to occur of

(i) the sale of the wife's property; (ii) the youngest child attaining the age of eighteen or completing full-time tertiary education, whichever shall be the later; and (iii) further order of the Court. (v) In the event of the net proceeds of sale of the matrimonial home being less than £210,183. the sum of £45,000 referred to in paragraph (iv) shall be reduced by a

corresponding amount. (vi) Pending completion of the sale of the matrimonial home, the husband shall continue to make the payments ordered by the Registrar on 1 st March 2005. Should he fail to make any such payment, the sum of £45,000 referred to in paragraph (iv) shall be reduced by a corresponding amount. (vii) Each party shall keep his or her respective pension policy. (viii) The wife shall be responsible for repayment of the loans from members of her family. (ix) The wife shall have the benefit of the sum in the HSBC bank account (approximately £3,000) which money she must apply in partial repayment of the family loans and the account of Island Lock & Safe in the sum of £293.25. (x) The wife shall transfer her shares in the Company to the husband for no consideration and forego any claims upon any business currently or in the future owned by the husband. (xi) The shares in Aviva plc shall be transferred to the husband. (xii) The two endowment policies which currently underpin the mortgage on the matrimonial home shall be surrendered upon the sale of the matrimonial home and the proceeds divided equally between the husband and the wife. (xiii) The furniture in the matrimonial home shall be retained by the wife for use in her proposed new property. Any personal belongings of the husband still in the garage at the matrimonial home shall be returned to him. Each party shall retain his or her existing motor vehicle. (xiv) On the basis of the above proposals, there shall be a clean break between the husband and the wife with no order for maintenance for the wife. (xv) The husband shall, however, pay maintenance for the children at the rate of £50 per week per child. The Court notes that the original proposal from the wife envisaged reduced child maintenance of £20 per week per child, but this was in recognition of the lesser share of the matrimonial home which was going to be allocated to the husband under that proposal. In our judgment, given the order we have made, it would not be right to expect the cost of these children to be made up by family allowance and we consider that the husband should make a proper contribution towards his children's maintenance. (xvi) Subject to (v) above, any arrears of child maintenance at the time of the sale of the matrimonial home shall be remitted. (xvii) There shall be no order as to costs. (xviii) There should be liberty to apply in the event of any difficulties arising in putting this decision into effect. Postscript 32. As envisaged in the preceding paragraph, the above judgment was distributed in draft to the parties. On receipt, Advocate Fitz arranged for Vibert & Bridle to attend at the matrimonial home in order to advise on the significance of the unfinished work rejected by the insurance company (see para 28(iv) above). Their advice was that a failure to undertake these works before sale might have a detrimental effect on the sale price of approximately £10,000. However, of rather more significance, the estate agents advised that the market value of the property was now some £420,000 rather than the £375,000 upon which the case was argued; i.e. it was hoped to obtain some £45,000 more than previously envisaged. This came as a considerable surprise to the parties and to their advisers. We must therefore consider how that affects our draft judgment and we have heard submissions from the parties on that aspect. 33. Our conclusion is as follows - (i) We do not consider that the change in price affects our decision to order a sale of the matrimonial home. On the contrary, it reinforces our conclusion in that there may now be additional funds for payment of creditors, re-housing etc. It would seem highly undesirable to lock up this extra equity until the children

have grown up by ordering the retention of the matrimonial home. (ii) We have considered whether we ought to re-visit the allocation of the sale proceeds so as simply to award one percentage of the net proceeds to the wife and another percentage to the husband. We have decided that that would not be appropriate because, despite the new valuation, there remains a concern as to what price will in fact be achieved. The agents have not given any explanation in writing for this increase in their estimate of value. Furthermore, the possibility of undertaking future works to the property may put some purchasers off. The first priority must remain the need to ensure an adequate home for the wife and children and we think that the best way to do that is to remain with the existing decision insofar as the gross sale proceeds do not exceed £375,000. (iii) However, if more than £375,000 is realised, we consider that the extra equity should be shared equally between the husband and the wife. Accordingly, once the wife has received the sum of £210,183 and once the husband has received the sum of £25,387, any additional net proceeds of sale should be shared equally between them. We appreciate that in paragraph 31(ii) above, we stated that any surplus over £210,183 should be applied for the husband's benefit with the result that, in theory, he could have received more than £25,387. However, this was written in the context of it being extremely unlikely that the house could be sold for a higher value and, even if it could, one would be thinking of a few thousand pounds extra at most. Now that we are considering what may amount to an extra £45,000, we think that a different approach is required. We think it would be unreasonable to allocate all of such sum to the husband. (iv) Miss Fitz has produced a draft Act of Court which elaborates upon the essence of our decision as set out in paragraph 31 as amended in this paragraph. We approve of that Act. We do not mention every change or refinement in what it proposed but we would mention the following - (a) In the unlikely event of the insurance company refusing to pay for the insured repairs, we think that they should be paid for by the wife out of the funds which she has, with her being reimbursed for them. We also think that the diminution in value attributable to the failure to carry out such work should be borne by the husband. The Act reflects that. (b) Should the husband fail to pay any child maintenance after sale of the matrimonial home, the sum of £45,000 should be reduced by a corresponding amount. This does not of course prevent the husband from applying to vary the rate of child maintenance should there be a material change in his financial position. 34. In summary, our decision remains essentially as previously set out, save that, once the wife has received £210,183 and the husband has received £25,387 out of the net proceeds of sale of the matrimonial home, any surplus shall be divided equally between them subject to any adjustment for the insured works and for any default by the husband in payments due under the Greffier's order pending sale of the property. *Authorities Mesher -v- Mesher. White -v- White (2001) All ER 1. Cordle -v- Cordle (2001) WL 1347087. Elliot -v- Elliot*

(2000) EWCA Civ 407 . *Baker -v- Baker*

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