Case No: B2/2012/1198

Neutral Citation Number: [2013] EWCA Civ 822
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LUTON COUNTY COURT
Mr Recorder Bueno QC
0WD00322

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 16th July 2013

Before :

Lady Justice Arden
Lord Justice Jackson
and
Lord Justice McCombe

- -

Between :

JULIAN WATSON	**Claimant/ Appellant**
- and -	
(1) TARIQ MAHMOOD SADIQ **(2) KHALID MAHMOOD SADIQ**	**Defendants/ Respondents**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr John McLinden QC and **Malcolm Birdling** (instructed by **Austin Ray**) for the **Appellant.**
Mr Nicholas Isaac for the **Respondents**

- -

Judgment

Lord Justice McCombe:

(A) Introduction

1. This is an appeal brought by Mr Julian Watson ("Mr Watson") from an order made on 29 March 2012 by Mr Recorder Bueno QC, sitting in the Luton County Court. The appeal is brought with the limited permission of Lord Justice Lloyd granted on 11 December 2012. The Respondents are Mr Tariq Sadiq and Mr Khalid Sadiq ("the Respondents"). The appeal is an unusual one in so far as it is brought against an order made, on its face, in part by consent. It is against the apparently consensual part of the order that the appeal is brought; there is no further appeal against the remaining, non-consensual parts of the order, although for my part I consider that if the consent to the earlier part of the order were somehow flawed, it is hard to see how the judge's order could survive at all.

2. The material parts of the order read as follows:

> "Upon hearing the Claimant and Defendant's [sic] in person and Counsel for the Defendants
>
> Upon trial of this action on 26th, 27th, 28th and 29th March 2012.
>
> And Upon the parties having agreed the terms set out in the attached schedule.
>
> **IT IS ORDERED BY CONSENT THAT**
>
> 1. All further proceedings in this claim be stayed except for the purpose of carrying such terms into effect.
>
> 2. Liberty to apply as carrying such terms into effect.
>
> 3. Liberty to the Claimant to apply to determine any issue about his possessions at 67 Redwood Drive, Hemel Hempstead, Herts. HP3 9ER
>
> 4. The restrictions dated 30th July 2009 in the proprietorship Register of Title Number HD147984 applied for by the Claimant for 25 Goldcroft, Hemel Hempstead, Hertfordshire HP3 8ET be removed.
>
> 5. The restriction dated 5th August 2009 in the Proprietorship Register of Title Number HD283086 applied for by the Claimant for 67 Redwood Drive, Hemel Hempstead, Hertfordshire HP3 9ER be removed.
>
> **AND THE COURT HAVING HEARD ARGUMENT FROM THE PARTIES FURTHER ORDERED THAT:-**
>
> 6. The Defendants do pay the Claimant interest assessed in the sum of £6,889.60 by 26th April 2012.
>
> 7. The Defendants do pay 60% of the Claimant's costs, to be subject to a detailed assessment unless agreed."

The schedule referred to read as follows:

> "In full and final settlement of all claims that the parties have against each other whether brought in claim no 0WD000322 in the Watford County Court and transferred to the Luton County Court ("the Action") or at all.
>
> 1. The Claimant agrees that all his equitable interest in 67 Redwood Drive, Hemel Hempstead, Hertfordshire HP3 9ER ("Redwood") has been assigned to the First Defendant, the registered proprietor of Title Number HD283086 as from 30th September 2009.
>
> 2. The Claimant agrees that all his equitable interest in 25 Goldcroft, Hemel Hempstead, Hertfordshire HP3 8ET ("Goldcroft") has been assigned to the Second Defendant, the registered proprietor of Title Number HD147984 as from 30th September 2009.
>
> 3. The Claimant and the Second Defendant have settled the purchase account as between themselves for the purchase of Goldcroft attached hereto and marked "A".
>
> 4. The Claimant and the First Defendant have settled the rent accounts to 30th September 2009 for Redwood attached hereto and marked as "B".
>
> 5. The Claimant and the Second Defendant have settled the rent accounts to 30th September 2009 for Goldcroft attached hereto and marked as "C".
>
> 6. The First Defendant will arrange to deliver to the Claimant at an agreed date and time all of the Claimant's possessions set out in the attached schedule marked "D" that remain at Redwood to the Claimant's son outside Redwood.
>
> 7. The First Defendant will pay the Claimant the sum of £67,175.50 as to £10,000 by 5th April 2012 and the balance by 26th April 2012.
>
> 8. The parties agree that they will keep these terms of settlement confidential and will not disclose the same to any third party without the consent of the other parties unless ordered so to do by any judicial authority or under compulsion of the law."

The schedule is signed by Mr Watson and by counsel then appearing for the Respondents.

3. As the order recites, it was made at the end of four days in March 2012 which had been set aside for the trial of an action brought by Mr Watson against the

Respondents. It will be necessary to say more about what happened in the course of those four days later in this judgment. However, little needs to be said about the underlying dispute. On the dates in question, Mr Watson appeared in person and the Respondents were represented by counsel, (Mr Gun-Cunnighame) not counsel who has appeared for him before this court on the appeal.

4. The dispute between the parties arose in respect of two properties known as 25 Goldcroft and 67 Redwood Drive, both in Hemel Hempstead, Hertfordshire. The Claim Form as originally filed by Mr Watson made a claim in debt for sums totalling £161,148, plus court fees and costs. By a "statement of issues", filed by Mr Watson in preparation for trial, the claim had been whittled down to a total of £136,519, plus interest and costs. That document stated that the alternative total sum, which the Respondents were said to have accepted as owing, was £74,110; it also identified set-offs/counterclaims made by the Respondents (not admitted by Mr Watson), reducing the sums, said to be admittedly owed, to £52,760. Underlying the claims by Mr Watson, and reflected by the contents of the "statement of issues" document, were claims by him to proprietary interests in the two properties at Hemel Hempstead, over the titles to which he had registered the restrictions at HM Land Registry which are mentioned in the order. Other claims were for a share of rent and profits and to recover possessions of Mr Watson, said still to be at the properties.

5. None of the remaining pleadings or other documents in the action have been put before us since it is accepted that the underlying issues in the action itself are of no materiality to the appeal. The appeal is brought upon the basis that Mr Watson's consent to the order was, he argues, "vitiated by duress and/or there was no true consent on his part" and that he "did not receive a fair trial at common law or within the meaning of Article 6(1) of the Human Rights Convention and/or the trial was irregular" (Grounds 7 and 9 of the grounds of appeal, reflecting the limited permission to appeal granted by Lord Justice Lloyd).

6. While the original grounds and skeleton arguments made allegations of duress directly against the Respondents, the thrust of the appeal, as argued before us, is directed to the contention that Mr Watson was driven into agreeing the consent order by improper interventions and pressures to settle the case exerted upon him by the Recorder. It is submitted that such interventions and pressures gave rise to an unfair trial process and a violation of Article 6. Alternatively, the order was entered into, so it is argued,

> "….without Mr Watson's true consent by reason of duress or undue influence, specifically by the improper pressure placed on the Appellant to settle by the learned Recorder. The fact that the duress or undue influence was at the hands of a third party (the learned Recorder) is immaterial here, as it was clearly within the knowledge of the Respondents, who were present throughout the hearing both personally and by counsel" (Skeleton Argument dated 31.5.13 of counsel for Mr Watson, paragraph 52)".

7. It is, therefore, the course of the proceedings at court on the four days between 26 and 29 March 2012, and specifically the conduct of the trial judge, that are in issue on the

appeal. It is necessary now, therefore, to say a little more about what happened on those days.

(B) The course of the proceedings

8. During the course of a hearing before me on 21 May 2013 I directed that the parties should endeavour to agree a non-contentious summary of the course of proceedings at court on the four days in question. That has now been helpfully provided. In addition, we have before us complete transcripts of what was said in court by and before the learned Recorder in court on those days. From those materials it has been possible for us to obtain a good understanding of the matters of which Mr Watson, through Counsel, now complains. It was agreed at that hearing, and again upon the hearing of the appeal, that the appeal could be decided upon the written materials alone, without further evidence, save for a small bundle of post trial correspondence. It is only necessary for the purposes of my judgment to summarise the salient features of the proceedings below as relied upon by the parties.

9. When the court sat on the morning of the first day, with Mr Watson being unrepresented, it is clear that (understandably) the Recorder was not expecting the type of opening of the case of which he would have had the benefit if Mr Watson, as claimant, had been represented by counsel or by a solicitor. The Recorder began by indicating that he had a formidable collection of files before him and that he had a skeleton argument from the defendants, but had been unable to identify a skeleton argument from Mr Watson. It appears from a short comment by the Recorder that he had not seen the papers before that morning; the parties' summary of proceedings for this court records that he expressed some annoyance that the bundles of documents had not been agreed and that he had been presented with a set of documents by each side. There was an attempt to identify a "Scott Schedule" of outstanding issues and to discover whether it was agreed. The Recorder stated that he wished to adjourn for two hours to read the papers and said that it was his firm view that the parties ought to try to reconcile their differences during that period. He said this,

> "92. …..looking at the nature of the disputes that you know, friends and former business partners, who have fallen out in this way is very regrettable and if the parties are able to reconcile their differences, then it would make, I think….it would be of enormous assistance, I think for the parties themselves, because you know a prolonged trial which is scheduled for four days and goodness knows how long before I can get a judgment out, it's just going to linger on and on and on. So I mean, you will all hear and take the advantage of the fact that I'm going to be adjourning for a couple of hours to read this stuff and see whether or not some sort of a settlement can be arrived at. If not then we'll proceed to try the case, okay."

10. When the court reconvened at 2 p.m., the Recorder indicated again that the parties should try to settle the case and he adjourned to 3.30 p.m., after the following exchange with the Respondents' counsel:

> "267. **Recorder Bueno QC:** Well let's not worry about that. I mean if the trial must proceed, it must proceed. I have no preconceived notion, one way or the other, I can assure you, but the one exception, the one preconceived notion I do have is in this case, you should exhaust the possibility of the compromise before we actually embark on a trial and the time isn't being wasted, because I'm reading and I suppose it will save time if push comes to shove. How much time do you need because I mean realistically I'll give you what time you require?
>
> 268. **Mr Gun Cuninghame:** Would you like us, Your Honour, to try and agree a trial bundle this afternoon, if we can't reach an accommodation?
>
> 269. **Recorder Bueno QC:** Look if you are talking constructively, you're talking constructively, I'd much rather the time was spent pursuing those discussions, I mean I am told that the trial bundle is virtually agreed anyway, your bundle 2, with a few additions, which we can add in. So I'm going to work on that.
>
> 270. **Mr Gun Cunninghame:** Very well.
>
> 271. **Recorder Bueno QC:** But I mean if I have to actually read this, to the point of being entirely au fait with the papers, it would take me a couple of days. I don't know how much time you both spent on this."

11. At 3.30 that afternoon the court assembled once more and there was further discussion about the state of the documents. At that stage the Respondents' counsel was himself looking for further time in which to consider some additional documents. At 4 p.m. the Recorder adjourned the case until 2 p.m. on the following day, encouraging the parties again to reach a "sensible commercial compromise".

12. On that second day at 2 p.m. the trial began. There was a short, perhaps rather unconventional opening, and the first witness, a Mr Swindlehurst, was called. After that, Mr Watson gave his evidence in chief, largely verifying his witness statements and the contents of certain other documents produced by him. Before the end of that afternoon session his cross-examination by the Respondents' counsel had begun. The court adjourned shortly after 4.15 p.m.

13. The hearing resumed at 10 o'clock on the following day, when a short witness for the defence was interposed. In the normal course, the cross-examination of Mr Watson should then have continued, but it seems that the parties and the judge became further involved in a discussion about the documents and Mr Watson's statement of issues. It was recognised that the ensuing discussion would be "an unusual course" because Mr Watson was in the middle of giving evidence, but the judge said that, "…I think it is going to help clarify matters". The parties seem to have agreed with this and the discussion continued for some time recorded in some 24 or so pages of transcript. Mr McLinden QC (with whom Mr Birdling appeared) for Mr Watson submitted that it is at this stage that the proceedings began to go wrong.

14. When the discussion moved on to the question of Mr Watson's personal possessions, the Recorder intervened to say this,

> "570. **Recorder Bueno QC:** It seems to me, listening to so much of this, it seems to me this is a case where a lot of progress ought to be made. You know I'm not going to enquire too closely, my job of course is to try the case if the parties can't agree, but I also see it as very much part of my function where there is a prospect of a principle compromise, to give appropriate latitude. But anyway, let's not waste time on that, we can talk about it over the luncheon adjournment."

A little later the Recorder said,

> "602. **Recorder Bueno QC:** I really have to rub my eyes in disbelief that grown men you know who have been friends and partners for many years, they've fallen out, we should actually be bickering over items like this, it's absolutely mind boggling. I mean it's a grotesque waste of time and money that we should be having to litigate all this. I mean, I'm sorry, I'm not criticising you for one moment, but I really am rubbing my eyes in disbelief, as this is unfolding. Just the thought now, we're going to have to try and reconstruct what all this stuff is, what the value of it is, and how it's going to be dealt with, I mean this is just farcical."

15. Shortly afterwards (the precise timing of which is not clear) the Recorder suggested first a 10 minute break, and then subsequently a break until 12.15 p.m. Just before that break was taken, there was the following exchange between the judge and the parties:

> "799. **Mr Gun Cunninghame:** Well I think it might be helpful if we just had a little bit of time to take stock and just…..
>
> 800. **Recorder Bueno QC:** Shall we say quarter past 12?
>
> 801. **Mr Watson:** Could I just ask that simple question, how much do they accept that they owe me?
>
> 802. **Recorder Bueno QC:** Well look, I mean I'm sure I'm just as keen as you are to know what the real dispute is between the parties at the moment, I mean there are difficulties on both sides, as I've said I know that there have been serious problems, you know, and I think as a result of that there are allegations of bad faith which are flying around, but at the end of the day as I've said, when businessmen enter into complicated business relationships, and they choose not to record their arrangements in writing but leave it as a matter of trust, then things invariably go wrong and you know, having to trawl through detail of this kind, at this remove, you know is very, very unsatisfactory. So as I say these are not matters of trust, these are matters of record and you know just as one party

is convinced that he may be right, so the other party is convinced he may be right and there is ample scope here for misunderstanding, Mr Watson, on both sides and you know sometimes when there are problems of this kind, the thought becomes father to the deed and so I think take stock. I shall re-read your witness statement and make sure it's coming from the right bundle. Okay."

16. At a time which is again unclear on the transcript, the parties returned to court. It appears that Mr Watson had felt ill in some way but this was said, suggesting that a settlement had been reached in principle:

> "807. **Recorder Bueno QC:** Word has reached me, Mr Watson, do sit down please.
>
> 808. **Mr Watson:** Thank you very much.
>
> 809. **Recorder Bueno QC:** You've had a little bit of a turn……I do understand.
>
> 810. **Mr Watson:** I'm so sorry.
>
> 811. **Recorder Bueno QC:** Don't apologise. The important thing is, are the parties talking constructively?
>
> 812. **Mr Gun Cunninghame:** Yes, well actually more than that Your Honour, we've agreed points of principle which should resolve all the issues between the parties.
>
> 813. **Recorder Bueno QC:** Well that's a very happy bit of information. I'm very glad, because as I said, some decisions would have had to be taken down the line which perhaps would have been uncomfortable for one or other of the parties, perhaps both.
>
> 814. **Mr Gun Cunninghame:** We need to work out the figures, and in view of Mr Watson's situation, we found the conference room very stuffy, what we are proposing to do is to go elsewhere, I'm going to stay with the parties and we're going to work through the figures this afternoon and this evening.
>
> 815. **Recorder Bueno QC:** Do you want to come back tomorrow morning then?
>
> 816. **Mr Gun Cunninghame:** The idea would be to come back with a draft Order tomorrow morning. Also Mr Watson may want to take some legal advice.
>
> 817. **Recorder Bueno QC:** Well you know the one thing that is most important is that this agreement is ….I mean no settlement, ones parties are happy with, I mean you know everybody's unhappy when a case settles, but on the other hand

> everybody should be happy. But these are matter of great moment so far as you're concerned, and indeed so far as the defendants are concerned and you know if you're a little bit under the weather at the moment, if you feel a little bit under pressure, the last thing that we want is for you to feel that in any way you're being coerced into a settlement. But I mean at the moment, if you are satisfied the points of principle which are principled ones and ones with which you're comfortable, have been arrived at, then it's a question of rolling up your sleeves and quietly working through the figures, then you should have that opportunity to do so. So are you happy for the matter to proceed as Mr Gun Cunninghame….
>
> 818. **Mr Watson:** Yes, I am.
>
> 819. **Recorder Bueno QC:** So I mean….
>
> 820. **Mr Watson:** I don't feel under pressure.
>
> 821. **Recorder Bueno QC:** Well I mean I can take it that there is an accord, there is consensus as to how this matter may now finally be disposed of.
>
> 822. **Mr Watson:** I think that we both think that we are talking about the same figures.
>
> 823. **Recorder Bueno QC:** Do I take that as a yes or as a maybe?
>
> 824. **Mr Gun Cunninghame:** Well the only thing I would say is that until everything is agreed, nothing is agreed."

The Recorder indicated that he was willing to adjourn to any time on the following day (the final date of the fixed hearing) that was convenient to the parties: 10 a.m., 10.30 and 11 o'clock were canvassed by the Recorder. He asked finally whether 2 p.m. might be more realistic, to which the Respondents' counsel indicated his agreement; Mr Watson did not dissent.

17. Before the judge rose, however, he was effectively invited by counsel to give an indication of the sort of interest rate that he might award on sums falling due to Mr Watson: the rival contentions were identified as being 8% and 2% over base. The judge said, "…8% is quite tasty rate of interest in this day and age…" The judge's final remark before adjourning for the day was this:

> "893. **Recorder Bueno QC:** Is that alright for you both to come back, I think it's as well to have everybody here so it's done and dusted and you know if there is any point of principle at all, anything anybody wants to discuss, I'm at the parties' disposal. I shall gather all these back and take these with me and I shall labour mightily overnight just in case it isn't settled. Well off you go and good luck to you. If there is a need for

> anybody, they want to have a telephone conference with me tomorrow morning, because I'll be here, is there a telephone number at the court at which I can be reached? You could phone, if there is a need, if you phone the court office, they'll get word to me and I'll get in touch with you somehow. Take your dad back and give him a drink, that'll perk him up. Thank you very much for your help."

18. When the parties reconvened at court at 2 p.m. on the following day, it was clear that final agreement had not been reached. Counsel informed the judge that there was disagreement in respect of two rent items and on interest. The Recorder then said,

> "14. **Mr Recorder Bueno QC:** I did mention to you that interest is of course discretionary and indeed there are cases at the highest level certainly Court of Appeal I am thinking one particular authority of (inaudible) LJ which I am sure you will be familiar with. Where a party brings problems and delays on himself then of course there is a good case even for disallowing any interest and you know you should bear in mind Mr Watson that whatever the outcome of these proceedings you chose deliberately to conduct your financial affairs, your commercial relationship, with the Defendants in a covert way in order to obscure your financial dealings from your wife and of course as a result of that we have got a lot of problems. So I give you fair warning at this stage and I am not pre judging anything but I am telling you at this stage fair warning that there is a real likelihood at the end of this case that you will not get the interest that you are seeking because I mean as I said you are to a large extent the author of your own misfortunes. If these arrangements had been reduced to writing in the way that proper commercial men regulate their affairs rather than your having obscured your relationship in order to shield your financial dealings from your wife then a lot of this could have been avoided so I think you should bear that point very much in mind. Now where are we at?"

19. Mr McLinden QC submits that this is the second main point at which the proceedings went wrong when, in effect, the Recorder began to enter into the detail of the "without prejudice" settlement discussions, in a manner that was likely to result in him being unable to continue to hear the case if settlement was not achieved.

20. Further exchanges ensued and a dispute arose before the Recorder as to what Counsel for the Respondents could tell the judge about the progress of the settlement discussions. Then this was said,

> "56. **Mr Watson:** Objection Your Honour to that.
>
> 57. **Mr Gun Cunninghame:** It's now too late.
>
> 58. **Mr Watson:** No, no I can't take that.

59. **Recorder Bueno QC:** Look let's try and be realistic about it because these proceedings as I said are ones which should never have come about I have bestrewed (sic:eschewed) the use of language which you know would actually reflects my true feelings about litigation of this kind but when we get down having narrowed the issues to these particular items here looking at the case in context, looking at the matter in the context of the case as a whole I really, I do raise my hands in utter exasperation.

60. **Mr Watson:** Me too…..

61. **Mr Recorder Bueno QC:** There is an issue here of proportionality and you know these proceedings are now almost out of control. They are almost Un-triable and again Mr Watson you are in a substantial mess and responsible for these proceedings not being correctly prepared for Trial and again this is something that may well reflect on costs at the end of the day. Now I mention all these matters now because you are not legally represented today but you must bear in mind what my provisional thinking on these matters is. Now I am not pre judging anything but I certainly know more than enough about the case to express those views. Bearing in mind what I said about interest and bear in mind what I have said also about costs because I mean these, the bundles that I have and the lack of pagination I mean it's shambolic and you are the Claimant at the end of the day, you are responsible for the conduct of these proceedings. It is your job to ensure that the paperwork is in order and with your failure to comply with the District Judge's direction with regard to the service of an index which has resulted in very considerable inconvenience to the Court."

Mr Watson drew to the Recorder's attention the absence of a statement of issues from the Respondents' side, in compliance with the court's earlier direction. The Recorder's riposte was, "Well your statement of issues was extraordinarily unhelpful". Mr Watson said, "Well it's what we're using". The Recorder replied, "Your statement of issues is one page. [I]t was almost unintelligible, Mr Watson". He added a little later, "…we have received a very detailed skeleton argument on behalf of the Defendants…It very helpfully set out what the issues in the case were in an uncontentious way and that was of considerable assistance to me…". There ensued the following,

"81. **Mr Recorder Bueno QC:** ……Now if you, it is for you to decide Mr Watson if you don't wish to compromise this case that is your right and if you're saying that settlement of this case depends upon settlement of all items but those two particular matters should not be regarded, sorry those two particular matters will balk the overall settlement then so be it we will continue with the Trial.

82. **Mr Watson:** That is what I am saying.

> 83. **Mr Recorder Bueno QC:** You're saying that are you . Alright then this is twenty past two on day 4. We have wasted a huge amount of time in this case obviously there is no point in proceeding with this case today. Either I simply abandon this Trial and it would have to be re listed before another Judge on another occasion and I give draconian directions and I will also hear submissions about costs and whether you want any interim costs orders or anything of that sort. Either side can ask for that of course and I am not talking to you I am talking to both of you, or else I will press on this afternoon with Mr Watson and we will adjourn this matter and it will come back to me at some time when the parties are free and when I will be able to do it and the Court can accommodate us."

21. The debate continued until at one moment there appeared to be "light at the end of the tunnel" when the following was said,

> "102. **Mr Watson:** In an effort to be reasonable Your Honour we have a difference of £2,000 on that and without being able to reach agreement on which should be taken I suggested that we settle it 50/50 draw a line down the middle of it.
>
> 103. **Mr Gun Cunninghame:** We perfectly agree Sir.
>
> …….
>
> 116. **Mr Watson:** Yes but the answer is yes."

The Recorder also checked that Mr Watson had been able to speak to his solicitor, as he had indicated on the previous day that he wanted to do. But still there followed statements indicating that interest and costs remained in dispute. Shortly before a further break in proceedings, the Judge said, (obviously jovially),

> "149. **Mr Recorder Bueno QC:** ……I should give everybody fair warning that this is a building which deals with criminal cases. I am sure there are cells here which could be put to good use if you haven't settled."

I should also refer to the following passage, to which Mr McLinden referred, which appears a few pages further on in the transcript and before the break:

> "251. **Mr Watson:** I agree and I am more than willing to reach agreement but as you quite rightly said yesterday I will not be steamrollered into reaching an agreement particularly when I am not represented.
>
> 252. **Mr Recorder Bueno QC:** It was your choice not to be represented Mr Watson.
>
> 253. **Mr Watson:** No unfortunately it wasn't my choice. If you don't have any money you can't be represented.
>
> 254. **Mr Recorder Bueno QC:** Mr Watson there it is the fact is that you are not legally represented today. If you feel that you are being steamrollered and

> you don't feel that you are in a position properly to exercise a free and independent mind well then we will simply continue with the Trial. If you on the other hand you as an experienced businessman feel that you have made good progress so far[sic]."

22. After that break, as counsel for Mr Watson submits in his skeleton argument before us, the judge seemed to embark upon a further attempt to "broker a deal" between the parties on an item by item basis. In the course of that process, it became apparent that costs might be a sticking point and the judge said,

> "362. **Mr Recorder Bueno QC:** Yes but the point is I can see that the parties are not going to agree about costs here and if the parties don't agree about costs then the settlement falls out of bed on that basis well I mean that would be a very, very unhappy circumstance because the costs consequent at the end of the day are going to be horrific but on the other hand if the parties are prepared to trust me first of all to deal with costs and second to deal with interest I mean I have expressed such views that I feel able to express at this time on the basis of the cases I know and I think I have got a pretty shrewd idea of what this case is all about now. "

The suggestion arose that the judge should decide the issues of interest and costs and there follows a passage in the exchanges upon which Mr Watson relies strongly in his appeal to this court. It is however, unclear whether the answer at 371 below should or should not be attributed to Mr Watson rather than to Mr Gun Cunninghame. The passage is as follows:

> "369. **Mr Gun Cunninghame:** Well he is saying from his point of view would you like to hear how I see the costs.
>
> 370. **Mr Recorder Bueno QC:** Oh god I am not going to make a, in fact I am bullying him slightly.
>
> 371. **Mr Gun Cunninghame:** You are indeed you are doing my job which is why I will shut up.

During the same session, however, it was said,

> "579. **Mr Recorder Bueno QC:** I don't want to shoot from the hip because we are all of us tired. So.
>
> 580. **Mr Watson:** Can I just say that I do appreciate Your Honour sitting so late to sort this out."

A further break in proceedings followed.

23. Even after this break the haggling continued, but late in the afternoon a schedule of agreement, based upon a draft prepared by counsel for the Respondents, was drawn up, with the parties agreeing that the Recorder should decide the questions of interest and costs. In the course of the debate on costs, the Recorder said, "…in a bizarre sort

of way the Court almost became a mediation and I hope Mediators don't behave like me".

24. In this manner, the disputes were ultimately compromised and the judge gave a judgment on the issues of interest and costs, which led to paragraphs 6 and 7 of his order, ordering the Respondents to pay interest assessed in the sum of £6,889.60 by 26 April 2012 and for the Respondents to pay 60% of Mr Watson's costs, to be assessed if not agreed.

25. I should add that the proceedings ended with the following exchange between Mr Watson and the judge:

> "974. **Mr Recorder Bueno QC:** Thank you very much. Right now the Order is now signed, the case is now at an end. You had better go because the Court staff here have been extremely indulgent. It has been a long innings and I would like to just congratulate the parties for having settled this case. I know it's not been very easy. There has been goodwill on all sides and I don't know whether the bruises will appear through the passage of time but anyway thank everybody. I am not going to apologise for keeping everybody here because I have a strong suspicion that if I hadn't been cracking the whip this matter wouldn't have been resolved. May I also particularly thank the Usher here whose has had a huge amount you know keeping everybody at bay.
>
> 975. **Mr Watson:** Thank you very much.
>
> 976. **Mr Recorder Bueno QC:** And you might find this difficult Mr Watson but I am going to thank Mr Gun Cunninghame because he has been of great assistance.
>
> 977. **Mr Watson:** He has.
>
> 978. **Mr Recorder Bueno QC:** He has and somehow or another he has steered this rather rocky ship into the safety of the harbour.
>
> 979. **Mr Watson:** He has done an excellent job.
>
> 980. **Mr Recorder Bueno QC:** So thank you very much indeed you have been very helpful.
>
> 981. **Mr Watson:** Now can I on behalf of both parties' thank you very much for sitting so late and being so helpful Sir.
>
> 982. **Mr Recorder Bueno QC:** Well actually it was entirely self protection for suspecting having to decide this case could have been very daunting."

(C) Events after the order

26. As already seen the order was made on 29 March 2012. It was initially drawn up by the court on 2 April 2012 without annexing the necessary schedule which had been signed by the parties. A full version of the order was eventually drawn up and dated 23 July 2012.

27. As early as 30 March 2012, Mr Watson wrote to the First Respondent urging that arrangements be made for payment of sums due under the order by bank transfer. Mr Watson also sought to correspond with the Respondents' counsel on matters relating to the carrying out of the order, but, quite understandably, counsel declined to engage in this, in the absence of continuing instructions from the Respondents.

28. On 2 April 2012 the First Respondent sent to Mr Watson his cheque for £10,000 in respect of the first interim payment. Objection was taken by Mr Watson to this form of payment as he claimed that it did not achieve actual receipt of funds into his account by the due date. He was insisting on a bank transfer. As the cheque tendered had not been presented by 16 April, the First Respondent wrote to Mr Watson to say that he had stopped the first cheque and to enclose a second cheque for £10,000. On 20 April, the First Respondent wrote to Mr Watson enclosing two cheques drawn by the Second Respondent, one for £57,175.50, in respect of the balance of the sum agreed to be paid, and the other for £6,889.60, in respect of interest. It is understood that those sums were duly received into Mr Watson's bank account.

29. There had been other points raised in the correspondence about the collection of Mr Watson's possessions and the removal of the restrictions on the two properties. On 20 April 2012, the First Respondent wrote to Mr Watson to say that the Land Registry had confirmed that the two restrictions had been removed. He also invited submission of a schedule of costs, and receipted solicitors' bills in respect of the same. Correspondence relating to costs continued into May 2012. Very surprisingly, however, it seems that, notwithstanding this correspondence, by 19 April 2012, Mr Watson had been trying to initiate an appeal through the County Court. He said nothing of this in the exchanges with the Respondents. On 22 May 2012, Mr Watson issued the Appellant's Notice of Appeal to this court. On 6 June, the First Respondent wrote to Mr Watson stating that he had received the Notice on 29 May. This appears to be the first time that the Respondents became aware that Mr Watson was trying to upset the Recorder's order.

30. Permission to appeal was refused on the papers on 18 October 2012, but was granted on an oral renewed application on 11 December 2012.

(D) The Arguments on the Appeal

31. As already noted, Mr Watson now appeals, inviting this court to set aside the order of 29 March 2012 on the basis of duress/absence of true consent and on the basis that he did not receive a fair trial, contrary to common law and/or Article 6 of the Convention.

32. Mr McLinden QC, for Mr Watson, has made it clear in his written argument that the duress and absence of consent upon which he relies are based upon the impact on his client of the manner in which the Recorder conducted the proceedings in open court during the days in question. He no longer pursues allegations previously made that the compromise is vitiated by the actions of the Respondents or either of them. Mr

McLinden submits that the fact that the duress or pressure was exercised by the Recorder is immaterial, as the actions of the recorder were well known to the Respondents at all material times.

33. In opening the appeal, Mr McLinden submitted that the proceedings in this case infringed three principles. These principles were as follows:

i) It is a trial judge's duty to "case manage" the trial justly to completion within the time allocated for the hearing;

ii) Where parties wish to discuss settlement that should not displace the primary duty as in i) above;

iii) A trial judge may properly encourage settlement, but should not engage in the process of it.

34. It was submitted that the course of proceedings, which I have summarised above, infringed Mr Watson's rights under Article 6 of the Convention and infringed the common law principles as to the boundaries of judicial intervention to be found in the decision of this court in *Jones v National Coal Board* [1957] 2 QB 55 at 64 where Lord Denning MR said,

> "The judge's part….is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevances and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal."

35. Mr McLinden argued that, from the very beginning of the trial, the Recorder wanted to see the case settled and "orchestrated" the proceedings to this end. This was against Mr Watson's interests; he was short of funds and needed settlement of the sums owed to him, some of which were clearly admitted, without delay. Mr McLinden illustrated this submission with references to certain extracts from the transcripts, many of which I have quoted above. Further, it was argued that the judge contravened the three principles set out in opening, and thus both Article 6 and common law principles, in three main respects: (a) the judge's persistent adjournments for settlement discussions rendered a conclusion of the trial within the allotted time impossible; (b) the interventions involving Mr Watson before his cross-examination could be concluded were not just "unusual", as the judge characterised it, but irregular; and (c) the judge's involvement in the intricacies of settlement, the quasi-mediation, put him into a position where he would have had to recuse himself from further hearing of the case, also preventing the expeditious disposal of the action, if settlement was not achieved.

36. In effect, Mr McLinden submitted, Mr Watson was backed into a position where the only true avenue was settlement: there would either be a settlement or the case would be "kicked into the long grass" (as Mr McLinden put it) by an adjournment. He submitted that, for Mr Watson, the judge's proposal on the last day that the trial should continue was entirely unrealistic; it was not an option at all for him and the judge himself said at one stage that if the trial was not settled that day, "…it is going to be a disaster…".

37. Finally, Mr McLinden argued that the *Tomlin* order, as ultimately drawn up, was not a document freely entered into by the parties. It had been drafted initially by counsel for the Respondents, the judge then had his input into it, and the judge failed to explain the order properly. In particular, the judge did not explain that it would be an order against which there would be no appeal.

38. I turn to the Respondents' submissions, presented by Mr Nicholas Isaac.

39. His first submission was that Article 6 of the Convention did not apply at all. He argued that the Article dealt with the "determination" of civil rights; here there was no determination because the case had been compromised by agreement. In my judgment, this was not the best point in Mr Isaac's able argument. Without reference to authority, it seems to me clear that Article 6 is engaged by the whole process of determination of rights; infringements may in principle occur, even in proceedings which are ultimately compromised.

40. More promisingly, Mr Isaac submitted that this appeal was to be resolved by the answers to eight questions:

    i) Was there an agreement?

    ii) If so, is it open to the court to interfere?

    iii) If so, in what circumstances?

    iv) Is a violation of Article 6 such a circumstance?

    v) In answering iv), what is the violation in question?

    vi) Was that violation "causative" of the wrong of which the subject complains?

    vii) In this case, in any event, was the agreement affirmed?

    viii) Further or alternatively, has there been acquiescence by Mr Watson or is there an estoppel arising which bars his present appeal?

41. On the facts, Mr Isaac submitted, there can be no conceivable objection to the course of proceedings up to the beginning of Day 4 of the trial. Moreover, by the end of Day 3 the parties indicated to the judge that they were agreed in principle and Mr Watson expressly stated that, "I don't feel under pressure". A *Tomlin* order was proposed and Mr Watson indicated that he wished to seek some legal advice. (It will be recalled that, on the following day, the judge asked Mr Watson whether he had spoken to his solicitor and he confirmed that he had.) Mr Isaac submits that, throughout the contested parts of the proceedings and in the exchanges with the judge about

settlement, Mr Watson demonstrated the ability properly to represent his own interests and to stand up for himself. The point arrived where the two items of contention, apparent at the beginning of the fourth day, were resolved, although Mr Watson began to "row back" from the agreement, but nonetheless in the end the impasse was resolved.

42. Mr Isaac submitted that, on the facts, it is necessary to see the criticisms of the judge in the context of the point reached at each stage of trial. For the most part, he argued, the judge was intervening or assisting in a situation where agreement had been reached and the judge was putting pressure on both sides to resolve matters of mere detail. That, argued Mr Isaac, is a far cry from a violation of Article 6.

43. With regard to the court's jurisdiction to unravel consent orders (Mr Isaac's next point), Mr McLinden had relied upon the decision of Neuberger J (as he then was) in *Ropac Limited v Inntrepreneur Pub Co.(CPC) Ltd.*[2011] L.&T.R. 10. In that case, the court was concerned with a consent order, made in the course of ongoing proceedings and providing for payment of money by a stated date, time being expressly of the essence. The question was whether the court could nonetheless extend time when the stated date had not been met. Neuberger J said,

> "31 To my mind, the CPR therefore give the court rather more wide-ranging, more flexible powers, than the RSC. In my judgment, those powers are to be exercised not merely to do justice between the parties, but in the wider public interest. Further, the objection to deal with a case justly must, as I see it, sometimes (albeit rarely) require the court to override an agreement made between the parties in the course of, and in connection with, the litigation. I consider that that means that the court has greater power to interfere than before. Having said that, I should add this. Where the parties have agreed in clear terms on a certain course, then, while that does not take away its power to extend time, the court should, when considering an application to extend time, place very great weight on what the parties have agreed and should be slow, save in unusual circumstances, to depart form what the parties have agreed."

44. Mr Isaac, for his part, relied upon the later decision of Ramsey J in *Community Care North East v Durham CC* [2010] EWHC 959 (QB); [2012] 1 WLR 338. That case concerned, as here, a *Tomlin* Order compromising proceedings as a whole. Ramsey J said this (after reference to *Ropac* and *Weston v Dayman* [2006] EWCA 1165 Civ):

> "23.In this case the March 2009 Order contains, in the schedule, a binding contract between the parties compromising the proceedings. It is not a consent order made at an interlocutory stage by which a particular application is compromised on terms, including terms as to time for compliance. Nor is it a consent order which incorporates the binding contract as terms of the order. It is in the form of a *Tomlin* Order. In the commentary to CPR 40.6 at paragraph 40.6.2 of the White Book Volume 1 it is stated:

"*Essentially, a Tomlin Order records terms of settlement agreed between the parties but those terms are not ordered by the court and are not enforceable as a judgment, at least not without a further order.*

The terms contained in the schedule are not something for approval by a judge. The judge will, however, approve the order itself.

...

If it is intended to embody terms of settlement which can be enforced as an order the terms need to be in the order itself (not the schedule) and set out clearly. Such an order should not include provision for a stay of the proceedings as there would be no point in such a stay."

24. As set out in that passage, the schedule to a *Tomlin* Order sets out an agreement which has been made between the parties as to the terms on which the proceedings have been settled. In general once the parties have entered into an agreement the ability to set aside or vary that agreement depends on there being a remedy in relation to that contract. Otherwise the court is only concerned with the meaning of the agreement in the schedule and this depends on normal principles. As Lord Steyn said in Sirius International Insurance Company (Publ) v FAI General Insurance Limited [2004] 1 WLR 3251 at [18] "*The settlement contained in the Tomlin Order must be construed as a commercial instrument.*"

25. In my judgment where the terms are contained in a schedule to the *Tomlin* Order the position is different from the terms being incorporated as part of a consent order. As set out in the commentary to the White Book a party can settle a case and seek a court order in one of two ways. First it can seek to incorporate the terms of the settlement within the body of the order so that those terms are part of the court order. The alternative way is by way of a *Tomlin* Order under which the parties seek a stay of the proceedings on terms that the parties will comply with the agreement in the schedule, with liberty to apply to enforce those terms. The court approves and orders the consent order in the first case but only approves and orders the terms of the order but not the terms of the schedule in the second case.

26. In the case of a *Tomlin* Order a stay is given on the basis that the agreement is complied with. The terms of the schedule are not ordered by the court. Frequently the terms of the agreement in the schedule to a *Tomlin* Order are detailed and contain matters which go beyond the scope of the original dispute in the proceedings.

27. As a general rule, I cannot see that the provisions of the CPR either in the overriding objective in CPR 1.1 or in the requirement for active

> case management under CPR 1.4, as referred to in Ropac, have any application to the terms of the agreement in the schedule to a *Tomlin* Order which have been freely entered into by the parties as a binding contract. As set out in Weston v Dayman CPR3.1(7) gives the court power to vary or revoke an order and Arden LJ proceeded on the basis that it applied to the consent order in that case, without deciding that it did. In principle, it would seem that the provisions of the CPR might permit the court to vary or revoke a consent order but, even in that case, a major and often determinative factor in the exercise of that power would be the fact that there was an agreement: see Ropac and Weston v Dayman. Equally, I see no reason why that same principle would not apply to the order part of the *Tomlin* Order. "

45. Mr Isaac submitted that this correctly stated the law concerning the court's power to interfere with *Tomlin* Orders and thus that the jurisdiction to set aside the terms of the schedule was confined to grounds upon which a contract in general might be set aside. At the very least, the court in interfering on an Article 6 basis would have to take into account the fact that the Order constituted a contract between the parties. Mr Isaac was perhaps, in the end, inclined to accept that if an agreement had been entered into *as a consequence* of a sufficiently serious violation of Article 6 that might justify a court setting it aside, (Mr Isaac's point vi) above). Here, he argued, the actions of the judge did not amount to a breach of the Article. On any basis, the parties had voluntarily continued settlement discussions well into the third day when they settled in principle. At that stage, the trial could never have been finished if the settlement fell apart and the judge was well able to assess how well the litigants before him were coping with the proceedings and the negotiations.

46. Finally, Mr Isaac submitted that whatever complaints Mr Watson might have had at the end of the proceedings, he clearly affirmed the agreement made and pressed for its implementation by his subsequent correspondence. In the circumstances, he argued, there had been the clearest possible waiver of any contractual remedy and acquiescence in the resultant bargain. What is more, the Respondents had paid the sums due under the agreement and, to that extent, they had relied upon an agreement which, unbeknown to them, Mr Watson was taking steps to challenge by way of appeal. Mr Issac relied upon the decision of Lord Campbell LC in *Ormes v Beadel* (1860) 2 De G F & J 333.

(E) Discussion

47. In my judgment, it is best to deal first with the contention for Mr Watson that the consent order should be set aside for lack of consent and/or duress on customary contractual principles.

48. Mr Watson's case on this part of the appeal requires him to persuade this court on the basis of the evidence, presented to us entirely on the papers, that it can and should set aside a contractual arrangement compromising the action.

49. There can be no doubt that the terms of the schedule to an order in *Tomlin* form amount to a contract between the parties. The customary basis upon which such a contract, compromising litigation, can be set aside are those upon which any ordinary contract can be set aside, i.e. for misrepresentation, fraud, undue influence, duress and

the like. It seems to me that there is little, if any room, for such an order to be upset by resort to procedural provisions of the Civil Procedure Rules: as their name indicates, the rules deal with procedure and not with substantive rights and obligations arising under contracts.

50. For my part, I agree with the analysis of Ramsey J in *Community Care North East v Durham CC* [2010] EWHC 959 (QB) that the CPR have no application to the schedule to a *Tomlin* order, which indeed is not an order of the Court at all. A different principle applies to the curial part of the order. The curial part of a *Tomlin* order is a consent order. In *Weston v Dayman*, Arden LJ, with whom Brooke and Wall LJJ agreed, proceeded on the basis that, whether the source of the jurisdiction for varying or revoking a consent order was in CPR3.1(7) or the liberty to apply contained in the order, there is jurisdiction to vary or revoke the order where it was just to do so but that the court has to be very careful in exercising its discretion where the consent order represented a contract between the parties (paragraph 24). "One of the aspects of justice is that a bargain freely made should be upheld." (paragraph 24). In cases where the variation is contrary to the agreement that the parties have made, and leaving aside the possible effect of a violation of article 6 in the proceedings in which the *Tomlin* order was made, I agree with Ramsey J that a major and often determinative factor in the exercise of the discretion will be the fact of that agreement. In the present case, Mr Watson seeks to set aside the whole of the Recorder's order but it follows from this discussion of the authorities that, putting on one side any violation of article 6, before the curial part of the order can be set aside, he must establish in the usual way that he is entitled to have the contract in the schedule to the order set aside.

51. Accordingly, in so far as Mr Watson's case is that the schedule to the Recorder's order should be set aside on the basis of some feature of the law of contract vitiating his consent, e.g. for duress, that is a matter which would need to be tried out either in a new action or by reference to the court below to try any relevant issue, perhaps pursuant to an order under CPR 52.10(2)(b). It is quite impossible upon an appeal such as the present, conducted entirely on the basis of the papers and without examination of witnesses, for the court to interfere on ordinary contractual principles.

52. In my judgment, therefore, this appeal cannot succeed so far as it is based upon any attempt to set aside the contract created by the agreement.

53. The only question, at this point of the rival arguments, is whether any of the matters relied upon by Mr McLinden, arising out of the proceedings before the judge, infringed the common law principles inherent in procedural fairness or constituted a violation of Article 6 and, if so, what would be the result?

54. It is well within a judge's function to indicate a view that an action before him seems to be of a nature that ought sensibly to be compromised and he can make enquiries as to whether avenues for settlement have been fully explored. If it emerges settlement might be possible, he may also afford to parties time out of court at any stage of the proceedings, if it seems to him right, to enable possibilities of compromise to be explored. He should, however, try to ensure, both in the interests of the parties and of other litigants waiting for cases to be heard, that indulgences to the parties to try to settle do not disable him from proceeding to deal with the case and decide it expeditiously if compromise should prove to be impossible. However, if it is apparent

that parties are aware that available trial time is slipping away during their negotiations, making a conclusion of a contested trial impossible if settlement negotiations break down, then that is a risk that they run. The court is not to be criticised if parties allow such a situation to develop. The trial can be re-fixed for hearing at another time. There is no breach of the common law or Article 6.

55. It is, of course (as Mr McLinden submits) the primary function of the judge to try cases before him justly according to the laws and procedures of the land on the evidence presented and the facts as ultimately found. It is certainly not his function to foist the parties off into finding a solution to their mutual dissatisfaction and contrary to their true wishes. He must not seek to exert pressure on the parties to settle so as to spare himself the trouble of deciding difficult or, what appear to him to be, "messy" cases.

56. In my judgment, what happened here did not infringe either common law principles of inherent fairness or Article 6 of the Convention.

57. The case had not been well prepared by the parties. The judge identified difficulties in achieving a satisfactory resolution of the issues in the time available on the materials provided. No doubt correctly, he saw that the case ought to be capable of sensible resolution and he afforded time on the first day for this to be explored while he was reading further into the documents. There could be no complaint about that. That course might have run the risk of the trial not being finished in the available slot, meaning that a new date would have to be found to finish the hearing. However, that is not an unusual event in the county court.

58. It may have been unwise for the judge, on the third day, to embark upon lengthy discussion of the documents with the parties, while Mr Watson's evidence had not been completed. When this process was finished, it was probably even more obvious that the trial would not finish within the allotted span, absent settlement. However, the parties must have been well aware of this. Equally, once the court had been informed that the parties had settled in principle (at the end of the third day), the subsequent involvement of the judge in the details of the "sticking points" and of the terms of settlement might well have made it difficult, if not impossible, for him to continue to be the trial judge if settlement was not actually reached. By that stage it was inevitable that any further contested hearing would have to be postponed and the question whether that judge could carry on at a reconvened hearing would probably have needed careful examination in any event.

59. All that I have recounted above seems to me to fall short of any infringement of either common law principles relating to the fairness of the trial process or of Article 6. The judge's handling of a badly prepared case and intractable settlement negotiations were clearly carried out in good faith and with the best intentions, even if his allowing time to slip by as he did may have amounted to poor trial management. Some of his interventions may have also surpassed the desirable levels of judicial encouragement of sensible compromise, my understanding of which I have sought to set out in paragraphs 54 and 55 above. However, that is not the same as offending principles of fairness or Article 6.

60. I cannot see that what transpired in this case could be said to undermine the settlement agreement, signed by Mr Watson and enshrined in the order under challenge. I would

not wish to say that a *Tomlin* Order could never be set aside for breach of the principles invoked by Mr Watson in this case, but I am quite satisfied that there was no relevant breach of those principles here, and certainly none sufficient to undermine Mr Watson's consent to the agreement.

61. There is, of course, an additional point. Whatever may have been the position when the order was made on 29 March 2012, it seems entirely clear to me that Mr Watson affirmed the agreement made by his determined insistence upon the performance of its terms by the Respondents in the correspondence in the ensuing weeks. In doing so, he waived any deficiency in the proceedings about which he now seeks to complain.

62. I have taken into account in this respect the passage from the judgment of Lord Bingham in *Millar v Dickson* [2002] 1 WLR 1615 at [31], relied upon by Mr McLinden and Mr Birdling in their skeleton argument, as follows:

> "In most litigious situations the expressions "waiver" is used to describe a voluntary, informed and unequivocal election by a party not to claim a right of raise an objection which it is open to that party to claim or raise. In the context of entitlement to a fair hearing by an independent and impartial tribunal, such is in my opinion the meaning to be given to the expression. That the waiver must be voluntary is shown by *Deweer v Belgium* (1980) 2 EHRR 439, where the applicant's failure to insist on his right to a fair trial was held not to amount to a valid waiver because it was tainted by constraint: p 465, para 54. In *Pfeifer and Plankl v Austria 14 EHRR 692* there was held to be no waiver where a layman had not been in a position to appreciate completely the implication of a question he had been asked: p 713, para 38. In any event, it cannot meaningfully be said that a party has voluntarily elected not to claim a right or raise an objection if he is unaware that it is open to him to make the claim or raise the objection. It is apparent from passages already cited from cases decided by the European Court of Human Rights that a waiver, to be effective, must be unequivocal, which I take to mean clear and unqualified…."

63. In this case, Mr Watson (on his case) knew full well that his consent to the order had been obtained unwillingly and that he was dissatisfied with the conduct of the Recorder (very much contrary to his remarks in open court at the conclusion of the hearing, which I have quoted above). However, he proceeded vigorously to enforce to the letter the agreement that had been made, and the Respondents acted to their detriment in paying the sums due thereunder.

64. Mr McLinden argues that this was not a "voluntary, informed and unequivocal election not to claim a right or raise an objection which it is open…to claim or raise" in Lord Bingham's words. It is said that Mr Watson was unrepresented and vulnerable and was merely seeking payment of sums due to him whether the agreement was upheld or not.

65. I do not accept that. Litigants in person of full capacity are bound by the agreements that they make and are equally capable, as any other litigant, of proceeding to enforce

such agreements notwithstanding such complaints as they may have about the process by which the agreement has been reached. If they do so, they must abide by the consequences. Mr Watson was not simply claiming payments that he contended were due to him whether the compromise was valid or not; he was expressly enforcing the agreement that he had made. In my judgment, affirmation, acquiescence and/or waiver are made out.

(F) Conclusion

66. For these reasons, in my judgment, this appeal should be dismissed.

Lady Justice Arden:

67. I agree.

Lord Justice Jackson:

68. I agree.