CA on appeal from the Family Division (Mr Justice Sumner) before Ward LJ. 16th September 2003

JUDGMENT : LORD JUSTICE WARD:

1. This is an utterly depressing application which fills me with horror, gloom and despondency. It is an application for permission to appeal the order made by Sumner J on 12th November 2002 when his Lordship ordered that the applicant before me, Mr G, pay £2,500 towards the costs of the respondent in this appeal, Miss K, and £90 of the costs of her attendance before Sumner J that day. Those costs arise out of proceedings which were heard by Sumner J, principally on 26th June 2001, following the removal of the child of these parties from the mother's care on the Friday afternoon of 22nd June. The baby was then only two weeks old. There are undoubtedly huge areas of dispute as to the circumstances in which the child was removed, suffice it to say that the mother eventually instructed solicitors late in the day -- perhaps even in the evening -- and, as I try to piece the facts together, I am assuming that the matter was first heard by Sumner J, as the out of hours applications judge, on that Friday evening.

2. The child was returned shortly before 11 p.m. on that Friday, 22nd June, and the matter came back before the judge on 26th, I assume as the return date of that application. I have a transcript of what took place on 26th June. The baby having been returned, it seems from reading the transcript that there was no application for further relief against the father by way of injunctions. There was, however, a discussion about contact, which was satisfactorily resolved, and contact arrangements were made.

3. At the conclusion of that hearing counsel for the mother sought an order for her costs. The judge observed that if he had to rule on that he would have to know more about the facts and to make certain findings on those facts. He said that more than once. When pressed by counsel, the father seems, on page 16 of the transcript, to have acknowledged that he behaved stupidly. It was not, however, sufficient for the judge there and then to make an order, and so he directed on that occasion that:

   "5. The applicant's solicitors shall serve upon the respondent a Schedule of Costs and a statement setting out the grounds upon which the applicant relies in her application for costs to date by 3rd July 2001. The respondent shall serve his reply to the Schedule and Grounds by 10th July 2001. The applicant shall have liberty to make an application for costs before Mr Justice Sumner on the basis of the Statement and Reply."

4. It is the applicant's case that he heard nothing more about the matter until informed by his bank, shortly before Christmas 2002, that his bank account had been frozen. Why I do not know: the terms of a freezing order are not before me. It appears that as a result of that order he may have been unable to pay his rent. Why there is no provision to make allowance for his ordinary living expenses, again, I simply do not know because the papers are not before me. He learnt that he had to attend the Croydon County Court, being the court to which Sumner J had transferred the matter on 25th February. Then he learnt that the costs order had been made against him on 12th November. He says he had no notice of the hearing before Sumner J on 12th November.

5. I have a short transcript of what took place there. The mother was in person. She is a qualified solicitor. She presented her own case and persuaded the judge to make the order I have recited. Why the judge did not deal with the matter on paper, I do not know. There is an issue between the parties as to whether or not her solicitors sent, as she says they sent, the schedule of costs and the grounds upon which she relied. According to papers placed before me copy documents were sent to Mr G care of his solicitors, who may or may not have been acting for him, and also to three other addresses. There is an issue as to whether or not he received them. There is, as I have said, an issue as to whether or not he received notice of the hearing on 12th November.

6. Mr G immediately set about trying to have the order of 12th November set aside. He says he encountered difficulties with conflicting advice as to the procedure. That may not be a surprise since the procedure is notoriously complicated. Be that as it may, it appears, but not clearly, from my papers that the application for permission was not actually made until 19th May, which is out of time. So he has a hurdle to overcome in explaining his delay, but, given the difficulties that a litigant in

person might experience and given some evidence that he was steadfastly trying to work his way through the procedural labyrinth, the court may find it possible to extend time.

7. What happens then? If the matter is to come before this court, this court will have to deal first with a conflict of evidence as to whether or not the various schedules ever were duly and properly served and, secondly, whether or not he was given notice of the hearing of 12th November. This court may not undertake that inquiry itself -- it is his word against Miss K's word -- and it may be that this court would have to send the matter back to the High Court for those factors to be resolved and then for the judge to engage in such factual inquiry as he thought might be necessary. For example, it may be necessary for the judge, if it goes back to him, to consider whether or not the hearing of 26th June was strictly necessary, given that the baby had been returned and assuming that no other substantive relief was being claimed on 26th June. The judge may have to give closer attention to the costs schedule, where it may be that upon closer examination there is a degree of duplication of expense. I must confess that £2,000 of costs for a simple application of this kind is a figure which fills me with the gloom and despondency I mentioned at the beginning of this judgment. All of that will take time. All of that will incur further costs.

8. There is great force in the written submissions of Miss K that the exercise is disproportionate. There is much with which the court can sympathise in her cri de coeur that, as she says in the skeleton argument, it is not in the interests of herself or the children that this litigation should be so protracted. In a letter placed before me today dated 10th July 2000 written by Miss K to Mr G she encloses the costs schedule and suggests that he makes an offer to avoid the need for further protracted litigation. That this matter should be compromised I have no doubt whatsoever. It is an utter waste of the court's time, an utter waste of the parties' time and an utter waste of the costs that will be involved. But, says Mr G, justice must also be done. It may have to be done at considerable cost to one or both of these parties, if they are foolish enough to continue to embark upon this rather silly litigation. The only thing I can fairly do, in the circumstances, is to adjourn this matter to be heard on notice to the respondent and for her to attend at the resumed hearing.

9. I now have this difficult decision to make. I urge these parties to be sensible and to come to some agreement. It may be that there has to be give and take. It may be, though he will hate to hear it, that Mr G has to pay some amount of costs, at least perhaps in respect of the costs that were involved on that Friday evening. Whether the amount is excessive, as claimed, is a matter which will be the subject of debate. But, as Miss K as a practising solicitor will understand, costs would be standard costs, not indemnity costs, and she has to establish the reasonableness of those charges. The costs of the hearing of 26th may or may not have been necessarily incurred. It may or may not be a point on which further compromise can be reached. If the parties were sensible, they could conduct that negotiation themselves. Such is the bad blood, I doubt whether that is possible.

10. Therefore what I shall direct is that if either the applicant, Mr G, or the respondent, Miss K, request that this matter be referred to mediation using this court's Alternative Dispute Resolution Service, then I direct that it shall be referred to mediation; and, if the other party fails to participate without a good reason, that may be a reason why this court will exact a penalty of costs against the recalcitrant party for failing to co-operate and by wasting this court's time. Unfortunately, they may have to pay for the privilege of that mediation. If they can arrange it more accessibly and at a lesser cost, then that is a matter for them to consider. But my order is that the application for permission is adjourned to be heard on notice to the respondent and that if either the applicant or the respondent request a reference to the court's ADR Service then I direct that such mediation take place.

11. There will be a stay on the proceedings in the meanwhile, and the matter must come back, listed for the appeal to follow, before a two-man court of which I shall be one member. If we have to deal with it again, and I hope I will not, we will deal with it once and for all.

Order: Application adjourned as above. A copy of the transcript of the judgment is to be supplied to the Applicant and the Respondent at public expense. Time estimate for the adjourned hearing: one hour.

The Applicant appeared in person assisted by his sister Ms S.
The Respondent did not appear and was unrepresented.