Neutral Citation Number: [2006] EWCA Civ 1190

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HIS HONOUR JUDGE MURDOCH QC
CANTERBURY COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

18/08/2006

B e f o r e :

LORD JUSTICE THORPE
LORD JUSTICE WALL

In the matter of S (Children)

Mr Martin Frank Stringer – present but not represented **Mr P Hepher (instructed by William Simmonds of CAFCASS Legal) as Counsel's Advocate to the Court**	**Appellant**

In the matter of E (A child)

Mr C Wall (instructed by Vivian Thomas & Jervis)	**For the Appellant**
Mr P Hepher (instructed by William Simmons on behalf of CAFCASS Legal) as Counsel's Advocate to the Court	
Mr Armstrong (instructed by Max Barford & Co)	**For the Respondent**

Hearing date : 18th July 2006

HTML VERSION OF JUDGMENT

Lord Justice Wall :

This is the judgment of the court

Introduction

1. These two applications for permission to appeal were heard together. They are both concerned with the questions the court has to consider when a party who is the subject of an order made under section 91(14) of the Children Act 1989 (a section 91(14) order) makes an application for permission to seek relief under the Act during the period in which the section 91(14) order is in force. For ease of reference we refer to such an application throughout this judgment as "an application for permission to apply", and all the references in this judgment to "the Act" are to the Children Act 1989.

2. Three principal points arise. The first can be succinctly stated in the following terms: -

> Is it permissible for the court, when making a section 91(14) order), to impose conditions on the order, restricting or otherwise identifying the circumstances in which an application for permission to apply can be made, and / or specifying the evidence which the applicant must obtain before such an application will be entertained?

3. In our judgment, and for the reasons set out below, the clear and simple answer to that question is "no".

4. The second point is more complex, and relates both to the evidence which is required for an application for permission to apply, and the manner in which such an application needs to be made.

5. The third question relates to the circumstances in which it is appropriate to make a section 91(14) order without limit of time (as happened in the first of the two cases before us), alternatively expressed to extend until the 16th birthday of the child in question (as happened in the second).

6. A third application for permission, which we had hoped to list at the same time, raised the question of a section 91(14) order expressed to last until the child concerned attained his or her majority. Unfortunately, the applicant for permission in that case did not pursue it in time for it to be listed with the current applications.

7. When listing the two applications for hearing together, Wall LJ invited CAFCASS Legal to assist by appointing an advocate to the court. We are extremely grateful to CAFCASS Legal and to Mr. Paul Hepher of counsel for the comprehensive and clear assistance they provided.

8. This judgment will follow the following structure. We shall firstly set out the facts relating to each application, the order made and the nature of the challenge to it. We shall then examine the arguments advanced by the advocate to the court both in general and with reference to each application. We shall then examine the arguments of the respondent in the first application, before stating our conclusions.

The nature of the case in the first application

9. In the first application, Christopher John Everett is the father of a child, C-W, who is now aged 9. He seeks permission to appeal against an order made by His Honour Judge Murdoch QC sitting in the Canterbury County Court on 10 May 2006. Mr E was the subject of a section 91(14) order made without limit of time by His Honour Judge Hargrove QC on 2 October 2001. Judge Murdoch refused Mr E's application for permission to apply for a contact order relating to his daughter, C-W, who was 4 when the section 91(14) order was made. He also refused an application made on Mr E's behalf for his application to be adjourned to enable relevant psychiatric / psychological evidence to be obtained; and he further refused Mr E's application for permission to appeal.

The facts in the first application

10. The essential background to the first application is that C-W's parents had a short relationship which started in early 1996 and ended in early 1998. In December 1996, when C-W was born, her mother, Allison Kemsley, was married to, but separated from, another man, by whom she had a daughter, C, born in 1994. It was common ground that Mr E had a significant involvement in C-W's life from her birth until about August 1999, although there were issues both as to the extent to which the parties lived together, and as to the nature of their relationship.

11. Contact ceased in August 1999 after Mrs. Kemsley had alleged that Mr E was violent to her. In November 1999, Mr E made an application for contact and for parental responsibility, and there followed a series of hearings before His Honour Judge Hargrove QC in the course of which Mr E was initially granted both parental responsibility and interim fortnightly supervised contact in a contact centre supervised and / or overseen by a consultant psychologist, Brendan Clowry, who had been appointed by the court on 21 December 1999 to make a psychological assessment of Mr E. Mr. Clowry filed a total of four reports in the proceedings, which moved from general optimism that a relationship between Mr E and C–W could be maintained to a final report dated 22 November 2000, shortly preceding the substantive hearing before Judge Hargrove on 28 to 30 November 2000, in which Mr. Clowry concluded that direct contact was contra-indicated.

12. The substantive hearing before Judge Hargrove in November 2000 is of pivotal importance, as the judge made a number of significant findings of fact adverse to Mr E. In particular, he found that on an occasion in January 1998 Mr E had raped Mrs. Kemsley, an allegation which the judge found proved notwithstanding the absence of any evidence of contemporaneous complaint by Mrs. Kemsley and notwithstanding the fact that thereafter Mr E continued both to stay with her on occasions and to have regular contact with C-W.

13. Generally speaking, Judge Hargrove preferred Mrs. Kemsley's evidence to that of Mr E on all points where they differed, although he concluded that she was "woolly on dates"; and, in summary, that she had failed to give full expression to Mr E's unacceptable behaviour. Thus, as the judge put it: -

> "The events of the period when the father would come to the house at periods of day and night, drunk, abusive and controlling must have been traumatic, and I have no doubt that she has tried to shut these matters out of her mind. To show the extent to which that must have shocked her, there was at least one occasion (I accept it occurred) when the father deliberately urinated over her."

14. The judge formed a very favourable impression of Mrs. Kemsley. He said of her:

> "One thread to be found throughout the mother's approach is that she was desperately anxious, whatever the cost to herself, that her child should have a father and the result of that was that she was willing to put up with the type of behaviour, the type of abuse that most people would have regarded as outrageous. But it did not seem to her outrageous, if she was making that sacrifice for the child. She was also anxious that the father should get himself stabilised and get himself on his feet. Indeed, she made a fairly substantial loan to him which was never repaid, to assist him financially. "

15. The judge's impression of Mr E was correspondingly unfavourable. It is summarised in the following sentence from the judgment: -

> "His evidence and the manner in which he gave it, corroborated the mother's account that he was an aggressive and controlling individual whose moods fluctuated wildly, who was unable to see beyond his own demands and quite impervious to any counter suggestion that he might be wrong."

16. There was a particular incident which impressed the judge. Mr E was due to have a period of contact observed by Mr. Clowry on 16 September 2000. It was at a time of a national petrol shortage, and Mr. Clowry telephoned Mr E to cancel the contact on the basis that Mr. Clowry had no petrol and could not get to the contact. The judge found that Mr E "berated him in an uncontrolled manner" and then, expressly disregarding Mr. Clowry's warning, took a can of petrol to Mrs. Kemsely's address, in order to prove that she could get petrol. As the judge found: "He demanded that the mother should tell Mr. Clowry that she had kept contact even if Mr. Clowry was not there".

17. At the time, Mrs. Kemsley believed that Mr E did not know where she was living, so his appearance on her doorstep with a can of petrol greatly distressed her. The judge regarded this incident as an example of Mr E being -

> "….. unable to put the protection of the child above his demands. He well knew that his arrival at the mother's safehouse would cause her distress. That distress was part of getting the mother to do what he wanted. It proves precisely what the mother had been saying all along. The father says that he now regrets this. His demeanour, whilst giving evidence, was far from reassuring on that point. The reason why he says he has learned his lesson is that he is now being prevented from seeing the child, in other words because he is not getting what he wants."

18. The reference to the father's lack of regret for the petrol can incident is significant, as is the judge's acceptance of Mr. Clowry's evidence. Prior to the substantive hearing, Mr E had in fact obtained a further psychological report from a Mr. Samuel Baeza,

whom he had elected not to call, and on whose report he did not rely. We express some surprise that the judge did not call for Mr. Baeza's report, but he appears not to have done so. It is, however, in our papers. Mr. Baeza agreed with Mr. Clowry's analysis, and took the view that Mr E suffered from a borderline personality disorder.

19. The consequence of Mr E's advisers' decision not to call Dr. Baeza, however, was that, as the judge put it, Mr. Clowry's evidence "(stood) alone". The judge quotes extensively from Mr. Clowry's final report, in which the latter concluded: -

> "In addition to the above, further investigations and consultations provide evidence to support the view that there are a number of ways Mr E is out of touch with reality and experiences distortions of perceptions of thinking. It appears that he creates a web of fantasy and wishful thinking to justify and validate his view of the world. His primary concern seems very much to be himself and his own needs and he has consistently shown that he will not conform to the rules which others are governed by. Somehow there is all some justification for the rules to be broken or a lack of acceptance that they apply to him as well as to other people. There have been clear indications that he finds it very difficult to tolerate frustration and is driven to try to control those he perceives as weaker than himself. Thus, I remain of the opinion that any direct contact between C-W and her father would almost inevitably result in giving rise to significant psychological harm and is therefore strongly contraindicated."

20. The judge's conclusion on contact was expressed in robust terms. Basing himself on Mr. Clowry's evidence, he stated: -

> "The child is entitled to a degree of stability and peace in her life in order to enjoy her youth. If she is to be manipulated and to be the subject of an obsession, her life will become distorted and unhappy. The child is still very young but she will, in the near future, undergo the changes needed partially because of education and possibly also because of the presence of a stepfather. There is, in my view, the prospect of serious harm should this child have direct contact with her father and who is incapable, unlike the mother, of meeting the child's needs to be regarded as a person to be protected rather than as the father indicates as a prop for the father's seriously damaged personality."

21. In the result, the judge made an order for indirect contact only. Mrs. Kemsley undertook to supply Mr E with annual reports on C-W's education and general well-being: Mr E gave a number of undertakings, including not to attend as Mrs. Kemsley's address or C-W's school. He had previously given undertakings against molestation, which were continued.

22. On 13 March 2001, Mr E's application for permission to appeal against Judge Hargrove's order was refused by Thorpe LJ, who commented that had he been trying the case in the county court he "might well have opted for another sustained try at direct contact using whatever local resources were available to improve the prospects of success". He could not, however, say that Judge Hargrove's "more draconian outcome" was beyond his discretionary ambit.

23. It is to be noted that, for the purposes of the application for permission made to Thorpe LJ, Mr E had been to see a consultant psychiatrist, a Dr. Hamdi, who had made a report, which concluded with the opinion that Dr Hamdi did not perceive a need for Mr E to undergo any form of treatment, or to take any medication.

24. There can, unfortunately, be no doubt that following the order on 30 November 2000, Mr E's behaviour towards Mrs. Kemsley deteriorated still further. Only a few days later, on 4 December 2000 he made an application for direct contact, and on 5 April 2001, he issued an application in the county court for a prohibited steps order designed to prevent Mrs. Kemsley bringing C-W into contact with her boyfriend.

25. Mrs. Kemsley's response, on 11 May 2001, was to issue an application to discharge the interim contact order. On 16 July 2001, on a committal summons issued by Mrs. Kemsley, Mr E was found guilty by Judge Hargrove of seven breaches of his undertakings given on 30 November 2000, and was given a suspended sentence of 21 days imprisonment on condition that he complied thenceforth with the undertakings.

26. We have a transcript of Judge Hargrove's judgment given on 16 July 2001. Mr E was in person. The judge examined his explanations for his conduct with great care, and concluded: -

> "I regret to say that the father has obviously become totally obsessed with what he regards as, first of all, the wrongness of the decision of 30 November 2000 and the failures of the Courts of Appeal (sic) to give him any relief from it, and the perjury, as he sees it, of the mother, and the damage to his good name. He has totally ceased to have any idea by normal standards that what he was doing is damaging, and will put the mother in fear, if his story is correct. I regret to say, I think this is a deliberate planned effort by the father to intimidate the mother."

27. The judge thus concluded to the criminal standard of proof that Mr E was in contempt of court. On 22 August 2001, Mrs Kemsley applied to discharge the order for parental responsibility. On 2 October 2001, there was a further substantive hearing before Judge Hargrove, at which Mr E's applications for direct contact and for a prohibited steps order were dismissed. The indirect contact order made on 30 November 2000, and the order giving Mr E parental responsibility, made on 18 April 2000, were both discharged, and the judge made the section 91(14) order, unlimited in time, which is at the heart of the current application. The judge also made a number of non-molestation orders against Mr E.

28. Most unfortunately, we do not have a transcript or even a note of the judgment given by Judge Hargrove on 2 October 2001. However, on 5 April 2002, Mr E was found to have been in breach of the orders made by Judge Hargrove, and was sentenced to 21 days imprisonment by His Honour Judge Hollis. The previous suspended sentence was activated and ran concurrently.

The application for permission to apply

29. Nothing happened thereafter until Mr E issued his current application for permission to apply for a contact order on 13 September 2005. Directions were given by a district

judge on 20 September 2005, and in due course the application came before His Honour Judge Murdoch on 10 May 2006.

30. The father's case was set out in a statement dated 10 October 2005. In a nutshell, it was that everything had changed. He had married. He now had a daughter of nine weeks. He had moved well away from the area in which the mother lived. He now lived in Cornwall. He had tried to make a new start from himself. He had had time to reflect. However, he felt he was still the father of C-W and wished to know how she was progressing. In paragraphs 20 and 21 of that statement he said: -

> "20. I understand in the past that I may have been brash but I have now realised that this must be a softly softly approach to re-establish contact."
>
> 21. I am not asking for contact just to be re-instated, as I know that I will need to prove myself to the court that I am a reliable person.

31. Mrs Kemsley's statement in response, which is dated 5 April 2006, raised the question of Mr E's mental health and referred back to the reports of Mr. Clowry and Mr Baeza. She argued that there was nothing within Mr E's statement which showed that he had changed in any way since the previous orders.

The hearing before Judge Murdoch

32. We have a transcript of the hearing before Judge Murdoch. No oral evidence was called. Mr. Christopher Wall, for Mr E, put the matter to the judge on the basis of Mr E's statement, and on the basis that a line should be drawn under the previous proceedings.

33. Mr. Wall took the judge through the previous history of the case. He thought his client would accept that he had, on occasions, acted "foolishly". His passion to see his daughter had perhaps overcome him.

34. Mr. Wall also pointed out that there was no transcript of Judge Hargrove's judgment on 2 October 2001, the occasion he had imposed the section 91(14) order. His main theme, however, was that the father had caused no trouble since 2002; that he had changed and settled down. He had a job and was living in a different part of the country.

35. Mr. Wall argued that the test for the judge to apply was that enunciated by Thorpe LJ in ***Re A (Application for Leave)*** [1998] 1 FLR 1 (***Re A***) at 4D-E, namely; "does the application demonstrate that there is any need for renewed judicial investigation?"

36. Mrs Kemsley's opposition was based on Mr E's behaviour, as found by Judge Hargrove and Judge Hollis. There was no evidence that anything had changed. The events of 1999 to 2002 had been glossed over. There was no evidence to contradict the fact that in the previous proceedings the father had been found to have suffered from a personality disorder.

Judge Murdoch's judgment

37. Having reviewed the history, and in particular the four reports of Mr. Clowry, the findings of Judge Hargrove and the committal order made by Judge Hollis, the judge summarised the submissions which had been made to him, and concluded his judgment in the following terms:

> "The issue before me must be addressed on the basis of this test: Does the material before the court today demonstrate the need for a renewed judicial investigation? That is the way the matter has been put before me by Miss Topping. I do not think it is seriously disputed by Mr Wall although he also refers to the test as being whether there is an arguable case. I certainly very much take on board that it is not for the father to show that there is some reasonable likelihood of success before he should be allowed to have permission to make an application for a contact order.
>
> The way in which the matter is put by Miss Topping on behalf of the mother is that when one looks at the father's statement it, in a very clear way, demonstrates that the approach by the father to his understanding of the difficulties he caused in 2000 and in 2001 has not changed at all. Although there has been a lapse of in excess of four years with no contact from the father to the mother, the father is still approaching matters on the basis that they are really the mother's fault. There is no indication either that the father's personality characteristics have changed or indeed that he has sought any kind of treatment in relation to what was seen as his personality difficulties by Mr Clowry and accepted as such by His Honour Judge Hargrove.
>
> The court must have regard to whether the fact that the father is now married and has another child alters the way in which the matter should now be considered so that those changes create a need for a further and renewed judicial investigation. Mr Wall says that the fact that these matters have occurred, the birth of the child and the marriage, taken together with the absence of any contact over a period of four years, is enough to warrant a further judicial investigation. And, of course, Mr Wall relies and heavily relies on the general principle as to the benefits for a child of having a relationship with a father and relies on the general principle that even where direct contact is not possible that it is generally at least not contrary to the interests of a child to have indirect contact.
>
> It seems to me, however, that this is quite an exceptional case. It is a case in which the father singularly demonstrated over a lengthy period of in the order of two years an obsession and a lack of control which convinced Mr Clowry and equally convinced His Honour Judge Hargrove that future contact between the father and C-W was contrary to her interests.
>
> I am satisfied that the full circumstances of this case are such that it would require considerably more than the matters which have been brought before the court by the father at this time to justify imposing upon the mother and the child a renewed judicial investigation. I have regard to what His Honour Judge Hargrove said in his judgment in November 2000 ….

38. The judge then cited extensively from Judge Hargrove's judgment and concluded: -

> His remarks in that judgment were directed to direct contact but they were extended, it seems clear from the order he subsequently made, to indirect

contact in view of the way in which the order for indirect contact was operated by the father.

It seems to me, therefore, that nothing that has been put before the court at this hearing on behalf of the father justifies the grant of leave to apply for a contact order at this stage and I will refuse the father's application."

The post judgment discussion

39. After Judge Murdoch had given judgment, Mr. Wall sought an indication as to the type of further information which the court would think helpful for an application for permission to apply. The judge suggested "a psychological report by someone who had the whole of the papers available to him or her". Counsel pointed out that, since his client was public funded, such a report could only be forthcoming if ordered by the court. He therefore invited the judge not to dismiss Mr E's application for permission but to adjourn it, and to direct the production of such a report.

40. This application was opposed by counsel for Mrs. Kemsley. She argued that such a report would have no value, as it would be written in a vacuum. Mr. Clowry and Mr. Baeza had formed a clear view of Mr E's mental state. Mr. Wall retorted that if counsel was correct, Mr E had no possibility of proving to the court that he had changed.

41. The judge dealt with this aspect of the case in the following way: -

"Mr Wall, it seems to me that it is not really a proper consideration for this court when considering how to deal with an application to have regard to whether a person is publicly funded or not. What you invite me to do is rather than, as I was proposing to do, dismiss his application on the basis of how it was presented today, instead of adjourn it, really as a device for the father to obtain further evidence to put before the court.

It seems to me that if you had at the start of this application invited me to take that course, that might have carried a little more weight. But for me to do that now I think would be an improper exercise of my discretion which would be based on the consideration that your client is publicly funded. It may be that the father could persuade the Legal Services Commission to fund the making of a fresh application. It may be that the father would be able to, in the course of some fresh application, obtain public funding for a suitable expert to be instructed. But I am not disposed to adjourn this application for the reasons you have suggested.

I am also concerned about how reliable the report would be in the light of what Miss Topping has said in reply. It certainly seems to have been the case that it was only after some time that Mr Clowry was able to form a full impression of the father's personality. So that is a further reason why I am not disposed to adjourn the application and grant the leave that you have requested."

The application in Stringer v Stringer

42. The application for permission to appeal in Mr. Stringer's case reaches this court by a highly unusual route. For reasons which will be apparent, however, I can take the facts quite shortly.

43. On 27 September 2004, His Honour Judge Mitchell, sitting in the Canterbury County Court was due to hear Mr. Stringer's application for residence of / contact with his two children They are JS, a boy born in March 1995 and ES a girl born in December 1998. That hearing was due to be the culmination of lengthy proceedings in relation to the children, during the course of which Mr. Stringer had plainly become wholly disenchanted with the family justice system. Unfortunately, his disenchantment was such that he did not attend the hearing before Judge Mitchell, but rather sought the judge's permission to withdraw his application. The judge duly granted that permission.

44. The judge's view was that everything possible had been done to establish a relationship between Mr. Stringer and his children. A guardian had been appointed in the proceedings, since both parents were acting in person. The guardian had instructed a psychologist, a Dr. William Conn, who had filed a very lengthy report and who had, the judge found, gone out of his way to try to establish a relationship between Mr. Stringer and his children. That it had not been possible to do so was, the judge found, quite clearly due to Mr. Stringer's refusal to engage in the process. Mr. Stringer had, furthermore, been quite unable to see that it was his behaviour which had the potential for causing emotional upset and harm to the children. The judge reached that conclusion with regret, since had Mr. Stringer engaged with the process the judge thought a means could have been found whereby Mr. Stringer could have been assisted, and contact could have taken place and developed.

45. The judge therefore took the view that the only way to protect the welfare of the children was to make a section 91(14) order. In doing so, he said: -

> "These proceedings have been dragging on for five years. These children's lives have been emotionally in turmoil as a result of Mr. Stringer's applications to the court. That they are not maladjusted is really a tribute to the mother and her partner Mr. Piper, because one knows that the sort of behaviour that Mr. Stringer has exhibited cannot be other than detrimental to these children. As I say, it is fortunate that they have the mother's strength of character to protect them from the worst of his excesses.
>
> In those circumstances, I propose to make the order."

46. Had the judgment ceased at this point, we think that Mr. Stringer might well have had some difficulty in attacking the principle behind the exercise of the judge's discretion to make a section 91(14) order. But it does not. The judge continued: -

> "It will bear the attachment that any such application should come before me if practicable. I am well aware that, as a judge, one cannot look to the future but for entirely unforeseen reasons I may not be here. ***I also take the view that that part of the order will recite that really no consideration should be given to it unless there is some form of report from a psychiatrist or a psychologist indicating some progress so far as Mr. Stringer is concerned so that Mr. Stringer will realise when he gets the order that that is what the court has in***

mind and also so that any other judge who might be seized of this matter might realise that that was in the court's mind when the order was made." (emphasis supplied)

47. The section 91(14) order made by the judge thus reads: -

> "The father shall not make any further applications to the court regarding the residence of the children or his contact with the children without leave of the court until the children have reached 16 years of age. Such application will require a psychological or psychiatric report indicating that the author has had sight of the guardian's report dated 17 September 2004 and the report of Dr Conn dated 1 August 2004 and that father has engaged in treatment. The application to be heard by His Honour Judge Mitchell if practicable.
>
> Leave to father to disclose the reports of the guardian dated 17 September 2004 and Dr Conn dated 1 August 2004 to his general practitioner and any ***treating*** psychiatrist or psychologist." (emphasis supplied)

48. Mr. Stringer sought the permission of this court to appeal against Judge Mitchell's order. On 19 July 2005, Black J dismissed his application. Whilst reciting them, she did not address the conditions attached to the section 91(14) order. Mr. Stringer then made a ***Taylor v Lawrence*** [2002] EWCA Civ 90, [2003] QB 528, application which came before Wall LJ on paper on 23 February 2006. He dealt with it by stating that Mr. Stringer could not complain about the bulk of Judge Mitchell's order made on 27 September 2004. Mr. Stringer had sought permission to withdraw his application and it had been granted. Mr. Stringer had not attended the hearing. There was abundant material on which the judge could make most of the orders he had made. Furthermore, Mr. Stringer had made a number of intemperate assertions about the integrity of individual judges and the system generally. Those, in Wall LJ's view served only to damage Mr. Stringer and to reinforce the impression of him conveyed by Judge Mitchell, Dr. Conn and the children's guardian.

49. Wall LJ was, however, troubled about the expressed duration of the section 91(14) order and the conditions which the judge had attached to it. He therefore invited submissions from Mr. Stringer on these points alone, and, since Mr. Stringer was in person, he invited CAFCASS Legal to instruct an advocate to the court to address them. Thus it is that Mr. Stringer's application for permission to appeal against the section 91(14) order comes to this court.

The submissions of the advocate to the court

50. Mr. Hepher firstly and properly reminded us of the terms of Section 91(14):

> On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court.
>
> (It is to be noted that the sub-section uses the word "leave". Following the introduction of the CPR the word "leave" has been superseded by the word

"permission". We will use the word "permission" in this judgment. We do not think there is any difference in meaning or effect between the two words.)

51. There is, of course, a very substantial body of case law in relation to section 91(14) orders. We mean no disrespect to Mr. Hepher's considerable erudition and industry if we refer in any detail only to those authorities and passages from them which seem to us directly relevant to the issues arising in the two applications before the court.

52. Mr Hepher began by reminding us that in ***Re N (Section 91(14) Order)*** [1996] 1 FLR 356 **(*Re N*)** Hale J (as she then was) had stressed the need for any application for permission to apply to be made on notice to the person affected by it. He identified in particular the passage at [1996] 1 FLR 356 at 359, in which she had described the purpose of the order and the permission stage in these terms:

    One of the difficulties with making such an order, however, is that unless the situation as to the precise contact arrangements is spelled out, there may indeed be a necessity to come back to the court. But the object of making such an order is to prevent unnecessary and disruptive applications to the court. It is, therefore, most undesirable in those circumstances that applications for leave pursuant to such a provision, particularly in a case such as this, are made ex parte. It would be much more satisfactory if the applications for leave had to be heard inter partes so that it could be ascertained whether there was a genuine need to invoke the court's assistance in the problem that had arisen".

53. Mr Hepher next referred us to ***Re A***, in which this court was concerned with the test to be applied when the court is considering an application for permission to apply for a section 8 application subsequent to the imposition of a section 91(14) bar. Thorpe LJ identified the test at [1998] 1 FLR 1 at 4:

    It seems to me undesirable to over-complicate the judicial task where a bar has been imposed and where the person restrained seeks leave to move. In that instance, I would favour the simplest of tests. Does this application demonstrate that there is any need for renewed judicial investigation? If yes, then leave should be granted. All that the courts commits itself to thereby is to survey the material presented in the form of statements supporting the form C1 application and probably the contents of a report from the court welfare office. The discretion that a court holds under the Children Act in relation to the conduct of any application relating to a child is so wide as to be almost unfettered. In appropriate cases the application may be determined at a directions appointment if the content of the statements and the court welfare officer's report indicate that the application should go no further. In other words, the grant of leave to apply is not the grant of a right to a full trial."

54. Mr. Hepher also reminded us to the guidelines set out by Butler-Sloss LJ (as she then was) in the leading case of ***Re P (A Minor) (Residence Order: Child's Welfare)*** [2000] Fam 15 (***Re P***). Of the familiar eleven points there identified by way of guidelines, we identify the ninth and the tenth as being of particular relevance to the issues raised in these applications, namely:

    (9) A restriction may be imposed with or without limitation of time.

> (10) The degree of restriction should be proportionate to the harm it is intended to avoid. Therefore the court imposing the restriction should carefully consider the extent of the restriction to be imposed and specify, where appropriate, the type of application to be restrained and the duration of the order.

55. Mr Hepher also relied on the following description of a section 91(14) order given by Butler-Sloss LJ in the same case ([2000] Fam 15 at 38) namely that:

> …. it is a partial restriction in that it does not allow him the right to an immediate inter partes hearing. It thereby protects the other parties and the child from being drawn into the proposed proceedings unless or until a court has ruled that the application should be allowed to proceed. On an application for leave, the applicant must persuade the judge that he has an arguable case with some chance of success. That is not a formidable hurdle to surmount. If the application is hopeless and refused the other parties and the child will have been protected from unnecessary involvement in the proposed proceedings and unwarranted investigations into the present circumstances of the child."

56. Mr. Hepher also referred us to a number of cases in which section 91(14) orders, and the procedure involved in invoking and implementing them had been expanded and developed, and where the court had felt obliged to invoke additional powers not given by the Act. These included ***Harris v Harris; A-G v Harris*** [2001] 2 FLR 895, in which Munby J had felt driven to direct that no party was to commence any proceedings without permission, and that any application for permission was to be filed in only one identified court and was to be dealt with on paper by a Judge of the High Court (Munby J if available), thereby depriving a party making an application to apply of the opportunity for an oral hearing on his application for permission with which the Family Proceedings Rules 1991 r 4.3(2) would otherwise have provided him. Munby J had described this use of his powers arising under the inherent jurisdiction of the court further to ***Grepe v Loam*** (1887) 37 ChD 168, as nothing short of the weapon of last resort where previous 91(14) orders had failed.

57. Mr Hepher further pointed to two cases in which Dame Elizabeth Butler-Sloss P had made the following points: firstly that it was wrong in principle, except in exceptional cases, to place a litigant in person in the position, at short notice, of confronting an order that bars him from dealing with any aspect of the case relating to his children, particularly relating to contact: - see ***In Re C (Prohibition on Further Applications)*** [2002] EWCA Civ 292 (***Re C***); and secondly, in ***Re G (Contempt: Committal)*** [2003] EWCA Civ 489 [2003] 2 FLR 58 (***Re*** G) that such an order should never be imposed without giving all parties a proper opportunity to make submissions. In the latter case, she described the imposition of a section 91(14) order in respect of contact for a 5 year term for a child under 3 as being tantamount permanently to closing the door on direct contact.

58. Mr. Hepher referred us also to ***Re B (Section 91(14) Order: Duration)*** [2003] EWCA Civ 1966 [2004] 1 FLR 871 (***Re B***), a case in which a father was being deprived or inhibited from an ordinary relationship with his child by the determination of the mother. Thorpe LJ was concerned at the overly severe nature of an open ended prohibition, to last for the minority of the child, and the message that relayed. He

concluded at para 16 of the judgment, and in relation to the facts of that case with these words:

> "the prohibition needs, above all, to be compatible with the primary drive and objective of the court to restore the relationship. Compatibility is, in my judgment, best achieved by limiting the section 91(14) prohibition to any application for direct contact and by setting the moratorium at a 2-year duration to enable the bespoke solution of video contact to be given a fair chance to shift attitudes and inhibitions."

59. On the other side of the coin, Mr. Hepher also reminded us that, sitting at first instance in ***A v A (Shared Residence)*** [2004] EWHC 142 (Fam) [2004] 1 FLR 1195, Wall J had made a section 91(14) order by consent designed to last throughout the minorities of the two children concerned. Although the case was primarily concerned with the grant of a shared residence order in complex and protracted proceedings, Wall J had commented on the very flexible nature of the tool and the very wide scope of circumstances in which it could be used. In that case he had concluded that the court had no further role to play, and that the order should reflect the fact that neither party nor the court believed that the parties should resort to it for resolution of any further difficulties.

60. Mr Hepher also referred us to ***In Re S (Contact: Promoting Relationship with Absent Parent)*** [2004] EWCA Civ 18; [2004] 1 FLR 1279 (***Re S***), in which Dame Elizabeth Butler-Sloss P had set aside a one year section 91(14) order on the basis that, whilst recognizing that the trial judge had simply intended for all to have a breathing space, the order was of a draconian nature which should be used with great care and sparingly, and in such circumstances where a breathing space is needed, as per guideline 7 in ***Re P***, in relation to which Dame Elizabeth had said:

> "….. the court will need to be satisfied first, that the facts go beyond the commonly encountered need for a time to settle to a regime ordered by the court and the all too common situation where there is animosity between the adults in dispute or between the local authority and the family and secondly, that there is a serious risk that, without the imposition of the restriction, the child or the primary carers will be subject to unacceptable strain."

61. The most recent relevant decision of this court to which Mr Hepher referred us was ***Re F (Restrictions on Applications)*** [2005] EWCA Civ 499; [2005] 2 FLR 950 (***Re F***). That case concerned a father against whom the mother had secured protection by way of injunctions under Part IV of the Family Law Act 1996 on two separate occasions. Shortly before trial of the proceedings under the Act, the father withdrew his application for direct contact, the CAFCASS officer having recommended that only indirect contact would be appropriate. On the morning of the hearing the mother gave notice that she would be inviting the court to make a section 91(14) order. This was granted in broad terms for a 2 ½ year period.

62. In giving judgment in this court, Thorpe LJ criticized the mother for failing to issue her application for a section 91(14) order in advance supported by evidence: it was procedurally inappropriate for the father, albeit represented, to have only had notice on the morning of the hearing. Counsel for the father sought to attack the grant of the

order as a matter of principle and that it was unnecessarily extensive in area and duration. Thorpe LJ did not consider the 2 ½ years to fall outside what he termed to be the wide discretion vested in the judge. He went on to state at para [12] of his judgment:

> "Manifestly, if circumstances change – and to some extent there have been fresh developments which I will mention briefly in a moment – it is open to Mr. RF at any stage to go to the court and to demonstrate that he has a case which requires judicial investigation."

The advocate to the court's argument on the power to attach conditions to a section 91(14) order

63. Mr Hepher then turned to the power to attach conditions to orders made under the Act. These, he pointed out were contained in section 11(7) of the Act, and not in section 91(14). Section 11(7) provided that: -

> (7) A section 8 order may –
>
> (a) contain directions about how it is to be carried into effect;
>
> (b) impose conditions which must be complied with by any person –
>
> (i) in whose favour the order is made;
>
> (ii) who is a parent of the child concerned;
>
> (iii) who is not a parent of his but who has parental responsibility for him; or
>
> (iv) with whom the child is living, and to whom the conditions are expressed to apply;
>
> (c) be made to have effect for a specified period, or contain provisions which are to have effect for a specified period;
>
> (d) make such incidental, supplemental or consequential provision as the court thinks fit.

64. Mr Hepher pointed out that section 11(1) and (2) set out the case management powers of the court when entertaining proceedings in which questions arise in respect of making a section 8 order. He submitted that these two sub-sections included section 91(14) orders, but that the powers were expressly restricted to timetabling and directing specific periods to avoid delay. It was section 11(7) then provided for the directions and conditions that may be attached to section 8 orders. The wording found at section 11(1) was not repeated at 11(7). It followed, Mr. Hepher argued, that Parliament had intended for the court to have a very wide discretion when providing for timetabling in all matters associated with a section 8 order, but that the broad powers to attach conditions only applied to the section 8 order itself.

65. Mr Hepher emphasised the point that section 91(14) did not itself make provision for the attachment of any conditions. Apart from dealing with the ambit and duration of the order, therefore, Mr. Hepher submitted that the court had no jurisdiction to attach conditions to a section 91(14) order.

The argument of the advocate to the court in relation to procedure

66. Finally, Mr. Hepher reminded us of the procedure for making an application for permission to apply. Permission, he submitted, should be sought in accordance with FPR 1991, r 4.3. This provides:

> (1) Where the leave of the court is required to bring any proceedings to which this part applies, the person seeking leave shall file -
>
> > (a) a written request for leave inform C2 setting out the reasons of the application; and
> >
> > (b) a draft of the application (being the documents referred to in rule 4.4(1A) for the making of which leave is sought together with sufficient copies for one to be served on each respondent.
>
> (2) On considering a request for leave filed under paragraph (1), the court shall –
>
> > (a) grant the request, whereupon the proper officer shall inform the person making the request of the decision, or
> >
> > (b) direct that a date be fixed for the hearing of the request, whereupon the proper officer shall fix such date and give such notice as the court directs to the person making the request and any local authority that is preparing, or has prepared, a report under section 14A(8) or (9) and such other person as the court requires to be notified, of the date so fixed.

The advocate of the court's submissions in relation to the individual applications

67. In relation to Mr Stringer's application, Mr. Hepher's submission was simple. The judge had not had jurisdiction to impose the conditions on the section 91(14) order which he had imposed. It followed that Mr. Stringer should be given permission to appeal against the imposition of those conditions.

68. In relation to Mr E's application, Mr Hepher noted that no point had been taken on the judge's formulation of the test which he had to apply. Mr. Hepher, however, submitted that since the judge had accepted that Mr E needed to demonstrate change by way of a further assessment, the judge was obliged to consider the effect of dismissing his application rather than adjourning it, particularly if the effect of a dismissal was effectively to deny Mr E the prospect of such an assessment. In that context, Mr. Hepher argued, it did not seem improper to take into account the fact that Mr E was publicly funded, and without the means privately to pursue a psychological assessment. Furthermore, it was necessary for Mr E to have the judge's permission to disclose the case papers to an expert. The dismissal of Mr E's application meant that he would be unable to meet the condition which the judge himself had raised.

The argument for Mrs. Kemsley in this court

69. For Mrs. Kemsley, Mr. Grant Armstrong made a number of powerful points. He relied on the strong findings made by Judge Hargrove and the psychological evaluation made by Mr. Clowry. He pointed to Mr E's behaviour after the hearing in

November 2000, and relied on the fact that he had twice been found to be in contempt of court, and had served a short sentence of imprisonment for contempt.

70. Mr. Armstrong argued that a section 91(14) order expressed to be without limit of time was appropriate in the instant case, where the facts went beyond the commonly encountered. The burden was on Mr E to demonstrate that there was a need for renewed judicial investigation. In reality, counsel argued, nothing had changed. Mr E's statement demonstrated neither an acceptance nor even a recognition of the seriousness of the court's findings against him. There was no contrition. There was no evidence that Mr E had attempt to address his anger, or sought any advice or treatment in order to demonstrate a capacity for change. Mr. Armstrong referred to the well-known decision of this court in ***Re L (a child) (contact: domestic violence)*** [2001] Fam 260 (***Re L***), and Dame Elizabeth Butler-Sloss P's well known statement ([2001] Fam 260 at 273E to F and repeated at 275E) that "in this context the ability of the offending parent to recognise his past conduct, be aware of the need to change and make genuine efforts to do so, will be likely to be an important consideration". The court also had to look at Mr E's motivation. Was it a desire to promote the best interests of the child, or was it a means to continue his harassment of Mrs. Kemsley? Mr. Armstrong submitted that on the evidence filed, Mr E came nowhere near establishing either that he had an arguable case, or that renewed judicial investigation was necessary.

71. The judge, Mr. Armstrong submitted, had approached the case correctly. He had, moreover, decided the case on the basis on which it had been put to him. He could not be criticised for so doing. He had not taken any irrelevant material into account. He had not omitted to consider any relevant factors. He had applied the correct legal test. The application to adjourn had (a) come too late; (b) had not been part of Mr E's primary case; and (c) would have been unlikely to have produced a positive result given the fact that Mr E plainly had not recognised the strength and validity of the previous findings against him.

Discussion

72. As stated in paragraph 2 to 5 of this judgment, these two applications have thrown up a number of issues. They can, we think, be summarised as follows:

(1) Is it permissible to attach conditions to a section 91(14) order?

(2) What is the correct approach both for the court and for a person subject to a section 91(14) order when an application for permission to apply is made?

(3) In what circumstances is it appropriate to make a section 91(14) order expressed to be without limit of time or to last until the 16th birthday of a relevant child;

(4) Is it necessary for notice to be given to the other party

(a) when an application for an order under section 91(14) is to be made?

(b) when an application for permission to apply is being made?

(5) How do these considerations apply to the applications currently before this court?

(1) The attachment of conditions

73. For the reasons given by Mr. Hepher set out in paragraphs 63 to 65 of this judgment, we are of the clear view that it is not permissible to attach conditions to a section 91(14) order beyond stating how long it is to last, and identifying the type of relief to which it applies. This conclusion seems to us to flow from the wording of section 91(14) itself, and from the fact that the power to impose conditions expressly given by section 11(7) of the Act is restricted to section 8 orders.

74. There are, however, other considerations which both lend strong support to the same conclusion, and also impinge on the other questions which we have posed. The first, of course, is that whilst section 91(14) does not impose an absolute prohibition on applications to the court, it is, nonetheless a fetter imposed by Parliament on parties' rights of access to the court in relation to their children. It plainly creates a judicial discretion as to the circumstances in which in falls to be used, but in our judgment must otherwise be applied as enacted, and without the accretion of any judicial interpretative gloss. Had Parliament intended section 91(14) to create the power to impose conditions when making an order under it, Parliament, we think, would have said so.

75. As importantly, perhaps, the imposition of conditions may in fact bring about the absolute prohibition on further applications which the sub-section itself does not permit. Thus, if a condition were to be imposed which is incapable of being fulfilled, the litigant would, effectively, barred from making an application for permission to apply.

76. In our judgment, Judge Mitchell's order is not saved by his grant of permission to Mr. Stringer to disclose the reports of the guardian and Dr. Conn "to his general practitioner and any treating psychiatrist or psychologist". Such an order, we think, simply reinforces the argument that the judge is making successful or at least partially successful treatment the pre-condition of an application for permission to apply. Furthermore, it confuses the investigative role of the court and the therapeutic relationship between doctor and patient. Each is addressing a different issue. A treating psychiatrist or psychologist is clearly not in the same position as an expert witness instructed to advise the court. The former is concerned with diagnosis and therapy with specific reference to the patient. He or she has no forensic function. The latter has a much wider and quite different perspective, and is addressing an issue on which the court has sought advice. Such an expert, in order to give an opinion, needs to see all the relevant papers in the case.

77. In summary, therefore, whilst it is permitted by the Act, and may well be appropriate for the court to impose a particular course of treatment on a party as a condition of making a contact order under section 8 of the Act , it is in our judgment impermissible to impose conditions on a section 91(14) order, and in particular impermissible to require that a party undergo treatment as a pre-condition of making an application for permission to apply.

(2) The correct approach to an application for permission to apply

78. In relation to the judicial approach to applications for permission to apply, we should say, by way of preliminary observation, that we see no inconsistency between Thorpe LJ's test in ***Re A*** set out at paragraph 53 above: ("Does this application demonstrate that there is any need for renewed judicial investigation?") and Butler Sloss LJ's test in ***Re P*** set out at paragraph 54 above: ("the applicant must persuade the judge that he has an arguable case with some chance of success"). In our judgment the two complement each other. A judge will not, we think, see a need for renewed judicial investigation into an application which he does not think sets out an arguable case. In the first application, Judge Murdoch adopted the ***Re A*** approach, albeit with a cross reference to ***Re P***. This seems to us perfectly sensible.

79. It is self-evident that a party who is the subject of an order under section 91(14) which has been made because of particular conduct by that party must have addressed that conduct if his application for permission to apply is to warrant a renewed judicial investigation or to present an arguable case. Thus, to take an obvious example, a man who has been made the subject of a section 91(14) order following findings of fact by the court of both persistent domestic violence to his former partner and his children and a fixed and delusional belief that his children are the victims of parental alienation syndrome, is unlikely to succeed in an application for permission to apply for contact or residence if he makes it without any acceptance of the court's previous findings.

80. This is, of course, quite different from parties being told that they cannot make an application because they have not fulfilled identified conditions imposed in the section 91(14) order. The need to address the court's findings and the reasons for the imposition of the section 91(14) order are matters of evidence which go to the success or failure of the application for permission to apply: the imposition of conditions on a section 91(14) order is an impermissible bar to an application for permission to apply being made at all.

81. It may well be, however, that the court is unable properly to address an application for permission to apply because it does not have sufficient information to enable it to make a decision. It may also be that the only means whereby the necessary information can be obtained is to give the applicant for permission the opportunity to obtain it by means of allowing access to the court papers by an appropriate expert. Thus if, for example, there is a question mark over an applicant's mental heath, or some other aspect of his personality which affects his suitability to have contact with his children, it may well be that the application cannot properly be resolved without a report from an expert who had been given access to the court papers.

82. This, of course, was the application made by Mr E post judgment. We will discuss that particular application when we give our decision in relation to his application. What is plain, however, is that an applicant for permission to apply must not put the cart before the horse. If, in order properly to mount an application for permission to apply, an applicant requires access by an expert to the court papers in order to report on the applicant's current state of mind and the appropriateness of

the application, the proper course, it seems to us, is to make the application for permission to apply, but to invite the court, before adjudicating upon it, to give directions for all the relevant evidence to be obtained. If, as we think will sometimes be the case, this requires a report on the applicant's current state of mind by reference to the court papers, the court should, in appropriate cases, adjourn the application, and not decide it until the report is available. Had that course been adopted in Mr E's case at the outset, it is possible that the judge, as he himself recognised, might well have acceded to it.

83. Where an application for permission to apply is being contemplated, therefore, careful thought needs to be given to the evidence which is required for its proper presentation. If that presentation requires a preliminary report, the court should be invited to order it prior to, and as a necessary ingredient of, its ultimate adjudication.

The circumstances in which a section 91(14) order should be made either without restriction of time or until a relevant child attains the age of 16

84. It is clear from ***Re P*** that an section 91(14) order can properly be made without limit of time or for the period over which the court, absent exceptional circumstances, has jurisdiction to make orders in relation to children under section 8 of the Act. This is normally the age of 16 – see section 9(6) although there is special provision for residence order made in favour or third parties: see section 12(5) of the Act, neither of which we need to set out.

85. In our judgement, however, orders made without limit of time, and orders expressed to last until a child is 16 should be the exception rather than the rule, and where they are made, the reasons for making them should be fully and carefully set out.

86. We take this view for a number of reasons. We do not seek in any way to say that there are not cases in which such orders are necessary to further the welfare of the children concerned. This court has as much experience as any of obsessional parents who continue to damage their children by relentless litigation in circumstances where the children's welfare is wholly subordinate to the continuing power battle between them, or where one parent behaves in a manner which makes future contact between him or her and the children impossible to contemplate as being in the children's interests. Such cases are, however, the tiny minority, and in the majority the function of the court, in our judgment, is not to give up, or to give the appearance that it is permanently shutting the door of the court in the litigant's face. This is, of course, particularly the case where contact should be taking place, but is being frustrated by the behaviour of the resident parent, as, for example, in ***Re B***.

87. The principal thrust of the extensive jurisprudence in this court on the subject of parental contact is that it is, generally speaking, in the interests of children to maintain a relationship with their absent parent unless there are compelling circumstances which render it contrary to their welfare to do so. This, not infrequently, involves the court in imaginative initiatives designed to preserve relationships between absent parents and their children. The provisions of the

Children and Adoption Act 2004, when implemented, should broaden the powers of the court to engage non-forensic interventions to the same end.

88. There is currently no power to compel absent parents to have contact with their children, and the statistics relating to the numbers of absent parents who give up and abandon the attempt to have any relationship with their children are alarming. The clear thrust of the Act, and the approach of the courts to the relationship between the absent parent and the child has been to foster it wherever possible, provided always that such contact is safe for the child: - see, in particular, the decision of this court in ***Re L***.

89. Thus, in each case in which section 91(14) is invoked, it behoves the court to consider carefully what mischief the section is designed to address, and in particular whether or not it is going to be possible, at the end of a defined period, to re-investigate the question, and to attempt the restoration of the relationship between absent parent and child.

90. Section 91(14) has been described as both draconian and flexible. Both descriptions are apt. Its use, however, has to be carefully controlled by the court as part of its over-arching strategy, which is to preserve and foster relationships wherever possible. An order which is indeterminate, or which is expressed to last until the 16th birthday of the relevant child is, in effect, an acknowledgement by the court that nothing more can be done. As we have already made clear, cases in which the court reaches the end of the road do exist, and there are cases in which it is essential for the welfare of the children and the physical health and sanity of the resident parent that an indefinite halt is called to litigation. But if the court has indeed reached that stage, it needs to spell out its reasons clearly, so that the parents – and in particularly the parent who is the subject of the section 91(14) order knows precisely where he or she stands, and precisely what issues he or she had to address if an application for permission to apply is going to be possible.

Notice to the other party

91. We are in complete agreement with those authorities which make it clear that before a section 91(14) order is made, the person affected by it should have a proper opportunity to consider it and be heard on it. In practice, however, the need for an order under section 91(14) order may only become apparent during the course of a hearing, or otherwise at relatively short notice. Where this happens, the court must ensure, if need be by a short adjournment, that the person on the receiving end, particularly if he or she is a litigant in person, has had a full opportunity to consider the making of such an order, and to voice objections to it.

92. We think a greater degree of flexibility is permissible where the question is whether or not a resident parent needs to be served in the first instance with an application for permission to apply. We think there is much sense, in certain sensitive circumstances, for the court to direct, in the first instance, that the application be not served on the other party until such time as the court has had the opportunity to consider it and to decide whether it is necessary for the other side to be served.

93. An obvious example is a case in which the stress of previous litigation has destabilised the family, and in which the fragile capacity of the resident parent may well be adversely affected by the service of an application for permission to apply, particularly if that application is unmeritorious or unlikely to succeed. Plainly, if the court takes the view that there is sufficient merit in the application to make it appropriate for the other party to be served, and that an inter partes hearing is appropriate, that is another matter.

94. We would therefore respectfully urge caution before following to the letter the passage from Hale J's judgment in ***Re N*** which we have set out at paragraph 47 of this judgment, and the statement by Thorpe LJ in ***Re A*** that an application for permission to apply should be determined inter partes ([1998] 1 FLR 1 at 3E-F). It is, in our view, open to a judge when making a section 91(14) order to direct that any application for permission to apply during its operation shall not, in the first instance, be served on the respondent to it, but should be considered by the judge on paper. The judge will then decide whether or not an inter partes hearing is required.

95. We do not, however, think that an applicant for permission to apply should be denied an oral hearing if that is what he or she seeks. Whilst a judge may properly, therefore, direct that the application will, in the first instance, be considered by him or her on the papers, we take the view that if the litigant is dissatisfied with a paper refusal, he or she should be afforded an oral hearing, however, unmeritorious the application may prove to be.

The application of these principles to the applications before the court

96. We are in no doubt that we should give Mr. Stringer permission to appeal against the section 91(14) order made in his case. We do not propose to limit the ambit of the appeal to the question of the conditions attached to it. We think Mr. Stringer should be entitled to argue, if he wishes, that an indefinite order under section 91(14) (or, indeed any order under section 91(14)) should not have been made. Whilst his prospects of success in relation to the imposition in principle of a section 91(14) order may be doubtful, we do not think it appropriate for the argument to be limited to the narrow, conditions point.

97. As to the application in Mr E's case, we are of the view that we should grant permission to appeal, but that the appeal itself should be dismissed. We reach that conclusion for the following reasons.

98. It is, we think, most unfortunate that we do not have a transcript of the judgment leading to the imposition by Judge Hargrove of an order under section 91(14) unlimited in time. We must, however, do our best with the material we have. The application for permission to appeal did not relate to the imposition of the section 91(14) order, but to the judge's refusal to allow Mr E to make an application for permission to apply. It is that application, and the judge's refusal to allow it, on which we have to adjudicate.

99. In our judgment, Mr E undoubtedly put the cart before the horse in not making his application for an adjournment and for a report until after the judge had given

judgment. He should plainly have sought permission under the aegis of his public funding certificate to obtain a report (which the judge could have directed be obtained from Mr. Clowry) as to Mr E's state of mind and the appropriateness of any renewed judicial investigation. The well-known difficulty in access to mental health advice under the National Health Service, and the inappropriateness of a treating doctor's report made without reference or access to the court papers made such an application wholly appropriate, and it is most unfortunate that it was not made.

100. This is not, however, the reason why we dismiss Mr E's appeal. We dismiss it because, in our judgment, the judge was plainly right to find, as he did, that the full circumstances of the case were such that it would require considerably more than the matters which Mr E had placed before the court to justify it imposing a renewed judicial investigation on Mrs. Kemsley and C-W.

101. It is, moreover, plain from Mr E's statement that, despite the changes in his circumstances, he has not learned the lessons of the past. His minimisation of his past conduct is striking. He describes is as "brash", and Mr. Wall told the judge that Mr E would accept that he had, on occasions, acted "foolishly". Such statements come nowhere near to a proper recognition of the effect which his appalling behaviour had on Mrs. Kemsley and C-W. There is, furthermore, a complete absence of any form of contrition. The reasons he gives for wishing contact to be resumed are not based on C-W's welfare, but on Mr E's wish to know how she is progressing.

102. In short, the judge, in our view, was not only entitled to resolve the application on the basis on which it was presented to him: he was entitled, on the evidence before him, to hold, as he did, that the test identified by Thorpe LJ in ***Re A*** had not been met.

103. This is emphatically not to say that we regard Judge Murdoch's decision as being the end of the road for Mr E. It is plainly open to him to make a further application for permission to apply in due course. We impose no conditions on that application. At the same time, it must now be apparent to Mr E that the basis for a successful application is an acceptance of the findings made by Judge Hargrove, and a recognition of the serious damage which his behaviour has done to any possibility of a resumption of a proper relationship between himself and C-W. Without evidence of even the beginnings of that process, Judge Murdoch, in our view, was entitled, in the exercise of his experienced judicial discretion, to dismiss Mr E's application. That exercise of discretion, in our judgment, is not one with which it would be proper, in all the circumstances of this case, for this court to interfere.

104. Mr E's appeal will, accordingly, be dismissed.