Neutral Citation Number: [2024] EWHC 3018 KB

Case No: KB-2024-000782

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 November 2024

Before : HHJ Karen Walden-Smith sitting as a Judge of the High Court

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Between :

BCLI	**Claimant**
- and -	
COMMISSIONER OF THE POLICE FOR THE METROPOLIS	**Defendant**

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Alison Gerry (instructed by **Hodge Jones & Allen**) for the **Claimant**
Robert Talalay (instructed by **Weightmans**) for the **Defendant**

Hearing date: 18 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ Karen Walden-Smith

Introduction

1. This hearing was to deal with a number of applications made on behalf of the defendant, the Commissioner of the Police of the Metropolis, and on behalf of the claimant, BCLI, who has the benefit of an anonymity order from an earlier court order. I am grateful to both counsel for their detailed, and careful, written and oral submissions.

2. The brief background to this case is that the claimant was raped and sexually assaulted on multiple occasions by three men between 1966 and 1976 when she was aged between 3 and 13 years. Her assailants were respectively her maternal grandfather, the gardener of a care home that she was placed into, and later her mother's partner – referred to as MM. The claimant seeks damages for personal injury for both psychiatric harm and aggravated damages. The claim against the defendant is on the basis that she alleges misfeasance in a public office. The allegation is that a named officer of the defendant allegedly failed in his duty to investigate the serious offences which were reported by the claimant in 2011.

3. The claimant had previously brought a claim on 28 February 2023 pursuant to the provisions of section 7 of the Human Rights Act 1998 arising from what was alleged to be a deficient investigation by the defendant's officers, in particular DS Dawson. That claim was withdrawn by the filing of a notice of discontinuance on 8 February 2024, together with a consent order recording a settlement agreement reached between the claimant and the defendant after the offer on 31 January 2024 that the defendant was prepared to *"draw a line under this matter by bearing their own costs in the event that the claimant agrees to withdraw this claim"*.

4. That offer had been made subsequent to the claimant serving on the defendant a proposed amendment to the HRA claim to include a claim in the tort of misfeasance of public office. The defendant had refused to agree to the claimant's proposed amendment on the basis of the claim being brought out of time and on the basis of it having no merit.

5. Subsequent to the discontinuance of the HRA claim, on 13 March 2024, the claimant issued the current proceedings, being a claim for damages for personal injury in the tort of misfeasance in a public office against the Defendant.

6. The defendant seeks an order striking out this claim for being an abuse of process as it is *res judicata* pursuant to the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100. As an alternative, the defendant contends that the claim was brought out of time. The claimant has brought a counter-application for an order that, if the claim was brought out of time then the claimant should be granted an extension of time. Finally, the defendant contends that even if the claim is brought in time and is not an abuse, the claim itself is deficiently pleaded as the claimant has failed to plead sufficient particulars of bad faith. The claimant denies that the claim is deficiently pleaded but seeks, in the alternative, permission to amend.

7. If the defendant is correct in asserting that this claim is an abuse for being *res judicata,* that would be an end to this matter. I took the decision at the outset of the hearing that

it was important, particularly given the factual background of this claim, that all the issues are thoroughly explored.

Factual Background

8. The claimant was born on 2 May 1963 and, when her parents moved to Australia in or about 1967, she moved with her brother and younger sister to live with her maternal grandparents. In 1969, the claimant and her brother were transferred to a children's home but visiting her maternal grandparents for a week or two at a time. She remained living in the children's home until November 1973 when she moved to live back permanently with her mother.

9. According to the original Particulars of Claim, the claimant had been abused by her maternal grandfather when living with her grandparents and whenever she visited from the children's home. When she was living at the children's home she was also sexually abused by a gardener at the home. When she was staying with her mother, from approximately the age of 9, she was sexually abused by her mother's boyfriend. At the age of 10, the claimant moved permanently to stay with her mother, together with her siblings. From that time in 1973, until the discovery of a letter in 1976, in which he outlined what he wanted to do to her, the mother's boyfriend subjected the claimant to sexual abuse including rape, digital penetration and oral sex.

10. Upon the discovery of the letter, the claimant's mother reported to the police the sexual abuse perpetrated by her boyfriend (MM) on the claimant. The claimant was aware of that first complaint to the police but she says that, due to her fear and trauma, she was unable to describe, as a 13-year old girl, any detail of the sexual abuse. MM denied the sexual abuse and he was not prosecuted. The claimant does not known why that decision was made.

11. After leaving school, starting work and leaving home to marry, the claimant started receiving therapy from approximately 1989. On 20 April 2011, the claimant (then aged 47) attended Enfield police station and alleged that she had been sexually abused as a child by MM, together with the abuse from the gardener and her maternal grandfather – although he had already died. Details of the allegations were recorded in the CRIS (crime reporting information system). An entry in the CRIS on 21 April 2011 by DS Dawson says:

> "I have noted this allegation. This is historic and happened in Hampshire. I have deployed a SOIT officer to make contact with the victim, offer support and explain SOIT role and investigation. 202 to be commenced.
>
> Due to offence being OMPD I will transfer this to Hampshire Constabulary.
>
> Once I have obtained a crime number and OIC from the relevant force this will be shown as No Crime and shown as complete"

12. PC Eade spoke with the claimant on 23 April 2011. The claimant gave details of the abuse from the gardener at the children's home and from her mother's boyfriend and I have read the CRIS reports for this period that show that on 20 April 2011 the claimant

reported the abuse by the gardener, her now deceased grandfather and her mother's boyfriend. The allegations were reported by PC Eade as taking place between 1969 and 1977. PC Eade records that she took contemporaneous notes of the claimant's narrative in Book 202 with respect to her allegations against the gardener and her mother's boyfriend.

13. DS Dawson recorded in the crime report on 21 April 2024

> "From reading the report it would seem that the victim has already reported this allegation that was dealt with. It maybe that once this has been confirmed it can be shown as No Crime."

A PNC (police national computer) check was undertaken on MM and DS Dawson recorded that he was conducting the following enquiries:

> "1. SOIT deployed to establish facts of this allegation to determine if SCD5 remit and confirm if matter previously dealt with by police
>
> 2. Tasking request sent to establish if suspect deceased
>
> 3. Microfiche check to establish previous arrest relating to this allegation.
>
> Until the above has been conducted this will remain a CRI
>
> I will complete a review once these checks have been conducted if required."

14. On 27 April 2011, DS Dawson records the following:

> "I have noted the update made by PC Eade. The victim states that this allegation was previously reported to police. She went to the police state where she was examined and provided a statement.
>
> The suspect was arrested but due to lack of evidence no further action was taken.
>
> I have conducted some research and requested the microfiche of the suspect. There is no record on file of him being arrested. There are previous convictions for theft and living off immoral earnings.
>
> The victim is adamant that this was dealt with by police and she only mentioned it to officres (sic.) as she was making an allegation against the gardenere (sic.) at the children's home and wanted to give police a full account of the sexual abuse that she has suffered.
>
> This linked crime is being investigated by Hampshire Police"

15. On 18 July 2011 DS Dawson recorded as follows:

> "Statement has been obtained [from the claimant]. She states that she reported incidents between 1971 and 1976. She states that the person responsible was the partner of her mother. This matter was reported to police at the time by her mother who has since died. She attended Edmonton police station. She was later examined and provided a statement. The suspect [MM] denied the allegations and the case was not taken any further.
>
> This statement was signed.
>
> Since this case has already been reported and investigated, unless further evidence comes to light this enquiry is closed.
>
> This is a duplicate report and should be shown as No Crime."

16. Finally, in a closing report dated 23 August 2011, DS Dawson recorded

> "Initial Response
>
> Victim attended Enfield police station on 20th April 2011 and disclosed that she had been raped on 2 separate occasions by 2 separate males. A SOIT officer was deployed following the two crime reports. Cris [number] is currently being investigated by Hampshire Police as the offences occurred on their ground. Enquiries were made with regard to the second allegation and it was established from the victim that she had made a statement to police. The suspect was arrested and interviewed but since she refused to go to court no further action was taken. There has been no additional evidence. A statement was later taken from the victim outlining the above."

17. In 2022, the claimant raised the historic sexual allegations with the police again. She had, by that time, undergone further therapy. It appears from the entry on the CRIS dated 21 June 2022 that she had initially been calling about an unrelated assault matter. She told the police in 2022 that she did want to pursue the matter in 2011 as the suspect would have been 70 years. It was not clear at that time whether MM was still alive and it was stressed to her that he could be spoken to if he is alive as "reports can be investigated at anytime." The entry sets out that she "is still unsure if she wishes to pursue the matter and have been given the CMS number [number] to make a call, quote the crime ref number when she has decided." It is recorded that on 22 June 2022 she telephoned to say that she definitely did want to proceed in 2011 but with the passing of time she wanted to discuss further to establish the best way forward. In July 2022 that is a further record that the claimant wished to speak to someone urgently as she "feels quite let down and confused that she has not been contacted. She doesn't even know if the suspect is still alive and is very worried by the whole issue, so just wants to speak to somebody about moving forwards.

18. The entry dated 11 July 2022, records that the claimant was further traumatised by discovering that MM might be dead and that she would not now get the justice she deserves and that "if the officers had listened to her properly in 2011 he could have

been dealt with then." After investigation the police ascertained that MM had died in 2021. As a consequence, the police could not proceed with an investigation in 2022.

19. The claimant made a complaint about the lack of investigation in 2011 and on 19 July 2022 the Director of Professional Standards at the Metropolitan Police recorded that the service she had received was unacceptable and that as she was able, as an adult, to give more evidence the sexual offences investigation should have been reported without question. She was given an apology and told that she could seek compensation.

Proceedings

20. The claimant's solicitor sent an early notification letter on 15 September 2022 and a full letter of claim on 14 November 2022, asserting that Articles 3 and 8 of the European Convention on Human Rights (ECHR) were breached by the failure to investigate promptly and effectively the report she made to the police in 2011.

21. In their response on 24 November 2022, the solicitors for the defendant raised a limitation issue – the limitation period for Human Rights Act (HRA) claim being one year from the accrual of the cause of action. As the investigation had been closed by 25 August 2011, limitation had expired on or around 25 August 2012 – claims brought under the HRA being once that should be dealt with swiftly and economically as there is no public interest in public authorities being burdened by expensive and time consuming claims brought years after the event (see *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72). In addition to raising limitation issues, the solicitors for the police briefly set out their defence to the HRA claim. With respect to the Article 3 complaint, that in applying *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, the claimant was unlikely to be able to establish that an investigation in 2011 would have been capable of bringing MM to justice given the limited evidence and that Article 8 did not apply.

22. The claimant issued proceedings on 28 February 2023 and Dr Getz, consultant psychiatrist, reported that the failure of the police to investigate significantly worsened the pre-existing complex post-traumatic stress disorder from which she had suffered since childhood.

23. On 8 June 2023, the claimant sought an extension of time to serve her Particulars of Claim until 4 September 2023 and applied for an order extending time under section 7(5) of the HRA. On 26 June 2023 (sealed on 27 June 2023) Master Stevens granted anonymity for the claimant, extended time for the HRA claim and extended tine to serve the particulars of claim. That order was made without a hearing and on 4 July 2023, the defendant applied to have it set aside.

24. Before that hearing was listed, the Particulars of Claim together with a schedule of special damages dated 1 September 2023 was filed and served. The defendant applied to strike out that claim on the basis that the HRA did not apply and the claim was out of time. In light of the application to strike out, no defence was filed. On 8 November 2023 notification was provided by the court that the application to strike out would be heard on 26 February 2024.

25. On 17 January 2024, the claimant's solicitors wrote to the defendant's solicitors with a copy of proposed Amended Particulars of Claim with a request that the defendant

consent to an additional claim in the tort of misfeasance in public office. The defendant's solicitors wrote on 31 January 2024 to say that the defendant could not consent to such an amendment and set out the following:

> "It is the defendant's position that if the claimant wanted to pursue a claim for misfeasance in public office this could and should have been included when proceedings were initially issued. There is nothing in the disclosure provided with the defendant's application that substantially alters what the claimant already knew prior to proceedings being issued and the fact that the claimant is only now seeking to add this claim suggested that it is really intended to try and circumvent the defendant's strike out application and keep this claim alive."

That can be said to be the *res judicata* or *Henderson v Henderson* point.

26. The letter then dealt with the limitation point as follows:

> "It is the defendant's position that any claim for misfeasance in public office would be statute barred as limitation commenced in 2011. Limitation commences when a claimant becomes aware of the decision itself (in this case the decision by DS Dawson to close the crime report and advise the claimant that it was not possible to re-investigate) not upon knowledge that the information given regarding that decision was incorrect at some later date. That a person does not become aware that advice was received was wrong/negligent until a later date is not material – the test is that the claimant understands in general terms the essence of the factual case upon which a later claim might be based (*Wilkins v University Hospital North Midlands NHS Trust* [2021] EWHC 2164 QB). It is the defendant's position therefore that limitation runs from 2011 and any misfeasance claim is therefore out of time."

27. The claimant was therefore fully aware from 31 January 2024 the defendant's position with respect to the proposed additional claim that there was misfeasance in a public office being an abuse of process and that it was out of time. The defendant also set out in that same letter its view that the claim did not have merit.

28. In addition to that open letter, the defendant's solicitors sent a letter on the same date marked as being "without prejudice save as to costs." In that letter, the defendant made an offer that "the defendant is prepared to draw a line under this matter by bearing their own costs to date in the event that the claimant agrees to withdraw this claim." The "drop hands offer" was said to be open for acceptance until 9 February 2024, after which preparation would start in earnest for the strike out hearing listed for 26 February 2024.

29. On 7 February 2024, the claimant accepted the offer to withdraw her claim and file a notice of discontinuance with the defendant bearing their own costs.

30. The notice of discontinuance was duly filed on 8 February 2024 and the court ordered, by consent, that the claim be discontinued and the defendant waived their right to costs under CPR 38.6 (i.e. entitlement to costs on discontinuance).

31. Subsequent to the discontinuance of the first claim in the circumstances set out above, the claimant commenced a second claim for misfeasance in public office on 13 March 2024 with the particulars of claim for the second claim, together with a schedule of special damages dated 5 April 2024, were filed and served on 9 May 2024.

The Second Claim

32. The defendant applied to strike out the second claim by an application made on 11 July 2024. The claimant made applications on 19 July 2024 to amend the pleadings and for an extension of time.

33. The claimant's solicitor contends that while it was clear from the defendant's correspondence leading up to the settlement that the defendant was intending to conclude the litigation: "While the Defendant's intention of concluding the litigation was clear, the Claimant made no similar indication. By withdrawing her HRA claim, she did not thereby agree to give up any right to bring any claim arising from the Defendant's failure to investigate the abuse she had reported in 2011. The Claimant fully intended to pursue her claim in misfeasance, albeit now she would have to do so by issuing a fresh claim." (see paragraph 16 of the statement of Sasha Barton dated 19 July 2024). Counsel for the claimant accepted that, despite knowing the basis upon which the offer was being made by the defendant, the claimant did not set out or even suggest that the offer was being accepted on a different basis – only that the acceptance was silent as to whether she intended to issue another claim.

34. In the letter sent by the claimant's solicitors on 17 January 2024 it was set out that:

> "If your client does not consent to the addition of a misfeasance claim to the existing claim, our client has the option of applying to the court to add this claim and/or could simply issue a fresh misfeasance claim."

It was, therefore, plainly in the contemplation of both the claimant and the defendant that the issuing of a fresh misfeasance claim was an alternative to amending the first claim to plead misfeasance. When the offer was made by the defendant "to draw a line under this matter" (emphasis added) that was not a reference solely to the already issued HRA claim being withdrawn with "drop hands" on the costs. It was an offer to bring "the matter", that is claims against the defendant relating to the police investigation in 2011, to an end. By accepting the offer made by the defendant, the claimant was accepting that she would not proceed against the police.

35. Counsel for the claimant set out in her skeleton argument that the defendant had refused the claimant's request to amend the particulars of claim to include the misfeasance claim and indicated that any application would be strongly resisted (the defendant did refuse to agree to the amendment and indicate that it would strongly resist any application to do so) and that it was "insisting that the strikeout application be dealt with prior to any application to add misfeasance as a cause of action" so that, if successful, there would be no existing claim to add the misfeasance claim and the

misfeasance claim would therefore inevitably fail. That is not what the defendant said. The defendant did say that the application to amend did not need to be heard first but that if the claimant did issue an application to amend then it should be heard with the applications to strike out which were already listed for 26 February 2024, with the time estimate for that hearing extended accordingly. That was an entirely sensible course to be taken so that any judge would hear all the applications together. If there was a meritorious application to amend then the claim would not have been struck out to stifle a meritorious amendment. A court would have been in a position to determine whether the HRA claim should be struck out or not and also determine whether there should be an amendment to plead misfeasance, in light of the arguments the defendant was raising that the claim was out of time and was inadequately pleaded.

36. The claimant was aware that the HRA claim could not succeed and, in my judgment, agreed to the offer to discontinue without any adverse costs consequences so as to avoid the consequences of what would have been a successful application to strike out. That agreement to bring "the matter" to an end was not expressly limited by the claimant to only the claim under the HRA. The defendant settled on the basis that it encompassed all the claims, including misfeasance, that the claimant potentially had against the defendant.

Abuse of Process

37. The defendant relies upon the principle in *Henderson v Henderson* (1842) as referred to above, The most recent authoritative explanation of *res judicata*, and its various forms, is that of Lord Sumption SCJ in *Virgin Atlantic Airways ltd v Zodiac Seats UK Ltd* [2014] AC 160 where he set out as follows:

> "*Res judicata* is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle… [After dealing with other examples of *res judicata.* Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

38. The origin and purpose of the principle was set out in the statement of principle of Wigram V-C in *Henderson v Henderson*:

> "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which

> was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

39. In *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC, the House of Lords dealt with the need for finality in litigation. Lord Bingham set out as follows:

> "…*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also take account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue that could have been raised before."

40. Lord Millett also referred in *Johnson v Gore-Wood* to the need to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions. The fact that the first claim in this matter was resolved by way of a settlement between the claimant and defendant does not alter the situation as the purpose of the rule is to protect a defendant from dealing with repeated actions concerning the same matter and, as was said by Lord Bingham in *Johnson v Gore-Wood:*

> *"A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing."*

41. In *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260, Thomas LJ (as he then was) reiterated that the question in every case is whether, applying a broad merits approach, the applicant's conduct is in all the circumstances an abuse of process *"The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression."*

42. In this case, the defendant can be seen to be on the front foot. It was the defendant who was seeking to strike out the claim and the offer to settle was couched in terms that it was to "draw a line" under the litigation. The defendant was not being "driven" to settle. The witness statement of Ms Barton, the claimant's solicitor, establishes that the claimant knew that the defendant was settling on the basis that would be the end of any claim and the offer to settle was not because the defendant was driven to settle

43. In applying a "*broad, merits-based judgment"* taking into account public and private interest and all the facts of the case, the second claim brought by the claimant is an abuse. Had the claimant wished to allege misfeasance against the defendant she could, and should, have done so within the first claim. Both this claim and the original claim, discontinued by the claimant, are identical save for the new cause of action. The parties are the same and the pleaded facts in the new Particulars of Claim are, save for allegation that police officers had knowledge of certain matters, the same. The claimant seeks, as she did in the first proceedings, damages for complex post-traumatic stress disorder and, while the claim is for slightly more, the heads of loss are the same.

44. The only substantive difference between the first and second claim is the cause of action, namely the allegation of misfeasance in a public office in place of the original claim that there had been a breach of the obligations provided by Article 3, by reason of there having been a failure to investigate adequately or at all. Prior to discontinuing the first claim, the claimant had sought the defendant's agreement to permit misfeasance as an additional cause of action. It was subsequent to the defendant's refusal to consent to the amendment to include that further cause of action that the claimant and the defendant entered into the "drop hands" settlement, with the defendant making it clear that the settlement was to bring to an end all claims.

45. It was open to the claimant to amend the original particulars of claim and argue that the amendment should be permitted at the same hearing as the defendant's applications to strike out. The claimant and the defendant had discussed such an amendment and the defendant had agreed that the application to amend should be heard at the same time as the application to strike out. It is not correct, as was suggested by claimant's counsel, that the defendant was insistent that the strike out needed to be heard in advance of any application to amend. The claimant decided to discontinue on 8 February 2024 rather than have her application to amend considered by the court on 26 February 2024, together with the defendant's strike out applications. As in *De Crittenden v Bayliss* [2005] EWCA Civ 1425, where Parker LJ, giving the judgment of the Court of Appeal, found there was no basis for challenging the judge's conclusion that the claimant in that case could and should have amended his pleading in the first action, the claimant has been represented throughout with counsel and solicitors. She knew of her potential

claim in misfeasance but decided not to amend the original pleading, but instead take the advantage of the "drop hands" offer on costs.

46. In *Warburton v Chief Constable of Avon and Somerset* [2023] EWCA Civ 209, the claimant brought a second claim which was factually identical to the first but raised a different cause of action. That different cause of action had been raised in a proposed amended pleading but, before amendment, the parties agreed to settle with the intention to settle the whole claim. In the judgment of Males LJ he set out that the decisive fact was that Mr Warburton knew that the offer was intended to settle all claims, pleaded and not pleaded.

47. In this case, the claimant's representatives have said that they knew that the defendant intended to finalise all litigation and accepted the offer on that basis while, on their own account, hiding an intention to start fresh proceedings by not informing the defendant that it was her intention to continue despite the settlement. The claimant thereby benefitted from avoiding the original claim being struck out with the costs consequences that would have followed from that strike out, knowing that the claimant did not intend to abide by the basis of the settlement offer being made. In my judgment that is a clear abuse. The claimant has brought the claim against the defendant for a second time, with the new cause of action being one that had been raised before agreeing to discontinue against the defendant. That is a clear abuse as the defendant is being "vexed twice".

48. The claimant has contended that the only reason the first claim could not proceed is because of the Supreme Court decision *In Re Dalton* [2023] UKSC 36. The Supreme Court held that the starting point for jurisdiction purposes for HRA claims ought to be that the HRA does not have retrospective application, and only applies from 2000 when the HRA came into force, but that under some circumstances an investigative obligation can "revive" if there was a "genuine connection" between the act, or inaction complained about, and the commencement of the HRA1998. That "genuine connection" would not normally be met outside a ten year period, or where there were compelling reasons, a further two years. It is said by the claimant that determination had a significant impact on the ability of the claimant succeeding in an HRA claim given the historic nature of the allegations of child sexual abuse and rape. That contention is not accepted by the defendant as the earlier decisions of the Supreme Court in *In Re Finucane* [2019] UKSC 7 and *In Re McQuillan* [2021] UKSC 55 had already settled that there needed to be a "genuine connection" (within ten or, exceptionally, twelve years) between the act, or inaction complained about, and the commencement of the HRA 1998.

49. The claimant further contends that the additional disclosure that had been obtained subsequent to the commencement of the first claim meant that the merits of the misfeasance claim had increased but that cannot be a reason for her having agreed to discontinue and then start a new claim. The claimant knew the basis for her misfeasance claim before she consented to discontinue. Had she proceeded with an application to amend then she would have needed to deal with the application to strike out the HRA claim and the opposition to the new claim. By agreeing to discontinue and not revealing that she intended to start again, the claimant not only avoided dealing with the arguments against her at that time but benefitted from avoiding the costs that she would likely have been required to pay pursuant to the provisions of CPR 44.15(b).

50. The defendant has satisfied the burden of establishing that this claim is an abuse by being *res judicata* and, therefore, an abuse.

Limitation

51. The defendant contends that the claim is, in any event, out of time. It is appropriate that I deal with these arguments with respect to limitation.

52. The claim is for damages for complex post-traumatic stress disorder which the claimant now says arose as a consequence of misfeasance on the part of the defendant's officers. The tort of misfeasance has a time limit of three years pursuant to the provisions of section 11 of the Limitation Act 1980. The three year time limit for a personal injury claim starts to run from (a) the date on which the cause of action accrued; or, (b) the date of knowledge (if later) of the person injured.

53. It is the claimant's case that she only became aware that the advice given to her in 2011 by DS Dawson that the complaint was not taken further as a consequence of her earlier complaint and that there was no new evidence so this was now a "no crime" was wrong, was in 2022 when she had been in communication with her local MP. The claim was brought on 13 March 2024.

54. If the claimant is correct in her contention that she was not aware until June or July 2022 that the harm she has suffered was attributable to the acts or omissions of the defendant's police officers, and that time did not start to run until then, then the March 2024 claim would be in time. The issue between the claimant and the defendant is what was the date of knowledge.

55. Date of knowledge is defined in section 14(1) of the Limitation Act 1980 as being the date on which the claimant first had knowledge of the following:

(a) that the injury in question was significant; and

(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

(c) the identity of the defendant

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

56. In Ms Barton's statement she sets out the following:

> "In BCLI's case, she knew in 2011 that she was extremely unhappy about DS Dawson's decision to close down the criminal case without further investigation and she knew that this was adversely impacting on her mental health but, as set out in the Particulars of Claim, the key facts she did not know were that DS Dawson was wrong to close the investigation and that the/an officer was mistaken in what he told her about his inability to investigate further. She believed, based on what he told her, that he was permitted and indeed obliged by law to close the investigation as he did."

57. The expert report of Dr Alexandra Getz dated 14 July 2023 provided that BCLI's complex post-traumatic stress disorder symptoms worsened significantly in 2011 when informed by the police that there would be no re-investigation into MM's abuse of her. *"She was shocked, she was in disbelief, and she was devastated…Distressing flashbacks that had become manageable were re-triggered."* She was therefore aware in 2011 that the injury in question was significant. She also knew that the injury was attributable to the act of the police officer telling her that he was obliged by law to close the investigation in 2011. While she further pleads that the news of the death of MM in 2022 significantly worsened the claimant's pre-existing psychiatric disorder, she also pleads that *"As a result of the misfeasance in 2011 the claimant's CPTSD worsened and did not improve."* She therefore also knew in 2011 that the injury was attributable to the act of the police officer and she knew that the identify of the defendant was an officer of the defendant. All the elements necessary for establishing knowledge were therefore present in 2011. The fact that the claimant did not have the knowledge that, as a matter of law, the act of the police not to investigate the allegation was potentially misfeasance is irrelevant.

58. The claimant has relied upon Lord Donaldson in *Hallford v Brookes* [1991] 1 WLR 428 where he stated that "knowledge" clearly does not mean "know for certain and beyond possibility of contradiction" but that it means *"know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ…"* and the decision of Purchas LJ in *Nash v Eli Lilly & Co* [1993] WLR 782 where he said *"Whether or not a state of mind for this purpose is properly to be treated by the court as knowledge seems to us to depend, in the first place, upon the nature of the information which the plaintiff has received, the extent to which he pays attention to the information as affecting him, and his capacity to understand it… The section, it is to be emphasised, attaches consequences to the having of knowledge which depends upon information and understanding. It does not depend upon the character of a plaintiff …".*

59. It is contended on behalf of the claimant that she could not have known that the injury she sustained in 2011 was as a result of the action or inaction of the defendant's officers in not investigating the allegation made. But that is, in fact, what is set out in the pleadings and her solicitor's statement. She did know that the cause of her injury was the decision not to investigate further.

60. The degree of certainty necessary to establish "knowledge" was set out by Lord Nicholls in *Haward & Ors v Fawcetts* [2006] 1 WLR 682 endorsing the approach of Lord Donaldson MR that:

> "… knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence… In other words, the claimant must know enough for it to be reasonable to investigate further."

and further, citing Blofeld J in *Hendy v Milton Keynes Health Authority* [1992] 3 Med LR 114 with approval, the degree of detail required to have knowledge:

> "…a plaintiff may have sufficient knowledge if she appreciates "in general terms" that her problem was capable of being attributed to the operation…"

and finally, with respect to who was responsible (the attribution test), Lord Nicolls said that

> "time does not begin to run against a claimant until he knows there is a real possibility that his damage was caused by the act or omission in question."

61. It is clear from both *Haward v Fawcetts* and the Supreme Court decision in *AB & Ors v Ministry of Defence* [2012] UKSC 9 that a claimant does not need to appreciate all the details of the claim that they may later seek to bring against a defendant in order for time to run. It is sufficient that there is an understanding of the essence of the factual case upon which a later claim might be based. There is no requirement, by virtue of the wording of section 14 of the LA 1980, that there has been an actionable breach of a legal obligation.

62. For the purposes of these applications, the defendant accepts that the claimant did not know that the advice she had received in 2011was potentially actionable. However, that is not a relevant consideration for the purpose of determining when time starts to run. As Lord Nicholls set out in *Haward v Fawcetts:*

> "*Irrelevance of knowledge that the act or omission involved negligence*
>
> 12. Difficulties may sometimes arise over the interaction of these "knowledge" provisions and the statutory provision rendering "irrelevant" knowledge that, as a matter of law, an act or omission did, or did not, amount to negligence: section 14A(9). By the latter provision Parliament has dawn a distinction between facts said to constitute negligence and the legal consequences of those facts. Knowledge of the former (the facts) is needed before time begins to run, knowledge of the latter (the legal consequences of the facts) is irrelevant. As Sir Thomas Bingham MR said in the clinical negligence case of Dobbie v Medway Health Authority [1994] 1 WLR 1234, 1242,

> knowledge of fault or negligence is not necessary to set time running. A claimant need not know he has a worthwhile cause of action."

63. In this matter, the claimant knew the necessary facts in 2011. The fact that she did not know the legal consequences of those facts is irrelevant. She was able to identify in 2011 that she might have a claim against the defendant. As a consequence, time started to run in 2011 and became time-limited pursuant to the provisions of section 11 of the LA 1980 in or about August 2014.

64. The additional information obtained by the claimant in 2022 when she spoke to other police officers and the letter on 19 July 2022 that acknowledged that the actions of the defendant's officers was "unacceptable", does not mean that time did not start to run when she had the necessary knowledge for the purposes of section 14 of the LA 1980.

65. The claimant has made a cross application to disapply the limitation period under section 11 of the LA 1980 and to extend time pursuant to the provisions of section 33 of the LA 1980. This provides that the court should have regard to matters set out in section 33(3):

> "In acting under this section the court shall have regard to all the circumstances of the case and in particular to –
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A, by section 11B or (as the case may be) by section 12;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

66. Counsel for the claimant sought to contend that the application should not be dealt with at the hearing of the various applications but that it be considered at trial, after the service of a defence and in order that the court could properly assess the strength, or otherwise, of the claimant's case and the prejudice to the defendant. The defendant applied for the application to be dealt with together with the other applications.

67. In my judgment, it was clear that the application ought properly to be dealt with at the hearing of all the applications. It would be entirely contrary to the overriding objective to allow the case to proceed to trial with all the attendant expense and time that would create, on the basis that the claim may (or may not) be allowed to proceed. The parties were able to put before the court in full the reasons as to why they contended that time should/should not be extended.

68. The parties were agreed that the principles to apply are those set out by Sir Terence Etherton MR in *Carroll v Chief Constable of Greater Manchester Police* [2017] EWCA Civ 1992 where he made it clear that in exercising its discretion under section 33(1) of the LA 1980 by having regard to all the circumstances of the case, with regard to the five matters specified, there is no fetter on what should be considered and the judge is obliged to consider the matter broadly:

> "3. The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant…Refusing to exercise the discretion in favour of a claimant who brings the claim outside the primary limitation period will necessarily prejudice the claimant, who thereby loses the chance of establishing the claim.
>
> 4. The burden on the claimant under section 33 is not necessarily a heavy one. How heavy or easy it is for the claimant to discharge the burden will depend on the facts of the particular case…
>
> 5. Furthermore, while the burden is on a claimant to show that it would be equitable to disapply the statute, the evidential burden of showing that the evidence adduced, or likely to be adduced, by the defendant is, or is likely to be adduced, by the defendant, is or is likely to be, less cogent because of the delay is on the defendant…
>
> 6. The prospects of a fair trial are important … The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the defendant might have been able to rely on are not available or have no recollection and there are no documents to assist the court in deciding what was done or not done and why… It is, therefore, particularly relevant whether, and to what extent, the

> defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents."

69. The claimant's contention is that the prejudice to the claimant, in losing her ability to bring a claim against the defendant in the particular circumstances of this case, significantly outweighs any prejudice to the defendant.

70. The defendant contends that there is significant prejudice given the 13-year period that has passed since the matters complained about in 2011 (10 years after the primary limitation period expired).

71. The claimant's application is supported by witness evidence from her solicitor, Miss Barton, whereas the defendant relies upon the witness evidence of his solicitor, Mr Hough. The SOIT Log Book 202 of PC Eade has not been located and may no longer exist. That log book is plainly of central importance but it does appear that the matters recorded in that log book have also been recorded in the CRIS entries. There are further documents that have not been located, including police notebooks and action books and internal emails and correspondence. It is not possible to say what information those documents may contain, only that they are not available to either the claimant or the defendant. The CRIS reports do provide a record of some things that were happening and some of the decision making, but it is far from a complete record. Additionally, and more significantly, the police officer who appears to have been the decision maker, has not been traced despite two attempts. Further attempts could be made by the defendant to locate DS Dawson but it cannot be guaranteed that he can be found and, given his central importance, as the claim is concerned with whether he acted in bad faith in 2011, it is of considerable prejudice to the defendant that the documentary and witness evidence is not yet available and may never be available.

72. That is not, in any way, to diminish the upset to the claimant in not being able to proceed with her claim against the defendant in such a sensitive and difficult case. The claimant contends that she has suffered irreparable and lasting psychiatric injury which she alleges was caused by the acts and omissions of the defendant's police officers. However, in considering whether there should be an extension of time, the court is also obliged to consider the principle of proportionality. As stated by Sir Terence Etherton MR in *Carroll*: *"Proportionality is material to the exercise of the discretion… In that context, it may be relevant that the claim has only a thin prospect of success…"*.

73. Lord Steyn set out the ingredients of the tort of misfeasance in public office in *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 AC 1, pages 191-194:

    (1) The defendant must be a public officer;

    (2) The second requirement is the exercise of power as a public officer;

    (3) The third requirement concerns the state of mind of the defendant – it is this area which is of particular importance – and there must be conduct amounting to an abuse of power accompanied by subjective bad faith:

    > "First there is the case of targeted malice by a police officer, ie conduct specifically intended to injure a person or persons. This

> type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where public officer acts knowing he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act his lawful."

(4) Duty to the plaintiff;

(5) Causation;

(6) Damage and remoteness.

74. With respect to the second limb of part three in Lord Steyn's explanation, Lord Hutton made it clear that the claimant must establish dishonesty: *"I consider that dishonesty is a necessary ingredient of the tort, and it is clear from the authorities that in this context dishonesty means acting in bad faith."*

75. Consequently, if the claimant is able to establish that she was provided with the wrong information by DS Dawson, or another, that she was provided with the wrong information, she still needs to show that information was provided to her with intentional dishonesty and bad faith. The currently pleaded case does not set out a positive case that there was bad faith. In those circumstances, the claimant does not appear to have good prospects of success. That weighs very heavily against her for establishing that she should be entitled to an extension of time for the bringing of her claim.

76. Looking at this matter broadly (as I am obliged to do) and taking into account the circumstances of this case, I do not find that there should be an extension of time (even if the case were not, as I have found, an abuse for being *res judicata*). I do not consider that the claimant has any more than a *"thin prospect of success."*

<u>Pleadings</u>

77. For completeness, I am also dealing with the claimant's application to amend.

78. The defendant does not oppose the application to amend a mathematical error in the Schedule of Special Damages. The opposition is with respect to the application generally to amend her pleading.

79. The claimant has raised a claim against the defendant for misfeasance in both the proposed amended pleading and in the current pleadings. This amendment would therefore be third time of pleading.

80. The pleading as it is currently drafted fails to specify who it is said acted in bad faith and how. While the claim is against the Commissioner of the Metropolis it is not a personal allegation against the Commissioner. As was set out relatively recently by Choudhary J in *FXJ v Secretary of State for the Home Department and Anr* [2022] EWHC 1531, an allegation of misfeasance must be pleaded and proved with care, particularly in relation to the element of subjective recklessness:

> "In *Southwark London Borough Council v Dennett* [2008] LGR 94, May LJ stated:
>
> … Mere reckless indifference without the addition of subjective recklessness will not do. This element virtually requires the claimant to identify the person or people said to have acted with subjective recklessness and to establish their bad faith. An institution can only be recklessly if one or more individuals acting on its behalf are subjectively reckless and their subjective state of mind needs to be established."

81. It is not suggested that police officers are not required to investigate allegations of serious criminal offences and that they would be acting outside of their powers if they failed to do so (see Green J, as he then was, in *DSD, NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436).

82. The claimant is obliged to identify the officer (or officers) who has allegedly acted in bad faith and identify any acts of bad faith. The closest the pleading comes to fulfilling that obligation is where it is said: *"the Defendant's officers in 2011, including DS Dawson, knowingly/recklessly abused their powers as police officers in failing in their duty to investigate …".* That is not an allegation of misfeasance but an allegation of negligence. Importantly, bad faith is not pleaded. The particulars of misfeasance set out in the Particulars of Claim are, in fact, negligence pleadings and do not go to the issues that *Three Rivers* raise, namely abuse of power accompanied by subjective bad faith.

83. In all the circumstances, including that there is no draft to consider, it is not appropriate to give permission to amend.

<u>Conclusion</u>

84. For the reasons set out in detail in this judgment, the claim is struck out for being *res judicata* pursuant to the principles set out in *Henderson v Henderson.* Leaving aside the strike out for being *res judicata,* which brings the matter to an end, even if the claim should not be struck out for being an abuse, it has been brought out of time and is deficient in the manner in which it has been pleaded and would be struck out for either or both of those additional reasons. Looking at this matter as a whole, and taking into account all the circumstances, there should not be an extension of time for bringing the claim nor permission to amend.