Procedural Considerations When Seeking Protective High Court Approval of Settlements in Personal Injury Claims.

Practitioners will be familiar with the cautionary tale of **Dunhill v Burgin [2014] UKSC 14, 1WLR 933** in which a settlement and damages payment was unravelled years after the event when it was found that at the time of original settlement the Claimant in fact lacked requisite capacity, thereby vitiating the settlement pursuant to CPR Part 21.10.
The case of **Coles v Perfect [2013] EWHC 1955 (QB)** (Teare J) modelled the approach of applying protectively for court approval when capacity might potentially be an issue.
The case of **Grimshaw v Hudson [2021] EWHC 425 (QB)** Fordham J, published today on Lexis, flags up further considerations. In that case protective approval was sought for a settlement in an adult claim. Neither party asserted that the Claimant lacked litigation capacity, and no Litigation Friend was appointed, but the issue was addressed in the medical evidence. The Judge, acknowledging the widespread acceptance of the inherent discretionary jurisdiction to grant protective approval, contemplated two preliminary questions which arose on consideration by the High Court of its discretion, namely:
a) Whether there was a good reason for invoking the inherent jurisdiction of the court by the parties; and
b) Whether the court was in a proper position to check the propriety of the proposed settlement.

Good Reason: in particular good reason here concerned whether this jurisdiction was invoked merely as a general, generic, "just in case" precaution (implicitly inappropriate), or whether there were genuine grounds for seeking to secure the approval. The Judge was satisfied that, whilst neither party considered that the Claimant lacked capacity, and that accordingly neither could assert incapacity, there were sufficient grounds for uncertainty identified within the medical evidence in the case properly to justify the application for approval. [Comment: Clearly, parties seeking to secure a protective settlement approval will need to lay before the court a sufficient evidential basis, raising a doubt as to capacity but falling short of a probability sufficient to displace the presumption of capacity under s.1(2) of the Mental Capacity Act 2005. It will be probably be necessary to investigate and obtain some expert evidence addressing this point if the offer of settlement for which approval is sought is made early in proceedings and before such issue has been investigated].

Propriety check: The requirement under the rules (CPR Part 21.3) is for the appointment of a Litigation Friend before any procedural step can be taken after it is considered that a given party lacks litigation capacity. As Lady Hale identified in Dunhill v Burgin the appointment of a litigation friend to act for the protected party was an important safeguard. The Court seized of an application for protective approval without a litigation friend would therefore seek to establish and require convincing that it was in as good a position as a judge considering an approval application brought under CPR Part 21.10 by a litigation friend. The Judicial approach should therefore be to look at the application as if the Claimant in fact lacked capacity. In Grimshaw, the Judge expressed himself fully satisfied that the materials before him enabled him to review the proposed settlement with the same thoroughness as if the Claimant lack capacity. The court expected and received as

complete and comprehensive a picture of the case as it would have expected in a formal approval case.

In making the order sought by the parties the Judge inserted recitals to the order reflecting these considerations and the court's findings on them, which it is suggested practitioners might be prudent to adopt in any draft order presented to the court, to reinforce the confidence in the finality and unimpeachability of the order.