IN THE COUNTY COURT AT BRISTOL **Case No: A90BS407/1IR20346**

Bristol Civil Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

8th January 2015

BEFORE:

HIS HONOUR JUDGE DENYER QC

BETWEEN:

DONALD STUART HILLIER Claimant

-and-

MERVIN ADAMS Defendant

APPEARANCES:

For the Claimant: Mr Hartley QC

For the Defendant: Mr Isherwood

APPROVED JUDGMENT

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JUDGMENT **8th January 2015**

HIS HONOUR JUDGE DENYER QC:

1. The Claimant Mr Hillier was born on 19th May 1946. On 28th September 2008 he was quite seriously injured in a jet ski accident. In April 2013, judgment in respect of liability was entered in his favour but on the basis that he was to be two-thirds responsible or regarded as two-thirds responsible for the accident. So two-thirds contributory negligence. The matter thereafter of course proceeds as a quantum-only case.

2. The injuries were quite extensive. A number of orthopaedic injuries. In addition, it was felt that the Claimant's mental functioning was deteriorating. There was some doubt as to whether or not he had received a direct head injury in the accident, or whether in fact such mental deterioration was related to some sort of hypoxic incident post-dating the accident, when the blood supply to his brain was affected. I will come back to that in a moment.

3. Be that as it may, by the end of July 2014 (and note that date, I think 23rd July 2014) District Judge Britton in this Court on the application of the Claimant (or more to the point, the Claimant's solicitor) and a perfectly proper application, appointed the Claimant's wife as his Litigation Friend. In support of that application the Claimant's solicitor was able to rely upon quite significant medical evidence from eminent consultants. So there is no doubt that as at the end of July 2014 these proceedings should only proceed, so far as the Claimant was concerned, by means of is Litigation Friend and that means that as from that time at any rate he was a protected party for the purposes of Part 21 of the Civil Procedure Rules.

4. On 29th August 2014, the Defendant made a Part 36 offer, namely that they pay £200,000. For it to be accepted in its entirety and safeguard the position on costs, that of course should have been accepted somewhere towards the end of September 2014, and of course it was not. Nevertheless, as at that point as at the end of September 2014, it was not withdrawn.

5. Further medical evidence was sought and a fairly crucial piece of evidence came to hand in the middle of November 2014. That indicated that the Claimant's deteriorating mental condition was related to constitutional matters and not related to trauma, whether directly or indirectly, received as a result of the accident. That, of course, has very significant consequences so far as quantum of damage was concerned, and the £200,000 suddenly became an extremely attractive offer and (although of course I express no final view because it would be wrong to do so) may well be rather more than the Claimant could hope to get by way of continuing the litigation.

6. The application that is before me today is an application on behalf of the Claimant for a declaration that the Claimant made a valid acceptance of the Defendant's Part 36 offer, and that involves this.

7. On 14th November 2014, the solicitor acting for the Defendant faxed to the Claimant's solicitors formal withdrawal of the Part 36 offer. On 15th November 2014 (see page 4.92 of the bundle), the Claimant's solicitors sent a document as follows:

> *"By personal service, by fax, by email and by first class post*
>
> *Further to the Defendant's enclosed Part 36 offer, the Claimant accepts that offer."*

8. As a matter of fact (and I accept) on 17th November 2014 the processor attended at the premises of the Defendant's solicitors and personally served that letter. There is evidence

in the bundle to that effect and I of course accept it. The document itself is headed "personal service, fax, email and first class post". On any view, it was personally served on 17th November 2014.

9. The argument is that the purported withdrawal by the Defendant's by way of fax on 14th November 2014 was not in fact effective and that the acceptance on 17th November 2014 was effective because as at that moment the purported withdrawal was not an effective withdrawal.

10. It all gets slightly complicated. There are other words that one can think of, but I will not use them.

11. At the bottom of the Claimant's solicitor's letters in tiny print it is indicated that the solicitors do not accept service by fax or email, and so they say "Look, on 14th November you sent a fax but we have made it clear we do not accept service by fax and by email. Therefore, it is not until the letter was delivered in the normal course of post, which was made in accordance with the rules we say would be 18th November, that you effectively communicated your withdrawal. If that is right, we had accepted before you legitimately withdrew."

12. As a matter of fact (as is apparent from the statement of Ms Black at paragraph 4.27 and following of the bundle), there had been correspondence between the parties about the appropriate medium of exchange between them. At 4.59 Ms Black, writing to the Claimant's solicitors, says:

> *"We do not accept service by email and please ensure that any further correspondence is correctly addressed and if serving a document, that it is faxed and posted to us. We will act likewise. Hope there's no more confusion."*

13. At 4.62, essentially in response to that fax of Ms Black's, the Claimant's solicitors fax a copy of the relevant document which coincidentally happened to the be the Certificate of Suitability in respect of the Litigation Friend. So they fax an important document to the Defendant.

14. We return to that matter on 6th August 2014 (see 4.71) when Ms Black in a letter sent by fax and by post to the Claimant explains why there is a good reason why service by email is not acceptable and for the future they must insist on service by fax and by post or solely by post. The Claimant then serve by way of fax their estimate of costs. It is all getting somewhat tedious by now. On 7th August, Ms Black, by fax and by post, says:

> *"We will only accept service by fax provided it is followed up by way of hard copy…"*

15. There is no doubt about it that the purported withdrawal on 14th November was sent by fax by the Defendant, and there is no doubt about it that in small print at the bottom of the Claimant's general letter rubric is an indication they will not accept service by fax or email.

16. There is Practice Direction 6A which deals with service. By paragraph 4.1 of PD6A:

> *"**4.1** Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means –*
>
> *(1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –*

(a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and

(b) the fax number, e-mail address or other electronic identification to which it must be sent;"

But it goes on:

"(2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) –

(a) a fax number set out on the writing paper of the solicitor acting for the party to be served;"

And then the rest goes on to deal with email.

17. There is, therefore, as it seems to me, a strong argument to the effect that by virtue of affixing the fax number to their letter-heading and correspondence, that that is a sufficient indication of a willingness to accept service by fax for the purpose of the Practice Direction. It is also at least arguable that having had the exchange in August about email and fax and the subsequent use of fax by the Claimant's solicitors, that they were impliedly indicating that they would accept service by fax. So as a matter of fact, I incline to the view that the argument about effective service of the withdrawal of the Part 36 offer is not a good argument and it was in fact withdrawn prior to the acceptance on 17th November.

18. But to some extent, I regard that as all rather academic. The fact is whether it was the 14th of November or the 18th of November, this Part 36 offer was withdrawn. The Claimant is a protected party and it is fairly trite law but by Part 21.10 of the rules, no settlement, compromise or payment and no acceptance of money paid into Court should be valid in respect of the protected party without the approval of the Court. The first part of the note to that rule at 662 of the White Book:

"The approval of the Court is required whenever the compromise et cetera on behalf of the child or protected party is reached and a compromise or settlement is not binding on the parties until it has been approved by order of the court."

19. I confess, this came as something of a surprise to me, but it derives from clear authority. Mr Isherwood has very helpfully annexed a number of authorities to his skeleton argument. The decision of Silver J in *Brennan v ECO Composting Ltd & Anr* [2006] EWHC 3153 (QB), where he considers the earlier decision of the Court of Appeal in *Whitwood v Drinkall* [2003] EWCA Civ 1547 and the decision of the House of Lords in *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170, HL.

20. I shall for the moment largely concentrate on *Drinkall*. One can simply read from the headnote at the moment:

"Before proceedings were issued a Part 36 offer to settle the issue of liability on an 80:20 basis in the Claimant's favour was made to and accepted by the Defendant. Shortly before the Claimant attained her majority, the Defendant withdrew from the settlement agreement. The Claimant commenced proceedings alleging that there had been a binding agreement, and the matter eventually went to the Court of Appeal."

I can do no better than read paragraphs 13 and following from the judgment of Brown LJ. In paragraph 13 he deals with the facts of the *Dietz* case:

> *"…the plaintiff widow accepted the defendants' offer of £10,000 to settle her and her infant son's Fatal Accidents Acts (and 1934 Act) claim ... An originating summons was then issued for the court to approve that settlement. Between then and the hearing of the application, however, the plaintiff, unknown to the solicitors on either side, remarried."*

And I am just old enough to remember when remarriage did feature in fatal accident claims:

> *"The master duly approved the settlement but, before the consent order had been drawn up, the defendant's solicitors learned of the plaintiff's remarriage and applied to set the order aside. The master acceded to that application … as was thereafter successively held by the judge, the Court of Appeal and the House of Lords. There were essentially two issues in the case. First, was the settlement agreement prior to its approval binding on the parties … or could either side repudiate?"*

And then secondly in relation to an outstanding point. In paragraph 18:

> *"18. The real difficulty with the argument, however, becomes apparent when examining its consequences. If Part 21.10 is really to be construed as having no application to partial settlements, then it would follow that, provided only one aspect of a claim remained in contention (perhaps only a minor head of damage …) the court's approval would not be required at all. Take this very case and assume that quantum were to be contested: the 80:20 liability split never needed approval."*

And then in paragraph 19:

> *"19. It inescapably follows from all this that, regrettable though it might seem, the defendants here were entitled to renege on their agreement as they did, for good reason or none, and must therefore succeed upon this appeal."*

21. One can see, just reading the following very short passage from the speech of Lord Pearson in the *Dietz* case, he says in the judgment at page 190 of the Law Reports:

> *"When the proceedings had been commenced by the originating summons in 1965 money was claimed on behalf of the infant as well as the plaintiff and therefore under the compromise rule so far as it related to the 9250 it was not valid without the approval of the court. In my view 'not valid' means having no legal effect. The settlement, insofar as it related to the 9250 in which the infant was interested, 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."*

22. And that is, going back to the White Book for a moment, it is there compendiously set out thus:

> *"A compromise or settlement is not binding on the parties until it has been approved by the order of the court.* [Reference to *Drinkall*, reference to *Dietz v Lennig*]. *This is so even if the agreement is reached under the provisions of Part 36 and even if the agreement is in respect of partial settlement of the claim and not the whole claim."*

And it goes on, and this is the point:

> *"Once the settlement is approved by the court, it is binding."*

23. The effect of those decisions therefore are (and, in fairness, Mr Hartley accepts this) that it is open to a Defendant faced with what I will persist in calling a person lacking capacity who has arrived in agreement with such a person but that agreement has not had formal court approval, it is open to the Defendant to renege on that agreement for any reason or no reason at all and such withdrawal or reneging is the end of the matter.

24. One would have thought that really was the end of the matter so far as this case is concerned, because as at the 17th of November, and indeed as of now, no court has approved the final settlement of £200,000. The Litigation Friend is still in place. The Claimant is still a protected party for the purposes of Part 21 of the rules.

25. It is suggested by the Claimant that in a sense one can dip and out of incapacity and that in respect of certain matters it may be one can be regarded as having capacity, and it is suggested that this is such a situation. It is said that I think on the 14th of November (and I hasten to add I accept what the Claimant's solicitor says), the Claimant's solicitor confers with the Claimant and his wife about accepting the £200,000. He forms the view that the Claimant is capable of giving instructions about that and therefore it is said at that time the Claimant did have capacity, if you like, to authorise the acceptance of the £200,000. I have to say I have a problem with that. I do not for a moment doubt his bona fides, but one has to think it through.

26. It was only in July 2014, in the light of heavy medical evidence, that the order is made appointing a Litigation Friend and making the Claimant a protected party. That position persists in general terms until today, i.e. he is still a protected party, still acting through his Litigation Friend. No application to remove the Litigation Friend has been made. Mr Isherwood properly points out to me that pursuant to the Practice Direction PD21, where it is wished to remove a Litigation Friend you have to make application to the Court supported by evidence, i.e. a medical report or other suitably qualified expert's report, indicating the protected party has regained or acquired capacity, and then there are rules about service. Well, that has not happened, there has been no application to remove the Litigation Friend.

27. I quite accept (and it may be that this is what the Claimant is relying upon) that at common law capacity could fluctuate. Indeed, Baroness Hale said as such in *Dunhill v Burgin* [2014] UKSC 18:

> *"13.The general approach of the common law … is that capacity is to be judged in relation to the decision or activity in question and not globally. Hence it was concluded in Masterman-Lister that capacity for this purpose meant capacity to conduct the proceedings (which might be different from capacity to administer a large award resulting from the proceedings)."*

She points out though at the end of paragraph 14 where the issue is the capacity to conduct proceedings, which is what Part 21 is all about. You simply cannot have this dipping in and out of capacity. Paragraph 15:

> *"…Rule 21.2(1) provides that "a protected party must have a litigation friend to conduct proceedings on his behalf". By rule 21.4(3), a litigation friend must be someone who can "fairly and competently conduct proceedings" ... This in itself suggests a focus on proceedings in general rather than on "the proceedings" as framed. Furthermore it applies right at the start of any proceedings. Indeed, as will be seen later, rule 21.10 applies to claims which are settled before any proceedings have begun. Read as a whole, therefore, rule 21 posits a person with a cause of action who must have the capacity to bring and conduct proceedings in respect of that cause of action. The proceedings themselves may take many twists and turns,*

they may develop and change as the evidence is gathered and the arguments refined. There are, of course, litigants whose capacity fluctuates over time, so that there may be times in any proceedings where they need a litigation friend and other times when they do not. CPR 21.9(2) provides that when a party ceases to be a patient (now, a protected person) the litigation friend's appointment continues until it is ended by a court order. But a party whose capacity does not fluctuate either should or should not require a litigation friend throughout the proceedings. It would make no sense to apply a capacity test to each individual decision required in the course of the proceedings, nor, to be fair, did the defendant argue for that."

28. But essentially that is the logic of the Claimant's argument here, that in respect of any individual decision (in this case, "I'll take the £200,000"), it would be open to me either by a simple acceptance of the Claimant's solicitors' evidence or by adjourning this case for further medical evidence, to make a finding of fact that on or about the 14th of November he did possess capacity. But in my view, that really makes a nonsense of Part 21. It exists to protect people such as the Claimant, he still acts via his Litigation Friend and no compromise has been approved by the Court. In the light of authority, then, the Defendants were entitled to resile, i.e. withdraw the Part 36 offer so that even if in fact I am wrong about the service point, it does not matter very much because it was always open to the Defendants to withdraw their offer (and they have).

29. Therefore, I decline to make the declaration that the Claimant seeks and the application for a declaration must fail.

End of judgment