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Law Society Reference
BHO/ZECH

Re-opening of Final Orders

CPD 1 Hour

Speaker : Roger Bickerdike



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Ancillary Relief Update

Speaker: Roger Bickerdike

The speaker is a barrister based at Zenith Chambers in Leeds who has substantial experience in all types of Ancillary Relief matters.

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Roger Bickerdike

(Call 1986)

Practices Exclusively in the area of **Family Law**

Summary of Practice:

Roger Bickerdike specialises exclusively in children and matrimonial work with a particular emphasis on public law children work and ancillary relief. He is experienced in all aspects of children work, having frequently acted for Local Authorities, the Official Solicitor, children themselves (through their guardians) and parents.

Roger Bickerdike has been highly recommended in successive editions of 'Chambers and Partners Guide to the Legal Profession' and the 'The Legal 500 - Who's Who in the Law'. He has extensive experience in Appellate work both in the High Court and Court of Appeal and has been involved in numerous reported cases.

Noteable Cases

- North Yorkshire County Council v B [2007] FamLaw 895
- Re C (A Child) [2006] EWCA Civ235
- Re K (Medical Treatment: Declaration) [2006] 2 FLR 883, FD
- Re G (Removal From Jurisdiction) [2005] 2 FLR 166, CA
- Re B (Leave to Remove: Impact of Refusal) [2005] 2 FLR 239, CA
- Re J (freeing for adoption) [2000] 2 FLR 58, FD
- Re MM (Medical treatment) [2000] 1 FLR 224, FD
- G -v- F (contact and shared residence: applications for leave) [1998] 2 FLR 799, FD
- Re J A (child abduction: non convention country) [1998] 1 FLR 231 CA
- Re W (Adoption: homosexual adopter) [1997] 2 FLR 406 FD
- Re C & F (Adoption: removal notice) [1997] 1 FLR 190 CA
- Re M (Abduction: habitual residence) [1996] 1 FLR 887 CA
- Re A (wardship: jurisdiction) [1995] 1 FLR 767 FD.
- Re A (Supervision Order: extension) [1995] 1 FLR 335, CA

- F -v- Leeds City Council [1994] 2 FLR 60, CA.
- Re C (A minor) (Adoption: parental agreement: contact) [1993] 2 FLR 260 CA
- Leeds City Council -v- C [1993] 1FLR 269 FD
- C -v- C (Contempt: evidence) [1993] 1FLR 220 CA.
- Re H (Child order: restricting applications) [1991] FCR 896 CA

Memberships

Active member of Family Law Bar Association

Member of the Association of Lawyers for Children

Family Team – Zenith Chambers

Seminars

Roger has presented seminars on various subjects including Removal from the Jurisdiction and aspects of Ancillary Relief.

Education

Nottingham University

**APPEALING OUT OF TIME AGAINST ANCILLARY RELIEF ORDERS ON THE GROUND OF
AN INTERVENING EVENT: FAR FROM PLAIN SAILING**

ROGER BICKERDIKE

6th August 2009

Background

1. It is now 22 years since the House of Lords, and Lord Brandon in particular, in *Barder -v- Barder (Caluori Intervening)* [1987] 2 FLR 480, set down the principles or conditions relating to appeals out of time made on the basis of intervening events.

2. These conditions are:
 - (i) That the intervening event invalidates the basis or fundamental assumption upon which the order was made such that, if leave were to be given, the appeal would be certain or very likely to succeed.

 - (ii) That the event should have occurred within a relatively short time of the order being made ("extremely unlikely that it would be as much as a year").

 - (iii) That the application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case.

 - (iv) That the grant of leave should not be permitted to prejudice third parties who have acquired in good faith and for valuable consideration interests in property subject of the relevant order.

Can a change in asset value (such as of a house or a business) qualify as an intervening event?

3. The leading case on this issue remains *Cornick -v- Cornick* [1994] 2 FLR 530, FD, a case in which the valuation of the husband's business had risen very shortly after the final hearing. This sharp increase (360% in 3 months) resulted in W receiving only 20% of the overall assets in circumstances where at the original ancillary relief hearing the District Judge had awarded her 51%. Dismissing the wife's application for leave to appeal out of time, Hale J, as she then was, identified three categories of changed valuation of asset cases, as follows:
 - (i) Where an asset which was taken into account and correctly valued at the date of the hearing changes value within a relatively short time owing to natural processes of price

fluctuation. The Court should not then manipulate the power to grant leave to appeal out of time to provide a disguised power of variation which Parliament has quite obviously and deliberately declined to enact.

- (ii) Where a wrong value was put upon that asset at the hearing, which had it been known about at the time would have led to a different order. Providing that it is not the fault of the person alleging the mistake, it is open to the Court to give leave for the matter to be reopened. Although falling within the Barder principle, it is more akin to the misrepresentation or non-disclosure cases than to Barder itself.
- (iii) Where something unforeseen and unforeseeable has happened since the date of the hearing which has altered the value of the asset so dramatically as to bring about a substantial change in the balance of assets brought about by the order. Then, providing that the other three conditions are fulfilled, the Barder principle may apply. However, the circumstances in which this can happen are very few and far between. The case law, taken as a whole, does not suggest that the natural processes of price fluctuation, whether in houses, shares or any other property, and however dramatic, fall within this principle.

4. Applying these principles to the facts of Cornick, Hale J found that the case clearly fell within the first category. There was no mis-evaluation or mistake at the trial. Nothing had happened other than a natural albeit dramatic change in the value of the husband's shareholdings. She commented that the wife's case amounts, in effect, "to saying that it is all terribly unfair".

Cases subsequent to Cornick

5. Subsequently, there have been a number of reported cases, some concerning significant decreases in the value of assets during recessionary times, but most concerning significant increases in the value of assets during periods of economic growth.

Examples of cases of assets decreasing in value

Heard -v- Heard [1995] 1 FLR 970

6. In ancillary relief proceedings the main asset was the family home. Based on the wife's valuation of £67,500, the equity was £55,500. The husband did not obtain his own valuation. The DJ made an order that the property should be sold and the wife, who had been living for some years with another man, should receive £16,000 with the balance to the husband. The rationale of the order was that the husband would need the balance to re-house himself. The husband tried unsuccessfully to raise £16,000 to buy out the wife. When that failed, he had the property re-valued and was told that it was worth only £42,000. Eight months after the order was made the wife sought to enforce it and the property was put on the market. The only offers received were for £30,000 and £33,000. Twenty months after the order was made, the

husband applied for leave to appeal out of time. He was unsuccessful at first instance, but his appeal was upheld by the Court of Appeal. Sir Thomas Bingham MR decided that either the original valuation was unsound, or that the house could not be sold at its original market price: the discovery of either of these facts amounted to a new event which invalidated the basis on which the DJ had made his order. The delay in the husband bringing the application could be excused on the basis that he had been attempting to raise money to avoid a sale in unfavourable market conditions.

7. It is noteworthy that, although this case was decided very shortly after Cornick, the latter case was not cited to the Court of Appeal. By way of comment, it seems to the writer that there are two particularly significant features of Heard upon which the decision turns. Firstly, that the Court of Appeal took the view that there may very well have been a significant mistake as to the value of the property at the time of the original hearing, and secondly that the case was very much a needs case – the rationale of the DJ's decision was plainly that the husband should be awarded such part of the equity as was required to enable him to be re-housed. Heard now needs to be seen in the light of Thorpe LJ's recent comments in Horne, as to which see para 35 below.

Middleton -v- Middleton [1998] 2 FLR 821, CA

8. A Consent Order was made for a 50/50 split of the assets: the main asset was a house from which a sub-post office had been run, and the valuation of this included a significant element of goodwill. On this basis, the sum for division was likely to be about £54,000. The husband, who had continued to run the post office, negotiated its removal after the order to premises several doors away. This left the house with a value of no more than £20,000. The net proceeds of sale were £652, and the total assets to be divided about £8,652. The Court of Appeal found that this was a case where the whole basis of the order had been frustrated by one of the parties, and it must follow that the order would be set aside on appeal. As the Court had all the information necessary to make a decision, it substituted its own decision for that of the District Judge, rather than remitting it for reconsideration. By various means, the Court of Appeal provided for the wife to receive exactly what she would have expected to have received under the District Judge's original order. Cornick had been cited in argument, but was not referred to in the judgment.

An example of a case of assets increasing in value

Burns -v- Burns [2004] EWCA Civ 1258, CA

9. The parties separated in about 1995. The main asset was a house. In 1997 and 1999 it was valued by Savills at £850,000. The wife was not convinced by the second valuation, and her solicitors asked Savills to reconsider it. Savills indicated that, although the residential market had strengthened during the last two years, they felt this price was appropriate for that house

in that location. In July 1999 a Consent Order was made whereby the husband retained the house and paid a compensating lump sum to the wife.

10. Within a month of the order the property was put on the market by the husband (though not with Savills) and an offer of £1.5 million was received. Contracts were exchanged three months after the date of the order for £1.7 million! Thorpe LJ, considering this chain of events, observed:

"There has been, inevitably, some considerable debate as to how the present case should be classified. Is it a case in which the order should be set aside on the basis of misrepresentation or breach of duty of candour, or is it a case which should be set aside on the basis of a new or supervening event? Mr. Moylan has submitted that it would be unfair to his client for the Court to classify this as a case of misrepresentation or breach of duty since his client has had no opportunity to give oral evidence in explanation of his conduct.

It seems to me that it is unnecessary to determine this point since the legal consequences are the same whether categorised as misrepresentation or supervening event. I would only say that the affidavit evidence is sufficiently clear in my judgment to arrive at least at a strong preliminary conclusion that this is a case of either active or passive breach of the duty of candour."

11. The Court of Appeal took the view that the case fell within the third of Hale J's categories. However, as the wife had delayed three years before making an application, permission to appeal out of time was refused.

More recent cases

12. A number of recent cases have emphasised that the jurisdiction to allow for the reopening of final orders would be exercised very sparingly given:

- (i) That there is a strong public interest in the finality of litigation (albeit balanced against the need for a just result in an individual case); and
- (ii) That only exceptional circumstances will give rise to a successful application.

B -v- B [2007] EWHC 2472 (Fam), [2008] 1 FLR 1279

13. Following separation, the husband occupied the FMH. At the time of the Consent Order it was valued at £1.25 million with equity of £587,000. The Consent Order required payment by the husband of a lump sum of £360,000 to the wife, representing her interest in the house and other assets. It was anticipated that the husband would either re-mortgage or sell the FMH to pay this sum. The husband's attempt to re-mortgage was unsuccessful, so two months after the order was finalised the house was placed on the market for £1.85 million. An offer of £1.6 million was received a month later, and accepted. After the Consent Order but before putting the property on the market, the husband, who was a property developer, carried out about £60,000 worth of work on the house to make it more attractive to prospective purchasers.
14. The wife sought to argue that the difference between the agreed valuation and the sale price was itself evidence that the agreed valuation was wrong. (Very surprisingly, and undoubtedly mistakenly, there was no attempt to adduce any additional valuation evidence to suggest that the first valuation was erroneous at the time of the order.)
15. The President, Sir Mark Potter, was unimpressed by the contention, in effect, of *res ipsa loquitur*. He said:

"23. Upon the facts of the case as I have recounted them, I found that submission unconvincing. Valuation, particularly in a rising market, is an inexact science and, in the case of a tired and poorly maintained property in a problematic location, much depends on the impression a discerning purchaser may receive of its potential."

16. The President went on to say that the husband had undertaken substantial and effective works to achieve a better price and that this, given that he was a property developer, was foreseeable. He dismissed the wife's application for leave to appeal out of time.

Dixon -v- Marchant [2008] 1 FLR 655, CA

17. This is an interesting example of an intervening event case which did not turn on a significant change/mistake in the valuation of an important asset.
18. The husband, who had retired, wanted to buy off his former wife's entitlement to periodical payments. It was a joint lives order in the sum of £15,000 per annum. During negotiations preceding an agreement, the wife had repeatedly denied in correspondence any intention to cohabit with the man with whom she acknowledged she had been in a long-term relationship.

The wife had even noted on the prescribed statement of information which accompanied the application for the Consent Order that she had "no intention to marry or cohabit at present". An agreement was reached whereby the husband would pay the wife the sum £125,000 and upon payment the wife's claim for periodical payments would be dismissed. Within weeks of the agreement, the wife had agreed to marry her long term partner and the marriage took place within six months of the order.

19. The husband applied to have the Consent Order set aside, arguing that the wife's re-marriage invalidated the basis and fundamental assumption upon which the agreement and order had been made. The application was dismissed at first instance, the Judge finding that there had been no deceit or non-disclosure on the part of the wife, as the marriage had not been planned at the time that the order was made.

20. The Court of Appeal, Wall LJ dissenting, dismissed the husband's appeal. The Court of Appeal held:

(i) Any fundamental assumption underlying an order had to be a common assumption, not a unilateral assumption of one of the parties. In fact, it had to be an assumption shared by the Court; even on a consent application it was, strictly speaking, the assumption of the Court and not of the parties that decided the matter.

(ii) There could have been recitals in the order that spelt out the assumption that the wife would not remarry for a period after the order was signed that would have alerted the Judge to the common intention to give the husband a right to claw back some of the lump sum in those circumstances. There was no such recital and the risk of her re-marrying was therefore one that the husband had to accept. The possibility of re-marriage had not been a special factor, she was free to marry at any time and everyone knew that. Ward LJ said this (at paragraph 25):

"It was no more than the straightforward capitalisation of the wife's periodical payments to achieve the common desire for a clean break [which] carried risks for both parties: for the husband that the wife would re-marry and he would have been better off paying her maintenance till the obligation ended; for the wife that a lump sum worth "no more than seven years or so at £15,000 per annum might be exhausted during her lifetime so that she would have been better off preserving her rights to maintenance". Thus, "there were no special features to the case: it was a run of mill compromise".

Judge -v- Judge [2008] EWCA Civ 1458, CA

21. This was a very unusual case in which the parties had divorced in 2001 with a clean break taking effect at that time. The assets were in excess of £30 million but there was a potential liability to repay to a trust fund a liability of up to £14 million, though it was recognised that the liability might be anything between that sum and nil. The wife received £6.6 million of the parties' assets and the husband indemnified her against all claims in respect of the potential liability. Subsequent negotiations with the Revenue eventually led to a liability of only £600,000 in 2006. The wife made an application before Coleridge J, the Judge at the original ancillary relief hearing, to set aside his order.
22. Coleridge J, refusing the wife's application for set aside, accepted that this turn of events was an unexpected windfall, but stressed that the original order had been made on the basis that the outcome in relation to his liability was uncertain. The wife would have received more if the liability at that level had been known, but the fact that it might be much lower was foreseeable and the lower liability was not, therefore, a Barder event. He said:

"In this case the ball bounced the wrong way for this wife. On the basis of the gloomy prognostications of the wife's own Counsel at the time, it might just as easily have bounced the wrong way for the husband in which event it would have had a catastrophic effect on his finances. She was completely secure, he was most insecure. That is precisely how I intended it to be."

23. In the Court of Appeal, the wife's appeal against refusal to set aside and application for leave to appeal out of time were dismissed. Wilson LJ stressed that the liability in 2001 was a "known unknown" in relation to which the Judge had found that the spectrum of eventual liability "was vast", and that the wife had sought a settlement based on assets of firm value, by which she had achieved complete security. Further, it would have been open to the wife to have argued in 2001 that the award should have been "calibrated" according to the determination of the liability, but she had not done so. Equally, it was pointed out that, had the liability proved to be appreciably higher than had been contemplated in 2001, it was "almost inconceivable" that the husband would have been able to secure on appeal out of time a re-opening of the award and a repayment from the wife.

Myerson -v- Myerson [2009] EWCA Civ 282, CA: "A rum do"

24. In Myerson, an ancillary relief application was compromised at an FDR hearing in February

2008. Of the assets then valued at £25.8 million, it was agreed that the wife would receive £11 million (43%) and the husband £14.5 million (57%). Each of the Husband's shares was then worth £2.99.

25. The husband, a fund manager, had a 30% shareholding in a company of which he was, at the time, the Chief Executive. On 19th March 2008, the date upon which an order gave effect to the compromise reached at the FDR, the shares in the company were worth £2.77 each.
26. The wife's £11 million was to comprise of a property in South Africa valued at £1.5 million and a lump sum, to be paid by instalments, of £9.5 million. The first instalment of the lump sum, a payment of £7 million on sale of FMH, was due to be paid and was paid, in April 2008. The balancing sum of £2.5 million was due to be paid in annual instalments of £625,000 over four years.
27. Following the agreement, the value of the husband's shareholding went into free-fall (described by Thorpe LJ as "financial eclipse"). In November 2008 the husband issued applications seeking variation of the order for the payment of the lump sum by instalments and relating to the transfer of the former matrimonial home. Those applications had been set up for a hearing before a High Court Judge (not the FDR Judge) to be heard in July 2009. However, the value of the husband's shares continued to drop dramatically, and in December 2008 he made an application to the Court of Appeal for leave to appeal out of time on the ground of a supervening event, namely the global economic crisis and the huge reduction in the value of his shareholding. At the point of the husband making this application his shares had reduced to 72.5 pence per share, and by the date of the hearing at the Court of Appeal, 11th March 2009, they had further reduced to 27.5 pence per share, which was one-tenth of their value as at the date of the original order.
28. The case was advanced on behalf of the husband on the basis that, in the new situation, the wife had achieved 105% of the assets, leaving the husband with -5%.
29. The Court of Appeal unanimously dismissed the husband's application for leave to appeal out of time. Lord Justice Thorpe commented that:

"Although the present appeal has its dramatic features, its resolution is not, in my judgment, difficult."

30. Having cited the "invariable cited" passage from Lord Brandon's speech in *Barder* and also cited extensively from Hale J's judgment in *Cornick*, Thorpe LJ held that "these citations clearly point to the dismissal of the husband's appeal".

31. However, Lord Justice Thorpe went on to say that the appeal failed not just on the application of these general principles, but for a number of additional reasons as well. These were:
- (i) Firstly, the order was not imposed but was the product of the will of the parties. The husband, with all knowledge both public and private, agreed to an asset division which left him "captain of the ship certain to keep for himself whatever profits or gains his enterprise and experience would achieve in the years ahead".
 - (ii) Secondly, when a businessman takes a speculative position in compromising his wife's claims, why should the Court subsequently relieve him of the consequences of his speculation by re-writing the bargain at his behest if things go badly for him?
 - (iii) Thirdly, although things were going badly at the moment, the husband continues to enjoy control of the opportunities that go with his shareholding.
 - (iv) Fourthly, and very significantly, because the payment of the lump sum was spread over five instalments there exists, and the husband has invoked, the statutory power of variation. Given that the outstanding instalments amount to £2.5 million, much more than token relief, this alone rendered the husband unable to satisfy the second limb of Lord Brandon's first condition, namely that the appeal would be certain, or very likely, to succeed if leave be given. In other words, given the width of the discretion given to the Judge deciding the application for variation in the exercise of statutory powers (which would include a significant reduction or even extinguishing of the outstanding instalments on the lump sum) an appeal directed to the majority of the lump sum already paid and/or the transfer of property order would have no more than "most uncertain prospects of success".
32. However, although most of the arguments advanced on behalf of the wife against the application were upheld, some were not. In particular, the suggestion that Lord Brandon's first condition demanded the identification of a "concrete new event", such as the liquidation of a company, was too narrow an interpretation and that "events in this context embrace happenings, developments or occurrences".
33. Further, the suggestion that the husband had not acted promptly enough did not find favour, given that he had acted within about six weeks of his own stated recognition of the extent of the financial crisis.
34. Thirdly, it had been contended on behalf of the wife that allowing the husband permission to appeal out of time in this case would have led to an opening of the floodgates. Thorpe LJ

expressed doubt about this, essentially reasoning that under the existing principles in Barder and Cornick the bar to an Applicant seeking leave in the context of changed asset valuation is already extremely high:

"Equally, I am wary of the floodgate submissions. There may be many who are contemplating an attempt to re-open an existing ancillary relief order on the grounds of subsequently encountered financial eclipse. All in that situation should ponder Hale J's analytical characterisation and asked themselves whether the events upon which they intend to rely can be brought within either the second or the third category. Even then they would be well advised to heed the warning that very few successful applications have been reported. I echo the words of Hale J that the natural processes of price fluctuation, whether in houses, shares or any other property, and however dramatic, do not satisfy the Barder test."

Horne & Horne [2009] EWCA Civ 487, CA

35. In this case the Court of Appeal reversed a Circuit Judge's decision to grant the husband leave to appeal against a lump sum order. The basis for the husband's application had been the dramatic collapse in property values. In holding that this did not constitute a Barder event, applying Cornick and Myerson, Lord Justice Thorpe said this about the earlier case of Heard (referred to at paragraph 6 above):

"I only add a word in relation to the case of Heard, which troubled the Judge. It is a decision of this Court, given on 20th June 1994, the Court consisting of the Master of the Rolls, Kennedy LJ and Millett LJ. It is a matter of surprise to me that an ancillary relief case should have been listed before a constitution that did not contain a family specialist, but this was fifteen years ago and there was not perhaps such a clear understanding as there now is that no family appeal can be listed before a Court that does not contain at least one family specialist. It is also to be noted that the Court did not have available to it the judgment of Hale J in Cornick, which was then only some three weeks old. The Court allowed an appeal in circumstances where a valuation before the District Judge of a house at £67,500 subsequently diminished to a sale at approximately half that figure. The Court

was satisfied that that constituted a Barder event. Revisiting the case, it seems to me clear that that case, as this, fell within the first paragraph of Hale J's analysis and not the third. I am particularly of that view since the delay in the sale of the property resulted in part from the husband deciding that he would himself endeavour to buy out the wife's entitlement but then failing to raise the necessary mortgage funds. Of course, at that time – 1992, 1993 - property prices were falling rapidly and this family got caught in that spiral. But insofar as HHJ Corrie perceived that the case of Heard does not fit in comfortably with the others, I share that perception. Looking at the authorities as a whole, given that Hale J's judgment in Cornick has been consistently approved in later decisions, I can only conclude that the true path to be followed by a Trial Judge is the path set by Barder followed by Cornick."

Plainly, these observations greatly reduce the potential utility of Heard.

Walkden -v- Walkden [2009] EWCA Civ 627, CA

36. In Walkden, the wife sought leave to re-open an ancillary relief order made by consent. Under the terms of the Consent Order dated April 2007, the wife, who had already received capital provision from the Husband under a deed of separation, received a further £50,000 in full and final settlement of all her claims. Amongst the assets retained by the husband was his minority (45%) shareholding in a private company. By his Form E the husband had estimated the value of his shareholding at £215,000. However, by August 2007, i.e. only four months after the making of the Consent Order, the husband had agreed to sell his shareholding for £1.8 million. The Circuit Judge (His Honour Judge Hunt) granted the wife leave to appeal on the basis that the sale of the shareholding constituted a Barder event.
37. In reversing His Honour Judge Hunt's decision, the Court of Appeal held that it was important to draw a distinction between the concept of a mutual mistake as to the value at the time of the order, which was not a Barder event, and a genuinely unforeseen post order event which invalidated a fundamental assumption behind the order. The wife in pursuing her application for permission to appeal had relied on both mutual mistake and a genuinely unforeseen post order event.

38. The Court of Appeal rejected the contention as to mutual mistake, on the basis that an analysis of the negotiations clearly demonstrated that there was in fact no consensus as to value and that the wife's advisers in the period immediately prior to settlement had themselves expressly stated that they considered the shareholding to have significant value.

39. On the question of the sale constituting a Barder event, the Court of Appeal did not consider the event to be unforeseen (as a possible sale had been contemplated at various stages in negotiation) and did not regard the change in valuation as constituting a Barder event either. Indeed, Thorpe LJ said this in overturning His Honour Judge Hunt's decision:

"I am as certain that the wife's application could not be made good under Barder principles as Judge Hunt was certain that it could."

40. Wall LJ, delivering a concurring judgment, commented that counsel for the husband was entitled to describe this case as the flip side of the decision of the Court of Appeal in Myerson.

Roger Bickerdike
6th August 2009

W and H divorce after a fifteen year marriage producing two children, aged 13 and 11. Post-separation, the children remain with W at FMH.

The net assets (excluding pensions) total £2.5 million of which the mortgage-free FMH, a five bedroom detached property situated in an acre of land, accounts for £1.5 million.

H, aged 45, is the Finance Director for a company which leases heavy plant to large construction companies. His basic salary is £175,000 gross per annum. However, in each of the last three years he has been paid a performance related bonus averaging £125,000 gross, putting his overall remuneration at £300,000 gross per annum.

W, also aged 45, does some part-time freelance interior design earning about £25,000 gross per annum.

At a contested ancillary relief hearing in June 2008, the assets were divided as to £1.6 million to W (FMH plus £100,000) and £900,000 to H. The pensions were equalised and the parties agreed a level of maintenance for the children. In addition, H was ordered to pay spousal maintenance at a level which reflected his basic salary only, the DJ indicating that this would enable him to use future bonuses to recover in capital terms.

At the hearing H had strongly resisted any unequal capital division, contending not only that he was highly unlikely in the current climate to be receiving bonuses for the next few years, but also that his employment was far from secure given the parlous state of the construction sector in particular.

The DJ, whilst acknowledging the difficulties presented to all by the economic downturn, found H to be "over-egging somewhat his own vulnerability".

The months following the hearing prove eventful:

(a) In October 2008, following a whirlwind romance, W moves her new boyfriend into FMH; her boyfriend is a man of appreciable wealth.

(b) In December 2008 the children, who cannot stand W's new boyfriend, move to live with their father.

(c) In February 2009, H loses his job. He receives redundancy/compensation of £125,000.

(d) In December 2008, W's only surviving parent dies suddenly of a heart attack and she stands to inherit half of the estate. She can expect to recover around £500,000, though will have to wait for the sale of a property before receiving most of it.

Advise H.

Would your advice differ had it been a consent order?

