Neutral Citation Number: [2016] EWHC 2493 (Fam)

Case No: FD16F00054

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 October 2016

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

- -

In the Matter of the Human Fertilisation and Embryology Act 1990

Between :

SAMANTHA JEFFERIES	**Claimant**
- and -	
(1) BMI HEALTHCARE LIMITED	
(2) HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY	**Interested Parties**

- -

- -

Ms Jenni Richards QC and Ms Rose Grogan (instructed by Hempsons) for the Claimant
Mr Harry Adamson (instructed by Blake Morgan) for the Second Interested Party
The First Interested Party was present but not represented

Hearing date: 28 September 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was handed down in open court

Sir James Munby, President of the Family Division :

1. When he was 19 years old, Clive Jefferies, then in the Royal Army Medical Corps, served his country in the Falklands War. On 8 June 1982 he was with the Welsh Guards on RFA Sir Galahad when it was bombed and destroyed by the Argentinian Air Force at Bluff Cove. On that day the fates smiled at him. Minutes before the attack he had been in a part of the ship where the first bomb exploded, killing many men. In the aftermath of the bombing he saved the life of a comrade who was in difficulties in the water. At his funeral, 32 years later, his commanding officer described his conduct on that fateful day as magnificent.

2. Returning to civvy street in 1987, Clive served the community as a nurse and midwife. He and his wife, the claimant Samantha Jefferies, met in 1999, moved in together in 2002 and married in 2007. Their ambition to have a family was assisted by the Sussex Downs Fertility Centre, a clinic operated by the First Interested Party, BMI Healthcare Limited, and regulated by the Second Interested Party, the Human Fertilisation and Embryology Authority (HFEA).

3. Neither of the first two cycles of IVF treatment was successful. On 1 April 2014 they attended the clinic to plan a third cycle of treatment, using three embryos, created from Samantha's eggs and Clive's sperm, which had been frozen on 11 August 2013. It was not to be. Fate struck. On 19 April 2014, suddenly and unexpectedly, Clive collapsed and died of a brain haemorrhage, while at home with Samantha. He was only 51 years old. He had previously been fit and healthy. It came as an appalling and terrible shock to Samantha. She was devastated.

4. On 19 March 2015, the clinic wrote to Samantha, telling her that the storage period for the embryos was due to expire on 11 August 2015. On 29 June 2015, the clinic wrote again, saying that, having taken advice from the HFEA, it seemed that the period of storage could not be extended and that accordingly the embryos would need to be used before 11 August 2015. The clinic indicated that it might be possible to obtain relief from the court.

5. The proceedings were commenced on 2 June 2016. The relief claimed was a declaration that it is lawful for the embryos to be stored for a period of 10 years from 11 August 2013.

6. Put very shortly, Samantha's case was that on 20 July 2013 Clive had signed a Form MT (see below) giving consent to the storage of the embryos for a period of 10 years; that although the Form MT was subsequently amended to substitute a storage period of only 2 years, that amendment was not signed by Clive; that the amendment was therefore, as a matter of law, invalid; and that, accordingly, the consequence in law of what had happened was that the original consent for the period of 10 years remained, and remains, effective. This part of the case was elaborated by reference to various other points which I refer to below.

7. As a separate and further point (the Article 8 point), it was asserted that limitation of the period of storage to 2 years would amount to a disproportionate interference with Samantha's rights under Article 8.

8. The matter came before me for directions on 23 June 2016. The clinic had indicated that it would not take an active role in the proceedings. The HFEA, represented by Mr Harry Adamson, had indicated in a letter dated 14 June 2016 that it was supportive of Samantha's primary basis of claim (see below) but that it wished to reserve the right to make submissions on the remaining issues. It appeared that the Secretary of State for Health might wish to intervene on the Article 8 issue. I directed, without opposition from Ms Jenni Richards QC and Ms Rose Grogan, who appeared for Samantha, that the case, *save for the Article 8 issue*, was to be listed for hearing in September 2016. I directed that the HFEA and the Secretary of State were to confirm in writing by 29 June 2016 whether they intended to participate in the hearing and whether they wished to submit evidence. Finally, so far as material for present purposes, I directed that in the event that Samantha's application other than in relation to Article 8 was unsuccessful the parties were at liberty to apply for directions in relation to the Article 8 issue.

9. By a letter dated 29 June 2016, the Government Legal Department on behalf of the Secretary of State wrote stating that the Secretary of State agreed with the HFEA that it was open to the court to make the declaration sought by Samantha. In those circumstances, and given that the Article 8 issue was *not* going to be dealt with, the Secretary of State did not consider it necessary to intervene in the hearing.

10. It was in these circumstances that the matter, other than the Article 8 issue, came on for hearing before me on 28 September 2016. As on the previous occasion, Samantha was represented by Ms Richards and Ms Grogan, and the HFEA by Mr Adamson. The clinic and the Secretary of State were neither present nor represented.

11. I break off at this point to explain the relevant statutory framework and the particular facts which have given rise to the claim.

12. The creation, keeping and use of embryos is regulated by the detailed statutory scheme set out in the Human Fertilisation and Embryology Act 1990, as amended. So far as material for present purposes, section 3(1A)(a) of the Act provides that:

> "No person shall keep or use an embryo except … in pursuance of a licence [granted by the HFEA]."

Section 12(1)(c) provides that:

> "The following shall be conditions of every licence granted under this Act – … that the provisions of Schedule 3 to this Act shall be complied with."

Section 14(4) provides that:

> "The statutory storage period in respect of embryos is such period not exceeding ten years as the licence may specify."

13. Schedule 3 is central to the issue before me. So far as material it provides as follows:

> "1 (1) A consent under this Schedule, and any notice under paragraph 4 varying or withdrawing a consent under this

> Schedule, must be in writing and … must be signed by the person giving it.
>
> …
>
> (3) In this Schedule "effective consent" means a consent under this Schedule which has not been withdrawn.
>
> …
>
> 2 (2) A consent to the storage of any … embryo … must –
>
> (a) specify the maximum period of storage (if less than the statutory storage period),
>
> (b) … state what is to be done with the … embryo … if the person who gave the consent dies or is unable, because the person lacks capacity to do so, to vary the terms of the consent or to withdraw it.
>
> …
>
> 3 (1) Before a person gives consent under this Schedule –
>
> (a) he must be given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and
>
> (b) he must be provided with such relevant information as is proper.
>
> (2) Before a person gives consent under this Schedule he must be informed of the effect of paragraph 4 … below.
>
> 4 (1) The terms of any consent under this Schedule may from time to time be varied, and the consent may be withdrawn, by notice given by the person who gave the consent to the person keeping the … embryo to which the consent is relevant.
>
> …
>
> 8 (2) An embryo the creation of which was brought about in vitro must not be kept in storage unless there is an effective consent, by each relevant person in relation to the embryo, to the storage of the embryo and the embryo is stored in accordance with those consents."

In the present case, the crucial provision is paragraph 1(1).

14. The HFEA provides two forms for the recording of the consents required by Schedule 3. The Form WT is completed by the woman; the Form MT by the man. They are in

very similar form. There is no problem in the present case with the consents given by Samantha; the problem arises in relation to the Form MT signed by Clive. It is accordingly on the Form MT that I concentrate.

15. The Form MT is entitled "Your consent to the use of your sperm and embryos for your partner's treatment and the storage of your embryos." It is 5 pages long and consists of seven sections, the last being the Declaration. In the present case the Declaration was signed by Clive and dated 20 July 2013. As required by the form, Clive had also signed, and dated 20 July 2013, the foot of each of pages 2, 3 and 4 of the form. So far as material for present purposes the key sections are 3, 4, 5 and 6, set out on pages 2-4 of the form. Each of these is structured as a question, or series of questions, followed in most instances by two boxes, one labelled "No" and the other "Yes".

16. Section 4 is headed "Storing embryos." It includes what for present purposes is the crucial question "For how long do you consent to the embryos (created in vitro with your sperm) being stored?" Following some explanatory text, the form continues as follows:

> "[Box] For 10 years
>
> [Box] For 55 years
>
> [Box] For a specific period (up to a maximum of 55 years) ›
> *Specify the number of years*
>
> [Box] years."

The first box contains, in manuscript, a √ which has been crossed out. The second box is blank. The third box contains, in manuscript, a √. The fourth box contains, in manuscript, the figure 2. The crossing out of the √ in the first box is *not* initialled. In contrast, on every other occasion where a manuscript √ has been crossed out – there are examples of this in sections 5.2, 5.4 and 6.4 – the alteration has been signed or initialled by Clive.

17. I have personally examined the original Form MT. It was apparent to me, and is common ground between the parties, that the amendments are in an ink visibly different from the ink used when the Form MT was originally completed.

18. The evidence before me consisted of witness statements of Samantha dated 18 May 2016 and 23 September 2016, witness statements each dated 12 April 2016 of two of the fertility nurses at the clinic, JH and LS, who advised Clive and Samantha in relation to consents, and a witness statement dated 28 July 2016 of Peter Thompson, the Chief Executive of the HFEA.

19. Samantha's witness statements painted a vivid and compelling picture of Clive as a soldier and a man and as her partner and husband; of their life together; and of their journey seeking, with the assistance of the clinic, the children they so very much wanted. During the course of the hearing Samantha addressed me from the well of the court, not because there was any need for oral supplement to her written evidence but because there were things she wanted to be able to say to me direct. As I have very

recently made clear in *Re Human Fertilisation and Embryology Act 2008 (Case V)* [2016] EWHC 2356 (Fam), para 6:

> "it is vital, in my view, that parents in these emotionally very difficult cases should be able to speak for themselves if they wish, whether or not they are represented and whether or not there is a need for further evidence."

What Samantha said was powerful and moving. Her plea was simple: "I want my husband's child."

20. I need not refer to the evidence of LS. The evidence of JH is important, because she was the nurse who saw Clive and Samantha when they attended the clinic on 23 July 2013 with the completed Forms WT and MT. She explained the clinic's policy at the time:

> "it was our policy at the Centre to offer embryo storage for NHS patients for an initial two year period, capable of extension. I understand that the policy arose because the NHS would only fund up to two years of storage, and the Centre had previously had difficulties keeping in touch with patients who moved house, lost contact, or stopped paying their storage fees after a period of time.
>
> In accordance with this policy, I used to explain that patients could consent for up to two years without paying storage fees, and that we would write to them a few months before the expiry of the storage period to ask whether they wanted to extend the storage and pay the storage fees themselves."

21. She continued:

> "I do not recall exactly what happened during my appointment with Clive and Samantha, but I believe it is likely that when I saw that Clive and Samantha had ticked the boxes on page two of their MT and WT forms, I would have explained the Centre's policy (as outlined above) and told them that they could consent for up to two years without paying storage fees. I would also have explained that we would then write to them a few months before the expiry of the storage period to ask whether they wanted to extend the storage and pay the storage fees themselves.
>
> Having explained the Centre's policy, it is likely I would have invited Clive and Samantha to amend their consent forms so as to reflect the two year period for which they had NHS funding and to be in line with the Centre's policy. The amendments and crossings out on their forms are not in my handwriting."

22. The particular importance of Mr Thompson's witness statement for present purposes is in his description of certain guidance issued by the HFEA:

> "On 31 May 2012, the HFEA issued guidance in the form of a Chief Executive's letter CE/12/02 under the heading "Extension of Storage of Gametes and embryos where one of the gamete providers is deceased". In issuing this guidance, the HFEA sought to draw attention to risks that may arise when patients are routinely asked to restrict their storage to a period of only 2 or 3 years. The guidance highlighted the fact that this practice gives rise to a higher risk that in the event of a patient dying, the gametes or embryos cannot continue to be stored, causing significant distress, stating: *"If your centre asks patients to restrict their storage to a period less than the maximum permitted by law, there is a higher risk that in the event of a patient dying the gametes or embryos cannot continue to be stored, causing significant distress. We strongly encourage you to consider the impact of this practice, in particular in circumstances where individuals have life threatening illnesses."* After this 2012 letter was written, particularly in the context of the guidance set out above, the HFEA fully expected responsible clinics to (i) stop the practice of asking patients to limit their consent for financial reasons, or at the very least (ii) explain the difference between clinic policy and the patient's right to consent to storage for up to 55 years, and the potential impacts of shorter storage after death. The HFEA was disappointed to learn that despite the May 2012 letter the practice was continuing, and therefore the HFEA took further steps to stop it including those set out below."

23. I need not refer to that further guidance. It all came too late for Clive and Samantha.

24. So far as the facts are concerned, I am entirely satisfied, and find as a fact, that:

    i) The Form MT in its original form was completed and signed by Clive (as was the Form WT, signed by Samantha) at their home on 20 July 2013.

    ii) The amendments to the Form MT which were signed or initialled by Clive, that is, the amendments to sections 5.2, 5.4 and 6.4, were made at the clinic on 23 July 2013 on the occasion described by JH.

    On the other hand,

    iii) It is unclear whether the amendment to the Form MT which was *not* initialled by Clive, that is, the amendment to section 4 reducing the storage period from 10 years to 2 years, was made on that occasion. Nor is it clear whether the figure "2" inserted in the box is in Clive's handwriting. JH, as we have seen, says that it is not her handwriting. In her first witness statement Samantha says that it came as a shock to her when she saw the consent forms again recently and saw the alteration to the storage period. In her second witness statement she said that the inserted "2" does not particularly look like Clive's hand-writing but adds, very frankly, "I cannot be certain." It seems likely that the

amendment was made (when and by whom being, as I have said, unclear) to reflect the clinic's policy at the time.

25. Samantha's primary submission is very simple. The Form MT as originally signed was a valid consent under the 1990 Act. It authorised storage of the embryos for a period of 10 years, as is plain on the face of the document. Clive gave effective, written and informed consent to the period of 10 years. As set out by Samantha in her first witness statement, the couple had researched the 10 year period and deliberately selected it. The subsequent amendment to a period of two years was not signed, in stark contrast, it should be noted, to every other amendment on the Form MT. The absence of a signature is sufficient to invalidate the amendment, as it does not comply with paragraph 1(1) of Schedule 3. This alone, Ms Richards and Ms Grogan submit, is determinative of the claim. Mr Adamson agrees. So do I. As I said during the hearing, the case turns on a signature. On this ground alone, Samantha is entitled to the declaration she seeks. I make clear, for the avoidance of any misunderstanding that the statutory requirement that a consent, or any variation or withdrawal of a consent, must be "signed by" the relevant person does not require a full signature; for this purpose, it is sufficiently "signed by" that person if, in his own hand, he initials it.

26. This conclusion, it will be appreciated, is in no way dependent upon who it was who made the relevant amendment, who it was who inserted the figure "2". Even if the alteration was made by Clive, knowingly and intentionally (and I stress that the evidence does not establish this), it would be quite immaterial. The fact that the alteration was not "signed by" Clive is fatal and thus, of itself and without more ado, determinative.

27. Mr Adamson appropriately reminded me of what Hale LJ, as she then was, said in *Mrs U v Centre for Reproductive Medicine* [2002] EWCA Civ 565, para 24:

> "The whole scheme of the 1990 Act lays great emphasis upon consent. The new scientific techniques which have developed since the birth of the first IVF baby in 1978 open up the possibility of creating human life in ways and circumstances quite different from anything experienced before then. These possibilities bring with them huge practical and ethical difficulties. These have to be balanced against the strength and depth of the feelings of people who desperately long for the children which only these techniques can give them, as well as the natural desire of clinicians and scientists to use their skills to fulfil those wishes. Parliament has devised a legislative scheme and a statutory authority for regulating assisted reproduction in a way which tries to strike a fair balance between the various interests and concerns. Centres, the HFEA and the courts have to respect that scheme, however great their sympathy for the plight of particular individuals caught up in it."

28. This does not mean that the judge must approach a case such as this bereft of humanity, empathy, compassion and sympathy. What it does mean is that the judge cannot allow his judgment to be swayed, or his decision to be distorted, by those very

human emotions. After all, the duty of the judge in a case such as this, as in every case, is that demanded by the judicial oath: to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will. Happily for Samantha in this case, the outcome, as determined by that stern test, is the outcome she seeks.

29. That suffices to dispose of this case and to entitle Samantha to the relief she seeks. I do not propose to express any concluded views on the various other submissions that were addressed to me, but it is convenient to indicate briefly what the arguments were in relation to these other points.

30. The first point was this: Ms Richards and Ms Grogan submitted that it would be open to me to infer from the totality of the evidence that the relevant amendment was *not* made by Clive. Mr Adamson made the same submission, contending that on a balance of probabilities the evidence rules out Clive as the person who made the amendment. They may be right, but there is no need for me to go any further than I have already and I decline to do so. There is, as I have already explained, no need to.

31. The second point related to whether or not, even if he had signed the amendment of the Form MT reducing the storage period from 10 to 2 years, it could have been established that Clive had been given "suitable opportunity to receive proper counselling about the implications" within the meaning of paragraph 3(1)(b) of Schedule 3 and had been "provided with such relevant information as is proper" within the meaning of paragraph 3(1)(b). In relation to the latter point, I was referred to what Arden LJ had recently said in *R (Mr and Mrs M) v Human Fertilisation and Embryology Authority* [2016] EWCA Civ 611, paras 78-79. The submission, and again Mr Adamson made common cause with Ms Richards and Ms Grogan, was that it can be inferred from the evidence that Clive did not give informed consent to the amendment, as required by paragraph 3. It is said that the Form MT was amended to reflect the clinic's funding policy, and not as a result of a change of heart on Clive's part, and that in any event there is no evidence that Clive was given any information or offered counselling about the implications of changing the Form MT.

32. Common to these submissions was the assertion, in fact more accurately the assumption, that the requirements of paragraph 3 apply as much to a variation or withdrawal of consent as to the original giving of consent. Counsel may be correct, but the proposition is not self-evidently apparent from the language of paragraph 3. Paragraph 1(1), as we have seen, refers to "A consent … and any notice … varying or withdrawing a consent." Paragraph 3, in contrast, refers merely to the giving of "consent." There is no need for me to express any view, let alone come to a conclusion, about an important point which, as Mr Adamson observed, requires careful consideration of various other provisions in Schedule 3, but which does not arise for decision. It is better that I do not. Nor do I propose to explore any further the various factual matters relied upon in this connection.

33. The third point related to the undoubted fact that Clive and Samantha had twice completed and signed, on the first occasion on 20 July 2013 and on the second occasion on 11 February 2014, the clinic's Form SDFC9, *Consent for the Cryopreservation and Storage of Embryos*. Ms Richards and Ms Grogan sought to argue that Clive's signature to each of these two documents was sufficient to satisfy

the requirements of paragraph 1(1) of Schedule 3, relying for this purpose upon the wording of paragraph I of the document, recording his understanding that "any embryos that are not replaced will, at the discretion of the medical and scientific staff, be preserved … and stored for a period of not more than ten (10) years from the date of fertilisation," and upon the language of the Declaration, at the end of the document, which he and Samantha signed, that "We will be bound by the acknowledgements, admissions and consents that we have made and given in this letter in the event of any subsequent death …" Mr Adamson pointed to the uncertainty of the words "not more than ten … years" and submitted that, in any event, the Form SDFC9, read as a whole, was directed to a wholly different issue and served a wholly different purpose: it was not, he submitted, a consent form at all but, rather, an agreed statement of the terms and conditions upon and subject to which the clinic agreed to store the embryos. I say no more about the point, which, again, is better left for decision in a case where it actually arises for decision.

34. Finally, I should add that in relation to the arguments based on Article 8 of the Convention, reference was made to the judgment of Hogg J in *In re Warren* [2014] EWHC 602 (Fam), [2015] Fam 1, and, in particular, to her somewhat Delphic words at paras 136-143. I record the point without expressing any views about it.

35. In *In re A and others (Legal Parenthood: Written Consents)* [2015] EWHC 2602 (Fam), [2016] 1 WLR 1325, para 110, where I was considering the HFEA's Forms WP and PP, used for the recording of consents under the Human Fertilisation and Embryology Act 2008, I referred to:

> "the imperative need for *all* clinics to comply, *meticulously and all times*, with the HFEA's guidance and directions, including, in particular, in relation to the use of Form WP and Form PP."

I went on (para 111) to add:

> "A completed Form WP and a completed Form PP surely needs to be *checked* by one person (probably a member of the clinical team) and then *re-checked* by another person, entirely separate from the clinical team, whose sole function is to go through the document in minute detail and to draw attention to even the slightest non-compliance with the requirements."

36. Mr Adamson invited me to express the same observations in relation to the Form WT and Form MT. I can well appreciate why he does so. Let me make clear: what I said in *In re A*, paras 110-111, in relation to Form WP and Form PP applies in precisely the same way, and with exactly the same force, in relation to Form WT and Form MT.