CA on appeal from High Court Family Division (Mr Justice Munby) be f o r e : Thorpe LJ : 26th June 2002

JUDGMENT : LORD JUSTICE THORPE:

1. This is an application for permission to appeal a substantial ancillary relief order made by Munby J and explained in a judgment which is dated 30th January 2002. This afternoon it is unnecessary to go into any of the facts in detail, other than to say that the parties have sadly erected huge walls between each other by their acts and by the use of litigation, both in this jurisdiction and in Saudi Arabia, which effectively imprisons the husband and the children within the Arab world, leaving the wife in this jurisdiction, the mistress of huge assets but heartbreakingly denied the company of her children.

2. There is no doubt at all that this sad state of affairs has been initiated and then driven by the husband. I do not suggest the least criticism of the wife in her reaction to a state of affairs which exploded in April 2000 with the husband's decision to take the children from the South of France to Saudi Arabia, and then almost immediately to initiate proceedings to establish his rights under Saudi law, as the father of children who had all of them attained an age that entitled him to custody according to Sharia law.

3. What has forcibly struck the court today is the sheer tragedy of this situation and the imperative need for these two parents to step out of the litigation trenches and to consider whether what they have achieved by their respective choices is what they really want for themselves and for their children. So in due course the pressing appeal to the parties from the court is to consider laying down arms and endeavouring to find a better way through the alternative dispute resolution scheme that this court operates. I will come later to consider how practically that could be achieved without seeming loss of face or abandonment of achieved positions through the litigation war.

4. Before I do that I consider the strength of the application for permission. The judge below was faced with a difficult case. The husband's participation in the proceedings was very partial. He, having initially declined to comply with the requirements of the family proceedings rules, belatedly offered to make disclosure by the conventional route of a Form E. Directions were given by Coleridge J in the summer of 2001 which required him to file that and, if so advised, an affidavit in response by 1st September. There was more or less compliance, in the sense that a document, albeit unsworn, was produced on 3rd September. The judge found, and for very good reason found, that it was not sufficiently comprehensive, nor sufficiently candid to anywhere near comply with the court's requirements. There was no opportunity for further exploration by way of cross-examination. The husband's case was argued by Mr. Deacon off the foot of that Form E. The wife, through her highly experienced and specialist legal team, aided in part by inquiry agents (who apparently succeeded in unblocking confidential Swiss bank accounts) and then by forensic accountants, was able to establish without much difficulty that the husband had concealed assets; that he had resorted to almost childish devices to try and pretend that what was his was not; and had generally conducted his response in a way designed to defeat or diminish the wife's award to the fullest extent of his endeavour. He even presented the ludicrous assertion that his assets exceeded his liabilities. So the judge was naturally both forthright and almost flamboyant in his condemnation of the husband. He arrived at the conclusion that all the identifiable assets should go to the wife, such as had not been transferred to her by interim orders. That made her the controller of roughly £13m in real property either in this jurisdiction or in France or in the United States. In addition, he said that the husband was to pay a lump sum of £10m. In addition, he said that the husband was to pay a further £2.5m for what the judge described as a war chest, alternatively a fighting fund, to fuel continuing litigation between the parents in relation to the children who, of course, had been immured by the husband in Saudi Arabia, denied all contact with their mother and denied the continuation of an international lifestyle and of education at first class London schools, both of which had been their privilege prior to the eruption of this terrible war between the parents.

5. Mr. Deacon has prepared a skeleton argument in which he has taken a number of detailed points of criticism of the judge's findings which we have not today investigated, even superficially. I suspect that some of those criticisms may be capable of being made good, but, I almost respond, to what avail? If the judge fell into error on points of detail, that is hardly surprising given the difficulty of the task. It

is hardly open to the husband to complain, since he was the author of all those difficulties. Mr. Deacon today has complained, with perhaps greater force, of the judge's elaboration of the assumption as to the extent of the husband's fortune, from the £20m plus advanced by Mr Tooth, the wife's solicitor, at a transcribed hearing before Holman J on 11th October, to a figure of 200 million dollars which the wife advanced in her evidence, founding herself upon a report that she had received from a friend who had in turn received a report from a journalist within the Arab world. Of course, the judge was in the difficult area of drawing inferences and finding some sort of foundation for the exercise, but I suspect that what Mr. Tooth said on instructions on 11th October may well have been nearer reality than what the wife received at second or third hand closer to the hearing.

6. Be that as it may, Mr. Deacon also complains of the judge's reasons for arriving at a basis for an evaluation of the husband's overall wealth of more than £50m sterling. All that is to be found in the judgment between paragraphs 92 and 96. It is enough to say that there is certainly some force in Mr. Deacon's criticisms of the judge's approach. In the end, it seems to me that the judge was inevitably going to transfer to the wife the £13m-odd of ascertainable realty that were within the court's enforcement grasp. But I have some real misgivings as to the foundation of his addition of £10m on top.

7. In a sense, it can be said: what does it matter whether the judge said 5, 10, or 50 million on top? These are Alice in Wonderland figures since they are unenforceable. What then could be the justification for the expense of an appeal to reconsider what is largely an academic figure? Against that, there seems to be little doubt that the wife's understandable and perhaps justifiable strategy has been to press, through her right of application for ancillary relief, for the largest possible outcome, to use as some sort of ammunition or bargaining chip in the terrible and tragic war over the loss of the children, not only her loss but their loss. Whether that is a wise strategy is another question. Only time will tell.

8. There is no doubt that part of the judge's approach towards his conclusion was not only the rationalisation of inference that I have already identified, but also the husband's misconduct in relation to the wardship litigation, first, in removing the children from France to Saudi Arabia without the wife's knowledge, let alone consent, and then his subsequent defiance of orders made in this jurisdiction, originating with an order made on 28th April. All that drew the strongest possible criticism from the judge, which is to be found in paragraphs 105 and 107.

9. There is an aspect of this which concerns me. It is allied to the final ingredient of the award, namely the war chest award. The reader of the judgment nowhere gleans that the father regarded himself as justified in steps that he had taken by the Sharia law, nor that he subsequently obtained from the Sharia court some validation of his self justification. Orders were made in the Sharia court; Mr. Mostyn says not until August, but certainly he had applied in that jurisdiction within four or five days of the making of the order in wardship.

10. There have been directly conflicting orders in force in both jurisdictions for almost two years now. That is a factor which seems to me to require not only mention but reflection. I can only think that the outcome of the case below is likely to lead to the perpetuation of the litigation mentality, which is of questionable benefit to the adults and which is manifestly and unquestionably harmful to the children. So I think the second and third ingredients of the award are open to argument and consideration by the court.

11. I would on that basis be inclined to grant permission but there is a factor which I have yet to mention. It is the suggestion that the husband, the father, is not entitled to access in this court system until he purges his contempt. It is not an argument which was pursued in front of the judge until an application was made by Mr. Deacon for permission to appeal, when the judge noted the submission but declined to rule on it and said that it should be considered by this court. It is an area of the law that is not by any means clear or, if the statement of the law is clear enough, its application is by no means clear as a matter of practice. It is certainly something that could not be decided with any confidence on a two hour contested permission application.

12. I come finally to the question of mediation. There is surely the need for the parents to step aside from litigation and from the mentality that encourages it, but the practical hurdles in the way to a meeting are no less obvious. Mediation should be here in London. Mediation requires the presence of both parents. Preconditions must necessarily be negotiated, given the fact that the husband will regard himself as being at risk of arrest the moment he sets foot within the jurisdiction. It seems obvious that if he is to come he has to be reassured and safeguarded. It seems obvious that if he is to come he must bring the children with him. Mr. Mostyn says that it must be on the basis that they must be restored to his client's care and control absolutely, save that the husband would have the right to apply in this jurisdiction for an order that he should have care and control and exercise that care and control in Saudi Arabia. Inevitably he will regard that, given particularly the language of judgment of Munby J, as being a risk that he would not contemplate running. Certainly, all Mr. Deacon has been able to say without instructions is that he would no doubt consider or be prepared to consider bringing the children to this jurisdiction for the purpose of contact. It may be that the divide between the parties will not be bridged and that London mediation will not take place, but I would direct that formal letters of invitation are to be addressed to the parties by the officer in charge of the scheme. No further steps are to be taken in the appellate proceedings pending responses to the invitation and pending the outcome of any mediation that is subsequently agreed. Perhaps it is unnecessary to decide much more this afternoon. I do not forget that Mr. Mostyn seeks the discharge of the stay which prevents the wife from enforcing against the residue of the properties that are not already in her charge. That application seems to me to be well founded and should succeed. There may be other areas I have left undone and, if so, no doubt I will be reminded of them. That is the order that I would propose this afternoon.

MR. JUSTICE WALL:

13. I agree. Given the hour I do not propose to add a full judgment of my own. However, I wish to make the point that, looking at the matter from the husband's perspective, it would be an appropriate exercise of the Family Division jurisdiction that, were it to be the case that he arrived in this country with the children, he should be free of the risk at that point of any process of arrest. The most important point, in my view, is to reinstate these children as genuinely international children, as they have been, so that they can fulfil their Arab and English and international heritages. Certainly, as part of any process of mediation I would envisage the children being here and the Family Division exercising its powers to ensure that they remain here during the period of mediation. The husband at that stage and for that process it should be assumed will not be arrested for his contempt.

14. This is an application for permission. My Lord has fully covered the ground and I am in full agreement with the course he proposes.

Order: Application for permission allowed in relation to paragraphs 1-6 of the order; stay lifted; costs to be costs in the appeal; formal letters of invitation by the ADR to be sent to the parties; no further steps to be taken in the appellate proceedings pending responses to the letters of invitation or until the outcome of such mediation as is agreed; mediation to be in London.

MR. N. MOSTYN Q.C. and MR. N. CUSWORTH (instructed by Messrs Sears Tooth) appeared on behalf of the Applicant.

MR. R. DEACON and MR. F. SIDDIQI (instructed by Birmingham Legal Partnership) appeared on behalf of the Respondent.