Neutral Citation Number: [2021] EWHC 973 (QB)

Case No: QB-2013-000845

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 21st April 2021

Before :

MS CLARE AMBROSE
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

LYNDONNE WORMALD	**Claimant**
(by his mother and Litigation Friend)	
v	
GULNAWAZ AHMED	**Defendant**

Roger Mallalieu QC (instructed by **Stamp Jackson & Procter Ltd**) for the Claimant
Winston Hunter QC (instructed by **DWF LLP**) for the Defendant

Hearing date: 24 March 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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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Covid-19 protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 21st April 2021.

Ms Clare Ambrose:

Introduction

1. This is a dispute about whether a Part 36 settlement offer that was accepted on 18 September 2020 can later be withdrawn and whether the settlement should be approved by the court. The facts were unusual and raise some novel questions as to the application of Part 36 of the Civil Procedure Rules to protected parties or children.

2. On 26 August 2009 the Claimant, Mr Lyndonne Wormald, was seriously injured in a road traffic accident at the age of 20. He suffered a serious, traumatic brain injury. He was a pedestrian and the Defendant was the driver involved.

3. In 2013 proceedings were commenced by the Claimant against the Defendant. Insurers were involved and have conducted the Defendant's case. Due to Mr Wormald's injury he lacked capacity to conduct the litigation and was a protected party. His mother Mrs Dawn Wormald was his litigation friend. Liability was denied by the Defendant.

4. On 15 October 2014, the Defendant's solicitors made a Part 36 offer in the sum of £2 million in respect of the whole of the claim. That offer was not withdrawn at any stage prior to the matters set out below.

5. Following a trial in November 2014 on the preliminary issue of liability, judgment was entered in the Claimant's favour for 60% of his damages to be assessed. An appeal against that liability judgment was dismissed by the Court of Appeal on 7 June 2016. Quantum remained disputed and was due to be decided in a nine day trial listed for October 2021.

6. On the 18 September 2020, the Claimant's solicitors served notice of acceptance of the offer of 15 October 2014.

7. Later that day, Mr Wormald sadly died.

8. On 25 September 2020, the Defendant's solicitors purported to withdraw the offer in light of Mr Wormald's death.

9. By an application dated 16 December 2020 the Claimant seeks a declaration that pursuant to CPR 36.11(2) the Defendant's offer of the 15 October 2014 has been accepted and that the offer cannot be withdrawn. The Claimant also seeks an order that the sum accepted in settlement is approved by the court and there be final judgment in the settled sum (less deductions for interim payments and costs).

10. I refer to the Claimant and his solicitors, Stamp Jackson & Procter Ltd ("the Claimant's solicitors"). These are the solicitors who acted for the Claimant named in the claim form, Mr Lyndonne Wormald, before his death, and they have issued this application in his name despite his death. They have instructed leading counsel who tells me that Mr Wormald's mother is his executor and that the application before me is brought on her instructions as

executor. He invites me (on her behalf) to substitute or add her as a party if necessary in order to allow the dispute to be resolved. Proceeding on that information, I am satisfied that it is necessary to substitute her as a party for Lyndonne Wormald, and treat the application as made and pursued on her instructions as an executor who will be the personal representative of his estate. I refer to the Claimant and his solicitors throughout this judgment to avoid confusion (and because the parties did not draw precise distinctions as to the different status of Mr Wormald, his litigation friend, his executor and his estate). The submissions made before me are made on the instructions of Mrs Wormald as executor and intended representative of Mr Wormald's estate, and she is to be treated as having substituted Lyndonne Wormald as Claimant. The parties are to liaise as to the correct name of the parties in the heading.

The evidence

11. I had a statement dated 16 December 2020 from Mr Mark Slade who acted for Mr Wormald and took instructions from Mrs Wormald. In addition I had a statement from Mr David Young of the Defendant's solicitors. The evidence was not challenged save as flagged up below.

12. The basic facts are covered above. The Defendant's offer of £2m was made on the 15 October 2014 and is in standard Part 36 terms. At the same time the Defendant made what was described as a liability offer under Part 36, offering to agree liability for one third of damages to be assessed.

13. In 2015 and 2016 the Defendant had paid the total sum of £450,000 by way of two interim payments in respect of damages. Approved payments out have been made in the sum of £58,246.73. The balance is held on trust following a court order dated 8 May 2018.

14. Mr Wormald's injuries from the accident meant he had ongoing health problems, used a wheelchair and had a stent in his trachea. The Defendant's solicitors were aware that he had been admitted to hospital on a number of occasions with respiratory infections and these periods of ill health had affected the appointments with the experts.

15. On the 14 September 2020 the Claimant's solicitors were informed that he was back in hospital having choked and suffered what Mr Slade described as a cardiac episode.

16. On 15 September 2020 the Claimant's solicitors were told he remained critical. Given those circumstances a full review of the claim and offers was carried out, and the firm's costs lawyer was consulted.

17. On 17 September 2020 there was considerable further activity for the Claimant's solicitors:
    a) They sent a letter to the Defendant's solicitors accepting two Part 36 costs offers relating to liability costs and also appeal costs. At the same time they notified the Defendant's solicitors that Mr Wormald was back in hospital and some upcoming appointments would have to be cancelled/ postponed.
    b) Mr Slade says that counsel was consulted on an urgent basis because the admission was due to a cardiac episode rather than a respiratory one.
    c) Serious consideration was given to accepting the £2,000,000 offer. A schedule of loss was prepared. The solicitors decided to seek Mrs Wormald's urgent instructions to conclude the claim on the best terms given the risks involved.

d) Mr Slade explains that at around 7.30 in the evening he had a very difficult conversation with Mrs Wormald regarding the pros and cons of accepting the offer. She was very distressed as she had been told Mr Wormald was very poorly and likely to have suffered a significant further brain injury. He discussed the possible costs implications of accepting the offer and the possible value of Lyndonne's claim if he were to die. Her clear instructions were to accept the offer and do the best thing for Mr Wormald.
e) The solicitors then again spoke to counsel and it was agreed that the £2,000,000 offer would be accepted.

18. On 18 September 2020:
    a) At 0819 on 18 September the Claimant's solicitors sent notice of acceptance of the Part 36 offer by email.
    b) At 1000 the Defendant's replied stating: "*I thank you for your letter purporting to accept our Part 36 Offer made back on 15 October 2014. I am aware that your client has been admitted to hospital. For the avoidance of doubt, can you confirm that he remains alive and if so, provide a detailed resume of what you have been told of his condition and what the future holds."*
    c) At 1145 the Claimant's solicitors notified the Defendants' solicitors that he was on life support and in a critical condition.
    d) At 1933 the Claimant's solicitors were advised by Mrs Wormald that he had died.

19. The Defendant's solicitors were notified of the death on 21 September and on the 25 September 2020, they sent an email purporting to withdraw the offer in light of the death.

20. There was disputed evidence as to whether a settlement of £2,000,000 would result in recovery significantly in excess of any reasonable value of the claim as now crystallised on Mr Wormald's death. The Defendant submitted that the offer would lead to a significant windfall to the estate. It was intended to address Mr Wormald's future and past losses, which would have crystallised on his death at a much smaller sum since the offer was based on the future costs of care, but the majority of those would not now be incurred. In his statement Mr Young said that based on the injuries suffered, the judicial college guidance, and the interim payments used from Mr Wormald's trust it was very unlikely that 100% of the damages would exceed £500,000, and there was only entitlement to 60%, namely around £300,000.

21. The Claimant's counsel disputed in submissions that there would be any unwarranted windfall indicating that over £279,000 had already been spent up to May 2020, and there would be substantial liabilities in costs (covering 6 years worth of litigation) by reason of the late acceptance of the offer.

22. In support of the application the Claimant put forward Mr Slade's statement, email correspondence from September 2020, the pleadings, various court orders, two orthopaedic reports dated 15 May 2013 and 30 March 2016 and a urological report dated 8 July 2020. The Claimant acknowledged that the Defendant had contested the application on grounds put forward in Mr Young's statement of 21 January 2021, including the assertion that the £2m offer was very significantly in excess of the value of the claim. The Claimant did not respond to this evidence. Given that advice had already been sought in September 2020

from counsel and the Claimant has experienced legal advisors I assume that this was a deliberate decision rather than an oversight. For the purpose of this application I assume that, if approved, the settlement will result in the estate recovering substantially more than it would have recovered if the claim had been decided at trial.

The issues to be decided

23. The dispute before me was as to the effect of the Claimant's acceptance of the offer and the Defendant's purported withdrawal of it. It was common ground that it raised a question of general application as to whether a Part 36 offer can be withdrawn (whether by a claimant or defendant) after acceptance on behalf of a protected party. I only considered the situation where a protected claimant accepted an offer but the situation is probably the same for a protected defendant.

24. The issues relating to whether the settlement should be approved were much less clearly defined. The Claimant had applied for approval but in submissions suggested that this was sought "to the extent necessary". The Claimant's counsel tentatively questioned whether approval for the settlement would be necessary at all. For reasons set out below, I reject that argument.

25. The Defendant's counsel fairly questioned the basis of the Claimant's application for approval noting the absence of the required evidence and the unclear basis upon which the solicitors were acting. The Defendant maintained that the settlement should not be approved, pointing to the legal arguments and the evidence regarding quantum and the circumstances of the offer. The Defendant invited the court to decline approval of the settlement and grant permission for him to withdraw the offer.

26. On an application for the approval of a settlement by a child or protected party the practice direction to Part 21 provides at paragraph 6.4 that:
"The court must be supplied with –
(1) an opinion on the merits of the settlement or compromise given by counsel or solicitor acting for the child or protected party, except in very clear cases; and
(2) a copy of any financial advice; and
(3) documentary evidence material to the opinion referred to at paragraph 6.4(1)."

27. The Claimant did not provide the court with that information. The Claimant has been advised by experienced solicitors and leading counsel. Given the earlier advice it is unlikely that this was an oversight. It is more likely that the Claimant decided to focus on the legal issue as to whether the Defendant's offer could be withdrawn.

28. The Claimant applied for an order approving the settlement, the Respondent dealt with that application and there was extended argument on the application for approval and how it should be addressed. Accordingly, it is appropriate for me to address that part of the application so far as possible, notwithstanding the lack of an opinion on the merits. At this stage it is fair to proceed on the assumption that this is one of the *"very clear cases"* and the merits of the settlement are obviously favourable to Mr Wormald's estate even though it disputed that there was a significant or unwarranted windfall. However, I make no final

ruling on that or the merits of the settlement, and it would remain open for the Claimant to put forward the materials required under the practice direction if it were in issue.

29. In my view the key issues to be decided were as follows

i) Where a protected party accepts a Part 36 offer is the other party subsequently able to withdraw that offer before approval of the settlement?
ii) When the court is asked to approve a settlement, on what grounds (if any) can a Part 36 offer be withdrawn?
iii) Should the court grant permission for withdrawal of the Defendant's offer of 15 October 2014 or approve the settlement in the amount offered?

The applicable procedural rules

30. Part 21 deals with children and protected parties. It provides that:

> **"21.10**
>
> (1) Where a claim is made –
>
> (a) by or on behalf of a child or protected party; or
>
> (b) against a child or protected party,
>
> no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court."

Part 36 deals with settlement offers as follows:

> Scope of this Part
>
> **36.1**
>
> (1) This Part contains a self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part ("Part 36 offers").
>
> …
>
> Withdrawing or changing the terms of a Part 36 offer generally
>
> **36.9**
>
> (1) A Part 36 offer can only be withdrawn, or its terms changed, if the offeree has not previously served notice of acceptance.

(2) The offeror withdraws the offer or changes its terms by serving written notice of the withdrawal or change of terms on the offeree.

(3) Subject to rule 36.10, such notice of withdrawal or change of terms takes effect when it is served on the offeree.

(Rule 36.10 makes provision about when permission is required to withdraw or change the terms of an offer before the expiry of the relevant period.)

…

Acceptance of a Part 36 offer

36.11

(1) A Part 36 offer is accepted by serving written notice of acceptance on the offeror.

(2) Subject to paragraphs (3) and (4) and to rule 36.12, a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer), unless it has already been withdrawn.

(Rule 21.10 deals with compromise, etc. by or on behalf of a child or protected party.)

(Rules 36.9 and 36.10 deal with withdrawal of Part 36 offers.)

(3) The court's permission is required to accept a Part 36 offer where—

(a) rule 36.15(4) applies;

(b) rule 36.22(3)(b) applies, the relevant period has expired and further deductible amounts have been paid to the claimant since the date of the offer;

(c) an apportionment is required under rule 41.3A; or

(d) a trial is in progress.

"…"

Costs consequences of acceptance of a Part 36 offer

36.13

(1) Subject to paragraphs (2) and (4) and to rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their

recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror.

…

4) Where—

…

(b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or

(c) subject to paragraph (2), a Part 36 offer which does not relate to the whole of the claim is accepted at any time,

the liability for costs must be determined by the court unless the parties have agreed the costs.

(5) Where paragraph (4)(b) applies but the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that—

(a) the claimant be awarded costs up to the date on which the relevant period expired; and

(b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

…

(6) In considering whether it would be unjust to make the orders specified in paragraph (5), the court must take into account all the circumstances of the case including the matters listed in rule 36.17(5).

Other effects of acceptance of a Part 36 offer

36.14

(1) If a Part 36 offer is accepted, the claim will be stayed.

(2) In the case of acceptance of a Part 36 offer which relates to the whole claim, the stay will be upon the terms of the offer.

(3) If a Part 36 offer which relates to part only of the claim is accepted, the claim will be stayed as to that part upon the terms of the offer.

(4) If the approval of the court is required before a settlement can be binding, any stay which would otherwise arise on the

> acceptance of a Part 36 offer will take effect only when that approval has been given.
>
> …
>
> Costs consequences following judgment
>
> **36.17**
>
> …
>
> (5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—
>
> (a) the terms of any Part 36 offer;
>
> (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
>
> (c) the information available to the parties at the time when the Part 36 offer was made;
>
> (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
>
> (e) whether the offer was a genuine attempt to settle the proceedings.
>
> (6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate."

The relevant case law and commentary

Case law on part 36

31. The White Book commentary explains that Part 36 was introduced in 2000 to reform the procedures for payments into court and offers made without prejudice save as to costs. The original purpose of Part 36 and its development since 2000 suggests that its provisions have always been intended to work as a self-contained code. The operation of Part 36 offers (and their acceptance) is not governed by ordinary contract principles although consensus underpins it, as acknowledged in *Gibbon v Manchester City Council* [2010] EWCA Civ. 726. In that case the Court of Appeal emphasised their operation as a code and rejected a contractual analysis in favour of applying the strict terms of Part 36 even though it acknowledged that "*in some cases the demands of clarity and certainty in the operation of Part 36 may appear to produce injustice"* [18].

32. The interests of certainty as to the application of Part 36 are a significant consideration. Both parties referred me to the judgment of Moore-Bick LJ in *Gibbon v Manchester City Council* where he explains the purpose of the provision:

> *"4. It can be seen from Part 36 as a whole, as well as from the extracts cited above, that it contains a carefully structured and highly prescriptive set of rules dealing with formal offers to settle proceedings which have special consequences in relation to costs in those cases where the offer is not accepted and the offeree fails to do better after a trial.*
>
> *…*
>
> *In seeking to settle the proceedings, therefore, parties are not bound to make use of the mechanism provided by Part 36, but if they wish to take advantage of the particular consequences for costs and other matters that flow from making a Part 36 offer, in relation to which the court's discretion is much more confined, they must follow its requirements.*
>
> *5. Part 36 is drafted as a self-contained code. It prescribes in some detail the manner in which an offer may be made and the consequences that flow from accepting or failing to accept it. In some respects those consequences reflect broadly the approach the court might be expected to take in relation to costs; in others they do not; for example, rule 36.14(3) allows the court to award a claimant who has obtained a judgment at least as advantageous as his offer interest on the sum for which he has obtained judgment at an enhanced rate of up to 10% over base rate, costs on the indemnity basis and interest on those costs at an enhanced rate as well.*
>
> *6. Basic concepts of offer and acceptance clearly underpin Part 36 , but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute. Such concepts are part of the landscape in which everyone conducts their daily life. It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature. Indeed, it is not desirable that it should do so. Certainty is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation. In my view, Part 36 was drafted with these considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended.*

> …
>
> *16. Rule 36.9(2) is quite clear: a Part 36 offer may be accepted at any time unless the offeror has withdrawn the offer by serving notice of withdrawal on the offeree. Moreover, it may be accepted whether or not the offeree has subsequently made a different offer, a provision which is contrary to the general position at common law. The rules state clearly how a Part 36 offer may be made, how it may be varied and how it may be withdrawn. They do not provide for it to lapse or become incapable of acceptance on being rejected by the offeree. That would be the case at common law, but it is inconsistent with the concepts underlying Part 36 , which proceeds on the footing that the offer is on the table and available for acceptance until the offeror himself chooses to withdraw it. There are good reasons for that. An offer which appears unattractive when made, and which is therefore rejected, may become more attractive as the proceedings progress and the parties reassess the strength of their respective cases. A defendant who chooses to leave his offer on the table may tempt the claimant into accepting it, with the benefit to himself of the consequences for costs of an offer made at an early stage. Part 36 allows a defendant (or for that matter a claimant) to decide whether to leave his offer open for acceptance or to withdraw it and make another offer later. To import into Part 36 the common law rule that an offer lapses on rejection by the offeree would undermine this important element of the scheme."*

33. The Defendant drew my attention to the fact that where a party in a personal injury case is a protected party the usual costs consequences of Part 36 may not be given full effect and the court may disapply them. Approval may take some time and prognosis may be difficult The Claimant referred to *SG v Hewitt* [2012] EWCA Civ 954. In that case a 6 year old claimant suffered a serious brain injury in a road traffic accident, and a Part 36 offer was made in 2009 (when he was around 12 years old) but not accepted until 2011. The dispute was as to whether costs should be subject to the normal order following Part 36 or whether the court should depart from that on grounds that it would be unjust. The court concluded that it would be unjust to apply the normal order because of the uncertainty of prognosis of the injury, and the implications of the requirement of court approval under CPR 21.10.

34. The judgment in *SG v Hewitt* was not explored in argument but the Court of Appeal drew a number of conclusions that are helpful to understand the application of Part 36 and its interaction with CPR 21.10.
    a) The mere fact that a party is a child would not be good reason to depart from the normal order available under Part 36 [36, 78].
    b) In deciding whether the normal order would be unjust the court must consider all the circumstances, including the factors now listed in CPR Part 36.17. The decision will be very fact sensitive [73].

c) Changes in circumstances between the date of an offer and the trial are usual contingencies inherent in litigation which do not of themselves justify a departure from the normal rule [44].
d) Uncertainties of prognosis were not to be regarded as part of the usual litigation risks of claims relating to serious injuries [71, 86].
e) The reasonableness of a party's conduct is an important factor but will not be decisive [93].
f) Whether one side has been open with the other will be relevant and failure to notify a prognosis once it becomes clear may be relevant [51, 90].
g) The court was reluctant to investigate whether an accepted offer gave rise to a perceived windfall since it was not relevant to costs and could undesirably open the door to a complex investigation [61].
h) The power of the court to depart from the normal order was a "*deliberate and important safety valve*" available where the case has features showing that the normal order would be unjust [76].

Case law and commentary on Part 21

35. Part 21 is well established and its importance was confirmed by the Supreme Court in *Dunhill v Burgin* [2014] I WLR 933 where the Supreme Court said (at paragraphs 20 and 32) that: "*the purpose of the rule is to impose an external check on the propriety of the settlement…The policy underlying the Civil Procedure Rules is clear: that children and protected parties require and deserve protection, not only from themselves but also from their legal advisors".*

36. In *Dunhill* the Supreme Court then endorsed the White Book's summary of the purpose of the rules, which now provides in full as follows:

> "Rules 21.10 and 21.11 and the Practice Direction provide a comprehensive code the objects of which are:
>
> (a) to protect the interests of children and protected parties. This may involve protecting the child from any lack of skill or experience of their legal advisers which might lead to a settlement of a money claim for far less than it is worth; see Dunhill above; and see Black v Yates [1992] Q.B. 526; 4 All E.R. 722 (claim by child dependants for compensation greater than amount awarded by a foreign court);
>
> (b) to provide means by which a defendant may obtain a valid discharge from a child or protected party's claim. A judgment in proceedings or an order approving a settlement of proceedings under Pt 10 binds the claimant child or protected party and gives the defendant a discharge;
>
> (c) to make sure that money recovered by or on behalf of a child or protected party is properly looked after and wisely applied. Rule 21.11 provides for the control of money recovered;
>
> (d) to ensure that the interests of all dependants entitled to a possible share in the settlement are properly defined and protected."

37. The parties referred me to *Dietz* v *Lennig Chemicals* [1969] AC 170 which appears to be the leading authority on the binding effect of a settlement concluded on behalf of a minor. Simon-Brown LJ (at [13-14] of *Drinkall v Whitwood* [2003] EWCA Civ. 1547) provided this impeccable summary of the case:

> *"The short facts of Dietz were that, before proceedings were issued [in August], 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 "subject to the approval of the court". An originating summons was then issued [on 18 October] for the court to approve that settlement. Between then and the hearing of the application [on 12 November], however, the plaintiff, unknown to the solicitors on either side, remarried [on 25 October]. 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, rightly, 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 at least on the defendants) or could either side repudiate? Second, even if it was not binding, was the master right, once he had approved it, to set aside his consent order rather than draw it up? Both points were decided against the plaintiff, the first because that was held to be the true effect of Order 80, r11 (equivalent to CPR 21.10(1)); the second because the defendants' consent to the court's approval of the settlement had been induced by an innocent misrepresentation. It is, of course, the first point alone which is critical for the purposes of the present appeal.*

The two reasoned speeches were given by Lord Morris of Borth-y-Gest and Lord Pearson. On the point now at issue, Lord Morris said:

> *"In my view, there was no binding agreement made in August. [p182] ... If in the present case a writ had first been issued and if thereafter there had been discussions leading to agreement, such agreement would have lacked validity unless and until the approval of the court was given. This is made clear by RSC Ord 80, r11 ... The present case came within the provisions of Order 11, r12 ... When ... the originating summons was taken out it made a 'claim' on behalf of a person under disability (ie the infant ... [T]he agreement 'for the settlement of the claim' would depend for its validity upon obtaining approval of the court. [p183] ... If the court's approval were given, a binding agreement would result upon the basis of which certain directions could be given by the court. [p184]."*

Lord Pearson said:

> *"There was a suggestion made in the course of the argument that the Compromise Rule, if it meant what it appears to say — if 'invalid' means 'of no legal effect' — is* ultra vires *. I do not accept that suggestion. When the claim of an infant or other person under disability is before the court, the court needs, for the purpose of protecting his interest, full control over any settlement compromising his claim. In my view, the making and re-making of the Compromise Rule were valid exercises of the rule-making power under the Judicature Acts, which is now contained in section 99 of the Act of 1925 [p189] ... The compromise rule is the vital one here. ... The settlement, so far as it related to the £9,250, 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. That which might have given it validity would have been an order made by the master with the effective consent of the parties ... [p190]."*

38. The parties also both referred to the Court of Appeal's decision in *Drinkall v Whitwood* [2003] EWCA Civ. 1547. A child's litigation friend had made a Part 36 offer before proceedings were issued, which had been accepted by the defendant's insurer. Eighteen months later the insurer withdrew from the settlement and the claimant sued on the settlement. The Court of Appeal concluded that the settlement was not binding and that *Dietz* was the decisive authority showing that either side could repudiate until approved under CPR 21.10. Simon Brown LJ concluded at paragraph 16 that:

> *"The fact that agreement here was reached pursuant to the express provisions of Part 36 can make no possible difference."*

39. Both decisions are dealt with in the White Book commentary to CPR 21.10 which states as follows:

> *"The approval of the court is required whenever the compromise, etc, on behalf of the child or protected party is reached: 21.10(1). A compromise or settlement is not binding on the parties until it has been approved by order of the court; see Drinkall v Whitwood [2003] EWCA Civ. 1547... 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."*

40. The Claimant's counsel disputed whether this commentary was correct. His position was that Simon Brown LJ's comment was an obiter dicta (which was accepted by the

Defendant) and reflected the situation at the time when Part 36 did not apply in full force to pre-proceedings offers and before the Court of Appeal had identified its self-contained nature. It was not clear whether any argument was advanced on Part 36 and there was no express rule limiting the circumstances under which a Part 36 offer could be withdrawn. He argued that Part 36 was amended in around 2010 to introduce express restrictions on the withdrawal of an accepted Part 36 offer.

41. This case law and CPR 21.10 was also under scrutiny in *Revill v Damiani* [2017] EWHC 2630 (QB) where Dingemans J investigated the application of CPR 21.10 and concluded that its interpretation under English law did not breach the protected party's rights under Article 6 of the European Convention of Human Rights. He identified that interpretation as follows:

> *"It is common ground that CPR 21.10 has been interpreted in judgments of the House of Lords and Court of Appeal to mean that a compromise with a protected party is not binding unless and until it is approved by the Court. This means that either the protected party or the other party to the compromise may withdraw from the compromise at any time before its approval." [2]*

The Claimant's case

42. Both counsel provided a careful analysis of the authorities. I only summarise their basic positions at this stage. The Claimant accepted that where parties enter a contractual compromise in respect of a claim involving a protected party, such compromise is not binding unless and until approved by the court, and either party may resile from it at any time before its approval. It disputed that this applied under Part 36 which expressly provides that an offer can "only" be withdrawn if it has not been accepted.

43. In essence, the Claimant's position is that Part 36 was carefully drafted to create certainty and that its provisions prevail such that the Defendant cannot now withdraw the offer it made in 2014. As explained above, the Claimant disputed that the White Book commentary correctly explained the application of *Drinkall* since that authority did not reflect the present wording of CPR Part 36.

44. The Claimant emphasised the plain wording of CPR 36.9(1) and the fact that there was provision for withdrawal in carefully prescribed situations (which were not applicable). Similarly, CPR 36.14 contains no qualification by reference to the claimant being a protected party, only as to when the stay takes effect. This means that once accepted the offer cannot be withdrawn and the only question then is whether the court approves the settlement. The provisions are clear in defining where CPR 21.10 applies, and the Defendant's protection lies in its initial evaluation of its offer and its ability to withdraw at any time before acceptance. This means that CPR 21.10 and CPR Part 36 can be read together to form a coherent whole for the protection of the protected party.

45. Counsel submitted that there was no valid reason to decline to approve the settlement. The purpose of the requirement for approval by the court is to ensure any settlement adequately provides for the protected party in light of their injuries and the litigation risks to which

they are exposed. It is not intended to protect the interests of the other side (save to ensure that there has been a proper discharge) so the Defendant's objections provided no ground for refusing approval. Counsel suggested that there are often situations where a settlement is perhaps mistakenly (or for unknown reasons) more advantageous than what the protected party might have recovered if the matter had gone to trial. This is usually a matter of happenstance. A change in circumstances would only be relevant where it means that the settlement would be disadvantageous to the protected party. The fact a settlement is advantageous to the protected party or even provides a windfall is not a relevant issue that would provide a reason to deny approval.

46. It was submitted that Mr Wormald had been in fluctuating health due to his traumatic brain injury. The prognosis had been out there at all times and the offer was putting its stake in the ground, and had been deliberately left on the table. It was happenstance that the offer was accepted on the same day that he died, it could have been 6 months before and it should not matter whether the events took place over one day or 6 months.

47. The Claimant asked the court to conclude that the Part 36 offer was validly accepted and the purported withdrawal is ineffective. "*To the extent necessary*" the court was invited *"either at this hearing or in due course*" to approve it.

The Defendant's case

48. The Defendant accepted that his offer had not been withdrawn prior to Mr Wormald's death, and that his solicitors accepted it on his behalf before his death. His case was that the acceptance was not binding until approved by the court, and accordingly notwithstanding the provisions of Part 36 it may be withdrawn. His counsel argued that the strict terms of Part 36 are subject to CPR 21.10 which is paramount and of universal application to all cases involving minors and protected parties. Part 36 was to be read together with the rest of the CPR rather than as a separate code. This means that any purported acceptance of a Part 36 offer is subject to and qualified by the provisions of CPR 21.10, and the permission of the court is required before there can be a valid acceptance. The effect of a non-binding acceptance is that either party is free to resile from the compromise and CPR 36.9 identifies the method.

49. The Defendant also relied on the well established case law establishing that an accepted offer is not binding until approved by the court. His position was encapsulated in the White Book commentary on CPR 21.10. He argued that the Claimant's argument is incorrectly based on there being a fundamental distinction between the effect of CPR 21.10 on compromises concluded within CPR Part 36 (where an accepted offer cannot be withdrawn), and all other compromises (when such an offer can be withdrawn). It was submitted that this distinction had never been previously advanced and had no support in the wording, case law or commentary. He suggested that it was significant that when the disparity in treatment of protected parties in relation to the binding effect of settlement offers had been explored in detail in *Revill* there had been no suggestion that Part 36 offers operated differently.

50. The Defendant's counsel also relied on Mr Young's evidence to submit that the offer from October 2014 had not been under consideration for years, and could only have been regarded as a legacy offer and neither party treated it as reflective of the value of the claim or an effective protective offer since it had been overtaken by events (including the outcome

of the trial on liability and the change in multipliers for life expectancy). In my judgment any argument that the offer somehow did not count is untenable in light of *Gibbon.* The offer remained a valid offer "on the table" under Part 36 and it was not necessary for the Claimant (or the court) to second guess whether it was still intended to apply. Whether the offer would have full force if accepted (for example under CPR 36.13) is another matter but that was separate.

51. The Defendant's position was that in the case of minor and protected parties the effect of CPR 36 is modified and the offer can be withdrawn. Alternatively if the withdrawal was ineffective, the Defendant contends that the settlement should not be approved. The relevant date for considering the offer is March 2021, at which point Mr Wormald has died without dependents and the sums under consideration will result in an unwarranted windfall for his estate. For that purpose he relied on Mr Young's statement of 21 January 2021 to which the Claimant had not responded. The Claimant's acceptance of the offer was hasty and opportunistic. The court would have allowed the Claimant to have resiled from his acceptance. It submitted that refusing approval will not result in disadvantage to Mr Wormald (or his estate) since he had already received interim payments reflecting the likely value of his claim, and the withdrawal of the offer will mean that his estate is not likely to be adversely affected in costs. All these circumstances justified the Defendant withdrawing his offer, and being permitted to do so.

Discussion and conclusions

(i) Where a protected party accepts a Part 36 offer is the other party subsequently able to withdraw that offer before approval of the settlement?

52. The civil procedure rules do not provide a clear answer to the issue raised. However, the wording of the rules provide guidance since CPR 36.11 expressly provides that acceptance of Part 36 offers is subject to Part 21.10. This means the binding effect of the offer and its acceptance is expressly made subject to CPR 21.10. CPR 36.13 provides an express "safety valve" so the court can depart from the normal costs consequences where that would be unjust. Under CPR 36.14 proceedings are stayed when an offer is accepted but that does not dictate the further consequences. CPR 36.14 acknowledges that a settlement may require approval under other rules in order to be binding.

53. The wording, purpose and case law on Part 36 suggests a firm intention that the strict terms of Part 36 do not prevail over Part 21 or the overriding objective more generally. This is clear from the fact that although the rules are highly prescriptive (as acknowledged in *Gibbon*) Part 36 expressly provides that the court has a discretion to depart from the costs consequences prescribed where that would be unjust. The Court of Appeal in *Gibbon* emphasised that a Part 36 offer was not governed by common law rules of contract but this did not mean that Part 36 was to be applied separately from other rules or the overriding objective. In *SG v Hewitt* the Court of Appeal recognised that Part 36 provides an express "safety valve" so the court can depart from the normal costs consequences where that would be unjust.

54. As mentioned above, the Claimant questioned whether the court's approval under CPR 21.10 was necessary, presumably because the protected party has died. While the financial advice normally required by the practice direction would now be redundant I reject the suggestion that the court's supervision is no longer necessary. The settlement offer was

accepted on behalf of a protected person before his death so CPR 21.10 is engaged and remains relevant. The approval may address the protected person's needs (and liabilities) prior to death and whether a settlement appropriately provides for his dependants. The court's approval is also intended to ensure that the Defendant is discharged so the court may need to be assured that the compromise has been effectively adopted by a personal representative entitled to act.

55. It was common ground that outside Part 36 offers the requirement for court approval introduces uncertainty as to the effect of a settlement in that it enables both sides to resile from their offer or acceptance. This has a downside and may operate unfavourably to the protected party, most typically in the sense that there is less certainty and it leaves open the possibility that they could lose "a good bargain" and be disadvantaged by having to litigate or accept a lower sum. However, decisions such as *Drinkall* treat this as an acceptable outcome of the rules and the policy of protecting such parties. Although the protected party may occasionally lose a "good bargain", it is more important that they are always offered protection by the court from a bad bargain.

56. *Drinkall* is strong persuasive authority to suggest that even where an offer falls within Part 36 either side may withdraw its offer pending approval because the offer is not binding. This is because Part 36 is about the costs consequences of settlement offers rather than the binding effect of compromises reached on behalf of protected parties (or the protection of those parties). The primary purpose of Part 36 is to lay down fair costs consequences for settlement offers so as to give parties a fair incentive to settle their disputes at a sensible level. Put crudely, a party who makes a sensible offer is likely to be rewarded and one who fails to take it up risks being penalised. *Gibbon* shows that it is intended to create a clear code with "*clarity and certainty"* for making and accepting offers, and also their costs consequences. However, certainty is not the overriding purpose. The rules do not override the policy (and consequences) of the rules in CPR 21.10 or the overriding objective more generally. This is seen in CPR 36.13 and CPR 21.10 incorporates a separate safety valve. The Defendant's arguments as to the importance of CPR 21.10 and its interpretation in allowing either party to resile from a settlement under Part 36 are also supported by *Dunhill, Dietz* and *Revill.*

57. A Part 36 offer gives rise to less certainty where protected parties are involved. In *SG v Hewitt* [2012] EWCA Civ 1053 the Court of Appeal acknowledged that uncertainty in prognosis and the requirement of court approval may justify departure from the normal costs consequences of a Part 36 offer. This is unsurprising since neither the court nor the parties can fairly evaluate the merits of a serious personal injury claim for the purpose of making (or accepting) a Part 36 offer without reliable evidence of the prognosis.

58. The amendments to Part 36 introducing the newly worded CPR 36.9(1) were not designed to depart from the position confirmed in *Drinkall* and *Revill,* or adjust the existing safety valves. I accept the Claimant's submission that *Revill* does not deal with Part 36. However, it is more consistent with CPR 21.10 having a broad, overriding application and supports the Defendant's submission that the existing interpretation CPR 21.10 prevails even in the case of a Part 36 offer. The White Book commentary suggests that this position still applies, notwithstanding the new wording of CPR 36.9(1). It was not necessary for CPR 36.9 (or any other part of Part 36) to contain an express proviso for CPR 21.10 (although extra wording would have clarified the position). The changed wording does not

justify a departure from the existing authority establishing that a compromise concluded with a protected party under Part 36 is not binding on either side until approved. However, Part 36 does place express restrictions on withdrawal of offers and these should be given effect so far as possible.

59. Neither the Claimant's construction of Part 36 (i.e. that no withdrawal is allowed at all following acceptance) nor the Defendant's construction (i.e. that he could withdraw at will) correctly reflected the wording of Part 36, its strong policy in favour of certainty and also the overriding policy under CPR 21.10 of maintaining court supervision of settlements made on behalf of children or protected parties. Both sides recognised that the issue was novel. To make sense of the rules it was not necessary for there to be express provision for withdrawal since the effect of CPR 36.11 and CPR 21.10 is that the settlement is not valid until approved.

60. The rules should be construed to give effect to the express restrictions on withdrawal under CPR 36, together with the express requirements of CPR 21.10, and the broader policies of the overriding objective and the protection of protected parties underlying these rules. Taking all these points into account, I conclude that:
    a) A compromise made on behalf of a protected party by acceptance of a Part 36 offer requires the approval of the court under CPR 21.10 (CPR 36.11 & 36.14).
    b) Where a protected party accepts a Part 36 offer, the offer and its acceptance are not binding to make a valid settlement until approved by the Court (CPR 21.10).
    c) The proceedings are not stayed until the court approves the settlement (CPR 36.14).
    d) Until the settlement is approved the other party may resile from its offer by giving notice of withdrawal (Drinkall). The withdrawal serves a purpose in giving notice that the settlement is challenged.
    e) However, the notice of withdrawal will not in itself be valid for the purposes of Part 36 (CPR 36.9), in particular in relation to costs consequences.
    f) Either party may apply for approval of the settlement (Practice Direction 21). A party resiling from the settlement may raise its position on that application. The court will decide whether the withdrawal is to be given effect or the settlement is to be approved.
    g) Further consequences were not explored but that party could probably issue an application to resolve any issue as to how the proceedings continue, including the effectiveness of its withdrawal from the settlement.

(ii) When the court is asked to approve a settlement, on what grounds (if any) can a Part 36 offer be withdrawn and approval of a settlement be refused?

61. The further difficult question arises as to how the court should exercise its discretion when it is asked to approve a settlement under CPR 21.10 or consider the effect of a withdrawal of a Part 36 offer.

62. Where a settlement has been concluded on behalf of a protected party the case law suggests that the court will allow either party to resile from it until it is approved. It was common ground that the protected party could ask the court to refuse approval if the settlement is disadvantageous so they will rarely need to invoke any other ground to resist approval. *Dietz* suggests that the court can refuse approval where one party has resiled from the agreement, and that an alternative or additional ground may be a defect in the parties' consent. (The additional grounds may become relevant on costs).

63. The Claimant was correct in contending that the primary considerations under CPR 21.10 remain the protection of the protected party and his dependants (including the proper control of the proceeds), followed by ensuring that the Defendant is properly discharged. However, the overriding objective is also relevant, namely dealing with cases justly. This includes ensuring that the parties are on an equal footing. The question is whether, in all the circumstances, approval of the settlement would be unjust. The assessment is to be made taking account of how matters stand at the date of the approval hearing. The onus of showing that it would be unjust to bind a party to its offer lies on that party. The court's discretion as to whether to approve the settlement is not governed by Part 36. However, the considerations raised under CPR 36.17 as to whether the normal consequences follow provide some useful guidance in assessing whether it would be unjust to bind a party to its Part 36 offer, even where that may be disadvantageous to the protected party. The decision will be fact sensitive and it may be easier to resile from a non-binding settlement than to ask the court disapply the normal costs consequences of Part 36. On the facts here it is not necessary to decide precisely where the test lies but the court may decline approval of the settlement if it would be unjust for a party to be bound by its offer.

64. Where the protected party has died and has no dependants then the protection of his interests as a vulnerable person becomes less significant, and the need to control the proceeds falls away. As explained above, CPR 21.10 still applies as the settlement was concluded on behalf of the protected person but (probably subject to the interests of minor dependents) the estate's interests do not require the same protection as that of a protected party. The court is not policing the compromise to see whether it is too generous to the protected party (or his estate) or gives rise to a financial windfall. It would be undesirable to enter into such investigations, not least since any settlement is likely to give rise to some element of financial windfall or shortfall (and reflect other considerations). This is a necessary aspect of a compromise, and part of the inherent contingencies of litigation. It will not in itself be decisive. However, if it is a clear case where the settlement will result in the protected party (or his estate) financially doing significantly better than he would have done at trial then this may go into the balance.

(iii) Should the court grant permission for withdrawal of the Defendant's offer of 15 October 2014 or approve the settlement in the amount offered?

65. The assessment of whether to grant approval is to be made taking account of how matters stand at the date of the approval hearing. It is relevant that the Claimant's recoverable losses have crystallised and he has no dependents: the settlement will benefit the estate (save for the Claimant's outstanding expenses).

66. On the evidence before me I draw the following conclusions:
    a) The Claimant's acceptance of the offer on 18 September 2020 was the direct result of the Claimant's solicitors being informed between 14 and 17 September 2020 of a significant change in his prognosis, which was now critical.
    b) The Claimant's solicitors immediately knew this would affect the value of the case. It gave rise to urgent consultations with both counsel and Mrs Wormald. Their evidence frankly acknowledged that the cardiac episode was treated differently to previous respiratory infections and it generated an urgent response.

c) The Defendant was not notified of the change in prognosis or the critical nature of the Claimant's condition until after the offer had been accepted.

67. The significant change in Mr Wormald's prognosis, or any life-threatening incident such as the cardiac episode in question, may have been foreseeable but it was not expected by either side, and nor was the hasty acceptance of the Part 36 offer. If these events had been expected then the significant level of urgent activity and decision-making on the part of the lawyers and the litigant friend was difficult to understand. There was little clear evidence as to whether the cardiac episode was caused by the injury, but I assume it was causative.

68. The Claimant's solicitors were placed in a difficult situation in responding to Mr Wormald's critical situation. Mr Slade's evidence referred to consideration being given to the risks involved. They have not clearly articulated what risks they feared at the time and their respective impact on Mr Wormald or his future estate. Acceptance of the offer posed risks for Mr Wormald but non-acceptance may have exposed him and his future estate to risks on costs or the loss of the offer. It would be reasonable for the litigation friend to take steps to maximise his recovery and that of his heirs. Mrs Wormald was in an exceptionally difficult situation. I reject any suggestion that her acceptance of the offer was opportunistic. However, the circumstances support the Defendant's submission that the decision was made under pressure and somewhat hastily. If the Claimant had pulled through then it would have been unjust to hold him to the compromise concluded under Part 36, and he would have easily been able to justify resiling from it.

69. The change in prognosis that led to the acceptance of the offer would not in itself justify departing from the normal rules for a Part 36 offer. Parties rarely have equal knowledge in deciding to conclude a settlement. However, Mr Wormald's prognosis was critical to any fair assessment of the value of the claim. The disparity between the parties' respective knowledge, and the Defendant's lack of opportunity to take advice and respond to the changed prognosis was significant. It meant there was a lack of equal footing on the decision to settle. It is relevant to whether it would now be fair and just to conclude the proceedings on the basis of the Claimant's acceptance. Further relevant considerations include the fact that the settlement will result in the estate recovering substantially more than the Claimant would have recovered if the actual prognosis had been known, and that the settlement will only benefit the Claimant's estate, such that the balance is now as between the estate and the Defendant's insurer.

70. On the evidence and submissions before me, all these considerations show that it would be unjust for the Defendant to be bound by the accepted offer made on 15 October 2014 and for the proceedings to be concluded by the court giving approval of a settlement made under these circumstances. The court would give effect to the Defendant's withdrawal of its offer and grant permission for this if necessary. The costs consequences of the offer and its withdrawal were not the subject of argument and are left open.

71. The Claimant has not provided the information required under the practice direction for an approval of the settlement, or fully answered the Defendant's requests for medical records. It may be unfair to decide the issue if there has been an oversight or misunderstanding, especially where the argument before me was mainly directed at the legal questions.

Accordingly, I reserve final determination of the question as to whether the settlement offer (or withdrawal of the offer) should be approved in order to give the Claimant's estate an opportunity to apply to adduce evidence to comply with the requirements of the practice direction and address any appropriate information requests made by the Defendant (with an appropriate opportunity to reply). I will hear the parties on any appropriate directions that would be required for that purpose.