Case No: J00CL517

IN THE COUNTY COURT AT CENTRAL LONDON

Date: 12/02/2025

Before :

HHJ BLOOM

- -

Between :

MICHAEL DAVIDSON	**Appellant**
- and -	
THE LONDON CENTRE OF PSYCHODRAMA (a firm)	**respondent**

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- -

Mr Niazi Fetto KC and Mr Bruno Quintavalle (instructed by **Andrew Storch Solicitors**) for the **Claimant**
Mr Elliot Gold (instructed by **Clifford Chance LLP**) for the **Defendant**

Hearing dates: 6th December 20024

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Approved Judgment

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

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HHJ BLOOM

HHJ BLOOM:

1. This is a rolled up permission to appeal and appeal hearing. The claimant (who makes this appeal) seeks to appeal a decision of District Judge Avent ("the DJ") made on 12th May 2023 when he struck out the claimant's claim under CPR 3.4(2)(a) (the statement of case discloses no reasonable grounds for bringing the claim) and 3.4(2)(b) (the statement of case is an abuse of process).

2. I was extremely ably assisted by oral and written arguments from leading counsel for the claimant and senior counsel for the Defendant. Unfortunately, as the case could not start until 11.30am and we sat until 5.45pm, there was no opportunity to give judgment on 6th December 2024. I was then away for a month hence a small delay in this judgment being handed down.

3. There are 4 grounds to the appeal albeit Grounds 2 and 3 are interlinked. Ground 1 is whether the DJ was wrong in his conclusions on CPR 11 as the claimant argued that the defendant had submitted to the jurisdiction of the court and could not challenge the same thereafter. As regards Ground 2, the claimant argued that the wrong approach to strike out claims was taken by the judge so that he wrongly considered evidence and reached findings of fact. As regards Ground 3, the DJ wrongly concluded that the statement of case was unclear and that this was an abuse of process. Ground 4 related to the limitation. The DJ was said to have wrongly applied the same. It was accepted by the defendant that if that was right, the claimant was in time for claims under Part 3 and 6 of the Equality Act 2010 ("the Equality Act") in respect of his final request for enrolment which was made in August 2021.

The Background

4. This was set out in the skeleton argument of the defendant and save as to paragraph 3 was not disputed. I have therefore repeated the same below save as corrected by leading counsel for the claimant

5. The claimant is the founder and chief executive officer of a charity concerned with distributing information on the traditional Christian view of sexuality, and the pastoral care of persons described as being formerly lesbian, gay, bisexual, or transgender.

6. On 12th February 2020, the claimant applied to enrol on one of the defendant's courses. He stated that he had a conscientious objection to guidance from the UK Council for Psychotherapists ('UKCP') which promotes/endorses a Memorandum of understanding on conversion therapy in UK.

7. On 14th February 2020, the defendant refused the claimant's application on the basis that it was fully aligned with the UKCP guidelines and ethics.

8. On 24th September 2020, the claimant asked the defendant to reconsider his application. The same day, the defendant replied that its decision was final for the reasons previously expressed.

9. On 26th August 2021, the claimant made a further application. The following day, the defendant referred the claimant to its earlier email.

10. On 22nd February 2022, the claimant filed a claim against nine defendants at Central London County Court. The initial claim was said to be against multiple parties.

11. On 10th July 2022, the claimant filed Particulars of Claim("POC") alleging direct discrimination, victimisation and indirect discrimination, and seeking aggravated and exemplary damages. The POC included three defendants and was said to relate sections 29, 85 and 91 (Parts 3 and 6) of the Equality Act.

12. On 9th August 2022, the defendant filed a Defence contending *inter alia* that as it was a "qualifications body", the claim fell within Equality Act 2010 Part 5, the county court had no jurisdiction to hear the claim, and the claim was out-of-time.

13. On 16th September 2022, the defendant filed an application to strike-out the claim on the grounds that it disclosed no ground for bringing it and/or was an abuse of the court's process. The defendant filed a statement from its solicitor, Ms Stewart, in which she set out why the defendant was not a "service provider", "school" or "further and higher education institution" and hence the claim was wrongly brought in the County Court. Her statement set out the functions and activities of the defendant and why it was not one of those three bodies and hence the relevant parts of the Act did not apply and there was no basis for bringing the claim.

14. On 1st March 2023, District Judge Avent heard the application. The claim in respect of section 85 which relates to "schools" and "pupils" was dropped. The claimant had not filed any evidence in response to that of the defendant but Mr Quintavalle, Counsel for the claimant below, spent some time explaining to the DJ why the defendant was arguably within the relevant sections ie a "service provider" or "university" or "further and higher education institution" . Further he argued that there was no basis on which the court could consider a jurisdiction argument.

15. On 26th May 2023, the judge handed-down his decision striking-out the claim. His judgment which is lengthy and detailed is in the bundle. The claimant appealed the decision which was listed before me as a rolled-up hearing.

GROUND ONE The Court was wrong to restrict the scope of the term "jurisdiction" in CPR 11 and the judgment in *Hoddinott v Persimmon Homes (Wessex) Limited* [2007] EWCA Civ 1203 to cases concerning jurisdictional defences in respect of the initiation of the claim, non-service, mis-service or the validity of the claim form.

16. The claimant said that CPR 11 and the case of *Hoddinott* meant that the defendant could not raise the issue of want of jurisdiction as they had submitted to the same by filing an Acknowledgement of Service ("AOS") in which they did not dispute jurisdiction and filed a Defence. The DJ concluded in para 152-154

> "152 That, in my view, rather misses the point. In the line of authorities referred to in the White Book, of which ***Hoddinott*** is but one example, they are all instances where 'but for' the various transgressions of failing to serve a claim form or letting a claim form expire etc, the Court would have had jurisdiction to deal with the claim in any event. The argument in all those cases was that because of the transgressions the correct approach should have been for the defendants to have applied under CPR 11 to assert that because of the transgression (e.g. that the validity of the claim form had expired) the Court no longer had jurisdiction to deal with the matter. Where the defendant failed to do that they were to be treated as having accepted the jurisdiction of the court notwithstanding that they would otherwise have had a procedural defence.

153. In this instance, however, the Act specifically excludes the County Court from having any jurisdiction at all to deal with Part 5 cases and whilst jurisdictional in nature the LCP are advancing it as a Defence which, if successful, would operate as a complete defence.

154. Mr Quintavalle is therefore not, in my view, correct to say that the LCP have accepted the Court's jurisdiction at this stage because the Court, as a matter of law, has no jurisdiction in the first place. What the LCP is raising, and has properly pleaded, is whether the Act can apply at all, which operates as a defence and can be raised at this stage. It is not a CPR 11 point."

17. CPR 11 is headed "Disputing the Court's Jurisdiction".

CPR 11(1) A defendant who wishes to

(a) dispute the court's jurisdiction to try the claim or

(b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction and should not exercise any jurisdiction which it may have.

18. The Rule provides that the defendant must files its AOS in accordance with CPR 10 and doing so is not a submission to jurisdiction; any application under CPR 11 must be made within 14 days of filing the AOS and be supported by evidence (CPR 11.4(a)). If the defendant does not make the application within 14 days of filing its AOS, the defendant "shall be treated as having accepted that the court has jurisdiction to try the claim".

19. Mr Fetto KC argued that as the defendant filed an AOS and did not make a CPR11 application but filed a Defence, it cannot challenge the jurisdiction of the court to hear the claims on the basis of its personal status. The defendant has to be treated as having accepted the court's jurisdiction "to try the claim". He said that section 114 of the Equality Act has given the county court jurisdiction to try Part 3 and Part 6 claims and this claim is brought by reference to those Parts, hence the court has jurisdiction.

20. The case of *Hoddinott* was brought to my attention and relied on heavily by the claimant in this context. I was referred to the decision at paragraphs 21-24 where the court held that the definition of "jurisdiction" is not exhaustive. "The word "jurisdiction" is used in two different senses in the Civil Procedure Rules. One meaning is territorial jurisdiction as used in CPR 2.3 and rules regarding service out of the jurisdiction (CPR 6.20). But in CPR 11, the word does not denote territorial jurisdiction but is a reference to the court's authority to try a claim.

"There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim (CPR 11(1)(b). Even if Mr Exall is right in submitting that the court has jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court should not exercise its jurisdiction to do so in such circumstances. In our judgment CPR 11(1)(a) is engaged in such a case. It is no answer to say that service of a claim form out of time does not if itself deprive the court of its jurisdiction and that it is no more than a breach of a rule of procedure namely CPR 7.5(2). It is the breach of this rule which provides the basis for the argument by the defendant the court should not exercise its jurisdiction to try the claim."

The court concluded that therefore CPR 11 was engaged.

21. Mr Fetto KC submitted that the court has jurisdiction to deal with the claim as pleaded under Parts 3 and 6. The case law shows that the aim of CPR 11 is to ensure jurisdictional points are taken early so as to save time and costs. He took me to Dicey and Morris and said that by filing the Defence, the defendant had submitted in personam to the jurisdiction. CPR 11 is addressing the court's authority or power to try the claim. The defendant has submitted to the court's jurisdiction to hear claims under Part 3 and 6 of the Equality Act by filing its Defence. The defendant cannot any longer rely on its personal status to argue that the court does not have jurisdiction.

22. Mr Gold took me through the history of the genesis of CPR 11. He took me back to the earlier RSC Order 12.8 and applications to stay on forum conveniens grounds which were brought together under CPR 11. He pointed to the fact that the old RSC Order 12.8 provided that a defendant who wished to dispute the jurisdiction of the court by reason of irregularity or other ground was required to give notice of intent to defend and apply for orders such set aside writ or service etc. He reminded me of the Civil Procedure Act 1997 section 1(2) which provides that the Civil Procedure Rules Committee must make rules of court called Civil Procedure Rules to govern the practice of the County Court, High Court and Court of Appeal. The aim of the rules is to secure that the justice system is accessible, fair and efficient.

23. Mr Gold argued that a "qualifications body" is a body that confers a relevant qualification needed for a particular trade and that it is not allowed to engage in unlawful discrimination under section 53. Section 53 fell within Part 5 and hence was only actionable in the Employment Tribunal. A body cannot be a qualifications body and an educational institution (section 54(4)(c) and Part 3 cannot apply to discrimination already prohibited by Part 5 (see s28(2)).

24. The point was made that the county court is an inferior court of record. The court cannot act outwith the power that Parliament has bestowed on the court by statute. CPR 11 applies where the court can waive jurisdiction. It is of no relevance where there is no jurisdiction at all. Mr Gold took me to *R v The Judge of County Court of Shropshire* [1887] QB 242 where the court made the point that there may be cases where the High Court will not grant prohibition because a party has submitted to the jurisdiction of the court, but that argument does not apply where there is no jurisdiction for the inferior court to act. In those circumstances, the High Court will act to keep the inferior court within its jurisdiction. He took me to Forsyth *v Forsyth* [1948] Probate 125 where Court of Appeal said that cases involving submission to a competent foreign court had "no application to courts of inferior jurisdiction in this country which derive their jurisdiction from statute. If such an inferior court lacks jurisdiction parties cannot, by agreement or otherwise, confer jurisdiction upon it. An instance of this principle is to be found in *Foster* v. Usherwood (1877) 3 Ex D1.3, where, discussing the jurisdiction of the county court, Bramwell L.J., said: "It is urged that consent has waived the objection. I do not understand what is meant by waiving the objection. In this case the registrar had no jurisdiction to make the order to try the action in a county court. The parties cannot by consent confer a jurisdiction which does not exist."

25. I was referred to Sedley LJ in *R(Shah) v IAT* [2004]EWCA Civ 1665 where he said regarding CPR 11 that "It may well be that in the class of case in which jurisdiction can be shown not to exist at all- the first class contemplated by CPR 11(1) - the procedural inhibitions on taking the point have to yield …to the principle that jurisdiction cannot be created by consent or acquiescence."

26. In *R(Williams) v SS Energy and Climate Change and others* [2015] EWHC 1202 the issue of jurisdiction was not raised until the conclusion of the rolled-up permission

hearing. Notwithstanding, Lindblom J stated in the context of CPR 11, that if there is a legislative bar on the court's jurisdiction such as a statutory time limit within which the relevant challenge must be made, the court cannot have jurisdiction conferred upon it by procedural rule. He concluded that there was no jurisdiction to determine the claim and it could not be generated by agreement or mutual mistake of the parties.

27. Mr Gold accepted that none of these authorities considered CPR 11 in detail but said that when read with the history of CPR 11 and its inception it is clear that it can only be referring to a challenge to the contingent want of jurisdiction that a party could waive. It cannot be referring to total want of jurisdiction that cannot be waived.

28. Mr Fetto KC responded that *Shah* was obiter; the court in *Williams* did not have *Hoddinoff* cited to it. Older cases are not cases where the CPR was relevant as they predated their existence so were of limited assistance.

Conclusion

29. I agree with Mr Gold's analysis. The historical background to this rule is important in my assessment. It is clear that the Rule arose from an amalgam of issues relating to forum non conveniens and RSC Order 12.8. The focus was on irregularities that would mean a defect of jurisdiction could be waived. Whilst *Shah* was obiter it was cited and approved in *R(Williams)*. I accept that *Hoddinott* was not cited but that does not take away from what in my view is the correct approach. It cannot be that a party can waive the issue of jurisdiction where the County Court has no such jurisdiction. This court is an inferior court. Parliament has conferred jurisdiction on the County Court in respect of some but not all parts of the Equality Act. The defendant cannot be said to have submitted to the jurisdiction of the court if the court has no such jurisdiction at all. The procedural rules of CPR 11 cannot give the claimant a jurisdiction that does not as a matter of law exist. If as a matter of statute, this court cannot hear a claim, I do not understand CPR 11 to be conferring jurisdiction on the parties. CPR 11 is addressing situations where there are procedural matters that could mean the court in the particular circumstances has no jurisdiction as the claimant has failed to act in a certain manner; however, aside from the procedural matters, the court has jurisdiction. I do not read *Hoddinott* as purporting to give the court jurisdiction to hear a cause of action that the court would not otherwise have as a matter of statute. If the defendant was within Part 5 of the Act, then there was no jurisdiction in the County Court to hear the claim. The claim must fail as the defendant was not within Part 3 or 6.

30. I am satisfied that Mr Gold's analysis is correct. The procedural rules take second place to statute. If the court as an inferior court of record is not entitled to hear a cause of action as it does not fall within its remit, the defendant cannot submit to the jurisdiction of the court. The whole claim is outwith the court. Where there is a procedural issue which means that, if established, the court has no jurisdiction to consider the claim, that is very different to situations where there is no underlying jurisdiction. For these reasons the DJ reached the correct decision. This is a rolled-up hearing. I give permission to appeal but dismiss the appeal on this ground.

Grounds 2 and 3: Error in approach to strike out under 3.4(2) by making findings of fact and straying beyond the pleadings alternatively wrongly finding the pleadings were an abuse of process due to the alternative bases set out in the statement of case .

31. I bear in mind that the defendant's application below was only a strike out application and there was no summary judgment application.

32. Mr Fetto KC submitted that these two grounds overlap each other. As regards CPR 3.4(2)(a) I was taken to *MF Tel Salr v Visa Europe Ltd* [2023] EWHC 1336 at para 34 where Master Marsh considered CPR 3.4 and CPR 24.3 and said

> "(1) The focus under CPR rule 3.4(2)(a) is on the statement of case and for the purposes of the application the applicant is usually bound to accept the accuracy of the facts pleaded unless they are contradictory or obviously wrong.
>
> (2) By contrast under CPR rule 24.2 the court is considering the claim or an issue in it and may be required, without conducting a mini-trial, to examine the evidence that is relied upon to prove the claim. The court is permitted to evaluate the evidence before it and to consider the evidence that can reasonably be expected to be available at trial. Furthermore, there is a second limb to CPR rule 24.2 which the applicant must establish even if the defendant has no real prospect of success at a trial.
>
> (3) The test for striking out as it has been interpreted leaves no scope for the statement of case showing a claim that has some prospect of success. The claim must be unwinnable or bound to fail. Under CPR rule 24.2 it is not good enough for a point to be merely arguable, it must have a real prospect of success. An application to strike out might fail whereas the same application for summary judgment might succeed.
>
> (4) In *High Commissioner for Pakistan in the UK v National Westminster Bank* Henderson J merely observed that no one in the claim had submitted there was a material difference between the two tests. That is not the same as the point receiving full judicial consideration and being determined."

33. The point made by Mr Fetto KC is that the statement of case was clear and, for the purposes of the application before the DJ, the court could not consider evidence and make findings of fact. But that is what the Judge did in this case. I was taken to the judgment at paragraph 36 where the judge said that the court must take a claimant's case at its highest and assume the facts to be true. He referred to *Arcelormittal North America v Rula* [2022] EWHC 1378 (Comm) where at paragraph 29 Picken J said that at [33] when considering a strike out application, "facts pleaded must be assumed to be true and evidence regarding the claims advanced in the statement of case is inadmissible. .. consideration of the application will be confined to the coherence and validity of the claim as pleaded".

34. The DJ considered that further to CPR PD 3A 5.2 evidence could be considered. The PD provides that "While many applications under rule3.4(2) can be made without evidence in support the applicant should consider whether facts need to be proved and, if so, whether evidence in support should be filed and served".

35. Mr Fetto KC made the point that in paragraph 38 of the judgment the DJ said that he was not being asked to make findings of fact on disputed evidence but in essence was being asked to "effectively determine two preliminary issues: firstly whether the proceedings were issued in time and if so secondly whether the court has jurisdiction to deal with the matter". The Judge did in fact determine it as a preliminary issue which was the wrong approach.

36. Mr Fetto KC pointed to the fact that in considering the strike out application, the issue that the court considered was whether the defendant was a body that fell within section 91(10) of the Equality Act 2010 which includes not only universities but other higher education institutions. The Judge said in his judgment that the issue was one of law and objective fact. By concluding that the Defendant was not an "institution" the court had

done precisely what was prohibited in a strike out and reached conclusions on disputed facts.

37. Further the DJ had wrongly criticised the lack of evidence provided by the claimant to support its claim but in doing so had ignored the nature of a strike out application under CPR 3.4(2), which was confined to consideration of the statement of case as pleaded. The transcript of the hearing and the judgment shows that the Judge considered evidence or lack of it and made findings of fact about the nature of the defendant body.

38. Overlapping with the above, Mr Fetto KC argued that the DJ was wrong to conclude that there was an abuse of process as the cause of action was not properly pleaded. The judge wrongly concluded that it was not possible to determine the true case brought. This was wrong. The pleading plainly identified the case brought; alternatives were pleaded but that is not an abuse of process. Many pleadings plead cases in the alternative. None of the cases advanced by the defendant in fact supported the argument that the DJ was entitled to strike out the pleadings as an abuse of process. Indeed, the defendant had no difficulty in identifying the case and pleading to the same. There was no abuse of process in this case. But in any event, if the pleadings were defective, the proper course was to permit amendment as the first step, not to strike out.

39. Mr Gold countered that the decision was one that the DJ was entitled to reach and was correct. The court was entitled to consider evidence (see *S v Gloucestershire CC* [2001] Fam 313 at page 342 A-D). May LJ made clear evidence could be admitted and that strike out should only occur in the clearest case. The admission of evidence did not detract from the fact that the application related "centrally to the statement of case". I was referred to *AB v MOD* [2013] 1 AC 28 where the Supreme Court refused an appeal on issues relating to limitation, and to comments made in the dissenting judgment of Lord Phillips where he said that the court could not strike out under CPR 3.4 (2) unless the terms of the pleadings justifed this course. But the court had an inherent jurisdiction to strike out under CPR 3.4(5) on the ground of abuse and the Court of Appeal could have considered the overall merits of the claimants' position.

40. Mr Gold distinguished *Arcelomittal*; the case before me was not about jurisprudence but the facts before the court. This case was struck out on the basis that there was no valid claim given the identity of the defendant. The DJ at paragraphs 35 to 38 directed himself correctly as to the law. This was not a case about disputed evidence.

41. Contrary to the case of the claimant, there were no "impugned" facts said Mr Gold. The claimant had not pleaded any facts about the defendant that were impugned. This was partly because the claimant had not pleaded a factual case as to what sort of body the defendant was. The Particulars of Claim did not plead a positive case as to how the defendant was either a school or service provider or institution providing higher education services. In this case the claimant was averring three mutually inconsistent parts of the Equality Act and the defendant could not be all three. The claimant wanted the claim accepted on its face but nothing explained the nature of the case or how it was put. The Defence had put forward a positive case that it was a qualifications body and no Reply was put in. No statement in response was put in when the strike out application was made. The judge was therefore entitled to, and correctly did, conclude that there were undisputed facts before him as set out in paragraphs 14, 95 and 104 of his judgment. The judge did not impugn the facts pleaded. He considered the evidence before him. He was not resolving disputed evidential facts as to the nature or activity

of the defendant. Either the defendant was an institute within the higher or further education sector, or not. The DJ was entitled to conclude that there was no reasonable basis for bringing the claim as the claimant had never put forward a basis on which the court could find that there was an argument that the defendant was was an institution in the higher or further education sector. The pleadings were inadequate. The action of refusing permission to enrol on a course is not in itself unlawful. Acts can be unlawful but not discriminatory. The claimant has to plead the case properly so that it is clear what was the service alleged or how the case arose. I was referred to *Scipion Active Trading Fund v Vallis Group Limited* [2020] EWHC 795 at para 58 and the point made and accepted that it is essential for a fair trial that each side knows in advance the case made by the other side.

42. I was taken to *Nwabueze v University of Law* [2021] ICR 280 where the Employment Tribunal ("ET") had struck out a claim on the basis that the defendant was a university not a qualifications body. Hence the claim in the ET for discrimination was wrongly brought. It should have been brought under Part 6 in the County Court. The claimant had asserted the contrary. The ET accepted evidence from the defendant and concluded it was a university. The EAT and Court of Appeal did not consider that the ET was wrong to so conclude. The point was also made in this case that the decision is binary. Either a body is a qualification body **or** a university; it cannot be both. If the evidence showed that a body was a university, that displaced its status as a qualifications body.

43. Mr Gold took me to the judgment and at paragraph 75 onwards, the DJ analysed how he concluded that the defendant was not an institution within higher or further education. He accepted that there was a legal definition of what the bodies were.

Conclusion

44. The focus of the appeal was that the claimant's pleadings were such that the DJ was wrong to conclude that the claimant had not disclosed reasonable grounds for bringing the claim and/or the pleading was an abuse of the court's process.

45. I remind myself that under CPR 3.4(2) and PD3A the Rules permit the applicant to provide evidence if the applicant considers "facts need to be proved" (PD 3A 5.2.). PD 3A 1.7 states that a party "may believe that he can show without a trial that an opponent's case has no real prospect of success on the facts or the case is bound to succeed or fail, as the case may, be because of a point of law. In such a case the party concerned may make an application under rule 3.4 or Part 24 (or both) as he thinks appropriate"

46. In *Libyan Investment Authority v King* [2021] 1WLR 2659 at para 57.4. (albeit obiter) Nugee LJ was satisfied that the rules permitted an applicant to seek to strike out a case that was factually hopeless. That is to be read as against what Master Marsh said in *MF Tel Sarl* at para 34 (see above). But I note that what was said in that case was that the applicant must **usually** (my emphasis) accept the facts unless they are "contradictory or obviously wrong".

47. The legal propositions that applied related to whether the defendant was a school, university or other institution that fell within sections 85, 91 or was providing services within section 29 of the Equality Act. The defendant had pleaded it was a qualifications body. It had provided evidence of the same and evidence that it was not was not within

the definition of an institution for further or higher education (see statement of Rachel Stewart).

48. The claimant pleaded that the defendant was a partnership accredited by two other bodies. It pleaded that it provided professional training to therapists and that its academic qualifications were accredited by Anglia Ruskin University. No other relevant facts were pleaded as to who or what the defendant body was. It was further pleaded that the claimant sought from 2020 to enrol as a student at the defendant body as he wanted to complete his studies. He was refused and pleaded that the refusal meant he was deprived of services, namely the course of study offered by the defendant. It was asserted that there was direct or indirect discrimination or victimisation by reference to three sections namely sections 85, 91 or 29.

49. The claimant had pleaded a claim under section 85 which depended on the defendant being a school maintained by a local authority, an independent educational institution, an alternative provision Academy or a special school. This aspect of the claim was abandoned at the hearing before the DJ. Plainly on the facts it had no reasonable prospect of success as the defendant was obviously not within section 85. If the claimant was right, notwithstanding the obvious factual position that the defendant was not a body within section 85, the court could not have struck the claim out if there had not been this concession.

50. As regards section 91, this relates to universities and institutes for further or higher education. If one looks at the pleading, the claimant pleaded discrimination relying on section 91; this section applies to certain "responsible bodies" of certain institutions.

51. Section 91(10) provides that

"In relation to England and Wales, this section applies to—

(a)a university;

(b)any other institution within the higher education sector;

(c)an institution within the further education sector."

52. Responsible body is defined by section 91(12) of the Equality Act. Section 94 of the Equality Act further defines "further education" and "higher education" by reference to other Acts. Institutions within the higher education sector are defined by the Further and Higher Education Act 1992 ("FHEA"). There are different institutions described therein. They included universities, registered bodies under the Higher Education and Research Act 2017 as well as designated institutions for Part II of FHEA.

53. The defendant's argument was that the pleading of the claimant never set out any facts that explained what sort of body it said the defendant was. The pleading set out the legal framework ie Section 91 but not the facts that demonstrated that the defendant was within section 91.

54. I agree with the DJ and the defendant that the pleading did fail to disclose any reasonable grounds to bring the claim and/or was an abuse of process. The authorities are clear that in considering the same the court should look at the pleading and not make

findings of fact. But the authorities also make it clear that court can strike out when the facts are unwinnable or plainly wrong. Master Marsh in *MF* did not suggest that a strike out cannot occur where necessary facts are not pleaded to formulate a claim or the facts pleaded are unwinnable. I remind myself that the purpose of pleadings as set out in CPR16 is to set out a concise statement of facts on which the claimant relies. As the notes in the White Book make clear, the claimant should state all the material facts namely those necessary for the purpose of formulating a cause of action (see 16.0.1). Further in relation to CPR 22 and the terms of the statement of truth attached to a statement of case, the point is made that one of the reasons for the wording in the statement of truth is to prevent pleading cases where the case is unsupported by evidence and put forward in the hope that something might turn up on disclosure (see CPR 16.2.8). It is to be remembered that the statement of truth asserts that the facts set out are true.

55. An analysis of the Particulars of Claim shows some facts about the defendant were set out in the first three paragraphs but none of the pleaded facts assert the factual basis on which the legal cause of action is said to rest. The DJ was plainly entitled to form the view that the Particulars of Claim whilst setting out the legal framework ie reference to section 91 did not plead the factual basis for the claim. The nature of the defendant's identity was critical to whether the claim was bought in this court or the Employment Tribunal and equally as to whether there was any claim under section 29 at all. The court did not have to resolve disputed facts or go outside the pleading to reach its decision to strike out. I agree with the defendant that there was simply no factual basis in the pleading to impugn. The Particulars of Claim never set out a factual matrix on which the claimant could hang his case. It was not about evidence but about the very pleading itself. There were no facts pleaded to dispute. These were not facts that were "obviously wrong" or "contradictory"; there were simply no relevant facts pleaded to explain factually why the defendant was a body that fell within section 91. The court was entitled to conclude that the pleaded claim was bound to fail where there were no facts set out explaining why the defendant was within section 91.

56. The claimant never put forward a pleaded case as to which body the defendant was asserted to be. In submissions and written argument Counsel for the claimant appears to have argued that the defendant might somehow be a university or an institute for further or higher education. However, critically the pleading itself did not set out any factual basis for this assertion. The pleading was silent as to what type of body the defendant was. The defendant denied that it was a "responsible body" of a university or other institution within section 91.

57. The DJ cannot be criticised to the extent that he concluded there were no reasonable grounds for bringing the claim under section 91 and/or it was an abuse of process where no factual basis was pleaded at all for explaining why section 91 applied to this defendant.

58. Where, as here, the type of institution is the gateway into the legal framework, the claimant has to set out some factual basis as to the nature of the body that the defendant is ie a university, an institution for Further Education or one for Higher Education. These are objectively ascertainable facts. They do not depend on disclosure but are objectively evidenced. Hence the reference by the Judge to objectively ascertained facts. The claimant was bringing the claim and had to explain the basis on which as a matter of fact he asserted this defendant fell within Section 91. The pleading failed to

do so; it only pleaded that the section applied. This is not a common law cause of action but a statutory cause of action where the claimant has to plead the basic facts that are necessary to establish why the defendant falls within the section. Given the total absence of a factual basis for pleading why the defendant fell within section 91 and the defendant's clear factual position that it was not within Section 91, the court was entitled to reach the conclusion that on the pleaded case there were no grounds for bringing the claim or alternatively it was an abuse of process to plead the case without setting out any factual basis for the assertion that the defendant was within section 91. My conclusion is that the court was right to strike out the claim under section 91 on that basis.

59. The DJ did appear to go further and make findings that the Defendant was not a body within section 91 That is criticised as being outside the powers of the Judge on a strike out. However as set out in PD3A and approved obiter in *Libyan Investment Authority* the court can strike out where the case is factually hopeless. The DJ concluded the case was factually hopeless as pleaded. The argument before the judge appeared to be that information as to the nature of the defendant body was something that would come to light on disclosure. The claimant had conceded that his claim was put on different bases as the exact nature of the defendant and its relationship to the claimant was unclear (Para 11 of the judgment). But the factual relationship between the parties was known and, as the judge and the defendant made clear, there were limited bodies that could fall within section 91. The court in *Nwabueze v University of Law* both at first instance and on appeal had no difficulty in reaching a conclusion on the basis of evidence from the defendant that the defendant was a university and hence not within Part 5. By analogy, the court in this instance was entitled to conclude on the evidence before it that was uncontroverted and clear and not contrary to any facts as pleaded that the defendant did not fall within section 91, which was a closed category. But even if the judge was wrong to so conclude, he was still entitled to strike out the claim under section 91 as set out above.

60. The alternative argument that remained was that the claimant could bring himself within section 29 of the Equality Act. Section 29 provides that a "service provider" concerned with the provision of a service to the public or a section of the public must not discriminate against a person by not providing the person with that service. Further, section 28(2) makes it clear that reliance cannot be placed on this section if the discrimination or victimisation is prohibited within Part 5 or 6. So if the Defendant was either discriminating as a "qualifications body" under Part 5 or a "university or institute for education" within Part 6 then the claimant could not rely on the services provision.

61. Under Section 54 a "qualifications body" is a body that confers a relevant qualification. A "relevant qualification" is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for or facilitates engagement in a particular trade or profession.

62. The claimant's pleading set out that the defendant provided professional training to therapists and that the claimant applied to "enrol" with the defendant. He already was practising as a counsellor and wanted to gain the diploma that the defendant provided so that he could enhance his skill as a therapist. The pleading at paragraphs 20, 24 and 26 asserted that by refusing to accept him on the course, the defendant had deprived him of services, namely the course of study to enhance his skills as a therapist and reconsideration of his application.

63. The DJ was correct to conclude that this pleading was incoherent. The pleading failed to recognise that section 29 could not arise if the defendant fell within Part 5 or Part 6. Pleading an alternative cause of action is a recognised manner of pleading but the factual basis for the same must be clearly set out, especially in this context where the one cause of action is inconsistent with the other. There was a statutory provision barring the claim under section 29 from proceeding if the claim was in Part 5 or 6. No factual basis was set out as to why the claim was within section 29 ie why the provision of services pleaded was not within section 54 or within section 91. These are completely contradictory stances and the pleading is silent on this issue. The defendant is meant to be able to understand the claim against it. This is not the same as pleading that a defendant is liable in nuisance or negligence. As the defendant asserted, this was a binary position. The claim under Section 29 could not proceed if the defendant was within Part 5 or Part 6; it was statutorily barred from proceeding. Prima facie the facts as pleaded indicated there was a claim under Part 5 but the claimant had failed to set out the factual basis on which he asserted the claim was nonetheless within section 29. This was perhaps understandable given that the claimant's own position before the DJ was that it was not clear or was debatable as to nature of the defendant and/or the relationship of the claimant to the defendant. The DJ was entitled to take the view that the pleading was incoherent where the basic facts were not set out. At no point was it pleaded that the services provision was on a completely different factual premise to the claim under section 91.

64. Consideration of the pleading demonstrates that it made little sense. The DJ was plainly entitled to conclude that a refusal to reconsider an application was not a "service" that was being provided and that the claim was unarguable. But further, the pleadings on their face as a matter of fact were stated to be a claim to enrol for professional services to enable the claimant to enhance his skills. That appears to be a claim under Part 5. The pleadings fail to explain why those facts do not amount to a claim within Part 5. On the face of the pleaded case there was a coherent set of facts but, even if true, they did not disclose a legally recognisable claim as prima facie the facts appear to fall within Part 5 and no facts had been pleaded as to why instead they fell within section 29. The defendant had not disputed the primary facts were correct but asserted that therefore the cause of action was within Part 5. The conclusion of the Judge was that the pleading was incoherent and an abuse of process where the facts pleaded conflicted with the claimant's assertion that there was a service being provided and there was no factual basis for the assertion that any service provided was not within Part 6 or indeed Part 5. The Judge was not disputing the facts but was satisfied that as pleaded the cause of action was incoherent. I am satisfied that was a decision he could reach in the context of this claim where a factual basis for the cause of action was required but was lacking.

65. I would go further than the DJ. I see no reason why as in other cases such as *Nwabueze v University of Law*, the court was not entitled on the undisputed pleaded facts to conclude that the defendant was a qualifications body. The pleadings of the claimant offered no alternative factual case as to why on the facts in this instance the defendant did not fall within Section 54. The claimant had not set out an alternative factual case. Counsel could not give evidence. Any arguments he made before the DJ were not based on factual pleadings but assertions. Indeed, the claimant's position was that the claimant could not say what the exact status of the defendant was.

66. Further, as the DJ found, there was a factual disconnect between the facts that the claimant applied to enrol on the course and his argument that he was being provided a service.

67. For the above reasons I am satisfied that the judge was entitled to conclude he could strike out under CPR 3.4(2)(a) and (b).

68. The DJ is criticised for not permitting an amendment, but none was sought before him. No draft pleading was provided then or indeed before me. It is not clear that the claimant is able to articulate his case any more clearly than has been done. Before the DJ, it was asserted that the case could not be pleaded more clearly as it was not clear what the status of LCP was (para 11 of the judgment). Given that the claim relates to one statutory cause of action (section 91) that can only arise IF the Defendant is within certain defined criteria (ie a university or institute) or alternatively is NOT a qualifications body or within section 91, it was essential that this issue of identity was identified clearly in the pleading. There was no reason to permit an amendment where none was proposed and indeed the basis of the claimant's position was that it was not really possible to do better at the time. The application was made in September 2022 and it is striking that in December 2024 on appeal, no draft pleading had been provided. In *Kim v Park* [2011] EWHC 1781 the court made the point that court will give an opportunity to remedy a defect *provided there is reason to believe that the claimant will be in a position to put the defect right* (emphasis mine). There was no basis to suppose the claimant was in such a position given the lack of any draft pleading and the fact that his own case was that it was not clear what the exact status of the defendant was or what its relationship with Mr Davidson was. The statement of case is, as CPR 22 makes clear, there to prevent claims being brought where it is not really known whether the claim can succeed. It is against this background that the argument for amendment fails.

I give permission to appeal but dismiss the appeals on Grounds 2 and 3.

Ground 4 Limitation.

69. This ground is otiose given my above findings. However, I shall deal with the same briefly. The claimant argued that the DJ was wrong to conclude that the applications were in effect a one-off act and hence the claim was out of time. He concluded that as the original decision was made on September 2020, the proceedings should have commenced within 6 months in the county court. Before me the claimant relied on *Rovenska v GMC* [1998] ICR 85 albeit I do not believe this case was before the DJ. The Court of Appeal held that where someone applied three times to become registered as a medical practitioner, time did not run from the first application. If the GMC had accepted a policy that was inherently discriminatory then on each occasion the application was refused, there was an act of unlawful discrimination. The claimant said the same argument applied here. If the defendant was operating a discriminatory policy in refusing admission to the course, then every new occasion on which refusal to enrol occurred was a new discriminatory act.

70. The defendant relied on three cases which it said showed the DJ was right to conclude that successive acts of alleged discrimination do not negate the time bar if the decision maker defaults to the original decision rather than making a genuinely new decision save where the decision is pursuant to a policy or regime (see C*ast v Croydon College* [1998] ICR 500. In *Okoro v Taylor Woodrow Construction Ltd* [2012] EWCA Civ 1590

it was held that a continuing state of affairs required the existence of a continuing relationship between the parties on which the complaint could be based. The defendant submitted that *R (Arnold White Estates Ltd) v Forestry Commission* [2022] EWCA Civ 1304 was the right approach and the time to bring a judicial review could not be extended by asking a decision maker to reconsider if the decision maker simply reaffirmed the earlier decision. There were good policy reasons to follow this approach i.e. it would be unfair to permit old claims being re-opened in this way. In any event, there were no new decisions. The defendant made one decision and, as pleaded by the claimant, rejected his further applications as the first decision was final.

71. The defendant distinguished *Okoro* on the basis that it was an employment case where the act was a one-off act equivalent to dismissal of staff whereas there was no such parallel in this instance. Each new time that the claimant applied to enrol where a discriminatory policy continued to apply, the claimant said there was a new discriminatory act that was subject to challenge.

Conclusions

72. The DJ in this respect was wrong to conclude there was one decision. I am satisfied looking at both *Rovenska* and *Cast* that this is a case where there is arguably a continuing discriminatory policy, time runs from every refusal of enrolment pursuant to it. Where, as here, the defendant refuses to enrol the claimant over a period of time on renewed applications and the claimant says the refusal to enrol him is inherently discriminatory then the authorities support him in enabling him to bring the claim relying on the last relevant decision. The defendant accepted that if I preferred this approach, the claim was within the limitation period in respect of the last decision.

73. *Okoro* is distinguishable as the applicants in that case were contract workers and the Court of Appeal was clear that the date when they were banned from site was a one-off act equivalent to dismissal as it ended the contractual relationship between the parties. Therefore, the latest date to bring the claim was the date they were banned from site in April 2008. It was not seen as a continuing act where underlying it was a contractual relationship which had come to an end. The workers had sought to argue that since the ban remained in force it was a continuing act. This was rejected. Of note there had been no request by the claimants in that case to seek work on the defendants' site since the ban, and the court therefore did not consider that possibility.

74. In respect *of R(Arnold) White Estates Ltd* the case involved a judicial review decision of a planning decision. The decision was made within the context of the judicial review regime where strict time limits exist in relation to challenging decisions public bodies. At paragraph 52 of the decision, of the Court of Appeal, the court said that the time cannot be extended by asking a decision maker to reconsider and treating the refusal to reconsider as a new decision. The point was made that unless there was a new decision the clock is not set running again by correspondence which only articulates a decision already made.

75. The argument that Mr Davidson was merely seeking to get the clock to run again is superficially attractive and would be valid if it was a one-off act. However, the refusal to consider enrolling him each time he applied related to the policy decision not to enrol someone who refused to accept the MOU that the defendant adopted. Thus, in my view

it falls within *Rovenska* and *Cast* and is at the least arguably a continuing discriminatory policy.

76. I give permission to appeal on Ground 4 and would have allowed the appeal on this Ground. However, in the light of my judgment on the other three grounds, the appeal is dismissed

77. The parties should seek to agree an Order and in default the hearing will be used for further arguments. If the parties can agree an Order the parties do not need to attend the handing down of judgment

HHJ BLOOM