Neutral Citation Number: [2021] EWCA Civ 67

Case No: A2/2020/0161

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HONOURABLE MR JUSTICE KERR
UKEAT/0007/19/JOJ

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2021

Before :

LORD JUSTICE BEAN
LORD JUSTICE FLAUX
and
LORD JUSTICE MALES

- -

Between :

IRWELL INSURANCE COMPANY LIMITED	**Appellant**
- and -	
(1) NEIL WATSON **(2) HEMINGWAY DESIGN LIMITED (IN LIQUIDATION)** **(3) DARREN DRAYCOTT**	**Respondents**

- -
- -

David Mitchell (instructed by **Mark D Owen, Solicitors**) for the **Appellant**
David Gray-Jones (instructed by **Lawson West**) for the **First Respondent (Mr Watson)**
The Second and Third Respondents did not appear and were not represented.

Hearing date: 14 January 2021

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Approved Judgment

Lord Justice Bean :

Introduction

1. Neil Watson, the Claimant, was employed by Hemingway Design Limited as a Product Administrator between 2011 and 2017. In April 2017 Mr Watson brought claims against Hemingway in the Leicester Employment Tribunal (ET) of unfair dismissal and disability discrimination. The disability discrimination claim was also made against Mr Draycott, the former Managing Director of Hemingway.

2. In December 2017, Hemingway entered a creditors' voluntary liquidation: we were told that the company has now been dissolved.

3. Hemingway had taken out a policy with Irwell Insurance Company Limited insuring it against awards arising from successful claims brought against it by employees in ET proceedings. The policy was subject to an exclusion requiring that Hemingway should take advice from Peninsula Business Services Limited, its employment law advisors, promptly before any action was taken against an employee, or as soon as matters became known, and that Peninsula's advice should be followed. The relevant clause provided that failure to comply with this condition voided the policy.

4. In July 2017, Irwell notified Hemingway that, because it had not taken advice from Peninsula in relation to the matters about which the Claimant complained, any award to the Claimant would not be covered under the terms of the policy.

5. In January 2018, Mr Watson applied to join Irwell as third Respondent to his claims before the ET, contending that any liability on the part of Hemingway had transferred to Irwell upon the former's liquidation, in accordance with the Third Parties (Rights against Insurers) Act 2010 ("the 2010 Act"). Irwell's Response contended that the question as to whether Irwell should or should not provide cover was a matter of interpretation and construction of the insurance contract between it and Hemingway; it was not a matter falling within the jurisdiction of the ET.

6. By a reserved judgment and reasons dated 4 September 2018 EJ Ahmed stayed the proceedings pending determination in the ordinary courts of whether Irwell was liable to the Claimant under the 2010 Act.

7. The claimant appealed. His appeal was allowed by the EAT (Kerr J, sitting alone) in a judgment of 16 December 2019. By order of Lewison LJ dated 11 June 2020 permission was granted to appeal to this court.

Legislative background

8. Prior to the enactment of the Third Parties (Rights Against Insurers) Act 1930 ("the 1930 Act") the right of a person or company to be indemnified under a contract of insurance against claims made against him by a third party whom he had injured (physically or otherwise) was personal. If the insured became bankrupt or, being a company, went into liquidation, the insurance money became part of the general assets distributable among creditors, and if the injured person had not already obtained judgment and levied execution in respect of any claim for damages, his only right was to prove in the bankruptcy or winding-up.

9. The position under common law was reversed by the 1930 Act, s 1 of which effected a statutory assignment of the rights of the insured to the injured third party. Mr David Mitchell, for Irwell, was no doubt right to say that this measure was intended to supplement the compulsory motor insurance regime introduced by the Road Traffic Act 1930.

10. A claim under the 1930 Act, even where the third party's claim against the insured was for damages in respect of personal injuries, was not itself a claim for such damages. It was a claim for indemnity under a contract of insurance of which the third party was the statutory assignee.

11. Under the 1930 Act the third party had to establish and quantify the insured's liability and then show that the insured was insolvent, as a precondition to bringing an action against the insurer under the policy. An immediate action against the insurer pending the determination of the insured's liability was not possible (*Post Office v Norwich Union Fire Insurance Society* [1967] 2 Q.B. 363, approved by the House of Lords in *Bradley v Eagle Star Insurance Co Ltd* [1989] A.C. 957). In the case of an insured which was a dissolved company this required an application to restore the company to the register.

12. In 1998 the English and Scottish Law Commissions published a consultation paper on the operation of the 1930 Act. This was followed by the publication by the Law Commissions, in July 2001, of a final Report and draft Bill. Following the publication of the draft Bill, it lay dormant for nine years, before being presented to Parliament in November 2009. It passed both Houses of Parliament without amendment and became the 2010 Act. It was not brought into force until 1 August 2016.

13. The 2010 Act retains the basic principle of the 1930 Act, allowing a third party to recover from the insurer in the event of the insured's insolvency, but it introduced a number of significant changes. The most important of these was aptly described by Mr Mitchell in his skeleton argument as providing "a single stage whereby if the insured has become insolvent the third party can bring a single action against the insured and his liability insurer, rather than bringing an action against the insured and then seeking to enforce it in separate proceedings against the insurer. This removes the need under the 1930 Act for a struck off company to be revived so that it can be sued. It also allows the court to resolve coverage questions as preliminary issues so that, if there is no coverage, a costly trial on the insured's liability can be avoided."

14. Sections 1 and 2 of the 2010 Act provide as follows:

> "1. **Rights against insurer of insolvent person etc**
>
> (1) This section applies if—
>
> (a) a relevant person incurs a liability against which that person is insured under a contract of insurance, or
>
> (b) a person who is subject to such a liability becomes a relevant person.

(2) The rights of the relevant person under the contract against the insurer in respect of the liability are transferred to and vest in the person to whom the liability is or was incurred (the "third party").

(3) The third party may bring proceedings to enforce the rights against the insurer without having established the relevant person's liability; but the third party may not enforce those rights without having established that liability.

(4) For the purposes of this Act, a liability is established only if its existence and amount are established; and, for that purpose, "establish" means establish—

(a) by virtue of a declaration under section 2 or a declarator under section 3,

(b) by a judgment or decree,

(c) by an award in arbitral proceedings or by an arbitration, or

(d) by an enforceable agreement.

(5) In this Act—

(a) references to an "insured" are to a person who incurs or who is subject to a liability to a third party against which that person is insured under a contract of insurance;

(b) references to a "relevant person" are to a person within sections 4 to 7[(and see also paragraph 1A of Schedule 3)];

(c) references to a "third party" are to be construed in accordance with subsection (2);

(d) references to "transferred rights" are to rights under a contract of insurance which are transferred under this section.

2. **Establishing liability in England and Wales and Northern Ireland**

(1) This section applies where a person (P)—

(a) claims to have rights under a contract of insurance by virtue of a transfer under section 1, but

(b) has not yet established the insured's liability which is insured under that contract.

> (2) P may bring proceedings against the insurer for either or both of the following—
>
> (a) a declaration as to the insured's liability to P;
>
> (b) a declaration as to the insurer's potential liability to P.
>
> (3) In such proceedings P is entitled, subject to any defence on which the insurer may rely, to a declaration under subsection (2)(a) or (b) on proof of the insured's liability to P or (as the case may be) the insurer's potential liability to P.
>
> (4) Where proceedings are brought under subsection (2)(a) the insurer may rely on any defence on which the insured could rely if those proceedings were proceedings brought against the insured in respect of the insured's liability to P.
>
> (5) Subsection (4) is subject to section 12(1).
>
> (6) Where the court makes a declaration under this section, the effect of which is that the insurer is liable to P, the court may give the appropriate judgment against the insurer.
>
> (7) Where a person applying for a declaration under subsection (2)(b) is entitled or required, by virtue of the contract of insurance, to do so in arbitral proceedings, that person may also apply in the same proceedings for a declaration under subsection (2)(a).
>
> (8) In the application of this section to arbitral proceedings, subsection (6) is to be read as if "tribunal" were substituted for "court" and "make the appropriate award" for "give the appropriate judgment".
>
> (9) When bringing proceedings under subsection (2)(a), P may also make the insured a defendant to those proceedings.
>
> (10) If (but only if) the insured is a defendant to proceedings under this section (whether by virtue of subsection (9) or otherwise), a declaration under subsection (2) binds the insured as well as the insurer.
>
> (11) In this section, references to the insurer's potential liability to P are references to the insurer's liability in respect of the insured's liability to P, if established."

15. Section 3 sets out provisions for establishing liability in Scotland. These broadly reproduce the provisions of s 2 relating to England and Wales and Northern Ireland except that there is no equivalent to s 2(3): the Explanatory Notes state that this is because in Scots law a declarator is not a discretionary remedy. Section 3(5) is equivalent to s 2(6) but since its wording formed part of Mr Mitchell's arguments I will return to it later in this judgment.

16. There is no mention of ETs in the 2010 Act.

The jurisdiction of employment tribunals

17. Unlike the High Court, ETs have no inherent jurisdiction. They exercise jurisdiction only in cases where statute confers it. ETs have exclusive jurisdiction in many areas, including unfair dismissal and discrimination in the course of employment. ETs also have concurrent jurisdiction with civil courts in respect of equal pay claims and certain contractual claims brought under Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 (SI 1994/1623) and the Scottish equivalent (SI 1994/1624). Claims under the 2010 Act are not among those listed in the 1994 Extension of Jurisdiction Orders.

The judgments below

18. In the ET sitting at Leicester Employment Judge Ahmed dismissed an application by Irwell to strike out disability discrimination claims as having no reasonable prospect of success but stayed the ET proceedings pending determination of the issue as to whether Irwell was liable to Mr Watson under the 2010 Act. He said:-

> "10. The principal issue is whether the determination of issues under the 2010 Act is a matter that this Tribunal can and should decide or whether it a matter for the ordinary courts."
>
> 11. In his helpful submissions Mr Gray-Jones argues that the 2010 Act was specifically passed to deal with the problems highlighted by the Law Commission on third party rights against insurers in their report in July 2011. Although I have not been provided with a copy of the Commission's report, there is no dispute that the aim of the legislation was to make it easier for third parties to bring claims without having to establish liability separately. The explanatory notes to the Act apparently state that the report's recommendations are accepted in that respect.
>
> 12. Accordingly, Mr Gray-Jones on behalf of the Claimant invites me to interpret the Act in such a way that it deals with the mischief which was designed to be addressed, namely that a third party should not have to bring separate proceedings to enforce an indemnity against an insurer.
>
> 13. Mr Graham on behalf of Irwell argues that Tribunals are creatures of statute and there is no statutory authority to give the Tribunal jurisdiction to deal with the provisions of the 2010 Act. He agrees that the issue as to liability under the 2010 Act needs to be determined but that the Tribunal is not the proper forum.
>
> 14. None of the cases which Mr Gray-Jones has referred me to, and I do not need to set them out here, are cases which involve the 2010 Act and Employment Tribunals. Of course the fact

> that there are no previously decided cases is not determinative but I note that there is an absence of any previously decided cases in the Employment Tribunal under the 2010 Act. All of them are cases in the ordinary courts. Mr Gray-Jones agrees that the reference to "arbitral proceedings" in section 2(8) does not refer to Employment Tribunals.
>
> 15. The issue between the Claimant and Irwell has nothing to do with an employment contract but rather a contract of insurance. The Claimant's claims against Mr Draycott and Hemingway arise out of an employment relationship. Irwell was never the Claimant's employer. There is no contractual nexus between the Claimant and Irwell nor indeed between Mr Draycott and Irwell. The insurance policy seems to have been taken out by Hemingway.
>
> 16. There will no doubt be evidential issues in relation to whether Hemingway breached the terms of its insurance policy. They will be critical to the ultimate decision. Those issues are properly decided by the ordinary courts rather than an Employment Tribunal. They do not arise out of any employment relationship. The Tribunal's jurisdiction in breach of contract cases is limited to claims under the Employment Tribunals (Extension of Jurisdiction) Order 1994. This case is nothing to do with that Order.
>
> 17. There will also be issues between Mr Draycott and his dealings with Peninsula as to whether the terms of the policy were followed and whether the conditions were adhered to. Those matters have nothing to do with any employment relationship or contract.
>
> 18. For those reasons, I consider it appropriate to stay the present proceedings."

19. Mr Watson appealed to the EAT. The appeal was allowed to proceed to a full hearing by His Honour Judge Auerbach, subject to dismissing some grounds he did not consider arguable. The only parties represented before the EAT (and likewise before us) were Mr Watson and Irwell. The liquidator of Hemingway stated that Hemingway would take no part in the appeal, and Mr Draycott was debarred from doing so following noncompliance with procedural orders. The main issue argued in the EAT was whether EJ Ahmed erred in law by disclaiming any power to determine the dispute between Watson and Irwell as to whether Mr Watson could recover any compensation from Irwell in respect of any liability of Hemingway. Kerr J also heard argument on a further issue, namely whether Irwell could rely on an arbitration clause in the contract of insurance between Irwell and Hemingway.

20. On the main issue Kerr J said [it should be noted that the "Mr Watson" mentioned in his judgment was not the Claimant, but Mr Bernard Watson, the advocate representing Irwell before the EAT] :-

"28. In my judgment, the real question I must decide is whether an employment tribunal falls within the words "the court" in section 2(6) of the 2010 Act. If it does, then the 2010 Act has conferred jurisdiction on the employment tribunal to make a declaration as to the insurer's liability under section 2(2)(a) of that Act. If that is so, the 2010 Act falls within the words "any other Act, whether passed before or after this Act" in section 2 of the ETA; and the jurisdiction "conferred on them" (the employment tribunals) by the 2010 Act is one which, by section 2 of the ETA, they "shall exercise".

29. But if an employment tribunal is not included in the meaning of "the court" in section 2(6) of the 2010 Act, the employment tribunal has no power to make a declaration under section 2(2)(a) of the 2010 Act. If that is the position, the employment tribunals have no power to determine an insurer's liability under the 2010 Act. No jurisdiction under that Act would be "conferred" on the tribunal within section 2 of the ETA. And as Mr Watson rightly observes, no ministerial order under section 3 of the ETA has conferred any such jurisdiction.

30. The employment judge observed that the issue between the claimant and Irwell "has nothing to do with an employment contract"; that there is "no contractual nexus between the Claimant and Irwell"; and that the issues between the claimant and Irwell "do not arise out of any employment relationship". These observations go too far. The issues between the claimant and Irwell do arise, indirectly, from an employment relationship. And a contractual nexus between the claimant and Irwell is created by the statutory transfer of contractual rights pursuant to the 2010 Act and the vesting of those rights in the claimant.

31. The judge was of the view that the issues between the claimant and Irwell "are properly decided by the ordinary courts rather than the Employment Tribunal". He considered that the latter's jurisdiction "in breach of contract cases is limited to claims under the Employment Tribunals (Extension of Jurisdiction) Order 1994". Those observations of the judge (leaving aside the jurisdiction over wrongful deductions from pay which may be a breach of contract) are correct only if an employment tribunal is not "the court" within section 2(6) of the 2010 Act. All roads lead back to that question.

32. It is clear from the differences between the regime of the 1930 Act and that of the 2010 Act, that the latter was intended to promote a "single forum" solution to recovery against an insurer where the insured has become insolvent. Mr Gray-Jones rightly says that the passages he showed me in the Law Commission report provide strong support for that view. I

therefore accept that the "mischief" canon of construction tends to point along the path down which he beckons me.

33. I do not attach much weight to any suggestion that contracts of insurance are so far out of an employment tribunal's comfort zone as to make it unlikely that Parliament can have intended the tribunals to grapple with them. Employment tribunals are required to be versatile, not just to decide complex EU law points worthy of the Supreme Court's consideration and sometimes a reference to the Court of Justice in Luxembourg. They not infrequently have to consider contract based issues going beyond traditional employer and employee relations.

34. They have to look at contracts between, for example, third and fourth parties for the provision of agency services. They make forays into landlord and tenant law, where an employee has a right to occupy premises as an incident of employment. They also have to apply the general law outside the employment sphere. For example, they may have to apply the provisions of the Interpretation Act 1978 where, say, provisions have been repealed or delegated legislation replaced by an updated statutory instrument. They have to decide human rights points in their capacity as a body bound by section 6 of the Human Rights Act 1998.

35. They are used to considering generic defences to contract claims, such as want of consideration, estoppel, affirmation or illegality. In TUPE cases, they may have to consider non-employment contracts transferring, or not as the case may be, an undertaking or part of an undertaking to another person. The transfer of rights under the 2010 Act operates in a manner not dissimilar to TUPE. In both cases, contractual rights and obligations are transferred to a person not a party to the original contract. ……..

38. Is an employment tribunal "the court" in section 2(6) of the 2010 Act? Mr Watson urged that the legislature has differentiated a "tribunal" from "the court" in the same section, when dealing with arbitral proceedings. I am not persuaded that the references in section 2 to a "tribunal" in the context of arbitral tribunals are of significant weight. They deal with a specific type of tribunal, not with tribunals generally, nor with a particular kind of statutory tribunal such as an employment tribunal. The separate treatment of proceedings before arbitral tribunals is needed because of the prevalence of arbitration clauses in insurance contracts.

39. Underhill J (P), as he then was, in *Brennan v. Sunderland City Council*, at [22(2)] was unwilling to construe the word "court", read with the word "action" in the Civil Liability

> (Contribution) Act 1978 as embracing an employment tribunal. [Kerr J referred to some passages in *Brennan*, and continued:]
>
> 41. There are differences between the nature of the right in play in the present case and the right in the *Brennan* case. There, the right claimed was a right to claim contribution by one joint tortfeasor against the other. It turned out that the underlying right to claim a contribution does not exist under the Civil Liability (Contribution) Act 1978 in the case of joint tortfeasors sued in employment tribunal proceedings. Sunderland City Council's problem was not just one of forum; it had no right to contribution that could be claimed even in an ordinary court.
>
> 42. Here, the issue is one of forum only. It is not disputed that Hemingway's rights under the insurance contract have transferred to the claimant, subject to Irwell's defences to a claim under it. Leaving aside the impact of the arbitration clause (to which I shall return shortly), the meaning of the word "court" determines whether the employee must bring one claim or two. If the latter is the correct construction of section 2(6) of the 2010 Act, the statutory purpose has failed in the 2010 Act in its application to employment tribunal claims.
>
> 43. Essentially for that reason, I have come to the conclusion that the construction for which Mr Gray-Jones contends is the correct one. The context calls for a purposive construction. The "single forum" statutory purpose would, otherwise, be defeated in employment tribunal claims. In my judgment, the cases relied on by Mr Gray-Jones, especially the *Peach Grey & Co* case, provide sufficient authority for the proposition that an employment tribunal is included within the words "the court" in section 2(6) of the 2010 Act.
>
> 44. In all the respects emphasised by Rose LJ in *Peach Grey & Co,* the employment tribunal functions like a court. It is independent of the state. It determines rights and liabilities. It administers oaths and affirmations. It awards remedies including compensation. In addition, it was omitted from the architecture of the First-tier Tribunal and the Upper Tribunal, created by the Tribunals, Courts and Enforcement Act 2007. Mr Gray-Jones' broad construction fits with the policy of the 2010 Act. Mr Watson's narrow construction does not.
>
> 45. I therefore respectfully disagree with the judge's conclusion that he had no jurisdiction to entertain the claim as against Irwell."

21. On the arbitration issue Kerr J said:-

> "46. I turn to consider the impact, if any, of the arbitration clause in the contract between Irwell and Hemingway. I have

seen the clause, which is in fairly standard form. It applies where there is a "difference or dispute" between Irwell and Hemingway "or any other person insured under this Policy". The difference or dispute "shall be referred to and finally resolved by arbitration before a sole arbitrator in accordance with the Arbitration Acts as amended (save as the parties may expressly agree)…". The president of a particular arbitration body "shall on the application of either party appoint the Arbitrator in default of agreement between the parties".

47. Strictly speaking, I do not need to consider the impact of the arbitration clause at this stage. Neither party has yet sought to invoke it. Irwell decided instead to engage with the employment tribunal by making the unsuccessful strike out application, without prejudice to its denial of jurisdiction. It was arguable that on its own case Irwell lacked any standing to bring the strike out application. The judge was prepared to determine it, perhaps because Mr Draycott was present and is likely to have supported it.

48. Irwell relied on the existence of the arbitration clause in its grounds of resistance to the claim, but merely pointed to its existence "[f]urther or in the alternative" to Irwell's challenge to the tribunal's jurisdiction. Irwell did not assert that it intended to take steps to have an arbitrator appointed. It had no need to do so unless its primary contention that the tribunal lacked jurisdiction were wrong, as I have now decided. If its primary contention were right, as the judge decided, the next step would be proceedings in the High Court or county court, which might or might not ever be brought.

49. Nevertheless, it is possible that the arbitration clause may become relevant at the next stage of the proceedings, should either party take steps to have an arbitrator appointed. Irwell is more likely to do so than the claimant. I heard argument (including in written observations from the parties after the oral hearing of the appeal) on the impact of the arbitration clause and I think it right to express my views on the arguments the parties have advanced.

50. The Law Commission report dealt with arbitration clauses at paragraphs 5.39-5.44. The Commissions recognised that the prevalence of arbitration clauses in employer's liability insurance contracts called for specific provision. They noted in the report that "under the ABI [Association of British Insurers] / Lloyds arbitration agreement most UK insurers have now undertaken not to enforce arbitration clauses in standard-form policies if the insured prefers to have questions of coverage determined by a court" (paragraph 5.40).

51. The Commissions recommended (paragraphs 5.43-5.44) that the third party should be bound by an arbitration clause in the insurance contract to the same extent as the insured. The third party should, however, be allowed to establish the insured's liability, as well as the insurer's, in the arbitration. If the third party's underlying dispute with the insured was subject to arbitration, the Commissions recommended that the third party should be obliged to litigate that underlying dispute in a court rather than by arbitration, unless the insurer agreed otherwise.

52. In the 2010 Act, those recommendations were accepted. The explanatory notes stated (at paragraph 3) that the Act "gives effect, with minor modifications, to the recommendations set out in the … joint report… ." As already mentioned, where there is an arbitration clause in the insurance contract, the third party is bound by it but may apply in the arbitration proceedings for a declaration as to the insured's liability in the underlying dispute. The insured may be joined as a defendant and if it is, any declaration will be binding on it.

53. Such is the effect of section 2 as it applies to arbitral proceedings. The third party is able to establish his or her rights, if he or she wishes, in a single proceeding, preserving the "single forum" policy in cases where the insurance contract contains an arbitration clause. The single forum is the arbitration, not the court. If the third party wishes to litigate the underlying dispute against the insured in the ordinary court, he or she will have to litigate on two fronts unless the insurer waives the benefit of the arbitration clause.

54. How do the provisions apply in the context of employment tribunal claims where the insured is insolvent and the third party has acquired the statutory right to proceed directly against the insurer? If I am correct in deciding that "the court" in section 2(6) includes an employment tribunal, the question could arise how section 2 would work where the insurer seeks to rely on an arbitration clause in the insurance contract. Irwell has already suggested that may happen in this case.

55. Mr Gray-Jones submitted that the issue could not arise because the insurer, here Irwell, is unable to rely on the arbitration clause by reason of section 203 of the ERA and section 144 of the EqA. He points to the decision of Slade J in the Clyde & Co LLP case. She held that an arbitration clause in an agreement between a partnership and a member thereof fell foul of both section 203 of the ERA and section 144 of the EqA: see her judgment at [39]-[44]. However, that was an arbitration clause in the contract between the third party and the respondent to the tribunal proceedings; it was not an arbitration

clause in an insurance contract between the respondent to tribunal proceedings and that respondent's insurer.

56. In argument before me, the parties addressed the arbitrability of the dispute between the claimant and Irwell. Mr Watson pointed out, as I have said, that section 203 and section 144 of the respective Acts refer to contract terms affecting the operation of "provisions of this Act", to inhibitions on proceedings "under this Act" or terms which "purport to exclude or limit a provision of or made under this Act". They refer to the provisions of the ERA and EqA respectively, but make no reference to the 2010 Act.

57. Mr Watson suggested that an arbitrator could determine the liability of an insured in respect of employment tribunal claims. Section 2(7) of the 2010 Act allows the third party in arbitration proceedings to "apply in the same proceedings for a declaration under subsection (2)(a)", i.e. "a declaration as to the insured's liability" to the third party. Mr Watson drew my attention to Fulham FC (1987) Ltd v. Sir David Richards [2011] EWCA Civ 855, [2012] Ch 333. The Court of Appeal upheld Vos J's decision staying Fulham's "unfair prejudice" petition under section 994 of the Companies Act 2006, to enable that dispute to be the subject of arbitration pursuant to the rules of the Football Association Premier League Limited.

58. Mr Watson suggested that an arbitral tribunal could, similarly, entertain the underlying dispute even though it would normally have to be litigated in an employment tribunal, not an ordinary court. I think there could well be difficulties with that proposition, though it would need to be decided on the basis of fuller argument than I have heard. If it arose for decision, it could fall to be decided by an arbitration tribunal, sitting in private, subject to a challenge in the High Court under the Arbitration Act 1996, rather than by an employment tribunal.

59. If the validity of Irwell's arbitration clause were to arise in this case, I think the better view is that the clause is void as against the claimant by reason of section 203 of the ERA and section 144 of the EqA. An arbitration clause of the type in this case, requiring the claimant (as statutory transferee of the rights of Hemingway, the insured) to submit his dispute with Irwell to arbitration, would in my view limit the operation of the provisions of the ERA and EqA relied on by the claimant as against Hemingway, not to mention Mr Draycott.

60. Those provisions would not be as fully functional as they would be if the arbitration clause were absent. If the clause is read with the law on transferred rights in section 2 of the 2010 Act and if it is invoked by the insurer, the third party is put in the position of either asking the arbitral tribunal rather than the

> employment tribunal to rule on the underlying dispute with the insured – probably against opposition from the insured, if made a defendant and if present – or litigating on two fronts before different tribunals; in the employment tribunal as against the insured (and any other party such as Mr Draycott in the present case) and in the arbitral tribunal as against the insurer.
>
> 61. I think those consequences are sufficient to render the arbitration clause void, though my observations to that effect are of course obiter. My reason for allowing this appeal is my decision that the learned judge below was wrong to reject jurisdiction over the claim against Irwell under the 2010 Act, for reasons I have given earlier."

22. He therefore allowed Mr Watson's appeal and set aside EJ Ahmed's decision staying the claim as against Irwell.

Authorities on whether a tribunal is a "court"

23. The authorities indicate that whether a tribunal is to be treated as a "court" for the purposes of a statute or rule depends on context. We were referred to a number of reported cases.

24. In *Attorney General v British Broadcasting Corporation* [1981] AC 303 the House of Lords held that a local valuation court was not a court for the purposes of the contempt of court jurisdiction, as its functions were essentially administrative rather than judicial. Viscount Dilhorne referred to a court as a body which discharges judicial rather than administrative functions and forms part of the judicial system of the country, rather than the administration of the government. Lord Scarman referred to a body "exercising judicial functions [which] can be demonstrated to be part of this judicial system."

25. In a passage relied on by Mr Mitchell, Lord Scarman added:

> "But in my judgment, not every court is a court of judicature, i.e. a court in law. Nor am I prepared to assume that Parliament intends to establish a court as part of the country's judicial system whenever it constitutes a court. The word 'court' does, in modern English usage, emphasise that the body so described has judicial functions to exercise; but it is frequently used to describe bodies which, though they exercise judicial functions, are not part of the judicial system of the kingdom ... When therefore, Parliament entrusts a body with a judicial function, it is necessary to examine the legislation to discover its purpose. The mere application of the 'court' label does not determine the question; nor, would I add, does the absence of the label conclude the question the other way."

26. In *Peach Grey v Sommers* [1995] ICR 549 the Divisional Court held that an industrial tribunal was an "inferior court" within the meaning of the High Court rules (so that

the Divisional Court had power to punish contempt in relation to industrial tribunal proceedings). Rose LJ said at p.537:

> "In my judgment it is. I say this for a number of reasons. First, ……. an industrial tribunal has many of the characteristics to which the authorities refer as being those of a court of law. It is true that it is not a court of record and its monetary awards have to be enforced and taxation of costs carried out by the county court; that although in practice it observes the rules of evidence it is not strictly bound to do so; that there are conciliation proceedings available involving the Advisory Conciliation and Arbitration Service; and that rights of audience are not limited to lawyers. But it was established by Parliament, it has a legally qualified chairman appointed by the Lord Chancellor, and, like the Employment Appeal Tribunal, which is a court of record, other members representing employers and employees drawn from panels compiled by the Secretary of State for Employment, It sits in public to decide cases which affect the rights of subjects and it has power to compel the attendance of witnesses, administer oaths, control the parties' pleadings by striking out and amendment and order discovery; the parties before it can have legal representation; it has rules of procedure relating to the calling and questioning of witnesses and addresses on behalf of the parties; it can award costs; it must give reasons for its decisions which, on a point of law, can be appealed to the Employment Appeal Tribunal and Court of Appeal. In all, it appears to me to exercise judicial functions."

27. In *Vidler v UNISON* [1999] ICR 746 an ET (with the assistance of counsel specially instructed as *amicus curiae*) decided that an employment tribunal was included within the term "any court" in s.42(1A) of what is now the Senior Courts Act 1981, so that a party who has been declared a vexatious litigant by the High Court is unable to pursue proceedings in an employment tribunal without leave of the High Court. This was a first instance decision (of Mr Andrew Bano, as he then was), but I consider it to be clearly correct.

28. It has also been held by this court that an employment tribunal is a "court" within the meaning of art 21 of the Brussels Convention concerning jurisdiction and the enforcement of judgments in civil and commercial matters: *Turner v Grovit* [1999] ICR 1144.

29. In *Brennan and others v Sunderland City Council and others* [2012] ICR 1183 the EAT, Underhill J presiding, held that an ET does not have jurisdiction to make orders for contribution under the Civil Liability (Contribution) Act 1978 between respondents in discrimination cases. Underhill J said:-

> "16. Logically, there are two distinct questions – first, whether the 1978 Act on its true construction confers a right to contribution in the case of liability for discrimination in the employment field; and secondly whether, if so, the employment tribunal itself has jurisdiction to determine such claims or

whether they can be brought only in the ordinary courts. No doubt the two questions are related: for one thing, it would be inconvenient, to put it no higher, if the Act did confer such rights but a party seeking to enforce them had to start a separate claim in the County Court. Nevertheless we think it important in the interests of clear analysis to take them separately. We start with the question of jurisdiction.

17. The starting-point is that any jurisdiction to consider contribution claims of the kind in question must derive not from the 1978 Act, which is concerned simply with the creation of a right to contribute rather than with the question of where it may be enforced, but from the statutes which expressly confer jurisdiction on the employment tribunal. This was indeed common ground between the parties. The case advanced by Mr Reade on behalf of the Council was not that the 1978 Act as such conferred the relevant jurisdiction but rather that the jurisdiction of the employment tribunal to determine the primary claims brought with it the power to determine any contribution claims between the respondents.

18. Each of the anti-discrimination statutes now superseded by the 2010 Act has its own provision conferring jurisdiction on the employment tribunal, but they are in substantially identical terms. In the present case the relevant statute is the Sex Discrimination Act 1975. Section 63 reads (so far as material):

> "*Jurisdiction of employment tribunals*
>
> (1) A complaint by any person ("the complainant") that another person ("the respondent")—
>
> (a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part II or section 35A or 35B, or
>
> (b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination harassment against the complainant,
>
> may be presented to an employment tribunal.
>
> (2) …".

19. In our view it is plain that that provision does not confer jurisdiction to entertain a claim under the 1978 Act. A contribution claim is not a claim "by … [a] complainant" that a respondent has committed an act of discrimination: it is a claim by a respondent that another person has committed such an act.

…

21. We accordingly believe that the Tribunal was right to hold that it had no jurisdiction to entertain the Council's contribution claim, and the appeal must be dismissed. It follows that we do not strictly have to decide the question whether the Council has such a claim at all, albeit justiciable in the County Court or High Court rather than the employment tribunal. But we heard extensive submissions on the question, and we think we should express our view.

22. It was the Unions' case that the 1978 Act is concerned only with liabilities falling for determination in the High Court or County Court and thus that it creates no right to contribution in relation to liabilities for discrimination in the employment field. Mr Millar and Mr White, for the Unions, placed particular reliance on section 1 (6) of the Act, which defines the liability in respect of which contribution may be awarded as being a liability established, or capable of being established, in an "action"; and on section 2 (1), which refers to the assessment of contribution "by the court". Although neither "action" nor "court" is defined (save for the provision in section 6 (1) that an action means "an action brought in England and Wales"), they submitted that the two terms taken together can only fairly be read as referring to court proceedings. Both terms have technical meanings well understood by lawyers. Specifically:

(1) In relation to "action" we were referred to section 225 of the Judicature Act 1925, which ultimately derives from the Judicature Act 1873 and defines "action" as "a civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court". In *Herbert Berry Associates Ltd v Inland Revenue Commissioners* [1977] 1 WLR 1437 Lord Simon said, at p. 1446C:

> "The Companies Act 1948 is a statute dealing with technical matters, and one would expect the words therein to be used in their primary sense as terms of legal art. The primary sense of "action" as a term of legal art is the invocation of the jurisdiction of a court by writ, …".

Mr Millar pointed out that the Employment Tribunals Act 1996 used the term "action" in precisely this technical sense in the section empowering the minister to confer jurisdiction on employment tribunals to hear contractual claims: see section 3 (2).

(2) In relation to "court" we were reminded that when the legislature means that term to cover tribunals it says so expressly: see, e.g., sections 12 (3) and 13 (5) of the Administration of Justice Act 1960; section 19 of the Contempt of Court Act 1981; and section 37 of the Freedom of Information Act 2000. Otherwise the "court" and

> "tribunal" are recognised as distinct: Mr Millar pointed out that the 1996 Act expressly designates the Employment Appeal Tribunal, but not employment tribunal, as a court of record (section 20 (3)).

The Unions also took the point that the Employment Tribunal Rules of Procedure contain no provisions equivalent to those of Part 20 of the Civil Procedure Rules under which a contribution claim may be brought and if necessary the party against whom contribution is sought brought into the proceedings.

23. It was Mr Reade's case that the Unions' focus on the words "action" and "court" was unduly narrow and technical. More particularly:

> (1) We were referred to the decision of the Divisional Court in *Peach Grey & Co. v Sommers* [1995] ICR 549, in which, purporting to follow observations made in the House of Lords in *Attorney General v British Broadcasting Corporation* [1981] AC 303, it was held that an industrial tribunal was an "inferior court" within the meaning of RSC O.52 so that it had jurisdiction to punish an act of contempt. We were also referred to *Vidler v UNISON* [1999] ICR 546.
>
> (2) Mr Reade submitted that the language of "actions" was now largely obsolete and that courts and tribunals used similar language of "claim" and "claim form".
>
> As to the absence of any procedural rules corresponding to Part 20 of the CPR, he submitted that rule 10 of the Rules of procedure gave tribunals wide procedural powers; and that in any event any lacuna in such powers could not affect the existence of the substantive right.

24. We prefer the Unions' submissions. In our view the natural reading of the sections on which they rely is indeed that the 1978 Act is concerned only with claims justiciable in the ordinary courts. No doubt the use of the words "court" and "action" is not conclusive, as the cases referred to by Mr Reade show; and it would be possible to construe them expansively if the context showed that that was the intention of Parliament. But we can see nothing in the context to suggest any such intention or that the draftsman was not using the technical language that he did in the sense in which it would normally be understood by lawyers. It is also necessary to bear in mind the legislative history. If the 1978 Act had been a wholly new creation it would have been at least reasonable to argue that Parliament must have intended to cover the statutory torts of discrimination which were by then already in existence (albeit fairly freshly-minted), even if the language was rather inept for the purpose. But the essential provisions of the 1978 Act

> derive from the 1935 Act, and although the former was intended to extend the scope of the latter that was only in certain limited and specific respects. We do not regard this point as decisive, since in principle it would be possible to construe the statute as "always speaking" and thus as applying to subsequently-created rights; but in our view the argument nevertheless carries some weight……..
>
> 25. The construction which we favour also has the merit of being consistent with our conclusion on the issue of jurisdiction. If it were otherwise the position would be that Parliament had created a right to contribution as between joint or concurrent discriminators in the employment field but had incompetently neglected to give the appropriate jurisdiction to employment tribunals to enforce those rights, whereas in our view it has provided for no right to contribute in this field at all, which is a more coherent position. The truth as we see it is that the legislature has simply failed to consider the question of contribution in the context of liability for unlawful discrimination, and since the right to contribution is a creature of statute we cannot repair that omission.
>
> 26. We do not regard this conclusion with any satisfaction. … Be that as it may, however, in our view any right to contribution, whether precisely mirroring the position as regards common law claims or modified to some extent to suit the employment context, can only be created by Parliament."

Discussion

30. Mr Mitchell reminded us of the classic authorities on statutory interpretation. If the words of a statute are clear, then (per Lord Reid in *IRC v Hinchy* [1960] AC 748, cited by Lord Edmund-Davies in *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at 164H-165B), "we must apply them as they stand, however unreasonable or unjust the consequences, and however strongly we may suspect that this was not the real intention of Parliament". On the other hand, as Lord Bingham of Cornhill said in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at [8]:-

> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

31. It is plain that the principal mischief at which the 2010 Act was aimed was the need for a third party such as Mr Watson to have to issue two sets of proceedings in order to make a successful claim against the insurer of an insolvent tortfeasor. If Irwell's

construction of the word "court" is correct, the "one-stop shop" service which the 2010 Act creates for claimants bringing personal injury cases, or contractual claims within the jurisdiction of the civil courts (such as wrongful dismissal), is not available to claimants raising causes of action within the exclusive jurisdiction of the ETs (such as unfair dismissal). Mr Mitchell realistically conceded that this would be a "regrettable" result, though he submitted that it is one which follows from the plain wording of the statute. But the idea that it was a distinction which Parliament *intended* to draw is fanciful.

32. The two authorities on whether an ET is a "court" which featured most prominently in argument were *Peach Grey v Sommers*, relied on by Mr Gray-Jones, and *Brennan v Sutherland*, relied on by Mr Mitchell. Despite the eminence of the presiding judges in each case, neither of these cases is binding on us, the first being a decision of a Divisional Court and the second a decision of the EAT. I entirely agree with all the reasons given by Rose LJ in *Peach Grey* for holding that an ET should be regarded as a court for the purposes of the contempt jurisdiction. They are, in my view, of general application.

33. *Brennan* is a controversial decision, which Underhill J said the EAT had reached with no satisfaction: and it remains open to this court to hold that it was wrongly decided. But even on the assumption that it was correct, it does not assist Irwell. The ratio of the decision was that the exclusive jurisdiction conferred on the ET under the relevant statute (at that time s 63 (1) of the Sex Discrimination Act 1975) was only to consider claims *by a complainant* that a respondent has committed discrimination against her. The ET could not, therefore, consider a claim by a respondent that someone else has committed discrimination against the complainant. That part of the decision, immaterial to the present dispute, was determinative.

34. In paragraphs 22 to 25 the EAT went on to hold that in any event an ET could not determine issues under the Civil Liability (Contribution) Act 1978. In reaching that conclusion it was influenced by the fact that the 1978 Act not only refers to a "court", but also describes the proceedings as an "action", the traditional term for a civil claim which has never been used in the ETs; and also by its decision on the jurisdiction issue. I accept Mr Gray-Jones' submission that there is a clear difference between an argument about jurisdiction and an argument about forum. Irwell accept, inevitably, that Mr Watson can bring a claim against them under the 2010 Act. The question is whether he can do so in the ET, or only in the county court or High Court.

35. Mr Mitchell made a number of other points in favour of the argument that "court" in s 2(6) does not include an ET. The first is that s 2(8) expressly provides that in relation to arbitral proceedings s 2(6) is to be read as if "tribunal" were substituted for "court", but there is no such treatment of ETs. I do not see this as a significant point. An arbitral tribunal would plainly not be treated as a "court" within s 2(6) unless specific provision had been made to that effect: it is not established by Parliament, nor is it part of the "judicial system of the country".

36. The next submission is that ETs, unlike the High Court, do not have an inherent jurisdiction to grant declarations, although in some statutes (such as s 146(3) of the Equality Act 2010) there is a specific power for an ET to do so. I regard this as a formalistic approach to the powers of ETs. ETs reach "decisions", which are classified as "judgments" or "case management orders"; but I do not think an ET

would be acting illegally if (for example) a liability decision that a claimant had been unfairly dismissed was worded as a declaration to that effect.

37. Mr Mitchell did, however, submit that the last point is reinforced by the provisions of the 2010 Act relating to Scotland. Section 3(5) provides that "where the court grants a declarator under this section, the effect of which is that the insurer is liable to P, the court may grant the appropriate decree against the insurer". In Scotland, he argued, only the Court of Session grants declarators, and only the Court of Session grants decrees; and it is inconceivable that Parliament in enacting the 2010 Act should have wished to make a distinction between ET cases north and south of the border. Although I have sat in the EAT in Edinburgh, I cannot claim to have sufficient experience of employment law in Scotland to know to what extent, if at all, it would be considered heretical to refer to a decision of an ET as a decree. I am not impressed by the point as an aid to construction of s 2(6).

38. A similar point, though not with a cross-border element, is the argument that the provisions for disclosure in Schedule 1 to the 2010 Act include in paragraph 3(3) a requirement that a notice seeking disclosure must be accompanied by a copy of "the particulars of claim required to be served in connection with the proceedings". "Particulars of claim" is strictly speaking a phrase from the Civil Procedure Rules, whereas the ET Rules refer to a "claim form" using a form prescribed in accordance with a Practice Direction: but since the form ET1 contains boxes in which a claimant is required to give some particulars of his claim, I regard this as a formalistic argument as well.

39. Like Kerr J, I do not accept the argument that the ET's lack of enforcement powers is a reason why it should not be considered a "court" within s 2(6). Parliament has provided that enforcement of ET judgments for the payment of money is dealt with by county courts in order to avoid the perceived inefficiency of creating a separate division of ET staff including bailiffs and the like, not because it regards the ET as too lowly or inadequate to exercise such powers. The county court has no discretion to revisit the decision of the ET and, as I understand it, applications for enforcement are dealt with administratively without a hearing.

40. I also reject, as Kerr J did, the suggestion that Parliament could not have intended ETs to deal with questions of insurance law. ETs regularly have to deal with difficult questions of law across a variety of topics, not confined to what would be regarded as mainstream employment law. Some of the claims with which they have to deal involve millions of pounds (contrasting with the limited jurisdiction of the County Court); others have very complex facts. I doubt whether applications for a declaration that an insurer is liable to meet a judgment in an unfair dismissal claim are even at the top end of the range of difficulty of cases with which employment judges have to grapple.

41. Mr Mitchell drew to our attention the fact that the Law Commission of England and Wales has recently published a report on the jurisdiction of ETs, making numerous recommendations for the removal of anomalies, in which the 2010 Act is not mentioned. That report was preceded by a consultation paper, which itself was preceded by informal consultation with the employment law community in the first half of 2018 in which suggestions were invited as to jurisdictional problems which needed fixing. The ET decision in the present case was not drawn to the attention of

the Law Commission. I can say with confidence that if it had been, the list of topics in the consultation paper would have included a question as to whether respondents considered that any amendment to or clarification of the law was desirable.

42. Accordingly, despite the series of points which Mr Mitchell deployed with skill and ingenuity, I am in no doubt that an ET is a "court" within the meaning of s 2(6) of the 2010 Act.

The arbitration issue

43. The consequence of what I have said so far is that the EAT's order lifting the stay imposed by the ET will stand and the case will proceed in the ET. However, Irwell have reserved the right to invoke the arbitration clause in the contract of insurance. Any application for a further stay of the ET proceedings in favour of arbitration would have to be made under s 9 of the Arbitration Act 1996, which provides:-

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> …
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

44. Although an application under s 9 has not yet been made, we (like the EAT) have heard full argument on the issue and I consider that we should decide it. It would be unfortunate if determination of the substantive merits of Mr Watson's claims, relating to a dismissal which took place four years ago, were to be delayed by a further jurisdictional dispute.

45. As a general rule, when a statutory assignment of rights under an insurance policy takes place pursuant to the 2010 Act, the claimant assignee (the "third party" or "P" in the terminology of the Act) is bound by an arbitration clause in the contract of insurance. For that reason, consistent with the statutory policy that the claimant should be able to bring a single set of proceedings, s 2(7) of the Act enables him to bring a claim in the arbitration against the insurer for a declaration as to the insured's liability to the claimant. Some claims, however, are not capable of being brought in arbitration and, in such cases, the position is different.

46. Claims for unfair dismissal and discrimination in the course of employment, where statute provides that the ET has exclusive jurisdiction, are an example. In such cases, to require the claimant to bring his claims for unfair dismissal and discrimination in the arbitration pursuant to s 2(7) would deprive him of access to the ET for the determination of those claims. On the other hand, to allow the insurer to obtain a stay of the claim against it pursuant to s 9 of the Arbitration Act 1996 would defeat the policy of the 2010 Act by requiring the claimant to bring separate proceedings, against the insured in the ET and against the insurer in an arbitration. The solution, giving effect to the policy of the 2010 Act, is that the arbitration clause must yield to the exclusive jurisdiction of the ET over claims for unfair dismissal and discrimination.

47. In *Fulham Football Club (1987) Ltd v Sir David Richards* [2012] Ch 333 Patten LJ (with whom Rix and Longmore LJJ agreed, so far as material for present purposes) said at [41]:-

> "……The statements of principle set out in the textbooks referred to above are simply recognitions that the scope of even the most widely drafted arbitration agreement will have to yield to restrictions derived from other areas of the law. Sections 9(4) and 81 of the AA 1996 confirm this. But the source of those restrictions is to be found elsewhere. ……One can point to a number of examples of statutory intervention designed to preserve a right of access to the courts. In the field of matrimonial law post-nuptial agreements dealing with maintenance on any subsequent separation were held to be unenforceable on grounds of public policy insofar as they purported to remove the right of the parties to apply to the Court for financial relief. This reservation is now statutory: see *Hyman v Hyman* [1929] AC 601 and ss 34-36 of the Matrimonial Causes Act 1973. In relation to employment and discrimination, there are statutory restrictions on the enforceability of any agreement which excludes or limits an employee's access to the employment tribunal: see Employment Rights Act 1996 s 203 and Equality Act 2010 s 144(1) as discussed in *Clyde & Co LLP v Van Winkelhof* [2011] EWHC 668 (QB)."

48. The two employment statutes to which Patten LJ referred prevent an arbitration clause being used to exclude or limit Mr Watson's right to bring claims for unfair dismissal or discrimination by Hemingway in an ET. The 2010 Act gives him the same rights against Irwell as he would have had against Hemingway. Accordingly the arbitration clause must be treated as inoperative, to the extent that Irwell cannot rely on it as a defence in, or a procedural block to, Mr Watson's claim against Irwell in the ET.

Conclusion

49. For these reasons, which are essentially the same as those given by Kerr J in his clear and meticulous judgment in the EAT, I would dismiss the appeal.

Lord Justice Flaux:

50. I agree.

Lord Justice Males:

51. I also agree.

ORDER

UPON the hearing of the appeal against the Judgment and Order of the Employment Appeal Tribunal dated 16 December 2019.

AND UPON hearing Mr David Mitchell of Counsel for the Appellant and Mr David Gray-Jones of Counsel for the First Respondent.

AND UPON the Second and Third Respondents being neither present nor represented.

IT IS ORDERED THAT

1. The appeal is dismissed;
2. The Appellant shall pay the First Respondent's costs of the appeal to the Court of Appeal on the standard basis. Costs are to be assessed if not agreed.

DATED