Neutral Citation Number: [2022] EWCA Civ 1408

Case No: CA-2021-000704 & CA-2021-000703

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch D)
Stuart Isaacs QC sitting as a Deputy High Court Judge
[2021] EWHC 1388 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2022

Before:
LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE NEWEY
and
LORD JUSTICE MALES

- -

Between:

TYNE AND WEAR PASSENGER TRANSPORT EXECUTIVE (trading as NEXUS)	**Claimant/ Respondent**
- AND –	
(1) NATIONAL UNION OF RAIL, MARITIME AND TRANSPORT WORKERS **(2) UNITE THE UNION**	**Defendants/ Appellants**

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Lord Hendy KC and **Madeline Stanley** (instructed by **Thompsons Solicitors LLP**) for the **Appellants**
David Reade KC and **Joseph Bryan** (instructed by **Addleshaw Goddard LLP**) for the **Respondent**

Hearing dates: 19-20 July 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 27th October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Underhill:

INTRODUCTION

1. The Claimant in these proceedings is the Tyne and Wear Passenger Transport Executive, which trades as Nexus. It operates the Tyne and Wear Metro. The Defendants are the National Union of Rail, Maritime and Transport Workers ("the RMT") and Unite the Union ("Unite") (together, "the Unions"). Nexus recognises the Unions for collective bargaining purposes in relation to employees in its grades 1-3 ("the relevant employees"). The majority of the relevant employees are members of the RMT: Unite's membership is relatively very small. It is not known how many are members of neither union, but it is likely that there will be some. The contracts of employment of the relevant employees, whether or not they are members of either union, expressly incorporate the terms relating to pay and conditions negotiated under the collective bargaining procedures. The basic structure of those terms and conditions is contained in a collective agreement called "the Red Book", but there has typically been an annual pay negotiation in which particular terms may be varied. The claim in these proceedings is for rectification of an agreement made as part of the 2012 pay round.

2. The proceedings are a sequel to an earlier claim brought against Nexus by a group of the relevant employees ("the *Anderson* proceedings"). I need to start with an outline of what was decided in that case:

   (1) By a letter to the RMT (copied to Unite) dated 10 October 2012, sent as part of that year's pay round, Nexus offered to consolidate a pre-existing entitlement referred to (inaccurately) as a "productivity bonus" into the basic pay of the relevant employees. That offer was in due course accepted. The resulting agreement has been referred to in these proceedings as "the Letter Agreement" (although it might strictly be more accurate to refer to "the Red Book as amended by the Letter Agreement").

   (2) The Red Book provides that employees in grades 1-3 are entitled to shift allowances, which give a percentage uplift on basic pay paid for working shifts. The Unions claim that the effect of the Letter Agreement is that the uplift should be applied to the figure for basic pay as increased by the consolidation of the productivity bonus: I will refer to shift allowance calculated on that basis as "enhanced". Nexus denies that the Letter Agreement confers, or in any event was intended to confer, any such entitlement and has continued to calculate shift allowances on the unenhanced basis. (I should add for completeness that any increase in the level of shift allowance has an impact on the calculation of holiday pay, but that gives rise to no distinct issue and is an irrelevant complication for our purposes.)

   (3) On 19 June 2015 Mr Steven Anderson and 69 other members of the RMT in grades 1-3 presented a complaint against Nexus in the Employment Tribunal ("the ET") under Part II of the Employment Rights Act 1996 claiming that the continuing payment of unenhanced shift allowance constituted an unlawful deduction of wages. The proceedings were funded by the RMT and in practice no doubt it had the direction of them: the claimants were represented by its

solicitors, Thompsons Solicitors LLP. It is common ground that the claimants represented the majority of the relevant employees – probably about two-thirds.

(4) By a decision promulgated on 21 December 2015 Employment Judge Hunter held that on the true construction of the Letter Agreement shift allowance fell to be paid on the enhanced basis. It followed that Nexus's payments of unenhanced shift allowance constituted unlawful deductions. He did not, however, decide the amount of the deductions in the individual cases but adjourned the proceedings in order to allow the parties to try to reach agreement. The formal Judgment reads:

> "The claim that the respondent has made unauthorised deductions from the wages of the claimants by underpaying them shift allowances and holiday pay is well founded."

That was followed by an order directing the fixing of a "remedies hearing" if the parties had not reached agreement by 26 February 2016.

(5) In the event no agreement or decision about the amounts due in the individual cases has been made. Fixing of the remedies hearing was deferred, initially pending an appeal to the Employment Appeal Tribunal ("the EAT") and then pending an appeal to this Court and an application for permission to appeal to the Supreme Court; and it has since been deferred further because of the present proceedings.

(6) The ET's decision was upheld by the EAT on 15 January 2018 and by this Court on 27 September 2018 (see [2018] EWCA Civ 2084, [2019] ICR 433): the appeal to this Court was heard with the appeal in *Agarwal v Cardiff University*, and the case is reported under that name. On 6 March 2019 the Supreme Court refused Nexus permission to appeal.

That outline is sufficient for our purposes, but more detail can be found in the judgment of this Court in *Agarwal*.

3. It is Nexus's case that, if – as it is now constrained to accept – the Letter Agreement on its true construction required the payment of enhanced shift allowance, that did not correspond to the common intention of the parties and it should accordingly be rectified for common mistake; alternatively, it contends that the Agreement did not correspond to its own intention, and that that was something which the Unions knew or ought to have known so that it should be rectified for unilateral mistake. I refer to both alternatives together as "the mistake case". It is central to the issues in this appeal that no such case had been raised, or even adumbrated, at any stage in the *Anderson* proceedings.

4. On 8 January 2019 Nexus's solicitors, Addleshaw Goddard, wrote Thompsons a letter before action advancing the mistake case. Para. 2.1 of the letter identifies the appropriate defendants to the threatened proceedings as "all employees of our client to whom the 2012 collective agreement applies".

5. On 21 May 2020, well over a year after the letter before action, Nexus issued the present proceedings not against any individual employees but against the Unions. The

particulars of claim plead the mistake case: I need not give the details. The only substantive relief claimed is "rectification of the Letter Agreement to give effect to the true agreement that the consolidation of the productivity bonus would not consequently increase the shift allowance". It is pleaded that that is to be effected by reading the Letter Agreement as including, after the provision for consolidation, the words:

> "… save that it is expressly provided that the consolidation of the productivity bonus shall not operate so as to increase basic salary or pay for the purposes of calculating any shift allowance or other allowance, which will continue to be calculated by reference to basic salary or pay as if the productivity bonus had not been consolidated by this agreement".

6. The Unions do not accept either that there was any common mistake as to the effect of the Letter Agreement as regards the calculation of shift allowance, or that they were or should have been aware of any mistake on the part of Nexus; but those issues have not yet been determined. We are at this stage concerned only with two preliminary matters which came before Mr Stuart Isaacs QC, sitting as a deputy High Court Judge, at a hearing on 12 May 2021. These were:

   (a) the trial of a preliminary issue as to whether Nexus is estopped from pursuing its rectification claim – in short, the Unions say that since Nexus did not advance the mistake case in the *Anderson* proceedings it cannot do so now;

   (b) the determination of an application by the Unions for the claim to be struck out, alternatively for summary judgment, on the basis (i) that, even if Nexus is not estopped from advancing the mistake case, it is an abuse of process for it to do so now when it was not raised or adumbrated in the *Anderson* proceedings and/or (ii) that the claim is barred by laches and/or (iii) that the Court has no power to order rectification of a collective agreement which has no effect in law.

   The issues were tried on the basis of an agreed statement of facts and (in the case of the Unions application) written evidence in the form of witness statements.

7. By a judgment handed down on 28 May 2021 the Judge rejected the Unions' case that Nexus was estopped from pursuing its claim and dismissed the strike-out/summary judgment application on all three of the grounds advanced.

8. The Unions sought permission to appeal to this Court on five grounds. The Judge himself gave permission on ground 4, which challenged his conclusion that the Court had power to rectify a collective agreement. Lewison LJ gave permission on grounds 1-3, which challenged the Judge's conclusions on the other issues with the exception of laches (which was the subject of ground 5).

9. The Unions have been represented before us by Lord Hendy KC, leading Ms Madeline Stanley, and Nexus by Mr David Reade KC, leading Mr Joseph Bryan. The representation was the same before the Judge. Lord Hendy, Mr Reade and Mr Bryan also appeared in this Court in *Anderson*.

10. Since the initiation of the *Anderson* proceedings other employees have presented complaints in the ET on substantially the same basis. There are five complaints, each

with multiple claimants: the total number of claimants is 44. The first – *Nicholson* – was brought in November 2015: the five claimants are all members of Unite. The other four – *Bolam*, *Hancock*, *Henderson* and *Smart* – were presented at various dates between September 2018 and October 2019. The claimants in those cases are all RMT members: some only joined Nexus after June 2015, but others were in employment then but for reasons that are not clear did not join in the *Anderson* proceedings.

SOME BACKGROUND LAW

11. In this section I summarise the law in three areas which form the background to the particular issues which we have to decide. I do not believe that any of what I say is controversial but it needs to be set out so that there is firm ground beneath our feet when considering those issues.

COLLECTIVE AGREEMENTS

12. It is common ground that the Letter Agreement constitutes a collective agreement within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992. Section 179 (1) of that Act provides that:

> "A collective agreement shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement—
>
> (a) is in writing, and
>
> (b) contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract."

The Letter Agreement contains no such provision and accordingly is not a legally enforceable contract.

13. It is, however, standard practice that where a trade union is recognised for collective bargaining the contracts of employment of the employees in respect of whom they are recognised (in the language of Schedule A1 to the 1992 Act, the "bargaining unit") will contain a provision agreeing that terms relating to individual rights and obligations which are negotiated collectively will be incorporated into their individual contracts of employment, with the result that they will be enforceable as between them and the employer as terms of those contracts. In that sense a union negotiating a collective agreement can be said to be negotiating "on behalf of" the employees concerned, although it does not do so as their agent (see *Framptons Ltd v Badger* UKEAT/01308/06, per Elias P at para. 30). It is common ground that the Letter Agreement is incorporated into the contracts of employment of the relevant employees in that way.

UNLAWFUL DEDUCTION OF WAGES

14. The claim advanced by the *Anderson* claimants was, as I have said, under Part II of the Employment Rights Act 1996. The principal operative provision is section 13. Subsection (1) reads:

> "An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

Subsection (2) defines "relevant provision" in relation to a worker's contract: I need not set it out. Subsection (3) reads:

> "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

"Properly payable" means payable pursuant to a legal obligation, typically under the contract of employment: see *New Century Cleaning Co Ltd v Church* [2000] IRLR 27, *per* Morritt LJ at para. 43. Subsection (4) excludes errors of "computation". Section 14 provides for certain "excepted deductions", which I need not set out. Section 27 defines "wages" in expansive terms, but I need not summarise it since there is no issue that the shift allowances which are the subject of these proceedings are wages. The effect of those provisions is that, as Nicholls LJ put it in *Delaney v Staples* [1991] 2 QB 47 (at p. 56), "leaving aside errors of computation, any shortfall in payment of the amount of wages properly payable is to be treated as a deduction".

15. Sections 23-26 of the 1996 Act provide for enforcement. Section 23 (1) reads (so far as material) as follows:

> "A worker may present a complaint to an employment tribunal—
>
> (a) that his employer has made a deduction from his wages in contravention of section 13 … ."

Section 24 (1) (a) provides that where a tribunal finds such a complaint well-founded it shall make a declaration to that effect and order the employer to pay the worker the amount of the deduction. A worker could of course bring ordinary debt proceedings in the County Court in respect of any such shortfall, but the Part II regime (which originated in the Wages Act 1986) is designed to give workers a cheaper and more accessible remedy.

16. In principle each "deduction" gives rise to a separate claim – or, as one would say in a common law context, a separate cause of action – and a worker is required by section 23 (2) (a) to bring proceedings within three months of that deduction (subject to a limited power conferred on the ET to extend time). However, by section 23 (3) where there has been a series of deductions time only runs from the last deduction in the series.

17. It was held by this Court in *Delaney v Staples* that, as Nicholls LJ put it immediately following the passage quoted above:

> "[A] dispute, on whatever ground, as to the amount of wages properly payable cannot have the effect of taking the case outside section 8 (3). It is for the industrial tribunal to determine that dispute, as a necessary preliminary to discovering whether there has been an unauthorised deduction."

(The reference to "section 8 (3)" is to the provision of the 1986 Act corresponding to section 13 (1).) A few years ago a heresy briefly gained currency to the effect that the ET had no power to determine a dispute about the meaning of a contract in the context of a claim for an unauthorised deduction; but orthodoxy was restored by the decision of this Court in *Agarwal*.

18. It is to be noted that a claim under Part II can only relate to deductions which have occurred as at the date of the presentation of the complaint: the ET has no power to make a declaration about the lawfulness of future deductions or to order an employer not to make such deductions. If, notwithstanding an adverse tribunal decision in a Part II claim, an employer fails to pay arrears which have accrued subsequently for the same reason and/or continues to make the deductions in question, the worker's only remedy is to present a fresh complaint to cover the later period. However, in practice this problem will rarely arise because if the circumstances remain the same the ET will be bound to uphold any such subsequent claim, and the employer will have nothing to gain by requiring workers to issue fresh proceedings which it would inevitably lose. Thus, in a case where the deductions in question are of a character which means that they are likely to recur, the expectation on both sides will normally be that the first complaint will decide the employer's obligations not only for the past but for the future. Accordingly, workers do not in my experience usually trouble to present an updating complaint or complaints to cover the continuing deductions[1]. That might be a prudent precaution, but there is not much risk attached to not taking it: even if, unexpectedly, the employer does not pay later-accruing arrears following an adverse decision, in the typical case where the employment continues the effect of section 23 (3) will be that they should not be out of time to present a further complaint.

RECTIFICATION FOR MISTAKE

19. Rectification is a remedy, originally developed by equity, for correcting mistakes in written instruments. Its role is stated at para. 16-001 of *Snell's Equity* (34th ed) as follows:

> "Where the terms of a written instrument do not accord with the true agreement between the parties, equity has the power to reform[2], or rectify, that instrument so as to make it accord with the true agreement.

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1 A case in which this did occur, though in rather unusual circumstances, is *Abercrombie v AGA Rangemaster Ltd* [2013] EWCA Civ 1148, [2014] ICR 209: see para. 10 of my judgment.

2 The term "reform" in reference to rectification has fallen out of use, but it should be noted because it appears in two nineteenth-century decisions to which I refer below.

> What is rectified is not a mistake in the transaction itself, but a mistake in the way in which that transaction has been expressed in writing."

20. The types of mistake which may justify an order for rectification are summarised later in the same paragraph as follows:

> "Traditionally, rectification was available where the parties had reached agreement, but by a common mistake its terms were incorrectly recorded in the final written document. However, rectification may also be available where only one party is mistaken as to the terms of the written document and the other is seeking to take advantage of this fact; in other words, rectification for unilateral mistake."

21. I need not go into any detail about what a party relying on either of the two forms of mistake needs to establish. But I should note, as regards common mistake, that an essential ingredient is that the parties should have reached some form of prior agreement (in the sense of an expressed common intention)[3] to which the written instrument fails to give effect; and, as regards unilateral mistake, that the party seeking to take advantage of the other's mistake should be acting unconscionably, which necessarily involves them being aware of that mistake. Although the two forms of mistake are conceptually different, I will refer to both simply as "mistake" except where I need to distinguish.

OVERVIEW OF THE ISSUES

22. The natural breakdown of the issues in this appeal does not quite correspond to the division between the preliminary issue and the Unions' application summarised at para. 6 above. Rather, they fall under essentially two heads:

    (A) There is an issue of law, raised by ground (iii) of the Unions' application and ground 4 of the appeal, about whether the Court has power to rectify the Letter Agreement. If it does not, the action as at present constituted is bound to fail and the Unions are entitled to summary judgment, or to have it struck out.

    (B) If the Court could in principle rectify the Letter Agreement, there is a question whether Nexus is estopped from pursuing a claim for rectification or whether it is in any event an abuse of process for it to seek to do so because of the decision in the *Anderson* proceedings. The former way of putting it is the subject of the preliminary issue before the Judge and grounds 1-2 of the grounds of appeal, and the latter is the subject of ground (i) of the Unions' application and ground 3 of the grounds of appeal.

(A) IS THE LETTER AGREEMENT RECTIFIABLE?

23. It is important for the purpose of this issue to distinguish between rectification of the Letter Agreement as such – that is, as a collective agreement reached between Nexus and the Unions – and rectification of the individual contracts of employment into which the relevant term is incorporated. The case proceeded both before us and before the Judge on the basis that the relief sought by Nexus in these proceedings is the former.

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[3] Arguably the precise nature of this requirement is not quite settled, and in so far as it remains contentious my language should not be regarded as espousing any particular position.

That is consistent with the way that the Particulars of Claim are pleaded, and of course with the fact that the only defendants are the Unions.

24. The Unions' case before the Judge was that rectification is only available in the case of agreements which have legal effect, which, by reason of section 179 (1) of the 1992 Act, the Letter Agreement does not. They also made the point that the appropriate defendants in any claim for rectification of the individual contracts of employment would be not the Unions but the employees in question: as Lord Hendy pointed out, that had in fact been Addleshaw Goddard's approach in their letter before action (see para. 4 above).

25. The Judge considered that case at paras. 56-63 of his judgment. At para. 58 he says:

> "In my judgment, rectification is not confined to legally binding contracts. In *Marley v Rawlings* [2014] UKSC 2 at [28], Lord Neuberger found no convincing reason why the courts could not rectify a will '*in the same way as <u>any other document</u>* [emphasis added [by the Judge]]'. Rectification is an equitable remedy which acts on the conscience of the party who seeks to take advantage of the mistake in question. It would be inconsistent with the equitable nature of the remedy to confine it in the way contended for by the defendants. It would altogether take out of the ambit of the remedy documents which were made in error that were not legally binding and enforceable. There is no reason why it would be unfair to permit rectification of legally binding contracts but not of other documents which have consequences for the parties concerned. Here, it would be unfair to deprive the claimant of the opportunity to pursue its rectification claim and so permit the defendants to take advantage of the mistake alleged by the claimant in the collective agreement."

At para. 59 he draws attention to the fact that rectification can be granted of documents other than contracts, referring to a passage in *Snell* which shows that a variety of unilateral instruments can be rectified. He also refers at para. 60 to two Canadian decisions, *Saanich Police Association v District of Saanich Police Board* (1983) 43 BCLR 132 and *Public Service Alliance of Canada v NAV Canada* (2002) 59 OR (3d) 284, in which it was accepted that a collective agreement was capable of rectification (in the former case by the court and in the latter by a labour arbitrator).

26. I am not persuaded by that reasoning. I agree with Lord Hendy that the fact that the Letter Agreement, viewed purely as a collective agreement, is legally unenforceable is an insuperable barrier to its rectification. The courts are, necessarily, concerned only with legal rights, and the fact that rectification is an equitable doctrine does not affect that: equitable rights are legal rights. The fact that unilateral instruments of the kind referred to in *Snell* are capable of rectification is, with respect, beside the point. Such instruments have legal effect, and there is indeed no reason in principle why they should not be rectified if they fail to give effect to the intention of their makers. But the point here is that the Letter Agreement has, as such, no legal effect at all. The Canadian decisions do not advance the argument, since as Lord Hendy pointed out, and as Mr Reade accepted, in Canadian law collective agreements do have legal effect: see *Toastmaster v Ainscough* [1976] 1 SCR 718.

27. Where I do agree with the Judge is that the Letter Agreement "has consequences" – by which I take him to mean legal consequences – for "the parties concerned", and that it would be unacceptable if it could not be rectified if either form of the mistake case were established. But the correct target for such rectification is not the Letter Agreement as such but the individual contracts of employment which embody the legal consequences to which he refers.

28. If the only problem were that the Particulars of Claim wrongly identified the Letter Agreement rather than the individual contracts as the instrument requiring rectification it may be that it would be straightforward to cure it by amendment. But the more substantial problem is that on the face of it Lord Hendy is right to submit that it would also be necessary to substitute (or, perhaps, add) the individual employees as defendants: it is they, not the Unions, who are "the parties concerned". There was some discussion at the hearing about the practicalities of pursuing a claim against a shifting class of defendants: even if all past and current employees who are or have been entitled to enhanced shift allowance on the basis of the Letter Agreement could be traced (many will be no longer employed), new employees will continue to enter the relevant grades in the future. It was suggested that any such difficulties can be resolved by the use of the representative action procedure under rule 19.6 of the Civil Procedure Rules, recently considered by the Supreme Court in *Lloyd v Google LLC* [2021] UKSC 50, [2021] 3 WLR 1268. We were not addressed about the details of how the procedure would operate in the present case, but it would in principle permit Nexus's claim to be brought, or continued, against representative employees while the Unions could no doubt in practice continue to have the conduct of the defence.

29. It might be said that there is no real difference between proceeding against the Unions to rectify a collective agreement incorporated into the contracts of individual employees and proceeding against those employees to rectify the agreement as so incorporated, since it is hard to see how the interests of the Unions and the employees (who had indeed agreed that the Unions should negotiate on their behalf) could differ; and accordingly that insisting on the individual employees being substituted or joined was an unnecessary formality. I have some sympathy with that point, but I do not think that it can justify departing from principle. It is the employees who are the parties to the contracts being sought to be rectified, and they should be parties to the action.

30. Before us Mr Reade relied on the decision of this Court in *Persimmon Homes Ltd v Hillier* [2019] EWCA Civ 800, [2020] 1 All ER (Comm) 475. That was a case in which rectification was sought of the terms of a disclosure letter submitted by a vendor in the context of a share sale agreement. It was held that the letter was rectifiable because, as David Richards LJ put it at para. 41 of his judgment, it was "an integral part of the suite of documents designed to give effect to the parties' intended transaction". But the Court was not in that case concerned with the current issue. Although it could be said that the Letter Agreement is "an integral part" of the individual contracts of employment, it is not those contracts which Nexus is seeking to rectify.

31. The upshot of that discussion is that the action is formally defective because, although the Letter Agreement is capable of rectification to the extent that its terms are incorporated in the individual contracts of employment, those contracts are not the target at which Nexus has aimed and it has in consequence proceeded against the wrong defendants.

32. It is convenient to mention at this point that in his skeleton argument, albeit in a different context, Lord Hendy argued that a rectification claim against the individual employees would be unworkable, since it would be both impossible and meaningless to try to ascertain whether each of them had reached a prior agreement of the necessary kind. Mr Reade pointed out that that submission was hard to reconcile with other aspects of the Unions' case, and I am not sure that Lord Hendy meant to submit that not only the Letter Agreement but also the individual contracts incorporating it were incapable of rectification. But if he did, I do not agree. I do not believe that the point about ascertaining the intentions of the individual employees gives rise to any difficulty. The employees have agreed that the terms in question should be negotiated on their behalf by the recognised Unions. That being so, what matters (as regards common mistake) must be what was intended and expressed by the union negotiators or (as regards unilateral mistake) whether those negotiators have acted unconscionably by taking advantage of a mistake on the part of Nexus. Evidence about the negotiators' intention and conduct can be adduced whether the defendants are the Unions themselves or the individual employees, or both.

33. Mr Reade submitted that if the Court concluded that the proceedings were formally defective in the way discussed above Nexus should be given the opportunity to apply to amend in order to seek rectification of the individual contracts and to join the individual employees as defendants. I was initially inclined to give it that opportunity, but I am persuaded by Males LJ's reasoning at paras. 120-126 below that the better course is simply to dismiss the action and allow Nexus, if so advised, to bring fresh rectification proceedings against the employees (though it may be that the Unions will also be proper parties). I would only make two observations:

    (1) If Nexus intends to issue fresh proceedings it should proceed promptly. Although the Unions' application to strike out on the basis of laches failed before the Judge and is not live in this Court, substantial further delay may be relevant if laches is relied on as a defence in any fresh proceedings.

    (2) If it is intended to proceed by way of representative proceedings, I would hope and expect that Nexus and the Unions will in the spirit of the over-riding objective liaise with regard to practical aspects (including the identification of appropriate representative defendants).

34. Notwithstanding the dismissal of the action I believe that I should consider the issues raised under head (B), on which we heard full argument. As appears from Males LJ's judgment, a decision on one of those issues forms part of his reasoning on the decision whether to offer Nexus the opportunity to apply for permission to amend; and a consideration of the other issues should be of assistance if they arise in future proceedings.

(B) *RES JUDICATA* AND ABUSE OF PROCESS

INTRODUCTION

35. The way that the issues of *res judicata* and abuse of process arise in these proceedings is not quite direct and needs to be spelt out. Although Nexus is the claimant its only purpose in bringing the proceedings is to enable it, if it succeeds, to deploy the fact that the Letter Agreement has been rectified as a defence in the pending unlawful deductions

claims[4] and any future such claims. Thus, although formally the issues are directed to Nexus's claim in the present proceedings, the real focus of the argument was on whether in the proceedings brought by the employees they could rely on *res judicata* and abuse of process to prevent Nexus from advancing the defence that the Letter Agreement has (if it has) been rectified.

36. It is important to appreciate that the answer to that question need not be the same in the case of all claimants, or claims. It was common ground before us that in the cases of the *Anderson* claimants different considerations might arise as between the deductions which were the subject of the proceedings and later deductions, and also as between the *Anderson* claimants and other relevant employees who have brought claims or may yet do so. I will accordingly consider those categories separately. Before I do so, however, I should summarise the applicable law.

THE LAW

Res Judicata

37. The most recent authoritative consideration of the law of *res judicata* is in the decision of the Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] 1 AC 160. Lord Sumption delivered the main judgment. The principal issue was whether cause of action estoppel was absolute not only as regards points decided in the earlier proceedings but also as regards points potentially affecting the existence of the cause of action but which had not been raised in those proceedings and had accordingly not been the subject of any decision. The resolution of that issue required a thorough consideration of the relationship of not only cause of action estoppel but also issue estoppel with the principle in *Henderson v Henderson* (1843) 3 Hare 100.

38. At para. 17 of his judgment Lord Sumption gave a helpful overview of various principles applied by the courts which could be grouped together under the heading "*res judicata*". He said (so far as relevant for our purposes):

> "Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages … . Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the

[4] It is important to appreciate that Nexus contends that those claims include the claims in *Anderson* itself – see para. 75 below.

> judgment. … Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 St Tr 355. 'Issue estoppel' was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

(I have added the underlinings for ease of reference.) For present purposes we are concerned mainly with the first, fourth and fifth of those principles, and consistently with Lord Sumption's approach I use the term *res judicata* to refer to them collectively.

39. In the following paragraphs of his judgment Lord Sumption reviews the inter-relation of those principles as they apply in cases where a party in later proceedings seeks to raise a point which could have been, but was not, raised in earlier proceedings between the same parties. He starts, at paras. 20-21, by examining the decision of the House of Lords in *Arnold v National Westminster Bank plc* [1991] 2 AC 93. Having analysed the reasoning in the speech of Lord Keith, with whom the rest of the committee agreed, at para. 22 of his judgment he summarises the position as follows:

> "*Arnold* is … authority for the following propositions:
>
> (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.
>
> (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, *if they could with reasonable diligence and should in all the circumstances have been raised*.
>
> (3) *Except in special circumstances where this would cause injustice*, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will *usually* be absolute *if it could with reasonable diligence and should in all the circumstances have been raised*."

(The italicisation in propositions (2) and (3) is mine.)

40. In the present case we are concerned with the application of *res judicata* to points not raised in the first proceedings. As to that, the essential points from Lord Sumption's summary are:

    (1) Cause of action estoppel is less than absolute in its application to points not raised in the first proceedings, because the party in question will only be debarred from raising such a point if it could with reasonable diligence, and should in all the circumstances, have been raised first time round.

    (2) The same question of whether a point could or should have been raised first time round is also relevant in the context of issue estoppel.

    (3) Issue estoppel is inherently more flexible than cause of action estoppel because, quite apart from the question whether the point could or should have been raised previously, the general rule is qualified by an exception for "special circumstances where [its application] would cause injustice" (which I think must also underlie the "usually" qualification as regards the first point).

41. At paras. 23-26 Lord Sumption considers and rejects an argument that the degree of flexibility recognised in his formulation was not available in the context of *res judicata* and was relevant only in the context of abuse of process. He reviews the case-law about the basis of the rule in *Henderson v Henderson*, in particular the decision of the House of Lords in *Johnson v Gore-Wood & Co* [2000] UKHL 65, [2002] 2 AC 1, and concludes, at para. 25, that *res judicata* and abuse of process "are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation". That being so, in my analysis below I have in the interests of clarity dealt with the two principles separately, as the Judge also did; but, as will appear, the same substantive considerations are likely to be relevant in both contexts.

42. *Res judicata* only applies where the parties to the second proceedings are the same as the parties to the first proceedings or are their "privies". Privies are traditionally treated as falling into three classes – "privies in blood", "privies in law" and "privies in estate or interest". In this case we need only consider privity of interest.

43. The first full examination in the authorities of the concept of privity of interest is in the judgment of Sir Robert Megarry V-C in *Gleeson v J Wippell & Co* [1977] 1 WLR 510, at pp. 514-517. I need not set the passage out in full. He begins by describing the concept as "protean, … and at times … almost capable of meaning all things to all men" (p. 514D). At p. 517 C-D he says:

> "This is difficult territory: but I have to do the best I can in the absence of any clear statement of principle. First, I do not think that in the phrase 'privity of interest' the word 'interest' can be used in the sense of mere curiosity or concern. Many matters that are litigated are of concern to many other persons than the parties to the litigation, in that the result of a case will at least suggest that the position of others in like case is as good or as bad as, or better or worse than, they believed it to be. Furthermore, it is a commonplace for litigation to require decisions to be made about the propriety or otherwise of acts done by those who are not litigants. Many a witness feels aggrieved by a decision in a case to

> which he is no party without it being suggested that the decision is binding upon him.
>
> Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest'."

(He goes on – "thirdly" – to explore the effect in the case before him of the rule that "for privity with a party to the proceedings to take effect, it must take effect whether that party wins or loses"; but I need not summarise that part.)

44. In *Johnson v Gore-Wood & Co* [2000] UKHL 65, [2002] 2 AC 1, Lord Bingham approved a finding that the owner of a company which was his "corporate embodiment" could be prevented by issue estoppel from revisiting a decision made in proceedings brought by the company. He deprecated a "formulaic approach" and expressly approved the second paragraph in the passage which I have quoted from *Gleeson*: see p. 32 E-G.

45. The most recent review of the law in this area appears in the judgment of Floyd LJ in *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 924, [2014] RPC 5: see paras. 22-35. After considering various authorities, including *Gleeson*, at para. 32 he summarises the correct approach as follows:

> "… [I]n my judgment a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation."

The formulation of element (c) reflects the particular facts of *Resolution*, where the estoppel was prayed in aid against the new party. In the present case it is the new parties, the Unions, who seek to invoke the estoppel against the party common to both actions, Nexus; but what matters is that the ultimate question is whether it is just to allow the issue in question to be relitigated.

46. The process envisaged by that summary is one of evaluation rather than the application of hard-edged criteria: that is apparent not only from the broad terms of the formulation of the question at (c) but from the formulation of elements (a) and (b) in terms of degree – "the extent to which". That is consistent with Sir Robert Megarry's reference in *Gleeson* to "a sufficient degree" of identification between the two parties to "make it just" that a decision to which one was party should be binding in proceedings involving the other. I should also note that at para. 30 Floyd LJ observes that an estoppel would arise against a party to a second action raising an issue decided in an earlier action where "in effect, he represents the party in the first action" and refers to the example given by Lord Reid in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (no. 2)* [1967] 1 AC 853 (see pp. 911-912) of a case where the first action is brought by a servant or agent of the claimant in the second.

Abuse of Process

47. As appears from what Lord Sumption says as quoted at para. 41 above, there is considerable overlap between the operation of *res judicata* and the power to strike out an action as an abuse of process because it raises issues which could have been raised in earlier litigation. As regards the latter, the correct approach is authoritatively established in pp. 30-31 of the speech of Lord Bingham in *Johnson v Gore-Wood.* The only point that I need note for present purposes is his statement that what is required is:

> "… a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

48. A party can be precluded on this basis from raising an issue even where it was neither a party to the previous proceedings nor their privy. That was decided by this Court in *Aldi Stores Group Ltd v WSP Group plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748. In that case the claimant sought to raise a claim against two defendants based on allegations which it had already raised against other defendants in earlier proceedings. The defendants contended that that was as an abuse of process because the claimant could and should have joined them in the original proceedings. The claimant argued that there could be no abuse of process unless they and the defendants in the original proceedings were privies. At para. 10 of his judgment (with which Longmore and Wall LJJ agreed) Thomas LJ rejected that argument. He said:

> "The fact that the defendants to the original action and to this action are different is a powerful factor in the application of the broad-merits based judgment; it does not operate as a bar to the application of the principle."

(The abuse argument was in fact dismissed on other grounds, but those are not material for our purposes.) To this extent abuse of process is available as an argument where *res judicata* would not be.

(1) THE *ANDERSON* CLAIMANTS

49. As explained at para. 18 above, the *Anderson* proceedings could only formally be concerned with deductions prior to the presentation of the claim, i.e. those alleged to have taken place between the date that the Letter Agreement came into force[5], and 19 June 2015 ("pre-complaint deductions"). It follows that any decision in those proceedings could not give rise to a cause of action estoppel as regards subsequent deductions: if it were to support a defence of *res judicata* that could only be on the basis of issue estoppel. That means that I need to consider the issue of *res judicata*, as it affects the *Anderson* claimants, separately as regards (a) the pre-complaint deductions and (b) any post-complaint deductions. However, it will be convenient to deal first with an issue which is common to both groups, namely whether the mistake case "could with reasonable diligence and should in all the circumstances have been raised" – see Lord Sumption's propositions (2) and (3).

Preliminary: Could/Should Nexus have Raised the Mistake Case in *Anderson*?

50. Lord Sumption's formulation refers both to whether the point in question "could" have been raised and to whether it "should" have been. There is a risk of being over-nice in an analysis which is ultimately directed to a broad question of justice, and the distinction between "could" and "should" may not always be clearly marked. However, the Judge and the parties addressed the two questions separately, and I think I should do the same.

"Could"

51. I will start by stating my own conclusion, without reference to the parties' submissions or the Judge's reasoning, though I will return to them in due course.

52. In my view Nexus could have raised the mistake case in the *Anderson* proceedings. It is of course true that an ET exercising its jurisdiction under Part II of the 1996 Act has no power to order rectification as such; the only relief that it can grant is as specified in section 24 of the Act (see para. 15 above). However, the mistake case could have been deployed by way of defence without the need for an order for rectification. As explained in the following paragraphs, that is the case in the ordinary courts, and I see no reason why it should not equally be the case in an unlawful deductions claim in the ET.

53. The position in the courts is established by two decisions of the Common Pleas Division of the High Court following the enactment of the Supreme Court of Judicature Act 1873. Section 34 of the 1873 Act assigned claims for "the rectification, or setting aside, or cancellation of deeds or other written instruments" to the Chancery Division alone, but the question arose whether other divisions of the High Court could determine issues of that character where they arose by way of defence. In short, it was held that they could: as succinctly summarised at para. 16-003 of *Snell*, "any Division may give effect to a defence of rectification as regards past transactions without actually rectifying the

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5 Mr Reade told us that there was an unresolved dispute as to the date on which the Letter Agreement came into force: Nexus says it was 1 April 2013 but the Unions say that it was some time in 2012. Nothing turns on this for our purposes.

instrument". It is, however, necessary to set out the reasoning in the two cases in a little more detail.

54. The first is *Mostyn v The West Mostyn Coal and Iron Company* (1876) 1 CPD 145. The claim was brought in the Common Pleas Division and arose out of a lease. The lessee pleaded by way of defence that the lessor knew, and had concealed from the lessee, that he had no title to part of the land demised, and he counterclaimed to have the lease set aside. One of the issues was whether it was necessary to transfer the action to the Chancery Division. The Court held that it was not. Brett J said, at p. 150:

> "If a defendant in an action in this Division sets up facts in his answer which in the Chancery Division would entitle him to have an instrument reformed or set aside, though this Division cannot reform or set it aside with regard to its effect in future, it may, for the purpose of determining the action, treat it as set aside."

Archibald and Lindley JJ delivered concurring judgments. In my view the headnote accurately records the effect of the decision as a matter of principle:

> "Where the defendant in an action in one of the Divisions of the High Court of Justice other than the Chancery Division relies on an equity to have a deed set aside as part of his defence, the Division in which the action is may give effect to the equity so far as these incidental to the purposes of the defence."

The principle so stated is in accordance with the fusion of law and equity affected by the 1873 Act.

55. In the second case, *Breslauer v Barwick* (1876) 36 LT 52, that principle was applied in the context of a claim for rectification. The claim was brought in the Common Pleas Division by an individual claiming as charterer of a steamship. The defendant owner pleaded that it was not the plaintiff that was named as the charterer in the charterparty but one of his companies. The plaintiff in his reply pleaded that the company had been named by mistake and contrary to the intention of both parties. In his demurrer the defendant contended that the plaintiff could not proceed unless and until the charterparty was "reformed" (see n. 2 above), which required the case to be transferred to the Chancery Division. The Court rejected that argument. Brett J, with whom Grove J agreed, said:

> "It is further said that the reply ought to ask that the charter-party be reformed, and that for this purpose the case be transferred to the Chancery Division; but the decision in *Mostyn v The West Mostyn Coal and Iron Company* shows that in such a case as this it is not necessary to go through the manual labour of reforming the agreement, but that if such facts are shown as would cause the Chancery Division to reform it, we may treat it as reformed, and give judgment accordingly."

In other words, if the charterparty was rectifiable, applying the applicable principles, it would be treated for the purpose of the plaintiff's claim as if rectified.

56. Those decisions are not binding on us; but it was not contended that they were wrongly decided, and the reasoning seems to me convincing. Although the principle which they state – in short, that rectifiability can be relied on as a defence even where the court has no power to rectify – was identified in the context of the jurisdiction of different divisions of the High Court I can see no reason why it should not apply generally, including where the jurisdictions in question are those of the High Court and the Employment Tribunal. It does not depend on the niceties of the drafting of the 1873 Act but on the distinction between raising an issue as a claim and raising it by way of defence: that distinction is equally valid in both contexts. It achieves a just outcome because it avoids what Brett J calls "the manual labour" (with the consequent expense and delay) of having to go to another court to seek rectification. An ET is as well able to decide a case of rectifiability for mistake as any of the other contractual issues which fall within its jurisdiction; indeed as a specialist tribunal it is likely to start with a better understanding of the context than a judge in the County Court or High Court.

57. I would add that, although the particular issue is different, such an outcome would tend in the same direction as the decision of this Court in *Agarwal* that an ET had jurisdiction to interpret the terms of a contract for the purpose of deciding a claim under Part II of the 1996 Act. At para. 27 of my judgment in that case I summarised my reasons for so holding as follows (so far as material):

> "(1) *Delaney v Staples* … is binding authority that an ET has jurisdiction to resolve any issue necessary to determine whether a sum claimed under Part II is properly payable, including an issue as to the meaning of the contract of employment.
>
> (2) ...
>
> (3) There is no good – or even, frankly, comprehensible – policy reason for carving out from the jurisdiction of the ET one particular kind of dispute necessary in order to resolve a deduction of wages claim. On the contrary, to do so would be incoherent and would lead to highly unsatisfactory procedural demarcation disputes. ETs are well capable of construing the terms of employment contracts governing remuneration and have to do so in many other contexts."

(The reference to *Delaney v Staples* is to the judgment of Nicholls LJ from which I have quoted at paras. 14 and 17 above.)

58. I accordingly believe that as a matter of law a case that the Letter Agreement was rectifiable for mistake could have been raised in *Anderson* by way of defence. To adapt Brett J's language in *Breslauer,* if such facts were shown as would cause the High Court to make an order for rectification of the Letter Agreement the ET could have treated it as rectified and dismissed the complaint on that basis.

59. Although Males LJ agrees that Nexus could have advanced the mistake case in the ET, he does not base that conclusion on the principle exemplified by the *Mostyn* and *Breslauer* decisions, which he says has no role to play in the context of Part II of the 1996 Act: see para. 131 below. I respectfully disagree. The question whether an amount of wages is "properly payable" falls to be decided by reference to the general

law, of which that principle is part. But I am not sure how substantial the difference between us really is. I do not disagree with anything he says in para. 132 of his judgment, and I agree with his proposition that a deduction may be lawful by reference to a contract which "needs to be rectified". I accept that it may be possible to reach that conclusion by a purposive construction of the statute, but I think that the principle exemplified by the *Mostyn* and *Breslauer* decisions provides a firmer doctrinal basis for it.

60. It is fair to say that the *Mostyn* and *Breslauer* decisions were not referred to by either party below and were only drawn to the parties' attention by the Court in the course of the hearing before us. The possibility of the ET determining a defence of rectifiability for mistake is not referred to in any employment law textbook of which I am aware; and in the only EAT decision to which we were referred in which it was argued that the contract of employment did not reflect the parties' common intention it was assumed that the issue would have to be decided by a claim for rectification in the County Court – see para. 24 of the judgment of Burton J in *Mango Hair v Dos Santos* (2002) EAT/129/02. It may therefore seem rather hard to say that the mistake could with reasonable diligence have been advanced. But even if it was not reasonable to expect anyone to spot those particular authorities, or to apply the proposition in *Snell* (see para. 53 above) to a situation like the present, I believe that it would not have required more than reasonable diligence to advance the mistake case on the basis preferred by Males LJ. And in fact in the *Bolam* proceedings Nexus did plead precisely such a case. Paras. 13.3 and 13.4 of its Grounds of Resistance raise by way of defence both a case of common mistake and, in the alternative, a case of unilateral mistake. As regards common mistake it is averred that the Letter Agreement was

> "void in so far as it is said to operate to increase shift pay in the manner alleged by the Claimants".

As regards unilateral mistake it is averred that the Agreement

> "is either void *ab initio* by reason of unilateral mistake on the part of the Respondent or, alternatively, it is binding only to the extent intended by the Respondent or it is susceptible to rectification or rescission and it is unconscionable for the Claimants to assert to the contrary".

The references to rescission and to the Letter Agreement being "void" do not correspond to my analysis above, but the reference to the Agreement being "susceptible to rectification" is consistent with both my approach and that of Males LJ.[6]

61. As to how the Unions put their case before the Judge, Lord Hendy, as I understand it, relied primarily on the terms of the *Bolam* pleading: his argument was that since Nexus pleaded a mistake case in *Bolam* it could equally have done so in *Anderson*. In his skeleton argument before us Lord Hendy continued to advance at least part of that argument, contending that it would have been open to Nexus to argue in *Anderson* that

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[6] I may indirectly bear some of the responsibility for the focus on rescission and the term being "void". At para. 58 of my judgment in *Anderson* I noted in passing that no mistake case was being advanced and in that context referred, rather inaptly, to rescission. Since the grounds of resistance in *Bolam* were pleaded only a month later it seems likely that that observation was the germ of Nexus's pleading.

its mistake rendered the Letter Agreement "unenforceable" or "void", with the result that the enhanced payments of shift allowance rate were not properly payable. As already noted, that terminology does not seem to me quite correct; but after considering *Mostyn* and *Breslauer* Lord Hendy modified his analysis to put the emphasis on rectifiability.

62. The Judge addressed the question whether Nexus could have advanced the mistake case in the *Anderson* proceedings at paras. 31-32 of his judgment, as follows:

> "31. I reject the defendants' submission. The mistake, if there was one, arose in the context of the negotiation of the collective agreement. Rectification of the *Anderson* claimants' individual employment contracts (or the collective agreement) was not possible in the *Anderson* proceedings. It is difficult to see how the issue of mistake, whether common or unilateral, could be satisfactorily resolved given that the *Anderson* claimants were not parties to the collective agreement and the defendants were not parties to the *Anderson* claimants' employment contracts. Factors which might come into play in the exercise of the court's discretion whether or not to grant rectification would not have been relevant in the *Anderson* proceedings.
>
> 32. For those reasons, notwithstanding the claimant's grounds of resistance in the *Bolam* proceedings, I do not consider that it was possible with reasonable diligence for the claimant to have raised the mistake arguments in the *Anderson* proceedings. Even if [it] had been possible, in my judgment, those arguments were not ones which in all the circumstances the claimant should have raised. This outcome also works justice since in my judgment it would not be just to deprive the claimant of the opportunity to advance the rectification claim against the defendants, whatever may be the claim's merits, on the basis of the outcome of the *Anderson* proceedings. Were the claimant estopped from pursuing a well-founded claim for rectification, it would mean that the outcome of the *Anderson* proceedings would have significant financial consequences in respect of every employee of the claimant in whose employment contract the Letter Agreement was incorporated."

I have quoted the whole of para. 32 for convenience, but in fact only the first sentence is concerned with the "could" question: I deal with the remainder, which addresses the "should" question, at paras. 67-71 below.

63. The essential reason for the Judge's decision that it was "not possible" to raise the mistake case in the *Anderson* proceedings was that the parties to those proceedings, i.e. the individual employees, were not parties to the Letter Agreement. I respectfully disagree with that approach, for the reasons which appear under head (A) above: it is the individual contracts, not the Letter Agreement, that are the proper target of any decision about rectifiability. Once that is appreciated, there would, for the reasons which I have given, have been no obstacle to the ET deciding that issue; and indeed the Judge does not rely on any problem of jurisdiction of that kind. He says that it would not be possible "satisfactorily [to] resolve" the issue of mistake where the individual employees themselves were not parties to the Letter Agreement, but I do not see why.

Of course the relevant evidence would be that of the Union negotiators, but there would have been no difficulty about adducing that evidence in the ET: the RMT were in practice running the proceedings. Any discretionary factors of the kind to which the Judge refers in the final sentence of paragraph 31might also relate more to the conduct of the Union negotiators than to that of the employees; but again there is no reason why such factors could not have been considered by the ET.

64. Mr Reade's primary submission before us was that the mistake case could not have been advanced in the ET because it had no jurisdiction to order rectification. He was constrained to acknowledge that a version of the mistake case had been advanced in *Bolam*, but he said that the case as there pleaded did not work as a matter of law. As regards the analysis based on *Mostyn* and *Breslauer*, he emphasised that, even if (contrary to his primary position) it applied in the ET, a defence of "rectifiability" was limited, as *Snell* puts it, to "past transactions".

65. I would reject Mr Reade's primary submission for the reasons which I have already given. The ET did have jurisdiction to determine the mistake case as part of a defence to the *Anderson* claim, and although the details of the pleading in *Bolam* may be questionable its overall approach was correct. The fact that rectifiability is limited to past transactions is not a reason why it could not have been raised in the *Anderson* proceedings. If it had succeeded it would have defeated the actual complaints before the ET, i.e. the complaints about the pre-complaint deductions. Further, though this is not the essential point, although the tribunal could not formally have rectified the Letter Agreement its decision would in practice (subject to any appeal) have made it impossible for the claimants to bring any claims as regards future payments of shift allowance at the unenhanced rate.

66. Mr Reade submitted by way of fallback that even if the ET had jurisdiction to determine the mistake case Nexus could not with reasonable diligence have advanced it. I have already addressed one aspect of that point: see para. 60 above. But in fact the basis for the submission in his skeleton argument was the proposition that the ET could not order rectification and/or that the parties to the *Anderson* proceedings were not the same as the parties to the Letter Agreement. I am not sure that those points go to the question of reasonable diligence, but in any event I do not accept them, for the reasons already given.

"Should"

67. Such evidence as there is about why the mistake case was not raised in the *Anderson* proceedings appears at para. 61 of the witness statement of Mr David Bartlett, the head of Nexus's Business Change and Technology Department, who says that "following [the decision of this Court in *Anderson*] … senior counsel raised the possibility of the claimant pursuing a claim for rectification against the unions on grounds of common or unilateral mistake". That must, I think, mean that that was the first time that the possibility of advancing the mistake case was considered: the common sense inference must be that the possibility of advancing the mistake case simply did not occur to Nexus or those advising them in the course of the ET proceedings.

68. In my view the mistake case should have been advanced in *Anderson*. In the absence of some special reason it is plainly incumbent on a party to advance all available defences. As we have seen, no such reason is suggested by the evidence. This is not a

case where there had been some subsequent development – either factual or legal – which justified Nexus in not doing so. In ordinary litigation it is common, where a case turns on a disputed issue of construction of a written instrument, for a party to aver that if their construction is found not to correspond to the meaning of the document it falls to be rectified for mistake (assuming, of course, that they have an evidential basis for the averment). It may be less usual for such a situation to arise in ET proceedings, but it can happen (as the case of *Mango Hair* illustrates) and there is no reason for any different approach in that context. There is clearly an overlap with the issue of "reasonable diligence": to the extent that there is, what I say above applies equally.

69. The Judge addressed the "should" question in para. 32 of his judgment: see para. 62 above. As I read it, he regarded his conclusion in the second sentence as justified by the same reasons as his conclusion on the "could" issue, with which I would respectfully disagree for the reasons already given.

70. The second and third sentences of para. 32 deal with an argument to the effect that the outcome is "also" just in a broader sense. That is apparently intended only as a supportive point and it will be convenient to deal with it later: see paras. 83-84 below.

71. Newey LJ reaches a different conclusion on the "should" issue: see para. 117 below. I note his concern that to raise rectifiability by way of defence rather than by way of counterclaim for rectification is unsatisfactory, and I would not disagree where the issue arises in a court which has power to order rectification; but for the reasons already given I believe that in a case like the present it is unobjectionable. Males LJ does not believe that we are in a position to decide the "should" issue ourselves: see para. 137. Fortunately, however, as will appear, these difference do not affect the outcome of the appeal.

Crane v Hegeman-Harris

72. Finally on this aspect, I should refer to a decision relied on by Mr Reade before us, though not before the Judge, which is arguably relevant to both the "could" and the "should" questions. *Crane v Hegeman-Harris Co Inc* [1939] 4 All ER 68 concerned a dispute about remuneration between an architect and a building contractor. The dispute was referred to arbitration. The arbitration proceeded on the basis that the sole question referred related to the construction of the remuneration clause in the relevant agreement. The arbitrator determined that question in favour of the architect. When he brought proceedings to enforce the award the contractors served a defence claiming that the term in question did not express the true agreement between the parties and counterclaimed for rectification. The architect argued (among other things) that they were estopped from doing so. There is thus at first sight some similarity with the issue before us.

73. Lord Greene MR, who delivered the leading judgment, upheld the decision of Simonds J ([1971] 1 WLR 1390 (note)[7]) that the terms of the submission to arbitration were limited to disputes arising out of the document purporting to record the remuneration

[7] The curious may wish to know that the reason why the report in the official law reports is thirty years late is that the original report in the All England Law Reports ([1939] 1 All ER 662) was said by Lord Wilberforce in *Prenn v Simonds* [1971] 1 WLR 1381 to be incomplete. (The issue on which it was cited in *Prenn v Simonds* was not the issue with which we are concerned here.)

agreement and did not cover any issue as to whether that document reflected the true agreement between the parties. He continued, at p. 72 E-G:

> "The only other point is … a suggestion that there was some sort of estoppel or quiescence by the respondents which deprives them of the right at this stage to raise the point. [Counsel for the claimant] contended that a party in circumstances such as these was not entitled to take two bites at a cherry. I think it is sufficient to say that nobody in the wildest flight of metaphor would say that a person was bound to take one bite at two cherries. The issue of rectification is a totally different issue. The only issue before the arbitrator related to the actual document, and there was nothing in the world to prevent the respondents from proceeding with that issue which was submitted until its conclusion, and then to raise a different issue altogether which was entirely outside the jurisdiction of the arbitrator."

74. The way that the estoppel point is there formulated appears to be rather different from how it was understood by Simonds J, who treated it as being based on estoppel by representation and could find no relevant representation; but as stated by Lord Greene it bears some similarity to Nexus's argument before us. However, the crucial distinction is that his reasoning is squarely based on the fact that the arbitrator had no jurisdiction to determine the rectification issue (because of the limited scope of the submission), whereas in our case the ET did have jurisdiction to determine rectifiability. That being so, I do not believe that *Crane* is relevant authority. I would add that the case pre-dates the clarification of the law of what we now label "issue estoppel" (a term which did not enter the English jurisprudence until *Thoday v Thoday* in 1964): the architect's case might have been put rather differently in the light of *Arnold* and *Zodiac*, though the limitation on the arbitrator's jurisdiction might still have posed an insuperable problem.

The Pre-Complaint Deductions

75. If in *Anderson* the ET had decided not only the issue of principle but also the amount of the pre-complaint deductions in each case an order for rectification of the Letter Agreement could not assist Nexus as regards those amounts: there would be a final order which could not be challenged except by appeal (or by seeking to have it set aside for fraud). However, as we have seen, no such determination has occurred because the ET deferred the quantification of the underpayments in each case (described as "remedy"). That being so, Mr Reade confirmed to us that it is Nexus's intention, if it succeeds in its rectification claim, to argue at the "remedy" stage, unattractive as it might appear, that it follows from that fact that no amount is payable notwithstanding the ET's previous decision. The question is whether such an argument would be precluded by *res judicata* or would constitute an abuse of process.

76. Mr Reade was right to acknowledge that Nexus's stance is unattractive. In *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 Diplock LJ said, at p. 642, that it was "too clear to need citation of authority" that where an issue raised by a claim is dealt with as a preliminary issue

> "… the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly

> determined. Their only remedy is by way of appeal from the interlocutory judgment … This is but an example of a specific application of the general rule of public policy, *nemo debet bis vexari pro una et eadem causa*. The determination of the issue between the parties gives rise to what I ventured to call in *Thoday v Thoday* [1964] P 181, 198, an 'issue estoppel'."

On the face of it, a case where a court has made a finding of "liability" but deferred a decision on quantification is the paradigm of the kind of situation that Diplock LJ was referring to. However, I think it is necessary to analyse the position more fully. I will address in turn cause of action estoppel, issue estoppel and abuse of process.

Cause of action estoppel

77. I start with two potential objections to the application of cause of action estoppel as regards the pre-complaint deductions.

78. First, Mr Reade submitted that the cause of action determined by the ET does not correspond to the subject-matter of the claim in this action. He submitted that the ET was concerned with a statutory claim that Nexus had made unlawful deductions from the claimants' wages within the meaning of Part II of the 1996 Act, whereas the issue in this action concerns their contractual entitlements, and that accordingly cause of action estoppel does not operate. I do not accept that submission. The distinction between the subject-matters of the two claims is in my judgment nominal rather than substantial. The substance of the ET's finding in *Anderson* is that the sums in question are due under the employees' contracts; all that the statute does is to afford an alternative mechanism for vindicating the claim. The substance of the decision sought by Nexus in these proceedings (as regards the pre-complaint deductions) is that the selfsame sums are <u>not</u> due under the contract. Thus the ultimate claim is the same in both sets of proceedings.

79. Secondly, I have been concerned whether the fact that the ET has made no final determination of the claim of any individual means that no cause of action estoppel can arise: the cause of action is the non-payment of a specific sum, and no such sum has been quantified in any of the claimants' cases. If that is so, then we are concerned with issue estoppel rather than cause of action estoppel: which characterisation is correct might in principle make a difference because, as we have seen, issue estoppel is potentially more flexible in its application than cause of action estoppel. In my view, however, the considerations of policy which underlie the doctrine of cause of action estoppel justify its application in a case of the present kind, where a court or tribunal decides that a claimant has a cause of action and simply defers quantification: what matters is that there has been a definitive decision on the question of liability. I note that in the passage from his judgment in *Fidelitas* quoted above Diplock LJ referred to the operative principle as issue estoppel; but I think a case of the present kind is to be distinguished from a conventional "preliminary issue", where the determination of the issue does not determine liability. It must also be borne in mind that Diplock LJ adopted the (avowedly novel) terminology of issue estoppel at a time when the taxonomy of this subject had not been fully developed as it has since been in *Arnold* and *Zodiac*.

80. Once that point is reached, since I have already held that Nexus could and should have raised the mistake case in *Anderson*, it would follow that it is precluded by cause of action estoppel from contending at the remedy stage that shift allowance was not payable at the enhanced rate.

Issue estoppel

81. That conclusion means that it is strictly unnecessary to consider the question of issue estoppel. I will, however, do so in case I am wrong on either of the two questions considered at paras. 78 and 79 above.

82. The primary requirements for an issue estoppel are plainly present. The ET found that the employees were contractually entitled to enhanced shift payments, whereas the purpose of the rectification claim is to enable Nexus to show, inconsistently with that finding, that they were not so entitled. (If it is necessary to put the point in Lord Sumption's terms, the fact that the terms of the Letter Agreement represented both parties' intentions was "essential to the existence of the cause of action" in *Anderson*.) I have already held that the mistake case could and should have been advanced in the *Anderson* proceedings. The only question is thus whether there are special circumstances which mean that the application of the bar would cause injustice.

83. As to that, I should start by making the point that, while in one sense it might be said to be unjust that Nexus should be precluded from advancing what may be a well-founded defence, that possibility is inherent in any case of the present kind and cannot by itself constitute a relevant injustice. It will only have arisen because Nexus failed to raise in the *Anderson* proceedings a point which could and should have been raised; and doing justice to both parties requires proper weight to be given to the important interest in finality. Accordingly what Nexus needs to show is some special circumstance which would render it unjust for it to be debarred from advancing the mistake case notwithstanding the importance of finality.

84. In the present case the interest in finality is particularly strong. Not only did Nexus not advance the mistake case in the ET, it failed to do so either in the EAT or before this Court. The only reason why the point remains even potentially open to it is that as a matter of case management final quantification was deferred pending the outcome of those appeals. The present proceedings were commenced only after all appeals had been exhausted (save for the application for permission to appeal to the Supreme Court), almost five years after the start of the ET proceedings (and, be it noted, almost eighteen months after Addleshaw Goddard's letter before action). In those circumstances it is very hard to see how it could be just to allow the mistake case to be advanced now.

85. The Judge addressed this issue at para. 35 of his judgment, as follows:

> "For the reasons stated above in the context of cause of action estoppel, the claimant is not issue estopped from pursuing the rectification claim here. The mistake issue was not '*necessarily common*' to the *Anderson* proceedings and the present proceedings; nor could it with reasonable diligence or should it in all the circumstances have been raised in the *Anderson* proceedings. In view of the significant financial consequences referred to above, I would, had it been necessary to do so, therefore have held that special circumstances exist in which it would

> not be just to deprive the claimant of the opportunity to advance the rectification claim against the defendants."

86. It will be seen that the Judge there largely adopts his previous reasoning in relation to cause of action estoppel. I have already addressed that reasoning, and it will be apparent why I respectfully disagree with him. But I should say something about his reference to "significant financial consequences", amplified in para. 32 as "significant financial consequences in respect of every employee of the claimant in whose employment contract the Letter Agreement was incorporated". It is clear that what he had in mind was that Nexus would be exposed to a liability to pay shift allowance at an enhanced rate to all the relevant employees for an indefinite future period. That, however, is not the liability with which we are concerned at this stage of the argument, which is limited to liability for the pre-complaint deductions claimed in the *Anderson* proceedings: I return later to the question of liability for the post-complaint deductions and to other employees.

87. It is clearly not enough to say that it is unjust that Nexus should have to pay a large sum for which (*ex hypothesi*) it might not be liable; that would undermine the importance of finality which issue estoppel is intended to protect. It may be – I express no concluded view – that a different conclusion would be justified if the sum involved were quite exceptionally high, or such as to imperil the continuation of Nexus's business. But there is no evidence to that effect. Indeed the statement of facts says nothing about the financial consequences of the ruling. In his judgment in *Anderson* Employment Judge Hunter refers to the amount in issue to date as being of the order of £500,000, representing an average increase in pay for the relevant employees of 5%. The parties were asked by the Judge whether that was an agreed figure. Lord Hendy did not accept it, but I am prepared to proceed on the basis that the amount is of at least approximately that order: that would not be very surprising given that 70 employees were claiming to have suffered regular shortfalls over a two-year period. I do not believe that the fact that Nexus would have to pay such a figure can possibly outweigh the interests of finality as regards the pre-complaint deductions.

88. Accordingly, even if Nexus were not precluded by cause of action estoppel from relying on a successful rectification claim to defeat the claims of the *Anderson* claimants in respect of the pre-complaint deductions, I have no doubt that they would be precluded by issue estoppel.

Abuse of Process

89. Finally, even if, contrary to my view, it cannot be said that Nexus should in all the circumstances have advanced the mistake case for determination by the ET, so that *res judicata* is not available, I believe that any attempt to rely on that case in respect of the pre-complaint deductions would be an abuse of process. The only responsible course for Nexus was to raise the mistake issue at an early stage in the *Anderson* proceedings, albeit on the basis that it represented a fallback, so that a decision could be made as to the appropriate case management options. I strongly suspect that the ET would have stayed the proceedings pending the outcome of proceedings in the High Court which

could have decided both the construction issue and (if necessary) the claim for rectification: that was what the EAT decided should be done in *Mango Hair*[8].

Conclusion

90. In summary, any attempt by Nexus at the remedy stage to defeat an order for payment of the pre-complaint deductions on the basis of the mistake case would be precluded by cause of action estoppel or issue estoppel; and even if I were wrong about that it would fall to be dismissed as an abuse of process.

91. Although neither Males LJ nor and Newey LJ agrees with all aspects of my reasoning on *res judicata* both are agreed that it would be abusive for Nexus now to rely on rectification (if proved) as a defence to the *Anderson* claimants' claims for the pre-complaint deductions. Thus, by whichever route, Nexus cannot rely on rectification as a defence to those claims.

The Post-Complaint Deductions

Cause of action estoppel

92. The *Anderson* decision cannot give rise to a cause of action estoppel as regards the post-complaint deductions because the ET was formally only concerned with underpayments which had occurred prior to the presentation of the complaint. Accordingly, if Nexus in due course sought to defend a claim for the post-complaint deductions by the *Anderson* claimants on the basis that the Letter Agreement had been rectified in the present proceedings, any answer based on *res judicata* would have to take the form of issue estoppel.

Issue estoppel

93. As in the case of the pre-complaint deductions, the primary requirements of issue estoppel are plainly present (see para. 82 above), and I have already concluded that the mistake case could and should have been advanced in the *Anderson* proceedings. Again, therefore, the only question is whether there are special circumstances which mean that it would be unjust for Nexus to be prevented from seeking to establish its mistake case despite its failure to raise it in *Anderson*.

94. I can see the case that there was for this purpose no relevant distinction between the claims for pre-complaint and post-complaint deductions. Notwithstanding the formal position, both parties must have understood that the outcome of the *Anderson* proceedings would in practice determine the issue of the claimants' entitlement to enhanced shift allowance on an ongoing basis (see para. 18 above); and there is nothing unjust in Nexus being precluded from re-fighting that issue as regards further deductions made on the identical basis.

95. That is a powerful point, but I do not think that it is necessarily determinative. If it is not rectified, the Letter Agreement will remain part of the contracts of employment of the relevant employees – at least unless and until re-negotiated, which it is hard to see that the employees or the Unions would have any incentive to do. It is true that the

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[8] So far as I can see, there was no issue in *Mango Hair* about construction, but that does not affect the point.

cohort of *Anderson* claimants will gradually diminish as they leave the workforce[9], but it may in this context be relevant to look beyond that cohort to all employees in the relevant grades, past and future (since it is not clear whether it is realistic for Nexus not to apply the Letter Agreement to incoming employees). Accordingly if it is precluded from relying on the mistake case, Nexus will have to pay the enhanced rate of shift allowance to a large number of employees for an indefinite and potentially very long period, in circumstances where (as we have to assume at this stage) there is an arguable case that that is not what either they or the Unions intended: this is the point that I understand the Judge to have been making in the second part of para. 32 of his judgment. In my view it is arguable that such an outcome would, if the mistake case were proved, give disproportionate weight to the interests of finality, important though they are. What is required is a holistic assessment of where the balance of justice lies between those interests and the impact on Nexus of not being able to advance its case. I do not believe that the balance necessarily falls the same way as regards the pre-complaint and the post-complaint deductions.

96. It is important to make clear that I do not believe that the Court has to choose between the two extremes of, on the one hand, preventing Nexus from relying on the mistake case for ever and, on the other, allowing it to do so in respect of the entirety of the post-complaint deductions. On the contrary, it would be open to it to find that it was just for the issue estoppel to operate as regards claims for deductions up to, but only up to, some specified date later than the commencement of the *Anderson* proceedings. I express no view about what such a date might be: possible candidates are the promulgation of the ET decision, the sending of the letter before action and the commencement of the present proceedings, but there may be others. An alternative, and perhaps more appropriate, way of achieving the same result would be by making any order for rectification on terms that prevented Nexus from relying on it as an answer to deductions made before the specified date. Terms of that kind are entirely appropriate in the context of an equitable remedy: see, for example, para. 40 of Lord Neuberger's judgment in *Marley v Rawlings* [2014] UKSC 2, [2015] 1 AC 129, where he said:

> "If it is a question of interpretation, then the document in question has, and has always had, the meaning and effect as determined by the court, and that is the end of the matter. On the other hand, if it is a question of rectification, then the document, as rectified, has a different meaning from that which it appears to have on its face, and the court would have jurisdiction to refuse rectification or to grant it on terms (e.g. if there had been delay, change of position, or third party reliance)."

97. I do not believe that this Court is in a position to perform the necessary holistic exercise. The submissions before us did not approach the issue in that way, and the statement of facts does not necessarily provide an adequate basis for it. Even if we had more information than we do, I would have been inclined to regard the exercise as premature at this stage. I can understand why the Unions would like to have the *res judicata* issue decided by way of preliminary issue, in the hope that that would avoid the expense and delay involved in having a trial of the mistake case, and in many or most cases that would indeed be the appropriate course; but in the particular circumstances of the

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[9] We were told by counsel for Nexus that 38 of the original *Anderson* claimants now remain employed by Nexus.

present case I think it is better for it to be determined (if it arises) by the Court hearing the rectification claim.

Abuse

98. If, contrary to my view, there was no *prima facie* issue estoppel as regards the post-complaint deductions, my conclusion would be the same about whether this Court could decide whether Nexus's reliance on the mistake case was an abuse of process. That is unsurprising, since, as Lord Sumption recognises, the same underlying principles are involved.

Conclusion

99. It follows from that approach that I believe that the Judge was wrong definitively to decide the issues of *res judicata* and abuse of process as regards the post-claim deductions.

Are the Unions the Employees' Privies?

100. I turn finally to an issue which on the basis of my conclusion on issue (A) does not arise. If, contrary to that view, Nexus were in fact entitled to proceed against the Unions alone, a defence of *res judicata* could still be raised if they are in law the privies of the *Anderson* claimants and thus entitled to rely on the decision in their case. We were addressed fully on that issue, and I think I should deal with it.

101. In my view the Unions would indeed be entitled to rely on the *Anderson* decision on the basis that there was privity of interest between them and the individual employees who claimed in those proceedings. The *Anderson* proceedings were concerned with the meaning and effect of a collective agreement which the Unions had negotiated on behalf of the bargaining unit to which the claimants belonged. In the negotiation the Unions were not acting in their own interests but solely in those of the employees in question: they were their representatives. The effect of the collective agreement was (and was only) to create for the employees the legal rights which were the subject of the *Anderson* proceedings. It is true that in law the Unions were not acting as the employees' agents, but, as appears from element (c) in Floyd LJ's summary in *Resolution*, we are concerned with substantive justice; and the relationship is in my view in this context substantively identical. Adapting Sir Robert Megarry's formulation in *Gleeson*, there is a sufficient degree of identification between the Unions and the employees to make it just to hold that *res judicata* should be available as between *Anderson* and the current proceedings.

102. The Judge reached the contrary conclusion. His reasons appear at para. 43 of his judgment, as follows:

> "Adopting the approach taken by Floyd LJ [in *Resolution*], I accept that the defendants had an interest in the subject matter of the *Anderson* proceedings. However, I do not accept that the defendants can be said to be, in reality, the party to the *Anderson* proceedings. The facts that the *Anderson* claimants were members of the RMT, that their claim was being supported and funded by the RMT and that the Letter Agreement was in issue in the *Anderson* proceedings and is in issue in the present proceedings are, in my judgment, insufficient for that

> purpose. The RMT could not have been a party to the *Anderson* proceedings and could not have brought the claim which the *Anderson* claimants brought. Whether or not the defendants could be said to be, in reality, the party to the *Anderson* proceedings, I do not consider that it would be just that the claimant should be bound by the outcome of the *Anderson* proceedings, for the reasons already stated. In my judgment, the fact relied on by the defendants that, from a practical viewpoint, the construction of the Letter Agreement arrived at in the *Anderson* proceedings would affect the collective negotiations going forward is a factor in favour of the claimant and not that of the defendants in determining whether it would be just that the claimant should be estopped from pursuing the rectification claim."

103. With respect, I do not accept that reasoning. For the reasons which I have given, the fact that the *Anderson* proceedings and the present proceedings are concerned with what contractual rights were created for the employees by the Letter Agreement which the Unions negotiated is sufficient to establish a privity of interest. (To the extent that the Unions placed primary weight on the facts that the *Anderson* claimants were members of the RMT and that their claim was being supported and funded by it, I agree that those facts are not relevant as such, though they may illustrate the nature of the relationship.) Although the Judge is right to say that the RMT (strictly the Unions) could not in law have been a party to the *Anderson* proceedings, I do not believe that element (b) in Floyd LJ's summary in *Resolution* means that it is a requirement that that should be the case: the test is a broader one of whether the Unions' interest in those proceedings is sufficient to make it just that they should be able to rely on the ET's decision in order to raise a defence of *res judicata* in the present proceedings. The Judge does in fact address that question in the second part of the paragraph. His reference to "the reasons already stated" is to the substantive question of whether *res judicata* is established: I do not believe that that bears on the privity issue.

Conclusion as regards the *Anderson* Claimants

104. Nexus is not entitled to rely on the mistake case, if proved, as an answer to a claim for the pre-complaint deductions. The question whether, and if so to what extent, it is entitled to do so as regards the post-claim deductions should be decided (if necessary) by the Court hearing the rectification claim.

(2) OTHER EMPLOYEES

105. We are here concerned with employees in grades 1-3 who were not claimants in the *Anderson* proceedings. Some, as we have seen, have since brought their own claims – see para. 10 above – and there are others who may yet do so. Nexus wishes in any such claims to advance the mistake case by way of defence, as it already has in *Bolam*. The question is whether it is precluded from doing so by *res judicata* or, even if it is not, whether to do so would be an abuse of process.

106. The employees in question would not in those circumstances be entitled to rely on *res judicata* because they were neither parties to the *Anderson* proceedings nor the privies of the claimants in those proceedings. In his reply Lord Hendy submitted, for the first time, that all employees in grades 1-3 were in privity with one another because they were all negotiated for by the Unions. I do not accept this. The employees in the

bargaining unit do not have a relationship of the kind required by the authorities. They are simply individuals who enjoy similar contractual rights against a third party. The outcome of the *Anderson* proceedings may for that reason be "of concern" to the other employees because it suggests that similar claims by them will succeed, but, as Sir Robert Megarry says in the first paragraph quoted from *Gleeson* at para. 43 above, that is not enough to constitute a privity of interest.

107. Accordingly the employees would have to rely on abuse of process. As to that, it is no doubt arguable that it must have been understood by both the Unions and Nexus that the *Anderson* proceedings would determine the entitlement of all relevant employees, both current and future, to enhanced shift allowance; and that it would accordingly be an abuse of process for Nexus, having lost in those proceedings, to seek to defend claims by other employees on a basis not advanced in *Anderson*. Lord Hendy referred us to *Ashmore v British Coal Corporation* [1990] 2 QB 338, in which this Court upheld the striking-out of a claim by an employee where a substantially identical claim had previously been dismissed in proceedings involving other employees. The circumstances are not identical to those of the present case because the claim in question was one of a large group which had been case managed together and in which the cases which were the subject of the earlier decision were selected as lead cases; but although that feature is not present here Lord Hendy submitted that that distinction was not fundamental.

108. Mr Reade argued that it would be wrong to equate the position of the other employees with that of the *Anderson* claimants, precisely because they were not parties to the *Anderson* proceedings. He reminded us of Thomas LJ's statement in *Aldi*, quoted at para. 48 above, to the effect that difference of parties was a "powerful factor" weighing against a finding of abuse in cases of this kind. But that may not be a strong point in the particular circumstances of the present case, where the Letter Agreement was negotiated collectively for the benefit of a defined bargaining unit: in those circumstances it might be thought to be natural for all parties to expect that a decision by a tribunal as to its meaning and effect would apply to everyone in that unit.

109. I do not believe that we should attempt to resolve those issues. Whether or not the other employees are in a relevantly worse position than the *Anderson* claimants as regards the post-complaint deductions, they clearly cannot be in a better position. In their case we have even less information than in the case of the *Anderson* claimants on which to decide how the relevant balance of justice should be struck. In particular, there may be a variety of reasons why they did not join in the *Anderson* proceedings which may be relevant to the question whether or to what extent they should be entitled to prevent Nexus relying on any rectification of the Letter Agreement. That question is, again, best decided (if it arises) by the Court deciding the rectification claim.

CONCLUSION AND DISPOSAL

110. I would allow the Unions' appeal against the Judge's dismissal of the strike-out application on ground (iii), and I would accordingly dismiss the action. It is for Nexus to decide whether to bring fresh proceedings against individual employees.

111. If Nexus does bring fresh proceedings and succeeds in proving the mistake case, it follows from paras. 90-91 above that it will nevertheless not be entitled to rely on rectification as defeating the claims of the *Anderson* claimants as regards the pre-

complaint deductions. It follows that there is no reason why the quantification of the individual claims by the ET, if they are not agreed, should not proceed (though it is not within the jurisdiction of this Court to make an order to that effect). As regards the other claims, if the Court finds the mistake case proved it will have to decide at that stage whether and to what extent Nexus is precluded from relying on rectification as an answer to those claims. The sooner there is a trial of the mistake case the better.

Lord Justice Newey:

112. I have read in draft the judgments of Underhill and Males LJJ. I agree with them that the appeal should be allowed, that the present action should be dismissed and that it will not be open to Nexus to seek to rely on rectification at the "remedy" stage of the *Anderson* proceedings.

113. Underhill and Males LJJ arrive at their conclusions by rather different routes, albeit that there is a good deal of common ground between them. For my own part, I agree with Males LJ's reasoning subject only to the comments which follow.

114. Like Males LJ, I consider that Nexus should have raised the question of rectification before the ET in the *Anderson* proceedings. It would then have been possible for the ET to give appropriate case management directions. That failure to alert a Court or Tribunal to the possibility of a further claim can potentially give rise to abuse of process can be seen from *Aldi Stores Ltd v WSP Group plc*, at paragraphs 29-31, and the other cases discussed in *Taylor Goodchild Ltd v Taylor* [2021] EWCA Civ 1135, at paragraphs 26-28. As Lord Bingham explained in *Johnson v Gore Wood &* Co, at paragraph 31, a "broad, merits-based judgment" is required when determining issues of abuse. I agree with Males LJ that, on the facts of the present case, it would be abusive for Nexus to seek to frustrate the expectation that the decision of the ET in the *Anderson* proceedings would (subject only to any appeal) determine the position of the *Anderson* claimants conclusively, at least in respect of past claims.

115. As he notes in paragraph 58, Underhill LJ considers that, as a matter of law, a case that the Letter Agreement was rectifiable for mistake could have been raised in *Anderson* by way of defence. Males LJ, in contrast, takes the view that the ET has power to order rectification if it is necessary to do so to determine a claim for unlawful deductions: see paragraph 132. I would myself prefer to leave open the question whether the possibility of rectification could have been raised in the ET either by way of a defence of "rectifiability" or on the footing that the ET could itself order rectification. Regardless of whether rectification *could* have been addressed in the ET in either of these ways, I have not been persuaded that Nexus *should* have pursued either course.

116. Underhill LJ cites two decisions of the Common Pleas Division in the 1870s, *Mostyn v The West Mostyn Coal and Iron Company* and *Breslauer v Barwick*. As Underhill LJ points out, both cases are mentioned in *Snell's Equity*, 34th. ed., in a footnote to paragraph 16-003. So far as I can see, however, the "rectifiability" aspect of the decisions has never featured in any subsequent reported judgment, and there is no question of their being well known. In fact, it has always been my own understanding that an application for rectification ought properly to be made by way of a claim or counterclaim rather than in a defence, and I think it highly desirable that parties should not try to mount defences of "rectifiability". A party asserting that rectification is justified is seeking relief without which the instrument will continue to take effect

according to its terms. Requests for such relief are appropriately the subject of a claim or counterclaim, and attempts to invoke "rectifiability" as a defence would be liable both to confuse and, were they to be successful, to produce an odd and unsatisfactory half-way house. In all the circumstances, I do not think Nexus "should" have invoked "rectifiability" in the ET.

117. Neither do I consider that Nexus "should" have invited the ET to order rectification. I can quite see that the ET can plausibly be argued to have that power, but the suggestion appears to be a novel one. We were not referred to any authority or textbook in which such a view has hitherto been propounded. To the contrary, it seems to have been the understanding of employment lawyers that the ET lacked any rectification power. As Males LJ notes in paragraph 131, that was apparently the view of all concerned, including Burton J, in *Mango Hair v Dos Santos* (Appeal No. EAT/129/02). I do not think Nexus can be criticised for not having tried to convince the ET that it could itself effect any rectification.

Lord Justice Males:

118. While I agree with much of what Lord Justice Underhill has said, I reach the same conclusion – that the appeal should be allowed and the action dismissed – by a route which is different in some respects. I shall therefore state my reasons on what I regard as the critical issues in my own words. I shall do so without covering again the ground which Lord Justice Underhill's judgment has already covered.

The wrong defendants

119. I agree with Lord Justice Underhill that any claim by Nexus for rectification needs to be made against the employees whose legally binding contracts are to be rectified. Rectification is not available to rectify a collective agreement concluded between an employer and a trade union which is not legally binding. Such rectification would not change in any way the legal obligations of the parties to the collective agreement. Parliament has provided in section 179(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 that, unless the parties to the collective agreement agree otherwise in writing, there are no such legal obligations.

Dismiss or amend?

120. That conclusion means that the action as presently formulated must fail. The question then is whether it should be dismissed or whether Nexus should be given an opportunity to apply to amend. I would dismiss the action now, leaving Nexus to bring new proceedings if it chooses to do so. I say this for a number of reasons.

121. First, Nexus made what was clearly a deliberate decision to sue the unions and not individual employees. Its solicitors' letter before action dated 8th January 2019 indicated that the defendants to the proposed claim "would be all employees of our client to whom the 2012 collective agreement applies". That included the entire workforce, including those who had been claimants in the *Anderson* proceedings and were still employed by Nexus. However, that course was not followed through when the claim was issued over 16 months later, on 21st May 2019. Although we do not have any explanation for this change of target, it can only have been deliberate and I would expect that it was

carefully considered. I do not find that surprising. It must be unpalatable for any employer to sue its entire workforce, even when most, but not all, of its employees are likely to benefit from trade union representation.

122. Second, the point was clearly taken below that Nexus needed to sue, or at least to join, the employees affected, but it persisted in suing only the trade unions right up to the Court of Appeal. In my view Nexus should live with the consequences of its decision.

123. Third, even now, we do not have a draft amendment. Although Mr David Reade KC submitted that, if necessary, Nexus should be afforded an opportunity to apply to amend to add additional defendants, I understood that to mean that Nexus would revert to the course proposed in the letter before action, that is to say to sue its entire current workforce including the remaining *Anderson* claimants (we were told that there are currently 38 such employees), with a view to avoiding having to pay them enhanced shift allowances throughout the period since the 2012 collective agreement was agreed. Certainly, Mr Reade made clear that it is Nexus' intention to argue at the remedies hearing before the employment tribunal that, if rectification is granted, the *Anderson* claimants should be deprived of the fruits of their victory in the employment tribunal proceedings so far. For the reasons which I shall explain, I consider that it would be (at least) an abuse of process to sue the remaining *Anderson* claimants in respect of past claims (i.e. those determined by the employment tribunal decision) and accordingly any application to join them which extends to such claims would be doomed to fail.

124. Fourth, that leaves the possibility that Nexus might decide to confine any application to amend so as to exclude *Anderson* claimants in respect of past claims, although it has given no indication of any such intention or even of having addressed its mind to which employees would be defendants to any claim. However, I do not think that such an application would be straightforward. We heard no submissions about how the representative procedure under CPR 19.6 might apply in this situation and it is to be noted that we are concerned with a shifting membership of the bargaining unit over time, where different considerations may apply to different groups of employees. For example, the interests of the *Anderson* claimants are not necessarily the same as those of employees who were members of the bargaining unit at the time of the *Anderson* proceedings, but who decided (perhaps for varying reasons) not to join in them. The interests of employees who joined the workforce after the decision in *Anderson* but before any claim for rectification was indicated, who might therefore have done so on the basis that the position had been settled, are not necessarily the same as those of employees who joined the workforce after it was known that the employer was contending that the written contract did not correctly record the true agreement made, and who might therefore be said to have contracted knowing that the position was uncertain. The interests of current employees are not necessarily the same as the interests of those who have left the workforce. Finally, the interests of employees who are not members of any union and therefore would not or might not have benefited from legal representation in making any unlawful deduction claim are not necessarily the same as those who are members of a union. None of these matters was touched on in argument, but it seems to me that there might need to be a number of representative defendants, representing groups with potentially different interests. In any event, it would be necessary to give the proposed defendants an opportunity to be heard on these matters before determining any application to join them, which would be likely to

require (at least) a further hearing in this court in which we would be acting essentially as a court of first instance making case management decisions.

125. I would add that the considerations just described open up the possibility that different groups of employees in grades 1 to 3 may be entitled to be paid differently for the same work, according to whether Nexus is entitled to bring a claim for rectification against them. How that would work in the context of collective bargaining would need careful consideration, quite apart from the formidable industrial relations difficulties to which it could give rise.

126. Fifth, I acknowledge that if Nexus decides to bring new proceedings, that may involve some delay and cost in dealing with the claim which is already concerned with events which occurred some 10 years ago. However, that has to be weighed against the inevitable delay and cost of a further hearing in this court and I doubt whether the existing proceedings are an efficient vehicle for the determination of claims against the employees. It seems to me to be preferable that there should be a clean break and (if necessary) a fresh start, while there should be little or no difficulty in adapting the existing pleadings to a claim against the employees to the extent that they deal with the merits of the claim for rectification. That work will not, therefore, be wasted.

127. In one sense the conclusion which I have reached so far is sufficient to conclude that the appeal should be allowed and the action should be dismissed. However, as part of my reasoning for saying that the action should be dismissed now is that it would be (at least) an abuse of process to sue the remaining *Anderson* claimants in respect of past claims, it is necessary to explain that reasoning.

Res judicata

128. We have heard argument on the *res judicata*/abuse of process issues and are able to reach a firm conclusion on the position of the *Anderson* claimants, at any rate so far as past claims are concerned. In the case of other claimants, and indeed the *Anderson* claimants in respect of future claims, the position is more complex and we are able to do no more than indicate some of the issues which may arise.

The Anderson claimants – past deductions

129. It is clear that any claim in respect of past deductions against employees who are *Anderson* claimants will be barred, although it is debatable whether that is because of cause of action estoppel, issue estoppel or abuse of process. As appears from Lord Sumption's analysis in *Virgin Atlantic* (*Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at [22]), by which we are bound, cause of action estoppel and issue estoppel do not apply to points not raised in the earlier proceedings unless they could with reasonable diligence and should in all the circumstances have been raised in those proceedings. Although related, "could" and "should" raise different questions.

130. However, I have no doubt that Nexus could and should have indicated in the employment tribunal proceedings that it proposed to bring a claim for rectification on the basis of mistake. Whether the employment tribunal would have been in a position to determine that claim itself is a separate matter. For my own part, I consider that it would, as I shall explain. At the very least, however, raising the issue would have

enabled the parties and the employment tribunal to consider, as a matter of efficient case management, how it should best be determined with a view to minimising costs and avoiding the creation of misleading expectations on the part of the *Anderson* claimants as to what their employment tribunal proceedings could achieve. So far as I can see from the evidence, the only reason why the point was not raised was that, at that stage, it had not occurred to Nexus or its lawyers. That is not a good reason. Indeed, it serves to confirm that Nexus' own expectation, as well as the *Anderson* claimants', was that the employment tribunal proceedings would finally determine their claim for unlawful deductions.

131. If necessary, however, I would hold that the claim for rectification *could* have been determined in the employment tribunal proceedings. Lord Justice Underhill cites two 19th century cases, *Mostyn v West Mostyn Coal & Iron Co Ltd* (1876) 1 CPD 145 and *Breslauer v Barwick* (1876) 36 LT (NS) 52 which held that, in respect of past claims, "rectifiability" could be raised as a defence in the Common Pleas Division of the High Court even though that Division of the Court did not itself have power to order rectification because that power was then reserved to the Chancery Division by the Judicature Act 1873. These cases are not binding on us and, for my part, I do not think that nice distinctions between the remedies available in law and in equity and the resulting allocation of jurisdiction between different divisions of the High Court, let alone the ingenious ways in which nineteenth century judges would get round those distinctions in order to do justice in particular cases, has any role to play in determining the scope of the jurisdiction of an employment tribunal in the late 20th and 21st centuries.

132. I prefer to say that the employment tribunal does have power to order rectification if it is necessary to do so in order to determine a claim for unlawful deductions. Sections 13 and 23 of the Employment Rights Act 1986 confer on the employment tribunal jurisdiction to determine whether a deduction from wages is unauthorised. It follows necessarily, in my view, that the tribunal has power to decide any issue which needs to be decided in order to determine a complaint that a deduction from wages is unauthorised. If the employer contends that the deduction is lawful because the written contract between the parties does not properly reflect what was agreed and needs to be rectified, that is an issue which needs to be decided.

133. In this regard I agree with what Lord Justice Underhill said in *Agarwal v Cardiff University* [2018] EWCA Civ 2084, [2019] ICR 433 at [27]:

> "27. In my view Judge Richardson in *Weatherilt* and Judge Hand in *Nexus* were plainly correct not to follow *Agarwal*, for the reasons that they give. At the risk of repetition, but very briefly, I can summarise what seem to me to be the essential reasons as follows:
>
> > (1) *Delaney v Staples*, to which the ET and the EAT in *Agarwal* were not referred, is binding authority that an ET has jurisdiction to resolve any issue necessary to determine whether a sum claimed under Part II is properly payable, including an issue as to the meaning of the contract of employment. In truth, that is the end of the matter, as Judge Richardson perceived; but I should say that I find Nicholls LJ's reasoning entirely persuasive.

> (2) There is no conflict between that position and the decision in *Southern Cross*. As both Judge Richardson and Judge Hand point out, the provisions in Parts I and II of the 1996 Act differ in their origins, purpose and terms. It is only an accident of legislative history that they are now contained in the same Act.
>
> (3) There is no good – or even, frankly, comprehensible – policy reason for carving out from the jurisdiction of the ET one particular kind of dispute necessary in order to resolve a deduction of wages claim. On the contrary, to do so would be incoherent and would lead to highly unsatisfactory procedural demarcation disputes. ETs are well capable of construing the terms of employment contracts governing remuneration and have to do so in many other contexts."

134. This was not new law, but rather a summary and application of what had already been decided in *Delaney v Staples* [1991] 2 QB 47, where Lord Justice Nicholls said:

> "The Act is, indeed, concerned with unauthorised deductions. But section 8(3) makes plain that, leaving aside errors of computation, any shortfall in payment of the amount of wages properly payable is to be treated as a deduction. *That being so, a dispute, on whatever ground, as to the amount of wages properly payable cannot have the effect of taking the case outside section 8(3). It is for the industrial tribunal to determine that dispute, as a necessary preliminary to discovering whether there has been an unauthorised deduction.* Having determined any dispute about the amount of wages properly payable, the industrial tribunal will then move on to consider and determine whether, and to what extent, the shortfall in payment of that amount was authorised by the statute or was otherwise outside the ambit of the statutory prohibition: for example, by reason of section 1(5) …" (The emphasis is supplied by Lord Justice Underhill in Agarwal).

135. Although the particular issue was different (in *Agarwal* the question was whether an employment tribunal could decide an issue of construction), the reasoning is equally applicable to the question whether an employment tribunal can order rectification if it is necessary to decide whether to do so in order to determine a deduction claim, and in my view is equally convincing in that context. Moreover, if an issue arises whether what has been agreed in an employment context (negotiations about wages) is correctly recorded in the parties' written contract, that is an issue which an employment tribunal with its specialist expertise is particularly well able to decide.

136. Whether the issue *should* have been raised is more complex, at any rate if the question is whether the issue of rectification should have been raised *for determination by the employment tribunal*. There appears to have been a view among employment lawyers and others that rectification issues are unsuitable to be determined in an employment

tribunal and incapable of being so determined. That appears to have been the view of all concerned in the proceedings before the Employment Appeal Tribunal in *Mango Hair v Santos* [2002] EAT/129/02, including Mr Justice Burton who was (or was about to become) its President. Against that, it may be said that *Snell* draws attention to the two 19th century cases on "rectifiability" (which do not otherwise appear ever to have seen the light of day) (*Snell's Equity*, 34th Ed (2020), para 16-003) and that Nexus did plead a mistake case in the *Bolam* claim before the employment tribunal.

137. Overall, I would say that, if the question is whether the mistake issue should have been raised for determination by the employment tribunal, that would give rise to a question of fact which we are not in a position to decide. That would have a bearing on whether the issue should have been raised (for the purpose of both cause of action estoppel and issue estoppel) and whether special circumstances existed (for the purpose of issue estoppel). Ultimately, however, it is not necessary to decide this question. On any view the mistake issue should have been raised so that consideration could be given to how it should be dealt with. Lord Justice Underhill may well be right in thinking that the employment tribunal proceedings would then have been stayed so that the construction and rectification issues could both be determined in the High Court.

138. It follows, in my judgment, that whether or not cause of action or issue estoppel applies, any claim for rectification which would deprive the *Anderson* claimants of their victory in the employment tribunal and all the way up to the Court of Appeal is barred by the abuse of process principle. As Lord Bingham explained in the oft cited passage from his speech in *Johnson v Gore-Wood & Co* [2002] 2 AC 1 at 31, there is a public interest in finality in litigation which is reinforced by the emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of the defence in later proceedings may, without more, amount to abuse if the court is satisfied that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. Whether this is so in any given case requires "a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before".

139. Looking at the matter in the round and making this broad merits-based judgment, it was clearly the expectation of all parties that the decision of the employment tribunal would (subject only to any appeal) determine the position of the *Anderson* claimants conclusively, at least in respect of past claims. After years of litigation on that basis, it would be abusive to allow that expectation to be frustrated so that, almost seven years after the decision of the employment tribunal, the employees in question face further litigation before they know whether they are entitled to be paid at the enhanced rate for work which they did years ago.

140. I would therefore hold that any claim for rectification with a view to undoing the decision in *Anderson* would be an abuse of process. It follows that the course which Nexus proposes to take in the remedy proceedings before the employment tribunal (see para 75 above) is not open to it.

The Anderson claimants – future deductions

141. It is clear that cause of action estoppel will not apply in respect of future deductions even for *Anderson* claimants. The cause of action for future deductions (i.e. in respect of periods later than those dealt with in the *Anderson* proceedings) is different (cf. *Arnold v National Westminster Bank* [1991] 2 AC 93). Any attempt to dispose of a claim otherwise than on its merits will therefore have to be based on issue estoppel (where the same "could and should" issue will arise as already discussed) or abuse of process. In my view these issues are unlikely to be suitable for summary determination or preliminary issues, independent of whatever may be the merits of the claim for rectification. Issue estoppel and abuse of process are both more flexible than cause of action estoppel, being subject respectively to "special circumstances" and a "broad merits-based judgment".

142. In considering such questions, a balance may need to be struck between, on the one hand, the strength of the expectation (to which Lord Justice Underhill refers at paragraph 18 of his judgment) that employment tribunal proceedings concerning past deductions from wages will in practice govern the future position and the strong public interest in finality of litigation and, on the other hand, the potential injustice to Nexus of holding that the *Anderson* decision applies indefinitely even on the assumption that Nexus would be able to satisfy the demanding requirements to make good a case of rectification (cf. what Lord Justice Underhill says at paragraphs 95-97 above). Quite how this balance should be struck (including, perhaps, whether claims only up to a certain point in time should be barred) would require proper evidence and careful consideration. Indeed, if the rectification claim were to succeed on a basis which involves (as alleged in the unilateral mistake case) unconscionable conduct on the part of the unions, that might be a relevant factor to take into account.

Other claimants

143. Employees who are not *Anderson* claimants may fall into different categories, as already indicated. There can be no question of cause of action estoppel in their case and any reliance on issue estoppel would require them to establish privity of interest with the *Anderson* claimants, a topic only touched on very lightly in argument before us. Subject to that, I doubt whether it would be right, or even practicable, to say anything about whether a claim for rectification against these employees could be met by a plea of issue estoppel or would amount to an abuse of process. If the question arises, it will need to be decided in the light of submissions from the parties affected.

Conclusion

144. As already indicated, I would allow the appeal and dismiss the present action.