Neutral Citation Number: [2021] EWHC 425 (QB)

Case No: E03YJ635

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY

Date: 25th February 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

MISS LOUISE GRIMSHAW	**Claimant**
- and -	
DR TIMOTHY HUDSON	**Defendant**

- -
- -

Jonathan Bertram (instructed by Corries Solicitors) for the **Claimant**
Matthew Jackson (instructed by DAC Beachcroft) for the **Defendant**

Hearing date: 25.2.21

Judgment as delivered in open court at the hearing

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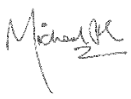
Approved Judgment

I direct that 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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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is an application by the Claimant, supported by the Defendant, for this Court to give approval, pursuant to the inherent jurisdiction of the Court, for a settlement arrived at by the parties in county court negligence proceedings. The case has been transferred to the High Court from the county court, by order of HHJ Sykes on 5 February 2021, on the grounds that the inherent jurisdiction being invoked by this application is exercisable by the High Court. The purpose and intention is that any approval given by this Court pursuant to its inherent jurisdiction would stand for the future as an approval for the purposes of CPR 21.10, were it to transpire at some subsequent stage that the Claimant had lacked capacity as at today to conduct the proceedings. If that eventuality did transpire, the settlement would have involved a protected party and thus would have needed Court approval (CPR 21.10(1)). The unravelling implications of such an eventuality are illustrated by the case of Dunhill v Burgin [2014] UKSC 18 [2014] 1 WLR 933.

The Coles case

2. The invocation of the inherent jurisdiction, to secure approval as a protection against such unravelling, is illustrated by the case of Coles v Perfect [2013] EWHC 1955 (QB). In Coles, Teare J held that this Court had inherent jurisdiction to grant approval in a case, where neither party asserted that the claimant lacked capacity, but where there was a doubt as to that capacity. He accepted that the exercise of that jurisdiction could properly promote finality in litigation, avoiding a trial of the issue of capacity. That was in circumstances where neither party was alleging incapacity, but where both parties were anxious to secure the approval of the Court to the settlement in order that the parties could be assured that the settlement was valid, final and binding. Teare J also concluded that, were the claimant subsequently found to have lacked capacity, the approval which he was granting would then stand as a valid approval for the purposes of CPR 21.10(1).

This case

3. So far as the parties are concerned, the circumstances in this case are directly parallel to those which arose in Coles. The wishes, anxiety and assurance described in Coles apply equally here. One difference between the present case and Coles is that in that case the proceedings were being conducted by a litigation friend on behalf of the claimant. There is no litigation friend in the present case. I will return at the end of this judgment to that feature and what I propose to do in the light of it.

Mode of hearing

4. The mode of hearing was by Microsoft Teams. The parties were satisfied, as am I, that this mode of hearing involved no prejudice to their interests. A remote hearing – during the Covid-19 pandemic – eliminated any risk to any person from having to travel to a court room or be present in one. The open justice principle was secured. The case and its start time were published in the cause list. So was an email address usable by any member of the press or public who wished to observe this public hearing. There was no application for anonymity.

Commentators

5. The jurisdiction exercised by the court in Coles, and the appropriateness of that exercise of jurisdiction, is reflected throughout the relevant commentaries. The Coles case was the subject of an article in the Journal of Personal Injury Law in 2013 by Mark Harvey. Coles is discussed in Kemp & Kemp: Personal Injury Law, Practice and Procedure at paragraph 4–121; Haywood & Massey, Court of Protection Practice at paragraph 24–019; Kemp & Kemp: Quantum of Damages at paragraph 28–024; in Foskett on Compromise 9th edition at paragraph 4–04, where the learned author records (footnote 12): "The course adopted in that case is often followed also where there is some element of doubt about the relevant party's capacity, but a trial of the issue is considered to be unnecessary or disproportionately expensive". Finally, and not least, Coles features in the White Book commentary at paragraph 21.10.3, where the learned commentators record: "It may therefore be wise where there is any doubt about capacity to seek approval". I have been shown, and seen, no commentary or case in which the jurisdiction in Coles, or the appropriateness of its invocation, have been doubted in the nearly 8 years since Coles was decided. I have noted that there is a reference to Coles in footnote 39 of the judgment of Marcus Smith J in Betesh Partnership (a firm) and others v Evans [2020] EWHC 1589 (QB), a case which (according to Westlaw) is headed for the Court of Appeal.

The Court's approach

6. The inherent jurisdiction, and any question of Court approval, will – as it seems to me – always engage questions of judgment and discretion on the part of the Court, acting in the interests of justice and having regard to the overriding objective. In the present case, in my judgment, it is appropriate to ask two questions in particular. The first is whether the Court is satisfied that there is a good reason why the Court's inherent jurisdiction to approve a settlement is being invoked by the parties. The second question is whether the Court is satisfied that it is in a position to provide an appropriate 'propriety check' for the purposes of deciding whether or not to give approval.

7. As to the first question (good reason), I can in the present case put to one side the question whether it could be appropriate for parties in the context of a damages settlement effectively to insist on an approval mechanism by the High Court on a general, generic or 'just in case' basis. Neither Counsel in this case takes the position that the inherent jurisdiction to approve a settlement is properly invoked in a case in which there is no issue at all relating to potential capacity. I need say nothing about whether the jurisdiction could properly be invoked on such a general, 'just in case' basis because I am quite satisfied that that is not this case. Both parties submit, and I accept, that there is in this case on the evidence a sufficient concern – or a sufficient potential concern – relating to capacity, which makes the invocation of the inherent jurisdiction an appropriate and properly pursued course. It is sufficient for me to reference a report of a jointly instructed expert neuropsychologist which report ultimately tells the parties and the Court: "… I cannot say I have found sufficient evidence to challenge [the Claimant's] capacity to manage her property and financial affairs or deal with the litigation". That observation arises in the context of other observations made by the expert as to: cognitive performance concentration span; appropriate communication; and the need to check understanding. The position before me is as it was before Teare J in Coles. Neither party is asserting that the Claimant lacks capacity to deal with the litigation. But there is, in their submission, and in my judgment, a sufficient question-

mark about capacity to provide a good reason for the course that has, understandably and properly, been taken.

8. I turn to the second question (propriety check). In my judgment, the Court in a case such as the present will need to confront any artificiality in the exercise which it is being invited to undertake, and address its mind to whether in all the circumstances the Court is confident that it is in a position to replicate the propriety check which Court approval of settlements provides in the case of protected parties. The essence of the Court's approval in such cases was encapsulated in Dunhill by Lady Hale when she emphasised (at paragraph 20) the purpose of CPR 21.10(1) as being "to impose an external check on the propriety of the settlement". In a case such as the present, the Court is being asked to act proactively and protectively, to promote finality, viewed against a possible future eventuality relating to the truth of the Claimant's capacity as at today. I have been fully satisfied, by both Counsel and through the materials with which I have been provided and the submissions that have been made, that I am able to place myself in the position of performing the same propriety check safeguard as I would perform were the Claimant lacking in capacity. I have been able to approach approval in this case on the basis of all the facts and circumstances remaining the same, except for one feature namely the adoption of a premise as to the Claimant's lack of capacity. In one sense, of course, that premise is false and artificial. Nobody is contending that the Claimant does lack capacity. She has been engaged in the steps leading to the settlement. Nobody is asking the Court to embark on or make directions for an enquiry as to capacity, still less to make any finding as to lack of capacity. Everyone is proceeding on the basis that the Claimant has capacity. However, for the purposes of considering approval, it is necessary and appropriate, in my judgment, to adopt the premise – albeit artificial – of supposing that, as at today, the Claimant lacks capacity. I ask these questions. Am I in a position, today, to discharge the approval function that would arise in those circumstances? Am I satisfied that I have done so? The answer to both questions is resoundingly yes. I turn to approach the issue of approval in that way.

Approval (an Order for the purposes of CPR 21.10)

9. The Claimant was admitted to hospital on an emergency basis on 15 July 2014 with what transpired to be an Addison's crisis. That condition arose out of a pre-existing condition: Addison's disease. She was in the intensive care unit for some 3 weeks. She needed a left ventricular assist device. She then subsequently suffered a stroke in February 2015. One of several visits that she had made to her GP's surgery had been on Friday 4 July 2014 when she was seen by the Defendant. The upshot of that visit was this: certain drugs were prescribed; repeat tests were arranged to take place the following Monday; she was advised by the Defendant that if her condition worsened she should call the out of hours telephone line or attend hospital A&E.

10. In the clinical negligence proceedings brought in the county court, the Claimant's case was that there was a negligent breach of duty by the Defendant on 4 July 2014. It is not necessary for me to go into detail, but I do consider it appropriate to identify some of the substantive features of the case. The Claimant's case was that, in circumstances of previous test results which had been reviewed, and in the light of how she presented and what she reported, she should have been urgently admitted to hospital or at least arrangements should have been made for more urgent further tests. Her case is that had the duty been properly discharged the Addison's disease condition would have been diagnosed, she would have been treated, and the Addison's crisis would have been

avoided. Her case is that various health conditions and consequences were caused by the breach of duty: they are described in detail in the particulars of claim, including a multiple organ failure and what is said to be a series of other consequential conditions and needs, which it is said would all have been very different and would have been avoided. The various impacts relied on include impact on life expectancy. All this, in the context of a Claimant who is now aged 25 and was in July 2014 aged 19.

11. The Defendant's case is that there was no negligence and no breach of any duty, that the response at the appointment on 4 July 2014 was a proper discharge of the clinical duties. Liability is denied in full. The Defendant's case also contests claims as to what would have happened, had the response been different, including whether the Claimant in fact would have gone for more urgent tests, in which context the Defendant relies on what is said happened (or did not happen) in relation to the tests on the Monday 7 July 2014. The Defendant does not accept that the Addison's crisis would have been diagnosed or treated. Some of the heads relating to condition and consequences are accepted by the Defendant as features which would have been avoidable had there been an earlier diagnosis. There are substantial disputes as to causation and as to recoverable quantum, even were the Claimant to succeed on liability.

12. The parties have marshalled evidence including expert evidence and exchanged their evidence on liability causation and quantum. The trial was due to take place over a 10 day period on 7 June 2021. The schedule of loss as revised in November 2020 for the Claimant included "£TBA" for general damages, £160,000 for past losses and £1.58 million for future losses. The Defendant's counter schedule of loss adopted the primary position that recovery should be "nil"; and alternative positions, were damages recoverable, which put general damages at £40,000; past losses at £62,000 and denied any recoverable future losses. What I have said gives a sufficient indication of the sorts of issues, parameters and features of these proceedings. There are other matters including factual disputes: for example, about whether the Claimant was carried into the GP's room on 4 July 2014, as is her case. I emphasise that I am not making any finding or provisional finding about any of the many disputed issues in these proceedings. Nor would I do so if this application for approval of settlement had involved a recognised protected party. Following a round table meeting on 15 December 2020 a settlement was agreed, subject to approval in its inherent jurisdiction by this Court. The proposed settlement subject to that approval involved the payment of £700,000, without any admission of liability, in full and final settlement. That sum is gross of CRU (certified at nil). The Defendant is also to pay the Claimant's reasonable costs.

13. I have had the benefit of a detailed confidential Advice written by Mr Bertram, Counsel for the Claimant. For the Court, that Advice stands in the place of what the rules require in a case involving a protected party: see CPR PD21 paragraph 6.4. I have also been provided with a large volume of relevant supporting material. I am quite satisfied that I have before me precisely the material that I would have if this were in fact a recognised protected party case. I am satisfied that today's hearing and the materials for it have been approached on precisely the same, proper, basis. The confidential Advice sets out why the settlement is considered by the Claimant's legal team to be appropriate, by reference to all issues – liability, causation and quantum of recoverable loss – by reference to relevant ranges, risks and uncertainties, strengths and weaknesses. I agree that this is a sensible settlement from the Claimant's point of view. I am satisfied that

this settlement is in the Claimant's best interests. On that basis I would approve this settlement under CPR 21.10 if the Claimant were a protected party. On that basis I approve this settlement in the exercise of my inherent jurisdiction.

No litigation friend (a further Order for the purposes of CPR 21.3(4))

14. I said I would return to the issue of the absence of a litigation friend. In the Coles case the proceedings were being brought by a litigation friend: the claimant's father. CPR 21.2(1) provides: "A protected party must have a litigation friend to conduct proceedings on [their] behalf". In Dunhill in her concluding paragraph (paragraph 34) Lady Hale said of that case – in which it had transpired that the claimant had lacked capacity at the relevant time – that "she should have had a litigation friend from the outset and any settlement should have been approved by the court under CPR rule 21.10(1). We have not been invited to cure these defects nor would it be just to do so". In the light of the rule (CPR 21.2(1)), and those observations, both Counsel in the present application have assisted the Court on the question of whether there is – in the absence of a litigation friend – a problem which could potentially undermine the Coles objectives of securing a valid, final and binding settlement; and whether there is any appropriate step that this Court could and should take to seek to eliminate any such potential problem.

15. Ultimately, both Counsel in this case have invited me to exercise the Court's inherent jurisdiction and make a further order: that the steps taken in the proceedings are valid and take effect notwithstanding the absence of a litigation friend. CPR 21.3(4) provides: "Any step taken before a child or protected party has a litigation friend has no effect unless the court orders otherwise". The purpose of the additional order sought is that it would serve to provide an appropriate shield for the future (for the purposes of CPR 21.3(4)), in precisely the same way that approval itself provides a shield for the future (for the purposes of CPR 21.10(1)). I am fully satisfied that it is appropriate, justified and proportionate – in the interests of justice and having regard to the overriding objective – for me to exercise my inherent jurisdiction to make that further order, for that purpose. I will do so.

16. It is appropriate for me to say little more about this aspect of the case and the justification for this further order. In Dunhill there was a discussion (beginning at paragraph 21) in Lady Hale's judgment which concerned the relationship between the giving of approval and the appointment of a litigation friend. The defendant in that case was arguing that Court approval is only needed where in fact there is a litigation friend. That argument was rejected. It is possible to read those passages as supporting the conclusion that a valid approval under CPR 20.10(1) can be given without any litigation friend, and to contend – on that basis – that there is a simple and short answer to the question whether any problem therefore arises in a case such as the present. That may be right. But there may be difficulties in treating those passages as constituting the definitive answer to the question. What Lady Hale was dealing with there was an argument which sought to narrow down the protection of approval. The defendant's argument there was that, even if it transpired that the claimant was a protected party, the settlement would be valid notwithstanding the absence of approval. In support of that argument the defendant was submitting that a precondition to the need for approval is the existence of a litigation friend. That 'narrowing down' argument was what was rejected by Lady Hale. She held that it was sufficient, as the precondition to the need for approval, that the claimant was in fact, at the time, a protected party. The safeguard

of court approval was triggered by that fact, standing alone. The status of protected party at the time did not need to have been recognised by the appointment of a litigation friend. I entertain some real doubt as to whether that conclusion carries with it the conclusion that no issue can arise as to the absence of the second safeguard – namely the litigation friend – when an 'unravelling' scenario arises. Indeed, I have already referred to Lady Hale's concluding reference to the two safeguards (litigation friend and approval) that should have been in place: the two "defects", neither of which were appropriately curable by the Supreme Court.

17. I make this clear. The position of both Counsel before me is that the settlement in the present case would not – by reason of the absence of a litigation friend – be in jeopardy of being subsequently invalidated, nor the Court's approval of the settlement in jeopardy of being undermined, absent the further order made by this Court today, were it subsequently to transpire that the Claimant lacked capacity as at today. Counsel may very well be right about that. Nothing I say in this judgment is intended to record any view, even provisionally, that that common position is legally incorrect.

18. Having said that, and without needing to seek – and seek prospectively – to resolve that issue, I am persuaded that it is fully justified to take the precautionary and protective steps of exercising the power which I have described, to order that steps have been valid and take effect. To do so is to promote certainty, finality and validity. It involves the Court exercising such powers as it has, and properly can, in the promotion of those objectives and intended consequences. In my judgment, it is appropriate for me to seek to eliminate any doubt and uncertainty through the exercise of that power. I do so in the following circumstances. (1) I am satisfied as I have explained that the rigorous and necessary external 'propriety check' of approval has been undertaken. (2) I am satisfied that it is in the interests of justice, having regard to the overriding objective, and in the public interest, to seek to promote certainty, validity and finality. (3) I am further satisfied that it is appropriate in the interests of justice to avoid unnecessary costs or further litigation steps. (4) I recognise that, had the Claimant in fact been identified as a protected party, there would have been a litigation friend conducting the proceedings in this case. (5) I also recognise that a litigation friend constitutes an important safeguard. (6) I am satisfied that the Court is able, with Counsel's assistance and with 'eyes wide open', to consider the implications of the steps being taken today, viewed against the self-same future eventuality which justifies invoking the inherent jurisdiction to approve the settlement. (7) I am satisfied that there is no reason why the Court should decline to promote certainty, finality and validity through the exercise of its further power; and every reason why it should do so. (8) I am satisfied, in all the circumstances, that it is just and appropriate to take that step.

19. I considered with both Counsel the prospect of this Court today, by means of a proactive safeguarding step, insisting on the appointment of a litigation friend to provide an additional layer of assurance for the purposes of the approval exercise. Neither party invited that course. In my judgment, they were right not to do so. It is true that in Coles there was a litigation friend, but that was the consequence of the fact that in that case the claimant had been under the age of 18 at the time when the proceedings had been commenced. The litigation friend was still bringing the proceedings at the time when the settlement was approved, though by that stage the claimant had reached the age of 19. None of the commentaries to which I have referred suggests that the absence of a litigation friend undermines the Court's ability to give a valid approval, in the exercise

of the Court's inherent jurisdiction, in a case in which there has never needed to be a litigation friend. It would be odd, and possibly arbitrary, if approval under the inherent jurisdiction should be smooth in cases where there happens to have been an independent and historic good reason for a litigation friend to have been in place; and those where there was never any good reason for a litigation friend. Both Counsel have pointed to the real difficulties that would arise in the Court insisting on the appointment of a litigation friend in a case such as the present. It could place the litigation friend in a difficult, and perhaps impossible, position in seeking to satisfy the required criteria for stepping in as a litigation friend. It could make the claimant's own position odd and artificial. I repeat: no party is submitting that the Claimant lacks capacity in this case. Moreover, no party is inviting enquiries into capacity. Indeed, an enquiry into capacity – with the unjustified and avoidable delay and cost – is precisely what the Coles inherent jurisdiction was designed to avoid. In my judgment, it is not necessary to embark on any further step, such as the appointment or pursuit of the appointment of a litigation friend. Indeed, in my judgment, such steps would not in the present case promote justice. They would, rather, introduce unnecessary artificiality. And the Court would be no better placed or assisted than it currently is.

20. The Court is able to see the appropriateness of the step of approval, with the virtues and positive objectives that such step has. Precisely the same virtues and objectives are promoted by the Court exercising the further power – in its inherent jurisdiction – today to order that steps in the proceedings were valid and take effect. That order stands to secure that there would be a proper resolution, given the terms of CPR 21.3(4), of any question, concern or dispute that might subsequently be raised. The potential for such questions, concerns and disputes stands to undermine the Coles objectives, legitimately pursued by the parties in making this application for approval.

Order

21. For all those reasons I made an Order, by consent, which recorded the settlement ("the Compromise") in its schedule, staying the proceedings with liberty to apply to enforce the Compromise, and dealing with costs. There were these two recitals: *"AND UPON the Court being satisfied that it is appropriate to give approval (paragraph 5 of this Order) to the Compromise pursuant to its inherent jurisdiction, such approval being intended to stand as the Court's approval for the purposes of CPR 21.10, should it subsequently transpire ("the Eventuality") that the Claimant was at the time of this Order a Protected Party through lack of capacity to conduct the proceedings (CPR 21.1(2)(d)). AND UPON the Court further being satisfied that approval is appropriate notwithstanding that there was at the time of this Order no litigation friend, and that it is appropriate to order (paragraph 6 of this Order) that steps taken in these proceedings were valid and take effect, such order being intended to stand as an order for the purposes of CPR 21.3(4) in the event of the Eventuality transpiring."* The operative part of the Order included: *"5. The Compromise is hereby approved by the Court. 6. All steps taken in these proceedings are valid and take effect, notwithstanding the Claimant not having had a litigation friend."*

25.2.21