Neutral Citation Number: [2019] EWHC 1488 (QB)

Case No: QB/2018/0125

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM MASTER THORNETT DATED 16 MARCH 2018
CASE NUMBER HQ15XOO868

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2019

Before :

THE HONOURABLE MR JUSTICE SWEENEY

- -

Between :

TPKN	**Claimant/ Appellant**
- and -	
THE MINISTRY OF DEFENCE	**Defendant/ Respondent**

- -
- -

Ms Una Morris & Ms Camila Zapata Besso (instructed by **Hodge Jones and Allen Solicitors**) for the **Claimant/Appellant**
Mr Jonathan Dixey (instructed by **Government Legal Department**) for the **Defendant/Respondent**

Hearing dates: 12 February 2019

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE SWEENEY

Mr Justice Sweeney :

Introduction

1. This is an appeal by permission of Murray J (granted at an oral hearing in October 2018) against the Judgment and Order of Master Thornett (both of 16 March 2018) in which he:

    1) Granted the Defendant / Respondent (hereafter the Defendant) summary judgment on the whole of the claim on the basis that the Claimant / Appellant (hereafter the Claimant) had no real prospect of succeeding on her claim on the ground that the Defendant was not vicariously liable to her.

    2) Struck out paragraphs 55-58 of the Claimant's Amended Particulars of Claim on the basis that they did not disclose any reasonable grounds for bringing a claim of misfeasance in public office.

2. The appeal involves three issues, namely whether:

    1) The Master erred in granting the Defendant summary judgment on the basis that it was not vicariously liable to the Claimant.

    2) The Master erred in striking out paragraphs 55-58 of the Claimant's Amended Particulars of Claim.

    3) Even if the Master did err in striking out paragraphs 55-58, that aspect of the case was disposed of in any event by reason of his findings on vicarious liability.

3. For reasons set out shortly below, I have no doubt that the Master did err in striking out [55] – [58] of the Claimant's Amended Particulars of Claim. It was common ground between the parties that, in the event of my reaching that conclusion, the outcome of the appeal would turn on the resolution of the first issue.

Background

4. The Claimant is now aged 42. She began her service in the Royal Navy in September 2003 and was stationed at the Devil's Tower Camp ("the base") in Gibraltar from July 2011 onwards, ultimately in the rank of Leading Hand (the equivalent of a Corporal). The base had accommodation for around 400 personnel.

5. The claim arises out of events at the base in the early hours of Wednesday 16 May 2012 when the Claimant alleges that, after a social Tuesday night out with TS (a Private serving in the British Army, who had been based at the base for a short time as part of a training exercise, and who the Claimant had first met in April 2012) and others they had returned to the base where, after the others had retired, TS had given her a shot of what she had understood at the time to be rum, after which she remembered very little other than that TS had raped and sexually assaulted her.

6. The Claimant did not report the offences at the time (because of previous negative experiences of reporting a rape whilst serving in the Royal Navy, and her perceptions of how she would be treated) nor when she later discovered that, as a result of the offences, she was pregnant. She informed the Navy that she was pregnant in or around

July 2012. In October 2012 the Claimant returned to the UK where, in February 2013, she gave birth to her daughter.

7. In May 2013 the Claimant reported to a civilian doctor that she had been raped and sexually assaulted. In November 2013 the Claimant reported the offences to the Wiltshire Police, and an investigation began. In February 2014 the Claimant made a Service Complaint (which was ultimately withdrawn in June 2014) about the rape and the treatment that she had received thereafter – as to which she alleged that, rather than receiving adequate support from the Royal Navy, she had received poor treatment and perceived that she had been discriminated against due to her gender and pregnancy, her sexual orientation, her psychiatric symptoms and her ethnicity.

8. The Claimant left the Royal Navy in October 2014. In January 2015 Wiltshire Police referred their investigation of the alleged rape to the Crown Prosecution Service ("the CPS") for pre-charging advice. It concluded that it had no jurisdiction over the case because the alleged offence had been committed in Gibraltar – where the Sexual Offences Act 2003 did not apply. Wiltshire Police thereafter referred the investigation to the Service Police.

9. A Letter of Claim was sent to the Defendant on behalf of the Claimant in February 2015. The Claim was issued in February 2015 and the Claim Form was served in June 2015.

10. In October 2015 the Service Prosecuting Authority ("SPA") determined that there would be no prosecution of TS in relation to the alleged rape and sexual assault – noting, the Defendant asserts, that: "*the fine detail of the surrounding circumstances of the complaint has a tendency to undermine rather than strengthen the prosecution case*". Thereafter the Defendant served a Letter of Response to the Claimant's Claim in January 2016.

11. In May 2017 the Claimant filed and served Particulars of Claim, a Medical Report and Schedule of Special Damages. In [44] of the Particulars it was asserted that, by reason of the history (as broadly summarised above):

> *"…the Defendant, by reason of the conduct of TS in Gibraltar, is liable to the Claimant in assault and battery and misfeasance in public office".*

Particulars of assault and battery were set out in [46] – [49]. In [50] it was asserted that further, and/or alternatively, the Defendant was liable to the Claimant for misfeasance in public office, the particulars of which were set out in [51] – [53]. In [54] it was asserted that:

> *"In all the circumstances, there was a close connection between the acts in question and TS's performance or purported performance of his service in the British Army, so that the Defendant ought to be held liable for those acts".*

Particulars of personal injury, loss and damage were set out in [56] – [62], and in [64] it was asserted, for reasons set out therein, that aggravated and exemplary damages were appropriate.

12. In early July 2017 the Defence was filed and served. In [2] the Defendant asserted that:

> *"Insofar as the Claimant proves that she was raped by TS on 16 May 2012, as to which the Defendant is unable to make admissions, TS was not acting in the course of his employment. There is no connection, or no sufficiently close connection, between the nature of TS's employment and the alleged assault of the Claimant".*

The Defendant also made clear in [3] that it pleaded to the Particulars of Claim without prejudice to the contention that they fell to be struck out pursuant to CPR 3.4(2) as disclosing no reasonable grounds for bringing the claim. Thereafter it was variously denied that the Defendant was responsible for the acts and omissions of its personnel that did not have any, or any sufficiently close, connection with their employment; that at the material time TS was acting under the direction and control of the Defendant and/or acting in the performance of his duties; that the content of [1] – [44] of the Particulars disclosed any basis upon which any actions of TS which the Claimant might prove had any, or any sufficiently close, connection with TS's employment for the purpose of holding the Defendant vicariously liable for them; that the matters set out in [51] & [52] of the Particulars were sufficient to establish that the alleged rape amounted to the exercise of power as a public officer; and that the Claimant was entitled to aggravated and exemplary damages. It was asserted that, in so far as TS was stationed at the base at the material time, it was in a capacity that was unconnected with the Claimant's role.

13. As indicated, the Defendant also made an application for strike out (pursuant to CPR 3.4(2)(a)) upon the ground that the statements of case disclosed no reasonable grounds for bringing the claim, and/or summary judgment on the whole of the claim (pursuant to CPR 24.2) upon the ground that the Claimant had no real prospect of succeeding on the Claim and there was no other compelling reason why the case should be disposed of at a trial. The application was supported by a witness statement from Mr Andrew Kelly of the Government Legal Department who indicated that it was understood that in interview during the police investigation TS had admitted that he had had sexual intercourse with the Claimant but had asserted that it was consensual. Mr Kelly asserted that the prosecution file disclosed matters which tended to undermine the Claimant's account of what had happened.

14. The grounds for strike out / summary judgment that Mr Kelly advanced were that:

    (1) Whilst he had regard, in particular, to the observation of Ward LJ and Tomlinson LJ in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2013] QB 722, to the effect that vicarious liability is a fact sensitive issue, there were no pleaded facts, and no additional facts known to the Defendant but not pleaded, which could give rise to a finding of vicarious liability.

    (2) In *Various Claimants v Catholic Child Welfare Society & Ors* [2012] 3 WLR 1319 at [34] the Supreme Court had confirmed that the criteria that had to be satisfied for the imposition of vicarious liability were, firstly, consideration of the relationship between the individual tortfeasor and the party said to be liable to see if it was capable of giving rise to vicarious liability; and, secondly, to

consider the connection that linked the relationship between the tortfeasor and the party said to be liable and the act or omission in question, or as Lord Steyn held in *Lister v Hesley Hall Limited* [2002] 1 AC 215 (at [24]): "*the relative closeness of the connection between the nature of the employment and the particular tort*".

(3) The other general principles to emerge from the authorities were that:

(i) The courts should avoid over-refining, or laying down a list of criteria for determining, what precisely amounts to a sufficiently close connection to make it just for the employer to be vicariously liable – simplification of the essence is more desirable (*Mohamud v Morrisons* [2016] AC 677 at [43]).

(ii) When assessing whether the act complained of should give rise to vicarious liability, it should be viewed against the background of the employee's duties, rather than too closely defined (*Lister* at [23], [43] & [50]).

(iii) The time at which, and the place at which, the matters complained of occurred will always be relevant, but they may not be conclusive (*Lister* at [44]).

(iv) Acts of intentional wrongdoing, including where the act is a criminal offence, are not necessarily inconsistent with vicarious liability (e.g. *Lister*; *Various Claimants v Catholic Child Welfare Society and Ors* (above); and *Bernard v AG of Jamaica* [2005] IRLR 398) but may be – see e.g. *N v Chief Constable of Merseyside* [2006] EWHC 3041, in which, on its particular facts, Nelson J concluded that a probationer police officer who was off duty but wearing uniform, and who had taken the Claimant to his home and raped her was "*merely using his uniform and position as a police officer as the opportunity to commit the assaults on the Claimant*" and that there was no duty owed by the Defendant to the Claimant which had in any sense been entrusted to the officer.

(v) It was a relevant factor to consider the extent to which the risk that abuse would be suffered was created or enhanced by the nature of the employer's business (*Bernard; Lister* at [65]; and *Catholic Child Welfare Society* at [86]-[87]).

(vi) It was not the case that just because service personnel in a command relationship were off duty that rank and military discipline were irrelevant (*Ministry of Defence v Radclyffe* [2009] EWCA Civ 635), although in that case the court could envisage that "*entirely social and private occasions attended by officers and servicemen could be imagined when this was not so*."

15. Against that background, Mr Kelly accepted that the relationship between the Defendant and TS was capable of giving rise to vicarious liability but asserted that, in relation to the second part of the criteria identified in the *Catholic Child Welfare Society*

case, there was no pleaded basis upon which the court could find that there was a sufficiently close connection between the nature of TS's employment and the alleged assault. Save for the fact that the Claimant and TS were both paid by the Defendant and happened to be based at the same (large) base at the time, there was no command or working relationship between them and they were in separate branches of the armed forces. The alleged offences had been committed in the early hours of a Sunday morning (in fact, I interpolate, a Wednesday morning), when they were both off duty and had been out drinking with friends, and there was no suggestion that the alleged offences were facilitated by the working environment, or precipitated by anything to do with their work – and hence the facts were significantly less indicative of any connection between TS's employment and the offences than the facts in *N* (above) in which the Defendant was held not to be vicariously liable.

16. Mr Kelly further suggested that, against the background of the criminal investigations, if there were any other matters available to the Claimant, she would no doubt have been aware of them and have pleaded them. Hence the Master was invited to strike the claim out as disclosing no reasonable grounds for bringing the claim, or alternatively to enter summary judgment in the Defendant's favour.

17. In the Claimant's Reply to Defence, which was also filed and served in July 2017, the Claimant variously asserted that the application for strike out and/or summary judgment was entirely misconceived and without proper foundation; and that the Defendant had pleaded no facts whatsoever in relation to TS's duties and responsibilities at the base. In [6] it was asserted that:

> *"The Claimant further avers that TS's torts were so closely connected with his employment that it would be fair and just to hold the Defendant vicariously liable and the sexual abuse of the Claimant was inextricably interwoven with the carrying out by TS of his duties (see Lord Steyn at paragraph 28 of <u>Lister and Others (AP) v Hesley Hall Limited</u> [2002] 1 AC 215)…"*

The connection, it was asserted, could be seen in the fact that TS was stationed at the base as part of his service with the British Army; that, but for his service, TS would not have been at the base, and would not have had access to the Claimant at the base; that TS had received remuneration for having to be stationed at the base for the purposes of the training exercise; that at all times, including rest periods, TS was under the direction and control of his superiors; that the hierarchy of direction and control was in place at all times at the base; that, had she complained at the time, the Service Police and SPA would have been responsible (having the requisite jurisdiction) for investigating and prosecuting TS given the close connection between TS's employment and her complaint of rape; and that the Defendant had been responsible for investigating the Claimant's Service Complaint. It was also asserted that TS had *abused* his power as a soldier of the British Army and a public officer when he had committed the pleaded acts against the Claimant.

18. In September 2017, it was agreed, via a Consent Order, that the identity of the Claimant must not be disclosed; that she should henceforth be referred to as "TPKN"; and that to the extent necessary to protect her identity, any other references, whether to persons or places or otherwise, be adjusted with permission of the parties.

19. The Defendant's application for strike out and/or summary judgment was first listed for hearing before Master Thornett on 9 October 2017. In oral submissions the Claimant developed her assertion that the closeness of the connection between TS's employment and her complaint of rape was why the criminal allegation was within the jurisdiction of the Service Police and of the SPA and that that was a basis for establishing vicarious liability. In the result, Master Thornett concluded that the argument had not been properly formulated in the Claimant's Particulars of Claim and thus ordered that:

> *"Unless the Claimant, if so advised, makes an application to entirely amend her Particulars of Claim by substitution, and files and serves the application by 4pm on 30 October 2017, the proceedings shall stand as struck out and rule 44.15 of CPR will apply."*

The Defendant's application for summary judgment was otherwise adjourned to a date to be fixed.

20. Amended Particulars of Claim (by substitution), dated 27 October 2017, were duly provided. They asserted that, by reason of the English Law (Application) Act 1962, the common law and rules of equity of England were at all material times in force in Gibraltar, and that consequently the Defendant was vicariously liable for the common law torts of assault and battery and misfeasance in public office by its employees and/or agents in Gibraltar. More factual details of the alleged torts and their surrounding circumstances were provided. Thereafter, in [48], having re-iterated that the acts of TS were so closely connected with his employment that it would be fair and just to hold the Defendant vicariously liable, the Claimant asserted that:

> "*…Evidence of a close connection between the actions of TS which the Claimant seeks to prove and TS's employment can be seen in the following facts:*
>
> *(1) At all material times, the Defendant was responsible for the welfare, safety and security of the Claimant whilst she was stationed at the base.*
>
> *(2) The Defendant entrusted or ought to have been able to entrust its military employees and/or agents stationed at the base to protect and/or defend the base, if required.*
>
> *(3) The Defendant entrusted or ought to have been able to entrust its military employees and/or agents stationed at the base to protect and/or defend others at the base, if required.*
>
> *(4) The Defendant entrusted or ought to have been able to entrust its employees and/or agents stationed at the base not to cause harm to others at the base.*
>
> *(5) TS was stationed at the base as part of his service with the British Army for the purposes of a training exercise.*

(6) TS was not stationed at the base for any social purpose, whether connected or unconnected to the British Army.

(7) Throughout the time that TS was stationed at the base, he would not have been permitted to permanently leave the base and/or abandon the training exercises he was undertaking, without leave being granted to him by a superior officer. Had TS done so without leave, he would have been liable to prosecution for a service offence under the Armed Forces Act 2006 ("AFA 2006").

(8) TS would have been paid not just for the hours that he was undertaking the training exercise but also would have received renumeration and/or benefits for having to be stationed at the base for the purposes of the training exercises.

(9) The Defendant's employees and/or agents who were stationed at the base were at all times deemed to be acting as employees and/or agents of the Defendant in that they were deemed to be engaged in service and fulfilling service functions, including during rest periods and whilst undertaking social activities.

(10) The hierarchy of direction and control was in place at all times at the base, including during rest periods and whilst undertaking social activities.

(11) At all times, TS, as a soldier in the British Army engaged in service, was under the direction and control of his superiors, even during the periods when he was not directly participating in the activities that formed the basis of the training exercise, including rest periods and whilst undertaking social activities.

(12) If TS had been given a lawful command by a superior at any time, including during rest periods and whilst undertaking social activities, he would have been required to comply, since his purpose for being stationed at the base was his service. If TS had failed to comply with a lawful command by a superior at any time whilst at the base, he would have been liable to prosecution for a service offence under AFA 2006.

(13) TS would not have been at the base and would not have had access to the Claimant at the base but for his service.

(14) The rape and sexual assault of the Claimant took place at the base. Thereafter, TS attended the Claimant's room and knocked on her door on two further occasions, causing the Claimant to feel harassed. TS was subject to

the Defendant's continuous direction and control at all times and was therefore subject to the Defendant's continuous direction and control at the time of the rape and sexual assault and further incident occurred. There was coincidence between the acts in question and TS's engagement in service with the British Army.

(15) The Claimant made a Service Complaint about the rape by TS in or around February 2014. The Defendant, via its employees and/or agents, had responsibility for investigating that complaint. The Claimant contends that the reason the Service Complaint of rape was within the Defendant's jurisdiction was because of the close connection between TS's employment and her complaints of rape.

(16) After the CPS had determined that there was no jurisdiction to prosecute the Claimant's criminal allegation of rape, Wiltshire Police referred the investigation to the Service Police.

(17) Section 42 of the AFA 2006 provides that a person subject to service law commits an offence under the section if he does any act that is punishable by the law of England and Wales or if done in England and Wales would be so punishable.

(18) The Service Police accepted jurisdiction for the investigation into the Claimant's allegation of rape. The Service Police accepted jurisdiction for the investigation because of the connection between the allegation and TS's service.

(19) The Service Police did not refer the investigation to the Royal Gibraltar Police.

(20) The Service Police thereafter referred the Claimant's allegation of rape to the SPA.

(21) The SPA accepted jurisdiction for the investigation because of the connection between the allegation and TS's service.

(22) The SPA did not refer the investigation to the prosecuting authorities in Gibraltar.

(23) The SPA, having accepted jurisdiction, made a prosecutorial decision in respect of the Claimant's allegation of rape.

> *(24) In the premises, the SPA made a determination not to prosecute TS.*
>
> *(25) Had a decision been made that the SPA ought to prosecute, the SPA would have prosecuted TS under the jurisdiction of the Court Martial, pursuant to section 50 of AFA 2006."*

21. The Particulars of Misfeasance in Public Office set out in [55] – [59] of the Amended Particulars were the same as those set out in [51] – [55] of the original Particulars, as (broadly speaking) was the remainder.

22. On 11 January 2018, Mr Kelly made a second witness statement addressing the Claimant's assertions (in [48] (15) – (25) of the Amended Particulars) as to the role and jurisdiction of the SPA – asserting that the Claimant had provided no authority for her principal propositions. Mr Kelly variously argued that;

    (1) The SPA fulfilled a similar function in the service justice system as the CPS did in the civilian justice system. It could advise, but not direct, the Service Police in the investigation of offences and did not itself investigate alleged offences.

    (2) The SPA applied the same Full Code Test as the CPS and in the Claimant's case had not found that there was a realistic prospect of conviction on a charge of rape. The Claimant had been informed of the decision and, although offered the right to have the decision reviewed, had not taken that up.

    (3) By virtue of s.72 of the Sexual Offences Act 2003 (and paragraph 1(b) of Schedule 2) the Crown Prosecution Service would have had jurisdiction if the Claimant had been under 18, but she was not.

    (4) Under s.367(1) of the AFA 2006 "*Every member of the regular forces is subject to service law at all times*", and thus the Claimant's allegation of rape was one of an offence contrary to s.42 of the 2006 Act which provided that:

    > *"A person subject to service law, or a civilian subject to service discipline, commits an offence under this section if he does any act that – (a) is punishable by the law of England and Wales; or (b) if done in England or Wales, would be so punishable".*

    (5) Article 3(1) of The UK Forces (Jurisdiction of Colonial Courts) Order 1965 (SI 1965/1203) ("the 1965 Order"), which was in force in the UK and Gibraltar, restricted the trial of members of UK forces, and of civilians subject to service discipline, in the Gibraltarian courts, including where (a) the alleged offence arose out of and in the course of his duty as a member of HM Forces or a member of that civilian component; or (b) the alleged offence was an offence against the person and the person or, if more than one, each of the persons in relation to whom it was alleged to have been committed had at the time thereof a relevant association with HM Forces.

    (6) The effect of Article 3(2) of the 1965 Order was that a member of UK forces, or a civilian subject to service discipline, could only be tried for such an offence in a

Gibraltarian court where a certificate was issued by or on behalf of the Governor, either before or in the course of the trial, to the effect that that the officer commanding Her Majesty's forces in the Territory had notified the Governor that it was not proposed that the case should be dealt with by a service court.

(7) Whilst vicarious liability was likely to arise in relation to cases falling within Article 3(1)(a), it might not arise, depending on the circumstances, in Article 3(1)(b) cases and thus the exercise of jurisdiction by the SPA was not determinative.

(8) Guidance in the Manual of Service Law supported that reading of the legislation – in particular that every member of the regular forces is subject to Service law at all times (whether on or off duty and whether within the UK or abroad); and that off-duty offences removed from the local authorities in other countries included offences against the person or property of another member of Her Majesty's forces.

(9) Thus the UK service authorities would ordinarily assume jurisdiction in Gibraltar to investigate and try an offence against the person committed by one member of HM forces against another whilst off duty, which negated the Claimant's assertion that the SPA's involvement implied vicarious liability, as the service authorities were likely to have investigated the alleged incident whether it had taken place on the base or not.

(10) The service authorities had not exercised jurisdiction because the alleged incident had taken place on the base, they had done so because both TS and the Claimant were subject to service law. The fact that the alleged incident had occurred at the base was irrelevant to the SPA's jurisdiction, and the Claimant's pleadings did not provide any evidence of a close connection between the actions of TS and his employment.

(11) Thus the Claimant would be unable to satisfy the second limb of the test for vicarious liability (see [14](2) above) and there was no pleaded or other basis upon which the court could find that there was a sufficiently close connection between the nature of TS's employment and the alleged offence.

23. The Defendant's adjourned application for strike out and/or summary judgment was heard before Master Thornett on 15 January 2018. At the outset of the hearing Master Thornett granted permission for the Amended Particulars. It was not in dispute (see below) during the appeal hearing that the hearings before Master Thornett had proceeded upon the basis that vicarious liability was the determinative issue.

24. As indicated above, on 16 March 2018 Master Thornett gave judgment (which I summarise below) in favour of the Defendant. Permission to appeal was refused.

25. In May 2018 the Claimant issued an Appellant's Notice, Grounds of Appeal and a Skeleton Argument, and thereafter Soole J granted a stay of execution. In August 2018, permission to appeal was refused, on the papers, by Sir Alistair MacDuff. However, as indicated above, permission was ultimately granted by Murray J at an oral hearing in October 2018 – upon the basis that he was satisfied that there were triable issues of fact; that he believed that it was arguable that Master Thornett's approach to the application of the law in the case was wrong; and that it was arguable that Master Thornett should

have invited submissions from the parties in relation to misfeasance in public office and, as the Claimant had raised that point, it was a question that should be considered as part of the appeal.

Master Thornett's judgment

26. The Claimant points out that in [1], [24] and [25] of Master Thornett's judgment he referred to the Defendant's application as being one to strike out the claim, pursuant to CPR 3.4(2)(a), on the basis that the statement of case was an abuse of process and disclosed no reasonable grounds for bringing the claim or, pursuant to CPR 24.2, on the basis that the claim had no real prospect of succeeding – whereas the Defendant had never asserted that the claim was an abuse of process and, in any event, abuse of process is the subject of CPR 3.4(2)(b).

27. Having shortly summarised the factual background (including an erroneous reference, no doubt based on Mr Kelly's evidence, to 15 May 2012 being a Saturday) Master Thornett turned to the history of the proceedings, variously recording that:

(1) At the first hearing of the Defendant's application, the court had been concerned to explore further the Claimant's contention that because the SPA had taken over the investigation of the alleged offence it was implicit that the Defendant had accepted that the offence, if established, fell within the scope of its responsibilities and liabilities as an employer – because of the close connection between TS's employment and the complaint of rape ([7]).

(2) Having granted permission for the amended pleadings at the commencement of the renewed hearing, the central arguments in support of the proposition of vicarious liability remained as originally pleaded and ([9]) the Claimant's case was, in essence, that:

(i) The Defendant had an overarching responsibility for the welfare, safety and security of all members of the services whilst stationed at the base;

(ii) Members of the forces were entrusted to protect and defend each other as part of their duties;

(iii) TS was obliged to be stationed in Gibraltar and more particularly at the base and to have attempted to leave without permission would have been a service offence, thus the "*hierarchy of direction and control*" as an employer was undivided and continuous – even if TS was permitted periods of recreational leave or the status of being off duty;

(iv) TS was always subject to the command of his military seniors throughout his stationing and that would be regardless of whether he was on duty or not;

(v) The incident took place at the base which was a place to which he would not have had access but for his service, and at which he was subject to "*continuous direction and control*" – thus there was "*coincidence between the acts in question and TS's engagement with the British Army*".

(3) The Claimant addressed the jurisdiction of the SPA in paragraphs 48 (15) – (25) of the Amended Particulars (see above), of which (15), and (18) – (22) were particularly relevant, including the assertion that the SPA had accepted jurisdiction for the investigation because of the connection between the allegation and TS's service ([10] & [11]).

(4) The Claimant's response to the Defendant's application had been to rely entirely on her pleaded case – no witness evidence or relevant disclosure had been produced by way of supplement or amplification. Some of the legal principles upon which the Claimant had sought to rely were without apparent supporting authority, whilst others were developed from well-known authorities on vicarious liability. Albeit that he accepted that if a proposition was arguable in law the underlying evidence would be for scrutiny at trial, the Claimant's approach had its limitations, particularly in relation to the allegations made in paragraphs 48(15), (18) & (21) ([12]).

28. As to the relevant legal framework, Master Thornett noted that the claim focused very substantially upon the element of continuing control over TS throughout his period of being stationed in the Territory, rather than on a close analysis of whether he was engaged in any specific military duty or task at the time of the act, "*which he clearly was not*". The Defendant's case was that, having regard to the fundamental principles arising from the relevant authorities (which had been decided at a high level) the claim was simply unsustainable in law, and the fact that an application to strike out or for summary judgment was more unusual in a case where there were self-evidently significant differences of fact that would have to be decided, did not enable the Claimant to resist the claim because authority was against her ([13]).

29. Master Thornett went on to consider *Lister v Helsey Hall* (above) at [70]; *Dubai Aluminium Co. Ltd v Salaam & others* [2003] 2 AC 366 at [23] & [26]; and *Various Claimants v Catholic Child Welfare Society & Ors* (above) at [34] – see [14(2)] above. Given the Defendant's concession that the first criterion in the *Catholic Child Welfare Society* case was arguable, Master Thornett then focused on the second criterion and the closeness of the connection between TS's status and engagement in the Services, the mutuality of that status with the Claimant, and the alleged act ([13.1] – [13.5]), including summarising the two questions to be considered in that regard, as posed by the Supreme Court in *Mohamud v WM Morrison Supermarkets PLC* [2016] AC 67 at [44] & [45] as follows:

> "*a. First, looking at matters in the round or broadly, what were the functions or what was the field of activities entrusted by the employer to the relevant employee i.e. what was the nature of his job?*
>
> *b. Secondly, was there sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice?*"

30. To those questions, Master Thornett added observations made by HHJ Cotter QC, sitting as a High Court Judge, in *Bellman v Northampton Recruitment* [2016] EWHC 3104 (QB) – namely, as to the first question:

> "*This should not entail a dissection of the employment into its component activities, rather a holistic approach and answering the question as a jury would.*"

and, as to the second question:

> *"Again, a broad approach should be taken and it is necessary to consider not only the purpose and nature of the act but also the context and circumstances in which it occurred."*

Master Thornett then recorded (in [13.6]) that in *Lister and Others v Hesley Hall Ltd* (above) at [42] – [45] Lord Clyde had affirmed the adoption of a broad approach including that both the negligent quality of the act and the connection with the employment had to be assessed against the background of the particular circumstances; that consideration of time and place would always be relevant, but may not be conclusive – thus an act committed outside the hours of employment may well point to it being outside the scope of employment; and that the opportunity to be available at particular premises whereby the employee had been able to perform the act in question did not mean that the act was necessarily within the scope of the employment – there had to be some greater connection between the tortious act of the employee and the circumstances of his employment than the mere opportunity to commit the act which has been provided by the access to the premises which the employment has afforded.

31. Master Thornett went on (in [13.7]) to analyse the decision of the Court of Appeal in *Ministry of Defence v Radclyffe* [2009] EWCA Civ 635, in which the court had recognised how an army officer might retain authority and responsibility for soldiers under his command even when he and they were off duty. In that case, having followed the strong encouragement of his Captain to jump from a bridge the previous day, the Claimant (a Second Lieutenant) had seriously injured himself performing the same jump the next day when demonstrating how to do it to other soldiers. The Court's acceptance of an overriding or overarching element of control was, Master Thornett opined, in consequence of a fact sensitive analysis of the sequence of events and the issue of military discipline had not been applied as an absolute answer in itself. Rather, at [20] & [21] of the judgment the court had made clear that the key to the legal analysis was whether the Captain owed the Claimant and the soldiers a duty of care, which he did, as he was the officer in charge of the swimming party with a duty to take reasonable care to guard his subordinates against the foreseeable risk of injury. The Captain's authority derived from his rank and the fact of the soldiers' employment, although it was more circumscribed by the fact that they were all off duty – albeit that certain entirely social and private occasions attended by officers and servicemen could be imagined when that would not be so.

32. Master Thornett then observed ([13.8]) that in *Various Claimants v WM Morrison Supermarkets PLC* [2017] EWHC 3113 (QB), in which an employee trusted with confidential payroll information in relation to about 100,000 employees had taken it home and, on a Sunday, had used his own computer equipment to send the information to a file sharing website, Langstaff J had variously concluded that the decision in each case was heavily fact sensitive; that location alone for the event was not decisive either way; that the employee had been entrusted with the data; and that there had been a "*seamless and continuous sequence of events*" between then and the disclosure such as to make the employer vicariously liable.

33. In setting out his decision (at [14] – [30] of his judgment), Master Thornett dealt first and at some length with the Claimant's point that the Defendant both had, and had accepted that it had, jurisdiction to investigate the offence under the AFA 2006 "*because of the connection between the allegation and TS's service*". It was, he said, the Claimant's contention that the requisite connection for vicarious liability explored in the common law authorities was made out by dint of the Defendant's acceptance of its statutory investigative and punitive powers; or that, even if not wholly made out, their taking up of the investigation constituted substantial circumstantial evidence in support of the common law principle of vicarious liability, and that therefore the point was arguable.

34. Master Thornett continued that he did not accept that line of reasoning because:

(1) It sought to infer a subjective acceptance by the Defendant of the common law principle of closeness of connection when, on a correct reading, the relevant legislation provided neither room nor need for such inference.

(2) Even if a subjective interpretation was to emerge on the facts, he could not accept that it could have any meaningful effect – given the plain and objective overriding jurisdiction of the SPA according to statute, with the SPA only ever being seen to have acted pursuant to its statutory powers. The belief or opinions of SPA personnel as to why they were enacting their statutory powers would be neither here nor there.

(3) Whilst s.367(1) of the AFA 2006 makes every member of the regular forces subject to service law (i.e. offences specific to military service) at all times, it was significant that s.42(1) of that Act additionally deemed as a breach of service law criminal offences that, in terms of the requisite elements required to be proved, did not in any way draw upon the incidence of the offence having been carried out by someone employed in the services – rather, it extended and included within service law entirely self-standing criminal offences. Thus it empowered the SPA and the services legal system generally, to take up the prosecution of those in the services for offences that were, in themselves, entirely without reference to their engagement – which was a matter of procedural convenience and efficacy, perhaps even public policy, but entirely unconnected with the type of civil liability argued for by the Claimant.

(4) The fundamental point remained clear when Article 3 of the 1965 Order was considered. Whilst offences falling within Article 3(1)(a) expressly involved acts arising out of and in the course of duty (in respect of which vicarious liability was liable to arise collaterally at common law), offences within Article 3(1)(b) did not involve acts arising out of and in the course of duty – the justification for prosecution by the services being that the alleged victim is a member of HM forces, or a civilian subject to service discipline. Thus, although Article 3(1)(b) did not necessarily preclude vicarious liability additionally being made out, it was far from correct to say that, for the jurisdiction to be operable, it had to arise out of circumstances where vicarious liability would additionally be established – it might or it might not.

(5) Further support was provided by the aspects of the Manual of Service Law cited by Mr Kelly, and by his unchallenged evidence that the SPA was independent of the chain of command and fulfilled a similar function to the CPS.

35. Thus, Master Thornett concluded, he was satisfied that the argument that the exercise of jurisdiction by the SPA could be taken as at least relevant, if not determinative, of the question of vicarious liability, had no realistic prospect of success, as it was clear from the legislation that the service authorities would ordinarily assume jurisdiction in Gibraltar to investigate and try any offence against the person committed by one member of HM forces against another while off duty – doing so under statute, not via their responsibilities qua employer. The location of the alleged offence made no difference. The jurisdiction arose because both the alleged offender and the person in relation to whom the offence was alleged to have been committed were persons subject to service laws.

36. As to the Claimant's broader allegations, Master Thornett concluded that they were very weak and, whilst not constituting an abuse of process for the purpose of CPR 3.4, stood no realistic prospect of success for the purposes of Part 24 given that:

(1) Although, ultimately, TS may well have been obliged to be within the territory and subject to military discipline, taken alone there was nothing in that to provide an arguable link with the alleged act – just as the mere incidence of the Captain in *Radclyffe* being subject to and able to impose discipline was not sufficient in itself to secure liability, which depended on a much closer series of connecting events.

(2) Equally, the contemplation in *Radclyffe* of private or social occasions being outwith the interests and responsibilities of military discipline and hence insufficient to constitute the close connection for the purpose of vicarious liability prevented any realistic reliance upon the fact that the alleged incident occurred back at the base – the evening had started as a private and social occasion even if it had ended as something very different.

(3) Having rejected as arguable the argument that the overriding discipline and control upon TS as a serviceman was sufficient, he was unable to accept that it was arguable that the return of the Claimant and TS to the base presented any substantive difference or distinction to the preceding social and private occasion – they were, after all, adults who were both allowed to leave and to return to the base providing they were off duty in the direct operational sense.

37. Thus, in [28], Master Thornett ultimately concluded that:

> *"I am satisfied that the Claimant does not have any real prospect of establishing there was a sufficiently close connection between the nature of TS's employment and the alleged assault. Save that TS and the Claimant are both paid by MOD and happened to be stationed at the same base at the same time, there was no command or working relationship between them or linking them. Indeed, they were in separate branches of the Armed Forces. The alleged assault happened in the early hours of a Sunday* [sic] *morning, when they were both off duty and had been out drinking with friends. There is no basis for alleging that that [sic] the act*

> *was facilitated by the working environment or precipitated by anything to do with their work".*

38. Master Thornett dealt with misfeasance in public office in [29] & [30], as follows:

> *"29. Finally, although not a point that was particularly explored at the hearing, I observe that the Amended Particulars of Claim still retains the allegations that, in committing the alleged act, TS committed the tort of misfeasance in public office.*
>
> *According to Halsbury's, Volume 69 Local Government, Para 876:*
>
> > *"The tort of misfeasance in public office may be committed by a local authority either directly or vicariously through its offences or members. The tort involves the unlawful exercise of power as a public officer where either (1) the conduct is intended to injure another or (2) action is taken knowing or being reckless that there was no power to do so and that the action will probably injure the claimant. It is a question of fact as to whether a sufficient connection can be established between the conduct complained of, the public office held and the power exercised."*
>
> *30. I am entirely satisfied there is no conceivable basis for arguing that the alleged actions of TS constituted his abuse of a public office. There is no aspect whatsoever of the events as particularised by which they could be described as the improper execution of his powers as a member of the armed forces. I strike out Paragraphs 55 to 58 in the Particulars of Claim as disclosing no reasonable ground for bringing the claim under CPR Part 3.4(2)."*

The arguments on appeal

39. As to misfeasance in public office and the striking out of [55] – [58] of the Amended Particulars of Claim, Ms Morris, on behalf of the Claimant, argued that:

    (1) Against the background that the Defendant's application had not suggested that there was no evidence of misfeasance but had focused on vicarious liability, and whilst there was some discussion at the hearing on 9 October 2017 as to whether there was a distinction between the test for vicarious liability and what was required to establish whether, for the purposes of misfeasance in public office, an act was in the course of duty, there was no argument about the different issue as to whether the act had to be an exercise of power, and Master Thornett had not indicated that he required the Claimant to deal with that issue – which may have been in his mind because of [26] of the Defence, albeit answered in [7] of the Reply to the Defence.

    (2) When refusing permission to appeal, Master Thornett had suggested that, given that the Defendant had made an application in respect of the entirety of the Claimant's claim, the Claimant was thus required to argue every point in the

Amended Particulars – which was wrong as it would defeat the purpose of the Defendant having to set out the basis of its application for the Claimant to respond to, and would also defeat the purpose of the CPR generally. Rather, as the Claimant's Speaking Note for the hearing on 9 October 2017 confirmed, the parties had concentrated on the single issue of vicarious liability.

(3) Further, it was wrong in law for Master Thornett to conclude that because rape could never be considered an exercise of power in accordance with a person's duties it could never constitute an act for the purposes of misfeasance in public office. Rather, the *Three Rivers* case (above), when considered in full (rather than relying on the extract cited from Halsbury's) makes it clear that an act for the purpose of misfeasance in public office is not confined to acts that constituted an improper exercise of a power, but also includes illegal acts, beyond the scope of any power.

40. As to vicarious liability, Ms Morris underlined that:

(1) The general legal principles had not been in dispute between the parties – including that whether vicarious liability ought to be imposed is fact sensitive and to be determined on a case-by-case basis.

(2) Nor was there any issue with the legal framework set out by Master Thornett in [13] of his judgment – albeit that he was referred to other authorities as well as those that he cited.

(3) However three of the cases had since reached the Court of Appeal, namely *Barclays Bank PLC v Various Claimants* [2018] EWCA Civ 1670; *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214 (which appeared to have been central to Master Thornett's focus on the fact that the events had occurred out of office hours as a reason not to impose vicarious liability, but in which the appeal had been allowed and vicarious liability had been imposed); and *WM Morrison Supermarkets PLC v Various Claimants* [2018] EWCA Civ 2339 (in which the decision to impose vicarious liability was upheld).

41. As to the merits in relation to vicarious liability, Ms Morris variously submitted that:

(1) Vicarious liability is a fact sensitive issue and, given the tests for strike out and summary judgment, Master Thornett had erred in his application of the general principles to the facts of the Claimant's case, and had also (and significantly) got the days of the week upon which the relevant events had occurred wrong.

(2) It appeared that he had relied on the decision at first instance in *Bellman* (above), which involved a social occasion at a weekend, following an earlier social occasion, and with out of hours drinking, not to impose vicarious liability. However, that decision had been overturned on appeal, with the Court concluding that the most recent and authoritative distillation of the legal principles was to be found in the questions identified in *Mohamud* (see [28] above) and all prior case law should be viewed through its prism. As to the second question posed, Lord Toulson had observed (at [45] in *Mohamud*):

> *"…The cases in which the necessary connection has been found for Holt's principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party…"*

[However, as Irwin LJ made clear at [40] the combination of circumstances that arose in *Bellman* would only rarely arise and the Court's decision was not authority for the proposition that employers became insurers for violent or other tortious acts by their employees].

(3) It was not, and never had been, the Claimant's case that it was sufficient to prove that access to commit the alleged rape via the working environment was sufficient for vicarious liability to attach. Master Thornett had failed to consider, as required, the cumulative effect of the Claimant's Amended Particulars of Claim which he had not set out and which disclosed reasonable grounds for bringing the claim and that the Claimant had a real prospect of establishing vicarious liability. He could not ignore the duty of care owed by TS to the Claimant, and the Claimant's point as to the jurisdiction of the SPA etc was not suggested to be a complete answer but was simply one aspect of the cumulative Amended Particulars relied upon.

(4) The decision in *N v Chief Constable of Merseyside* (above) involved a Police Officer pretending to be on duty in order to commit an assault, whereas in the instant case there was no deception by TS in that regard and he was on duty at the material time.

(5) Whilst Master Thornett had found that there was no arguable link between TS having been obliged to be in Gibraltar and being subject to military discipline and the alleged rape, the Claimant's argument was that, although the incident had occurred otherwise than when TS was directly engaged in his training exercise he was at the material time under the direction and control of his supervisors on the base, including at the time of the event; and, as part of his duties, TS was entrusted with the welfare and safety of others, including the Claimant, at the base – which was in direct contrast to the commission of an act of rape.

(6) *Radclyffe* (above), to which Master Thornett had referred, was decided on a different point, but vicarious liability was imposed despite the relevant incident having occurred on a social occasion. Equally, whilst Master Thornett had referred to the absence of a chain of command or of a direct working relationship between TS and the Claimant, the Claimant had not suggested that command structure or the fact that the Claimant and TS were in different forces was relevant. In any event, there was no authority which indicated that a chain of command or a direct working relationship was required to establish vicarious liability – it had just happened that there was a chain of command in *Radclyffe.*

(7) Whilst Master Thornett had proceeded on the basis that both TS and the Claimant had been "*off duty*" in the traditional sense, TS had not been – as he was required to be at the base, he was in receipt of continuous remuneration for being at the base, and because of the continuous structure of direction and control and liability to the service authorities for any unlawful acts or omissions carried out on base, including those which would not be an offence in other employment contexts.

(8) Master Thornett had rightly acknowledged that offences falling within Article 3(1)(a) of the 1965 Order would be likely to involve collateral vicarious liability, but had erred in determining (based on Mr Kelly's submissions rather than on direct evidence from the person(s) who had made the decision) that the service authorities had exercised jurisdiction under Article 3(1)(b). Such a conclusion was not open to Master Thornett on a strike out application. Rather, given his view as to the likely consequences of an offence falling within Article 3(1)(a), and the fact that it appeared likely that jurisdiction was exercised under that Article, there was a triable issue on the point and if evidence from the SPA confirmed that the decision was taken under Article 3(1)(a) both that fact and the reasons for it would be relevant to the Claimant's case.

(9) In any event, in relation to summary judgment, Master Thornett had failed to consider whether there were any other compelling reasons why the case should be disposed of at trial – notwithstanding the fact that in [21] & [22] of the Claimant's Speaking Note for the hearing on 9 October 2017 it was asserted that there were compelling reasons, namely that serious allegations were made about TS's conduct in the course of his service in the British Army; that the impact on the Claimant had been serious and significant; that the prejudice that the Claimant would suffer if the Defendant's application succeeded was grave; and that it was not appropriate that the issue of vicarious liability should be determined at that stage, as it was a matter that should be litigated at trial.

42. The overall submissions advanced by Mr Dixey, on behalf of the Defendant, were that Master Thornett did not err in:

(1) Concluding that the Claimant had no real prospect of succeeding on her claim on the grounds that the Defendant was not vicariously liable to her, and that there was no other compelling reason why the case should be disposed of at trial.

(2) His approach to whether the Amended Particulars of Claim disclosed any reasonable grounds for bringing the misfeasance in public office and, in any event, his finding that the Defendant was not vicariously liable for TS's alleged actions was sufficient to dispose of the appeal.

43. Mr Dixey immediately accepted that, for the purposes of the hearing before Master Thornett and of the appeal, the court was required to proceed upon the basis that the Claimant's factual allegations were correct. He also recognised, as Mr Kelly had done in his first witness statement, that the assessment of vicarious liability was fact sensitive and that it was relatively rare for claims for vicarious liability to be struck out but maintained that this claim did stand to be struck out. He also accepted that the Defendant had never sought to suggest that the case was an abuse of process, and that although Master Thornett had expressed the correct test under CPR 24.2 in [1] of his judgment, he had not dealt in the body of the judgment with whether or not there was any other compelling reason why the case should be disposed of at a trial. However, Mr Dixey submitted, there was no compelling reason to go to trial.

44. As to vicarious liability, Mr Dixey submitted that, for the reasons set out in Mr Kelly's statements and Master Thornett's judgment, the Master was right to conclude that the Claimant had no real prospect of succeeding, and there were no other compelling reasons why the case should be disposed of at trial. Master Thornett had made no errors

of law and had had regard to all relevant factors – including (at [24] of his judgment) the combination of all the Claimant's Particulars.

45. As to the facts, Mr Dixey accepted that there had been an error in the Defendant's application (and thus in Master Thornett's judgment) as to the days of the week involved. However, he asserted, the relevant contact between the Claimant and TS had begun off the base and thus not in the working environment; it had been a coincidental meeting. Mr Dixey asserted that it was not pleaded that TS had used his role or rank to spend time with the Claimant. They had been drinking off base until the early hours. TS was not, Mr Dixey contended, exercising a pastoral role – only a social role. He accepted that after they had returned to the base it had turned into something far worse. However, it was not a rape following on from work and the opportunity to be present on base with the Claimant did not necessarily mean that the offence was within the scope of his employment. The coincidence was not sufficient to give rise to vicarious liability and he was not employed to care for the Claimant. At the highest, TS owed a duty to prevent harm to others, but that was not sufficient, in the circumstances of this claim, to lead to vicarious liability. To do such would be to stretch the law too far and would open inappropriate floodgates – with vicarious liability for all service personnel who committed sexual offences. In any event TS had, in reality, been off duty at the material time.

46. The role and jurisdiction of the SPA, although not the only issue, was, Mr Dixey submitted, the key issue during the hearings before the Master. He accepted that if the only basis upon which the SPA could have assumed jurisdiction was via Article 3(1)(a) there may have been greater force in the Claimant's argument. However, jurisdiction could arise in other ways, and thus Master Thornett had been correct to find that the Claimant's argument to the effect that the exercise of jurisdiction could be taken as at least relevant, if not determinative, of the question of vicarious liability, had no real prospect of success – which was not an impermissible factual finding but a clear consequence of the wording of the Order. In any event, it was not apparent that the Service Police and the SPA had acted under Article 3(1)(a); whatever the basis upon which they had acted a subjective decision by them could not assist the Claimant and did not require further evidence; if it was relevant it would allow the Defendant to gerrymander the choice of which Article to proceed under in order to avoid vicarious liability; and it was impossible to see how, even if the Service Police and the SPA had acted under Article 3(1)(a), that assisted the Claimant. To the extent that, before Master Thornett, there had been argument as to whether the alleged rape could be "an offence against the person", some assistance was provided by the Visiting Forces Act 1952 (which had clear parallels with Article 3 of the 1965 Order), the Schedule to which defines such offences as including offences contrary to Part 1 of the Sexual Offences Act 2003 (which include rape).

47. As to the authorities, Mr Dixey underlined that an important aspect of the tests in *Mohamud*, as echoed in the Court of Appeal in *Bellman*, was that the seamlessness or otherwise of the relevant transactions was relevant – which needed to be borne in mind in this case. Mr Dixey further emphasised that in *N* the fact that the off-duty probationer was acting as a police officer was important but not decisive, and submitted that the probationer's conduct in that case had been analogous to that of TS in this case. TS had had no pastoral responsibility for the Claimant at the material time. Mr Dixey posed the question, if TS was deemed to be on duty, where would the boundaries of vicarious

liability be? It was going too far to say that the return to base meant that he had obligations towards the Claimant. Rather, he had been on a frolic of his own. By reference to *Radclyffe*, Mr Dixey continued that TS had not used his position to coerce, to influence, or to exert authority over the Claimant. Equally, in contrast with *Bellman*, the instant case simply involved an impromptu drink on base with no transition from the working to the social environment. There was no necessary connection between TS's employment and the rape.

48. As to misfeasance, Mr Dixey accepted that at the outset of the hearing on 9 October 2017 Ms Morris had accepted, in discussion with the Master, that in order to prove that TS was acting in a public office it would be necessary to establish the same as was required to establish vicarious liability. Thus, Mr Dixey further accepted, the parties and the Court had proceeded on the basis that the determinative issue in the proceedings would be whether or not the Claimant could establish that the Defendant was vicariously liable for TS's actions. It followed that, given his ultimate finding in relation to vicarious liability, the Master did not need to determine whether the matters alleged amounted to misfeasance in public office. Thus, the appeal was academic and should be dismissed. In any event, there was nothing improper in the Master considering Halsbury's which merely summarised the well-established principles from the *Three Rivers* case – and even if there was merit in the appeal on this point, and [29] & [30] of Master Thornett's judgment were struck down, that would still leave a valid judgment in relation to vicarious liability, which was the critical issue.

49. In reply Ms Morris variously asserted that:

(1) The Amended Particulars made clear that the Claimant and TS had first met in April 2012, in a work context, not in a social context on the night of 15 May 2012 – on which night the events had been seamless.

(2) Given that the Defendant had not produced an Amended Defence, or any disclosure or relevant witness statement, it was not known whether the relevant Amended Particulars were admitted or denied.

(3) TS's duty to prevent harm to others included a duty not to cause harm to others.

(4) There was no force in the Defendant's floodgates argument, each case was fact specific.

(5) In *N* (above) the officer had at all times pretended that he was on duty, he had never been on duty and was thus truly on a frolic of his own.

(6) The court should be interested in evidence in relation to the 1965 Order issue, including what the basis and reasons for the acceptance of jurisdiction were. A strike out was not appropriate when relevant factual issues were unresolved.

The Merits

50. In my view this appeal must be allowed. Given that I have summarised the background, the judgment of Master Thornett and the arguments on appeal at some length, I can give my reasons shortly.

(1) Misfeasance

51. As indicated above, I have no doubt that Master Thornett erred in striking out [55] – [58] of the Claimant's Amended Particulars of Claim. There was no argument before him about whether, in committing the alleged act, TS had committed the tort of misfeasance in public office. Rather, the arguments of both parties were, appropriately, all about whether the Claimant had any real prospect of showing that the Defendant was vicariously liable for the commission of that and other torts by TS. It follows, as a matter of basic fairness, that Master Thornett should not have ruled on the issue of whether, in committing the alleged act, TS had committed the tort of misfeasance in public office, without first giving the Claimant a clear opportunity to make submissions on that issue. Equally, whilst the quotation from Halsbury's was, in itself, accurate it did not encompass the full scope of the tort, and (had she been given the opportunity) the Claimant would have been able to point to aspects of the *Three Rivers* judgment which support her case that the tort is not confined to acts that constitute an improper exercise of a power, but includes illegal acts that are beyond the scope of any power. Hence [29] – [30] of Master Thornett's judgment must be struck down.

52. As also indicated above, that, of course, is not the end of the appeal. I must go on to consider vicarious liability.

(2) Vicarious liability

53. The Defendant was right to recognise that the assessment of vicarious liability is fact sensitive, and that it is relatively rare for claims of vicarious liability to be struck out. As the Court of Appeal made clear in *Bellman*, the most recent and authoritative distillation of the legal principles is to be found in the questions identified at [44] & [45] of the decision of the Supreme Court in *Mohamud* (which questions Master Thornett summarised in his judgment) and all prior case law must be viewed (as I have viewed it) through the prism of that case.

54. The Defendant accepted that the relationship between it and TS was capable of giving rise to vicarious liability. As the Defendant also, and inevitably, accepted, Master Thornett was required to proceed upon the basis that the facts pleaded by the Claimant were true.

55. Against that background, I concluded, for the reasons advanced by the Claimant (as set out above) that Master Thornett erred in:

(1) Failing to give appropriate weight to the combination of all the matters relied upon by the Claimant which, in my view, do give rise to a real prospect of establishing vicarious liability (albeit that there are challenges to be overcome).

(2) Concluding that the argument that the exercise of jurisdiction by the SPA could be taken as at least relevant to the question of vicarious liability had no prospect of success, when it was plainly so relevant and had a sufficient prospect of success.

(3) Concluding that there were not triable issues of fact when there plainly were – in relation, for example, to the nature of, and interconnections between the jobs of the Claimant and TS, the duty of care, the exercise of jurisdiction by the SPA, and the

extent of the connection between the position in which TS was employed and his wrongful conduct.

56. In addition, Master Thornett was (inadvertently) misled as to the day of the week on which the relevant events occurred and failed to consider whether there were other compelling reasons why the case should be disposed of at trial when the Claimant argued that there were.

57. Notwithstanding the skill with which they were advanced, I was not persuaded by Mr Dixey's arguments, and (for the reasons that she advanced) preferred those of Ms Morris.

58. Thus, I concluded that the appeal should be allowed.

Conclusion

59. For the reasons set out above, the appeal is allowed.

60. I have approved an Order accordingly.