CA on appeal from Kingston upon Hull CC (District Judge Glentworth & His Honour Judge Hepple QC) before Simon Brown LJ; Jonathan Parker LJ; Thomas LJ. 6th November 2003.

JUDGMENT : Lord Justice Simon Brown:

1. Kerry Drinkall (the claimant) was born on 18 October 1983. On 19 January 1998, aged 14, bicycling home from school, she was in collision with a motor car driven by the defendant. She was, alas, seriously injured, sustaining in particular a severe closed head injury which has left her with some permanent brain damage.

2. On 5 April 2000, before proceedings were issued, the claimant through solicitors made a Part 36 offer (see CPR 36.10) to settle the issue of liability on a 80:20 basis in her favour, an offer accepted on 7 April 2000 by the defendant's insurer's loss assessors.

3. Some eighteen months later, on 26 September 2001 (22 days short of the claimant attaining her majority on her eighteenth birthday), the defendant withdrew from that settlement agreement (as later explained, with a view to contending for a higher degree of contributory negligence because the claimant had not been wearing a cyclist's helmet).

4. On 11 January 2002 the claimant issued Particulars of Claim in the Kingston-upon-Hull County Court relying on the April 2000 exchange of letters which, she pleaded, constituted a binding agreement on the issue of liability. The defendant disputed that, pleading that the claimant was a minor in April 2000 and that: *"The parties were unable to enter a binding settlement whether as alleged or at all without the approval of the court, which approval was not sought or given. In the premises no binding agreement has been reached."*

5. The issue whether there was a valid compromise agreement was ordered to be tried as a preliminary issue.

6. District Judge Glentworth on 4 October 2002 decided that the agreement was valid and binding. His Honour Judge Hepple QC on 6 February 2003 upheld that decision on the defendant's appeal before him. This second appeal comes before the court with the permission of Hale LJ. (The defendant now recognises, as Hale LJ pointed out, that his appeal from District Judge Glentworth should itself properly have been brought in the first place to this court rather than to Judge Hepple).

7. The appeal turns on the true construction and application of CPR 21.10 which, so far as material, is in these terms:

> *"21.10(1) Where a claim is made (a) by or on behalf of a child … no settlement, compromise or payment and no acceptance of money paid into court shall be valid, so far as it relates to the claim by [or] on behalf of … the child, without the approval of the court.*
>
> *(2) Where*
>
> *(a) before proceedings in which a claim is made by or on behalf of [a] child … (whether alone or with any other person) are begun, an agreement is reached for the settlement of the claim; and*
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> *(b) the sole purpose of proceedings on that claim is to obtain the approval of the court to a settlement or compromise of the claim, the claim must:*
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> *(i) be made using the procedure set out in Part 8 (alternative procedure for claims); and*
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> *(ii) include a request to the court for approval of the settlement or compromise."*

8. The District Judge observed, in her short judgment: *"In effect, what the defendant is seeking to do is to use the protection given to minors to resile from an agreement which was reached between the claimant, through her litigation friend, and the defendant."*

   and concluded: *"In my judgment, there is a binding agreement which has been reached between the parties which requires the court's approval at the appropriate time."*

   She ordered that judgment on liability be entered for the claimant as to 80% of the claim for an amount to be decided by the court.

9. The determinative paragraphs in Judge Hepple QC's judgment upholding that decision are these:

> *"23. In my judgment, the provision of Part 21.10 applies to a claim which is made in proceedings, not an entitlement to a claim made before proceedings are begun. In my judgment, so much is clear from the*

*introductory words of paragraph 2 which read: **'Where (a) before proceedings in which a claim is made'** (my emphasis).*

24. There is, in my judgment, for the purposes of Part 21, no claim in existence before proceedings bringing such claim are commenced. The Civil Procedure Rules do not, in my judgment, bite on settlements reached before proceedings are commenced, unless one or other party wants them to by proceeding under Part 8 for court approval, pursuant to CPR 21.10(2). …

*26. During the course of the appeal my attention was drawn to the notes in the Civil Procedure text … relating to Part 21.10, part of which reads as follows: **'Agreements for the settlement of claims involving children and patients may be reached before proceedings are begun. In these circumstances** it will be necessary to obtain the court's approval of the settlement or compromise.'*

27. In my judgment, insofar as it suggests that obtaining the court's approval of the settlement or compromise is mandatory, the note is wrong. 'Valid' for the purposes of Part 21 relates to settlements after proceedings have begun and not ones reached before proceedings are issued. So much is clear, in my judgment, from rule 2 which makes, as I have sought to indicate, special provision for the bringing of proceedings solely for the purposes of getting the court's approval.

28. Part 21.10 is, in my judgment, procedural, and applies only to agreements reached within court proceedings or to proceedings voluntarily brought to obtain approval. It does not affect the substantive law of contract involved infants."

10. The "substantive law of contract involving infants", to which Judge Hepple was there referring, is the rule that, in the ordinary way, minor's contracts are enforceable by the minor but are not binding upon him unless he expressly ratifies them upon coming of age.

11. Sympathetic though one may be to the conclusion reached by Judge Hepple, the difficulties in his reasoning are quickly apparent. It is, for example, surely clear that the "claim" referred to at the end of clause (a) in paragraph 2 of Part 21.10 must necessarily pre-date the commencement of proceedings since paragraph 2 expressly envisages issuing Part 8 proceedings to *approve "an agreement … reached for the settlement of the claim"*.

12. As it happens, however, it is unnecessary for this court to reach its own conclusion on the correctness or otherwise of the judge's reasoning below since, as Mr Burns' researches at last discovered (although not until after permission was given to appeal to this court), the House of Lords decided the very point arising here by reference to materially identical rules in ***Dietz -v- Lennig Chemicals Limited*** [1969] 1 AC 170. The rules then in question were as follows: *"RSC, Ord 80, r11: where in any proceedings … money is claimed by or on behalf of a person under disability, no settlement, compromise, or payment and no acceptance of money paid into court … shall … be valid without the approval of the court.*

RSC Ord 80, r12: (1) Where, before proceedings in which a claim for money is made by or on behalf of a person under disability (whether alone or in conjunction with any other person) are begun and an agreement is reached for the settlement of the claim, and it is desired to obtain the court's approval to the settlement … the claim may be made in proceedings begun by originating summons and in the summons an application may also be made for (a) the approval of the court to the settlement …."

13. The short facts of *Dietz* were that, before proceedings were issued, the plaintiff widow accepted the defendants' offer of £10,000 to settle her and her infant son's Fatal Accidents Acts (and 1934 Act) claim "subject to the approval of the court". An originating summons was then issued for the court to approve that settlement. Between then and the hearing of the application, however, the plaintiff, unknown to the solicitors on either side, remarried. The master duly approved the settlement but, before the consent order had been drawn up, the defendant's solicitors learned of the plaintiff's remarriage and applied to set the order aside. The master acceded to that application, rightly, as was thereafter successively held by the judge, the Court of Appeal and the House of Lords. There were essentially two issues in the case. First, was the settlement agreement prior to its approval binding on the parties (or at least on the defendants) or could either side repudiate? Second, even if it was not binding, was the master right, once he had approved it, to set aside his consent order rather than draw it up? Both points were decided against the plaintiff, the first because that was held to be the true

effect of Order 80, r11 (equivalent to CPR 21.10(1)); the second because the defendants' consent to the court's approval of the settlement had been induced by an innocent misrepresentation. It is, of course, the first point alone which is critical for the purposes of the present appeal.

14. The two reasoned speeches were given by Lord Morris of Borth-y-Gest and Lord Pearson. On the point now at issue, Lord Morris said: *"In my view, there was no binding agreement made in August. [p182] … If in the present case a writ had first been issued and if thereafter there had been discussions leading to agreement, such agreement would have lacked validity unless and until the approval of the court was given. This is made clear by RSC Ord 80, r11 … The present case came within the provisions of Order 11, r12 … When … the originating summons was taken out it made a 'claim' on behalf of a person under disability (ie the infant … [T]he agreement 'for the settlement of the claim' would depend for its validity upon obtaining approval of the court. [p183] … If the court's approval were given, a binding agreement would result upon the basis of which certain directions could be given by the court.* [p184]."

15. Lord Pearson said: *"There was a suggestion made in the course of the argument that the Compromise Rule, if it meant what it appears to say - if 'invalid' means 'of no legal effect' - is ultra vires. I do not accept that suggestion. When the claim of an infant or other person under disability is before the court, the court needs, for the purpose of protecting his interest, full control over any settlement compromising his claim. In my view, the making and re-making of the Compromise Rule were valid exercises of the rule-making power under the Judicature Acts, which is now contained in section 99 of the Act of 1925 [p189] … The compromise rule is the vital one here. … The settlement, so far as it related to the £9,250, in which the infant was interested, was only a proposed settlement until the court approved it. Either party could lawfully have repudiated it at any time before the court approved it. It had no validity by virtue of the parties' agreement in the August settlement. That which might have given it validity would have been an order made by the master with the effective consent of the parties …* [p190]."

16. That authority is in my judgment decisive upon the present appeal, certainly with regard to the basis on which the matter was decided below. The fact that agreement here was reached pursuant to the express provisions of Part 36 can make no possible difference. The judge's reasoning simply cannot stand in the light of *Dietz*, to which his attention was not drawn.

17. In the course of argument we considered whether the impact of *Dietz* and, more particularly, the effect of paragraph 1 of Part 21.10 could be escaped by reference to the agreement in the present case being for a partial rather than complete settlement of the claim, ie the settlement of an issue (liability) and not the whole claim. Certainly the most obvious reading of paragraph 2 of the rule is that "the settlement of the claim" there referred to is a reference to the final settlement of the whole claim. The claimant would hardly otherwise be issuing proceedings under Part 8; rather he would be seeking approval within an ordinary Part 7 action. Nor to my mind is this point necessarily destroyed by the reference in paragraph 1 of the rule to the unapproved settlement not being valid "so far as it relates to the claim by or on behalf of the child". The use of that phrase is to distinguish the child's claim from such other claim as may be joined with it (as the infant's claim was joined with the mother's claim in *Dietz* itself). Paragraph 1 also I have no doubt, was drafted essentially without thought for partial settlements.

18. The real difficulty with the argument, however, becomes apparent when examining its consequences. If Part 21.10 is really to be construed as having no application to partial settlements, then it would follow that, provided only one aspect of a claim remained in contention (perhaps only a minor head of damage in a high value case) the court's approval would not be required at all. Take this very case and assume that quantum were to be contested: the 80:20 liability split never needed approval. (I recognise, of course, that the requirement for the court's approval in any event ceases once, as here, the claimant reaches his or her majority but that cannot affect the argument. We are here discussing the application of the rule during the claimant's minority and plainly it would be intolerable were the requirement for the court's approval to be escaped merely because some issue remains to be agreed). The rule need not be and accordingly should not be construed so as to produce this absurd result.

19. It inescapably follows from all this that, regrettable though it might seem, the defendants here were entitled to renege on their agreement as they did, for good reason or none, and must therefore succeed upon this appeal.

20. Before parting from the case, however, I would add the following footnotes:
    i) It may well be, as Mr Korn for the respondents suggests, that those acting for child claimants in future will on occasion think it prudent to issue proceedings (presumably under Part 7 rather than Part 8) to obtain the court's approval for any partial settlement of the claim lest, as here, the defendant otherwise seeks to repudiate it. The need for this appears not hitherto to have been appreciated. *Dietz* itself, of course, was concerned with a final settlement agreement and the impact of the decision on partial settlements may not have been apparent even to those acquainted with the case.
    ii) Mr Korn further submitted that a consequence of applying ***Dietz*** is that Part 21.10, a rule designed for the protection of vulnerable people (children and patients), becomes instead a loophole to be exploited against them. Had the liability agreement reached here in April 2000 been between adults it would, of course, have been enforceable. Mr Korn submits that the Rules could and should provide, consistently with the general law concerning minors, that settlement agreements prior to court approval are voidable at the option of the child (not, as was held in *Dietz* open to repudiation by either party). That said, a Compromise Rule materially the same form as Part 21.10(1) has stood now for many years and opportunities to change it have not been taken. Whether it should now be altered must be for consideration by others. Meantime it is clearly desirable that *Dietz* (and perhaps also this case which illustrates *Dietz*'s inescapable application to partial settlements too) be brought more clearly to the profession's attention. Most surprisingly it is not referred to either in the White Book or the Green Book.
    iii) Once a child claimant reaches adulthood, a settlement agreement which until then, on the authority of *Dietz*, has been invalid, can, it seems to me, unless and until repudiated, be treated as an offer and accepted by either side.
    iv) The doctrine of estoppel (in one form or another) may perhaps be available to a party who has acted to his detriment in reliance on a settlement agreement which the other party then seeks to repudiate. No such argument, however, was addressed to us on the present appeal (indeed, the point having surfaced in one of the respondent's skeleton arguments was later expressly abandoned). This, therefore, is no occasion to explore its possibilities.

21. Those, I repeat, are just footnotes. They cannot affect the outcome of this appeal. For the reasons previously given I conclude that the settlement agreement reached here was invalid, that the defendants were accordingly entitled to repudiate it as they did, and that their appeal must accordingly be allowed.

Lord Justice Jonathan Parker:

22. I agree.

Lord Justice Thomas:

23. I also agree.

Peter Burns Esq (instructed by James Chapman & Co) for the Appellant
Adam Korn Esq (instructed by Messrs Stamp Jackson & Proctor) for the Respondent