Neutral Citation Number: [2021] EWHC 745 (QB)

Claim No: F90MA102

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

Date: 25th March 2021

Before:
MR JUSTICE FORDHAM

- -

Between:

MRS KATIE JOHNSON (formerly MS KATIE COOKE) **(A Protected Party by Ms GEMMA COOKE, her Sister and Litigation Friend)**	**Claimant**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and –	
THE MOTOR INSURERS' BUREAU	**Interested Party**

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- -

Winston Hunter QC (instructed by Potter Rees Dolan) for the **Claimant**
Isabel Hitching QC (instructed by Government Legal Department) for the **Defendant**
Richard Viney (instructed by Freshfields Bruckhaus Deringer LLP) for the **Interested Party**

Hearing date: 25.3.21
Judgment as delivered in open court at the hearing

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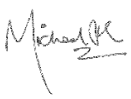
Approved Judgment

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. The purpose of today's hearing is for me to consider whether the proposed settlement in this case is in the best interests of Katie Johnson ("the Claimant") who appears with her litigation friend Gemma Cooke. A somewhat complicated procedural history, which I will need to outline later, has brought the parties through to today's hearing. In Katie's words, it has been a journey of over 24 years. The circumstances of the case involve two particular features which are worth mentioning immediately. The first is that the issue of litigation capacity on the part of the Claimant has been a hotly disputed issue between the parties, so that the Defendant ("the SST") strongly maintains that the Claimant does not lack litigation capacity. The second feature is that the nature of the settlement arrived at involves, as a condition, confidentiality from the Defendant (and the public) of the agreed sum to be paid to the Claimant. I will return to both of those features later on.

Mode of hearing

2. The mode of hearing was by Microsoft Teams. I am satisfied that a remote hearing was necessary and appropriate during the pandemic. It involved no prejudice to the interests of any party. By having a remote hearing, we 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 (I return to the question of confidentiality below): the case and its start time were published in the cause list. Also published in the cause list was an email address usable by any member of the press or public who wished to have permission to observe the hearing. Eleven people participated or observed. The hearing was recorded and this ruling will be released in the public domain.

Anonymity

3. There was no application for anonymity. As I have said, there is a question regarding confidentiality of the agreed sum.

The Injuries

4. The Claimant is 31 years old. On 16 July 1997 she was injured when she was struck, and dragged along the ground, by a scrambler motorcycle driven by David Kershaw who was uninsured and was subsequently convicted of dangerous driving. That incident took place on a footpath near the Claimant's house. She was playing. She was 7 years old. The Claimant sustained the following injuries: multiple skull fractures particularly at the base of her skull; fractures of the left petrous temporal bone and through the roof of the left orbit and also involving the left parietal and right frontal bones; a fracture to the shaft of the left femur; bruising around her left eye; a left pneumothorax and extensive grazing to the right side of her body. She has severely reduced capacity, a right sided hemiparesis which affects her coordination and muscular control, a marked cognitive impairment, reduced executive functioning and personality change, together with a predicted reduced life expectancy. She has long-lasting disabilities and difficulties.

Two Sets of Legal Proceedings

5. As a consequence of those events, two sets of legal proceedings were in due course commenced. The first ("the First Claim") was a claim issued in July 2000 against David Kershaw as first defendant and the Motor Insurers' Bureau ("the MIB") as the second defendant. That first set of proceedings was brought by the Claimant's grandmother and litigation friend. The Claimant was 10 years old. The second set of legal proceedings ("the Second Claim") was a claim issued in April 2019 against the SST, again brought (originally) by the Claimant's grandmother and litigation friend (her litigation friend is now her sister). By April 2019, the Claimant was aged 29.

The First Claim

6. What happened in relation to the First Claim, in essence, was this. Mr Kershaw did not participate in the proceedings. The MIB defended the claim. Its denial of responsibility to meet damages to compensate the Claimant was based on two key contentions: (a) the MIB's contention that a scrambler motorbike was not a road use vehicle; and/or (b) the MIB's contention that the footpath was not a road. A trial of preliminary issues was due to take place on 22 November 2001. By an order dated 9 October 2001 of DJ Harrison, informed by confidential Advice by Counsel Andrew Moore, this Court approved – as being in the Claimant's best interests – a settlement involving the MIB being ordered to pay 50% of any subsequently awarded damages in respect of its contingent liability arising out of the Uninsured Drivers Agreement 1988. By an order dated 30 November 2009 of Parker J, informed by a confidential Advice of Geoffrey Tattershall QC, this Court approved – as being in the Claimant's best interests (it being deemed that she lacked litigation capacity) – a settlement involving the MIB being ordered to pay (as the 50% payable by the MIB under the First Claim) to the Claimant the sum of £1.1 million. That was the end of the First Claim. In effect, it covered half of the Claimant's legally assessed compensatable needs and entitlements (had she recovered damages in full).

The Second Claim

7. What has happened in relation to the Second Claim, in essence, has been this. The Second Claim was brought against the SST as defendant, seeking damages under EU law. The claim was a Francovich claim: that there had been a failure to implement EU Directives, the consequence of which was that the Claimant was impeded in full recovery against the MIB in the First Claim, allowing the MIB to raise the two contentions to resist that claim. The Second Claim therefore sought to recover from the SST the remaining £1.1 million, not covered by the recovery on the First Claim, together with interest. The quantum of the claim, as set out in a schedule of loss served on 29 July 2019, was put at £1.572 million.

8. In the Second Claim, the SST denied any liability raising a number of defences, including whether the EU law Francovich criteria for recoverability were satisfied (eg. sufficient seriousness of breach). The contested issues also included the following: (1) the SST's denial of liability on the basis of a €350,000 so-called 'cover limit' in the same EU Directives which had been said not properly to have been implemented; (2) the SST's denial of liability based on the expiry of a limitation period, in circumstances where the true position was that the Claimant had litigation capacity at the material times; and (3) the SST's denial of liability based on the contention that the settlement approved by DJ Harrison in October 2001 had been an unreasonable one because the MIB's dual defence to the First Claim was hopeless. A trial of a first preliminary issue (the 'cover limit' point) was listed for today 25 March 2021.

9. I said at the beginning of this judgment that one feature of this case is that litigation capacity has been hotly contested in these proceedings: the Second Claim. That is because the SST's limitation period defence to the Second Claim necessarily involves the contention that the Claimant in fact had litigation capacity at relevant times.

Settlement

10. In January 2021, the MIB appeared on the scene in relation to the Second Claim. The upshot is this. The MIB has put forward an ex gratia offer of a payment to be made by the MIB to the Claimant, in relation to the Second Claim, together with payment of the Claimant's costs of the Second Claim (agreed at £180,000). The terms of the MIB's offer include confidentiality as to the figure which the MIB would pay to the Claimant (a feature I mentioned at the beginning of this judgment). For the purposes of the settlement being approved and implemented the MIB has applied, with the consent of the Claimant and the SST to be joined as an Interested Party. The SST as Defendant has agreed to the Second Claim coming to an end in the circumstances, subject to the Claimant paying a portion (£40,000) of the SST's costs.

Doubts as to Capacity

11. My approval is sought pursuant to CPR 21.10, in circumstances where the Claimant is said by the Claimant's team to be a "protected party", the proceedings having been brought by a litigation friend (CPR 21.2(1)). As I have explained, the SST denies that the Claimant lacks litigation capacity, whether or not the Claimant lacks capacity in other respects (there is a related question of whether the Claimant lacks transactional capacity). Resolution of that contested issue as to litigation capacity would have been central to the limitation defence raised by the SST. I am quite satisfied that it is not necessary or appropriate for the Court to make a ruling – or embark on an enquiry – as to the question of litigation capacity, in the circumstances of this case. Nobody is inviting me to do so. The Court can appropriately give approval for a settlement in a case where doubts have arisen over litigation capacity, without it being necessary to resolve those doubts: see Coles v Perfect [2013] EWHC 1955 (QB). The Court is able to proceed on the premise that the Claimant lacks capacity to conduct the proceedings and is a protected party. The Court is well able to consider, on that premise, whether the settlement is in the Claimant's best interests. In doing so, it can invoke its power under the CPR and its inherent jurisdiction. The consequence is to avoid any risk of the settlement – which the parties wish to enter and wish to be effective and binding – unravelling because it later transpires that the Claimant did lack capacity to conduct the proceedings and the approval required by CPR 21.10 was absent: see Dunhill v Burgin [2014] UKSC 18. In effect in the present case the Claimant is inviting approval pursuant to CPR 21.10 and the SST, consistent with its position in these proceedings, is inviting approval pursuant to the Court's inherent jurisdiction.

Approval

12. On the premise – or, put another way, on the assumption – that the Claimant lacks capacity to conduct these proceedings, I have asked myself two questions. First, whether I have the information and assistance that I need in order to be able to consider whether the settlement is in the Claimant's best interests. If so, secondly, whether I am satisfied that the settlement is indeed in the Claimant's best interests. The answer to both of these key questions is, resoundingly, 'yes'.

13. I am satisfied that it is appropriate to give approval for the settlement in this case. I have had the advantage of a very thorough confidential Advice dated 8 March 2021, written by Winston Hunter QC and Matthew Sellwood. That Advice sets out in detail the reasons why the Claimant's legal team consider that a settlement in the form proposed including the confidential figure is in the Claimant's best interests. It deals in detail with the contours and circumstances of the case. Having considered that Advice carefully, together with the other papers in the case to which I have been referred, I agree that it is a sensible settlement from the Claimant's point of view. I do not need to say more than that. Indeed, I do not consider it appropriate to say more than that.

Confidentiality of the sum to be paid

14. As I have already explained, it has been a condition of the settlement put forward by the MIB that the sum to be paid to the Claimant in respect of the Second Claim should be kept confidential from the SST (and therefore out of the public domain: that is only achievable if it is kept confidential at today's hearing and in this judgment). Nothing regarding that confidentiality undermines the Court's ability to have considered the nature of the settlement. The position is addressed in detail in the confidential Advice. I have already encapsulated, by reference to the figure of £1.572 million set out in the July 2019 schedule of loss, the scale of full recovery of the 50% not paid by the MIB in consequence of the First Claim. I am fully satisfied that the confidential sum which is the subject of the settlement between the MIB and the Claimant, which I am approving, is at a level which in all the circumstances is a sensible settlement in the Claimant's best interests.

15. All three parties – since I am directing that the MIB be joined as an interested party – accept, for the purposes of today's hearing, that if this Court were to permit confidentiality protection in relation to the sum which is the subject of the settlement, that should be taken as constituting a (limited) derogation from the open justice principle; they all submit that such derogation would need to be 'necessary in order to ensure that justice has been done'. The SST was not actively seeking to obtain the information. All Counsel invite me to conclude that in the particular circumstances of this case, the limited derogation is necessary to ensure that justice is done. Counsel on all sides have cooperated, with laser effectiveness, to provide a Note for the Court dealing with this issue. I am satisfied that it is necessary, in order to ensure that justice is done, for the sum to remain confidential and for the Schedule to the Order I make today to be confidential. The essential reasons are these: (1) the Court can be satisfied that the approval function – which involves confidential material being considered – is not, nor is public confidence in the integrity of it, in any way undermined; (2) the open justice principle is not, per se, offended by parties settling claims in Tomlin order form with a confidential schedule (see Zenith v Coury [2020] EWHC 774 (QB) especially at paragraphs 65-68); (3) in the case of a claimant with undoubted litigation capacity there would thus be no principled objection to a Tomlin order with a confidential schedule; (4) the MIB's offer has been made ex gratia, emanating from a third party, and expressly on a confidential basis (for reasons into which I am satisfied I do not need to go); (5) it would stand to deprive the Claimant of the opportunity of settling the claim if no derogation were permitted; (6) the derogation is limited to the sum to be paid; (7) there is a balance to be struck engaging not only the open justice principle and Article 10 freedom of expression, but also the Claimant's Article 8, A1P1 and Article 14 rights (as to the latter, see X v Dartford & Gravesham NHS Trust [2015] EWCA Civ 96 at paragraph 30); (8) that balance comes

down decisively – in the particular circumstances of the present case – in favour of the Claimant being able to accept the settlement on the terms on which it has been offered. In short, I do not consider that it could be appropriate, in the particular circumstances of the present case, to seek to interfere with a component of the settlement – namely the confidentiality from the SST of the sum of money being paid by the MIB to the Claimant – for the purposes of delivering this judgment, notwithstanding the open justice principle and Article 10. It does not follow from any of this that it would be open routinely to defendants (for example, health authorities in clinical negligence cases) to make settlement offers conditional on confidentiality which would then undermine the public interest in the reporting of approved settlements. I say nothing about that, which would need to be considered in such cases, were it to arise. My decision is limited to the particular facts and circumstances of the present case. There was no objection or question from any member of the press or public at the hearing. Finally, I will grant liberty to apply so that any person seeking to challenge the confidentiality aspect may do so, on notice to the parties, and they will be heard.

Order

16. I am happy to give my approval to the settlement. I will order that the MIB be joined to these proceedings – the Second Claim – as an interested party. I will order, by consent, that these proceedings be stayed generally, and that the Claimant or the MIB may apply to enforce the terms of settlement in the Confidential Schedule to the Order. The Confidential Schedule to the Order will record that the MIB shall pay the Claimant a gross sum specified in the Schedule in full and final settlement of the claim for damages by a specified date and that upon satisfaction the MIB shall be discharged from any further liability arising from the accident. There shall be liberty to any person to apply as to the confidentiality of the Schedule. I order that the MIB shall separately pay the Claimant's costs of the claim, agreed at £180,000. I order that the Claimant pay the fixed sum of £40,000 in respect of the SST's costs of defending the claim, those costs to be paid within 21 days of receiving the payment of damages from the MIB as set out in the Confidential Schedule, that payment of those costs to be accepted by the SST in full and final settlement of its claim for costs, the Claimant being discharged from any further liability towards the SST and the MIB bearing no liability in respect of the SST's costs. Finally, I will order that the Claimant provide the MIB with an updated signed form of assignment by 4pm on 24 March 2021 thereby protecting the MIB's right to seek to recover its full updated outlay from Mr Kershaw.

17. I am grateful to Counsel and all three legal teams for the assistance that they have given the Court. I have been able to express to Katie the fact that it is both from her perspective and from the perspective of justice and the Court it is good that a suitable and satisfactory settlement (albeit after such a long journey) has been able to be identified, carefully considered and now formally approved. I wish her well.

25.3.21