Case No: 2013/582

Neutral Citation Number: [2013] EWHC 1955 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Rolls Building
Fetter Lane
London EC4A 1NL

13 May 2013

BEFORE:

THE HONOURABLE MR JUSTICE TEARE

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BETWEEN:

REBECCA COLES Claimant

- and -

DAVID PERFECT AND OTHERS Defendant

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MR A ULLSTEIN QC appeared on behalf of the Claimant

MR D KNIFTON appeared on behalf of the First Defendant

MR C SMITH appeared on behalf of the Second Defendant

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Approved Judgment

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(Official Shorthand Writers to the Court)

MR JUSTICE TEARE:

1. This is an application by the claimant, Rebecca Coles, suing by her father and litigation friend Steven Coles, for an order that the court approve a settlement which has been reached of a claim for personal injuries by the claimant against the defendant.

2. The claim arises out of an event on 11 May 2008 when the claimant suffered a very severe head and brain injury. The event was a marine accident which occurred on the River Orwell in Suffolk. The claimant was being towed on an inflatable attached to the rear of a power boat. The defendant, who was the driver of the power boat, took evasive action in order to avoid a collision with a sail boat. In doing so, the inflatable swung around propelling the claimant's head into the bow of the sail boat, as a result of which the claimant suffered the head and brain injury to which I have referred. At the time, the claimant was 14 years old.

3. A claim was made by letter on 9 June 2008. On 16 July 2008 the defendant's insurers admitted liability on behalf of the defendant. Negotiations ensued and on 19 November 2012 agreement was reached between the parties as to the sum to be paid by the defendant to the claimant in settlement of the claim.

4. In addition to the uncertainties inherent in proving the quantum of the claim, the parties also had to consider the impact on the claimant of the limit of the defendant's liability as provided by the Merchant Shipping Act 1995. Under that Act, the defendant was entitled to limit his liability for all claims arising out of the accident to the sum of approximately £1.439 million. The limit of the defendant's insurers' liability under the policy of insurance was, I am told, the same figure. In effect, it is that figure which has been offered and accepted though the total sum payable will be about £1.37 million, the difference being accounted for by a sum paid to another young girl who was injured in the accident and by the CRU payments.

5. The court has noted the value of the claim as assessed in September 2011 by counsel acting behalf of the claimant. In view of the limit on the defendant's liability that advice has not been updated, since it was considered that no useful purpose would be served thereby.

6. In principle it seems to the court that the settlement is one which the court can approve, having regard, first, to the value of the claim as assessed in September 2011 and to the uncertainties in proving it and, secondly, to Secondly, the impact of the statutory limit on the defendant's liability. Thirdly, there are the uncertainties involved in seeking to challenge that limit. Fourthly, there are the terms of the defendant's policy of insurance and in particular the effect of a successful challenge to the limit under the Merchant Shipping Act on the defendant's insurers liability. And, fifthly, there are the uncertainties involved in seeking to recover from the defendant rather than his insurers an amount equal to the settlement figure plus costs.

7. The claimant does not assert today that she lacks capacity. The defendant does not assert today that the claimant lacks capacity. The evidence before the court which touches on that matter is equivocal and, as I say, the claimant and those advising her have not come to the court today with a view to seeking a declaration of incapacity. In those circumstances a question has arisen as to the jurisdiction of the court to approve the settlement and also as to the effect of CPR 21 rule 10 in circumstances where the court approves the settlement at a time when it has not been determined that the claimant is a protected party through lack of capacity.

8. On behalf of the claimant Mr Ullstein QC has submitted that the court has inherent jurisdiction to approve the settlement. He submits on the basis of the notes in the White Book at Volume 2, page 2442 that the court has inherent jurisdiction "to the doing by the court of acts which it needs must have power to do in order to maintain its character as a Court of Justice". He tells me that he has been involved in other cases where there has been a doubt as to the capacity of the claimant. In those cases the judges of the Queen's Bench Division have nevertheless approved the settlement. Mr Ullstein submits that that is an appropriate exercise of the court's inherent power because it achieves not only finality in litigation, but also protects the interests of the claimant.

9. On behalf of the defendant, Mr Knifton has not submitted that the court lacks inherent jurisdiction to approve the settlement, where there has been no determination that the claimant is a protected party. Both parties, the claimant and the defendant, are anxious to avoid the eventuality which occurred in <u>Dunhill v Burgin (No 2)</u> [2012] 1 WLR, page 3739 where a settlement was made in circumstances where the claimant was, as it was later proved, a protected party, but where the court had not approved the settlement. In that case the settlement having been at a very low figure compared with the proper value of the claim, the claimant when in receipt of further legal advice wished to say that pursuant to CPR 20.1 rule 10, the settlement was not valid because it had not been approved by the court. It is to ensure that no such difficulty occurs in this case that the claimant has issued its application seeking the court's approval to the settlement.

10. Mr Knifton has very properly referred the court to the cases of <u>Masterman-Lister v Brutton & Co</u> [2003] 1 WLR page 1511 and <u>Saulle v Nouvet</u> [2007] EWHC 2902 Queen's Bench. In those cases the court emphasised the need for the court to determine the issue of capacity at an early stage in the litigation. However, it is necessary to note that in both of those cases an issue had arisen as to capacity. In <u>Masterman-Lister v Brutton</u>, the claimant, who had (as in <u>Dunhill v Burgin</u>) entered into a settlement but without approval, did assert that the claimant lacked capacity and the matter therefore had to be dealt with. In <u>Saulle v Nouvet</u>, there were a number of expert reports before the court, most of which said that the claimant had capacity but one of which said that the claimant lacked capacity. The court held following <u>Masterman-Lister v Brutton</u> that the court had to determine the issue of capacity.

11. Those two cases are to be contrasted with the present case where neither party alleges incapacity. The expert evidence before the court which touches upon this matter does not express the opinion that the claimant lacks capacity, but notes that there is a doubt as to whether or not she does. In those circumstances the submission of Mr Knifton on behalf of the defendant, who is very properly anxious to protect the interests of the defendant's insurers, is that on the true construction of Order 21, rule 10 approval by the court at a time when it has not been determined that the claimant is a protected party is ineffective, with the result that the settlement, although it receives the approval of the court, would not be valid. He therefore submits that the appropriate course in the present case is for the court to declare that the claimant has capacity, but to order that in the event that the claimant lacks capacity the settlement is one which the court approves.

12. I am reluctant to order that there should be a trial of the issue of capacity in circumstances where neither party is alleging incapacity, but where both parties are anxious to secure the approval of the court to the settlement in order that the parties can be assured that the settlement is valid, final and binding. To require a trial of the issue of capacity in those circumstances would be, as submitted by Mr Ullstein, a disproportionate order to make because it would be immensely costly.

13. I am satisfied, firstly, that the court has an inherent jurisdiction to approve the settlement. I am also satisfied that the concern which has been expressed on behalf of the defendant's insurers, namely that approval of the court in the circumstances where the claimant has not been declared to lack capacity and is only a protected party is founded. The rule simply requires that there must be approval of the court with order that a settlement of a claim but by a protected party is valid. It seems to me that if the court approves the settlement and if hereafter it should be determined that the claimant lacks capacity, that the effect of CPR 21 rule 10 will not be that the settlement is invalid but that it is valid because it will have obtained the approval of the court.

14. For those reasons, the court will approve the settlement.

15. It is necessary in the light of the debate on jurisdiction and on the effect of CPR 21 rule 10 to discuss the precise wording of the order and we can proceed to do that.