

CA on appeal from Chelmsford County Court (His Honour Judge O'Brien) before Thorpe LJ, Mr Justice Bell.  
8<sup>th</sup> May 2001

**JUDGMENT : LORD JUSTICE THORPE:**

1. This is an application for permission to appeal with appeal to follow if permission granted. It comes to this court as a result of an order made by Rix J on 10th November 2000. The applicant before him, as before us today, is Mr. Trevor John Maskell in person. The application today is opposed by Mr. Simison on behalf of Carol Linda Maskell. They were formerly married and were respectively the applicant petitioner and the respondent to ancillary relief proceedings, which came for final hearing to District Judge Pearl sitting in the Harlow County Court on 29th October 1999.
2. Seemingly, as a result of Mr. Maskell's long employment in the printing trade, the parties at that date owned a property which was heavily mortgaged but still had an equity of about £26,000. They also had two policies of insurance, one or both of which were probably charged to support the borrowings. The value of both was about £10,000, and seemingly one was worth a little more than the other. The order made by the district judge was that the wife should receive the whole of the equity in the home together with the more valuable of the two policies.
3. I find that order very difficult to understand against the background that there were three children of the family, born respectively in 1987, 1989 and 1992, who were in the shared care of their parents, alternating week and week about with each. That situation had been in being, seemingly to the benefit of the children, since the wife's departure from the matrimonial home in June 1995. The only other asset that was within the district judge's assessment was a pension, which had a CTV of about £31,000 or £32,000 at that date. Mr. Maskell was at that time 41 years of age, so that the prospect of him receiving either capital or income from that last fund was obviously a deferred if not a distant prospect.
4. After the ruling of the district judge there were subsequent hearings in the county court, one on 14th July 2000 in which the judge ordered Mr. Maskell to vacate by a specific date, and there was a third hearing before another district judge on the day that he was required to vacate refusing his application for a stay. So Mr. Maskell then applied to the circuit judge for an extension of time to appeal the order of District Judge Pearl. There was also before Judge O'Brien an application by Mrs Maskell for Mr. Maskell's committal for breach of the order requiring him to vacate. The judge had the advantage of counsel on behalf of both parties on that date. Counsel for Mr. Maskell sought to go behind the order of District Judge Pearl, on the basis that it had been eroded by an unforeseen and fundamental supervening event, namely Mr Maskell's loss of employment some two months or so after the District Judge's ruling. In my opinion, counsel, who set the judge off on that trail, was pointing in the wrong direction. This was a long way from a *Barder* situation. There is nothing permanent about employment of the sort that Mr. Maskell held at the date of judgment before the District Judge. There are hundreds of thousands of breadwinners who have to face the challenge of the loss of what seems to be secure employment as a result of all sorts of events. It may be some major takeover or it may be that some shift in the international market destroys the security, not only of individuals but of whole communities. Judge O'Brien was undoubtedly right to deny Mr. Maskell a fresh hearing on the application on the principles in *Barder*.
5. Where the judge went fundamentally wrong, in my opinion, was in reassuring himself that District Judge Pearl's order was conventional and therefore correct. He said that: *"If one looks at this as a comparatively long marriage . . . one could then see £26,000 and the £6,000 endowment policies, £32,000, going to the mother. Father has his £40,000 pension fund, plus the £4,000 endowment, so £44,000, less the debts of about £8,000, so that brings him to £36,000. So there is a rough equivalent."*
6. That passage seems to be fundamentally flawed, for the judge is making the seemingly somewhat elementary mistake of confusing present capital with a right to financial benefits on retirement, only 25 per cent of which maximum could be taken in capital terms, the other 75 per cent being taken as an annuity stream. He simply failed to compare like with like. I have a grave anxiety that the District Judge made the same mistake. We cannot know for sure because we do not have the written evidence before the District Judge. There is no note of her judgment and even counsel's submissions in writing

for Mrs Maskell on 29th October, which were before Judge O'Brien, are not before us today. So Mr. Simison, who has done his best, is in a difficult position in trying to remove the fundamental anxiety that there has been an injustice in this case.

7. So what can we do to correct or to remove the anxiety? It seems to me that all this court can do is to overturn the order of Judge O'Brien, granting to Mr. Maskell the permission to appeal out of time that Judge O'Brien refused him. It follows that all the subsequent orders, namely the order of Judge Pearl of 14th July and the order of District Judge Shanks of 18th August have to either fall away or be stayed, and equally the wife's application for committal must be further adjourned. I am aware of the hardship to Mrs Maskell in extending these proceedings yet further. She is legally aided. She has now appeared five times before the court and all her costs will be a charge, albeit a deferred charge, upon whatever capital sum she recovers. Furthermore, Mrs Maskell has made a valiant attempt to inject good sense into this situation by a letter which she wrote to her former husband on 21st January 2000. That letter might have resulted, probably should have resulted, in a sensible agreed variation of the order of District Judge Pearl. It is sad that it did not, but there is still an opportunity for this couple to embrace mediation as an alternative to litigation.
8. Although allowing the appeal setting aside the order of Judge O'Brien and granting Mr. Maskell permission to appeal from the district judge to the circuit judge, we are not inevitably committing the parties to renewed attrition. This court operates an ADR service which is as relevant in cases where appeals are allowed and litigation remitted to the county court as they are when cases first come into the court with some discernible opportunity for compromise. A letter will go to both sides inviting them to consider submitting outstanding issues to mediation by a pro bono mediator to be appointed by the office lawyer, Mrs di Mambro, since this is a family appeal within her overall management. If the parties can agree today that mediation is a sensible course, then the letter of invitation would be superfluous and they would today ask the associate in court to set the mediation process in train. But that is the order that I would propose.
9. **MR. JUSTICE BELL:** I agree.

**Order:** Permission to appeal out of time granted; appeal allowed; order of Judge O'Brien to be overturned; subsequent orders of 14th July and 18th August to either fall away or be stayed; the wife's application for committal further adjourned; parties to be invited to submit to ADR; Mr Maskell to serve notice of appeal within 14 days. (Order not part of the judgment of the court)

THE APPLICANT (assisted by Dr Pelling) appeared in Person.

MR. J. SIMISON (instructed by Messrs Whiskers, Harlow, Essex) appeared on behalf of the Respondent/Petitioner.