Appeal No. UKEAT/0010/13/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 7 June 2013
Judgment handed down on 7 August 2013

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MRS C BAELZ

MR C EDWARDS

VISTEON ENGINEERING SERVICES LTD — APPELLANT

MR L OLIPHANT & OTHERS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW CLARKE (One of Her Majesty's Counsel) Instructed by: Clifford Chance LLP 10 Upper Bank Street Canary Wharf London E14 5JJ
For the Respondent	MR PETER EDWARDS (of Counsel) Instructed by: Thompsons Solicitors 18 Lawford Street Old Market Bristol BS2 0DZ

SUMMARY

CONTRACT OF EMPLOYMENT – Implied term/variation/construction of term

The Employment Judge did not err in construing an agreement reached between Ford, the transferor, and Trade Unions as not including a six year time limit on a term giving transferring employees a contractual entitlement to have their pay terms "mirror" those of Ford employees. There was no basis for reading into a provision which gave them the entitlement "for the duration of their employment" a limitation of six years which was the time within which new bargaining structures for transferred employees would have to be established and after which transferred employees would not be covered by Ford collective bargaining arrangements. However the Employment Judge erred in holding that the pay terms of transferring employees, including "mirroring" were not within the scope of the new bargaining arrangements established by UNITE with the Respondent. The contractual "mirroring" term could be varied or replaced by agreement. However at the time of the hearing before the Employment Judge no such agreement had been reached. Appeal dismissed.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Visteon Engineering Services Ltd. ('the Respondent') appeal from the judgment of an Employment Judge ('EJ') on a Pre-Hearing Review ('PHR') sent to the parties on 1 October 2012 ('the judgment') that "…the mirrored terms agreement dated 25 January 2000 did not expire in 2006". This issue arose in the context of claims made by 35 employees who presented claims in respect of alleged deduction from wages; an increase in pay for 2008 and 2009 to which they claimed entitlement under the Mirrored Terms Agreement ('MTA').

2. The MTA was incorporated into the contracts of employment of the Claimants on the transfer of their employment from the Ford Motor Co. Ltd. ('Ford') to Visteon UK Ltd from which the Respondent was spun out.

3. The MTA entitled transferring employees to the terms and conditions negotiated for Ford employees. It was the Respondent's case before the ET that these terms ceased to have effect either on the expiry of a fixed period of six years or consequent upon a new collective agreement being made affecting the transferred employees. The EJ determined that the material part of the MTA was of indefinite duration with the effect that the Claimants were entitled to the same pay increases in 2008 and 2009 as were given to Ford employees in the same occupational groups.

4. The Respondent contended that the EJ erred in holding that the material part of the MTA was of indefinite duration. Alternatively that the EJ erred in failing to hold that material provisions of the MTA were replaced by a collective agreement entered into on 14 June 2007 between the Respondent and Unite ('the 2007 Agreement').

Outline facts

5. Visteon UK Ltd. was spun out of Ford on 28 April 2000. On that date there was a **Transfer of Undertakings (Protection of Employment) Regulations 2006** ('TUPE') transfer affecting employees including the Claimants. The MTA was made between Ford and the Ford European Works Council on 25 January 2000. By a subsequent transfer on 1 July 2007, the Respondent was spun out from Visteon UK Ltd.

6. In material part the MTA provides:

> **"Scope of the Agreement**
> **The following agreement applies to hourly and salaried employees on Visteon payroll below Senior Management (the agreement covers up to and including LL5/SCR) of the current European plants in Berlin, Bueren, Wuelfrath, Belfast, Basildon, Enfield, Swansea and Charleville and to the existing Visteon engineering and other staff and hourly support activities in the countries where the above plants are located.**
> **…**
>
> **Employment Contract**
> **…**
>
> **Accrued seniority and all existing terms and conditions, in particular pension entitlements, will be transferred to the new employment contracts. For the duration of their employment, terms and conditions of existing Ford employees, who transfer to Newco, will mirror Ford conditions (incl. discretionary pension in payment increases) in their respective countries (lifetime protection).**
>
> **In respect of employee programs, such as car purchase and share purchase plans, comparable programs will be developed and implemented.**
>
> **…**
>
> **Future new hires into Newco after the date of Legal Separation will be employed under terms and conditions decided by Newco, which in the UK will be negotiated collectively as appropriate and in Germany will be aligned with the respective tariff agreements.**
>
> **For terms and conditions of employment of existing Ford employees who transfer to Newco at the time of Legal Separation in the UK and Germany, Newco will adopt and honour the outcome of the Ford collective agreements in the respective countries.**
>
> **…**
>
> **Employee Representation**
> **…**
>
> **In the United Kingdom:**
> - **current Ford employees who transfer to Newco at the time of Legal Separation will continue to be represented by the existing Ford Procedure and bargaining arrangements for 6 years after Legal Separation. Ford National Bargaining Committees will include management representatives of Newco as appropriate.**
> - **thereafter Newco will establish local and national representation and bargaining arrangements for all Newco employees in the existing UK Ford locations which transfer to Newco at the time of Legal Separation.**
> - **separation of Newco representation arrangements from Ford earlier than provided for in this agreement may take place if it is agreed by all parties that this is mutually beneficial.**

- **representation in respect of new Newco employees hired following the Legal Separation of Newco from Ford, will be the subject of discussion between Ford, Newco and the appropriate national unions in the UK.**

…

Ford and Newco management commit that this agreement will transfer to any successor company."

7. By letter dated 17 April 2000 Brian Smith, Human Resources Manager, wrote to all former Ford employees in Visteon explaining that in addition to current terms and conditions transferring to Visteon UK Ltd. under TUPE:

> **"…the Company and the Unions have reached an agreement governing the separation of the Visteon organisation. Further details of this agreement and the position regarding pensions are provided in the attachment to this letter."**

The document attached to the letter giving "Further details regarding Ford/Visteon Union agreement and pension arrangements" provides:

> **"In the event of any ambiguity between this summary and the Agreement, the Agreement will take precedence.**
>
> **<u>1) Agreement Governing the Separation of the Ford/Visteon Organisation</u>**
>
> **This agreement dated 25 January 2000 applies to hourly and salaried personnel on Visteon payroll below Senior Management…**
>
> **<u>i) Employment Contracts</u>**
>
> **The agreement specifies that for existing employees of the above activities who transfer to Visteon UK Limited at the time of legal separation, accrued seniority and all existing terms and conditions, in particular pensions entitlements, will be transferred to the new employment with Visteon UK Limited. For the duration of your employment with Visteon UK Limited, your terms and conditions as an existing Ford Motor Company Limited ("Ford") employee who transfers to Visteon UK Limited, will mirror Ford conditions, (including discretionary pension in payment increases) in the UK (lifetime protection).**
>
> **For terms and conditions of employment of existing Ford employees who transfer to Visteon UK Limited at the time of legal separation in the UK, Visteon UK Limited will adopt and honour the outcome of the Ford collective agreements.**
>
> **In respect of employee programmes such as car purchase and share purchase plans, comparable programmes will be developed and implemented.**
>
> **…**
>
> **<u>v) Collective Bargaining and Employee Representation</u>**
>
> **Current Ford Employees who transfer to Visteon UK Limited at the time of legal separation will continue to be represented by the existing Ford Procedure and bargaining arrangements for 6 years after legal separation. Ford National Bargaining Committees will include management representatives of Visteon UK Limited as appropriate.**
>
> **Thereafter Visteon UK Limited will establish local and national representation and bargaining arrangements for all Visteon UK Limited employees in the existing UK Ford locations which transfer to Visteon UK Limited at the time of legal separation.**

Separation of Visteon UK Limited representation arrangements from Ford earlier than provided for in this agreement may take place if it is agreed by all parties that this is mutually beneficial.

Representation in respect of new Visteon UK Limited employees hired following legal separation of Visteon UK Limited from Ford will be the subject of discussion between Ford, Visteon UK Limited and the appropriate national unions in the UK."

8. The EJ held that for collective bargaining purposes employees of Visteon UK Ltd. and subsequently the Respondent were divided into three groups. The "blue" transferred group comprise original Ford employees who transferred to Visteon UK Ltd. on 28 April 2000. The "purple" group are new hires who joined after 28 April 2000 but before 1 March 2001. The "orange" group are employees who joined after 1 March 2001.

9. The EJ set out in paragraph 21 the Ford pay agreements from 1 December 1999 to 16 October 2008. The final agreement was a 3 year agreement which was not mirrored by the Respondent and it is that pay increase which gave rise to these claims. Not only employees in the "blue" transferred group but also those in the "purple" and "orange" groups were given the same pay increases as those for Ford employees up to but not including 2008.

10. In accordance with the MTA, until 28 April 2006 former Ford employees who transferred to Visteon UK and thereafter to the Respondent were represented in the Ford Procedure and bargaining arrangements. The terms of new hires were the subject of collective agreements reached with the Respondent by their representatives.

11. An "Amending Agreement – Pay, Pensions and Competitiveness – Visteon UK Ltd." entered into on 20 December 2006 ('the Amending Agreement') was the first collective agreement negotiated with the Respondent rather than with Ford which purported to set rates for "Visteon Mirrored Terms employees" as well as for new hire and competitive cost rate employees. All the employees in the occupational groups covered by the Amending

Agreement, whether they were "blue", "purple" or "orange" were given the same percentage increases which in turn were the same as the Ford increase. The Amending Agreement fixed pay increases for two years until November 2008.

12. A procedure agreement was entered into on 14 June 2007 by the Respondent with UNITE ('the Procedure Agreement'). The Procedure Agreement regulated:

> **"…the procedure for the relationship between [the Respondent] and UNITE representing the members who are on the General Salary Roll, Professional level and Hourly Manual Employees of [the Respondent]."**

It was a general principal of the Procedure Agreement that:

> **"c) [The Respondent] confirms that UNITE has exclusive rights to negotiate on behalf of, or represent the Employees defined as part of this Agreement.**
>
> **d) UNITE has the right to exercise it's (sic) functions within the provisions of this Agreement on the basis that matters concerning major terms and conditions will be the subject of determination at the [Respondent] NJNC [National Joint Negotiating Council]…"**

13. The Union negotiators requested that former Ford employees be given a pay increase mirroring that in Ford for 2008 and 2009. The Respondent offered a lower percentage increase to the "blue" transferred group, which is likely to have been the same as that give to new hires and competitive cost rate employees. However the "blue" transferred group were in addition offered a cash lump sum. The offer was made subject to conditions which included "no further 'Mirroring' of Ford changes to terms and conditions" and "Cessation of all legal actions pursuant to the claim for the non-payment of the 5.25% pay increase from November 2008." The Respondent made the final increased offer on 20 July 2010. The EJ recorded that negotiations were still continuing at the date of the hearing before him and there had been no pay increases.

14. The contracts of employment of all the Claimants incorporated "Current Agreements made between the Company and the Trade Unions". The pro forma terms of employment included in the documents before us were those entered into with Ford.

The judgment of the EJ

15. The EJ held at paragraph 25 that the pay terms of the MTA were incorporated into the contracts of the "blue" transferred employees, the remaining Claimants in these proceedings. There is no appeal from that finding.

16. At paragraph 26 the EJ held:

> **"The major dispute in the case has been reliance placed upon the minutes of a FEWC select committee meeting on 12 and 13 January 2000 in the run up to the 25 January mirrored terms agreement. Superficially this provides very telling evidence in support of the claimants' construction of the agreement."**

However before the EJ considered the admissibility of evidence of pre-contract negotiations, he considered the wording of the MTA. He held at paragraph 30:

> **"In my view, the words of the agreement are wholly unambiguous and clear. Under the heading 'Employment Contract' the phrase 'The existing employees…for the duration of their employment in their respective countries (lifetime protection)' are so clear as not to admit of any contrary construction urged upon me by the respondent."**

17. The EJ rejected the contention of the Respondent "that despite the use of the words 'lifetime protection' the mirroring arrangement is limited to 6 years". He did not consider that the negotiation by the NJNC in 2006 of a two year pay deal which mirrored the Ford pay settlement was coincidental.

18. The EJ accepted the submission on behalf of the Claimants that the terms in the MTA as to Employee Representation were entirely separate from the "Contract of Employment" provisions in the MTA. In this regard the EJ found it:

> **"…difficult to ignore factual matters that were discussed in the January 2000 negotiations to the effect that it would be impracticable to stay within the Ford pay negotiation arrangement in a body containing employee representatives from two separate companies."**

The EJ went on to hold:

> **"38. … By contrast nothing could be less unequivocal than the words 'lifetime protection' in respect of the employment contracts.**
>
> **39. There will therefore be areas which, for the Visteon NJNC, are not 'negotiable' despite the fact that they are a negotiating body. They negotiate 'below the line benefits for all employees' and they negotiate pay for the purple and orange employees and all other conditions but my clear reading of the MTA agreement is that the pay and pension terms for the blue employees, the 66 claimants in these proceedings, are to mirror the Ford agreement for the duration of their employment, This is a matter of strict contract law. Contract law does not always produce the most attractive solutions. This is the nature of contract law."**

The EJ recognised that this conclusion "bears very heavily on the company" and that "the effect is not good in industrial relations terms".

19. From paragraph 42 of the judgment it is apparent that the EJ reached his conclusion that on a proper construction of the MTA the Claimants were entitled to the same pay increase terms as the equivalent Ford employees for the lifetime of their employment with the Respondent. The EJ rejected the contention of the Respondent that despite the use of the words "lifetime protection" the mirroring arrangement was limited to six years.

The contentions of the parties

20. Andrew Clarke QC for the Respondent contended that the EJ erred in law in failing to hold that the duration of the mirroring of future Ford collectively bargained terms for UK employees including the Claimants moving to Visteon UK Ltd. and then to the Respondent was limited to six years. Mr Clarke QC admirably and succinctly summarised in his skeleton argument his submissions on the correct approach in law to construing the MTA. Those

submissions were repeated in the hearing before us. The best summary of those submissions is in his skeleton argument which stated.

> **"10. The following rules, or principles, of contractual interpretation are relevant in this instance and, it is anticipated, are uncontroversial:**
>
> **10.1. The ultimate aim of interpreting a term in a contract is to determine what the parties meant by the language used (*Pink Floyd Music Ltd v EMI Records Ltd* [2011] 1 WLR 770, per Lord Neuberger MR at para. 17);**
>
> **…**
>
> **10.4. The standpoint in determining what the parties meant is that of a reasonable person with all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time that the agreement was made (*Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL), per Lord Hoffman at 912H). This remains the case where the contract is poorly drafted and ambiguous (*Mitsui Construction Co Ltd v A-G of Hong Kong* (1986) 33 BLR 14 (P.C.) per Lord Bridge, cited with approval by Lord Clarke in *Rainy Sky SA v Kookmin Bank* at para. 26);**
>
> **10.5. The surrounding circumstances (or factual matrix) does not include evidence of negotiations, or of the parties' intentions: see the classic dictum of Lord Wilberforce cited in 'Chitty on Contracts' 30th edn. Vol. 1, para. 12-119);**
>
> **10.6. If there are two possible constructions, the tribunal is entitled to prefer the construction which is consistent with common sense and to reject the other (*Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, per Lord Clarke at para. 21);**
>
> **10.7. When dealing with the interpretation of a collective agreement the court is entitled to consider whether a particular suggested meaning makes 'industrial sense': see *Anderson v London Fire & Emergency Planning Authority* [2013] EWCA Civ 321 at paras. 22 and 25;**
>
> **10.8. The behaviour of the parties subsequent to the making of a contract is not admissible evidence to help to establish its meaning: see 'Chitty on Contracts' 30th edn. Vol. 1, para. 12-126. This issue was examined twice by the House of Lords in the 1970s and the ruling was clear: see *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583. In the later case of *Schuler*, Lord Wilberforce described this as '*nothing but the refuge of the desperate*'. If it were otherwise confusion would reign. An agreement could mean one thing when entered into and another thing at a later date. An agreement could change meaning because someone unaware of its contents (or who misunderstood them) acted in a manner inconsistent with what would otherwise have been the correct interpretation of it;**
>
> **10.9. In construing a contract all parts of it must be given effect to, where possible and no part of it should be treated as inoperative, or surplus, eg per Stephenson LJ in *Lewis v Barnett* (1982) 264 EG 1079, CA."**

21. Mr Clarke QC further submitted that post contractual evidence cannot be used as an aid to construction. Mr Edwards, counsel for the Claimants, agreed with this proposition because of binding authority at this level but wished to preserve a contrary position for argument in a higher court.

22. Mr Clarke QC submitted that applying the principles explained in paragraph 21 of **Rainy Sky**, where the language used by the parties has more than one potential meaning the EJ is entitled to prefer the construction which is consistent with business common sense and reject the other. Further, even where the words of a contract are not ambiguous, as Lord Hoffman held in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896, the understanding of a reasonable man knowing the relevant circumstances can be used to construe those words. Lord Hoffman held at 912H-913E:

> **"(4) The meaning which a document … would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax…"**

Lord Bingham MR in **Adams v British Airways Plc** [1996] IRLR 574 at paragraph 22 explained that the principles of construction of collective agreements are no different from any others.

23. Under the MTA former Ford employees now employed by the Respondent were going to be represented by Ford collective bargaining procedures for a maximum of six years. Applying these principles to the facts, Mr Clarke QC contended that on a proper understanding of the implications of the limited time for such representation it makes commercial sense that the terms negotiated by the Ford procedure only apply to the "blue" transferred employees so long as they are represented in that procedure. Accordingly the mirroring provisions have a finite life of six years.

24. Further, Mr Clarke QC contended that it was impermissible for the EJ to take into account "factual matters that were discussed in the January 2000 negotiations" to conclude that

the bargaining arrangements were time limited but separate from the pay terms and conditions for "blue" transferred employees which were not. He contended that on a true reading of the MTA it cannot be said that there is a separation between the mirroring of terms and conditions and collective bargaining arrangements. Mr Clarke QC submitted that the EJ erred in reconciling provisions in the MTA relating to "lifetime protection" for the transferred employees with those establishing collective bargaining for them by the Respondent after six years by impermissibly limiting the scope of that bargaining to matters not dealt with by the Ford agreements. The EJ referred at paragraph 24 to his view that certain of the terms of the Ford settlement could not be incorporated into Visteon UK's agreement such as the Ford EDAP scheme (Employment Development Assistant Programme) car purchase, car leasing, car production bonus. These were described by the EJ as "below the line benefits" which would have to be negotiated by the Respondent.

25. Mr Clarke QC relied upon the terms of the Procedure Agreement. The Procedure Agreement contains no provision for the exclusion of any of the terms and conditions of the "blue" transferred group from its operation. There would be almost no terms to be negotiated for "blue" transferred employees in the new collective bargaining structure if pay terms were to be determined by Ford collective bargaining. Nor does the Procedure Agreement provide that certain terms for the "blue" transferees are still to be derived from Ford collective bargaining.

26. The primary argument advanced for the Respondent was that collective agreements reached with Ford were the source of pay terms for "blue" transferred employees for six years from 28 April 2000. Thereafter the Procedure Agreement entered into between UNITE and the Respondent provided the mechanism for collective bargaining for terms and conditions of employment for the Respondent's employees including the Claimants. In the alternative to the submission that the pay terms of the MTA were time limited, Mr Clarke QC contended that the

Procedure Agreement replaced the MTA as the source of terms and conditions of employment for the "blue" transferred employees including the Claimants. Thus they were no longer entitled to have their pay terms and conditions of employment mirror those of Ford employees but were subject to terms negotiated by UNITE with the Respondent. It was said that the EJ failed to consider the argument that the Procedure Agreement replaced the mirroring provisions of the MTA. Had he done so he would have been bound to conclude that the Procedure Agreement replaced the material part of the MTA.

27. Mr Edwards for the Claimants agreed that Mr Clarke QC had correctly summarised the legal principles applicable to the construction of the MTA. The construction urged by Mr Clarke QC which would put a limit of six years on the entitlement of the "blue" transferred employees to have their pay terms mirror those of Ford employees would require putting a line through the words "for the duration of their employment". It would also require substituting the words "six years" for "the duration of their employment". The interpretation of the MTA advanced by Mr Clarke QC is contrary to its express terms. There is only one possible reading of the MTA and that is the one adopted by the EJ. It is impermissible to rewrite an agreement "to make industrial common sense". "Lifetime protection" in the MTA means what it says.

28. Mr Edwards submitted that the EJ did not err in treating negotiating machinery and terms and conditions of employment as two separate topics. The MTA provided that for six years after separation the Ford negotiating machinery would apply to "blue" transferred employees. Thereafter it would be a Visteon UK and then negotiating machinery set up for them by the Respondent which would apply. There is nothing to prevent Ford pay terms co-existing with the use of the Respondent's negotiating machinery.

29. Mr Edwards submitted that the Procedure Agreement of 2007 simply established the representation and bargaining machinery envisaged in the MTA after the initial six year period. It did not affect the lifetime mirroring of Ford terms and conditions for "blue" transferred employees.

Discussion and Conclusion

30. The issues in this appeal are whether the EJ erred in holding that the pay terms in the MTA were not time limited to coincide with the provision in the agreement for representation of "blue" transferred employees by the existing Ford Procedure and bargaining arrangements to continue for six years after 28 April 2000 and thereafter to be represented in bargaining arrangements to be set up for them by the transferees. Further, whether the EJ erred in failing to deal with and accept the alternative contention of the Respondent that if the entitlement of the "blue" transferred employees to "mirrored pay terms", was not limited to six years from 28 April 2000, those terms were replaced by collective bargains reached under the 2007 Procedure Agreement between UNITE and the Respondent.

Were the mirrored pay terms limited to six years from 28 April 2000?

31. The contracts of employment of the "blue" transferred employees with Ford provided that their employment was:

> **"…subject to the terms of Agreements made from time to time between the Company and the Trade Unions…"**

32. The MTA included provisions dealing with the impact of separation on the employment terms of those transferring from Ford to Visteon UK and thereafter to the Respondent and employee representation and collective bargaining for the transferring employees. It is accepted by the Respondent that the pay terms of the MTA were incorporated into the contracts

of employment of the Claimants. The Respondent relied on the collective bargaining terms in the MTA to construe the pay terms and contended that the agreement must be read as a whole.

33. Pursuant to the TUPE transfer the contracts of employment with Ford of the "blue" transferred employees had effect after the transfer on 28 April 2000 as if originally made with Visteon UK Ltd and then the Respondent. By letter dated 17 April 2000 Ford informed the "blue" transferring employees that in addition to the then terms and conditions of employment the Company had entered into the MTA. A summary of its terms was attached to the letter with a statement that:

> **"In the event of any ambiguity between the summary and the Agreement, the Agreement will take precedence."**

Accordingly we will consider the issues before us on the basis of the MTA rather than the summary.

34. The canons of construction applicable to the contracts of employment of the Claimants were clearly, comprehensively and helpfully summarised by Mr Clarke QC. They were not challenged by Mr Edwards whilst reserving for a higher court the Claimants' position on whether reliance may be placed on subsequent events in construing a contract.

35. Linguistically it is not possible to read "for the duration of their employment" in the MTA as "for six years from separation". The words are not ambiguous and are not capable of bearing two possible constructions. However that is not the end of the matter. As explained by Lord Neuberger in **Pink Floyd Music Ltd. v EMI Records Ltd** [2011] 1 WLR 770 at paragraph 17 the ultimate aim of interpreting a provision in a contract is to determine what the parties to a contract meant by it. Lord Neuberger MR held:

"17. …that involves ascertaining what a reasonable person would have understood the parties to the contract to have meant. In that connection, we were referred, in particular, to passages in the speeches of Lord Hoffmann in *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, passim, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912F-913G and in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, paras 21-26.

18. Those well known and important passages demonstrate that while one may proceed on the prima facie assumption that the words at issue mean what they naturally say, they cannot be interpreted in a vacuum. The words must be interpreted by reference to what a reasonable person (who is informed with business common sense, the knowledge of the parties, including of course of the other provisions of the contract, and the experience and expertise enjoyed by the parties, at the time of the contract) would have understood by the provision. So construed, the words of a provision may have a meaning which is not that which they may appear to have if read out of context, or the meaning which they may appear to have had at first sight. Indeed, it is clear that there will be circumstances where the words in question are attributed a meaning which they simply cannot have as a matter of ordinary linguistic analysis, because the notional reasonable person would be satisfied that something had gone wrong in the drafting.

19. In both *Investors Compensation* [1998] 1 WLR 896 and *Chartbrook* [2009] 1 AC 1101, Lord Hoffmann made it clear that there is a fundamental difference between interpretation and rectification: the difference arises from the fact that in a claim for rectification, the court can take into account, and in an appropriate case can give effect to, the negotiations between the parties, whereas it cannot do so on an issue of interpretation. This case is concerned with interpretation, so what was said in negotiations is irrelevant and thus inadmissible (thereby ruling out some of PFM's evidence).

20. Further, as Lord Hoffmann also made clear in *Investors Compensation* [1998] 1 WLR 896, there is a difference between cases of ambiguity, which may result in giving the words a meaning they can naturally bear, even if it is not their prima facie most natural meaning, and cases of mistake, which may result from concluding that the parties made a mistake and used the wrong words or syntax. However, he emphasised the court does "not readily accept that people have made mistakes in formal documents" - *Chartbrook* [2009] 1 AC 1101, para 23. He also pointed out in paragraph 20, that, as the court, and therefore the notional reasonable person, cannot take into account the antecedent negotiations, the fact that the natural meaning of the words appears to produce "a bad bargain" for one of the parties or an "unduly favourable" result for another, is not enough to justify the conclusion that something has gone wrong. One is normally looking for an outcome which is "arbitrary" or "irrational", before a mistake argument will run.

21. Accordingly, before the court can be satisfied that something has gone wrong, the court has to be satisfied both that there has been "a clear mistake" and that it is clear "what correction ought to be made" (per Lord Hoffmann in *Chartbrook* [2009] 1 AC 1101, paras 22-24, approving the analysis of Brightman LJ in *East v Pantiles (Plant Hire) Ltd* (1981) 263 EG 61, as refined by Carnwath LJ in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus LR 1336)."

There is no reason to adopt a different approach to the construction of the MTA. In **Adams v British Airways Plc** [1996] IRLR 574 Sir Thomas Bingham MR held:

"22. …But despite … special characteristics, a collective agreement must be construed like any other giving a fair meaning to the words used in the factual context (known to the parties) which gave rise to the agreement."

36. The MTA must be read as a whole. However in our judgment there is no inherent inconsistency between the pay terms and conditions of the "blue" transferred employees being determined by Ford settlements and the setting up by the Respondent for them of local and

national representation and bargaining arrangements after six years. The requirement that Visteon UK Ltd. and then the Respondent set up their own representation and collective bargaining arrangements for the "blue" transferred employees within six years of separation does not affect the duration of the obligation to mirror the pay of Ford employees. That entitlement was incorporated into their contracts of employment.

37. However we part company with the EJ in paragraph 39 of his judgment. The Procedure Agreement of 14 June 2007 entered into between UNITE and the Respondent contains no exclusion from its scope for the pay of "blue" transferred employees. Nor is such an exclusion necessary to accommodate any existing obligation to mirror Ford pay terms for such employees. As with all contractual terms the MTA pay entitlement can be varied or replaced by agreement. Since its implementation the "blue" transferred employees have been represented under the structure put in place by the 2007 Procedure Agreement. Under the Procedure Agreement major terms and conditions are the subject of determination at the Respondent's NJNC.

38. The EJ held that because the mirrored pay terms for the "blue" transferred employees were not time limited to six years from 28 April 2000 those terms were "not 'negotiable'" and were outside the scope of the Procedure Agreement. We respectfully disagree. As we have observed there is no express exclusion of the pay terms of "blue" employees from the scope of the Procedure Agreement. There is no basis or need to do so. A collective agreement can and in this case did for the 2006 General Increase specify different rates of pay for different groups. There is no reason in law why the NJNC could not reach a different settlement for "blue" transferred employees from that for others.

39. The contracts of employment of "blue" transferred employees incorporate Agreements made from time to time between the Respondent and the Trade Unions. The Procedure Agreement is one such agreement. The Procedure Agreement regulates "the procedure for the relationship between [the Respondent] and UNITE representing its members who are on the General Salary Roll, Professional level and Hourly Manual Employees of [the Respondent]". "Blue" transferred employees are within its scope. There is no material before us to show that their pay terms are not the subject of determination at the Respondent's NJNC. If and when agreement is reached at the NJNC to change the pay terms of the "blue" transferred employees, that change, like all terms of collective agreements incorporated into their contracts will vary or supersede the current entitlement to mirror the Ford pay settlements. No such agreement had been reached by the time of the hearing before the EJ. Accordingly the pay terms of the transferred employees continued to mirror those of Ford employees.

40. In our judgment, in accordance with **Pink Floyd**, an informed reasonable person applying business common sense and having the knowledge of the parties, would not have understood the pay mirroring provision for "blue" transferring employees to be time limited to six years from 28 April 2000. The observations of the EJ that the bargain "bears very heavily on the company" and "is not good in industrial relations terms" are in the words of Lord Neuberger in **Pink Floyd** paragraph 20 "not enough to justify the conclusion that something has gone wrong" with the drafting of the relevant provision of the MTA. Whilst the bargain may not have been a good one as it applied to the Respondent, that is far from saying that in order to make "industrial sense" the MTA has to be interpreted by limiting the express words of the material provision by inserting a temporal limit of six years on the entitlement to mirrored pay terms. Accordingly the ground of appeal challenging the conclusion of the EJ that the mirrored pay terms of the "blue" transferred employees is not limited to six years from 28 April 2000 does not succeed.

Did the EJ err in failing to deal with and accept the alternative argument that the mirrored pay terms were replaced by the 2007 Procedure Agreement?

41. The EJ held at paragraph 42:

> **"In view of my reading of the written agreements I do not need to address all the subsidiary contentions put forward by Mr Clarke."**

He therefore did not deal with the argument that if the mirrored pay terms were of indefinite duration they were replaced by the 2007 collective agreement. In our judgment the EJ erred in holding that the pay terms of the "blue" transferred employees did not fall within the scope of the 2007 Procedure Agreement.

42. The mirrored pay terms for "blue" transferred employees could have been varied or replaced by a collective agreement reached by the Respondent's NJNC. The Amending Agreement of 20 December 2006 entered into between the Respondent and the Trade Union side of the NJNC included terms relating to the pay of "blue" transferred employees under mirrored terms. However no agreement has been reached under the collective bargaining mechanism or with the "blue" transferred employees or the Claimants for the variation or replacement of the mirrored pay terms. Since such agreement was not reached collectively or individually the EJ did not err in failing to hold that the mirrored pay terms ceased to apply to the contracts of employment of the Claimants on the coming into force of the 2007 Procedure Agreement.

43. The appeal is dismissed.