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Re S (Children) : Re E (A Child) (2006)

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Barristers
Paul Hepher

Facts
It was not permissible for a court, when making an order under the Children Act 1989 s.91(14), to attach conditions to the order beyond stating its duration and identifying the type of relief to which it applied. An order made under s.91(14) without limit of time or expressed to last until a relevant child attained the age of 16 should be the exception rather than the rule, and where it was made, full reasons should be set out clearly.

The appellant (E) appealed against a decision refusing him permission to apply for a contact order in respect of a child (C), and in a separate action the applicant (S) applied for permission to appeal against an order made under the Children Act 1989 s.91(14). E had initially been granted parental responsibility and interim supervised contact in respect of C. At the substantive hearing the court held that there was a prospect of serious harm to C if E had direct contact with her, and made an order for indirect contact only. However, that order and the parental responsibility order were later discharged, and the court made an order against E under s.91(14) of the Act, without time limit. E then applied for permission to apply for a contact order on the ground that his circumstances had changed. His application was refused on the basis that further information was required to justify a renewed judicial investigation. S was granted permission to withdraw his application for a residence and contact order in respect of his children. However the court, having regard to the welfare of the children who had been subject of lengthy proceedings, imposed a s.91(14) order on S and attached a number of conditions that required S to undergo treatment and specified the evidence that was required before an application for permission to apply for a residence order or contact order could be made. The order was expressed to last until S's children reached 16 years of age. The issues were (i) whether it was permissible to attach conditions to a s.91(14) order; (ii) the correct approach to an application for permission to apply; (iii) the circumstances in which a s.91(14) order should be made either without time limit or until a relevant child attained the age of 16; (iv) whether it was necessary for notice to be given to the other party when an application for a s.91(14) order was to be made and when an application for permission to apply was being made.

Held
HELD: (1) It was not permissible to attach conditions to a s.91(14) order beyond stating its duration and identifying the type of relief to which it applied. That was clear from the wording of s.91(14), and from the fact that the power to impose conditions expressly given by s.11(7) of the Act was restricted to orders under s.8 of the Act. If Parliament had intended s.91(14) to create the power to impose conditions when making an order under it, it would have said so. The imposition of conditions might in fact bring about the absolute prohibition on further applications that the subsection itself did not permit. If a condition was to be imposed that was incapable of being fulfilled the litigant would be effectively barred

from making an application for permission to apply. S was given permission to appeal against the s.91(14) order, which was not limited to the conditions point. (2) It was self-evident that a party, who was subject of an order under s.91(14), which had been made because of particular conduct by that party, had to have addressed that conduct if his application for permission to apply was to warrant a renewed judicial investigation or to present an arguable case, Re A (Application for Leave) (1998) 1 FLR 1 and P (A Child), Re (1999) 3 WLR 1164 applied. However, that was different from the parties being informed that they could not make an application because they had not fulfilled identified conditions attached to the s.91(14) order. If, in order properly to mount an application for permission to apply, an applicant required access by an expert to the court papers in order to report the applicant's state of mind and the appropriateness of the application, the proper course was to make the application, but to invite the court, before adjudicating upon it, to give directions for all the relevant evidence to be obtained. The judge was plainly right to find that the full circumstances of E's case were such that it would require considerably more than the matters that E had placed before the court to justify it imposing a renewed judicial investigation. The test in Re A had not been met, and E's appeal was unsuccessful, Re A applied. It was open to E to make further application for permission to apply in due course and no conditions on that application would be imposed. (3) A s.91(14) order could properly be made without limit of time or for the period over which the court had jurisdiction to make orders in relation to children under s.8 of the Act, Re P applied. That was normally the age of 16. An order that was indeterminate, or which was expressed to last until a child was 16, was in effect an acknowledgement by the court that nothing more could be done. If the court had reached that stage, it had to spell out its reasons clearly. (4) Before a s.91(14) order was made, the person affected by it should have a proper opportunity to consider it and be heard on it. Where the need for an order under s.91(14) became apparent during the course of a hearing, the court had to ensure that the person who was subject to the order had had a full opportunity to consider the making of such an order, and to voice objections to it. It was open to a judge when making a s.91(14) order to direct that any application for permission to apply during its operation should not, in the first instance, be served on the respondent to it, but should be considered by the judge on paper. The judge could then decide whether an inter partes hearing was required. If the litigant was dissatisfied with a paper refusal, he should be afforded an oral hearing, however unmeritorious the application might prove to be, Re N (A Minor) (Residence order : Appeal) (1996) 1 FLR 356 considered.

Judgment accordingly.