Appeal No. UKEAT/0141/19/JOJ
UKEAT/0143/19/JOJ
UKEAT/0144/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On Monday 10 June 2019
Judgment Handed Down on 19 June 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

INCE GORDON DADDS LLP AND ORS — APPELLANTS

MRS J TUNSTALL AND ORS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the First to Third Appellants (Mr C Dwyer, Mr M Volikas & Mr Biggs)	MISS GHAZALEH REZAIE (of Counsel) Instructed by: Charles Russell Speechlys LLP 5 Fleet Place London EC4M 7RD
For the Fourth Appellant (Ince Gordon Dadds LLP)	MS KATHERINE APPS (of Counsel) Instructed by: Ince Gordon Dadds LLP Algate Tower 2 Lemon Street London E1 9QN
For the Fifth Appellant (Mr J O'Keeffe)	Not in attendance
For the Respondent Ms Tunstall (Mrs J Tunstall)	MR MARK GREAVES (of Counsel) Instructed by: Leigh Day Solicitors Priory House 25 St. John's Lane London EC1M 4LB

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SUMMARY

PRACTICE AND PROCEDURE – Postponement and stay.

Practice and Procedure – Stay – Paragraph 43(6) Schedule B1 ***Insolvency Act 1986***

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The Claimant had commenced Employment Tribunal ("ET") proceedings against eight Respondents. Subsequently, the first two Respondents (one of which had been the Claimant's employer) went into administration and a stay was imposed on the proceedings under paragraph 43(6) Schedule B1 **Insolvency Act 1986**. Although accepting (absent the consent of the administrators or permission from the Companies Court) that stay must be remain in respect of the First and Second Respondents, the Claimant applied for the proceedings to be continued in relation to the remaining Respondents (the Third to Seventh being employees or agents of the First and/or Second Respondents; the Eighth Respondent being said to be a the relevant transferee of the First and/or Second Respondent's business (or relevant part) under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE")). The ET agreed with the Claimant, holding that paragraph 43(6) did not prevent legal proceedings being continued in respect of stand-alone claims against other Respondents (those proceedings being pursued against the Third to Seventh Respondents by virtue of section 110 **Equality Act 2010**; against the Eighth Respondent under regulations 4 and 7 **TUPE**). The ET considered the potential prejudice the remaining Respondents might face, in particular in relation to disclosure (it being accepted that the First and/or Second Respondents would possess most of the relevant documentation) and privilege. It did not, however, consider these were issues that necessarily arose from the stay under paragraph 43(6) but, in any event, took the view that orders for disclosure could nevertheless be made against the First and/or Second Respondents under rule 31 **ET Rules 2013**; more generally, the ET did not consider that there was yet any evidence to suggest that disclosure/privilege issues would arise such as to give rise to any overwhelming prejudice against the Third to Eighth Respondents.

The Third, Fourth, Fifth, Seventh and Eighth Respondents appealed.

Held: *dismissing the appeals*

Notwithstanding the potential vicarious liability of the First and/or Second Respondent (whether by reason of section 6 **Limited Liability Partnership Act 2000** or under section 109 **Equality Act 2010**) and the likely application of the doctrine of *res judicata* (understood as giving rise to a cause of action *or* to an issue estoppel), paragraph 43(6) Schedule B1 **Insolvency Act 1986** did not require the ET to continue the stay in relation to the Third to Eighth Respondents; the issue was not one of jurisdiction but of case management discretion. The ET had taken into account the potential liabilities faced by the First and/or Second Respondents and the likely application of the doctrine of *res judicata* but had permissibly concluded that it was a matter of choice for the administrators as to whether they consented to the proceedings being continued against the First and/or Second Respondents in these circumstances: that was not a "choice fallacy", as the Respondents contended as the option of consenting to the continuation of proceedings was expressly allowed by paragraph 43(6). As for the potential prejudice to the remaining Respondents, the ET had taken proper account of the risk to professional reputation and of the difficulties arising in respect of disclosure and questions of privilege. It had correctly identified that these were largely issues arising in the proceedings in any event, not as consequences of the stay. It had also been right to point to its power to make disclosure and information orders under rule 31 of the **ET Rules 2013**. The ET had, moreover, not discounted the possible problems that might arise but had decided it would be wrong to simply assume that this would necessarily arise be so, allowing that this might be a question to be revisited if there was actual evidence of prejudice faced by the Respondents.

UKEAT/0141/19/JOJ
UKEAT/0143/19/JOJ
UKEAT/0144/19/JOJ

HER HONOUR JUDGE EADY QC

Introduction

1. By virtue of paragraph 43(6) Schedule B1 **Insolvency Act 1986**, a statutory moratorium applies to legal proceedings against a company in administration. The questions raised by this appeal concern the approach to be taken by the Employment Tribunal (the "ET") when the proceedings in question are pursued not only against such a company (in respect of which the proceedings have been stayed) but also against other Respondents, to which the moratorium would not otherwise apply. This is, so far as the parties to these proceedings are aware, a point that has not previously been determined.

2. The appeal relates to a Judgment of the ET sitting at London East (Employment Judge Foxwell, sitting alone, at a Preliminary Hearing on 14 March 2019), sent out on 21 March 2019. Appeals against that decision were lodged on 10 and 24 April 2019 and were then listed for hearing as soon as practicable, allowing for the fact that a further Preliminary Hearing before the ET has been listed for 21 June 2019.

3. For ease of understanding, in giving this Judgment, I refer to the parties by their titles in the underlying ET proceedings.

The Parties

4. The Claimant, Mrs Tunstall, is a solicitor. Between 16 April 2007 and 9 October 2018, she was employed by either the First or Second Respondent (there is an issue as to the correct identity of her employer), then respectively known as Ince & Co LLP and Ince & Co Services

LLP (in the ET's Judgment the First and Second Respondents are sometimes simply referred to as "the Employer").

5. Messrs Dwyer, Volikas, Biggs, Hodgson and O'Keefe – respectively, the Third, Fourth, Fifth, Sixth and Seventh Respondents before the ET – were all either employees, agents or partners (more properly to be described as members) of the First and/or Second Respondents.

6. The Eighth Respondent, Gordon Dadds LLP – which is now known as Ince Gordon Dadds LLP – is alleged to be the transferee of the business of the First and/or Second Respondent (or, at least, the part of the business in which the Claimant was employed) for the purposes of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"). The First and Second Respondents went into administration on 31 December 2018 and the Eighth Respondent acquired some of their business and staff on the same day.

The Procedural History

7. The Claimant was dismissed from her employment on 9 October 2018. By 18 October 2018, she had completed the ACAS Early Conciliation ("EC") procedure. On 15 November 2018, she presented claims to the ET against the eight Respondents. In her ET proceedings, the Claimant seeks to claim: unfair dismissal, pregnancy related discrimination, sex discrimination, part time worker discrimination and disability discrimination.

8. All the Respondents have entered responses in the ET proceedings, contesting the Claimant's claims.

9. On 11 December 2018, the ET sent all parties a notice of a Preliminary Hearing listed for 11 March 2019.

10. As already recorded, on 31 December 2018, the First and Second Respondents went into administration. Upon receiving notice of that fact, the ET wrote to the parties on 15 January 2019 to say that the proceedings were stayed under the **Insolvency Act 1986** and the Preliminary Hearing was therefore cancelled. That decision was taken pursuant to paragraph 43(6) of Schedule B1 to the **Insolvency Act 1986** (inserted by section 248 and Schedule 16 of the **Enterprise Act 2002**), which provides that:

> **"No legal process … may be … continued against the company or property of the company except**
> **(a). With the consent of the administrator, or**
> **(b). With the permission of the court."**

11. On 18 January 2019, those acting for the Claimant wrote to the ET, requesting that the stay be lifted in respect of the Third to Eighth Respondents and the Preliminary Hearing re-instated; it was contended that this would be in accordance with the overriding objective as those Respondents were not affected by the statutory moratorium pursuant to paragraph 43(6). The Regional Employment Judge directed that a hearing take place to consider the Claimant's application and, insofar as necessary, address further case management.

12. That hearing took place before Employment Judge Foxwell on 14 March 2019. The Claimant was represented by counsel, albeit not by Mr Greaves, who now appears. The administrators of the First and Second Respondents were then represented by counsel, whose instructions were limited to opposing the lifting of the stay. The First and Second Respondents are now formally Respondents to the current appeal, although they do not oppose the appeal and have played no part in the current hearing. The Third, Fourth, Fifth and Eighth Respondents are

now the Appellants before the EAT. The Third, Fourth and Fifth Respondents (Messrs Dwyer, Volikas and Biggs) were represented before the ET by Miss Rezaie of counsel, as they are on this appeal; the Eighth Respondent by Ms Apps of counsel, who also continues to represent its interests on appeal. The Seventh Respondent (Mr O'Keefe) appeared in person below, and has continued to do so on the appeal, albeit he was unable to attend the hearing (due to professional commitments) and adopted the submissions of the other Respondents. The Sixth Respondent, Mr Hodgson was separately represented before the ET by counsel; although he is formally a Respondent to the appeal, he has played no part in the appeal proceedings.

The ET's Decision and Reasoning

13. The ET recorded the information provided by the First and Second Respondents as to the likely duration of the administration, as follows:

> **"(20) Ms Barsam emphasised in her submissions that all that was being asked for was a stay of the entire proceedings during the administration. When I dug a little deeper into this however, she could not say how long such a stay might last, although she suggested a review in six months' time. Ms Apps told me that there is now an interim report from the administrators saying that it is possible that the administration will come to an end to be replaced with a Creditors Voluntary Arrangement. … If and when the administration ends, the statutory moratorium on claims against the Employer will end but, of course, none of us know when this will happen. …"**

14. Although tempted to continue the stay in respect of all proceedings for a short while to see what might happen, the ET noted that all parties wished it to reach a decision of principle on the Claimant's application. Having considered the submissions made, the ET concluded that there was nothing in, or arising from, the **Insolvency Act 1986** that required a stay of the proceedings brought against the Third to Eighth Respondents.

15. In reaching that decision, the ET accepted that it had no power to lift the stay of proceedings affecting the First and Second Respondents, as companies in administration under

the **Insolvency Act 1986**. That said, it noted that the claims against each of the Third to Seventh Respondents arose from their potential personal liability under s 110 **Equality Act 2010** (the "EqA") and, similarly, the claim against the Eighth Respondent arose against it in its own capacity under **TUPE**.

16. The ET referred to the Judgment of Norris J, sitting in the Chancery division of the High Court, in **Unite the Union, McCartney & Ors v Nortel Networks UK Ltd (in administration)** [2010] EWHC 826 Ch; [2010] BCC 706 (and see below) but did not consider that case applied to freestanding claims against other parties sued in their own (as opposed to some representative) capacity.

17. Although accepting that – should they subsequently become active participants in the proceedings – the First and Second Respondents would be bound by any findings made in the cases of the other Respondents, the ET took the view that was a matter in the hands of the administrators, who had a choice whether to participate in the proceedings. Thus, whilst there was a risk of issue estoppel affecting the First and Second Respondents, the ET (i) did not accept that this undermined the statutory moratorium, and (ii) considered the remedy for this risk lay entirely in the hands of the administrators.

18. The ET also considered the possible prejudice impacting upon the Third to Eighth Respondents arising from difficulties in obtaining disclosure from the First and Second Respondents and the potential issue of legal professional privilege. Recognising that professional reputations might be at stake and full disclosure of all relevant and admissible evidence would be ideal, the ET considered that this was a problem affecting all the parties in the case and did not

mean that the ET should "duck" its underlying task, which was to determine claims properly put before it. Disclosure issues could, in any event, be addressed by applications for third party orders and it was not possible to anticipate how the potential arguments in that regard might be determined – that being something that would depend on the evidence and could not be predicted on the basis of mere assertion.

19. As for legal professional privilege, again the ET was not prepared to simply assume that this was an issue in the proceedings, holding that it would be necessary to provide some evidence to establish the existence of legal professional privilege rather than assuming this was an issue that must support the continuation of the stay.

The Appeal

20. The grounds of appeal are fourfold and can be summarised as follows:

(1) The ET erred in law in lifting the stay against the Third to Eighth Respondents as that was contrary to paragraph 43(6) of Schedule B1 to the **Insolvency Act 1986**: (i) because, given the doctrine of *res judicata*, it had the effect of continuing the claims against the First and Second Respondents, and (ii) because the ET had erred in its failure to adopt the approach laid down in **Nortel**.

(2) More specifically, ET erred in its consideration of the issue estoppel arising in these claims.

(3) Separately, the ET erred in its analysis of the question of legal advice privilege, thus failing to take proper account of the prejudice suffered by the Third to Eighth Respondents.

(4) More generally, the ET erred in its approach to the question of comparative prejudice.

21. The Claimant resists the appeal, essentially relying on the reasoning provided by the ET, but also contending the ET was wrong to find that the First and Second Respondents would be bound by findings made in the claims against the Third to Seventh Respondents as a result of issue estoppel between co-Respondents. The Claimant's challenge to the ET's reasoning in this regard has not formally been treated as a cross-appeal but no objection has been taken to the Claimant's reliance on this alternative basis for supporting the ET's conclusion that the stay against the Third to Seventh Respondents should be lifted.

The Parties' Submissions

In Support of the Appeal

22. Ms Apps led in putting forward the arguments in support of the appeal – her submissions being adopted by Miss Rezaie and Mr O'Keefe. As the foundation for those arguments, Ms Apps first set out the following six propositions, which she says apply as a matter of law: (1) Schedule B1 of the **Insolvency Act 1986** is a complete code of the powers and duties which apply in relation to the administration of companies and LLPs – only the Companies Court has the power to alter the powers, duties and liabilities of the entity in administration; (2) by virtue of paragraph 43, Schedule B1, when there is a claim against multiple defendants including a company or LLP in administration *and* the automatic effect of a finding of liability against a co-defendant would being the company or LLP in administration (i.e. the doctrine of *res judicata* would apply), the moratorium on legal proceedings applies unless the administrators consent or the Companies Court gives permission; (3) the same is true where the automatic effect of a finding against a co-defendant would bind the company or LLP in administration (i.e. issue estoppel); (4) in considering granting permission under paragraph 43, the Companies Court (and, if contrary to proposition (1), the ET (i.e. if it has power to do so)) must consider the nature of the

administrators' duties: the test is whether the claims are exceptional; (5) a party to litigation who knows of the existence or content of legal advice cannot disclose the fact or content of that advice without the consent of the party who holds the privilege; (6) the role of the ET is to ensure that proceedings are determined justly and that all parties receive a fair trial – the test is not one of "overwhelming prejudice".

23. Turning to the specific grounds of appeal, by **Ground 1**, it was contended that the ET had erred in lifting the stay in the cases of the Third to Eighth Respondents as this was contrary to Schedule B1 of the **Insolvency Act 1986**:

(1) In this case, by virtue of the *res judicata* principle, this meant the claims against the First and Second Respondents were thus continued, contrary (absent administrators' consent or Companies Court permission) to paragraph 43(6).

(2) Correctly analysed, the claims against the Third to Seventh Respondents were thus claims that would directly bind the First and Second Respondents (and for which they would be jointly and severally liable, see **LB Hackney v Sivanandan** [2013] EWCA Civ 22; [2013] ICR 672); this was both outside the jurisdiction of the ET and contrary to the authority of **Unite the Union, McCartney & Ors v Nortel Networks UK Ltd (in administration)** [2010] EWHC 826 Ch; [2010] BCC 706.

(3) As for the claim against the Eighth Respondent, this was based on the premise that the Claimant was automatically unfairly dismissed under regulation 7(1) **TUPE**. If correct, it was further alleged that liability for the other claims would pass to the Eighth Respondent, to the automatic exclusion of the First and/or Second Respondents (see **Allan v Stirling District Council** [1995] IRLR 301): thus, the determination of this claim

against the Eighth Respondent would bind the First and/or Second Respondents as a matter of *res judicata* (although in their favour, if the claim was successful).

(4) The ET had erred in holding there was nothing in paragraph 43(6) to prevent the bringing or pursuing of claims arising from the same facts against other parties who were not in administration (see the ET at paragraph (17)) and had been wrong to consider that the Judgment in **Nortel** would not prevent this (**Nortel** made clear that the Companies Court would only exceptionally grant permission for the pursuit of employment claims that would bind the administrators).

(5) The ET had further erred in apparently understanding the Respondents' argument in this regard as limited to issue estoppel (misconstruing the guidance in **Sweetman v Nathan** [2003] EWCA Civ 1115 as limited to issue estoppel).

(6) The ET's error was apparent when it held it was only "*if the employer subsequently becomes an active participant in these proceedings it will be bound by findings already made*"; that failed to take into account the liability automatically arising by virtue of section 6 of the **Limited Liability Partnership Act 2000** and section 109 **EqA**.

(7) Although the ET had characterised the administrators as having "*a choice whether to participate in these proceedings*", that was (i) a fallacy, given the automatic liability that would arise (see above), (ii) failed to recognise their obligations as officers of the Court (paragraph 5 Schedule B1), and (iii) was contrary to the purpose of paragraph 46 (see **Mortgage Debenture Ltd v Chapman** 2016 1 WLR 3048).

24. As for the Claimant's argument in response, that it would have been open to her to pursue claims against the individually named Respondents alone (see **Hurst v Kelly** [2013] ICR 1225),

A that was (1) not what had happened, and (2) was no answer to the point that the ET had no power to allow the continuance of proceedings against a company in administration.

B 25. Turning to **Ground 2**, even if correct to focus on the question of issue estoppel, the ET had erred in finding that the "remedy" lay in the hands of the administrators. That failed to take proper account of the fact that the defences of the First and Second Respondents would be informed by the evidence of the Third to Seventh Respondents (for example, as to the reason for the Claimant's dismissal and for the rejection of her appeals) and factual findings relating to those Respondents would bind the First and Second Respondents - if later released from the stay, they would have no meaningful prospect of arguing otherwise. Again, the ET's characterisation of the administrators' "choice" was a fallacy.

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E 26. By **Ground 3**, it was contended that the ET had further erred in its analysis of legal advice privilege and the issue that arose in this regard. It would be a breach of privilege (and a breach of their professional, contractual and regulatory obligations) for any of the Third to Seventh Respondents to inform the Eighth Respondent, the Claimant or the ET of the existence of legally privileged material. The ET's decision either required the administrators to engage with the litigation (in circumstances in which, pursuant to paragraph 43(6), they were entitled to a stay) or irreversibly prejudiced the defence of the Third to Eighth Respondents.

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G 27. Similarly, by **Ground 4**, it was contended that the ET had erred in its approach to the question of comparative prejudice. This was not (as the Claimant sought to argue) a perversity challenge. The ET had wrongly applied a test of "*overwhelming prejudice*" (see the ET at paragraph (22)) and had apparently seen the issue as being whether it meant that it could "*duck*

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its underlying task … to determine claims … properly brought" (ET paragraph (21)). It had failed to apply the overriding objective (to deal with the case fairly and justly) or to properly recognise the prejudice faced by the Third to Eighth Respondents:

(1) Although the ET had acknowledged that "*professional reputations may be at stake*", it had failed to take into account (i) the particular difficulties arising from the Third to Seventh Respondents' professional, contractual and regulatory obligations, and (ii) the potentially career-ending risks for the individual Respondents (who would be required to report any adverse findings of discrimination to the Solicitors' Regulatory Authority). This was an argument further emphasised in oral submissions by Miss Rezaie on behalf of her clients and by reference to the position of Mr O'Keefe.

(2) The ET had considered that "third party" orders could be sought against the administrators but they were not third parties: they remained parties to the claims, albeit not required to actively participate.

(3) As for the Eighth Respondent, the ET had apparently failed to appreciate that it had bought part of the business of the First and Second Respondents some three months after the termination of the Claimant's employment and had received no employee information relating to her. The Eighth Respondent would not be able to review documents relating to the Claimant without the consent of the administrators and was not privy to any legal advice that might have been sought in relation to her dismissal.

The Claimant's Case in Response

28. By way of overview, the Claimants contends: (1) the ET decision in issue involved an exercise of case management discretion and there was limited scope for the EAT to intervene;

(2) the Respondents were asking for the proceedings to be stayed indefinitely – that was important to bear in mind when considering the question of prejudice; (3) neither the First nor Second Respondents had in fact appealed the ET decision – other Respondents were purporting to be concerned about the fate of the First and Second Respondents but were, in truth, doing no more than seeking to avoid the claim being heard at all.

29. In addressing **Ground 1** of the appeal, the Claimant submitted as follows:

(1) The ET had not erred in finding that there was nothing in paragraph 43(6) to prevent the pursuit of claims against parties who were not in administration.

(2) More specifically, a claim was not "continued" for the purposes of paragraph 43(6) if it was stayed; alternatively, it was not continued "against a company" for those purposes if the company was not a Respondent to the claim in question.

(3) The claims that were continued as a result of the ET's decision were the claims against the Third to Eighth Respondents; the First and Second Respondents were not parties to those claims and the claims in question were not parasitic on claims against the First and Second Respondent. As the ET had rightly observed: "*the claims against the Third to Seventh Respondents arise from their potential liability under section 110 of the **Equality Act 2010** and, similarly, the claim against the Eighth Respondent arises against it in its own capacity under the **TUPE Regulations 2006***" (ET paragraph (10) (ii)). Indeed, it was open to the Claimant to pursue her claims against the Third to Eighth Respondents without bringing any claims against the First and Second Respondents (see **Hurst v Kelly** [2013] ICR 1225) and it would be contrary to section 110 **EqA** if paragraph 43(6) automatically gave rise to a stay on proceedings against an employee or agent of a

company in administration. The issue could not be one of jurisdiction; it was simply a factor to be considered by the ET when exercising its case management discretion.

(4) Even if the Respondents' submissions on the question of *res judicata* were taken to be correct (as to which, see further below), it did not follow that there would be automatic liability against the First and Second Respondents, not least as, if the Claimant succeeded in her claims against the Third to Eighth Respondents, she could fully recover against them and simply withdraw her claims against the First and Second Respondents.

(5) As for the ET's view that **Nortel** did not assist in this case, that was correct given that the claim in **Nortel** was against the company in administration alone and not against any other company or individual.

(6) As for the ET's understanding of the Respondents' case on estoppel: (i) it had not erred in its understanding of the guidance in **Sweetman** – the paragraphs relied on by the Respondents had, indeed, related to issue estoppel; (ii) in any event, issue estoppel was just one of the legal principles encompassed by the portmanteau term "*res judicata*" (see per Lord Sumption at paragraph 17 **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)** [2013] UKSC 46) – any misunderstanding of the Respondents' case by the ET made no difference to its reasoning; (iii) whilst it might be the case that a cause of action estoppel arose on the **TUPE** automatic unfair dismissal claim, this (a) was a point of prejudice for the First and Second Respondents to take, not the Eighth Respondent; (b) could not give rise to any subsequent contribution proceedings (there is no joint liability on transferor and transferee); and (c) the ET was entitled to see this as a matter of choice for the administrators.

30. Turning to **Ground 2**, the ET's decision assumed the First and Second Respondents would be bound by findings of fact made in the claims against the other Respondents (i.e. it assumed the case urged under Ground 2) and permissibly took the view that the First and Second Respondents had a genuine choice as to whether or not to participate in the proceedings (it being open to the administrators to consent to the stay being lifted). If a person knowingly stood by and saw his battle fought by somebody else in the same interest, he should be bound by the result and not be allowed to re-open the case (and see the authorities cited in **Qantas Cabin Crew (UK) Ltd v Alsopp and ors** UKEAT/0318/13, at paragraph 25). The First and Second Respondents could not successfully argue that the prejudice to them in not being entitled to avoid *both* participation *and* the consequences of non-participation so outweighed the Claimant's right to pursue her claims against the other parties such as to mean the ET's decision was perverse. And the other Respondents could certainly not succeed in running such an argument on the First and Second Respondents' behalf.

31. As for **Grounds 3 and 4**, the Claimant contends that these are properly to be understood as perversity challenges. As for the question of privilege (**Ground 3**), the appeal relied on two premises that were pure speculation: (1) that the First and/or the Second Respondents had received relevant legal advice in relation to the Claimant; and (2) that, if the stay were lifted, the First and/or Second Respondents would waive that privilege. The ET had rightly taken the view that, absent evidence as to the existence of any such privilege, it would be wrong for it to speculate. It had also correctly observed that, in any event, this was a problem in the litigation and did not arise from the stay. Even if there did exist such privileged material, the ET had permissibly concluded that this did not give rise to overwhelming prejudice for the remaining Respondents such that it would be appropriate to stay the proceedings on this basis (see the ET

at paragraph 22). Although the language of "*overwhelming prejudice*" did not arise from the ET Rules or case-law, it could be taken that the ET had in mind the question of justice to all parties (and see the ET at paragraph (11)). As for the broader question of disclosure – the wider prejudice issue (**Ground 4**): (1) the ET had given proper regard to the risk to "professional reputation" (specifically, see the ET at paragraph (21) and its reference to the Seventh Respondent's submissions at paragraph (11)); (2) it allowed that the Third to Eighth Respondents would be in a weaker position in respect of access to documents without the participation of the First and Second Respondents in the proceedings (ET paragraph (10) (iv)) but permissibly weighed that against (i) their ability to give their own accounts, and (ii) the similar prejudice faced by the Claimant; and (3) it had accurately noted that it was open to the parties to seek an order for disclosure from the First and/or Second Respondents – an application that might be made against "*any person*" (see rule 31 Schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**).

32. Finally, the Claimant argued her alternative ground for resisting the appeal: contending that the ET had wrongly accepted the Respondents' case on issue estoppel as that required that there must be a conflict of interest between the Respondents (see **Sweetman**), which was not true in this case so far as the Third to Seventh Respondents were concerned (the First and Second Respondents having not taken any point under section 109(4) **EqA** (which might otherwise allow them to avoid liability) and the ET having no power to apportion liability (see **Sivanandan**)).

Reply to the Claimant's Alternative Ground

33. In responding to the Claimant's alternative ground for upholding the ET's decision, it was observed that Sweetman was addressing the particular issue arising on the facts of that case; it

did not provide that there could be no issue estoppel in other cases. In any event, the principle laid down in **Henderson v Henderson** (1843) 3 Hare 100 would apply such as to mean that it would not be open to the First and Second Respondents to seek to go behind findings made in the proceedings in relation to the other Respondents.

The Law

The Claimant's Claims – the Legislative Framework and the Potential Routes to Liability

34. In her ET claims, the Claimant makes the following complaints:

a. Unfair dismissal – a claim pursued against the First or Second Respondent, under sections 94, 98 and 111 of the **Employment Rights Act 1996** (the "ERA") and/or against the Eighth Respondent under regulation 4 **TUPE**.

b. Automatic unfair dismissal – a claim pursued against the Eighth Respondent under regulation 7 **TUPE**.

c. Pregnancy/maternity discrimination; sex discrimination; disability discrimination – claims pursued against the First and/or Second Respondent under s 109 **EqA** and against the Eighth Respondent under regulation 4 **TUPE**; and as against the remaining, individual, Respondents, these claims are brought under section 110 **EqA** – the Third to Seventh Respondents being potentially liable as employees or agents of the First and/or Second Respondent.

d. Part-time worker discrimination – a claim brought under the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** (the "PTWR") – brought against the First and/or Second Respondent under Part II of the **PTWR** and/or against the Eighth Respondent, under regulation 4 **TUPE**.

35. The Claimant has chosen to pursue her **EqA** claims against both her employer (so, against the First and/or Second Respondent, pursuant to section 109 **EqA**, with the potential for any such liability to be transferred to the Eighth Respondent, pursuant to regulation 4 **TUPE**) *and* the individual employees/partners she contends were involved in the decisions or actions complained of. She would, however, be entitled to pursue such claims against the individuals as employees or agents of the First/Second Respondent regardless of whether she was also bringing a claim against the employer or principal, provided she is able to establish that the employer/principal would have been liable by virtue of section 109 **EqA**, see **Hurst v Kelly** [2013] ICR 1225, EAT at paragraphs 6-7 and **Barlow v Stone** [2012] IRLR 898, EAT at paragraphs 15-20. In this case, it has not been claimed that section 109(4) **EqA** would have any application (the provision that would allow an employer or principal to avoid liability if they had taken all reasonably practicable steps to prevent the employee or agent engaging in the discriminatory conduct in issue): accordingly, if the Claimant can make good her allegations of discrimination against the individually named Respondents, that would serve to establish liability against the employer/principal (whether or not a claim had actually been pursued against that entity before the ET) and thus, in turn, would mean that the ET could find that the individuals were liable for those acts of discrimination under section 110 **EqA**.

36. As the Respondents have also observed, a Limited Liability Partnership ("LLP") will, in any event, be liable for the wrongful acts or omissions of any member, as section 6(4) of the **Limited Liability Partnership Act 2000** provides:

> **"Where a member of the limited liability partnership is liable to any person (other than another member of the limited liability partnership) as a result of a wrongful act or omission of his in the course of the business of the limited liability partnership or with its authority, the limited liability partnership is liable to the same extent as the member."**

37. More than that, the Respondents point out that the First and Second Respondents will also automatically have joint and several liability for any of the Claimant's claims against the Third to Seventh Respondents that are held to have been made out, the ET having no power to apportion any joint and several liability between co-Respondents, see **Hackney LBC v Sivanandan** [2013] ICR 672, CA, in which Mummery LJ approved the earlier analysis of the EAT (Underhill P presiding) on this point (see paragraphs 57-64 and 82-89 **Sivanandan**).

38. At present, however, the ET proceedings against the First and Second Respondents remain stayed. The administrators could consent to the proceedings being continued against those entities (paragraph 43(6)(a) Schedule B1 **Insolvency Act 1986**) but they have not been asked to do so and, in any event, have stated that they would not give consent if asked. Although the First and Second Respondents have played no part in this appeal (albeit they have stated they would support it), the submission made by Ground 1 is that is that the ET's decision to lift the stay in respect of the other Respondents effectively means that the proceedings are continued against the First and Second Respondents. That, it is said, is contrary to the purpose and scheme of Schedule B1 of the **Insolvency Act 1986**. In order to test that proposition, it is necessary to consider Schedule B1 in more detail.

Schedule B1 ***Insolvency Act 1986***

39. As already recorded, paragraph 43(6) of Schedule B1 to the **Insolvency Act 1986** provides that no legal process may be instituted or continued against a company in administration, save with the consent of the administrator (paragraph 43(6)(a)) or with the permission of the Court (paragraph 43(6)(b)). It is common ground that (i) this applies to the First and Second Respondents (albeit they are limited liability partnerships rather than limited companies), (ii) this

will apply to proceedings before the ET, and (iii) permission to bring or continue such proceedings would need to be obtained from the Companies Court, the ET does not have jurisdiction to grant permission under paragraph 43(6).

40. The purpose of this provision was considered in **Unite the Union, McCartney & Ors v Nortel Networks UK Ltd (in administration)** [2010] EWHC 826, Ch; [2010] BCC 706. In that case, the employer had gone into administration with the object of rescuing the company as a going concern and some 37 former employees and their trade union (Unite) then commenced proceedings in the industrial tribunal in Northern Ireland without first seeking the consent of the administrators or the permission of the court; they subsequently applied to the court for permission to pursue claims of unfair dismissal, breach of contract and discrimination (the administrators had consented to a protective award claim being pursued). The Court refused the applications, holding (see paragraph 8 of the Judgment):

> **"… The company has gone into administration because the monetary claims it faces far exceed the assets available for their payment. The object of the administration is to exploit and deploy those assets "in the interests of the company's creditors as a whole", i.e. in the interests of all those who have monetary claims. To enable the administrators to discharge that function para. 43(6) imposes a general rule that those with monetary claims against the company may not pursue them. The administrator is thereby enabled to dispose of the assets and so to realise a sum for distribution either within the administration, or through a scheme of arrangement or company voluntary arrangement, or by exit into a liquidation. As Patten J. observed in *AES Barry Ltd v TXU Europe Energy Trading Ltd (in admin.)* [2004] EWHC 1757 (Ch); [2005] 2 B.C.L.C. 22 … at [24]: "… it will be in exceptional cases that the court gives a creditor whose claim is simply a monetary one, a right by the taking of proceedings to override and pre-empt that statutory machinery." In my judgment the question is whether the claims of Unite and of the Northern Irish employees are "exceptional" in some respect."**

41. In **Nortel**, the Court went on to consider the nature of the claims being pursued: the submission made by the trade union and the employees was that these required a form of judicial determination such that they would not be provable in the administration and thus should be treated as "exceptional". The Court disagreed, holding that these were each debts or liabilities to which the company was subject at the date of administration or for which it became subject after

that date by reason of an obligation incurred beforehand; it was undesirable that such claims should be categorised as unprovable in the administration (and thus irrecoverable). The Court also rejected the argument that the nature of the decision required in respect of these claims amounted to an exercise of judicial discretion: this was a matter of adjudication, not discretion – if the necessary ingredients were established, the claimants would be entitled to damages; that did not depend upon an exercise of discretion by the Court.

42. The purpose of the moratorium on legal proceedings imposed by paragraph 43(6) **Insolvency Act** has been characterised as "*a breathing space*", see per Nicolls LJ in **In re Atlantic Computer Systems plc** [1992] Ch 505 at p 528, cited with approval in **Mortgage Debenture Ltd (in administration) v Chapman** [2016] 1 WLR 3048, where at paragraph 13 David Richards LJ explained:

> **"… the principal purpose of an administration is either to rescue the company itself as a going concern or to preserve its business or such parts of its business as may be viable. The purpose of the moratorium is to assist in the achievement of those purposes. The moratorium on legal process against the property of the company best preserves the opportunity to save the company or its business by preventing the dismemberment of its assets through execution or distress. The moratorium on legal proceedings serves the same purpose by preventing the company from being distracted by unnecessary claims. …"**

43. In the current proceedings, the ET considered that the First and Second Respondents' participation in the legal process was ultimately a matter of choice for the administrators. In support of this appeal, however, it is said that this demonstrated a fundamental misunderstanding of the purpose of the administration and of the role of the administrator. In this regard, the Respondents rely on paragraph 3 of Schedule B1 of the **Insolvency Act 1986**, where the purpose of administration is explained as follows:

> **"(1) The administrator of a company must perform his functions with the objective of- (a) rescuing the company as a going concern, or (b) achieving a better result for the company's creditors as a whole than would be if the company were wound up (without first being in administration), or (c) realising property in order to make a distribution to one or more secured or preferential creditors.**

> **(2) … the administrator of a company must perform his functions in the interests of the company's creditors as a whole.**
>
> **…"**

And on paragraph 5, where it is stated that:

> **"An administrator is an officer of the court (whether or not he is appointed by the court)."**

44. For completeness, I also note that, by paragraph 4, it is provided that:

> **"The administrator of a company must perform his functions as quickly and efficiently as is reasonably practicable."**

And at paragraph 76 it is stated:

> **"(1) The appointment of an administrator shall cease to have effect at the end of the period of one year beginning with the day on which it takes effect.**
> **(2) But- (a) on the application of an administrator the court may by order extend his term of office for a specified period, and (b) an administrator's term of office may be extended for a specified period not exceeding one year by consent."**

45. It is the Respondents' case that the statutory restrictions upon administrators - who must carry out their functions as officers of the court and in accordance with the requirements of Schedule B1 – are such that it was a fallacy to speak in terms of a "choice" for these purposes. I return to that proposition in the "Discussion and Conclusions" section below.

46. The Respondents further contend, however, that the "choice fallacy" also arises from the ET's apparent misunderstanding of the principles of *res judicata* and how these impact upon the stayed claims against the First and Second Respondents in these proceedings. It is, therefore, helpful to turn to the legal principles that arise under the heading "*res judicata*" before considering the Respondents' arguments on their merits.

Res Judicata

47. In **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)** [2013] UKSC 46; [2014] 1 AC 160, Lord Sumption explained the general principles that underlie the doctrine of *res judicata*, as follows:

> **"17. 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: see *Conquer v Boot* [1928] 2 KB 336. 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 judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504 (Parke B). …. 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."**

48. In **Sweetman v Nathan** [2003] EWCA Civ 1115, the Court of Appeal was specifically concerned with the question whether an issue estoppel arose on the facts of that case and approved the characterisation of the test provided at first instance, as follows:

> **"48. In support of' his submission that issue estoppel applies in the present case, Mr Pooles relies on the statement in *Spencer Bower, Turner & Handley, the Doctrine of Res Judicata* (third edition, 1996):**
> ***"Res judicata* estoppels normally operate between plaintiffs and defendants. However they may also operate between defendants. The relevant principles were developed by the Privy Council in Indian appeals. In *Munni Bibi v Tirloki Nath,* the Privy Council said:**
>
> **"In such a case three conditions are requisite: (1) There must be a conflict of interest between the defendants concerned; (2) It must be necessary to decide the conflict in order to give the plaintiff the relief he claims and (3) The question between the defendants must have been judicially decided'."**

As the Court of Appeal observed at paragraph 44:

> **"The Judge had correctly stated the test in relation to issue estoppel between defendants in his paragraph 48 where he cited *Munni Bibi*. In *Cottingham v Earl of Shrewsbury* (1843) 3 Hare 627 Sir James Wigram V-C said at page 638**
>
> **"If a plaintiff can not get at his right without trying and deciding a case between Co-defendants the Court will try and decide that case, and the Co-defendants will be bound. But, if the relief given to the Plaintiff does not require or involve a decision of any case between Co-defendants, the Co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the Plaintiff obtains."**

49. Returning to the more general discussion in **Virgin Atlantic Airways Ltd v Zodiac**, the relationship between estoppel and abuse was considered in **Qantas Cabin Crew (UK) Ltd v Alsopp and ors** UKEAT/0318/13, where the EAT (HHJ McMullen QC presiding) cited the Judgment of the Court of Appeal in **Skyparks Group PLC v Marks** [2001] EWCA Civ 319, which had approved the following passage from **Wytcherley v Andrews** [1871] LR 2 PMM:

> **"[…] that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened."**

50. In **Qantas**, the EAT held that the Claimants had previously stood by when they could have entered into earlier litigation, which meant "*they are privies in the proper sense*" and were not to be allowed to re-start the litigation.

51. As the Respondents have observed, such circumstances may also give rise to an estoppel in the sense identified in **Henderson v Henderson** (1843) 3 Hare 100 (which provided an alternative basis for the EAT's decision in **Qantas**).

Discussion and Conclusions

52. It is common ground that the ET had no power to lift the stay of proceedings impacting upon the First and Second Respondents, companies in administration under the **Insolvency Act 1986**; that could only be brought about by consent of the administrators (which had not been sought or given) or with the permission of the Companies Court (to which no application had been made). By Ground 1 of the appeal, however, it is contended that the moratorium (or "breathing space") required by Schedule B1 of the **Insolvency Act** is compromised, and the purpose of paragraph 43(6) undermined, by the continuance of proceedings against the Third to Eighth Respondents. That, it is argued, means the ET's decision to lift the stay against those Respondents fell outside its powers: this was not just a matter of case management but of jurisdiction.

53. I disagree with the premise of the argument under Ground 1. The ET's decision does not continue the proceedings against the First and Second Respondents: the ET accepted it had no jurisdiction to lift the stay in respect of those entities and expressly limited its decision to the Third to Eighth Respondents. Its decision meant the Claimant could continue the claims she had instituted against the Third to Eighth Respondents, but those were not contingent upon her claims against the First and Second Respondents and could be pursued as stand-alone, separate causes of action against each of the Third to Seventh Respondents, under section 110 **EqA**, and against the Eighth Respondent, under regulations 4 and 7 **TUPE**. It is right that the First or Second Respondent might be vicariously liable as employer or principal for the actions of any of the Third to Seventh Respondents (whether that is seen as arising under section 109 **EqA** or section 6 of the **Limited Liability Partnerships Act 2000**), but there is no requirement that a Claimant include a claim against the employer or principal in order to pursue her complaint against an

employee or agent under section 110 **EqA** (see **Barlow v Stone** [2012] IRLR 898 and **Hurst v Kelly** [2013] ICR 1225) and it is common ground that the claims brought against the Eighth Respondent cannot give rise to any issues of joint liability in any event.

54. That, in my view, is sufficient to counter the argument that the ET acted outside its jurisdiction in lifting the stay in relation to the Third to Eighth Respondents. As the Claimant has observed, had she simply instituted proceedings against the Third to Eighth Respondents (as it would have been open to her to do), paragraph 43(6) would have provided no basis for contending that an automatic moratorium must be applied. In such circumstances, it might be open to the Respondents to apply for a stay on other grounds (and see the discussion below), but that would fall under the ET's powers of case management; it would not be a question of jurisdiction.

55. The same analysis also applies to the jurisdictional arguments based on the application of the doctrine of *res judicata*. Although the ET focussed on the question of issue estoppel, it plainly also had in mind the cause of action estoppel that would arise in respect of the claim under **TUPE** (see paragraphs (24) and (25) of its Judgment). Although the Claimant argues (by her alternative ground) that the ET was wrong to do so, it is apparent that it accepted the Respondents' arguments that the doctrine of *res judicata* would apply: The First and/or Second Respondents would be bound by the findings of fact made in the claims against the Third to Eighth Respondents and the finding made under **TUPE** would determine any question of liability under those Regulations. Proceeding on that basis, it seems to me that the ET correctly saw this as a relevant matter in determining whether to exercise its case management discretion to lift the stay against the Third to Eighth Respondents. To suggest that the ET had no jurisdiction to make such a decision would be to fail to recognise the Claimant's stand-alone causes of action against those Respondents.

Again, had the Claimant only instituted proceedings against the Third to Eight Respondents, there could have been no suggestion of an automatic stay arising by virtue of paragraph 43(6): at most, that would have been a matter for the ET to consider as an exercise of case management discretion; it would not have been a point of jurisdiction.

56. For the reasons I have thus identified, I do not accept that Ms Apps has made good the second and third propositions of law that prefaced the submissions made in support of the appeal. As for the first proposition, that may be correct but it does not answer the particular issue arising in these proceedings.

57. All that said, the question remains whether – accepting (as I do) that the decision fell within the ET's case management discretion – the ET nevertheless erred in determining to lift the stay against the Third to Eighth Respondents. As I have already allowed, the potential vicarious liability of the First and/or Second Respondent and the implications of the doctrine of *res judicata* (whether arising as a cause of action or an issue estoppel – and see the analysis in **Virgin Atlantic Airways v Zodiac**, supra) were relevant matters for the ET to consider in exercising its discretion. As Mr Greaves has observed, however, it is apparent that the ET did have regard to these possibilities and it would not be open to me to interfere with the conclusion it reached in this respect unless the ET can be shown to have applied the wrong legal test, to have had regard to irrelevant considerations, to have failed to take other relevant matters into consideration or to have reached a perverse conclusion.

58. For the Respondents, Ms Apps and Miss Rezaie argue that the ET's reasoning in this respect was undermined by its reliance on what they have characterised as the "*choice fallacy*".

They submit that, given their obligations in the administration and their role as officers of the Court, the administrators cannot be said to have any real "choice" as to how to proceed; they are bound to perform their functions in accordance with the requirements of Schedule B1 (see above). Moreover, by deciding that the proceedings should continue against the Third to Eighth Respondents - with the likely application of cause of action and issue estoppel that would follow - the ET's decision would further restrict any "choice" open to the administrators and would require their engagement with the proceedings in a way that was contrary to the purpose underpinning paragraph 43(6). Even if this was not a jurisdictional issue, therefore, the Respondents would be entitled to raise this as a point going to the ET's exercise of its case management discretion.

59. I return to this point in relation to the disclosure issues, below. On the question of the potential impact of the ET's decision on the administrators of the First and Second Respondents, however, I accept that this raises a relevant point of concern. The statutory moratorium imposed by paragraph 43(6) is intended to provide a "breathing space" (see **In re Atlantic Computer Systems plc** [1992] Ch 505), during which the company is to be spared from the distraction of unnecessary claims (see **Mortgage Debenture Ltd (in administration) v Chapman** [2016] 1 WLR 3048). That said, it is expressly allowed that the administrator might consent to the institution or continuance of the legal process in issue (paragraph 43(6)(a) Schedule B1) and the administrators of the First and Second Respondents thus have a real choice, albeit the decision they take will be determined by asking whether taking the course in question will hinder the administration (and see the discussion at paragraphs 17 to 19 **Nortel** by way of illustration in this regard). It may be that the administrators will continue to take the view that any involvement in the proceedings would be an unhelpful distraction, notwithstanding the potential application of

A the *res judicata* principles identified by the Third to Eighth Respondents (or the "abuse" argument identified by the Claimant, see **Qantas Cabin Crew v Alsopp**, supra), but I do not consider the ET erred by characterising this as a choice; that, after all, is what paragraph 43(6)(a) allows and the ET was entitled to take this into account when exercising its discretion.

B

60. For all those reasons, I dismiss Grounds 1 and 2 of the appeal.

C

61. As already noted, the potential implications of the ET's decision do not, however, stop there. The circumstances of this case give rise to particular issues that have the potential to impact not only on the "breathing space" otherwise to be afforded the First and Second Respondents by

D virtue of paragraph 43(6), but also on broader questions of justice and the entitlement to a fair trial. Specifically, as the ET acknowledged, the Third to Eighth Respondents will not have access to documentation held by the First and Second Respondents in the same way as might be expected

E were there no stay in place. Whilst the Claimant may also face difficulties in this regard, I am prepared to accept that there may be a particular prejudice for the Third to Eighth Respondents, given that documentation relevant to their defences to the Claimant's complaints will almost exclusively be in the possession of the First and/or Second Respondents. I would also accept the

F very real concerns of the Third to Seventh Respondents as to the potential consequences of an adverse finding of discrimination. Had the ET failed to have proper regard to these matters, I accept that this would render its decision unsafe.

G

62. It is with these observations in mind that I return to the ET's reasoning. Although I consider its use of the term "*overwhelming prejudice*" unhelpful, I do not think the ET lost sight

H of the overriding objective – the need to deal with the case fairly and justly – in determining

whether it was right to lift the stay in respect of the claims against the Third to Eighth Respondents in this case. It is, in particular, apparent that the ET was careful to make its decision on the information before it and not on assumptions of which it could not be certain at that stage; it is in this context that the ET use of the term "*overwhelming prejudice*" has to be understood: the risks that had been identified were not such that they required the proceedings against the Third to Eighth Respondents to be stayed without any further exploration of the disclosure issues raised.

63. More specifically, the ET permissibly took account of what it referred to as the possibility of an application for a "*third-party order*", which would allow such issues to be more fully considered in due course. That was a reference to the power afforded to the ET under rule 31 Schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**), whereby it may: "*order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a county court …*"; although often described as a "*third-party order*", this is a power that can thus apply to "*any person*". On its face, therefore, that is a power that could apply to the First and Second Respondents, to require that they disclose documents or provide information to the other parties in these proceedings. As the ET allowed, should issues be raised as to whether that was appropriate (which might include, for example, the question whether the making of such an order was contrary to paragraph 43(6) Schedule B1 **Insolvency Act 1986**), those could then be considered on their merits.

64. Although not specifically identified by the ET, it seems to me that the power afforded by rule 31 would also enable any remaining issue relating to privilege to be addressed. The objection raised by Ground 3 of the appeal is that the Third to Seventh Respondents are unable even to

disclose the existence of any privileged documentation, still less give evidence as to the content of any such material. That, it is suggested, would prejudice their ability even to ask for disclosure of potentially privileged documentation. Of itself, however, as the ET observed, that does no more than identify a problem that could have arisen in the litigation in any event: absent waiver of privilege by the First and/or Second Respondent, the Third to Seventh Respondents would never have been able to disclose the fact or content of such material. Even if that were not a complete answer to the point raised in this regard, rule 31 would allow for an order to be made against the First and Second Respondents such as would enable clarification as to whether privilege was being asserted without any breach of obligation on the part of the Third to Seventh Respondents. That, in turn, would allow the ET to properly assess the potential prejudice to the remaining Respondents and, if necessary, re-visit its decision on the question of the stay.

65. The ET did not discount the potential prejudice facing the Third to Eighth Respondents if the stay was lifted; it chose, however, not to make a final determination of the practical issues that might arise in a vacuum. In deciding to take that course, I do not read the ET's explanation as giving priority to the need not to "*duck*" the task of determining claims properly put before it (paragraph (21)) over and above the need to ensure the fair and just trial of those claims. Absent a proper basis for assessing issues of disclosure and privilege, however, the ET considered that the appropriate course at that stage was to lift the stay in respect of the proceedings against the Third to Eighth Respondents. That was a permissible exercise of the ET's case management discretion and I do not accept that Grounds 3 and 4 of the appeal are made out.

66. Given my conclusions on the appeal, it is unnecessary for me to address the alternative ground relied on by the Claimant.

Disposal

67. For the reasons I have provided, I duly dismiss this appeal.