CA on appeal from the Croydon County Court (His Honour Judge Coningsby QC) before Ward LJ, Keene LJ. 18th March 2002

JUDGMENT : LORD JUSTICE WARD:

1. On 31st May 2001 His Honour Judge Coningsby QC, sitting in the Croydon County Court, made (among others) the following orders:

   "(1) Upon the mother supplying the father today with the addresses of the children's school and having previously given the residential address of the children, the father's application under the Family Law Act 1996, section 33, is dismissed.

   (2) Upon the father's indication of a wish to appeal against the order of District Judge Fink dated 3rd August 2000 dismissing his application for an occupation order under the Family Law Act 1996 and against the order of District Judge Parker dated 10th May 2001 dismissing his further application for ancillary relief (by way of an order of transfer of tenancy), the court treats the father as making an application for permission to appeal and each of those applications is now dismissed.

   (3) Upon the father's application for a residence order in respect of the three children, that application is dismissed as having no realistic chance of success."

2. On 5th November 2001 I heard the father in person seeking permission to appeal against those orders. On the information available to me at the time, I was inclined to dismiss his application for permission to appeal against paragraph (1) of that order, but I directed that the other applications be heard on notice. They come before us in that way today and on this occasion both parties are in person.

3. In the midst of deep muddle, there is one point of practice of importance to the profession and to the judiciary. But first let me sketch out shortly and as best I can some of the confused history of these proceedings. It is a regrettable fact - a deplorable fact, perhaps - that this is the fifty-ninth time these parties have been before the courts. It was because of this proliferation of litigation that I urged them to use the Court's mediation service to endeavour to compromise their difficulties. But Mrs Egbaiyelo has refused to do so. Whether she has good reason or none, I know not; but, having seen the two of them today, I can readily understand that the prospects of mediation of these parties' differences is absolutely negligible. It is therefore a case which, unhappily, the court has to grapple with, but grapple with fully and properly in order to resolve matters once and for all.

4. They married in 1984. There are three children - three boys: the eldest is nearly 17; the second boy is twelve and a half, and the third child is eight. They lived in a council house or flat at 22 Wesley Close, London SE17, which is a three or four bedroomed property. The wife (as I shall call her) became the tenant of that property in 1991. In the disputes which have arisen the property has become the subject of innumerable applications by both of them for occupation orders under the Family Law Act 1996. At least one of those matters came to this Court.

5. There were, however, also divorce proceedings, which resulted in a decree absolute of divorce being pronounced on 12th October 1999. Following those divorce proceedings there were ancillary relief applications made, perhaps by both of them. They were listed for an FDR appointment. Nevertheless, on 3rd August 2000 District Judge Fink made an order in these terms:

   "Upon hearing counsel for the petitioner and upon hearing the respondent in person
   It is ordered that
   (1) Order as draft annexed hereto.
   (2) Leave to appeal refused.
   (3) Vacate first appointment for 7 November 2000, both parties' claims for ancillary relief having been disposed of at today's hearing.
   (4) Vacate any hearing fixed for the respondent's application for occupation and non-molestation orders, the husband having agreed there have been no acts of violence since the last adjudication was made."

6. The draft order, which the judge approved, looks as if it was drafted by counsel for the wife. It ordered that the husband had no right of occupation over the former matrimonial home at 22 Wesley Close, London SE17. It directed payment of nominal periodical payments at five pence per annum until the youngest child attained the age of 17 years or the petitioner's remarriage or further order.

The third order was: *"All the respondent's [the husband's] deemed claims against the petitioner for property transfer orders, lump sums, financial provision and pension provision are dismissed and he shall not be entitled to make any further applications in relation to this marriage."*

7. The fourth order was: *"The petitioner's claims for property adjustment orders, lump sum provision and pension provision shall be dismissed."*

8. There was likewise a dismissal of claims under the Inheritance (Provision for Family and Dependants) Act 1975.

9. In the bundle of documents which is before us there is a schedule of assets and income, which again it would seem was prepared by counsel for the wife. Her property was described in these terms:
"(1) Tenancy agreement in the name of petitioner (maiden name) dated 2.12.91 for 22 Wesley House, Newington Estate, London SE17 (4 bed house).
(2) No other assets declared."

10. Her income was then set out.

11. As a result of the discussions we have had today, Mrs Egbaiyelo has told us that she in fact bought the freehold of that property on 1st April 2000. On that basis, therefore, at the time District Judge Fink appears to have dealt with the ancillary relief matters on 3rd August 2000 it seems that he was dealing with matters under a misapprehension of the true facts. Whether the true facts would eventually make any difference is not for us to judge at this stage.

12. It is clear that he thought that would be the end of the matter; but he reckoned without the resilience of the parties to litigate. On 9th May 2001 it would seem that the husband applied, by notice of an application for ancillary relief, to seek a property adjustment order in respect of 22 Wesley Close, London SE17. I have not been able to trace whether or not there was an affidavit in support in the papers before us. It may not much matter.

13. That application probably came before District Judge Parker on 10th May 2001, when he heard the respondent husband in person, the petitioner having no notice of the hearing. He ordered, not surprisingly:
"1 .Upon noting that the [respondent's] application for ancillary relief was dismissed by order of District Judge Fink of 3 August 2000, present application for ancillary relief be struck out.
2. The balance of the application under the Children Act 1989 and the Family Law Act 1986 be adjourned to 31 May 2001 ..."

14. The husband then applied to Judge Coningsby. Judge Coningsby dealt with the matter in a summary way. We do not have a full transcript of what occurred, but we have a note prepared by counsel for the wife. It records a discussion between the judge and the husband; 13 observations between them are recorded. In the course of the discussion the judge stated that he could not deal with matters which had gone to the Court of Appeal. Of course, that would be right, but I understand those matters which went to the Court of Appeal to have been relating to the occupation of the property and the order made at one time by District Judge Freeborough on 10th August 1999 and an appeal from that heard by His Honour Judge William Barnett QC on 3rd February 2000. Permission to appeal those orders was apparently refused by this Court on 11th April 2000, but I have no more information about it than that. The judge went on to say to the husband, in the first exchange he had with him, that he would have to appeal against District Judge Fink's order of 3rd August relating to ancillary relief. That may have been correct; it probably was. I note, as a point of detail only, that when the order came to be drawn District Judge Fink's order is described as an application for an occupation order under the Family Law Act. I do not understand it to have been that: it was at least in part the hearing of the claims for ancillary relief, as the judge correctly identified in that exchange.

15. The judge dealt with the outstanding application for residence by saying simply, *"I am dismissing the residence application."* He added this: *"I am treating the husband's submission with regard to the occupation orders as an application for permission to appeal the order of 10th May 2001 relating to ancillary relief and I refuse permission to appeal."*

16. The judgment he gave was very short. He said only this, as noted by counsel (a note not approved by the judge and it may therefore be inaccurate): *"The exact circumstances of the husband's living arrangements are not clear. He wants an order so that the local authority will provide him with accommodation. I cannot make any order because I have no jurisdiction with regard to homeless legislation. This is dealt with by the Housing Department and is not under the control of the court, save for the appeal procedure. I have no jurisdiction to entertain the husband's application."*

17. He made the orders accordingly.

18. As I have begun to understand the complicated factual background to this dispute, it can be summarised in this way. The mother and former wife some years ago established a home for herself in Cambridge because her work had taken her there. It would seem that at one time she was living at an address in Mowbray Road in Cambridge. Her name appears on the register of electors for that address. She told us today that it became sensible for her (and I see the sense in it) to move the family to Cambridge so that she could be at home to see the children to and from school. The children were therefore entered for schools in Cambridge, the detail of which was given to the father at the hearing before Judge Coningsby. At the hearing before Judge Coningsby it had also been revealed, in a letter dated 24th May 2001, that they were living at Wesley Road; so quite what the position was I do not know. Mrs Egbaiyelo tells us today that she is in fact no longer living at 91 Mowbray Road in Cambridge and that she is unwilling to disclose her whereabouts (and, more importantly, the whereabouts of the children) for fear of being disturbed in her occupation of that property by acts of harassment by the father.

19. The factual position today, therefore, is that the father does not know where his children are living, and the factual basis upon which I dismissed his application is undermined. I propose to revoke the order refusing him permission to apply for the disclosure of the whereabouts of his children and to deal with the matter as if it were fully before us today.

20. If he were able to obtain occupation and, more particularly, obtain the tenancy of Wesley Road or to have what is now a freehold interest in the property transferred to him, then, subject to whatever difficulties there may be in removing the present tenants of that property, he would at least have a home at which he could see his children and offer them staying contact, which, arguably at least, is in their best interests. If he were successful in his application, there is the germ of a case. The judge thought there was no realistic prospect of a residence order. Of course there is not if he has no home to offer the children; but, if he is successful in obtaining some means of getting back to Wesley Road, then his application, in theory at least, is arguable.

21. All of those matters are fraught with difficulty. When the case first came before me I was inclined to say that this was a second appeal and that accordingly this Court ought not to interfere unless there was a compelling reason or some important point of principle or practice arose. I had not at the time at first fully appreciated that, by a quirk of procedure, family proceedings are treated differently from other proceedings. That is a quirk of procedure which is little known and is causing difficulty for this Court because the judges below, understandably, do not appreciate the full implications.

22. So I turn to what is the important point of practice arising in this appeal. In a nutshell, it is this. Whereas there is a requirement for permission to appeal from a district judge's order in order to get an appeal before the county court judge in county court proceedings or the High Court judge in High Court proceedings, that requirement for permission to appeal does not appear to apply to family proceedings. By his order Judge Coningsby, in treating the father's applications as applications for permission to appeal, made an error, if that view is correct, and in the light of that error his judgment cannot stand.

23. Let me try to analyse the position as best I can, bearing in mind that we have not had the benefit of argument from counsel, who may be able to detect flaws in the analysis. The changes to the law begin with the Access to Justice Act 1999. Section 54, "*Permission to appeal*", provides (so far as material):

"(1) Rules of court may provide that any right of appeal to -

(a) a county court,

(b)the High Court, or
(c)the Court of Appeal,
may be exercised only with permission. ...
(3) For the purposes of subsection (1) rules of court may make provision as to -
(a)the classes of case in which a right of appeal may be exercised only with permission,
(b)the court or courts which may give permission for the purposes of this section,
(c)any considerations to be taken into account in deciding whether permission should be given, and
(d)any requirements to be satisfied before permission may be given, and may make different provision for different circumstances.
(4) No appeal may be made against a decision of a court under the section to give or refuse permission (but this subsection does not affect any right under rules of court to make a further application for permission to the same or another court)."

24. I should also read section 55(1) relating to second appeals. *"Where an appeal is made to a county court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that -*
(a)the appeal would raise an important point of principle or practice, or
(b)there is some other compelling reason for the Court of Appeal to hear it."

25. It was because of section 55 that I was at one time inclined to dismiss this application. Fortunately, the efforts of the Court of Appeal Office have lifted the scales of ignorance from my eyes. It now seems to me that when, on 26th April 1999, the Civil Procedure Rules first came into force, the provisions of the County Court Rules and the Rules of the Supreme Court were incorporated as schedules to the CPR and so appeals from district judges continued to be governed by County Court Rule Order 13, rule 1, County Court Rule Order 37 and, in the High Court, by the Rules of the Supreme Court Order 58.

26. On 2nd May 2000 CPR 52 came into force. By CPR 52.3, *"Permission":*
"(1) An appellant or respondent requires permission to appeal -
(a) where the appeal is from a decision of a judge in a county court or the High Court, except where the appeal is against ... [three exceptions are given]
(2) An application for permission to appeal may be made -
(a) to the lower court at the hearing at which the decision to be appealed was made; or
(b) to the appeal court in an appeal notice."
(3) Where the lower court refuses an application for permission to appeal, a further application for permission to appeal may be made to the appeal court.
(4) Where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at a hearing."

27. It then deals with when permission should be granted.

28. One of the fundamental changes brought about by CPR Part 52 is the imposition of the requirement to seek permission to appeal in almost all civil cases heard in the county courts, the High Court and the Court of Appeal. Until Part 52 came into force it was only the Court of Appeal which had the permission to appeal filter. The imposition of that requirement for permission to appeal has the significant consequence that there is no appeal from a decision of the appeal court made at an oral hearing to grant or refuse permission to appeal to that court: see section 54(4) of the Access to Justice Act 1999 and Part 52.3(3) and (4) and the practice direction to Part 52 in paragraph 4.8.

29. The consequence is that, whereas the Court of Appeal itself is bound by Part 52 when dealing with appeals from family proceedings, nonetheless, by virtue of rule 2.1, there is a different regime in the court below. Rule 2.1 provides as follows:
"(1) Subject to paragraph (2), these Rules apply to all proceedings in -
(a) county courts,
(b) the High Court; and
(c) the Civil Division of the Court of Appeal.

(2) These Rules do not apply to proceedings of the kinds specified in the first column of the following table (proceedings for which rules may be made under the enactments specified in the second column) except to the extent that they are applied to those proceedings by another enactment."

30. Family proceedings are listed in the first column and they are governed by the Matrimonial and Family Proceedings Act 1984, section 40. Pursuant to the rules made thereunder, appeals in family proceedings are governed by Family Proceedings Rules 8.1 and 8.1A.

31. To develop the quirk of procedure, the Family Proceedings Rules 1991 contain, in rule 1.3, the provision that:

"(1) Subject to the provisions of these rules and of any enactment the County Court Rules 1981 and the Rules of the Supreme Court ... shall continue to apply, with the necessary modifications, to family proceedings in a county court and the High Court respectively."

32. So, where there is a family proceeding and there is an appeal from the district judge, the old family proceedings route of appeal under rule 8 continues to apply, and the old provisions of the County Court Rules and the Rules of the Supreme Court continue to govern that appeal. There is, therefore, no need to seek permission to appeal from a district judge's order in family proceedings: there is an appeal as of right.

33. An attempt has been made by this Court to harmonise appeals in family proceedings with appeals under the Part 52 route. In **Cordle v Cordle** [2001] EWCA Civ 1791, a judgment of 15th November 2001, this Court suggested that appeals should be decided on Court of Appeal principles, not by the broad exercise of a discretion exercised de novo, as had been established in **Marsh v Marsh** [1993] 1 WLR 744. But subject to that, a party to family proceedings still has, perhaps anomalously, an appeal as of right and he does not need to seek permission to appeal. That is the message which should be known more widely to circuit judges and High Court judges.

34. What, then, is the result of this application? Because the judge gave no reasons at all for dismissing the application for residence, and because it is so closely linked with the applications relating to the former matrimonial home, permission should be given to appeal that and the appeal should be allowed.

35. With regard to the application made for the disclosure of the children's addresses, I revoke my previous order because of the misinformation I had and I would give permission to appeal that and allow that appeal to go back to the judge.

36. On the vexed question of the former matrimonial home, it seems to me that the correct analysis must be that the means of challenge now open to the husband is to appeal (and perhaps he has to seek an extension of time to do so) against the order made by District Judge Fink on 3rd August 2000. **Barder v Barder [**1988] AC 20 may apply. Judge Fink made an order in ancillary relief proceedings. That dismissed all his applications for a transfer of property. Unless that dismissal is set aside, the court will have no jurisdiction to interfere with the interest in the former matrimonial home at Wesley Close. He must, therefore, have that order set aside. If he does, then the order of District Judge Parker stands or falls with it. But those matters have not been properly considered by the judge and they must go back for full consideration on the merits.

37. I cannot conclude without stating how much I view these proceedings with despair. When the case goes back it will be for the sixtieth time. There are bound to be innumerable applications for directions. But I hope that the court will finally give these parties a full opportunity to ventilate the differences between them, both with respect to the home and the children, so that, in so far as finality is possible in family proceedings at all, there will be finality after a full investigation of the facts. The father should not think that, because we have sent it back for rehearing, he is bound to succeed. I can see formidable difficulties in his way, but I can see arguments in favour of both parties. Unfortunately, the matter has to be looked at. I hope it will be looked at fully and that the parties have ample opportunity to present their cases. If they are able to be represented, it would be a huge advantage to the judge and I do hope that each of them makes a determined effort to obtain proper advice because,

courteously though they have presented their submissions to us today, they are in no position fully to present the arguments which this complicated web of muddle now calls to be unravelled.

38. I would allow the appeals against the order of Judge Coningsby and remit the matter back for rehearing.

39. **LORD JUSTICE KEENE**:I agree.

Order: appeals against order of Judge Coningsby allowed and matter remitted back for rehearing.

The Applicant Respondent Mr Egbaiyelo appeared in person.
The Respondent Petitioner Mrs Egbaiyelo appeared in person.