Neutral Citation Number: [2023] EWHC 1262 (KB)
Case No: QB 2018 004142
Judgment date: 26 May 2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Before :

MRS JUSTICE HILL

- -

Between :

DAVID JOHN FROSDICK — **Applicant**

- and -

THE OFFICIAL RECEIVER — **Respondent**

- -
- -

The Applicant appeared in person
The Respondent did not appear and was not represented

Hearing date: 4 May 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 26 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill:

Introduction

1. By an application notice dated 15 November 2022, supported by a witness statement of the same date, the Applicant David Frosdick seeks to set aside an Extended Civil Restraint Order ("ECRO") made by Martin Spencer J on 17 June 2022, under paragraph 8(1) of that order.

2. Mr Frosdick provided a skeleton argument, a further witness statement dated 6 January 2023 and a bundle of documents. The Official Receiver ("OR") provided a witness statement from Antony Nwanodi, employed barrister and senior lawyer within the Government Legal Service ("GLD") filed on 19 January 2023 and a brief email to the court dated 2 May 2023.

3. The material provided by the OR included the judgment of Foskett J dated 6 July 2018 at [2018] EWHC 1714 (QB). That refers back to the earlier judgments of Birss J (as he then was) dated 11 July 2017 at [2017] EWHC 1737 (Ch) and Andrew Hochhauser KC, sitting as a Deputy High Court Judge, dated 23 November 2016 at [2016] EWHC 3008 (Ch), all of which I have considered.

4. Mr Frosdick represented himself at the hearing before me on 4 May 2023. His submissions were courteous and helpful and assisted in clarifying the key issues he sought to raise. Both Mr Frosdick and the OR made provided various further documents after the hearing.

The factual background

Mr Frosdick's bankruptcy

5. The matter has a lengthy history, helpfully set out in the three judgments to which I have referred at [3] above. I am indebted to them for the detail of it and I summarise it as follows.

6. In August 2007 Mr Frosdick suffered personal injuries in a car accident. He instructed a firm of solicitors, Cobbetts LLP ("Cobbetts"), to pursue a personal injuries claim with the assistance of a Conditional Fee Agreement or ("CFA"). At some stage prior to June 2009, Cobbetts terminated the CFA and told Mr Frosdick that they would no longer handle his claim.

7. Mr Frosdick alleged professional negligence against Cobbetts. At Foskett J explained at [7], Mr Frosdick:

> "...wanted to pursue as part of his personal injuries claim a claim for €782,000 by way of loss of profits arising from contracts for the provision of poker software that he had made with two gaming institutions, each of which had to be cancelled because of his injuries.

> He also wanted to claim a further €17 million or thereabouts reflecting what he said was the value of the loss of a chance of earning profits from those contracts".

8. Birss J at [10] described Mr Frosdick's complaint against Cobbetts as relating to their failure to issue a protective claim in relation to these losses. In a recent letter of claim dated 21 March 2023 (see [51] below) the allegation of negligence against Cobbetts is described more broadly, as their termination of the CFA without conducting the work specified within it and without providing proper grounds for doing so.

9. It appears that a dispute arose between Mr Frosdick and Cobbetts over £13,389.52 in unpaid fees. On 18 April 2011 Cobbetts presented a bankruptcy petition against Mr him. According to the OR, there were other creditors of Mr Frosdick who made claims in the bankruptcy.

10. The bankruptcy hearing was listed at Coventry County Court on 25 May 2011. Mr Frosdick took me to a copy of a statement he had signed on 20 May 2011. This indicated that he had been hospitalised from 7 to 13 May 2011. The statement referred to medical evidence from Dr Adrian Stanley, Consultant Physician in Cardiovascular Medicine, suggesting it would be wise to adjourn the upcoming hearing on grounds of Mr Frosdick's ill-health. Mr Frosdick told me that he handed this statement into the County Court before the hearing but that his request to adjourn was refused. The hearing proceeded in his absence before District Judge Sanghera, who made the bankruptcy order against Mr Frosdick.

11. Under the Insolvency Act 1986 ("the 1986 Act"), section 306(1) Mr Frosdick's estate automatically vested in the OR, who had stated on 14 July 2011 that he was acting as Trustee in bankruptcy.

The Trustee's disclaimer of the right to sue Cobbetts

12. On 18 August 2011 Mr Frosdick wrote a four-page letter to the OR. This asked the OR to litigate or assign back to him the cause of action he had against Cobbetts for professional negligence. The letter made a suggestion that £75,000 in third party funds was being made available to the OR in order to purchase from the OR the ability to sue Cobbetts.

13. On 25 August 2011 Mr Frosdick issued a claim against Cobbetts in the County Court. On 21 December 2011 Coventry County Court dismissed this claim. It appears likely that this was because Mr Frosdick had by then been declared bankrupt.

14. On 15 September 2011 the OR appointed Nigel Fox, an insolvency practitioner, as the Trustee in bankruptcy with effect from 20 September 2011. On 11 October 2011 Mr Frosdick was informed of this appointment.

15. According to [17] of Birss J's judgment, on 9 January 2012, Mr Frosdick wrote to Mr Fox seeking to acquire the alleged cause of action against Cobbetts in exchange for "substantial third-party funds". I have not seen that letter but I have been provided with a letter in similar terms to the OR dated 10 January 2012.

16. On 18 May 2012 the Trustee signed a Notice of Disclaimer relating to "any rights of action and claims against Cobbetts for defamation and/or any other matter". Birss J noted at [17] that the reason for the reference to defamation was that Mr Frosdick had included defamation as one of the causes of action he wished to bring against Cobbetts.

17. On 25 May 2012 Mr Frosdick's bankruptcy was automatically discharged.

County Court applications by Mr Frosdick from 2012-2016 and the first ECRO

18. Over the next few months, he made several applications to the Coventry County Court to set aside the bankruptcy order. All those applications were dismissed. These included orders made by HHJ Cooke on 29 May 2012 and HHJ Barker QC on 29 October 2012. In his reasons for dismissing Mr Frosdick's application, HHJ Barker QC stated that "if anything", his complaint was "about the disclaimer of a potential cause of action against [Cobbetts] by [Mr Frosdick's] Trustee [Mr Fox]". As Birss J explained at [18], Mr Frosdick's complaint was that the cause of action was "worth a very substantial amount of money" and "was a claim against the petitioning creditor who put the bankruptcy proceedings in train in the first place".

19. Mr Frosdick intimated a potential claim against the OR. On 18 February 2013, the OR asked Mr Frosdick to set out what cause of action he was referring to and why he considered that the OR should be a Defendant to any claim he might bring. Mr Frosdick does not appear to have responded to that letter.

20. In July and August 2015, Mr Frosdick issued three further applications in the Coventry County Court, at least two of which were made against Mr Fox. On 26 August 2015, HHJ Gregory dismissed two applications dated 10 and 21 August 2015 as totally without merit and noted that on 29 July 2015 an application made by Mr Frosdick had also been dismissed as totally without merit.

21. On 26 August 2015 HHJ Gregory also made an ECRO against Mr Frosdick, the effect of which was to restrain him from issuing claims or making applications in any County Court concerning any matter involving or relating to or touching upon or leading to the proceedings in which the ECRO was made, without first obtaining the permission of a Circuit Judge.

22. Notwithstanding the ECRO, on 21 September 2015 Mr Frosdick sought to issue proceedings against Mr Fox in the Coventry County Court. It appears that HHJ Gregory refused permission to bring that claim twice, on 6 October 2015 and 2 February 2016.

23. On 18 March 2016, Mr Frosdick sent a letter before claim to the OR. There was further correspondence from Mr Frosdick to the OR in March 2016.

24. Mr Frosdick made a further application to issue proceedings in the Coventry County Court, which HHJ Gregory again refused on 31 March 2016.

Frosdick v Secretary of State for Business, Energy and Industrial Strategy and others [2016] EWHC 3008 (Ch) (Andrew Hochhauser KC, sitting as a Deputy High Court Judge, 25 November 2016)

25. On 18 May 2016 Mr Frosdick brought a claim against the OR in the High Court. Although he was still subject to HHJ Gregory's ECRO this did not apply to the High Court. This was the claim that came before Mr Hochhauser KC, the OR having applied to strike it out. At [21] of his judgment, Mr Hochhauser KC described it as "strikingly similar" to the one Mr Frosdick had issued on 21 September 2015 against Mr Fox, which he had been refused permission to proceed with.

26. From [30]-[46] of Mr Hochhauser KC's judgment it is apparent that Mr Frosdick's claim comprised allegations that the OR had breached sections 289(3), 287 and 315-316 of the 1986 Act; had breached a duty of candour; had acted negligently; had breached his rights derived from Articles 1 and 6 of the European Convention on Human Rights, had breached the best practice guidance in the technical manual issued to Insolvency Service staff; and had committed the tort of misfeasance in a public office.

27. For the detailed reasons given in his judgment Mr Hochhauser KC struck out all Mr Frosdick's claims under the CPR 3.4(2)(a) and (b), on the basis that the statements of case disclosed no reasonable grounds for bringing the claim; or (b) were an abuse of the court's process or were otherwise likely to obstruct the just disposal of the proceedings.

Frosdick v Fox and Baker Tilly Creditor Services LLP [2017] EWHC 1737 (Ch) (Birss J, 11 July 2017)

28. During the currency of HHJ Gregory's ECRO, Mr Frosdick brought a further claim in the High Court. This claim was brought against Mr Fox and Baker Tilly Creditor Services LLP, his employers. This came before Birss J, again on an application by the Defendants to strike the claim out. At [5] Birss J described it as a "very similar" to the claim that had been struck out by Mr Hochhauser KC.

29. Again, this claim involved consideration of sections 315-316 of the 1986 Act. These sections deal with a Trustee's power to disclaim "onerous property". Section 316 provides as follows:

> "Notice of disclaimer shall not be given if
>
> (a) a person interested in the property has applied in writing to the Trustee or one of his predecessors as Trustee requiring the Trustee or that predecessor to decide whether he will disclaim or not, and
>
> (b) the period of 28 days beginning with the day on which that application was made has expired without a notice of disclaimer having been given under section 315 in respect of that property."

30. Birss J noted at [52] that Mr Frosdick's case was, in essence, that the August 2011 or January 2012 letters should be regarded as section 316 notices, with the effect that Mr Fox's Notice of Disclaimer was invalid.

31. Unlike Mr Hochhauser KC, Birss J was assisted by specific submissions on the meaning of "onerous property" for these purposes. At [39] he concluded that [35] of Mr

Hochhauser KC's judgment which suggested that Mr Frosdick's professional negligence claim against Cobbetts might not constitute onerous property was in error, albeit indicating that his finding in this regard did not undermine anything else in his judgment.

32. Birss J concluded that a bankrupt cannot make a valid application under section 316 in relation to property which is within the bankrupt's estate and has vested in the Trustee, for the reasons he gave at [61]-[65] of his judgment. On that basis he was satisfied that Mr Frosdick's claim did not have reasonable prospects of success and struck it out.

33. He noted at [66] that the claim was "an attempt to re-litigate matters which have been struck out before". As he did not have a clear understanding of the reasons why Mr Frosdick's earlier claims had failed, he did not strike the new claim out on that basis. He was also not persuaded to make a further ECRO against Mr Frosdick. However, Birss J ended his judgment by indicating to Mr Frosdick that a further ECRO was likely if he continued to make "multiple unsuccessful applications to the courts relating to the same issues in the past".

34. HHJ Barker's ECRO expired in August 2017.

Foskett v The Official Receiver [2018] EWHC 1714 (QB) (Foskett J, 6 July 2018)

35. On 28 March 2018 Mr Frosdick commenced a new claim against the OR. Again, there was an application to strike it out under the CPR 3.4.2. This came before Foskett J. He identified at [10] what he described as Mr Frosdick's "essential and, it would seem, constant grievance" as being "the unreasonable and unlawful failure of the OR and/or his former Trustee in bankruptcy to transfer the rights of action against Cobbetts to him that is his".

36. At [19]-[24] Foskett J found that the new claim contained the cause of action that had been dismissed by Mr Hochhauser KC; gave rise to an issue estoppel [namely the prohibition on re-litigating an issue decided in earlier proceedings even though in respect of a different cause of action]; was an abuse of process; and was totally without merit. Importantly, Foskett J stated at [22] that "if there was any doubt" about whether issue estoppel applied, it was "impossible" to see how, once the OR was a Defendant in any action brought by Mr Frosdick seeking relief relating to the failure to assign the claim against Cobbetts, the claim would not be struck out on the basis of "*Henderson v Henderson* abuse", which he explained had been described more recently in *Johnson v Gore-Wood (No. 1)* [2002] 2 AC 1 and *Aldi Stores Ltd v WSO Group plc* [2008] 1 WLR 748.

The second ECRO

37. On 2 July 2018 Foskett J made a further ECRO against Mr Frosdick, in similar terms to that made by HHJ Barker but applying to the High Court as well as the County Court.

The third ECRO

38. Foskett J's ECRO was due to expire on 1 July 2020. On 27 May 2020 Mr Frosdick filed an application notice indicating that he wished to file a fresh claim. In his witness

statement in support of the application, he alleged that the OR had failed to comply with the statutory duty under the Insolvency Rules 1986, rule 6.125(7). This rule required the OR to give to the Trustee "all such information, relating to the affairs of the bankrupt and the course of bankruptcy, as he [the OR] considers to be reasonably required for the effective discharge of by the Trustee of his duties in relation to the estate". Mr Frosdick asserted that the OR had breached this duty by failing to provide Mr Fox with Mr Frosdick's 18 August 2011 letter regarding the cause of action against Cobbetts (see [12] above) as part of the "handover bundle" on his appointment.

39. On 18 June 2020 Griffiths J made a third ECRO against Mr Frosdick. He gave his reasons as follows:

> "(1) It is apparent from the Claimant's witness statements that he persists in wishing to relitigate matters which have been definitively decided against him dating back to 2011 or before, and that the proposed claims are totally without merit.
>
> (2) In his latest Application Notice he states he has complied with the terms of the ECRO of Foskett J "and wish[es] to file [a] fresh claim involving or relating to or touching upon the proceedings in which the ECRO was made". This demonstrates that a further ECRO is required.
>
> (3) The reference to fresh evidence and fresh Defendants makes no difference, and is in such general terms that it adds no merit to a position totally without merit. These matters have been adjudicated and (in addition) the limitation period has long since expired".

40. Griffiths J's ECRO was due to expire on 19 June 2022.

The fourth ECRO

41. On 22 March 2022 Mr Frosdick issued a further application notice, seeking permission to bring a fresh claim against the OR and Mr Fox both jointly and severally. The claims were described as relating to "allegations of breach of duty in the managing of his bankruptcy". He referred to Griffiths J's ECRO but submitted that he "was seeking to litigate matters which have not been brought before the Court before and were not discovered until July 2017".

42. In the statement in support of the application Mr Frosdick indicated that the proposed claims would be brought against the OR or alternatively the Trustee for failing to carry out their duties in the bankruptcy. He again referred to rule 6.125(7). He contended that the July 2017 date was relevant as it was only during the course of the proceedings before Birss J that he became aware that Mr Fox had not received the 18 August 2017 letter from the OR. He contended that this had led him to sustain losses in the form of the inability to see Cobbetts in relation to the €782,000 and the €17 million figures referred to at [7] above.

43. On 17 June 2022, Martin Spencer J made a further ECRO. He gave his reasons as follows:

> "(1) It is apparent from the Claimant's application that he persists in wishing to relitigate matters which have been definitively decided against him dating back to 2011 or before, and that the proposed claims are totally without merit.
>
> (2) Further, the reasons set out in the ECRO made by Mr Justice Griffiths on 18 June 2020 continue to apply".

44. On 24 August 2022 Mr Frosdick issued a further application notice. On 9 September 2022 Ritchie J noted that it related to the issue in the ECRO and dismissed the application as totally without merit. He gave his reasons as follows:

> "(1) The Applicant has not complied with the ECRO and persists in making TWM applications relating to the same complaints which were covered by the ECRO.
>
> (2) There is nothing in the bundle before me which justifies any alteration to the order complained about".

The 15 November 2022 application and Mr Frosdick's submissions

45. Mr Frosdick's 15 November 2022 application notice contended that Martin Spencer J's ECRO should be set aside because it was made without reliable evidence and there was no power to make it; and the issues relating to the Insolvency Rules 1986 raised in his 22 March 2022 application have never been dealt with.

46. Mr Frosdick's witness statement dated 15 November 2022 reiterated his allegation of a breach of the OR's duty under rule 6.125(7), leading to his inability to sue Cobbetts.

47. In his further witness statement dated 6 January 2023, Mr Frosdick raised a new point. This was to the effect that the District Judge who made the bankruptcy order had erred in failing to apply the duty set out in the 1986 Act, section 323. This provides in the section of the Act addressing "Administration by Trustee" that "an account shall be taken of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other." He relied on *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25 for the proposition that this was a mandatory duty.

48. Mr Frosdick developed this further in his skeleton argument dated 6 January 2023. During the hearing Mr Frosdick took me to his 20 May 2011 statement as evidence that he had raised the issue of his claim against Cobbetts with the District Judge in advance of the hearing. The letter stated that his counterclaim against Cobbetts valued at €782,000 far exceeded the debt they sought from him in the sum of £13,389.52. However, he contended the District Judge had failed to apply section 323 at the hearing which occurred in his absence.

49. Mr Frosdick's case was that had section 323 been applied properly by the District Judge, the monies due to him under his professional negligence claim against Cobbetts would have been set off against the monies they claimed he owed them and would have extinguished that liability. On that basis the bankruptcy order would never have been

made. This rendered all the proceedings void and showed that there was no sound basis for the later ECROs. He relied on *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 for this proposition.

50. I asked him whether once the bankruptcy order had been made, he had referred to section 323 in any of his applications to set it aside. He said he had not. He said that this was because he needed a copy of his 20 May 2011 statement to make good his point in relation to section 323. Since he has been made homeless consequential on the bankruptcy his papers are all in boxes and hard to locate. He had only found a copy of the 20 May 2011 statement in early January 2023.

51. Further, he explained that he was now considering a fresh claim against the Lord Chancellor as vicariously liable for the acts of the District Judge in failing to apply section 323. He envisaged that this would be a claim in negligence, but he wished to take legal advice as to the exact cause of action. He did not want to litigate and had sent a letter of claim to the GLD on 21 March 2023 setting out the basis of his claim and inviting them to consider Alternative Dispute Resolution. After the hearing he provided me with a copy of the letter. This also intimates a further potential claim against the OR for breach of section 323.

The OR's position

52. Mr Nwanodi's witness statement explained that the GLD had not been served with Mr Frosdick's 22 March 2022 and 24 August 2022 applications. However the GLD's overarching position was that Mr Frosdick was repeatedly attempting to re-argue his loss of profit or loss of a chances claim, neither of which the Official Receiver or the Trustee in bankruptcy had agreed to assign to him. Those matters had been determined conclusively by the court in previous proceedings and gave rise to the decision of Foskett J, such that it was plain that he had no valid claims against the OR.

53. Further, Mr Nwanodi's letter to the court dated 12 May 2023 set out the OR's understanding that section 323 section addresses the right of set off that exists in respect of liquidated sums (ie. already ascertained sums of money) but does not apply to a potential right of action.

Analysis

54. Although Mr Frosdick's written documents were a little hard to follow, during the hearing it became clearer that he was advancing points under two broad headings.

(i): The Insolvency Rules 1986, rule 6.125(7)

55. As explained at [41]-[42] above, Mr Frosdick's 22 March 2022 application was focussed on allegations he was making against the OR about how his bankruptcy had been managed, specifically with respect to rule 6.125(7). During the hearing Mr Frosdick suggested that he was not seeking to bring a new claim in relation to this matter. He confirmed this in post-hearing correspondence. However, this argument was the thrust of his 22 March 2022 application. He was certainly relying on it in support of his argument that the ECRO should never have been made by Martin Spencer J.

56. From the material before me I have no reason to doubt Mr Frosdick's assertion that the particular point about rule 6.125(7) has not been fully litigated before. However, that does not mean that it would be appropriate to permit him to litigate it now.

57. Mr Frosdick had made the point about rule 6.125(7) in his 27 May 2020 application. Griffiths J determined then that such a claim was totally without merit and that the limitation period in respect of it had expired: see [39] above.

58. I agree with Griffiths J's assessment of the merits of such a claim. Simply by way of example, it was not clear how the alleged failure by the OR to pass on to Mr Fox the 18 August 2011 letter had any causative consequence, given that Mr Frosdick wrote to Mr Fox directly in the same terms on 9 January 2012: see [15] above. Further, Griffiths J was right to highlight the limitation difficulties, not least because the alleged breach relates to events in August 2011; and on Mr Frosdick's own case he had known about the alleged breach of rule 6.125(7) since 2017 but had not sought to litigate it until March 2022.

59. Further, and more fundamentally, the allegation of a breach of rule 6.125(7) is, in my judgment, merely another way of seeking to challenge the actions of the OR with respect to the disclaimer issue. This had been the specific subject-matter of the claims before Mr Hochhauser KC and Foskett J and had been the basis of at least some of the County Court applications: see HHJ Barker's reference to the issue in his 29 October 2012 order at [18] above.

60. In my judgment the allegation of a breach of rule 6.125(7) is squarely caught by [22] of Foskett J's judgment (see [36] above), such that even if Mr Frosdick is not precluded from pursuing it by virtue of issue estoppel, it would be an abuse of process in the *Henderson* sense to permit him to do so.

61. As the White Book 2022, paragraph 3.4.5 explains, *Henderson* abuse precludes a party from raising in subsequent proceedings matters which were not, but could and should, have been raised in the earlier ones. *Johnson* and *Aldi* make clear that whether re-litigation of a decided issue is an abuse depends upon all the circumstances: a broad, merits-based approach should be adopted, taking into account all the public and private interests involved and all the facts of the case.

62. Applying that approach, I agree with Foskett J that it would not be fair to permit Mr Frosdick to litigate another claim against the OR or Trustee, arising out of exactly the same factual scenario as the earlier claims, especially given the significant delay since the key events and the number of times Mr Frosdick has sought to litigate (and has litigated) the issue in various guises.

63. The basis on which Martin Spencer J made the 17 June 2022 ECRO was that Mr Frosdick's 22 March 2022 application involved him trying to re-litigate matters which had already been decided and to bring claims which were totally without merit. This was an entirely justified overall conclusion in light of the history set out above.

(ii): The Insolvency Act 1986, section 323

64. Mr Frosdick's point in relation to section 323 involves him going even further back in the chronology than HHJ Barker's 29 October 2012 order. He deployed it as a basis for saying that the bankruptcy order should never have been made by District Judge Sanghera in May 2011, such that all the orders since then including the extant ECRO were void. He cited the principle in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 as authority for this proposition.

65. His latest letter of claim dated 21 March 2023 intimates a claim against the OR in relation to section 323. Such a claim would, in my judgment, constitute a *Henderson* abuse for the reasons given at [60]-[62] above.

66. The letter also intimated a challenge to the actions of the District Judge, through a claim against the Lord Chancellor. The basis of such a challenge would be that the judge failed to apply section 323 and so should never have made the bankruptcy order.

67. The proper route for challenging the alleged failure of the District Judge to comply with the set off provisions was by means of an application to set aside or appeal the bankruptcy order. This was a route Mr Frosdick followed on more than one occasion in 2012: see [18] above. He was aware of the concept of set off which is why he wrote the 20 May 2011 letter. His perceived loss of the value of the right to sue Cobbetts was at the heart of his concerns even at that time. It therefore seems to me unlikely that section 323 was not raised at all in the applications to set aside the bankruptcy order.

68. Even assuming Mr Frosdick is correct, and section 323 was not raised, the means by which he could potentially do so now would be by way of a further and very late application to set aside or appeal the bankruptcy order. Such an application would again constitute a *Henderson* abuse. The recent location by Mr Frosdick of the 20 May 2011 statement does not provide a compelling basis for permitting him to make such an application.

69. To the extent that Mr Frosdick seeks to litigate the alleged failure of the District Judge to apply the section 323 duty through a free-standing civil claim against the Lord Chancellor, the same would also constitute a *Henderson* abuse. It would also be totally without merit, not least because judicial office holders are immune from negligence claims arising out of their judicial functions: see the Crown Proceedings Act 1947, section 2(5). This proposition is not changed by the judgment in *HHJ Kalyany Kaul KC -v- (1) Ministry of Justice (2) The Lord Chancellor (3) The Lord Chief Justice* [2023] EAT 41, to which Mr Frosdick referred. That case relates to a claim against the Ministry of Justice under the Equality Act 2010 by a serving judge and does not support the proposition that negligence claims can generally be brought in relation to judicial acts. The limitation period for any such claim has also long passed.

70. Crucially for the purposes of the ECRO, the section 323 argument relates to the very first order in this long history of litigation. It does not, in itself, show that all of the totally without merit orders which have been made since then, and which have led to the ECROs, including the most recent one, were unjustified.

71. After circulation of my draft judgment, Mr Frosdick drew my attention to *Stein v Blake* [1996] 2 AC 243 as authority for the proposition that the scope of section 323 is not limited to liquidated sums. This does not affect my analysis as set out above, to the

effect that litigating this issue through any of the means set out at [65], [68] or [69] would be an abuse of process; and that the ECRO was properly made.

Conclusion

72. For all these reasons I do not consider that there is any proper basis for setting aside the 17 June 2022 ECRO. Mr Frosdick's 15 November 2022 application is therefore dismissed.