



12 March 2014

## PRESS SUMMARY

**Dunhill (a protected party by her litigation friend Tasker) (Respondent) v Burgin (Appellant)**  
**Dunhill (a protected party by her litigation friend Tasker) (Respondent) v Burgin No 2**  
**(Appellant) [2014] UKSC 18**  
*On appeal from [2012] EWCA Civ 397; [2010] EWCA QB 3163*

**JUSTICES:** Lady Hale (Deputy President), Lord Kerr, Lord Dyson, Lord Wilson, Lord Reed

### BACKGROUND TO THE APPEAL

On 25 June 1999 the respondent, Ms Dunhill, was struck by a motorcycle driven by the appellant, Mr Burgin, when crossing the road. She suffered a severe head injury. In May 2002 she issued a claim against Mr Burgin for damages limited to £50,000 for her injuries. On the day of the trial, settlement negotiations took place and Ms Dunhill, after advice from her counsel and solicitor, decided to compromise her claim for £12,500 plus costs, which was embodied in a consent order put before the judge.

Ms Dunhill had in fact suffered very serious injuries and this settlement represented a gross undervalue of her claim, if she could establish that Mr Burgin had been negligent. In 2006 she consulted new solicitors. A litigation friend was appointed to act on her behalf, who applied for a declaration that she had not had mental capacity at the time of the settlement and that the consent order should be set aside with directions for the future conduct of the claim.

Two preliminary issues arose. The first was the test for deciding whether a person lacks the mental capacity to conduct legal proceedings on her own behalf. The second was the consequence if legal proceedings were compromised without it being recognised that one of the parties lacked that capacity, so that the requirement in Part 21.10 of the Civil Procedure Rules (CPR) that the compromise must be approved by a court was not complied with.

The High Court held that capacity was to be judged by reference to the decisions which Ms Dunhill had actually been required to take in the action as drafted rather than those which she might have been required to take had the action been differently framed. On this basis she did have capacity. The Court of Appeal ruled that she had to have capacity to conduct the more complicated action which ought to have been brought and Ms Dunhill had lacked that capacity. When the case was remitted to the High Court, it held that her lack of capacity rendered the settlement void as it had not been approved by the court as required by CPR 21.10.

The Supreme Court gave permission to Mr Burgin to appeal against both findings.

### JUDGMENT

The Supreme Court unanimously dismisses the appeals. It holds that, on the test properly to be applied, Ms Dunhill lacked the capacity to commence and conduct proceedings arising out of her claim against Mr Burgin. The consent order must be set aside and the case proceed to trial. Lady Hale gives the only judgment.

## REASONS FOR THE JUDGMENT

### *Test for capacity*

The general approach of the common law, now enshrined in the Mental Capacity Act 2005, is that capacity is to be judged in relation to the decision or activity generally and not globally. On the issue before the court the question was Ms Dunhill's capacity to conduct the proceedings. CPR 21 posits a person with a cause of action who must have the capacity to bring and conduct proceedings in respect of that cause of action. This could not depend on whether that person received good advice, bad advice or no advice at all. The test of capacity to conduct proceedings for the purpose of CPR 21 is the capacity to conduct the claim or the cause of action which the claimant in fact has rather than to conduct the claim as formulated by her lawyers, and on this test it was common ground that Ms Dunhill lacked that capacity [13-18].

### *The effect of incapacity*

It followed that Ms Dunhill should have had a litigation friend when the proceedings were begun. Although the court had power to validate steps taken without a litigation friend retrospectively, it was not just to do so in this case in relation to a settlement and consent order made without the external check on its propriety required by CPR 21.10. The consequence was that the settlement was of no effect. The terms of CPR 21 did not enable Mr Burgin to rely on the fact that he had not been on notice of Ms Dunhill's incapacity [22]. A settlement of a claim was an established exception to the general position under English law in respect of a contract made by a person who lacks capacity, which is valid unless this fact was or ought to have been known [23-30].

Although there was a need for finality in litigation, and the difficulty of re-opening cases such as this so long after the event was recognised, the policy underlying the CPR was clear: that children and protected parties require and deserve protection, not only from themselves but also from their legal advisers [32-33]. Accordingly the consent order must be set aside and the case go for trial [34].

*References in square brackets are to paragraphs in the judgment*

### **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

<http://supremecourt.uk/decided-cases/index.shtml>