Neutral Citation Number: [2017] EWHC 2630 (QB)

Case No: TLQ17/0378

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2017

Before :

MR JUSTICE DINGEMANS

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Between :

Joseph James Penn Revill (a protected party proceeding by his litigation friend, Kirsty Marie Jarram)	**Claimant**
- and -	
Philip Damiani	**Defendant**

- -
- -

Adam Weitzman QC and Lee Parkhill (instructed by **Irwin Mitchell**) for the **Claimant**
Stephen Grime QC (instructed by **Weightmans**) for the **Defendant**

Hearing date: 12th October 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Dingemans:

Introduction

1. This is a trial of a preliminary issue about whether the Defendant, Philip Damiani, "is entitled to resile from a compromise of the action contained in a memorandum of agreement reached by the parties on 24th February 2017". The compromise was made with the Claimant, Joseph James Penn Revill, who is a protected party acting by his litigation friend and partner Kirsty Jarram. The compromise was of Mr Revill's claim for damages against Mr Damiani arising out of a road traffic accident which occurred on 6th April 2015.

2. It is common ground that CPR 21.10 has been interpreted in judgments of the House of Lords and Court of Appeal to mean that a compromise with a protected party is not binding unless and until it is approved by the Court. This means that either the protected party or the other party to the compromise may withdraw from the compromise at any time before its approval.

3. Mr Revill's case is that the provisions of CPR 21.10 are incompatible with his rights protected by article 14 of the European Convention on Human Rights ("ECHR") when read with either article 6 or article 1 of the first protocol of the ECHR. This is because there is unjustifiable discrimination against him as a protected party, when compared with a party who is not a protected party. Mr Damiani's case is that the provisions of CPR Part 21.10 are necessary for the protection of protected parties, and that the requirements of CPR Part 21.10 are justifiable and proportionate.

The evidence

4. The evidence is taken from the witness statement of David Withers, a solicitor for Irwin Mitchell LLP, solicitors. Mr Withers' statement was read because there was no challenge to his evidence. I set out below material facts.

The accident and Mr Revill's injuries

5. On 6th April 2015 Mr Revill was riding a Suzuki motorcycle on the B5324 in Osgathorpe. His partner Ms Jarram was on the back of the motorcycle. Mr Damiani, who was insured by Zurich Insurance plc, was driving a Renault motor car in the opposite direction. Mr Damiani crossed over into the wrong carriageway, and there was a collision between the motor cycle and the Renault motor car causing injuries to both Mr Revill and Ms Jarram.

6. Mr Damiani was convicted at Leicester Crown Court of causing serious injury by dangerous driving, and he was sentenced to a term of imprisonment.

7. Mr Revill was born on 20th January 1988 and was aged 27 years at the date of the accident. He is now aged 29 years. According to the report from Dr Priestley, a neuropsychologist, Mr Revill suffered a very severe traumatic brain injury which has led to a blunting of intellect, persisting problems with delayed memory, and executive function deficits. There is medical evidence showing that Mr Revill lacks capacity to conduct the litigation and his own affairs, although this was a matter disputed in the

underlying litigation. It was because he lacked capacity that Mr Revill became a protected party.

8. Mr Revill made claims for, among other matters, a future loss of earnings and future care costs, future case management costs, future therapy costs and future court of protection costs.

9. Proceedings were issued in May 2016. Liability for the accident was admitted on Mr Damiani's behalf. This meant that the issue of the quantum of Mr Revill's claim needed to be resolved. A separate claim by Ms Jarram for her losses was compromised.

The memorandum of agreement dated 24th February 2017

10. After some expert evidence had been obtained on both sides, there was a joint settlement meeting on 24th February 2017 in London which culminated in the making of a memorandum of agreement dated 24th February 2017. In circumstances where as a result of my judgment there will be a trial of the quantum of Mr Revill's claim it is not necessary for me to set out exact details of the claims made and all of the terms of the memorandum, but I will set out sufficient detail to highlight the issues. The parties are aware of the figures.

11. At the conclusion of the meeting those representing Mr Revill and those representing Mr Damiani agreed the terms of a memorandum. This provided for a lump sum payment for all of Mr Revill's losses, including his future losses. The calculations for Mr Revill's future losses used a multiplier for future losses based on a discount rate of 2.5 per cent. This discount rate had been set by the Lord Chancellor pursuant to section 1 of the Damages Act 1996 on 25th June 2001. The Lord Chancellor had set the rate after the judgment of the House of Lords in *Wells v Wells* [1999] 1 AC 345 in which the previous conventional discount rate (of 4 to 5 per cent) had been reduced to 3 per cent to take account of the expected rate of return on index-linked government securities. The House of Lords had changed the discount rate because the Lord Chancellor had not yet exercised powers under the Damages Act. In the judgments in *Wells v Wells* there were comments about the undesirability of encouraging parties to incur the expense of expert evidence to bring about a change in the discount rate and the desirability of leaving matters for the Lord Chancellor to determine.

12. The 2.5 per cent discount rate remained unchanged from 2001. In common law jurisdictions which did not have the Damages Act Courts have adjusted the discount rate, sometimes to provide for a negative discount rate, see *Helmot v Simon* [2012] UKPC 5; [2012] Med LR 394, where in Guernsey a discount rate of minus 1.5 per cent was used for earnings related losses and 0.5 per cent was used for other losses. At the time of the joint settlement meeting it was expected that the Lord Chancellor would make an announcement varying the discount rate, but it was not known what discount rate would be adopted.

13. In clause 3 of the Memorandum of agreement the parties provided figures for the annual future loss of earnings and figures for the other combined annual future losses setting out the multipliers which had been used and the final sums agreed for the lump sum for such losses. Clause 3 provided that "in the event of a reduction in the discount rate before the date of the Court approval hearing the future losses as set out

herein will be recalculated in accordance with the reduced discount rate". In his statement Mr Withers said that this provision had been inserted because leading counsel for Mr Revill had made it clear at the joint settlement meeting that if the discount rate was reduced after the meeting and before court approval, then leading counsel "would find it difficult to write the approval advice for the court".

14. The memorandum of agreement also recorded the fact that Mr Revill's solicitor agreed "to issue an application for approval of this settlement by 31st March 2017 and to ask the court to stay the current proceedings pending that approval".

The change of discount rate and withdrawing from the agreement

15. On 27th February 2017 the Lord Chancellor announced that the discount rate would be reduced from 2.5 per cent to minus 0.75 per cent. Counsel for Mr Revill recalculated the future losses. The amount to be paid to Mr Revill under the memorandum had substantially increased.

16. It was in these circumstances that Mr Damiani's solicitors wrote by letter dated 13th March 2017 saying that Mr Damiani was withdrawing from the compromise saying "you will appreciate my client's legal entitlement to resile from the agreement".

17. Those acting on behalf of Mr Revill contested Mr Damiani's right to withdraw from the agreement and applied on 16th March 2017 for an approval hearing, which was listed for 10th April 2017. In the event directions were agreed for this preliminary issue and the approval hearing was adjourned.

Relevant provisions of the CPR

18. CPR Part 21.2(d) defines a protected party as a party "who lacks capacity to conduct proceedings". CPR Part 21.3(4) provides that "any step taken before a … protected party has a litigation friend has no effect unless the court otherwise orders".

19. So far as is material CPR Part 21.10 provides: "(1) Where a claim is made- (a) by or on behalf of a … protected party; … no settlement, compromise or payment (including any voluntary interim payment) … shall be valid, so far as it relates to the claim by, on behalf of … the protected party, without the approval of the Court."

20. The CPR Part 21 and the Practice Direction provides a mechanism for obtaining court approval. It includes at paragraph 5.2 provision for the legal representatives of the protected party to provide an opinion "on the merits of the settlement or compromise".

21. The notes in the White Book identify 4 objects of CPR Part 21.10. These are: (1) to protect the interests of the protected party, including from any lack of skill on the part of their legal advisers; (2) to provide a means by which the defendant may obtain a valid discharge in respect of the claim; (3) to ensure that money recovered is properly looked after; and (4) to ensure that the interests of dependents entitled to a share of the recovery are properly defined and protected. Another policy consideration set out in the notes to Order 80 in the last edition of the Supreme Court Practice at para 80.11.2, to which reference was made in *Dunhill v Burgin (Nos. 1 and 2)* [2014] UKSC 18;

[2014] 1 WLR 933 at paragraph 33, was to ensure that legal representatives acting for a protected party were paid their proper costs and no more.

22. Other relevant provisions of the CPR include: the "overriding objective of enabling the court to deal with cases justly and at proportionate cost", see CPR Part 1.1(1); and the requirement that the court "must further the overriding objective by actively managing cases", see CPR Part 1.4(1). Active case management includes encouraging the parties to use alternative dispute resolution and fixing timetables or otherwise controlling the progress of the case.

The effect of CPR 21.10

23. In *Dietz v Lennig Chemicals Limited* [1969] 1 AC 170 the House of Lords considered the provisions of the Order 80 rules 11 and 12 of the Rules of Supreme Court which was the predecessor to CPR Part 21.10. RSC Order rule 11 provided "where in any proceedings … money is claimed by or on behalf of a person under disability, no settlement, compromise, or payment and no acceptance of money paid into court … shall … be valid without the approval of the court". It is common ground that this is in material respects in the same terms as CPR Part 21.10.

24. In *Dietz* a Defendant sought to withdraw from a compromise of an action brought by a widow and dependent children set out in an exchange of letters. The plaintiff had accepted an offer of £10,000, subject to the approval of the court. The compromise had been approved by the Master but before the order was drawn up it became known that the plaintiff had remarried, which was then material to the issue of quantum. This fact was unknown to the legal representatives at the time of the approval hearing, and when it became known a summons to set aside the compromise was brought. In the House of Lords Lord Morris determined at pages 181-182 that "there was no binding agreement made in August … If … a writ had first been issued and if thereafter there had been discussions leading to agreement, such agreement would have lacked validity unless and until approval of the court was given". Lord Pearson at pages 189-190 referred to the compromise rule set out in RSC Order 80 rule 11 and said "The settlement … was only a proposed settlement until the court approved it. Either party could lawfully have repudiated it at any time before the court approved it. It had no validity by virtue of the parties' agreement in the August settlement. That which might have given it validity would have been an order made by the master with the effective consent of the parties …".

25. The approach in *Dietz* was followed after the introduction of the Civil Procedure Rules in *Drinkall v Whitwood* [2003] EWCA Civ 1547; [2004] 1 WLR 462 at paragraph 16.

26. As was noted in paragraph 30 of *Dunhill v Burgin*, the House of Lords in *Dietz* had held that the rule making body had power to impose the compromise rule set out RSC Order 80 and now reproduced in CPR Part 21.10. There was no challenge before me to the vires of CPR Part 21.10 and, as was noted in paragraph 30 of *Dunhill v Burgin*, the Civil Procedure Act 1997 provided further powers in schedule 1 to those making the Civil Procedure Rules.

27. In these circumstances, it was common ground that unless the provisions of the Human Rights Act 1998 lead to a different result, I am bound to hold that Mr Damiani

was entitled to withdraw from the compromise set out in the memorandum dated 24th February 2017. This is because the compromise was not "valid without the approval of the Court" pursuant to CPR 21.10, and Mr Damiani had withdrawn from the compromise before it had been approved.

Relevant provisions of the Human Rights Act

28. The Human Rights Act gave domestic effect to the provisions of the ECHR. Section 3(1) of the Human Rights Act provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights". Provision is also made for declarations of incompatibility.

29. So far as material article 6 of the ECHR provides: "In the determination of his civil right and obligations … everyone is entitled to a fair and public hearing …". Article 1 of the First Protocol provides: "Every natural person … is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.". Article 14 of the ECHR provides: "the enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as … other status".

Relevant legal principles

30. Article 14 prevents discrimination on certain grounds in the enjoyment of rights and freedoms set out in other articles in the ECHR. Discrimination in the enjoyment of rights and freedoms on those grounds occurs when the discrimination occurs within the ambit or field of the rights and freedoms set out in the other articles in the ECHR.

31. It is common ground that "for the purposes of article 14, a difference in treatment is discriminatory if it `has no objective and reasonable justification', that is, if it does not pursue a `legitimate aim' or if there is not a `reasonable relationship of proportionality between the means employed and the aim sought to be realised'", see *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471 at paragraph 72.

32. In *R(JS) v Work and Pensions Secretary* [2015] UKSC 16; [2015] 1 WLR 1449 at paragraph 8 it was recorded that a violation of article 14 would occur where there was: "(1) a difference of treatment, (2) of persons in relevantly similar positions, (3) if it does not pursue a legitimate aim, or (4) if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised".

33. In *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, Lord Nicholls considered the issue of justification and noted at paragraph 18 that a difference in treatment could be justified "only if it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised".

34. The issue of proportionality was considered in *R v A* [2001] UKHL 25; [2002] 1 AC 45 at paragraph 45 where the approach of Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 was followed. This approach was to consider "whether: (i) the legislative object is

sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".

35. In *RP v The United Kingdom* (Application 38245/08) the applicant complained about the fact that in family law proceedings relating to the removal of her children the Official Solicitor had been appointed to act on her behalf. This was because she had been determined to lack capacity to understand advice that she had been given by solicitors and counsel instructed on her behalf. RP complained of infringements of articles 6, 8, 13 and 14 read with articles 6 and 8 of the ECHR. The complaint under article 6 of the ECHR was ruled admissible but dismissed. All the other complaints were held to be inadmissible.

36. At paragraphs 61-78 of the judgment in *RP v United Kingdom* RP's complaints under article 6 of the ECHR were analysed. It was held that the right of access to the Court was subject to limitations, and contracting parties enjoyed a margin of appreciation in laying down such regulation of access to the Court, but that such regulation of access must not impair the very essence of the right to a fair trial. At paragraph 65 it was confirmed that "in cases involving those with disabilities the Court permitted the domestic courts a certain margin of appreciation to enable them to make the relevant procedural arrangements to secure the good administration of justice and protect the mental health of the person concerned". The Court considered that it was not only appropriate but necessary for the domestic court to take measures to represent RP's interests in the litigation.

37. So far as the complaint under article 14 with article 6 of the ECHR was concerned the Court accepted that RP was treated differently from someone with legal capacity, but that the measures taken to protect RP were within the UK's margin of appreciation, see paragraph 89.

38. In a domestic context in *Ghaidan* Lord Nicholls equated the international margin of appreciation with "the discretionary area of judgment the court accords Parliament when reviewing legislation …". In this context the relevant body was the rule making body for the Civil Procedure Rules.

39. In *Surrey County Council v P* [2014] UKSC; 2014] AC 896, the Supreme Court emphasised at paragraph 45 the requirement for the state to make reasonable accommodation to cater for the special needs of those with disabilities, and reference was made to the United Nations Convention on the Rights of Persons with Disabilities. Article 13 of the Convention provides that state parties should ensure effective access to justice for persons with disabilities on an equal basis with others, including by making procedural accommodations.

Some common ground and the issue in dispute

40. There was much common ground between Mr Weitzman QC and Mr Grime QC, and I am very grateful to them and their legal teams for their helpful written and oral submissions.

41. First it is agreed that Mr Revill's status as a protected party for the Civil Procedure Rules is an "other status" for the purposes of article 14 of the ECHR.

42. Secondly the claim made by Mr Revill as a protected party against Mr Damiani falls within the ambit or field of article 6 of the ECHR, because it involves the determination of Mr Revill's civil rights.

43. Thirdly there is a difference of treatment between Mr Revill as a protected party and another litigant who is not a protected party bringing a claim for damages. This is because the other litigant who is not a protected party can compromise their claim for damages without obtaining the approval of the Court.

44. This means that the issue is whether the difference in treatment has an objective and reasonable justification, in the sense that: (1) the difference of treatment pursues a legitimate aim; and (2) there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

45. It was also common ground that the difference in treatment between protected parties and other litigants pursued a legitimate aim, namely the objects set out in paragraph 21 above.

46. This meant that the real issue between the parties was whether there was a reasonable relationship of proportionality between the means employed requiring the compromise to be approved by the Court pursuant to CPR 21.10 and the aims sought to be realised summarised in paragraph 21 above.

47. Mr Weitzman referred to the approach which had been taken in family proceedings to compromises in *Smallman v Smallman* [1972] Fam 25. In that case the words "subject to the approval of the Court" did not prevent a binding agreement being made or entitle one party to resile from its terms before the court had been asked to approve it. The clause simply suspended carrying out the terms of the agreement until it had been approved. In *Sharland v Sharland* [2015] UKSC 60; [2016] AC 871 at paragraphs 27 and 28, Baroness Hale commented on differences between compromises in family proceedings and civil proceedings. Mr Weitzman's essential point was that the CPR could have adopted the approach to "the approval of the Court" in family proceedings. Mr Weitzman submitted that such an approach would have been consistent with the United Nations Convention on the Rights of Persons with Disabilities, would have involved less interference with Mr Revill's ECHR rights, and would have been a proportionate approach to the issue of protected parties. Such an approach would have meant that Mr Damiani could not have withdrawn from the compromise unless the Court did not approve the compromise. Mr Grime submitted that the approach taken by the rule making committee to this provision of the CPR was a proper approach, well within the discretionary area of judgment for the rule-making body.

The claim made by Mr Revill is not within the ambit of article 1 protocol 1 of the ECHR

48. The fact that it is common ground that the civil claim made by Mr Revill is within the ambit of article 6 of the ECHR means that it is not necessary to determine whether the

claim is also within the ambit of article 1 protocol 1 of the ECHR. However as there has been argument on the point I will express briefly my conclusion on this point.

49. In my judgment, the claim made by Mr Revill does not engage the provisions of article 14 with article 1 protocol 1 of the ECHR. This is because the question of whether Mr Revill has made a binding compromise does not affect Mr Revill's enjoyment of his rights set out in article 1 protocol 1 of the ECHR. His claim for damages is a chose in action which will either have been converted into an entitlement to sums due under the compromise, or remain an existing chose in action. The law has not affected the peaceful enjoyment of his possessions or discriminated in the enjoyment of those possessions which continue to exist. In my judgment Mr Revill's complaint falls to be addressed under articles 6 and 14 of the ECHR alone. This is because it is a complaint about discrimination in the treatment of protected parties compromising legal claims by the rules of Court, when compared with unprotected parties. I should record that even if I had found the claim to be within the ambit of article 1 protocol 1 with article 14 of the ECHR, my conclusion on justification and proportionality set out below would have been the same.

CPR 21.10 is a proportionate means of achieving legitimate aims

50. In my judgment the approach taken by CPR 21.10 to compromises and court approval was a proportionate means of achieving the legitimate aim of ensuring the protection of protected parties from: other parties; from themselves; and from legal representatives. This is because, as was common ground, the objects set out in paragraph 21 above required the implementation of a scheme which required court approval of a compromise made by a protected party before that compromise would bind the protected party. This was because the protected party required protection from inadequate compromises, other parties required a means of obtaining a valid compromise, and consequential matters of distribution of the damages and costs needed to be resolved. This means that, as was common ground, CPR 21.10 pursued a legitimate aim.

51. Although it is right that the CPR could have been rewritten so that the approach in family proceedings was adopted, in my judgment the approach taken by the CPR was proportionate. This was for two main reasons. First the decision whether to continue with the "civil proceedings approach" set out in CPR21.10 or the "family proceedings approach" was within the discretionary area of judgment for the rule-making body for the Civil Procedure Rules. There are factors in favour of the family proceedings approach. In this case it would have meant that Mr Damiani would have been held to the compromise, assuming that the court approved the compromise. However there are factors in favour of the approach taken by CPR 21.10. These include the facts that: (1) the compromise rule now set out in CPR 21.10 is long established so that all practitioners know where they stand, meaning that everyone can enter into negotiations to attempt to compromise the action knowing the legal position about when the compromise will become binding; and (2) permitting all parties, including the protected party, to withdraw from a compromise before it had been approved, maintained a fair balance between protected parties and the other party who might want to withdraw. The "family proceedings approach" requires permission from the court to withdraw from a compromise, and such permission might not be provided. This could create uncertainty with attendant worry and cost. It might also be undesirable, for example legal representatives acting in a case where a protected party

had developed groundless fears about the effect of a compromise (which compromise would affect the rest of that protected party's life) and which groundless fears would never have been sufficient to justify a court refusing to approve the compromise, might withdraw from the compromise. This would enable the protected party to be reassured, providing as much autonomy as possible to the protected party consistent with the UN Convention, before a further compromise was made. That further compromise would either meet the protected party's concern or at least provide as much comfort as possible to the protected party. It was for the rule making body to decide which approach between the "civil proceedings approach" and "family proceedings approach" to pursue. The approach taken by CPR 21.10 was well within the discretionary area of judgment accorded to the rule making body to make the relevant procedural arrangements to secure the good administration of justice and to protect the relevant rights engaged.

52. Secondly CPR 21.10 formed part of a series of rules which, among other matters, included the duty on the court to provide active case management. In this case, as appears below, it enabled the Court to set a trial date for a 4 day hearing commencing on Monday 11th December 2017. The powers of active case management permit the court to ensure that cases involving protected and unprotected parties are managed in a proportionate and efficient manner, thereby securing the good administration of justice and protecting relevant rights.

Other developments

53. At the conclusion of legal argument on 12th October 2017 I announced my decision that Mr Damiani was entitled to withdraw from the compromise set out in the memorandum. I had notified the parties during argument that if I was able to announce my decision on the day of hearing (with reasons to follow), and if my decision was that Mr Damiani was entitled to withdraw from the compromise, I would exercise my case management powers to manage the case to set a trial date for the trial of the quantum of Mr Revill's damages. I noted that both parties had had sufficient information to agree a (non-binding) compromise of the action on 24th February 2017, and that it should be possible to arrange a trial of quantum within a short period of time. I noted that Mr Revill would be disappointed by the fact that Mr Damiani was entitled to withdraw from the compromise and that although the rules might permit that, the rules also encouraged me to manage actively the case to arrange a trial. I should record that I am grateful that both parties managed to get sufficient information to be able to make informed submissions on the directions necessary for trial. I therefore gave directions on the day of the haring providing for a trial to commence in the week of 11th December 2017. The directions made provision for lay and expert evidence at the trial.

54. After I had given those directions and before delivery of this draft judgment, I was informed on Thursday 19th October 2017 that the parties had been able to reach a further compromise of the action. I have therefore produced this judgment so that the judge approving the compromise will know why I permitted Mr Damiani to withdraw from the compromise set out in the memorandum dated 24th February 2017.

Conclusion

55. For the detailed reasons given above: (1) I dismissed the application for a declaration that the Defendant was bound by the compromise of 24th February 2017; (2) I did not make a declaration that the provisions of CPR 21.10 were incompatible with the provisions of the Human Rights Act 1998; and (3) I directed that the trial of the action be listed to be heard on Monday 11th December 2017 with a time estimate of 4 days.