

[\[Order Full Text\]](#)**JHUTI v JHUTI (2020)****Ch D (Falk J) 15/07/2020**

CIVIL PROCEDURE

CAPACITY : DELAY : JUDGMENTS AND ORDERS : LEGAL REPRESENTATION : RETROSPECTIVE EFFECT : SETTING ASIDE : SETTLEMENT : TOMLIN ORDERS : CPR r.3.1(7), r.21.2(1), r.21.3, r.21.10

The court refused to accede to an application to set aside court orders made in 2016 on the basis that the applicant had lacked capacity when the orders were made. Even if she had lacked capacity at the time, it was appropriate to regularise the position retrospectively and approve the orders under [CPR r. 21.3\(4\)](#) and [r.21.10](#).

The applicant applied to set aside court orders on the basis that she had lacked capacity when they were made.

The applicant had been involved in two sets of proceedings. The first were employment tribunal proceedings against her former employer, in which she had eventually been successful before the Supreme Court and in relation to which the remedies hearing was due to take place in November 2020. The second were probate proceedings which had been brought against her by her brother (J) regarding allegations that she had committed breaches of duty as the executor of their late mother's estate. In 2015 the solicitors (N) representing her in the employment proceedings had become concerned about her mental state. In June 2015 she was assessed by a psychiatrist who concluded that she had full litigation capacity with regard to the employment proceedings. However, in December a different psychiatrist came to the opposite conclusion, and a litigation friend was appointed. On 31 October 2016 a Tomlin order was made in settlement of the probate claim whereby the applicant agreed to pay £196,000 in two instalments. When the first instalment was not paid, J obtained a freezing injunction, which was continued on 5 and 9 December. On 16 December the freezing injunction was discharged (the Morgan order) subject to certain conditions. The applicant was legally represented at the December hearings. J and N, whose fees from the employment proceedings remained unpaid, opposed the instant application.

The applicant submitted that the Tomlin and Morgan orders should be set aside because she had lacked capacity at the time they were made.

HELD: Legal principles - A party who lacked capacity to conduct legal proceedings was a protected party, and had to be provided with a litigation friend to conduct proceedings on their behalf under [CPR r.21.2\(1\)](#). [Rule 21.3\(4\)](#) made clear that any step taken before a protected party had a litigation friend had no effect unless the court ordered otherwise. Furthermore, the court's approval was required under [r.21.10](#) for any settlement involving a protected party to be valid. However, where it had not been appreciated at the time that a party lacked capacity, the court could regularise the position retrospectively, [Dunhill v Burgin \[2014\] UKSC 18](#) followed. Moreover, the court had a general power under [r.3.1\(7\)](#) to vary or revoke orders. The test for determining whether a person had capacity was set out in the [Mental Capacity Act 2005 s.2\(1\)](#) and [s.3](#). [Section 1\(2\)](#) provided that a person was assumed to have capacity unless the contrary was established. The burden of proof was on the person asserting incapacity, and the question of capacity was issue-specific, [Masterman-Lister v Jewell \[2002\] EWCA Civ 1889](#) followed.

Application to the facts - The applicant had been assigned a litigation friend in the employment proceedings but not in the probate proceedings. It was clear that a decision as to capacity in one context did not bind a court which had to consider the same issue in a different context, [Masterman-Lister](#) followed. The evidence did not establish that the applicant had lacked capacity for the purposes of the probate proceedings when either the Tomlin or Morgan orders were made. She had been represented in the probate proceedings until shortly before the Tomlin order and then again at the hearings in December 2016. There was no indication that her legal representatives had any concerns over her capacity. Correspondence between the applicant and J's solicitors in November 2016 also indicated that she was able to make decisions within the meaning of s.2 and s.3 of the Act. Nevertheless, some doubt remained on the issue of capacity in light of the December 2015 psychiatric report. However, even if the court was wrong about the applicant's capacity at the time the Tomlin and Morgan orders were made, it was appropriate to regularise the position retrospectively under [r.21.3\(4\)](#) and [r.21.10](#). If the Tomlin order was undone, it would simply reopen the probate proceedings and the applicant was unlikely to do materially better in those proceedings than before. Furthermore, the Morgan order reflected concerns about dissipation and the failure to pay N's fees and the outstanding probate judgment. Concerns about dissipation remained. Finally, there had been a significant delay in making the application. Accordingly, it would not be in the interests of justice to set aside the orders.

Application refused

Counsel:

For the applicant: Hammad Baig

For the respondent: Philippa Daniels

For N: Lionel Nichols

LTL 20/7/2020 EXTEMPORE : [2020] 7 WLUK 286**Document No. AC5012277**