Neutral Citation Number: [2023] EWHC 1593 (KB)

IN THE HIGH COURT OF JUSTICE **Case No: QA-2021-000148**
KING'S BENCH DIVISION
On appeal from the order of His Honour Judge Luba KC dated 4th June 2021 County Court case No F85YX110

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2023

Before :

Mr Justice Cotter

- -

Between :

GEORGE MAJOR
(BY HIS LITIGATION FRIEND KATHERINE GEE)

Appellant

- and –

KALAIVANI JAIPAL KIRISHANA

Respondent

- -
- -

Theo Lester (instructed on a direct access basis) for the Appellant
Armit Karia (instructed by **Taylor Rose Solicitors**) for the Respondent

Hearing dates: 28th April 2023
- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 30 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE COTTER

Mr Justice Cotter:

1. This is an appeal from an interim case management decision of His Honour Judge Luba KC made on 4th June 2021.

2. For ease of reference (and because I found the references to the Appellant in the skeleton arguments to be inconsistent and confusing) I shall refer to the Appellant before me (and the Defendant and protected party in the claim) by his name; Mr Major and the litigation friend by hers; Ms Cowell, (as she was before she recently married). I shall refer to Ms Kirishana as the Respondent.

3. Mr Major challenges the order of His Honour Judge Luba KC dismissing the application made by Ms Cowell to be discharged from her position as litigation friend of Mr Major. Ms Cowell stated that she had developed mental health issues, could not cope with the stress of the litigation, could not properly discharge the role of litigation friend and no longer consented to the role. The Judge also ordered that Mr Major pay the costs of the unsuccessful application.

4. After Ms Cowell's application was dismissed the claim proceeded to trial before His Honour Judge Raeside KC on 3rd-4th August 2021, who entered judgment for the Respondent against Mr Major (who could not give evidence as he lacked capacity). The Judge also ordered that Mr Major pay the costs of the trial on an indemnity basis. This order ("the trial order") has not been appealed (or otherwise been the subject of an application to appeal).

5. This appeal came before Mr Justice Freedman for a permission hearing on 15th and 16th December 2022. I need not descend into the detail of why the hearing lasted for longer than a day. He gave permission to appeal on each of the five (amended) grounds of appeal. The effect of the appeal on the trial order, what was described in argument as the "*materiality question*", was raised and adjourned for consideration at the main appeal, together with an application made by Ms Cowell to adduce fresh evidence (a further witness statement). Subsequently Mr Karia raised the materiality question (and that the appeal was now academic) within a respondent's notice. In a skeleton in response Mr Lester argued that if the appeal was successful and the order of His Honour Judge Luba KC set aside that the trial order should (or at least could) also be set aside.

6. Mr Justice Freedman gave a time estimate of one day for the appeal. Subsequently the Respondent lodged an electronic and hardcopy bundle running to 1194 pages. I also have four appeal bundles and three bundles of authorities. The Appellant's skeleton argument was filed on the morning of the hearing and was 29 pages. The Respondent's skeleton argument extending to 26 pages.

7. I indicated at the outset that given the extent of the issues covered within the Appellant's and Respondent's notices and the skeleton arguments, which would require substantially more than a day of Court time, even when taken efficiently, I would first deal solely with the five grounds of appeal against the order of His Honour Judge Luba KC. To consider the materiality question before doing so (as Mr Karia had suggested in his skeleton) would be to place a complex and sizeable cart before the horse. If the appeal against the order of His Honour Judge Luba failed then materiality did not arise. If it succeeded then the parties should have the opportunity to consider their positions given that there is no appeal notice in respect of the trial order and also the comments

of His Honour Judge Raeside as to what he thought the implications would be for the trial before him[1].

The underlying claim

8. Mr Major and the Respondent were in a relationship. Mr Major had mental health issues. In 1982 he was diagnosed with developmental dysphasia (expressive type). On 20th July 2011 it was discovered that he had a pituitary Adenoma (a brain tumour) which was removed. On 9th April 2018 he was diagnosed with a bipolar affective disorder Type 2, and a generalised anxiety disorder. The then treating Doctor found Mr Major to exhibit a range of difficulties including:

    a) Communication/speech – his speech was stilted and he struggled to communicate both his symptoms and the time course with which they had arisen. He spoke softly but the content was normal.
    b) Low mood/depression – he struggled to define his mood, but it was notably low throughout the interview and he was intermittently very tearful.
    c) Insomnia.
    d) Hypomania.
    e) Poor impulse control with increased spending.
    f) Poor judgment.
    g) Impulsivity – there were concerns by the family regarding Mr Major's impulsivity[2].

9. It was documented that Mr Major's developmental history seemed to indicate a long-standing history of emotional instability and, possibly more eccentric behaviour in his youth. Medication was prescribed including an antidepressant (Sertraline) and an antipsychotic (Quetiapine).

10. Mr Major is currently under the care of a consultant at King's College Hospital and has also been treated at South London and Maudsley NHS Foundation Trust.

11. Mr Lester submitted that the Respondent well knew of Mr Major's mental health issues when she commenced the claim against him and cannot have been taken by surprise in due course when it was found that he did not have the capacity to litigate. However ultimately it was unnecessary to consider this issue.

12. The proceedings concerned a claim for breach of contract in relation to (primarily) the payment of various loans. The value of the claim was £46,438 plus interest.

13. It was, and is, relevant to the issues to be determined in respect of her accepting the role as a litigation friend that Ms Cowell, who was a long term friend of Mr Major, believed that he has been exploited and had been the victim of controlling and coercive behaviour on the part of the Respondent.

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[1] "The parties know the risk; that is if you are successful on your appeal what takes place will be set aside", per the transcript of HHJ M Raeside KC's judgment of 4 August 2021, page 24 at lines 33-34.
[2] This analysis is set out in the report of Dr Bach which was before the court when the order was made that Mr Major lacked capacity (see paragraph 18 below).

Procedural history

14. The claim was issued on 23 July 2019. A defence was served on 9th September 2019 referring to alleged harassment and denying the central allegations. On 28 April 2020, directions to trial were made, subsequently notice was given of a trial date of 14 October 2020.

15. Up until early September 2020 Mr Major was represented by solicitors. At a hearing on 9th September 2020 before His Honour Judge Saggerson, Mr Major represented himself. The order made included a costs order against Mr Major. A trial date was set for 14th and 15th October 2020.

16. On 12 October 2020 Mr Major (supported by his parents and Ms Cowell) raised issues of capacity to conduct the proceedings.

17. On 13th October 2020 the matter came before His Honour Judge Luba KC. He vacated the trial date and gave directions for investigation of the issue of capacity. On 20th November 2020 the matter came back before His Honour Judge Luba KC. Mr Major was represented by Ms Walker of Counsel acting pro-bono (having been contacted through Advocate[3] the day before).

18. In January 2021 Dr Laura Bach prepared a medical report on the issue of capacity. She stated that during her assessment, Mr Major became distracted at times, overwhelmed and had to be reassured. It was necessary to explain, clarify and repeat what was being asked. Mr Major presented with difficulties expressing himself, and many of his answers lacked detail. Overall, he struggled to express and articulate what he wanted to say due to communication and memory problems. Dr Bach stated

> "I asked Mr Major if he understands what is meant by a breach of contract and he responded that "it is to do with going on holiday and claiming money". He was unable to provide any further details. He did not understand that the claim also referred to costs for rent and for other purchases, and he stated he is confused about what the Claimant is asking for. I asked him how much was being claimed and he responded that he thinks it is £26,000, which is a grossly inaccurate response."
>
> and
>
> "Overall, Mr Major was vague in his responses, which lacked detail and understanding. He frequently stated that he did not understand the risks and had not real idea of what the risks were. His recall of what the proceedints (*sic*) and claim were about were either frankly completely inaccurate, or hazy and confused. He appeared overwhelmed and stressed, and at times was unable to express fully his responses."
>
> And

[3] Advocate is the Bar's national pro-bono charity

> "He appeared at this assessment to be suffering severe anxiety and depressive symptoms."

On formal cognitive testing, Mr Major demonstrated severe impairments in attention, memory and abstract reasoning. He struggled to understand and recall information regarding the claim and appeared to be overwhelmed and stressed by his Bipolar condition, lack of sleep and litigation procedure. Dr Bach concluded that he did not have the capacity to litigate.

19. On 19th February 2021 Mr Major's parents wrote to the Court. They asked for stay whilst the Official solicitor was approached to act as Mr Major's litigation friend. Mr Major (senior) also filed an application on 4th March 2021 to adjourn a hearing listed on 8th March 2021. His Honour Judge Luba KC refused the application.

20. Shortly before a further hearing on 8th March 2021 Ms Cowell was approached by Mr Major's parents and pro-bono counsel and asked if she would be Mr Major's litigation friend. She was initially hesitant but eventually agreed and filled in (and filed) a certificate of suitability (dated 7th March 2021). She stated that she had known Mr Major for ten years and was extremely concerned about the effect the proceedings were having on him. She stated that in her opinion they were an extension of harassment which he had already suffered. The form required Ms Cowell to confirm that she consented to act as a litigation friend and that

> "I am able to conduct proceedings on behalf of (Mr Major) competently and fairly…"

21. On 8th March 2021 His Honour Judge Luba QC declared that Mr Major lacked capacity and ordered that Ms Cowell be appointed as his litigation friend.

22. Given some references in subsequent statements/skeleton arguments on behalf of the Respondent it is important to understand its implications of the finding that Mr Major lacked the capacity to litigate. Capacity must be considered as at any given time/stage in within the litigation on all the available evidence. It is a binary issue. Capacity can be lost and gained, but if a person lacks capacity the proceedings should not continue. If they do so any step take may be of no effect. Whilst this may be frustrating for an opposing party and prevent the progress of the litigation that is of no weight at all in the assessment of capacity. Also the extent to which there is a person willing to act as a litigation friend is irrelevant when considering the question of capacity.

23. I pause to observe that if Ms Cowell had not agreed to be the litigation friend then the litigation would have ground to a halt until a litigation friend was in place. It seems clear that (as is usually the case in my experience) the Official Solicitor would have been reluctant to act unless some arrangement as to her fees was in place. The Respondent may have been asked to give an indemnity (the likely response has not been indicated to me). So Ms Cowell's appointment was no doubt welcomed by the Respondent.

24. Returning to the chronology His Honour Judge Luba KC gave directions through to a new trial date which included a requirement that Mr Major was to provide to the Respondent any further documents that he wished to rely on. The order also referred to a telephone listing appointment. In due course a notice was sent for that hearing. It stated that the "Applicant's solicitors" must arrange the telephone conference. Of course, there was no Applicant only, as the heading on the order set out a Claimant and Defendant.

25. On 22nd March Mr Burkett, the Respondent's solicitor e-mailed Ms Cowell and said that she was the Applicant referred to in the order and it was her responsibility to arrange the hearing

> "The notice of telephone listing must be arranged by the applicant's (you) solicitor."

26. As Mr Karia conceded during submissions this was wrong. In my view it was a surprising mistake for a litigation solicitor to make. In any event Ms Cowell responded on the same day, apologizing for the delay asking Mr Burkett what he meant and asking him what she needed to do on advance of the hearing. What was obviously needed was a constructive response given she was a litigant in person and also the duty on Mr Burkett to further the overring objective and help arrange the hearing. However Mr Burkett, responded as follows

> "Dear Ms Cowell
>
> Thank you for your email.
>
> I'm afraid I cannot provide you with legal advice.
>
> As the Defendant's appointed litigation friend, you are responsible for making decisions in relation to the claim on his behalf.
>
> You can find a list of your duties on the government website Litigation friends; Duties – Gov. Uk (https://www.gov.uk/litigation-friend/duties), which I'm sure Amelia Walker discussed with you.
>
> Please provide the Defendant's and your dates to avoid for trial.
>
> I recommend that you seek independent legal advice."

27. It is not surprising that Mr Burkett's response caused Ms Cowell some confusion and anxiety.

28. On 23rd March Ms Cowell was signed off work with anxiety and stress.

29. On 31st March Ms Cowell e-mailed two witness statements and some additional e-mail correspondence to Mr Burkett. His response was as follows:

"Dear Ms Cowell,

Thank you for your email.

In accordance with paragraph 9 of the Court's order dated 8 March 2021, we write to confirm that the Claimant objects to the Defendant's reliance on the attached witness statements at trial.

Please note that the attached witness statements will not be included in the trial bundle. Neither will any of the documents/correspondence produced by the Defendant in the applications between October 2020 and March 2021.

Kindly refrain from copying in amit.karia@NewSquareChambers.co.uk to any emails sent between our firm and you.

Please confirm why you have copied the Defendant, his parents and the Court into your email. This is particularly concerning given that the Defendant has alleged to not have the mental capacity to participate in this litigation. I also refer to your certificate of suitability dated 7 March 2021, which states "…I am extremely concerned about George and the effect that these proceedings are having on him. They are preventing him from putting his life back together. He has lost his house and his business; has not worked, I am told, for over two years; and it is unclear when he will work consistently again. I am told he is in receipt of a form of disability benefit and has a Freedom Pass for public transport and, as such, can see no point pursuing him through the courts for tens of thousands of pounds…"

Your actions are completely contradictory to this statement.

You also have no authority to file the attached witness statement with the court. We trust you will contact the court and request that the attached statements are removed from the court record. Please copy us into your correspondence.

Furthermore, we note that you have failed to respond to our attached emails of 22 March 2021, requesting confirmation of the Defendant's and your dates to avoid for trial.

We remind you again of your litigation friend duties, which can be found on the government website here Litigation friends; Duties – Gov.UK (www.gov.uk)

Please note that if you continue to disrupt the effective disposal of the proceedings, to include filing of documents with the court when you do not have permission to do so and failing to communicate appropriately with our firm, the Claimant will seek an adverse costs award against you in these proceedings.

I recommend that you seek legal advice."

30. Whilst in my judgment it was an unnecessarily aggressive e-mail and the threat of seeking personal costs inappropriate, it is the effect upon Ms Cowell that is important. Again, not surprisingly, when read, it caused concern and anxiety.

31. On 1st April 2021 (before sight of Mr Burkett's e-mail) Ms Cowell applied to terminate her appointment as a litigation friend (she asked that the Court deal with the application without a fee and without a hearing). The statement attached (dated 1st April) set out that

> "2. I am making this witness statement to explain to the Court respectfully and with regret that I am unable to continue acting as a litigation friend. Ms. Walker has endeavoured to find for me a relevant form to fill in to apply to be discharged as a litigation friend but has not been able to.
>
> 3. Following the hearing at which I was appointed, I was signed off work on 23rd March with anxiety and stress. I am attaching a copy of my doctor's letter. This is due to be reviewed on 6th April, but is likely to be extended. I am also currently pursuing a grievance procedure against my employer. When I agreed to act as George's litigation friend I was not at that time suffering with any issues regarding my mental health and I honestly did believe I would be able to act for George at the same time as continuing my case against my employer.
>
> 4. It became clear to me that I would not be able to do so once I was signed off work, but I didn't want to let George or the Court down in not trying to assist him to meet the deadline of 31 March 2021 for sending to the Claimant any other documents or evidence. However, I found this process extremely stressful in light of my current condition, and this has reinforced my view that I am not going to be able assist George to continue in this matter, particularly as the trial becomes closer. I should also say that I have been trying to manage correspondence from the Claimant's solicitor which has been confusing to me, including suggesting that it was me/my solicitors who was supposed to be arranging the listing appointment. I have also found this process stressful and disorientating and have had to rely heavily on Ms. Walker.
>
> 5. I am well aware that the Claimant has repeatedly said that George's capacity issues are a ruse or a way to delay this trial. This is clearly not the case as the expert evidence and the Court's determination has found. I would like the Court to be assured that had I not become unwell, I would have been able to continue in this role, but I do not feel able to do so now, and do not wish to jeopardise my health further. I hope that my actions in trying to meet the deadline of 31 March shows that I have in good faith been trying to fulfil my obligations even when unwell myself.

> 6. George's parents, who are better placed than me to identify suitable alternatives as they are more aware of George's friends, have been making enquiries (as they did when I was first approached). No suitable alternatives have been found. Ms. Walker has assisted me in understanding what the options are now and it appears that the only alternative now would be an application to the Official Solicitor. Since George does not have the funds to give security for costs, this would fall to the Claimant. If the Claimant wishes to pursue a claim against a litigant who lacks capacity then this appears to be the only route forward.
>
> 7. I would be happy to explain the position orally to the Court, although given my current health I would prefer that this does not happen, and hope that the Court accepts this witness statement and the accompanying evidence as proof in support of why I should be discharged as a litigation friend."

32. It is most unfortunate, given the nature of this application, that it was only heard some two months later. This was no fault of Ms Cowell. At the time the application was made there was no trial date.

33. Mr Burkett's response to the application stated that the Claimant had suffered financially in reviewing the application and that costs in the application would be sought from Ms Cowell.

34. On 12th April there was an e-mail exchange between Mr Burkett and the pro-bono Counsel. Mr Burkett accused Counsel of "wasting our time" and she had to request by reply that he attempt some civility in his correspondence.

35. On 13th April there was a listing hearing with a Court officer and a trial date of 3rd August 2021 was set. On the same day the Respondent issued an application for an unless order requiring payment of interim costs awarded in September 2020 in default of which the claim be struck out. Of course, this would have been very worrying for Ms Cowell.

36. On 13th April Ms Cowell had an anxiety attack and was signed off between 13th April and 27th April. This attack was following sight of Mr Burkett's e-mail of 31st March. In her witness statement of 30th April she stated

> "I had not seen a direction that required me to provide to the Claimant dates to avoid prior to the listing appointment. I now understand that when Mr Burkett said that I had failed "to communicate appropriately" what he meant was that I had not served documents on him by post, even though the email signature on all of his emails asks for all correspondence to be by email. When I read this email from Mr Burkett, I was deeply concerned about the way in which I had conducted matters. Following this, I suffered an anxiety attack on 13 april. Although I had returned to work on 6 April, I sought further medical help from my doctor on 13 April who signed me off work from 13

> April to 27 April 2021 (sick note enclosed to this witness statement). As set out above, I am currently signed off until 10 May 2021."

37. In response to Respondent's application (and also on 13th April) Ms Walker, pro-bono Counsel wrote to the Court stating that she was "very concerned" by the Claimant's solicitors conduct of the matter. The e-mail stated

> "Dear Sirs
>
> I am having to take the unusual step of replying to this email as Counsel, because as Mr Burkett is well aware the Defendant's litigation friend is unable to act due to her own ill health and has made an application to be discharged as a litigation friend.
>
> I am now in the position of having to ask that the Court takes no further steps on this application, given that I am now not able to be properly instructed and the Defendant is now without anyone to act as a litigation friend.
>
> I also wish to convey that I am very concerned by the Claimant's solicitor's conduct of this matter. This includes:
>
> a) A request being made to the Court's officer this morning at the listing appointment that His Honour Judge Luba recuse himself from any further involvement in this case. No proper explanation was advanced for this;
>
> b) An unfounded threat of a costs order against the Defendant's litigation friend;
>
> c) Refusal to engage in professional correspondence with me, despite my repeated requests to him to do so. This includes correspondence in which I was twice accused of wasting time, in the circumstances in which (i) Mr Burkett demanded the Defendant's dates to avoid and yet failed to provide the same to the Defendant, (ii) refused to acknowledge that it fell to the Claimant to arrange the telephone listing appointment and sent aggressive correspondence on that point.
>
> d) The making of this instant application in the full knowledge of the Defendant's litigation friend's ill health and inability to act in responding to it.
>
> Whilst I accept that it is not for the Court to arbitrate on conduct, I am now in the position of finding it hard to see how the Claimant's solicitors can be permitted to continue in this manner.
>
> Kind Regards,"

38. After contact from the Court Ms Walker indicated that Ms Cowell was happy to provide medical evidence to the Judge but not to the Respondent's solicitors. Counsel stated

> "Dear Mr. Carrasco,
>
> Thank you for your email and I'm most grateful to you for providing the same to HHJ Luba QC. Since we were anxious that the application was considered by the Court as soon as possible, a paid application has also now been made in the same form. Ms. Cowell is happy to provide the doctor's letter to the Judge (and has also now received an updated one today), but is not happy to provide these to the Claimant's solicitors given the Claimant's prior conduct in threatening to disclose medical records, she does not trust and I concur with her in this that it will be handled sensitively.
>
> I would be grateful if you could relay this to His Honour Judge Luba QC. We will of course be guided by him as to what documents he considers need to be disclosed to the Claimant, but I do feel compelled at this point to add that Mr. Burkett has repeatedly refused to respond to my suggestions to be civil, professional and reasonable in his correspondence to both me and Ms. Cowell, and has added significantly to Ms. Cowell's anxiety by making unfounded threats of adverse costs orders against her. It is in all of those circumstances that I do not think it would be appropriate for either Mr. Burkett or his client to have sight of private medical documents."

39. On 19th April Ms Cowell was signed off until 10th May.

40. The Application came before His Honour Judge Luba KC on 4th June 2021

Evidence before the Judge

41. The reasons relied upon by Ms Cowell were set out in her witness statement in support of that application dated 1 April 2021, subsequently supplemented by a further witness statement dated 30 April 2021. Within that second statement Ms Cowell stated as follows

> "4. Following my appointment as litigation friend on 8 March, my personal circumstances changed and a number of events led me to seek advice from my doctor regarding the state of my mental health. As set out in my second witness statement dated 1 April 2021 (enclosed to this witness statement), I was initially signed off work by my doctor due to my mental health from 23 March 2021 to 6 April 2021. I was also prescribed medication for my anxiety. Following the appointment with my doctor on 23 March, I made an application to be discharged as a litigation friend which was submitted to the Court on 1 April 2021. I remain signed off work by my doctor and I enclose the latest copy of my sick note in this regard."

> My Mental Health and the hearing on 4 June 2021
>
> 5. As I explained in my first witness statement, I am not withdrawing out of disrespect to the Court, and I am not doing this at the request of the Defendant. Given the recent deterioration of my mental health, I do not feel that I am able to carry out my role as litigation friend and comply with my duties to act in the Defendant's best interests and have concerns about my ability to make effective decisions on behalf of the Defendant.
>
> 6. Since my application on 1 April 2021, I continue to act in a very limited capacity by reviewing emails. However, I understand that there are deadlines that the Defendant has to comply with between now and 4 June. I do not feel capable of complying with these or giving Ms Walker (the Defendant's barrister) instructions to comply.
>
> 7. In addition, if the Court requires me to continue to act in a role that I am not capable of doing, I am also concerned about the impact that it will have on my mental health."

42. Ms Cowell also set out that Mr Burkett's conduct, which in her view had been aggressive and unhelpful, had contributed to the increased levels of her anxiety. She provided three examples and also referred to the response to her application (which also threatened to seek a personal costs order) and stated

> "I do not feel mentally resilient enough to deal with any further correspondence with the Claimant's solicitor, given the stress and anxiety that his previous correspondence has caused me."

43. I pause to observe that, objectively speaking, a degree of stress and anxiety arising from Mr Burkett's approach to correspondence, including two references to seeking personal costs orders, was unsurprising (and in my opinion this should have been the conclusion of any Judge reviewing this very unfortunate period within the litigation). Here Ms Cowell (who is a litigant in person) was also very vulnerable given her mental health condition.

44. Ms Cowell concluded:

> "I do not feel well enough to wait until 4 June 2021 for the hearing scheduled. My mental health is deteriorating. I am not in a position where I can respond to Mr Burkett's emails, the Claimant's application dated 14 April 2021 or instruct Ms Walker in the interim."

45. In May 2021, Ms Cowell instructed Mischon de Reya, to act for her (not Mr Major) given the threats of seeking a personal costs against her. Although they never went on the record, they sent a lengthy letter of 6th May pointing out that

> "The deterioration in our client's mental health has been compounded by your inappropriate conduct in these proceedings both in relation to our client's position as litigant in person and in relation to our client's application to withdraw as the Defendant's litigation friend."

46. Mr Burkett's letter in response did nothing to lower the temperature that he personally, in no small part, had generated within the litigation. He described the solicitors' position as ambiguous and extremely unhelpful and he suggested that they had "no standing to communicate with him". Given that they were concerned with an assertion that Ms Cowell might be personally liable for costs i.e. a threatened application against her personally, he was wrong to adopt this stance. Ms Cowell's solicitors did not need to be on the record in the proceedings to correspond with him. In any event he accused Ms Cowell of having ignored e-mails and he had "simply reminded her of her obligations and duties as the defendant's appointed litigation friend".

47. Mr Burkett filed a witness statement dated 1st June. He set out the Respondent's opposition to the application to remove. He pointed out that Ms Cowell had been able to prepare two witness statements and an application between 1st and 30th April

> "despite *claiming* to be suffering from anxiety" (emphasis added)

This was an important comment as it revealed that Mr Burkett (and/or the Respondent) doubted Ms Cowell's veracity. This despite the lack of any basis for doing so and also it appears with a degree of ignorance as to anxiety conditions generally. His statement went further in paragraph 72.

> "The Claimant believes that Mrs Cowell and the Defendant's parents are trying everything in their power to delay the trial."

This allegation against Ms Cowell was ill thought through and should not have been made as Mr Burkett should have appreciated that if Ms Cowell had not stepped forward as a litigation friend in March, the litigation would have come to a halt pending the appointment of a litigation friend. It was Ms Cowell's involvement which had allowed the progression of the litigation and the setting of a trial date.

48. Mr Burkett also stated of Ms Cowell that

> "Her only involvement remaining in this litigation is to assist the Defendant in preparing for the trial for 3rd August (as agreed) liaise with Amelia Walker, Taylor Rose, and the court. The Defendant and litigation friend have full representation."

49. As I shall consider in due course this was a gross simplification of the duties of a litigation friend who does not assist a party rather he/she conducts the litigation. Mr Burkett failed to refer to all of the aspects of conducting the case which he knew (or ought to have appreciated had he given the matter adequate consideration) to be necessary in the period between April and 3rd August, including consideration of the both parties' evidence, assessing prospects of success (and if available Counsel's advice on prospects of success) and the making or accepting/rejecting of offers to settle. He makes no reference to dealing with the Respondent's application.

50. His assertion about full legal representation was to pro-bono Counsel who had assisted on occasions in the past, and continued to assist with hearings.

51. Mr Burkett concluded his statement as follows;

> "…it would be wholly disproportionate to grant the application to remove, particularly at this late stage."

Skeleton arguments

52. Mr Amunwa, Counsel instructed by Ms Cowell, drafted a helpful skeleton argument on behalf of the Defendant (he did not appear at the hearing).[4] He pointed out that as stated by Mr Justice Foskett in **Bradbury-v-Paterson** [2014] EWHC 3992 the position of enforced continuation would be "unwelcome and uncomfortable" and that the power to refuse the application ought not to be applied against the will of a litigation friend acting in good faith or reasonably. He submitted that a key criterion for appointment (and continued appointment) was consent and that there was no obligation to identify a substitute litigation friend. In any event Ms Cowell could no longer fairly and competently conduct proceedings. As for the Claimants objections he submitted that Mr Burkett was preoccupied on what he perceived to be matters of frustration to the Claimant's convenience.

53. The Claimant's skeleton was prepared by Mr Karia who also appeared on the application. He argued firstly that the evidence did not show an inability through mental health "to take the very few steps left in this litigation" and "in essence she only needs to instruct a barrister" Secondly (and somewhat boldly) that it would not be in Mr Major's interest "for the trial to be aborted" and also it would not comply with the overriding objective.

54. Some of the comments made in Mr Karia's skeleton in the context of an application by a litigation friend who was applying to be released from the role on mental health grounds (following the need for medical treatment) left something to be desired in terms of recognising the impact of mental health conditions. He argued that

> *"the changing whims* of a litigation friend could not be allowed to disrupt legal proceedings, particularly, as in this case where a position changed in a three week period."
>
> and
>
> "To suggest that she was not mentally well enough to engage in this litigation *is fanciful* given the steps that she has taken in this litigation…"

55. He added that:

[4] Ms Walker, pro-bono Counsel, stated that she was unable to act as Ms Cowell had applied to be removed as a litigation friend.

> "The cost of the claim as a result of issues over Mr Major's capacity has become disproportionate on any view. It would be an embarrassing example of inefficient justice."
>
> And
>
> "the amount of court and judicial time (that) has already been expelled on Mr Major *et al*[5] *messing about with this issue"...*

56. The comments failed to take into account that, on the basis of expert medial evidence, the Court had determined that Mr Major had no capacity. As I have set out it is a binary issue determined on medical evidence. It is difficult to see how a comment that he had "messed about" with the issue of capacity could be justified.

The hearing

57. Ms Cowell's application came before the Judge on 4 June 2021. It is the order made at this hearing which is the subject of appeal.

58. The hearing was changed at the eleventh hour from an in person hearing to a remote hearing. At 5.10 pm the evening before Ms Cowell sent in documents confirming her medication and that she had returned to work on a limited basis.

59. Ms Cowell was unrepresented at the hearing which was before His Honour Judge Luba QC. Given her disclosed, diagnosed mental health condition she should have been recognised as a vulnerable

60. At the outset of the hearing, Ms Cowell made the following submissions:

> "*MISS COWELL: Good morning, your Honour. Yes, first of all, I would like to apologise that my resilience is insufficient to actually continue with this hearing. I was signed off from work on 23 March until 6 April, and since that time this has escalated. I did try to go back to work for a time but I am afraid that the behaviour of the Claimant's solicitor, the bullying emails that I have been receiving, and the threats for costs that have started from the outset, have just meant that I have not - a combination of that with my - the medication which kind of seems to make you worse before you get better. I am just - my concentration is severely impaired. I am still not back at work full time.*
>
> *I have sent to the court an email from my Line Manager who has - I was off work for four or five weeks and I am still only back at work three days a week and I am not actually doing my full duties at the moment. I just do not feel as though I can act in George's best interest. I am not saying I do not have capacity, I am saying, you know, I just cannot do this job properly. Everything I do is wrong and, you know, I have already incurred quite substantial costs just to bring my position because Advocate say that I*

[5] This appears to be a reference to Ms Cowell

> *cannot instruct them now, that is why Miss Walker is not here because I have stepped down as litigation friend.*
>
> *So, I have had to get a direct access barrister myself just to make sure that George is covered for this. But I just cannot, you know, I have to concentrate on doing my, you know, getting back to work full time, getting my health in order, and supporting my mother at what is a difficult time because, having seen my parents for the first time in seven months, my father is not well. I just really cannot do this. I do apologise*."

61. The Judge requested evidence in relation to those points:

> "*Thank you very much, Miss Cowell. Now that, strictly speaking, is all submission. You have not there given me any evidence, you are just addressing me from your perspective.*
>
> *…*
>
> *Do you want to point me to particular evidence in the bundle that supports what you have told me?*"

62. Ms Cowell then referred to the e-mail which she had sent the evening before and became flustered when making references to the bundle. She confirmed that she was back at work three days a week and had sent in an e-mail from her line manager. The Judge explained:

> "JUDGE LUBA: Yes. Well, Miss Cowell, you will appreciate that one of the great difficulties in this litigation is that everybody is treating contact to the court like confetti.
>
> MISS COWELL: Mmm hmm.
>
> JUDGE LUBA: You do not submit evidence by sending an email, particularly to a Judge's clerk, not least because of the administrative difficulties that that gives rise to. My clerk is, for example, temporarily absent today for reasons of ill-health and therefore unable to forward anything. So, the extent of the material I presently have before me is that contained in the bundle.
>
> MISS COWELL: OK.
>
> JUDGE LUBA: You are pointing to your two witness statements and to your sicknotes which took you to 10 May.
>
> MISS COWELL: That is right.
>
> JUDGE LUBA: Anything else you want to say?
>
> MISS COWELL: Well, I am certainly not back at work yet full time. I am not performing my duties as I normally would, and I

> do request in my skeleton argument, if I could refer you please to - now - sir, is my skeleton argument no in – I was told that the skeleton argument had been presented to you."

63. His Honour Judge Luba KC then asked Ms Cowell about a substitute litigation friend:

> "JUDGE LUBA: What I am sure, as you have seen from Mr Karia's position on behalf of the Claimant, is that they say that this is a case in which there might be an expectation that you would do more than simply, as it were, seek to walk away without having found somebody else more able to assist Mr Major.
>
> MISS COWELL: Well, unfortunately, because of my experience of this litigation, we did have two people who were prepared to step in but, having seen what I have been going through, they have declined to do so.
>
> JUDGE LUBA: Yes, that is two of 60 million.
>
> MISS COWELL: It is a very hard thing to do. I mean, there is apparently - I am advised that there is an Official Solicitor who would normally step into this scenario ---
>
> JUDGE LUBA: Well, the Official Solicitor is very hard pressed dealing with the cases of people who are comatose quite literally ---
>
> MISS COWELL: Yes, indeed.
>
> JUDGE LUBA: --- or obviously suffering from very severe learning disabilities. In Mr Major's situation he is not, as it were, somebody who has just arrived from Mars. He has, no doubt, a connection built up over his adulthood of family, friends, contacts, acquaintances, and so on. And I think the point that you are being invited to meet is that even if I have a discretion to discharge you as litigation friend, why are you not able to say well, with the energy I have got I have been able at least to persuade the father, the mother, brother, sister, friend, to come forward in my stead?
>
> MISS COWELL: Well, originally, we did but this has been opposed so bitterly and the hostility is so great that people just will not do it. You know, Mr Major had a call from the Claimant a couple of weeks ago that has meant we have had to go for an non-molestation order which we are hoping to hear about today

64. In his submission Mr Karia stated

> "I mean, from what we have heard today at least, it seems quite unlikely he will be able to get another litigation friend and the 3

> August trial is going to need to be aborted. In my submission, that just cannot be permitted to occur. I appreciate that Miss Cowell is slightly reluctant, it is not lost on any of us, but what she needs left to do to actually get to trial is quite minimal. Being a litigation friend at a trial is slightly different to being a Claimant. It still has to make decisions but it does not seem to be those sort of decisions where settlement or the like would occur. Just instruct someone for trial and someone attends trial."

65. The reference to slight reluctance was a mischaracterisation of Ms Cowell's position.

66. Also the reference to her role at trial and to it not including "the sort of decisions where settlement or the like would occur" was wrong. It failed to recognise that faced with a claim with some merit anyone with conduct of the litigation should give some consideration to settlement and whether an offer should be made. She also had to deal with the issue of Mr Major's inability to give evidence at trial[6] (which would inevitably impact on the likely prospects of success). As I suggested to Mr Karia if the question had been posed of him/Mr Burkett, "do you think the Defendant should be trying to settle the case pre-trial?", the answer would have been resoundingly in the affirmative.

67. The suggestion that Ms Cowell could somehow breeze through these steps also jarred somewhat with her inability to proceed through some interim steps without incurring very serious criticism from Mr Burkett and the threat of applications for personal costs.

68. Ms Cowell set out her position in response to the assertion that she had only "quite minimal" steps left to take

> "MISS COWELL: Just in respect of my duties going forwards if I was compelled to remain litigation friend, Mr Major is a litigant in person, so, I do not just have to instruct someone, I have to create the bundle, I have to make decisions about his trial, and I just do not feel confident to do that at all."

Judgment

69. The first point to note is that the Judge did not question the veracity or accuracy of Ms Cowell's account. He noted that

> "*Ms Cowell made it plain that the primary reason she is suffering from stress, such as to disable her from returning to full time work is in fact the stress of conducting her role as litigation friend.*"

and also at the heart of her application was the general point that;

> "*her own state of wellbeing and other demands upon her are such that she cannot sensibly discharge the role and responsibility of litigation friend of Mr Major any longer and that if she is compelled to do so, that will be disadvantageous to*

[6] He did not give evidence at the trial

> *his interests because, to put it crudely, he will have somebody functioning at less than 100 per cent 'fighting his corner'*."

70. His Honour Judge Luba QC decided that:

(a) The termination of a litigation friend's appointment is a matter for the Court and not for the litigation friend. It is "not automatic" and involves an exercise of judgment and discretion.

(b) That the Court could "sensibly have regard" to the criteria set out in CPR 21.4 and in particular sub-paragraph 3

(c) The Court must have regard to the overriding objective.

(d) The Official Solicitor "is in a particular circumstance and one might expect the Court to deal rather differently with an Official Solicitor's application than with an application made by a litigation friend who is an individual".

(e) That Ms Cowell had exhibited a series of fitness notes from a General Practitioner indicating that she has been in a position of being unfit to attend her place of work.

(f) There was "very little likelihood" that the "looming" trial date would be lost had Ms Cowell been in a position to suggest an alternative litigation friend to step forward.

(g) There was "relatively little left to do before the trial" given that "all that remains to be done for trial in the instant case is agreement of the bundle and attendance at the trial, and suitable instruction of an advocate for Mr Major"

(h) In relation to the trial "no particular burden would be cast" on Ms Cowell because the organisation Advocate had already indicated its willingness to assist Mr Major and was "highly likely" to provide an advocate for trial."

(i) That there was "strong material before the Court demonstrating that Ms Cowell is able to take these steps that now remain to be taken before the trial date" as she had been able to instruct her own solicitors (in respect of the threat of personal costs applications) and also instruct Advocate.

71. The Judge the stated

> "15. I have to draw all those strands together. I have to take into account the impact on the respective parties of either granting or refusing the application, I have to consider all of the circumstance of the case, and I have to have regard to the overriding objective.
>
> 16. As I draw the strands together, there seem to me to be features which weigh particularly heavily in the balance: first, the imminence of the trial date; secondly, the fact that it is the second trial date in this case; thirdly, the real risk to the trial date if the application is allowed; fourthly, the relatively limited steps that now remain to be taken between today and the trial date.

> This is not to say that I have not put into the balance the other factors going the other way, particularly Miss Cowell's desire to be relieved of the responsibility, and the fact that, as I have indicated, there is a real risk of a perception on Mr Major's part that he is being assisted by somebody functioning at less than 100 per cent.
>
> 17. Nevertheless, the court must do the best it can in the circumstances to do justice as between both parties. Miss Cowell herself agreed to act as litigation friend on 8 March 2021. Her application of 1 April seeks to discharge her from that responsibility. For the reasons I have indicated, I consider that the balance tips in favour of the dismissal of this application, and accordingly that is the order I will make. Miss Cowell will remain the litigation friend for the Defendant. This application is dismissed."

72. Importantly the Judge also provided the following clarification of his reasoning within his judgment as to costs of the application:

> "A primary reason that the litigation friend's application failed was Mr Major's inability to put forward any person in his umbrella of friends, family or other related persons of an alternative individual. The litigation friend has quite properly, based on her own medical condition, suggested that she is not the best person to represent Mr Major's interests. Her application failed primarily because there is no one better able presently to represent his interests in the remaining period down to trial."

73. By his order of 4th June His Honour Judge Luba KC

(a) Dismissed the termination application (Ms Cowell's application) with Mr Major to pay the Claimant's costs summarily assessed in the sum of £4,800

(b) Dismissed the Respondent's application for an unless order with the Respondent to pay Mr Major's costs summarily assessed in the sum of £500.

(c) Amended the trial time estimate to one day

Events after the hearing

74. Mr Major (as opposed to Ms Cowell) sought permission to appeal the 4 June 2021 order. The Appellant's notice was served on the Respondent on 14 July 2022. Mr Major also sought an injunction against the Respondent. Mr Karia described this step as follows:

> "On 10 June 2021, Mr Major despite ***purporting to lack capacity*** or funds or capacity) instructed solicitors to make an urgent non-molestation application in the Horsham Family Court against the Respondent. That was dismissed." (Emphasis added)

75. This comment again illuminates the Respondent's attitude to capacity and meshes with the earlier comments about Mr Major "messing about" with capacity. As I have already set out at any given stage a person either has capacity or they do not. It is a matter for the court to assess. Once that assessment is made it remains valid until varied or set aside. It is also not surprising that the person who lacks capacity may take an unmeritorious or unwise decision. That is the very reason why they need a litigation friend.

76. On 25th June 2021 Ms Cowell lodged an Appellant's notice.

77. By application notice filed on 16 July 2021 (but dated the 12th) Ms Cowell applied to adjourn the trial listed for 13 August 2022. That application was refused by His Honour Judge Luba KC by his order of 20th July 2021.

78. On 27th July 2021 Ms Cowell issued an application on form N244 in the interim applications court. She sought permission to appeal the order of 20th July 2021 and also adjournment of the trial.

79. Mr Burkett provided a statement in response. He again referred to Mr Major "purporting to lack capacity"

80. Ms Cowell's application came before Mr Justice Pepperall who indicated he was troubled by HHJ Luba QC's order of 4th June which at first blush he considered an unusual order. He stated;

> "Miss Walker invites me to deal with this case on its merits and not on its technicalities. I am content to do so in part because, when I first saw the papers for this application, I was troubled. I was concerned that on the face of the papers at least, it was an unusual order to decline to release a litigation friend who no longer feels able to act on behalf of a protected party; especially a litigation friend who asserts her own mental health difficulties and who withdraws her consent so to act. I accept that there is a basis in authority for the Court having a discretion, rather than it being a matter of automatic right. The application before Judge Luba was made pursuant to r.21.7 of the Civil Procedure Rules 1998. It is plain both from the terms of the rule and authority in respect of the exercise of that power that it is a discretion vested in the Court, and one that must therefore be exercised in accordance with all of the factors in the case and the overriding objective. Nevertheless, it seemed to me that, on the face of it, it was an unusual order to refuse such application. I am fortified in that view by the observation of Foskett J in *Bradbury v Paterson* [2015] COPLR 425, where he observed, at paragraph 31:
>
> "Although the Court has a full discretion, there may 'in reality' be little room to manoeuvre when presented with such an application.""

81. After he had ensured that there had been direct contact with the court Pepperall J was frustrated in his aim to try and deal with the appeal against the order of 4th June;

> "Unfortunately, there is no transcript or even note of the judgment. It is therefore impossible on the papers before me properly to engage with the question of permission to appeal."

82. He also noted that he did not have an appeal bundle or the evidence before the Judge. As a result "and with some regret" he had to dismiss the application.

Trial

83. The claim proceeded to trial on 3rd – 4th August 2021, where HHJ Raeside KC gave judgment in favour of the Respondent. Ms Cowell did not have an advocate to conduct the trial[7]. Mr Major did not give evidence[8]

84. Mr Karia sought to pray in aid a number of matters that happened at the trial in relation to the merits of the decision taken by His Honour Judge Luba QC and of the action as a whole.

85. In my view there needs to be a very significant degree of caution exercised before embarking upon consideration of whether any such subsequent matters can impact upon the issue which is considered within this judgment i.e. whether the Judge erred in law at an earlier hearing.

86. Mr Major did not give evidence, lost and was subject to an order for indemnity costs (of itself a concerning matter). In my judgment the court should be very slow to enter into evaluation of the performance of a litigation friend in such circumstances. In a witness statement of 14th December 2022 Ms Cowell referred to her impaired ability to assimilate the content of the bundle, that she missed significant discrepancies in the evidence and was too anxious to focus properly.

87. As for the merits of the action it is not as simple as considering the judgment on the issues in evidence before the court at the trial. Consideration would have to be given to what arguments could/should have been run but were not (including as to how the court should approach Mr Major), what evidence could/should have been called[9] (and what offers could/should have been made). It is also important to recognise that the litigation remains live and issues of privilege and conflict of interest arise.

88. As a result I have not considered what happened at the trial in any detail.

89. Returning to the progression of the appeal, on 3 February 2022, Sir Stephen Stewart struck out this appeal on the basis that section 4-6 of the appellant's notice were missing

---

[7] At the start of the trial Ms Walker acting pro-bono made an application to adjourn the trial

[8] His Honour Judge Raeside stated "*It is always difficult for a court to assess a witness in the absence of hearing or seeing a witness being cross-examined under oath but as Mr Major has no capacity and I found he cannot therefore stand to be cross-examined, the court has to do its best on the basis of the witness statement alone in the usual way and I have set out above my views on his witness statement. Overall I considered his evidence to be more implausible than plausible given the rather straitforeward [sic] nature of this case.*"

[9] Ms Cowell had not provided a witness statement for the trial, and intended to rely on a witness statement in the proceedings (for the application to vacate the first trial).HHJ Raeside refused permission to rely on that statement

(as identified by the Respondent in correspondence dated 15th July 2021). An attempt to appeal that order was struck out with costs.

90. On 9 March 2022 the Appellant applied to set aside the 3 February 2022 order. On 4 April 2022, Sir Stephen Stewart's ordered that the Application be listed for a 1 hour contested hearing. The hearing ordered by Sir Stephen Stewart was listed before Mr Justice Freedman on 1 November 2022.

91. On 30th November 2022, substantially altered grounds of appeal were filed

92. Ms Cowell made a further application dated 13th December 2022 to be discharged.

93. On 20 December 2022, after a two-day hearing, Freedman J reinstated the appeal and granted permission to appeal on all 5 grounds.

94. The Respondent filed a Respondent's Notice in the Appeal on 9 January 2023. The additional grounds were that:

    (a) Successful challenge to the decision would have no material effect such as to render the premise of the appeal academic or hypothetical (Ground 1).[10]

    (b) That there was no requirement of consent by a litigation friend at all, alternatively consent is only considered at the initial stage of appointment (Ground 2).

Fresh evidence

95. Freedman J also adjourned an application to adduce fresh evidence in the form of a further witness statement and exhibits from Ms Cowell dated 17th November 2022 to the appeal hearing.

96. Ms Cowell has provided two further witness statements as required by the order of 2 November 2022 (statement 27 November 2022 and the statement 14 December 2022. In those statements she covers matters largely postdating the decision under appeal, describing the negative impact she believes her mental health condition and other circumstances had on the trial outcome. The exhibits to the 27 November 2022 which may constitute fresh evidence are:

    i) The Vineyard Surgery medical record for K Gee 13 April 2021

    ii) Screenshot of text messages A Walker & K Gee 3 March 2021

    iii) Email S O'Neil to K Gee 10 May 2021

    iv) Occupational health report re: K Gee 6 May 2021

    v) Letter from Advocate re: inability to act 3 June 2021

97. Given that His Honour Judge Luba KC did not doubt Ms Cowell's veracity or address her medical condition within his reasoning, and also given that I have not reached the

[10] This notwithstanding the existence of an adverse costs order.

stage of considering the materiality question, as I indicated to Mr Lester[11], these documents took matters no further as regards the issue of whether the Judge erred in law on 4th June 2021. If necessary I will further consider the application in due course.

Grounds of appeal

98. The five grounds are summarised as follows.

(a) The Judge took an incorrect approach to the application to discharge a litigation friend
(b) The Judge was plainly wrong in his findings as to representation at and preparation for trial
(c) The Judge fell into error in that there was no requirement for the identification of a substitute before the appointment of a litigation friend could be terminated
(d) The Judge was wrong in law in that ordering Ms Cowell to continue as a litigation friend meant that he was ordering forced labour in breach of Article 4 of the European Convention on Human Rights
(e) There were procedural failings before/at the 4th June 2021 hearing

99. The fifth ground fell away during submissions given that His Honour Judge Luba KC expressed no concern about the veracity of Ms Cowell.

100. I shall set out the respective submission when considering each ground in turn. However, I will first set out the relevant legal framework.

The law

101. A litigation friend is required to act for the benefit of the individual and safeguard their interests.

102. CPR 21.4 sets out that;

> (3) If nobody has been appointed by the court or, in the case of a protected party, appointed as a deputy as set out in paragraph (2), a person may act as a litigation friend if they –
>
> (a) can fairly and competently conduct proceedings on behalf of the child or protected party;
>
> (b) have no interest adverse to that of the child or protected party; and
>
> (c) where the child or protected party is a claimant, undertake to pay any costs that the claimant is ordered to pay, subject to any right to be repaid from the assets of the child or protected party.

[11] In his skeleton Mr Lester submitted that the fresh evidence largely assisted with the 'materiality question'

103. PD21, revoked in the 153rd Practice Direction Update as of 6 April 2023 but in force at the time of the relevant decision, stated:

> PD21.2 The litigation friend
> …
> 2.2 A person who wishes to become a litigation friend without a court order pursuant to rule 21.5(3) must file a certificate of suitability in Practice Form N235—
> (a) stating that he consents to act,
> (b) stating that he knows or believes that the [claimant] [defendant] [is a child] [lacks capacity to conduct the proceedings],
> …
> (d) stating that he can fairly and competently conduct proceedings on behalf of the child or protected party and has no interest adverse to that of the child or protected party
> …
> PD21.3 Application for a court order appointing a litigation friend
>
> 3.1 Rule 21.6 sets out who may apply for an order appointing a litigation friend.
> 3.2 An application must be made in accordance with Part 23 and must be supported by evidence.
> 3.3 The evidence in support must satisfy the court that the proposed litigation friend—
> (1) consents to act,
> (2) can fairly and competently conduct proceedings on behalf of the child or protected party,
> (3) has no interest adverse to that of the child or protected party
> …
> 3.4 Where it is sought to appoint the Official Solicitor as the litigation friend, provision must be made for payment of his charges.

104. Although the form N235 is not mentioned in Part 21, and the requirement for its use was set out in PD21, and therefore it now appears that there is no explicit requirement for use of that form, it is my experience courts continue to require the use of Practice Form N235. This is unsurprising given that The Gov.UK website states

> "Use this form to tell the court that you are acting on behalf of a child or a protected party"
>
> And
>
> "You *must* send the form to the court either:
>
> - with a claim
> - in response to a claim" (emphasis added)

The form, notably, contains the requirements to confirm

'I consent to act as litigation friend' and

"I am able to conduct proceedings on behalf of the above named person competently and fairly and I have no interests adverse to those of the above named person".

105. The Gov.UK website[12] also states;

"Duties

You must 'direct the proceedings' on behalf of the other person if you're their litigation friend. This means you'll[13]:

- make decisions in their best interests
- do everything you can to tell them what's happening in the case and find out their wishes and feelings
- talk to their solicitor about what's happening, get advice from them and give instructions to them in the other person's best interests
- pay any costs ordered by the court"

106. In **R. (on the application of Raqeeb) v Barts Health NHS Trust** [2019] EWHC 2976 (Admin) MacDonald J considered the extent of the duties of a litigation friend, in the context of a legally represented child/protected party;

"20. With respect to the first requirement to be fulfilled by a litigation friend, the meaning of the phrase "conduct proceedings on their behalf" is not elaborated in the rules. Such conduct will, however, no doubt include anything which, in the ordinary conduct of any proceedings, is required or authorised by a provision of the CPR to be done by a party to the proceedings. Further, the authorities make clear that, in fairly and competently conducting the proceedings, the litigation friend is required to act for the benefit of the child and to safeguard his or her interests. With respect to this particular aspect of the role of the litigation friend in current context, some assistance may be drawn from the authorities.

21. In *Rhodes v Swithenbank (1889) 22 QBD 577* at 579 Bowen LJ described what was then termed the 'next friend' of an infant as "the officer of the court to take all measures for the benefit of the infant in the litigation". That articulation was cited by Brightman J *In re Whittall [1973] 1 WLR 1027* , a case concerning two persons who had agreed to act as what was then termed guardians ad litem for infant defendants to an application under the Variation of Trusts Act 1958 . In articulating the duties of a guardian ad litem in light of the statement of Bowen LJ in *Rhodes v Swithenbank* , Brightman J stated that the function of the guardian ad litem "is to guard or safeguard the interests of the infant who becomes his ward or protégé for the purpose of the litigation." As to how this to be is achieved by the litigation friend, in *In re Whittall* Brightman J went on to observe, in the context of the child as defendant to litigation, that:

"The discharge of this duty involves the assumption by the guardian ad litem of the obligation to acquaint himself of the nature of the action in

[12] Mr Burkett referred Ms Cowell to this website
[13] Surprisingly this is the exact wording

> which the infant features as a defendant, and the obligation to take all due steps to further the interests of the infant."

And later in the context of the particular application with which Brightman J was concerned in *In Re Whittall* :

> "…the guardian ad litem of the infant has the duty, under proper legal advice, to apprise himself fully of the nature of the application, of the existing beneficial interest of the infant, and of the manner in which that interest is proposed to be affected, and to inform the solicitor whom he has retained in the matter, of the course of which he, the guardian, considers, in light of the legal advice given to him, should be taken on behalf of the infant."

23. Within the foregoing context, two matters emerge with respect to the duty of the litigation friend to fairly and competently conduct proceedings. The first is that the central role of legal advice in the discharge of the duties of the litigation friend has been emphasised by the courts. As noted above, in *In Re Whitall* Brightman J emphasised the need for the guardian ad litem to act "under proper legal advice". In *OH v Craven* Norris J also emphasised the central role played by the legal advice received by the litigation friend in the discharge of his or her duties.

24. The second is that whilst the litigation friend is required to act on legal advice, he or she must be able to exercise some independent judgment on the legal advice she receives (*Nottinghamshire CC v Bottomley [2010] EWCA Civ 756*). In doing this, the litigation friend must approach the litigation with objectivity. In *In Re Barbour's Settlement Trusts [1974] 1 WLR 1198* Megarry J observed as follows, albeit in the context of the court being asked to approve a compromise of a dispute involving the interests of a minor, as follows regarding the interrelationship between the minors' interests and the role of the litigation friend:

> "Second, there is the important matter of the minors' benefit. When the court is asked to give its approval on behalf of minors to a compromise of a dispute, the court has long been accustomed to rely heavily on those advising the minors for assistance in deciding whether the compromise is for the benefit of the minors. Counsel, solicitors, and guardians ad litem or next friends have opportunities which the court lacks for prolonged and detailed consideration of the proposals and possible variations of them in relation to F the attitudes of the other parties and the apparent strength and weakness of their respective claims. When the matter comes before the court, the terms of settlement are in final form and the time for consideration is of necessity less ample. The court accordingly must rely to a considerable extent on the views of those whose opportunities of weighing the matter have been so much greater. Expressing a view on whether the terms of a proposed compromise are in the interests of a minor is a matter of great responsibility for all concerned. The solicitors must see that all the relevant matters are put before counsel, that the right questions are asked, and that the guardian ad litem or next friend of the minor fully understands and weighs counsel's advice when it is given. Counsel has to

> discharge what in my judgment is one of the most important and responsible functions of the Bar, that of helping those unable to help themselves; and the guardian ad litem or next friend must understand the advice given and carefully weigh the advantages of the proposed compromise to the minor against the disadvantages."

107. In the absence of legal representation the duty to conduct proceedings as a litigant in person on behalf of a protected party is even more onerous. In the present case it meant the defending the claim and the conduct of all ancillary functions[14].

108. The conduct of the litigation is not "risk free". In **Glover v Barker** [2020] EWCA Civ 1112, Newey LJ, with whom Patten and Moylan LJJ agreed, explained that the jurisdiction to make a costs order against a litigation friend is derived from s.51 of the Senior Courts Act 1981 and that;

> "…There is no presumption that a defendant's litigation friend should bear costs which the defendant would have been ordered to pay if not a child or protected party. That the litigation friend controlled the defence of a claim which succeeded will not of itself generally make it just to make an adverse costs order against the litigation friend. Factors that might, depending on the specific facts, be thought to justify such an order include bad faith, improper or unreasonable behaviour and prospect of personal benefit…"

109. In **Bushby -v-Galazi** [2022] EWHC 136 (Ch)His Honour Judge Klein (siting as High Court Judge) stated

> 90…..it might be thought surprising, bearing in mind the broad discretion conferred by s.51 , if a court could not make a costs order against a litigation friend who has conducted the proceedings unfairly or incompetently, and has thereby caused costs to be incurred, if the circumstances make such an order just.
>
> ..
>
> 93. I would therefore hold that the unfair or incompetent conduct of proceedings by a litigation friend can, depending on all the circumstances, be the basis for making a costs order against a defendant's litigation friend.

110. So the duties of a litigation friend can be onerous. Also a Defendant's litigation friend does not have an immunity against a personal costs order. This of relevance if a

[14] The "conduct of litigation" is a reserved legal activity for the purposes of the Legal Services Act 2007, and may only be carried on by an authorised person, or an exempt person. Schedule 2 paragraph 4 (1) of the 2007 Act provides that: The "conduct of litigation" means (a) the issuing of proceedings before any court in England and Wales,(b) the commencement, prosecution and defence of such proceedings, and (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions)

litigation friend is required to act against their wishes a fortiori when the person doubts their ability to conduct the litigation competently.

Termination of the role of litigation friend

111. CPR 21.7 states

> (1) The court may –
>
> (a) direct that a person may not act as a litigation friend;
>
> (b) terminate a litigation friend's appointment; or
>
> (c) appoint a new litigation friend instead of an existing one.
>
> (2) An application for an order under paragraph (1) must be supported by evidence.
>
> (3) The court may not appoint a litigation friend under this rule unless it is satisfied that the person to be appointed satisfies the conditions in rule 21.4(3).

112. On any application under CPR 21.7, or if the Court acts of its own motion, the primary focus must be on whether the litigation friend continues to satisfy the criteria in CPR 21.4 (a) and (b).

113. In **Shirazi (by his Litigation Friend Leila Golesorkhi-Shirazi) v Susa Holdings** [2022] EWHC 477 (Ch) Chief Master Shuman was concerned with an application by the defendants to remove the claimant's litigation friend (and wife) Mrs Shirazi. He stated

> "Drawing these strands together the approach of the court to an application such as this is to consider whether the litigation friend satisfies the criteria in CPR rule 21.4(3) . The question of whether the litigation friend can fairly and competently conduct proceedings on behalf of a protected party (criteria 21.4(3)(a)) necessarily involves consideration of whether they are acting in the best interests of the protected party. Whilst I accept Mr Learmonth's submission that simply satisfying the criteria will not mean that a litigation friend would never be removed, it is difficult to think of a practical example where that might arise, unless perhaps the overriding objective would support appointing a proposed litigation friend over a current one".

114. I respectfully agree.

115. In **Bradbury-v-Paterson** [2014] EWHC 3992 the court was faced with "a novel point" about what the Court should do when the Official Solicitor concludes that he/she can no longer continue to act as litigation friend for a protected party in litigation because the anticipated source of funding for the Official Solicitor's costs ceases to be available. Due to psychiatric illness the Defendant lacked capacity and an order was made that the Official Solicitor should be appointed to act as his litigation friend. The Official Solicitor had agreed to act in that capacity and did so until the withdrawal of funding by the Defendant's insurer (the MDU).The Official Solicitor then applied to the court pursuant to CPR r.21.7 for an order that he be discharged as Mr Paterson's litigation

friend. The application was opposed and it was submitted that the court can compel the Official Solicitor to continue to act as a litigation friend in circumstances where, he had initially consented to act in that capacity.

116. As regards what Foskett J described as "the one issue of principle (namely, whether the Court can, in effect, compel the Official Solicitor to continue acting)" he stated

> "27. Miss Morris counters that submission by saying that the power to order the termination of a litigation friend's appointment is not restricted in the manner contended for by Mr de Navarro. Subject only to the requirement (in CPR 21.7(2)) that the litigation friend provides evidence in support of his application for an order terminating his appointment, she contends that there is no further requirement in CPR 21.7 requiring, for example, that he identifies a substitute. Indeed she submits that CPR 21.7(1)(b) would be otiose if there were such a requirement.
>
> 28. It does seem to me that Miss Morris' submission on the construction of the rules is correct. She supplements that submission by contending that it is clear that any litigation friend must (a) consent at the outset to his appointment (see paragraph 23 above) and (b) continue to consent throughout the duration of that appointment. She says that, apart from anything else, a litigation friend who is unwilling to continue to act is, by definition, a person who is most unlikely to continue to satisfy the criteria set out in CPR 21.4(3) (which applies also to those appointed by court order: CPR 21.6(5)) of being a person who can "fairly and competently conduct the proceedings on behalf of the … protected party" and "has no interest adverse to that of … the protected party." A litigation friend who is being required to act on an unwilling basis will, she submits, almost by definition have an interest adverse to the protected party because his primary interest will be in bringing the litigation to an end as speedily as possible regardless of whether this is in the interests of the protected party. She also says, looking at matters more widely than the position of the Official Solicitor, that the reading of CPR 21.7(1) for which Mr de Navarro contends would "have a chilling effect on the ability of litigation friends to accept invitations to act." She suggests that this would be particularly so where a case involves public funding where the criteria for such funding change on a regular basis and where, in any event, reassessment by the Legal Aid Agency of those who are publicly funded "but are on the cusp of having sufficient means not to be eligible" for such funding not infrequently leads to revaluation and the withdrawal of funding. She suggests that no litigation friend who needed to instruct lawyers to act for him would be prepared to act unless he had a cast iron guarantee that the costs of doing so would be met whilst acting as a litigation friend.
>
> 29. Those submissions have some considerable force in the generality of things, though I would doubt that the Official Solicitor, as an officer of the court, would act contrary to the interests of a protected party in such a situation. Nonetheless, because of the funding constraints to which he is now exposed (see paragraphs 33-37 below), the position of enforced continuation as a litigation friend would undoubtedly be unwelcome and uncomfortable.
>
> ..
>
> 31. Miss Morris was anxious to emphasise that she was not suggesting on the Official Solicitor's behalf that a court can or should automatically grant an

> application under CPR 21.7(1)(b) : it should only do so when the evidence justifies the grant of the application and there may be circumstances in which it would be inappropriate to grant it. I agree that the court's discretion is a full one, though in reality there may be little room to manoeuvre when presented with such an application.
>
> ..
>
> 38. I have had the benefit of much more extensive argument and assistance than was afforded to McGowan J. However, it seems to me that she was entirely justified (and almost certainly obliged) to make the orders asked of her relating to the cessation of the involvement of the Official Solicitor and Ryans.
>
> 39. Given the concerns she had about the impact of those orders on the litigation as a whole, it might have been open to her to adjourn the application so that the other affected parties could make representations about the way forward, but there is no doubt, to my mind, that the application before her was properly constituted. However, the opportunity to make representations has now been taken before me and I cannot see how I could myself have declined the application made by the Official Solicitor and indeed the solicitors whom he had instructed on his behalf to cease to act."

117. I agree with the conclusions of Foskett J that there is no necessity that a substitute litigation friend be identified before an order can be made under CPR 21.7. As for the observation that a litigation friend who is being required to act on an unwilling basis will have an interest adverse to the protected party (because his/her primary interest will be in bringing the litigation, and with it their unwanted involvement, to an end as speedily as possible, regardless of whether this is in the interests of the protected party), this has very considerable, if not overwhelming force where the litigation friend is not a lawyer, and so has no professional obligations to the protected party or the Court. As I have set out the litigation friend is charged with the conduct of the litigation, aspects of which are particularly demanding for a litigant in person (and if not progressed competently the litigation friend is potentially exposed to a personal costs order) and a litigation friend for a defendant is not entitled to expenses (contrary to Mr Karia's submissions).

118. I turn to the grounds of appeal

Incorrect approach to the application to discharge (Ground one)

119. Mr Lester submitted that the Judge erred in law, in conducting an open balancing exercise of factors he considered relevant without giving priority or at least particular prominence to the factors that are set out at r.21.4(3). He submitted that the first and primary consideration for the Court when faced with any application under CPR 21.7 (or when considering making an order of its own motion) is whether the following criteria are each met

> i. there is consent to act;
>
> ii. the person can fairly and competently conduct proceedings on behalf of the child or protected party

iii. the person has no interest adverse to that of the child or protected party;

120. Mr Lester argued that it would make no logical sense to set out such requirements as gateways to the appointment of a litigation friend, whilst allowing discharge decisions to ignore (or merely weigh) them as one of many factors. A discharge decision which did not give particular weight to the requirements, would fail to uphold the purpose of the CPR in setting those requirements as part of the protection mechanism that Part 21 enshrines in civil procedure for protected parties. If the requirements had no more weight that another kind of consideration, such an impending trial date, then the necessary protection will potentially be abrogated.

121. Mr Lester wisely did not go so far as to say that a failure to be satisfied in respect of each of the three would axiomatically lead to discharge, but he submitted that there would have to be exceptional circumstances for a person to be ordered to remain a litigation friend if all were not met. He recognised that His Honour Judge Luba KC did acknowledge the CPR 21.4 factors, stating,

> "I may sensibly have regard to the criteria set out in CPR 21.4, and in particular, sub-paragraph (3)",

but argued that those factors were nowhere featured in the Judge's listing of 'features which weigh particularly heavily in the balance' at the conclusion of his decision, rather those factors were

> "first, the imminence of the trial date; secondly, the fact that it is the second trial date in this case; thirdly, the real risk to the trial date if the application is allowed; fourthly, the relatively limited steps that now remain to be taken between today and the trial date".

Only after consideration of these factors did the Judge consider CPR 21.4 factors

> "This is not to say that I have not put into the balance the other factors going the other way, particularly Miss Cowell's desire to be relieved of the responsibility, and the fact that, as I have indicated, there is a real risk of a perception on Mr Major's part that he is being assisted by somebody functioning at less than 100 per cent"

Mr Lester submitted that the Judge's approach was essentially the reverse of that which should have been taken; it was the r.21.4(3) factors and the 'consent' factor which should have been the primary or overriding considerations or at least 'weighed particularly heavily in the balance'. The Judge only weighed up the lack of consent and the prospect of risk of a protected party not being protected due to an ineffective litigation friend, in scales already tipped by factors which had no relevance to the underlying priority of safeguarding the protected party.

122. Mr Lester also submitted that the Judge did not truly engage with the issue of consent at all, as indicated by the euphemistic referral made to 'Miss Cowell's desire to be

relieved of the responsibility'.[15] The Defendant's skeleton argument (drafted by Mr Amunwa) set out consent as a front-and-centre issue, but it only appeared in the Judgment as something of afterthought and there was no reference at all to the potential for an adverse interest, being a likely or necessary corollary of a lack of consent.

123. Mr Karia submitted that consent is "not a true factor" for a litigation friend. It does not form part of a discrete element of the test in CPR 21.4(3) and was only set out in the Practice Direction (and the form). However he conceded that the issue of consent would be "wrapped up" within the Court's consideration of CPR 21.4(3). He also submitted that

> "an argument at a slightly lower level is that the requirement of consent exists only at the time of appointment"

124. Mr Karia pointed that the court can appoint someone of its own volution. He relied upon the decision of His Honour Judge Hodge KC (sitting as a Judge of the High Court) in **Krishan Kumar v Kevin Hellard** [2021] EWHC 181 (Ch) to appointed as litigation friend of the Court's own volution under CPR.21.6 an incapacitated party's daughter who had lasting power of attorney. Given the weight attached to this decision in it necessary to consider it some detail.

125. The matter before the learned Judge was an appeal by Mr Krishan Kumar, who was 82 years of age, against a bankruptcy order. Before the District Judge, there was a letter (unsigned) purporting to come from Mr Kumar, although as His Honour Judge Hodge KC stated "possibly written by his daughter (who holds a Lasting Power of Attorney for her father)" stating that Mr Kumar was currently suffering from Alzheimer's disease. The writer referred to Mr Kumar's poor state of health and said that, as a result, he would be unable to attend court. There was also a letter, apparently from a GP which stated that he had lacked capacity. Notwithstanding these letters the District Judge made the bankruptcy order. His Honour Judge Hodge noted that

> "The appellant lived with his daughter and her family and was well cared for"

He found that the District Judge should have formed the view that there was a need for a litigation friend and that the bankruptcy was wrongly made and unjust because of a serious procedural error in the proceedings in failing to appoint a litigation friend. He then continued

> "15. The question then is: What further steps should be taken? It seems to me, on the material before the court, appropriate for the court to appoint a litigation friend so that the present petition can proceed. The court has power to do so under CPR 21.6(1) . Since the appellant's daughter, Kusum Kumari, has a Lasting Power of Attorney for her father, she is the appropriate person to appoint. I therefore appoint her to act on this petition as the appellant's litigation friend".

126. The extempore judgment of His Honour Judge Hodge KC did not (and did not need to) contain any analysis of the principle of the appointment of a litigation friend without prior consent having been obtained. It was an eminently sensible and pragmatic step

[15] Perhaps in light of Mr Karia's reference made to her "slight reluctance" to continue in the role.

taken by a very experienced Judge given the unusual circumstances he faced. I have no doubt that he was well aware that Mr Kumar's daughter could apply to set this aspect of his order aside under CPR 3.3(5)(a) (there was no need to appeal) or to make an application under CPR 21.7.

127. Mr Karia's broad overview in respect of ground one is that it was an appeal against an interlocutory case management decision where the Judge had exercised a broad discretion. The decision reached did not fall outside the wide ambit of discretion open to the Judge.

Analysis

128. Mr Lesters' submissions broadly set out the correct position.

129. The starting point when considering whether the appointment of a litigation friend (legally qualified or not) should be terminated is whether the conditions in CPR 21.4 (3) continue to be satisfied and whether the litigation friend continues to consent to act. These are not merely factors which may be taken into account in the balance with no more weight than any other considerations. The Court should guard against any weakening of these mandatory requirements which may deprive a protected party of what the rules deem as necessary protection. If the conditions are no longer satisfied, or the Litigation Friend no longer consents to act it, it will require exceptional circumstances for the appointment to continue. Here there was no finding that the application, made by a litigation friend who was acting as a litigant in person, was anything other than bona fides. She no longer consented to act and doubted her ability "to comply with my duties to act in the Defendant's best interests and have concerns about my ability to make effective decisions on behalf of the Defendant." Having raised no issue with Ms Cowell about her mental health and its impacts the Judge should have considered whether there were any exceptional circumstances which could mean that it was proper to order her to remain in the role. In the absence of such circumstances the application should have succeeded.

130. Although not expressly set out within CPR 21.4(3) consent is a fundamental requirement for a litigation friend's appointment. It is very difficult to envisage circumstances where a person who makes an application to be appointed does not consent to the appointment at the time the application is made. The Court will ordinarily require consent to be specifically addressed through form N235 although this is no longer expressly required by a Practice Direction. It will only be in very rare circumstances that the Court will appoint a person without first considering this issue (or being able to arrive at a view that consent is likely as in **Kumar v Hellard**).

131. Consent is a requirement not just a matter of basic principles of justice and fairness but also for the reasons particularly emphasised in **Bradbury**. For the avoidance of doubt I agree with Foskett J's statement in Bradbury that

> 'I do not think that there is any warrant for the conclusion that the consent of any person to act as a litigation friend is irrevocable, certainly under the regime provided for by the CPR.'

132. Whilst the withdrawal of consent will not axiomatically lead to the termination of an appointment (as also noted in **Bradbury**), it must be a key factor both in its own right

(because the court faces forcing someone to do something which they no longer wish to do) and also due to the risk that the presence of an unwilling, non-consenting litigation friend poses to the fairness of the proceedings and to the safeguarding of the protected party's interests. I think it likely that these factors gave rise to Pepperall J's "first blush" concern about the order in issue.

133. Mr Karia's submission that consent is "not a true factor" for a litigation friend is misconceived. The argument "at a slightly lower level" that the requirement of consent exists only at the time of appointment is also wrong. The need for consent continues throughout the appointment. As was pointed out in **Bradbury** in the absence of consent a conflict of interest arises.

134. In the present case the withdrawal of consent was understandable and justifiable and His Honour Judge Luba KC raised no issue with Ms Cowell's evidence as to the onset of her mental health issues and the likely impact of continuing her role as a litigation friend. It appears that the Judge quite properly ignored the comments about her "claiming" to suffer anxiety and to her "changing whims". These comments should not have been made.

135. Mr Burkett's unnecessarily aggressive conduct of the litigation unsurprisingly, and considerably, heightened Ms Cowell's anxiety and this was not her fault.

136. Given that Ms Cowell no longer consented and doubted her ability to comply with her duties it required exceptional circumstances to justify forcing her to continue. However the application had additional merit given the consequential risk to Ms Cowell's health of making her continue, the lack of continuous legal representation, the complexity of the matter (the trial bundle being around 2500 pages with Mr Major's lack of capacity likely to impact on the extent of the defence evidence), and the need to consider settlement/conduct generally.

137. The loss of a trial date alone cannot ordinarily outweigh the fact that there is no longer consent or that the requirements for appointment as a litigation friend are no longer met. The reason for this is obvious. The trial may well not be a fair one if the protected party has his/her interests in the hands of a person who cannot competently and/or and fairly conduct the proceedings and/or no longer wishes to do so (in which case a conflict of interest arises as the litigation friend's interest lies in the speedy conclusion of proceedings). There is also the risk of consequential litigation brought on behalf of the protected party in respect of any perceived failings of the Litigation friend to act with appropriate care.

138. I fully recognise that this decision was an exercise of discretion. However it is a well established principle that an appellate court can, and should, interfere with that exercise if it has gone seriously wrong. In my Judgment the Judge failed to properly direct himself as to the correct approach to the issue before him and fell into serious error. As a result the decision was plainly wrong and/or outwith the discretion allowed by the CPR upon an application by a litigation friend to be discharged.

139. The circumstances of Ms Cowell plainly and overwhelmingly were such that they should have led to her being discharged. She no longer consented to act and there was a real risk (due to her significant mental health difficulties and related personal situation) of her not being capable of performing her duties properly and/or of her

having an interest adverse to that of Mr Major in that she would want the litigation to be over and could not face interaction with Mr Burkett (including with regard to settlement).

140. Whilst a discretion exists on an application to terminate it is trammelled. As I have set out once the conditions in CPR 21.4 and/or consent are no longer present it would take exceptional circumstances for a decision to continue the appointment to be justified. As Foskett J observed in Bradbury the Court has

> 'little room to manoeuvre when presented with such an application'

141. In the present case the loss of a trial date (which had only be obtained as a result of Ms Cowell agreeing to act) and the fact that no substitute had been identified could not constitute sufficiently exceptional circumstances to displace the usual result of a lack of consent and/or inability to satisfy the conditions at CPR 21.4(3).

142. Ground one is successful, the decision was wrong and the order that Ms Cowell continue as litigation friend should not have been made

143. I shall deal briefly with grounds two and three which also concern the exercise of discretion.

Findings as to representation at and preparation for trial (ground two)

144. Further and in any event the Judge fell into error in the exercise of his discretion by taking into account and attaching weight to his view that there was "relatively little left to do before the trial" given that "all that remains to be done for trial in the instant case is agreement of the bundle and attendance at the trial, and suitable instruction of an advocate for Mr Major". He was encouraged into this error by the Respondent's submissions. As Ms Cowell correctly stated she had "to make decisions about his trial", in respect of which she did "not feel confident to do that at all."

145. The conduct of litigation is an onerous responsibility and cannot be sensibly divided into set procedural steps without consideration of the ancillary duties such as the continuing need to review prospects of success, evidential issues and to also to consider settlement. Here Ms Cowell was faced with the difficulty of Mr Major lacking capacity yet being the sole potential witness of fact in his own defence.

146. Care is also necessary when equating assistance from a pro-bono advocate at hearings with a solicitor having conduct of the action. The Judge's finding was only that it was likely that there would be "assistance" specifically at trial. He failed to properly take into account the conduct required of Ms Cowell involved far more than simply preparing for the trial date. In particular the Judge overlooked that Ms Cowell should be considering settlement. Had he addressed his mind to it he would have had to recognise Ms Cowell's understandable reluctance to engage with Mr Burkett given her health could impair that process.

147. As a result the Judge took into account a factor which he should not have taken into account in the exercise of his discretion. Ground two also succeeds. This would require me to undertake a fresh exercise of discretion, but given my conclusions on ground one this is not necessary.

The requirement for the identification of a substitute (ground three)

148. The Judge also fell into error by applying, in effect, a prerequisite that a substitute be identified. He found that the reason that the application "failed primarily" was Mr Major's inability to put forward any person to take on the role in the remaining period down to trial."

149. As I have already set out there is no requirement on a litigation friend to identify a substitute before termination of the role will be allowed. Rather as I have identified if the conditions for appointment are no longer met and/or the litigation friend no longer consents, exceptional circumstances will be required before the appointment can continue.

Compulsory Labour (Ground four)

150. Given my conclusions on the first three grounds it is not necessary to deal with the discrete argument under ground four. It is a not a straightforward issue and has some substance. Conduct of litigation can be very onerous, time consuming and a litigation friend acting for a defendant is not entitled to expenses.

Conclusion

151. For the reasons set out above this appeal succeeds. Ms Cowell's role as a litigation friend should have been terminated in June 2021.

152. In view it would be desirable for the CPRC to consider clarification of the issue of consent in respect of an application under CPR21.6 given that the practice Direction is no longer in force (and there may be doubt as to the Court's ability to require form N235 be signed).

153. I will give the parties time to reflect on the way forward with the balance of the appeal.