Neutral Citation Number: [2009] EWCA Civ 976
Case No: B4/2009/1803

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION
Her Honour Judge Hughes QC

Lower Court No: FD09F00399
Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 25/09/2009

Before:

LORD JUSTICE WILSON

Between:

ANTHONY ARBUTHNOT WATKINS GRUBB (Applicant)

- and -

JENNIFER FRANCES GRUBB (Respondent)

Mr Nicholas Cusworth QC and Mr Richard Sear (instructed by Harcus Sinclair) appeared on behalf of the Applicant husband.
Mr James Turner QC and Mr Harry Oliver (instructed by Payne Hicks Beach) appeared on behalf of the Respondent wife.

Hearing date: 23 September 2009

Judgment

Lord Justice Wilson:

1. I give reasons for my refusal, announced at the end of the hearing in the afternoon of 23 September 2009, of a husband's application for permission to appeal against an occupation order made by Her Honour Judge Hughes QC in the Principal Registry of the Family Division on 31 July 2009. Her order was that the husband should vacate the matrimonial home at Mayes House, East Grinstead, Sussex, by 28 August 2009 and thereafter should not, otherwise than with the consent of the wife or pursuant to further order of the court, return thereto. Execution of the order has been stayed until today; and

no doubt the husband will need a further, short, ultimate, extension of the stay in order to effect his departure.

2. The occupation order was of course made under s.33 of the Family Law Act 1996. In her application for relief under that Act the wife also sought a non-molestation order under s.42 thereof. In principle the judge also acceded to her application for such an order. By s.42(6) a non-molestation order may be expressed so as to refer either to molestation in general or to particular acts of molestation. As drawn by counsel and perfected by the court, the judge's separate order under s.42 indeed referred to particular acts of molestation: for, by paragraph, 1 the husband was forbidden to use or threaten violence against the wife and, by paragraph 2, he was forbidden to intimidate, harass or pester her. The inclusion of paragraph 1 was highly unfortunate in that there was scarcely any finding (nor allegation) of violence on the part of the husband to the wife and certainly no suggestion of such recent violence as might have justified an order against his use or threat thereof. During the hearing I extracted from Mr Turner QC, who, with Mr Oliver, represented the wife before the judge as well as before this court, an undertaking on behalf of the wife to apply forthwith for the deletion of paragraph 1 of the non-molestation order under the slip rule. Although the husband's primary target was to secure permission to appeal against the occupation order, he also sought to appeal against paragraph 2 (as well, of course, as paragraph 1) of the non-molestation order on the basis that he had offered to the judge an undertaking not to intimidate, harass or pester the wife, which there had been no good reason for the judge to spurn. When, however, I asked Mr Cusworth QC who, with Mr Sear, appeared before me (albeit not before the judge) on behalf of the husband, to show me the reference in the transcripts of the proceedings before the judge to the allegedly proffered undertaking, he proved curiously unable so to do. Instead he made hesitant reference to the possible inclusion of a proposed undertaking in some position statement filed by the husband for the use of the judge but not included in the papers for my use on this application and, obviously, not referred to orally before her. In the absence of any oral mention of it by the husband to the judge, who appeared in person before her save on the occasion of the hand-down of her judgment on 31 July, I have insufficient confidence that the judge was appropriately invited to accept an undertaking on his part. Mr Turner accepted that, had the husband proffered it, there would have been no good reason for the judge to spurn it and, instead, to make the injunction. In those circumstances the husband's objection to paragraph 2 of the non-molestation order falls away.

3. The hearing which led to the hand-down of judgment on 31 July 2009 took place over two and a half days between 15 and 17 July, whereupon the judge reserved judgment. The explanation for the substantial length of the hearing was that a district judge had directed that another matter be heard by the judge in effect at the same time as the wife's application under the Act of 1996. The other matter was a defended suit for divorce. By a petition issued on a date in August or September 2008 the wife sought a decree of divorce pursuant to s.1(2)(b) of the Matrimonial Causes Act 1973, namely on the basis that the marriage had broken down irretrievably and that the husband had behaved in such a way that she could not reasonably be expected to live with him. Following an unsuccessful attempt at reconciliation during the autumn 2008, the husband filed an answer denying both that the marriage had broken down irretrievably and that he had behaved in such a way that the wife could not reasonably be expected to live with him. Unsurprisingly his answer led to the enlargement, by amendment, of the allegations in the wife's petition and to her articulation of allegations of more recent events in a

supplemental petition. All these further allegations the husband in effect again denied. Thus the judge conducted a combined hearing of the defended suit and of the application under the Act of 1996. Although, as I have said, the husband appeared in person during the hearing before her, Harcus Sinclair, solicitors, had been energetically representing him in the months prior to the hearing. And, on the date of hand-down of the judge's judgment, they re-emerged on his behalf, with counsel. The judge's judgment was thus a compendious judgment in which she disposed of both matters and explained her reasons for concluding that the wife was entitled to a decree nisi of divorce under the Act of 1973 as well as to the occupation and non-molestation orders under the Act of 1996.

4. The hearing before me had been arranged to be a hearing not only of the husband's application (in proceedings 2009/1803) for permission to appeal against the orders under the Act of 1996 but also of his application (in proceedings 2009/1902) for permission to appeal against the grant of the decree nisi. It was only in the morning prior to the hearing that a message was sent to the court on behalf of the husband to the effect that he no longer intended to proceed with his application for permission to appeal against the grant of the decree. Accordingly, at the outset of the hearing, I granted leave to him to withdraw that application and, by consent, ordered him to pay the wife's costs of and incidental to that proposed appeal. Having done a substantial amount of preparatory work referable to both proposed appeals, I feel entitled to state that it was wise of the husband to withdraw his proposed appeal against the decree in that it stood no prospect of success whatever. Conversely, however, it was profoundly unwise of him to have pressed his opposition to the wife's suit to the lengths of a protracted contest before the judge and, for almost a month thereafter, even of a proposed appeal.

5. The parties married in 1985. They have five children. The first is R, a boy, who is now aged 23 and who has recently graduated from university. The second is A, a girl, who is now aged 21 and who, as part of her undergraduate studies in Dublin is spending a year of study in Paris. The third is G, a girl, who is now aged 18 and who is embarking on a gap year prior to attendance at university. The fourth is K, a girl, who is now aged almost 17 and who attends boarding school. The fifth is L, a girl, who is now aged 13 and who has recently begun to attend a different boarding school. Although the husband is no doubt as fond of all the children as is the wife, the fact is that his relationship with them, in particular perhaps with two or three of them, has been very strained; and there is no challenge to the judge's conclusion that the home of the two minor children and the home base of the three adult children should, following separation, be with the wife. It is thus not controversial that she will need in the short term as well as in the medium term, accommodation with six, or at any rate five, bedrooms.

6. The matrimonial home under the roof of which both parties continue separately to live is Mayes House. The house lies near the centre of a substantial estate owned, and still to some extent farmed, by the husband. The estate, or at any rate a substantial part of it, has been held in his family for over a century. Within the husband there is a strong sensation of life-time stewardship of the estate on behalf of future generations of the family. The sensation is in principle wholly admirable but unfortunately, as the judge was required to investigate as a result of his defence of the suit for divorce, the sensation of stewardship has expanded within the husband's mind beyond all rational proportion. As now I need only briefly to summarise, it infected married life for many years and ultimately destroyed it.

7. Mayes House has in effect six bedrooms and is the centre from which at present the husband runs his estate and directs various businesses. The affidavits in Form E which have been filed but which, correctly, have not been included in the papers for my use appear to include a concession on the part of the husband that he has total assets amounting to about £10million (albeit gross of CGT), of which the greater part is presently represented by real property in and around the estate. It is unclear to me whether any significant part of the husband's wealth was built during the marriage. To the extent that his wealth has been inherited, the application of the sharing principle to the wife's financial claims will be thereby affected.

8. For years the husband has been gravely concerned that the wife's increasing dissatisfaction with the marriage might lead to an award to her following divorce which would have grave impact upon the assets of which he regards himself only as the steward. No doubt the wife is entitled to a substantial award, which I fear will cause the husband to suffer acute pain; but one feature of it is already clear, namely that it will not include Mayes House. It appears that she makes no active claim against it and in any event, in making the occupation order, the judge accepted that, following determination of her application for ancillary relief, the wife would be moving out of it. So the wife's continued occupation of Mayes House, exclusive of that of the husband, was intended by the judge to be temporary; and, as I will explain, it is likely not to need to continue even for as long as the pendency of her application for ancillary relief. Whether, living perhaps basically alone but, as one hopes, having some or all of the children to stay with him at times, the husband will consider it appropriate to make Mayes House his home in the long term is an open question and, of course, a matter for him.

9. It is important to note that Mayes House has by no means been the only matrimonial home of the parties. There have been three other homes on – or near – the estate, from which the husband has managed to run the estate and conduct his businesses. First there was a small home in Ashurst Wood. Then, in about 1993, the parties moved to a substantial property with eight bedrooms, named Damerel, which the husband owned and owns and which lies at a little distance, namely about 15 minutes by car, from the farm. The family lived there for ten years. In about 2003 it moved to Mayes House. At that point Damerel was let and it remains let, albeit that it is a property with considerable continuing significance for the present issue. Importantly, in about 2006, the family moved out of Mayes House, apparently in order that the husband could generate a substantial rental income therefrom. It moved into a flat on the estate in a property known as Garden Gate. In that there are only four bedrooms in the flat, the accommodation was cramped but the family tolerated it; and the husband managed to run the estate and his businesses therefrom. As when the family lived at Damerel, the fact that his apparently admirable foreman has lived, with his wife, in a staff flat adjoining Mayes House does not appear then to have presented a significant problem for the husband. It was only in about August 2007 that the family returned to Mayes House.

10. It is worthwhile to note the curious arrangements under which the parties then returned to Mayes House. The judge found that, at any rate by that time, the husband was aware that his relationship with the wife was deteriorating and that he had become fearful of the financial consequences of any divorce. He therefore arranged that a company controlled by him, namely Mediamaximiser Ltd, should lease Mayes House from him and that the family should return only once the lease had been effected. Perhaps the husband, who had clearly taken legal advice by this stage, considered that, were the company to be

nominally entitled to possession of the house, matrimonial home rights could not arise in favour of the wife under s.30 of the Act of 1996. The husband required the wife, who appears to have been a director of the company, to execute the lease on its behalf; and the judge found that the husband twice cancelled the date fixed for removal of the family's belongings from Garden Gate to the house until she had executed it.

11. In the light of Mr Cusworth's submission to me that the judge's occupation order was an entirely premature, and at best pragmatic, rearrangement of the family's residential arrangements, which should have awaited substantive determination of the wife's application for ancillary relief, it is worthwhile to note the length of time for which the husband has been, in the words of the judge, trying to bully the wife into submission in relation not only to her financial claims following divorce in general but to her claims referable to accommodation in particular. At around the time of the return of the family to Mayes House in about August 2007 there were a variety of curious communications sent by the husband to the wife and bizarre draft agreements presented by him to her for signature. In one such draft agreement, apparently drawn shortly prior to the family's move back to Mayes House and (one would imagine) drawn by lawyers on the husband's instructions, there were recitals that "both parties recognise how family law has changed and has become something of a lottery, which can lead to bitterness"; that "neither party has any desire to pursue under matrimonial law the non-matrimonial assets of the other"; and that the wife "has recognised, in seeking departure from Garden Gate, that [the husband] would be "destroyed" if she were to pursue non-matrimonial assets merely on account of being permitted to live in them under terms as agreed". The body of that proposed agreement provided that all property held by the husband prior to marriage should remain in his ownership following any divorce and that, subject to the husband's 'provision' of accommodation and maintenance appropriate to her 'reasonable needs', the wife would in the event of divorce make no financial claim against him of any sort. By letter dated 10 August 2007 the husband wrote to the wife that "I am not prepared to be sued by you for any capital amount by way of divorce or separation whilst you are living at Mayes …" By letter dated 18 September 2007 he suggested to her that they should jointly apply to a court for a consent order that Mayes House was not their matrimonial home and that its surrounding premises were non-matrimonial assets. Later the husband furnished the wife with a draft agreement, dated 31 December 2007, in which she was invited to agree that "neither party will – now or in the future – lay any claim … to the capital of the other excepting in order to redeem specific borrowings agreed between the parties" and that "school and university fees will be subscribed by the parties equally (albeit with borrowings if necessary)".

12. In circumstances of the husband's very substantial wealth, to which there is apparently to be added for this purpose the existence of substantial trust funds for the children, the husband's suggestion in 2007 that the wife should fund one half of the school and university fees of the children was extraordinary. But it was no novel suggestion. From an early stage of the marriage, particularly when the wife conceived more children than the husband had apparently expected her to conceive, he had sought to insist that she should make an equal contribution to the educational costs of the children, albeit, if necessary, by initial borrowing from himself. So, if you please, he had purported to create a loan account in which he had recorded the increasing level of indebtedness on the part of the wife to him in that respect.

13. Following the return of the family to Mayes House, the husband never provided the wife with her own key to it. His explanation was a fear that she might lose it. He kept one key; one other key was provided for the whole of the rest of the family. The wife attended a reading club on some evenings and, so the judge found, the husband threatened to lock her out of the house if she failed to return to it by 11pm. The judge found that on three occasions he did indeed lock her out of the house although, of course, he opened it up for her in due course. The term of his lease of Mayes House to the company was for one year and thus it expired in August 2008. The judge found that, at that time, the husband put pressure upon the wife to vacate the property and threatened to exclude her and the children from it while they were away on holiday. The response of the wife to the extraordinary degree of harassment to which the husband had thus subjected her was, with hesitation, regret and apprehension, to issue her petition for divorce.

14. Mr Turner made clear to the judge that he did not seek the occupation order by reference to s.33(7) of the Act of 1996, i.e. that he did not argue that the wife or any of the children was likely to suffer "significant harm" attributable to the husband's conduct were an occupation order not made. He made clear, rather, that his case was founded on s.33(6); and, in parenthesis, he validly pointed out that the facility to make an occupation order by reference to s.33(6), as an alternative to s.33(7), indicated that Parliament did not require the establishment of likely "significant harm" before such an order could be made. In her judgment the judge correctly referred to the content of s.33(6), in particular to the four features (or collections of features) there specifically identified, the last of which is, of course, the conduct of the parties in relation to each other and otherwise. There was, therefore, considerable overlap between the behaviour of the husband which the judge was required to appraise for the purpose of determining the defended suit and the conduct on his part to which she was required to have regard under s.33(6). Thus it is that in order to provide an intelligible explanation for my refusal of permission to appeal against the occupation order I have been obliged to refer to such of the historical conduct of the husband as was relevant to the enquiry under the Act of 1996. Happily, however, the husband's withdrawal of the proposed appeal against the decree nisi saves me from a recital – in public – of much of the other material which the judge considered to amount to behaviour on his part such that the wife could not reasonably be expected to live with him. Of that other material, I need only refer to the following findings of the judge (none of which the husband seeks to challenge in the proposed appeal against the occupation order):

    (a) that, although the wife volunteered that in effect the husband was never physically violent towards her, he was verbally abusive towards her on numerous occasions;

    (b) that, following the presentation of the petition for divorce, the husband continued to be domineering and controlling towards her; and

    (c) that, by way of example, when the wife and two of the children arranged to go skiing in Les Arcs in March 2009, the husband made independent arrangements, contrary to the wife's wishes, to stay there and ski in order, as the judge found, to use the holiday as an opportunity to apply pressure to the wife to withdraw her suit for divorce.

15. It is inevitable that the level of strife between the parties over many years, but in particular over the last two years, would have taken a toll on the health of both of them.

Of the wife, the judge said "she is under stress and she needs to be separate from the husband if possible". It is I who have added emphasis to the most significant of her words; but in my view the evidence demonstrably entitled the judge to deploy it. The parties share the same doctor, Dr Bellamy in East Grinstead; he wrote reports on both parties to which, in writing comments to ten questions posed in writing to her on behalf of the judge following judgment, the judge acknowledged that she should in judgment have made express reference. She there wrote that she had taken Dr Bellamy's reports into account; and in my view her assertion in that regard cannot seriously be gainsaid.

16. Dr Bellamy's report upon the wife, dated (as Mr Cusworth stressed) as long ago as 24 February 2009, was that on 30 January 2009, in discussion with her, he considered that she was finding "her decision" very difficult to cope with and that she was tearful; and that his formal assessment of her mental health on that date indicated that she was suffering a moderately severe depressive disorder, for which he prescribed an anti-depressant. Before the judge the wife confirmed that she was continuing to take the medication and that she found it extremely helpful. Mr Cusworth, with his back to the wall, suggested to me that what had thus precipitated the wife's disorder and thus her need for medication was, in the doctor's words, the wife's own "decision", namely her decision to proceed with the divorce in the light of the failure of the reconciliation, and was unrelated to the husband's conduct towards her. With great respect, Mr Cusworth's distinction is absurd.

17. Dr Bellamy's report on the husband, dated 4 June 2009, was, in the view of the judge, rather unsatisfactory. She was plainly entitled to take that view: for it went too far and thereby devalued itself. It was, no doubt, entirely correct for the doctor to state that the process of separation had already caused the husband a great deal of stress. The doctor went on, however, to express the conviction that, were the husband to live "off site" (by which he may or may not have meant away from Mayes House itself), he would suffer "significant additional stress as it would make it almost impossible to conduct his business". How the doctor felt able to assert such a virtual impossibility is unclear; and, in the light of her survey of the marital history, in particular of the substantial periods during which the parties had lived in Damerel and in Garden Gate and yet the husband had continued to conduct his businesses, the judge was clearly entitled to treat Dr Bellamy's report upon the husband with caution if not scepticism.

18. It was Mr Cusworth's submission to me that the judge was not entitled on the evidence to conclude that the wife "needed" to live separately from the husband. In that regard I asked him to address me on her answers to Mr Turner in examination-in-chief that "I cannot live with … this pressure any more" and, in particular,

    "I end up each day stressed … I feel as if I am being shredded to pieces because the children would rather there was a clear cut line and I think their relationship with him would be far better if we were apart and I am absolutely torn down the middle by it all … I want to be myself again."

    Mr Cusworth submitted that the wife's latter answer indicated that current circumstances in the home more greatly affected the children than herself and that, in that none of the children was now resident there other than during holidays, it betrayed the lack of urgency in the wife's case. I consider that Mr Cusworth's interpretation of it is strained. True it is that in judgment the judge did not specifically refer to either of these passages

in the wife's evidence. Nevertheless she stated that, subject to one point in relation to which she had been mistaken, the wife's evidence was truthful; and when, in answer to another of the husband's written questions post-judgment, the judge observed that the wife had claimed that the current situation at Mayes House was "intolerable", I believe that, in part, she was recollecting, and accepting, these passages in the wife's evidence.

19. There were in my view highly significant features of the stance taken by each party before the judge in relation to the issue of short-term accommodation.

20. The significant feature of the stance taken by the wife was that, were the husband to put forward proposals for the reasonable alternative accommodation of herself and the children, she would be ready herself to vacate Mayes House and, large though it would be for him to occupy alone, to leave the husband in occupation there. She pointed out that any such move on her part would be unlikely to be a move to her final home, likely to be acquired only in the wake of the determination of her claims for ancillary relief; and thus that her offer entailed the not inconsiderable burden of two likely moves of home on her part within a relatively short period. Such, however, was her proposal; and in particular the wife referred to Damerel, obviously large enough for her family needs and a house which had provided suitable accommodation for the family until about 2003. The problem was, however, that Damerel was let.

21. The significant feature of the stance taken by the husband was that, by his solicitors' letter dated 20 May 2009, reiterated in his affidavit dated 12 June 2009, he accepted that a period of separation would be "beneficial". Mr Cusworth may well be correct in suggesting that the husband's hope at that time was that, following the proposed period of separation, there would be a reconciliation; but nothing can detract from his recognition at that time, and before the judge, that a period of separation would be beneficial. He said beneficial; the wife said necessary; and the judge said necessary. In that letter dated 20 May, the husband's solicitors proceeded to address whether the separation might be achieved by the wife's move back to Damerel. The trouble was that his proposal in this respect was unsatisfactory and lacked definition. He demanded an express recognition by the wife that Damerel was in excess of her requirements and that she would make no claims against it and, on that basis, he said that he would "use his best endeavours" to secure the tenant's vacation of it. But where, for example, was the concomitant offer of interim maintenance which would enable the wife to provide for the family at Damerel? As the judge asked the husband during his final submissions, "how does she finance it?". "That," replied the husband, "is a question that is beyond my experience … can I take advice on that?" The fact is that the husband had had ample time in which, with his solicitors, to craft a concrete proposal which would enable the wife and children to live adequately in Damerel in the short term. As it was, however, the judge was confronted with a situation in which Damerel represented no answer to the need for immediate separation.

22. But, unlike Damerel, the flat in Garden Gate was and remains empty: too small for the wife but, at any rate in terms of size, more than adequate for the husband.

23. Mr Cusworth's submissions reached their apogee when he referred not to the substance of the wife's case for the order and to the judge's accession to it, but to some of the language deployed by the judge in explaining her decision. I fear that, in some of her language, she did indeed depart from the tramlines of s.33(6) although she had expressly

noted them. "It is my clear view," said the judge in judgment, "that the best interim arrangement would be for the husband to vacate the … matrimonial home … and move to Garden Gate". At the hand-down on 31 July she said orally that her "favourite course is not uprooting the family at the moment" and that the "more sensible use of the property is him going into the flat". Indeed when, later, addressing the applications of the husband's fresh counsel for leave to appeal both determinations she indicated that, having refused leave to appeal against the decree, she would refuse leave to appeal against the occupation order "because it seems to me one follows on from the other". With great respect the occupation order definitely did not follow on from the decree and the issues of leave to appeal were entirely distinct. Even when later responding to the husband's written questions the judge wrote that she had considered it "more sensible for the wife to stay until financial issues had been resolved" All the italics in this paragraph are mine. No doubt the full court would have been critical of the judge's language. But it would then have penetrated beneath the language to the substance of the wife's case and enquired whether nevertheless the wife had in all the circumstances a case for an occupation order which in law the judge was entitled to accept.

24. In the course of his oral submissions Mr Cusworth relied on four authorities of this court:

    (a) *Wiseman v. Simpson* [1988] 1 FLR 490, in which the court stressed the draconian nature of an occupation order;

    (b) *Re Y (children) (occupation order)* [2000] 2 FCR 470, in which it stressed that an occupation order was one of last resort and that a recorder who had made such an order on the basis only that the situation in the home had to end sooner rather than later had acted impermissibly;

    (c) *G v. G (Occupation Order: Conduct)* [2000] 2 FLR 36, in which a judge who, notwithstanding substantial friction in the home, had refused to make an occupation order was held to have reached a legitimate conclusion, particularly in the light of the fact that the wife's application for ancillary relief was fixed to be heard less than three months later; and

    (d) *Burke v. Burke* [1987] 2 FLR 71, in which a judge's occupation order, directed to take effect eight weeks later, was set aside on the basis that, were the court to feel able to tolerate a delay of eight weeks, the case could hardly carry the degree of seriousness requisite for the making of an order at all.

25. Mr Cusworth therefore submitted that the judge failed to recognise the seriousness of the order which she made; that her choice of language betrayed her misuse of an occupation order as a pragmatic way of resolving unpleasantness at home prior to determination of financial issues; that her grant to the husband of 28 days for vacation betrayed the absence of necessary urgency; and that, in that the FDR meeting between the parties and their lawyers is fixed to take place only in March 2010 and that, were it to fail to produce settlement, the determination of the wife's financial application might lie far further into the future, the likely duration of the occupation order was impermissibly long.

26. I was of the clear view that the full court would not have accepted these arguments. An occupation order is always serious, and no doubt can sometimes be particularly serious when it relates to a spouse's removal from what one might almost call his ancestral

home. But the occupation order is likely to carry its greatest level of seriousness when it is made against a spouse to whom alternative accommodation is not readily available. This court will beware of confining the width of the discretion in s.33(6) within a straitjacket not consonant with its terminology. In the present case immediate separation was not only "beneficial" but "necessary" and, in the light of the husband's failure to craft proposals for the wife's accommodation in Damerel or indeed elsewhere, the only way of achieving it was to evict the husband, to whom his property at Garden Gate was readily available and who in any event had massive resources with which to fund his comfortable accommodation elsewhere. Indeed Mr Cusworth's complaint about the likely length of the husband's absence from Mayes House seemed to me to be wholly unreal. The length of his absence from it is a matter entirely within his own control. In accordance with the wife's concession, the judge made clear that, once reasonable alternative arrangements had been made for the accommodation of the wife's large family, the wife should herself vacate Mayes House and enable the husband to return. Indeed Mr Cusworth told me that, since the hearing before the judge, the husband had negotiated with the tenant of Damerel that he should vacate by 31 December 2009. I was also told by both counsel that, on 21 September, Judge Hughes had conducted a hearing of the wife's application for maintenance pending suit; that counsel for the wife had then invited her to fix the level of interim maintenance payable by the husband to the wife on the basis either that the wife would remain in Mayes House pursuant to the occupation order or that the husband would make Damerel available for the wife's occupation rent-free; and that the judge had resolved to deliver her reserved judgment upon the application today. It seems therefore likely that the wife will, in accordance with the court's expectation, move to Damerel in January or February 2010. Such were all the circumstances by circumstances to which, at one point during the hearing, I asked Mr Cusworth, firmly but genially, "but what are you doing here?".

27. For the above reasons I concluded that the husband's proposed appeal had no real prospect of success.