

CA on appeal from High Court Family division (Mr Justice Munby) before Thorpe LJ, Mr Justice Wall 5<sup>th</sup> October 2004.

**JUDGMENT : LORD JUSTICE THORPE:**

1. This is the culmination of a case which has received a great deal of publicity. The appeal to this court is from the judgment of Mumby J, which was given on 30 January 2002 and which is reported at [2002] 1 FLR 1053. The effect of Mumby J's order was to transfer to the applicant wife real properties in Europe and the United States with an estimated value of about £13.5 million. In addition, he ordered the payment of arrears of periodical payments, a lump sum of £10 million and what he, perhaps infelicitously, described as a war chest of £2.5 million available for the use of the applicant wife in order to fund further litigation to secure the return of her children from Saudi Arabia.
2. That last provision reflects one of the hallmarks of the history. When the marriage disintegrated the respondent husband took a number of steps in order to secure the future to his own advantage. He took steps to transfer away to nominees the European real properties, and most seriously, he removed the children of the family, then aged approximately 18, 17, 14, 12 and 8, to Saudi Arabia from the South of France in breach of orders made in this jurisdiction in wardship.
3. The consequences of these aggressive steps were predictably dire. The petitioner issued and pursued her rightful claims for ancillary relief in this jurisdiction. She initiated criminal proceedings against the father in the South of France, resulting in his conviction and sentence in absentia for abduction of the children. He countered by cooperating only to a most minimal degree in the ancillary relief proceedings, by obtaining orders to buttress his position in Saudi Arabia and by obtaining fatwas against the wife both in Cairo and in the Lebanon, the country from which the wife originates.
4. The judgment of Mumby J was characteristically robust and trenchant in its language. The headnote to the report in the Family Law Report includes this passage: *"Although the husband's misconduct in abducting the children had been very grave and properly tended to increase the award to which the wife was entitled, it was not the very worst kind of conduct and did not drive the award to the top of the discretionary bracket."*  
The report continues that the judge nevertheless thought it appropriate to furnish the wife with the so-called war chest.
5. Under those circumstance an application for permission to appeal from the husband was hardly unexpected, and the application resulted in a hearing on 26 June 2002 before myself and my Lord, Wall LJ. In granting permission the court referred to the forthright and almost flamboyant language of the judge's condemnation of the husband, and the impression given by the judgment below that there had been little regard paid to the husband's understandable self-justification by reference to his rights under Sharia law and by further reference to the rights he had established for himself in the courts of Saudi Arabia. However the grant of permission was limited to the lump sum of £10 million and the war chest in the sum of £2.5 million. The court declined to grant permission in respect of the enforceable core of the judgment below, namely the transfer to the wife of the real properties.
6. On 26 June we stressed the terrible cost to the family of these bitter litigation battles and urged upon them the greater advantage of endeavouring to resolve all that was in issue by mediation. Accordingly, the court directed that letters of invitation should go to the parties to engage in mediation under the auspices of the Court of Appeal ADR scheme. It is a misfortune that at that date the administration of the Court of Appeal ADR scheme had passed to specialists in the field of commercial litigation, namely CEDR. It is also a misfortune to the parties that after the making of the order of 26 June there was no continuing judicial supervision of the mediation process. The consequences were that the parties were offered an experienced commercial mediator, but one without any experience of family mediation, and the problems inevitably attendant on agreeing the venue and whether the children should be brought to the mediation, led the whole process to founder. Accordingly on 1 August 2003 mediation was formally abandoned and the husband sought to restore his appeal to this court. By that stage he had changed his legal team and was represented by Mr

Timothy Scott QC instructed by Mr Burrell of Davenport Lyons. They have continued to represent him ever since.

7. In the resumed appeal Mr Scott adopted a bolder line than had been taken by his predecessor. He sought to extend the permission to include the enforceable core of the order below, on the basis that the language and discretionary disposition of the judge demonstrated that he had not had a proper regard to the reality that this is essentially a Middle Eastern family and that the father's adoption of the laws and customs of his own country in the crisis of marital breakdown had been almost inevitable.
8. It was on that wider front that the appeal was listed for hearing on 13 May. On the wife's side, Mr Mostyn QC was asserting that the husband's contempt denied him the right to appellate review. Mr Mostyn relied on the well-known principle established in **Hadkinson v Hadkinson**. Accordingly, the embattled position of the parties was even more profound on 13 May 2004 than it had been on 26 June 2002.
9. At an early stage on 13 May we required an explanation as to why the mediation that we had put in train on 26 June 2002 had failed. Once it emerged that responsibility for that failure lay as much with the administration of this court's scheme as with the response of the parties, a fresh endeavour was made to persuade the parties that still the mediation road offered much better prospects, particularly if mistakes learned from the previous endeavour were recognised and steps taken to ensure that they were not repeated.
10. Overnight, between 13 and 14 May, much useful negotiation was done between leading counsel, and on 14 May we were presented with an agreed order for the further adjournment of the appeal and for the arrangement of a London mediation in the summer that would bring the children to London and enable them to be reunited with their mother after an interval of some four and a half years. The mediation was as complex and as difficult as is conceivable in a family dispute. Accordingly, as supervising Lord Justice in family ADR, I took responsibility for the appointment of the mediators. We were fortunate in securing the services of two highly experienced experts who had very special qualities to bring to the task: one of them a retired circuit judge with great experience in family proceedings, the other one of the spiritual leaders of the Moslem community in the United Kingdom.
11. The process of mediation extended between late July and mid-August. During that period there were six days given to mediation. The husband's arrival for the commencement fixed for 23 July had been threatened by the discovery that there was an international arrest warrant out against him, as a consequence of the conviction and sentence in the Tribunal de Grande Instance in Grasse. That threatened to derail the entire process and only through requests to the Ministry in Paris from the Department of Constitution Affairs and requests to Interpol from the President's family lawyer was it possible at the last moment to obtain from the judge in Grasse the temporary suspension of the international arrest warrant. However, that temporary suspension expired with the mediation still short of its essential goal and there was accordingly an interruption whilst the husband returned to Saudi Arabia and a further extension was obtained from the French court. That enabled the resumption of the mediation in early September and the completion of Heads of Agreement on the 7th. It is important to record that the children were themselves contributors to that outcome. They were separately represented by a very experienced London solicitor and I suspect that their contribution to the mediation helped their parents to see the importance of objectivity and of subjugating their own emotional conflict to the welfare of the children.
12. The end, then, of this long story is the presentation to the court today of an agreed order. Its essential terms are contained first of all in three recitals: that the parents will respectively pay the children's living expenses during periods of contact and while the children are living with either of them in term time; the mother will pay school fees and costs in relation to UK education, whilst the father will pay school fees and costs in relation to education outside the United Kingdom; that transport costs in connection with contact will be borne by the parent with whom contact is taking place. These recitals recognise the fundamental terms acknowledged by each parent that the children's rights to a voice in any question affecting their education or their place of residence must be recognised.

13. Moving then to financial matters, the essential terms of the order are that the limited permission to appeal granted in June 2002 is extended to enable the appeal to be allowed; then to delete from the order below the obligation on the husband to pay the £10 million lump sum, the £2.5 million war chest, the arrears of periodical payment and the accrued interest. The sum total of the liabilities set aside by this order is some £17 million.
14. It is further acknowledged by the wife that she will enter into a settlement of a substantial sum which she will derive from a future sale of the principal former matrimonial home in London. She has also undertaken to enter into a settlement of the villa in France upon herself for life with reversion to the children.
15. There are attendant terms of this consent order which will ensure that the husband and wife together join in seeking the setting aside of the conviction in France and that they together will seek in Saudi Arabia the setting aside of the finding of marital disobedience against the wife as well as the fatwas to which I have referred. Further within 14 days of this order the husband will pronounce a lawful talaq divorce.
16. There are other detailed provisions of this consent order which it is not necessary now to refer to. It is only necessary to stress that this is an outcome which reflects both the generosity and worldly judgment of both parents and also their acknowledgment that the children that they have created are neither pawns nor possessions. It reflects great credit on the legal teams on both sides who have throughout participated in the mediation. It reflects great credit on these highly experienced mediators who have been able to bring this most difficult of cases to final settlement.
17. From the point of view of the Court of Appeal it supports our conviction that there is no case, however conflicted, which is not potentially open to successful mediation, even if mediation has not been attempted or has failed during the trial process. It also demonstrates how vital it is for there to be judicial supervision of the process of mediation. It is not in a difficult family case such as this, enough for the supervising Lord Justice or the Lord Justice directing mediation simply to make the order and thereafter assume that there will be a smooth passage to an initial meeting. The selection of the appropriate mediator in a difficult case is crucial, and the availability of the supervising judge to deal with crisis is equally important, as is well demonstrated in this case by the crisis that developed once the extent of the husband's international jeopardy emerged.
18. In conclusion, it can be said that the availability and importance of mediation at an appellate level has been emphasised by this appeal.
19. **LORD JUSTICE WALL:** I agree.
20. **MR MOSTYN:** Your Lordship when reciting the term of the order did not mention that which is very important for my client, that she will be given a talaq.
21. **LORD JUSTICE THORPE:** Thank you for that reminder. I will put it into the transcript.

MR TIMOTHY SCOTT QC (instructed by Davenport Lyons, London) appeared on behalf of the Appellant

MR NICHOLAS MOSTYN QC AND MS REBECCA CAREWPOLE (instructed by Messrs Sears Tooth, London) appeared on behalf of the Respondent