



5 Stone Buildings

CPR 21 & Approval of Compromises

Jordan Holland

16 April 2021

www.5sblaw.com

Who Needs a Litigation Friend

- Two categories of people who cannot conduct litigation on their own behalf:
 - CPR 21.1(2)(b): Child (any person under 18)
 - CPR 21.1(2)(d): A “*protected party*”: a party, or an intended party, who lacks capacity to conduct the proceedings
- CPR21.1(2)(c): “*‘lacks capacity’ means lacks capacity within the meaning of the Mental Capacity Act 2005*”
- Test for capacity is issue specific (statutory test of incapacity at s.3 MCA 2005)
- Dunhill v Burgin [2014] UKSC 18 - the test is whether person has capacity to conduct the claim that he/she has, not the claim as formulated by his/her lawyers
- If falls within either category then must have a litigation friend: CPR 21.2(1)-(2)

When does an adult lack litigation capacity?

Bailey v Warren [2006] EWCA Civ 51

“The assessment of capacity to conduct proceedings depends to some extent on the nature of the proceedings in contemplation. I can only indicate some of the matters to be considered in assessing a client’s capacity. The client would need to understand how the proceedings were to be funded. He would need to know about the chances of not succeeding and about the risks of an adverse order as to costs. He would need to have capacity to make the sort of decisions that arise in litigation. Capacity to conduct such proceedings would include the capacity to give proper instructions for and to approve the particulars of claim, and to approve a compromise. For a client to have capacity to approve a compromise, he would need insight into the compromise, an ability to instruct his solicitors to advise him on it, and an understanding of their advice and an ability to weigh their advice...He would need to know what he was giving up and what would happen if he refused to accept the offer of compromise.”

Arden LJ

Application of the Capacity Test

- Important to remember that P may have litigation capacity notwithstanding that does not have capacity in relation to subject-matter of the litigation (but Russell J thought this would be highly unusual: LB Redbridge v G [2014] EWHC 485 (COP))
- D v R [2010] EWHC 2045 (COP): UI case in which proceedings had been started on P's behalf and Henderson J had to consider whether P had capacity to discontinue them:
 - Needs at least a basic understanding of the claim. If gift to be set aside vitiating factor has to be established. Needs to understand the nature of the vitiating factor and be able to weigh up arguments for/against pursuing the claim.
 - But provided that P is equipped to make the decision it makes no difference whether he makes an imprudent decision or a decision which would not be in his best interests as defined by s.4 MCA 2005.

Who May Act as Litigation Friend

- Either of the following may become litigation friend without court order (CPR21.4):
 - Deputy appointed by Court of Protection with power to conduct proceedings on the protected party's behalf (won't apply to a child unless the child is likely to lack capacity at 18 and has therefore had a deputy appointed)
 - Person who can fairly/competently conduct proceedings on protected party's behalf and has no adverse interest and if protected party is a claimant undertakes to pay any costs which the protected party may be ordered to pay
- A litigation friend has a right to (on application) recover reasonable costs and expenses from any sum recovered (CPR 21.12) but:
 - Subject to exceptions this will not include any costs which are disallowed on assessment (CPR 21.12(3))
 - Provides no protection if protected party is unsuccessful

Compromise on behalf of child/protected party

- No compromise on behalf of child/protected party is valid without the approval of the court (CPR 21.10 (1))
- If proceedings issued then LF brings the application by Application Notice (supported by witness statement)
- If proceedings are not issued then LF brings the application by Part 8 Claim Form (supported by witness statement) (CPR 21.10(2))
- General rule that until such time as court's approval is given any party (not just child/protected party) may repudiate the compromise:
 - Drinkall v Whitwood [2004] 1 WLR 462
 - But consider drafting of settlement agreement

Application for Approval

- If prior to issue of proceedings must include:
 - Draft consent order (PD21, para 5.1(1))
 - Extent to which Defendant admits liability (PD21, para 5.1(2))
 - Age/occupation of child/protected party (PD21, para 5.1(3))
 - LF's approval of compromise (PD21, para 5.1(4))
 - Copy of any financial advice received re. compromise (PD21, para 5.1(5))
 - An Opinion on the merits (from counsel or solicitor) + instructions (unless set out in Opinion) (PD21, para 5.2)

- If proceedings issued must include:
 - Opinion on the merits (counsel or solicitor) (PD21, para 6.4(1))
 - Copy of any financial advice (PD21, para 6.4(2))
 - Copy of any documentary evidence relevant to the Opinion (PD21, para 6.4(3))

Hearing of the Application

- Other parties to the claim (or compromise if unissued) should be listed as respondents/defendants to the application. However:
 - Not to be served with copies of the Opinion or other privileged information
 - Consider redactions to witness statement in support of application
 - Consider redactions to skeleton argument
- Respondents/defendants entitled to attend:
 - But not for such parts of the hearing as refer to privileged material
- Unless application made during the course of the trial:
 - Master or District Judge if made on behalf of a child (PD21, paras 5.6(1) and 6.5(1))
 - Master or designated civil judge or nominee if protected party (PD21, paras 5.6(2) and 6.5(2))

Hearing of the Application: Public v Private

- General rule recorded at CPR 39.2(1) is that the hearing is to be in public. No general exception to the rule for approval applications.
- However, CPR 39.2(3) provides that if the court is satisfied that one of the matters listed at the sub-paragraphs of that rule applies and that it is necessary to sit in private to secure the proper administration of justice then it will do so:
 - CPR 39.2(3)(c): the hearing involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality
 - CPR 39.2(3)(d): a private hearing is necessary to protect the interests of any child or protected party
- Consider how much of the hearing has to be in private:
 - Opinion/merits
 - Confidentiality of any settlement agreement/Schedule to Tomlin Order

Hearing of the Application: Court's Approach (1)

- CPR 21 gives no guidance on the court's approach to its jurisdiction to approve a compromise (and neither does the commentary in the White Book)
- Bailey v Warren [2006] EWCA Civ 51 (retrospective application for approval of compromise) at 180 to 184:
 - The court's discretion whether to approve a compromise is unfettered. Its role is to ensure that the protected party's best interests are served.
 - In doing so the court will consider the advice of the protected party's legal advisers as to the merits of entering into the proposed compromise. Even if the court believes that that advice contains errors it may choose to exercise its discretion to approve the compromise if it considers (with the benefit of submissions) that its terms are nonetheless reasonable.
 - There are other factors which bear on the protected party's best interests. These include the circumstances in which one might accept a less favourable compromise in order to achieve a quicker end to the case and avoid the necessity for a trial.

Hearing of the Application: Court's Approach (2)

- Bailey v Warren [2006] EWCA Civ 51 (retrospective application for approval of compromise) at 180 to 184:
 - A myriad of factors bear upon a compromise and the modern encouragement to compromise in civil litigation is a sufficiently powerful incentive that the court should not ordinarily too readily question the wisdom of a proposed settlement when it is asked to approve it.
 - While the protected party's interests predominate, the other party to the compromise is not without an interest which the court must protect. If an agreement was openly negotiated and concluded after the protected party had taken legal advice that is a relevant factor.
 - The interests of the good administration of justice (including the finality of judgments and the certainty of outcome of litigation) are also relevant.
- Consider also the approach of the Court of Protection under the Mental Capacity 2005: see para 142 of Bailey v Warren

Investment of Monies Recovered

- Money recovered on behalf of child/protected parties shall be dealt with in accordance with directions given by the court and not otherwise (CPR 21.11(1)):
 - Court may direct that the money be paid into court (PD 21, para 8.1(1)) or to LF etc. for immediate benefit of child
- Court can (and does) direct that money can be held outside of court on bare trust:
 - Can also direct a discretionary trust (as long as judgment not already given: see Allen v Biochemicals [1974] QB 384)
 - Consider terms of trust (in particular whether power to apply money for benefit other than minor)
 - Who is to be trustee (if sum large then court will likely want a professional)

Costs

- The general rule is that a Litigation Friend may only recover the costs (s)he has incurred on behalf of the child/protected party on application (CPR 21.12(1)).
- But those costs must be subject to detailed assessment (CPR 46.4(2)(a) and (in the case of a child) are limited to the assessed amount (CPR 21.12(1A)):
 - Unrecoverable costs will be payable by the LF personally (unless solicitor/counsel agrees to waive them)
- But there are exceptions (PD 46, para 2.1):
 - Where there is no need to do so to protected PP/child or their estate
 - Where another party has agreed to pay a specified sum and solicitors/counsel have agreed to waive further fees
 - Where court has decided costs by way of summary assessment and solicitors/counsel have agreed to waive further fees
 - Where an insurer/other person is liable and court satisfied that able to discharge costs
- All must be considered **before** agreeing to terms of compromise
 - What if costs are higher than anticipated?

5 Stone Buildings

Any questions?

t 020 7242 6201

w www.5sblaw.co.uk

 @5sblaw