Neutral Citation Number: [2023] EWHC 948 (KB)

Case No: QB-2022-000886

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 April 2023

Before :

Master Thornett

- -

Between :

MR TOMASZ DANIELEWICZ (A PROTECTED PARTY PROCEEDING BY HIS LITIGATION FRIEND MISS JUSTYNA KOSINSKA)

Claimant

and

MISS JESSICA CANNON (1) MOTOR INSURERS' BUREAU (2)

Defendants

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Mr Gordon Exall (instructed by Morgan Carter) for the Claimant
Mr David White (instructed by Clyde & Co.) for the Second Defendant
No appearance by the First Defendant

Hearing date: 15 March 2023

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JUDGMENT

Master Thornett :

1. This is the reserved judgment on the Claimant's Application dated 23 March 2022 for permission to continue with his proceedings. The Claim Form was issued on 17 March 2022, being the third such claim arising from the Claimant's personal injury sustained as a pedestrian in the early hours of 26 June 2015. As such, as he had in the second claim he had previously issued, the Claimant relies upon the permission required under CPR 38.7. That provides:

> Discontinuance and subsequent proceedings

38.7 A claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if –

(a) he discontinued the claim after the defendant filed a defence; and

(b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim.

2. In this claim ("the Third Claim"), the Claimant sues, as a Protected Party, the driver, Ms Jessica Cannon, as First Defendant and the Motor Insurer's Bureau as Second Defendant. The Particulars of Claim asserts that the Claimant had "used all reasonable endeavours to ascertain the identity and liability of an insurer for the First Defendant. Tradex Insurance Company Limited ("Tradex") insured the Claimant's father but the Claimant has been told by Tradex that they did not insure the vehicle itself nor Miss Cannon. The First Defendant was not insured at the relevant time". The Particulars of Claim goes on to aver the usual particulars about the liability of the MIB in such circumstances.

   As will be discussed, not all of that paragraph is entirely correct.

3. The Claimant sustained various and significant injuries, in particular a severe head injury. This is therefore by no means an insignificant claim. As a Protected Party, no limitation point arises.

4. There has been no Acknowledgement of Service or Defence from the First Defendant. In its Defence dated 5 September 2022, the Second Defendant admits that the First Defendant negligently caused the accident and that the First Defendant was convicted in 2016 for driving under the influence of alcohol, but relies upon:

   a. Allegations of contributory negligence, in attempting to cross the road in the way he did;

   b. Non admission of loss;

   c. The feature of this being the third claim brought in respect of the same incident and, as such, permission for which should not be granted pursuant to CPR 38.7.

5. The Claimant has been and continues to be represented by the same firm of solicitors throughout.

6. The sequence of events in respect of the previous proceedings is as follows, as drawn from the Witness Statement in support of the Application from the Claimant's solicitor, Mr Nicholas Cowley, dated 23 March 2023. Mr Cowley provides remarkably little detail or amplification about the errors and mistaken steps in respect of the previous proceedings. Nor, more particularly, how and why they ocurred. Having annexed to his statement copies of medical reports in support of the Claim, to present the background to the previous claims Mr Cowley instead principally relies upon (as an exhibit) the Second Defendant's Witness Statement from Ms Gillian Rothwell, dated 1 December 2021 and as prepared in support of the MIB's 1 December 2021 Application to strike out the second issued claim. This means that information about what went wrong in the first two sets of proceedings is largely as presented (and there of no suggestion not objectively) by the MIB in two Witness Statements from Ms Rothwell: that date 1 December 2021 in the second claim and that dated 8 March 2023 in this claim.

   Time was offered by me and taken by the Claimant's representation at the commencement of the hearing to check whether more amplified reasoning and underlying explanation could be offered for the sequence of errors directly from the Claimant's representatives. Having taken instructions, Mr Exall returned to inform me that the court was invited to hear the Application as it stood.

8. "The First Claim": E92YJ821

7.1 This was issued in the County Court Money Claims Centre on 20 June 2018 by the Claimant in his own right i.e. not as a Protected Party and against only Ms Cannon. The claim was limited to £25,000 and, treating the Claimant then *not* as a Protected Party, would have been only a few days' before expiration of primary limitation. The date of the accident as at issue was endorsed as "26/06/18" which plainly would be impossible if issue was on 20 June 2018. However, nothing seems to have ever hinged on this. The Claimant's solicitors purported to serve the Defendant with the Claim Form by covering letter dated 17 October 2018 i.e. just before expiration of the Claim Form at an address 136 Wakefield Street, East Ham, London, E6 1NQ. The covering letter refers to the solicitors having *"been in correspondence with your insurers TradeEX…to whom you may care to refer these papers straight away".*

7.2 Tradex, as potential insurers of the vehicle, agreed to be added as a Second Defendant in February 2019 but raised various questions about service of documents upon the (now to be treated as) First Defendant.

In the Amended Claim Form adding Tradex as a Defendant, the Statement of Value of the claim was increased to £75,000 and the date of the accident corrected. Amended Particulars of Claim asserted that the Second Defendant insured the First or alternatively that the Second Defendant was "the relevant road traffic insurer pursuant to s.148 and s.152 of the Road Traffic Act 1988".

7.3 The Defence of the Second Defendant denied that it had issued a policy of insurance to the First Defendant or that it had issued any policy covering the accident vehicle at the time of the accident. It denied, therefore, any cause of action was possible under the (as then applied) European Communities (Rights against Insurers) Regulations 2002. Further, it denied that the Claimant had given it any notice as required under s.152(1) of the 1988 Act and, as such, the Second Defendant could not be found liable as an insurer "whether pursuant to s.151 of that Act or at all". The Defence expressly sought a direction that there be a split trial on the issue of whether it could be liable under either the 2002 Regulations or the 1988 Act.

7.4 Plainly, the issues then relied upon by the Second Defendant were fundamental and significant. What had led to such issues arising at all is only as can be pieced together from copy correspondence annexed to Ms Rothwell's first statement. In an e-mail dated 9 January 2020 to the Claimant's solicitors, the Second Defendant made clear that, from its viewpoint:

- The 7.6.18 letter produced by the Claimant's solicitors purportedly giving notice to the Second Defendant for the purposes of the 1988 Act had featured no addressee and had been sent to the old registered office for Tradex. That had changed back in November 2017. Whilst Tradex had arranged for correspondence to be forwarded upon changing their address, this particular letter was never received because it was not addressed to anyone (i.e. Tradex or otherwise);

- The address used for the First Defendant for the purposes of service was inapplicable. The Second Defendant was unaware of any evidence of her ever having lived at 136 Wakefield Street, East Ham, London, E6 1NQ and, to the contrary, it appeared that on release from prison in May 2017 the First Defendant had returned to her parent's address at 200 South End Road, Rainham, Essex RM13 7XT.

7.5 The claim proceeded to a hearing on 14 January 2020 when the claim was transferred for hearing of the preliminary issue sought by the Second Defendant to the County Court Hearing Centre at Central London. On 3 March 2020, the Claimant's solicitors asked the Second Defendant's solicitors to "confirm the correct address for Jessica Cannon". The Second Defendant's Solicitors replied on 13 March 2020 to confirm that "the only address" they held for Jessica Cannon was 200 South End Road, RM13 7XT.

7.6 On 24 March 2020, the Claimant's solicitors e-mailed the Second Defendant's solicitors to state *"Upon discussing with Counsel and due to the procedural errors on this case we have decided to discontinue current proceedings and have re issued fresh proceedings. We have served our notice upon Miss Cannon, Tradex and MIB"*. A formal Notice of Discontinuance in the County Court at Central London, dated 25 March 2020, appears in Ms Rothwell's first statement.

9. Quite why the fundamental errors in the first claim arose has never been explained. By this I contemplate material from the Claimant's representatives going beyond admitting the errors in fact but instead any reasonable explanation, if possible, how they arose. Was it, for example, from misunderstanding, misinformation or other reasons that, despite knowledge of the correct procedure, the procedure adopted was incorrect? Mr Cowley's 23 March 2023 statement does not take matters any where near this far. Having at Para 13 again asserted Tradex as being "the insurers of Miss Cannon's father" (a point I don't follow, given the Defence in the First Claim) he remarks at Para 14 how the claim was discontinued *"following receipt of the Defence from Tradex due to a procedural issue relating to service upon Miss Cannon. This discontinuance caused significant professional embarrassment to the firm"*.

10. Putting for one moment aside the question why correct information as to Ms Cannon's address for service had not been fully established well before issue of the First Claim, in objective terms it is reasonable to conclude that from (i) the Defence dated 19 June 2019; (ii) the Second Defendant's solicitors 9 January 2020 letter; (iii) the Second Defendant's letter dated 13 March 2020; through to (iv) an unknown date when Counsel advised sometime before the Claimant's solicitors 24 March 2020 e-mail confirming discontinuance, the Claimant, his Litigation Friend and his legal advisors had established what had gone wrong in the First Claim and so what was needed to remedy before issuing in any second claim.

Further, it should have been clear that any second claim would require the permission of the court pursuant to r.38.7.

11. <u>"The Second Claim" : G67YJ886</u>

11.1 Nearly six months after discontinuing, the Claimant issued the Second Claim on 22 September 2020. I am not told how that period was spent in preparation for the Second Claim. I repeat, however, the conclusion that the faults of the First Claim must already have been apparent upon its discontinuance.

For reasons that are neither explained nor justified, the address for service on Ms Cannon of the Claim Form was again cited as 136 Wakefield Street. The difference was that Tradex were now added as the Second Defendant from the outset and, later, a Third Defendant, sued as "*Motor Insurance Bureau*".

11.2 Service upon the Second Defendant in January 2021 (and so, again, up to the deadline for service of the Claim Form and thereby negating any saving amendments or other relevant Application) led to the Second Defendant's Defence dated 10 February 2021. That relied upon various points, including:

- The failure of the Claimant to serve the First Defendant at an address at which she was resident;

- The absence of permission under r.38.7 to pursue the proceedings, given discontinuance of the First Claim;

- The non-payment of the Second Defendant's costs due from the First Claim;

- The absence of any operative insurance for the car being driven by the First Defendant at the time of the accident and so the inapplicability of any contemplated liability of the Second Defendant.

11.3 The Third Defendant, having been added subsequently as a defendant, clarified that its proper title was the "*Motor Insurers' Bureau*", but agreed the correct could be treated as carried over without the need for formal amendment, in its defence dated 30 April 2021. At Para 7, the Defence required the First Defendant to be correctly served, referring (as had the Second Defendant) to the address on the Claim Form as not being the First Defendant's residence and relying upon CPR 6.9(3). The absence of permission under r.38.7 was expressly pleaded.

11.3 The Claimant had certified service upon the First Defendant in an N215 dated 13 January 2021 but it is now accepted that, owing to repeated use of the 136 Wakefield Street address, was incorrect. I note within Exhibit GRW 6 of Ms Rothwell's first statement is a copy of the recorded delivery envelope sent (and frank marked 13-01.21) by the Claimant's solicitors enclosing the Claim Form and supporting documents. That has a Royal Mail stamp "unable to deliver this item" with either[1] the box "address incomplete" or "addressee gone away" hand endorsed.

11.4 According to Ms Rothwell, this documentary confirmation of non-service on the intended address for the First Defendant came about only when the Claimant's solicitors disclosed to the Second and Third Defendants on 7 April 2021 a number of documents pertaining to service. The various documents are itemised by Ms Rothwell and seem to lead to the conclusion that the Claimant may have been attempting to serve the First Defendant at various other addresses at the time but, critically, the damaging evidence was of ineffective service at the (only) address cited on the Claim Form.

11.5 It will be readily apparent to any litigator that by choosing to serve the Claim Form in the Second Claim close to the expiry date for service was particularly courting with disaster in this case where, as far back as December 2019, the Claimant's solicitors had been informed that the First Defendant's address was likely to be that of her parents in 200 South End Road, Rainham, Essex and not 136 Wakefield Street.

11.6 In support of the Third Defendant's 1 December 2021 Application to strike out the Second Claim, Ms Rothwell describes investigatory steps taken by the Second Defendant to undertake enquiries as to the First Defendant's residence. That research had established that the First Defendant had associations with 200 South End Road evidenced from October 2019 but, conversely, no evidenced links to 136 Wakefield Street. The Third Defendant had also conducted its own independent research, which established links between the First Defendant and 200 South End Road between 2010 and 2021. She was also recorded on the electoral role from 2020 to 2021 at another

[1] Ms Rothwell at Para 10 b. suggests it is the latter but it is difficult to tell from the copy provided to the court. Either way, it is clear that delivery had not taken place.

address 142 Macon Way, Upminster. There were no references to her being associated with 136 Wakefield Street in their research either.

The statement predictably refers to the provisions in CPR 6 for service at a defendant's last known address but the obligation at r.6.9(3) to take reasonable steps to ascertain the address of a defendant if the claimant has reason to believe that a defendant no longer resides at the apparent "last known address". The Application submitted that the Claimant had failed to take any reasonable steps to ascertain a suitable address for service upon the First Defendant.

11.7 I comment that is very difficult to understand why the very steps taken by the Second and Third Defendant's could not have been taken before issue of the Second Claim, given the very clear indications during, and the experience of having to discontinue, the First Claim.

11.8 Mr Cowley's commentary on the Second Claim is similarly brief in assisting the court on such questions. He suggests at Para 16 that the MIB had been added to the Second Claim "*as there was <u>now</u>* [my emphasis] *a dispute as to whether the vehicle itself was insured*", and makes no reference to this having been a pleaded point in the First Claim. He explains that "*initially*" the r.38.7 requirement had been "*not appreciated by the handler at the time*". The r.38.7 Application was not issued until 10 November 2021: so about ten months after service, over twelve months after issue and so over eighteen months after the First Claim had been discontinued.

11.9 The Claimant's r.38.7 Application never proceeded to the hearing listed for 7 January 2022, neither the Second Defendant's strike out application. Without elaboration, Mr Cowley simply states at Para 24 *"This second set of proceedings against the three Defendants, Miss Cannon, Tradex and the MIB were subsequently discontinued on 21st December 2021"*.

12. "<u>The Third Claim</u>": QB-2022-000886

This is the current claim, as issued on 22 March 2022. The Defendants are now (i) Ms Cannon, the driver and (ii) The MIB.

The Rule 38.7 Application, though dated 23 March 2022, was not issued on CE File until 8 April 2022. On 11 October 2022 the Claimant submitted to the court a completed Masters Appointment Form, as provides the parties' time estimates and preferred dates for an Application. The form should be submitted at or very shortly after the point of issue of an Application and hearings are not listed until the form has been completed.

13. <u>Procedure</u>

13.1 Rule 38.7 is silent how or when a claimant should seek permission. The notes in the White Book refer to conflicting views as to whether the Application has to be concluded before issue in order for any issued proceedings to be valid. In the current case the Claimant made the application after issue but prior to service, anticipating that the application could be heard prior to service. This did not occur, the Claimant explaining that time was needed for him "to serve proceedings to comply with CPR 7".

I add that without proper presentation of the relevant information required by the court, in particular a completed Masters Appointment Form, the Claimant's Application would not have been listed before then anyway.

13.2 Fortunately, no point taken by the Defendant that the Application is too late.

13.3 There are various reported authorities providing assistance on the operation of the Rule. Counsel have directed me each to their selections. There seems little fundamental difference between the parties on the guidance available, save that Mr Exall seeks to refine the criteria for permission by relying upon – as "the appropriate approach" – the following passages in *Western Power Distribution (South Wales) Plc v South West Water Limited* [2020] EWHC 3747 (TCC).

Joanna Smith QC, sitting as High Court Judge:

> 39. Having taken into account the submissions of the parties and all of the evidence, I disagree with Mr Coles. I note in particular the recent decision of the Court of Appeal *in Playboy Club London Limited v Banca Nazionale del Lavoro SPA* [2018] EWCA Civ 2025 , in particular the judgment of Sales LJ at [54] where he says this:
>
> "The burden is on BNL as defendant to identify reasons why bringing the second claim is manifestly unfair: *Michael Wilson & Partners v Sinclair* [2017] EWCA Civ 3; [2017] 1 WLR 2646 , at [100] per Simon LJ (with whom the other members of the court agreed). The courts will not lightly shut out a party from pursuing a genuine claim, unless abuse of process can clearly be made out: *Stuart v Goldberg Linde* [2008] EWCA Civ 2; [2008] 1 WLR 823 , at [65] per Lloyd LJ. 'It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process …': *Michael Wilson & Partners* at [48(5)] per Simon LJ."
>
> 40. Applying a broad merits-based judgment, there is, in my view, no manifest unfairness in this case in allowing the claimant to pursue the claim for the following reasons…..

13.4 Mr Exall accordingly submits that (i) the burden is on the Defendant to establish why bringing this claim is "manifestly unfair" and (ii) the court will not lightly shut out a party from pursuing a genuine claim unless abuse of process can clearly be made out (iii) the court should approach the matter by taking a "broad merits-based" approach. The Claimant submits that the present action cannot be treated as an abuse of process on the basis of the procedural errors in the earlier proceedings. The Claimant submits that because of the absence of evidential prejudice to the Defendant and limitation continuing to run owing to the Claimant being a Protected Party, the merits of permitting the present claim to continue justify permission. Mr Exall elaborated that because the Claimant cannot give evidence owing to his condition and the First Defendant being highly unlikely to be co-operative, the issue of the circumstances of the accident and hence accident reconstruction on the issue of contributory negligence are no different to what they always have been: the same evidence is there to be assessed.

Mr Exall sought initially to mollify the obvious adverse impression presented by the catalogue of errors in the previous claims by pointing out that they did not arise by reason of any attempt deliberately to flout the rules. I was referred to Para 17 of Mr Cowley's witness statement suggesting that it seemed that the fee earner at the time of the Second Claim (who has since passed away) simply lacked the relevant procedural knowledge "initially".

During the hearing when invited, however, Mr Exall conceded that ignorance of the relevant procedure and requirements realistically had to be described as negligence.

14. Mr White on behalf of the Second Defendant disputes that r.38.7 amounts to a test of manifest unfairness and distinguishes the facts and circumstances of *Western Power*. Moreover, he submits it is clear from other authorities, particularly from the Court of Appeal, that the ambit of discretion and consideration by the court is far wider and ultimately guided by the fundamental requirement of explanation for the previous error(s) or default as gave rise to the

discontinuance. Mr White emphasises Briggs LJ in *Hague Plant Limited v Hague and Others* [2014] EWCA Civ 1609.

At [61] Briggs LJ noted that the then edition of the White Book used the phrase "exceptional circumstances" as characteristic of the sort of explanation likely to be required in an application for permission under Pt 38.7 and commented

> "... but it is dangerous in my view to erect that as a test imposed by the rules, not least because of its inherent uncertainty. To that limited extent the judge may have mis-described the ambit of the court's discretion to give such permission. The real question for the judge was whether, having abandoned the de facto directorship claim ... a sufficient explanation was offered for its re-introduction to overcome the court's natural disinclination to permit a party to re-introduce a claim which it had after careful consideration decided to abandon."

15. In *Captain Saulawa & Anor v Captain Abeyratne & Anor* [2018] EWHC 2463 (Ch) Chief Master Marsh at [13] similarly drew upon explanation by way of background to the discontinuance, and court resources reflecting disinclination towards repeated claims, as highly pertinent:

> "... the way the court should consider the matter was to consider the relevant conduct of the parties, to consider prejudice and to consider whether there is any indication of harassment or other matters. In short, it seems to me that it is right that the court should look at the circumstances in which the discontinuance took place; but the court is also entitled to look at the position in the round, to have regard to the interests of justice and also to have regard to the not unimportant factor of the proper use of court resources."

16. Mr White points out that *Western Power* was a case where the second claim arose from facts unknown to the Claimant at the time of issue of the first and where the Claimant had fully paid the (then) Defendant's costs of the first claim. In contrast, the present claim sees no new facts or events, simply the Claimant and his legal advisors seeking to make good two, not one, previous attempts. Further, the Defendants' costs in neither of the former claims have been paid, so it fairly can be said that the Second Defendant approaches this claim already at a financial disadvantage.

17. I agree with Mr White that *Western Power* was a different case and do not accept it can be read as establishing the specific and distilled test suggested by the Claimant. At [22], in contrasting r.38.7 with r.17.4 (amendment after limitation), the Deputy Judge remarked how r.38.7 was different because it is "concerned with ensuring that the putative defendant is not placed in a situation where he must be twice vexed with the same matter". Hence, following the dicta of Briggs LJ in *Hague* [27], a "key issue" is whether there is sufficient explanation for the subsequent claim [29].

Paragraphs [39] and [40] relied upon by the Claimant therefore have to read in context. The Deputy Judge there was dismissing a submission from the defendant that the well known principle in *Henderson v Henderson* had a direct application in a r. 38.7 application and thus a second claim had to be treated as an abuse of process. Hence consideration, and the singling out, of the procedural concept of unfairness was in the context of considering abuse of process; as explored in *Playboy Club London Ltd*, a decision concerning whether a claim in deceit should have been relied upon in a previous claim and so whether the subsequent claim amounted to an abuse of process.

On my reading, at [40] the concept of unfairness (manifest or otherwise) was quite clearly not intended as an exclusive or dispositive test but one of various factors listed as falling within the requisite "broad merit-based judgment" accepted at the very commencement of [40].

In passing, I remark, that if strict analogy with the reasoning in We*stern Power* is relied upon, several of the factors listed in the case as relevant at [40] are very different indeed from this case and so undermine the Claimant's intended approach:

(i) The very early discontinuance of the first action;
(ii) Minimal inconvenience to the defendant;
(iii) An actual payment towards the defendant's costs; and
(iv) The absence of what might constitute "unjust harassment" of the rejoined defendants.

Hence, it was "in accordance with the overriding objective" to permit the new claim [42].

18. I am satisfied that "unfairness" is therefore but one of the various factors for consideration within r.38.7, no single one of which is always bound to be more authoritative than another. It is plain from other authorities as to the far broader and non-exclusive nature of the considerations to be applied.

19. In *Wickham v Riley* [2020] EWHC 3711 (Fam) the claimant's son was granted permission pursuant to r. 38.7 to issue a further claim against his father's estate. At paragraph 30 of the Judgment, Williams J held that the approach to such applications should be as follows:-

"i) The application is to be considered in the light of the overriding objective to deal with cases justly.

ii) Applications for permission to bring a new claim made after the expiry of a relevant limitation period should normally be refused whether or not the claim itself was issued before the expiry of the limitation period or afterwards.

iii) The nature of the limitation period will be relevant. If the limitation period is a purely discretionary one the approach will be different to cases where the limitation period is more rigid.

iv) There is a public interest in finality in litigation which must be relevant to the question of whether permission should be granted.

v) The court must consider whether a sufficient explanation has been offered for the reintroduction of a claim which had been abandoned. The circumstances in which the claim was abandoned will be relevant. If the claimant had been misled or tricked by the defendant, where important new evidence had come to light or where there had been a retrospective change in the law it is likely the court would give permission.

vi) The merits of the underlying claim will be relevant. Where the claim has no reasonable prospect of success or is an abuse of process this will be relevant.

vii) Other aspects of the overriding objective will be relevant."

20. In the very recent case of *Astley v Mid-Cheshire Hospitals NHS Foundation Trust* [2022] EWHC 337 (QB), Eyre J also confirmed the broader approach to be adopted. At [46], discussing the similarities but also distinctions between Pt 38.7 and *Henderson v Henderson* or *Johnson v Gore Wood* principles:

> "The *Johnson v Gore Wood* requirement that the court is to make a broad merits based assessment and the need for finality and for the avoidance of abuse of process which underly the *Henderson v Henderson* principle can of course be relevant when the court is considering giving permission under Pt 38.7. Looking at the merits broadly and considering manifest unfairness will often be relevant factors. It may well be on occasion relevant as a check to see whether, if the earlier proceedings had been resolved in a way different from discontinuance, there would be an abuse in bringing fresh proceedings. However, none of that, in my judgement, is the actual test to be applied. Instead, those are matters which go into the circumstances to be considered when the court is looking at matters in the round and applying, as it should, in my assessment, Briggs LJ's test to see if there is sufficient explanation given to overcome the court's disinclination to allow further proceedings arising out of the same circumstances. Consideration of the merits broadly and potential abuse are elements in the process described by Chief Master Marsh in the *Captain Saulawa* case but they are not the governing criteria. They will often be very potent factors in what is an exercise of discretion but the test must be that laid down by Briggs LJ".

21. Whilst openly acknowledging the sequence of errors, the Claimant submits that permission should be given to continue with the Third Claim. Mr Exall emphasised this is a claim of considerable value where, subject to any deduction for contributory negligence, the Claimant is entitled to damages. Further, the issue of contributory negligence is not evidentially

prejudiced by the delay caused by the errors. The accident reconstruction expert evidence will follow the same path as it always would have done. Whilst conceding it is not necessarily a card that wholly trumps the desire for finality in litigation, Mr Exall submits that absence of evidential prejudice is a very significant factor.

I am asked to note the distinction between the errors of his solicitors and the absence of any events caused by him personally or his family. I have no direct evidence of this and comment that the feature of a Protected Party having a Litigation Friend is to ensure compliance with court rules and procedure.

Further, owing to limitation still running Mr Exall submits that it would remain open to the Claimant to issue a fourth claim if he wanted.

22. The Defendant emphasises the circumstances and nature of the errors in which two, not one, claims have now been discontinued in respect of the same cause of action. Mr White drew my attention to the distinction made by HH Mathews at [46] in *Ward v Hutt* [2018] EWHC 77 (Ch) between a party seeking to amend and thereby bolster their claim in an existing claim and a party repeating the same claim as had formerly been voluntarily given up. In this case, that feature has been twice repeated. Mr White submits that the starting point in r.38.6 to act as a check on re-litigating previous disputes given the public interest in the finality of litigation. Considerations of saving time and resource, or at least allocating the same proportionately, are likewise at the centre of the Overriding Objective.

23. Conclusion

I look at matters in the round and balancing the various factors. No one factor is conclusive but the most significant factors have to be the circumstances in which two sets of proceedings for the same cause of action were discontinued. Here, explanation is key, whether as seen specifically in the context of r.38.7 or in the added context of *Denton* considerations. On the latter test, it is openly conceded by the Claimant that the breaches are serious and significant, not trivial.

It is regrettably a very striking feature of this case that there is no explanation for the catalogue of errors in this case other than ignorance of procedural rules and a failure to establish evidence in a way that other defendants had proved could relatively easily be obtained. Evidence, moreover, that had then been provided to the Claimant before issue of the Second Claim. Ignorance of procedure is hardly a persuasive explanation, even from a litigant in person. Neither would overwork or lack of reasonable resource to investigate if, by inference, those are taken to be an implied explanation. In my judgment, the unfortunate errors in the First Claim were entirely amenable to correction and remedy in the Second Claim. On the facts and evidence as explored, the failure to explain in this claim how and why in the Second Claim there were repeated the same (in the case of retaining an established incorrect address for service for the First Defendant) or similar errors in the First Claim is serious and profound.

Frankness of acknowledgment of error is not a complete substitute for adequate explanation. Were it to be, then practically every application for relief would be granted.

I am unpersuaded by the suggestion that the Claimant theoretically can still continue to bring claims owing to limitation still running. Whilst the authorities are careful to draw distinctions in analogies between the operation and considerations of r.38.7 to those in abuse of process Applications, it seems to me that the repeated issue of claims arising from precisely the same cause of action would amount to an abuse of process in its own right. Either way, however, the submission has little appeal in seeking the exercise of discretion in this third claim.

I am unpersuaded that the absence of evidential prejudice in a claim whereby the Claimant is acknowledged in principle to be entitled to receive certain damages is sufficient to justify the continued engagement of resources by either the court or the defendant(s). I agree with the Defendant's submission that, although not always a palatable one, on the facts of this case the Claimant has an obvious cause of action against his present solicitors. Here the very points relied upon about undenied entitlement of damages in principle and lack of evidential prejudice are at least as compelling in concluding that permission should not be granted to continue with this claim as they are why the Claimant should instead consider looking to his solicitors via their indemnity insurance.

In conclusion, having regard to the resources which have already been taken up in dealing with this claim, the overriding objective and the court's natural disinclination to permit repeated litigation without convincing explanation and justification, the Application is dismissed. The claim should be struck out.