Appeal Nos. UKEAT/0007/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 December 2019
Judgment handed down on
16 December 2019

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

MR NEIL WATSON	APPELLANT
HEMINGWAY DESIGN LIMITED (in liquidation)	FIRST RESPONDENT
MR DARREN DRAYCOTT	SECOND RESPONDENT
IRWELL INSURANCE COMPANY LIMITED	THIRD RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID GRAY-JONES (of Counsel) Instructed by: Lawson West Solicitors Limited, 4 Dominus Way, Meridian Business Park, Leicester, Leicestershire LE19 1RP
For the First Respondent	NO APPEARANCE
For the Second Respondent	DEBARRED FROM TAKING PART IN THE APPEAL
For the Third Respondent	MR BERNARD WATSON (Representative) Peninsula Business Services Ltd, The Peninsula, Victoria Place, 2 Cheetham Hill Road, Manchester M4 4FB

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SUMMARY

PRACTICE AND PROCEDURE – Postponement or stay

PRACTICE AND PROCEDURE – Transfer/hearing together

PRACTICE AND PROCEDURE – Parties

B

An employment judge had erred in law in deciding that he lacked jurisdiction to determine a claim under the Third Parties (Rights Against Insurers) Act 2010 (the 2010 Act) arising between the claimant and the insurer of the insolvent first respondent. The employment tribunal was "the court" within the meaning of section 2(6) of the 2010 Act and therefore had power to make declarations under the 2010 Act as to the liability of the insurer as well as of the insured.

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The employment judge's decision to stay the claimant's claim under the 2010 Act against the third respondent insurer was therefore set aside and the stay lifted.

The better view, expressed *obiter* as the point had not yet arisen, was that the arbitration clause in the contract of insurance between the insolvent first respondent and its insurer was rendered void by the anti-avoidance provisions in section 203 of the Employment Rights Act 1996 and section
D 144 of the Equality Act 2010, since the arbitration clause would, if given effect, limit the operation of the provisions of those Acts.

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THE HONOURABLE MR JUSTICE KERR

Introduction and Summary

1. The main issue in this appeal is whether an employment tribunal has power to determine an insurance cover dispute between a claimant and the insurer of an insolvent respondent, where the insured's rights to insurance cover have vested in the claimant under the Third Parties (Rights Against Insurers) Act 2010 (the 2010 Act). As far as I and the parties are aware, this issue has not previously been decided. The entry into force of the 2010 Act was delayed until 1 August 2016, by which time it had been amended by the Insurance Act 2015.

2. The appeal is against a reserved decision of Employment Judge Ahmed sitting in Leicester on 27 July 2018. The judgment and reasons are dated 4 September 2018 and were sent to the parties two days later. The judge dismissed the application of the third respondent (Irwell) to strike out the claims, a decision not appealed. However, he stayed the claims as against Irwell, pending resolution of the insurance cover dispute in the county court or High Court which he held to be the proper forum for that dispute. That is the decision now appealed.

3. The appeal was allowed to proceed to a full hearing by His Honour Judge Auerbach, subject to dismissing some grounds of appeal he did not consider arguable. The point he described as the "nub of the appeal" is whether the judge erred in law by disclaiming any power to determine the dispute between the claimant and Irwell as to whether the claimant could recover any compensation from Irwell in respect of any liability of the insolvent first respondent (Hemingway) for unfair dismissal and disability discrimination.

4. The merits of those claims against Hemingway have not been determined. A separate disability discrimination claim is made personally against the second respondent, Mr Draycott who is a director or former director of Hemingway, now in liquidation. Mr Draycott has taken no part in the appeal because of a debarring order following his non-compliance with procedural orders in the appeal. Hemingway's liquidator has indicated that Hemingway does not wish to take part in the appeal.

5. I heard argument on a further issue that may arise: whether Irwell can rely on an arbitration clause in the contract of insurance between Irwell as insurer and Hemingway as insured. The claimant says not; although the 2010 Act would bind the claimant to the arbitration clause, it is void by statute because it impedes access to the tribunal. Irwell says this is wrong because the clause only affects the claimant's rights under the 2010 Act and not his rights under the Employment Rights Act 1996 (ERA) and the Equality Act 2010 (EqA).

The Facts

6. Hemingway is, or was, a furniture design and production company. Mr Draycott was the managing director. From 1 February 2011, Hemingway employed the claimant as a product administrator. Disputes arose and the claimant resigned and claimed constructive dismissal. His employment ended on 17 January 2017.

7. He presented claims against Hemingway and Mr Draycott. He claimed unfair constructive dismissal (against Hemingway only) and disability discrimination (against both) on 28 April 2017. Hemingway (but not Mr Draycott) had a contract of insurance with Irwell covering (up to a maximum limit of cover) any liability of Hemingway to pay compensation in respect of the claims. Hemingway and Mr Draycott contested the claims in a joint response filed on 14 June 2017.

8. On 14 December 2017, Hemingway went into a creditors' voluntary liquidation and appointed a liquidator. A pre-arranged hearing took place the next day, to determine whether the claimant was under a disability at material times. The judge found that he was. The merits hearing was fixed for three days starting on 22 January 2018.

9. In view of the liquidation, the claimant then applied in writing on 18 January 2018 to join Irwell as third respondent. That was refused on the papers on the ground that the application was made late and would mean loss of the three day hearing due to start four days later.

10. At the start of that hearing, Mr David Gray-Jones applied for reconsideration of that decision. The judge agreed, finding that the delay was excusable. He noted that Irwell had written to Hemingway denying liability under the insurance contract. The judge decided that Irwell should be joined. The three day hearing was adjourned.

11. On 18 April 2018, Irwell filed a response, contesting the jurisdiction of the tribunal over the claim as against it, Irwell; applying to strike out the claim as "scandalous and vexatious" and having no reasonable prospect of success; admitting the existence of the insurance contract; denying liability to indemnify to Hemingway because the latter had "failed to comply with the terms of the Policy"; and drawing attention to an arbitration clause in the insurance contract. Without prejudice to those points, Irwell adopted the defence of the other two respondents.

12. On 27 July 2018, a preliminary hearing before EJ Ahmed took place to consider Irwell's application to strike out the claim as against it. Hemingway did not attend. Mr Draycott did, in person. The judge also heard argument from the claimant and Irwell on the issue of whether the tribunal had power to entertain a claim by the claimant directly against Irwell, on the basis that its insured's rights had vested in the claimant under the 2010 Act.

13. The judge gave short shrift to the strike out application, dismissing it and rejecting the suggestion that a deposit should be ordered. He rejected also the claimant's argument that he had power to determine any direct claim by the claimant against Irwell under the 2010 Act. He noted the absence, though he accepted it was not determinative, of any previously decided cases showing that the tribunal had power to entertain such a claim.

14. The main part of the judge's reasoning was that the issue between the claimant and Irwell had "nothing to do with an employment contract but rather a contract of insurance"; there was "no contractual nexus" between the claimant and Irwell, nor between Mr Draycott and Irwell. The disputes between the claimant and Irwell "do not arise out of any employment relationship" and the tribunal's jurisdiction over breach of contract claims is "limited to claims under the Employment Tribunals (Extension of Jurisdiction) Order 1994".

15. The judge also observed that there would be evidential issues arising from the actions of Hemingway and its former managing director Mr Draycott over whether Hemingway had, through him, forfeited insurance cover by non-compliance with the terms of the policy. Those matters were for the ordinary courts and "have nothing to do with any employment relationship or contract". He therefore decided to stay the proceedings to enable that issue to proceed in an ordinary court.

16. It is against that decision that the claimant now appeals. Only the claimant and Irwell have taken part in the appeal. Mr Draycott is, as already mentioned, debarred from taking part. The liquidator of Hemingway wrote to the appeal tribunal on 11 November 2019 asking that his position be recorded on the court file and informing that Hemingway is scheduled to be dissolved on 26 December 2019, in 10 days.

Scheme of the 2010 Act

17. I do not need to explain the whole of the 2010 Act. I confine my account to what is needed for this appeal. Where a "relevant person" incurs a liability to a "third party", the rights of the relevant person under an insurance contract covering the liability are transferred to the third party ("transferred rights") (section 1(1) and (2)). A "relevant person" (the insured) includes a company that is in liquidation or goes into liquidation (section 1(5)(b) and 6(2)(d)).

18. The third party may sue the insurer without having "established" the insured's liability in the underlying dispute but may not enforce the transferred rights without first establishing the insured's liability in that dispute (section 1(3)). Liability is only "established" if its existence and amount are established by obtaining a declaration, a judgment or an award in arbitral proceedings (section 1(4)).

19. If the third party has not yet established the insured's liability, the third party may bring proceedings against the insurer for a declaration as to the insured's liability to the third party, or as to the insurer's potential liability to the third party, or both (sections 2(1)-(3)). The insurer may rely on any defence on which the insured could rely in the underlying dispute (section 2(4)) and on any defence the insurer would have against the insured entitling the insurer to decline cover under the insurance contract (section 2(3)).

20. Where the insurer is found liable to the third party, "the court may give the appropriate judgment against the insurer" (section 2(6)). The insured may be made a defendant to proceedings in which a declaration of its liability in the underlying dispute is sought. The insured is bound by the declaration if, but only if, it is a defendant to those proceedings (section 2(9)-(10)).

21. Where the third party is entitled or required to pursue proceedings against the insurer by arbitration, because of an arbitration clause in the insurance contract, the power of "the court" to give "the appropriate judgment" is read as referring to the power of the "tribunal", i.e. the arbitral tribunal, to "make an appropriate award" in the arbitration (section 2(6)-(8)).

22. The third party may apply in the arbitral proceedings for a declaration both in respect of the insurer's liability or potential liability and in respect of the insured's liability (section 2(7)). The insured may be made a defendant to the arbitral proceedings (section 2(9)). A declaration

of the insured's liability is binding on the insured if it is made a defendant to the arbitral proceedings (section 2(10)).

Submissions of the Parties

23. The following matters are common ground. Hemingway is a "relevant person" within sections 1 and 6 of the 2010 Act. Hemingway's rights under the insurance contract "are transferred to and vest in" the claimant as a "third party" under section 1(2) of the 2010 Act. Irwell can rely as against the claimant on any defences it could rely on as against Hemingway, in respect of the insurance contract (section 2(3) of the 2010 Act).

24. It is also agreed that an insurer can normally invoke an arbitration clause in the insurance contract as against the third party (section 1(4)(c), 2(6)-(8) of the 2010 Act). However, there is a disagreement over whether that position is modified in the present case by the anti-avoidance provisions in section 203 of the ERA and section 144 of the EqA.

25. I paraphrase the main arguments of Mr Gray-Jones, for the claimant, as follows:

(1) The 2010 Act was passed to address the mischief encountered under the former 1930 Act of the same name: that the claimant had to bring two separate sets of proceedings. This is clear from the report *Third Parties – Rights Against Insurers* dated July 2001 prepared jointly by the Law Commission (Law Com No. 272) and the Scottish Law Commission (Scot Law Com No. 184) (the Law Commission report). The decision of the judge below perpetuates the mischief which the 2010 Act was intended to remedy.

(2) The Law Commission report and the explanatory notes to the 2010 Act (which support the proposition that the statutory purpose is that identified in the Law Commission report) are admissible as evidence of the statutory purpose of the 2010 Act: *Fothergill v. Monarch Airlines Ltd* [1981] AC 251, HL; *R (S) v. Chief Constable of South Yorkshire* [2004] 1 WLR 2196, per Lord Steyn at [4]. Mr Gray-Jones might also have cited his remarks on explanatory notes in *R (Westminster City Council) v. National Asylum Support Service* [2002] 1 WLR 2956, at [2]-[6].

(3) The application of the 2010 Act to employment tribunal claims should be consistent with and not contrary to the statutory purpose of enabling the rights it confers to be exercised within a single set of proceedings, not by two separate claims as under the 1930 Act. The 2010 Act refers in section 2(6) to "the court" making "a declaration under this section". The "court" is not identified but should be the same court as the court seised of the underlying dispute between the third party and the insured.

(4) The reference to a "tribunal" in section 2(8) refers to the specific case of an arbitral tribunal which is clearly not a court. An employment tribunal, by contrast, can be a court and bears all the hallmarks of one: a body which discharges judicial functions and forms part of this country's judicial system rather than the administration of government: see *Attorney-General v. BBC* [1981] AC 303, per Lord Edmund-Davies at 351F ("largely a matter of impression…"); per Lord Scarman at 358C-E; *Peach Grey & Co v. Sommers* [1995] ICR 549, per Rose LJ at 557D-H; *Turner v. Grovit*

[2000] 1 QB 345, CA (not reversed on appeal on this point); *Vidler v. UNISON* [1999] ICR 746; and *Law Society v. Otobo* [2011] EWHC 2264 (Ch).

(5) The jurisdiction of the employment tribunals is entirely statutory, but they must also apply the general law when exercising their statutory jurisdiction. Their powers are not confined to those expressly conferred. It is lawful for the tribunal "to do what the law expressly or impliedly authorises" (per Stanley Burnton LJ in *Virdi v. Law Society* [2010] 1 WLR 2840. At [28]). The employment tribunal's power in respect of the 2010 Act is to award a remedy against the insurer following the statutory transfer of liability from insured to insurer.

(6) The absence of jurisdiction to determine claims by respondents against third parties not sued by the claimant (*Beresford v. Sovereign House Estates* [2012] ICR D9, UKEAT/0405/11/SM and *Welsh v. Bendel*, UKEATS/0014/12/BI, 29.6.12) or to determine claims for contribution as between respondents (*Brennan v. Sunderland City Council* [2012] ICR 1183, EAT), does not assist Irwell. It is irrelevant that the claimant did not enter into a contract with Irwell; he did not contract with Mr Draycott either, but may have a cause of action against him. The claim against Irwell is founded on an insured liability arising from an employment relationship.

(7) An arbitration clause in the insurance contract generally binds the third party (*BAE Systems Pension Funds Trustees Ltd v. Bowmer and Kirland Ltd* [2018] 1 WLR 1165 (O'Farrell J)). But the clause here is void by section 203 of the ERA and section 144 of the EqA. It excludes or limits the operation of provisions of the ERA and precludes the claimant from bringing proceedings under it before the tribunal, as against Irwell which has inherited Hemingway's liability. It also purports to exclude or limit provisions of the EqA in respect of the discrimination claim against Hemingway, by the same reasoning; cf. Slade J's decision, not appealed on this issue, in *Clyde & Co LLP v. Bates van Winkelhof* [2012] ICR 928 (QBD).

26. Mr Bernard Watson, for Irwell, not surprisingly supported the judge's reasoning and conclusion. His main arguments may be paraphrased more briefly, thus:

(1) An employment tribunal has no power to interpret and apply the 2010 Act, nor to construe the insurance contract and determine issues arising under it as between insurer and insured. An employment tribunal is not a body falling within the meaning of the words "the court" in section 2(6) of the 2010 Act.

(2) The jurisdiction of employment tribunals is entirely statutory. By section 2 of the Employment Tribunals Act 1996 (the ETA) they "shall exercise the jurisdiction conferred on them by or by virtue of this Act or any other Act, whether passed before or after this Act". By section 3, the appropriate minister may confer other powers on them, within the limits of that section. The claim against Irwell falls within neither section 2 nor any provision made by the minister under section 3.

(3) The judge was right to observe that the employment tribunal's jurisdiction over contract claims is limited to claims falling within the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. There was no

equivalent instrument made under section 3 of the ETA extending the tribunal's jurisdiction to determining claims against insurers under the 2010 Act.

(4) The shortcomings of the 1930 Act, to which the Law Commission report draws attention, cannot alter the statutory provisions. The claimant can bring a single set of proceedings in non-employment tribunal cases but in employment tribunal cases the liability of the insurer needs to be established in court or arbitral proceedings first; the reverse of the process envisaged in the 1930 Act. In oral argument, Mr Watson accepted that the claimant could ask the tribunal to determine the insured's liability first. The issue would be one of case management for the tribunal.

(5) The judge below was therefore correct to decline jurisdiction over the claim against Irwell under the 2010 Act. The correct forum for that claim would, normally, be an ordinary court, not the tribunal. However, here there is an arbitration clause in the insurance contract which Irwell is entitled to invoke so as to require the claimant's claim against Irwell to be determined in arbitration proceedings.

(6) The arbitration clause in the present case is valid and binds the claimant. The two statutory provisions relied on, section 203 of the ERA and section 144 of the EqA, only render void arbitration clauses inhibiting or precluding claims under those two Acts. They do not impact on the claim against Irwell, brought under neither of the two Acts but under the 2010 Act.

Reasoning and Conclusions

27. I have carefully considered these rival contentions and the authorities. My starting point is to consider the statutory jurisdiction conferred on employment tribunals. The employment tribunal, unlike this appeal tribunal (see section 20(3) of the ETA), is not a superior court of record. It has been held to be a "court" or "inferior court" for some purposes but not others. The authorities cited, mentioned above, show that whether the employment tribunal is a "court" depends on the statutory context. Sometimes "court" is juxtaposed with "tribunal" and the employment tribunal is not a court. Sometimes an employment tribunal is also a court.

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

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

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

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

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

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

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

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

36. The employment tribunals also have to consider, from time to time, other provisions modifying liability for the statutory torts which may found a claim under the ERA and the EqA. Under the Education (Modification of Enactments Relating to Employment) (England) Order 2003, the governing body of a school with a delegated budget may be treated as the claimant's

employer although the relevant local authority is in law the employer, is liable to pay any compensation and is entitled to be joined in the proceedings.

37. Similarly, statutory transfers of liability occur frequently in the context of local government reorganisation or the reorganisation of other locally based public bodies. To take but one example among many, Schedule 1, paragraph 7(1) of the Magistrates' Courts Committees (Devon and Cornwall) Amalgamation Order 1998 provides that "[a]ny person employed by a transferor committee on the day before the amalgamation date shall be transferred on the amalgamation date to the employment of the transferee committee on the same terms as those on which he was employed by the transferor committee.

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

39. Underhill J (P), as he then was, in *Brennan v. Sunderland City Council*, at [22(2)] was unwilling to construe the word "court", read with the word "action" in the Civil Liability (Contribution) Act 1978 as embracing an employment tribunal. He noted four statutory provisions (section 12(3) and 13(5) of the Administration of Justice Act 1960, section 19 of the Contempt of Court Act 1981 and section 37 of the Freedom of Information Act 2000) supporting the proposition that "when the legislature means that term [court] to cover tribunals it says so expressly".

40. He also, however, recognised that the scope of a "court" depends on the statutory context, acknowledging at [23] the cases of *Attorney-General v. BBC*, *Peach Grey & Co v. Sommers* and *Vidler v. UNISON*. And at [24] he allowed that "it would be possible to construe them [the words 'court' and 'action'] expansively if the context showed that that was the intention of Parliament".

41. There are differences between the nature of the right in play in the present case and the right in the *Brennan* case. There, the right claimed was a right to claim contribution by one joint tortfeasor against the other. It turned out that the underlying right to claim a contribution does not exist under the Civil Liability (Contribution) Act 1978 in the case of joint tortfeasors sued in employment tribunal proceedings. Sunderland City Council's problem was not just one of forum; it had no right to contribution that could be claimed even in an ordinary court.

42. Here, the issue is one of forum only. It is not disputed that Hemingway's rights under the insurance contract have transferred to the claimant, subject to Irwell's defences to a claim under it. Leaving aside the impact of the arbitration clause (to which I shall return shortly), the meaning of the word "court" determines whether the employee must bring one claim or two. If the latter is the correct construction of section 2(6) of the 2010 Act, the statutory purpose has failed in the 2010 Act in its application to employment tribunal claims.

43. Essentially for that reason, I have come to the conclusion that the construction for which Mr Gray-Jones contends is the correct one. The context calls for a purposive construction. The

"single forum" statutory purpose would, otherwise, be defeated in employment tribunal claims. In my judgment, the cases relied on by Mr Gray-Jones, especially the *Peach Grey & Co* case, provide sufficient authority for the proposition that an employment tribunal is included within the words "the court" in section 2(6) of the 2010 Act.

44. In all the respects emphasised by Rose LJ in *Peach Grey & Co*, the employment tribunal functions like a court. It is independent of the state. It determines rights and liabilities. It administers oaths and affirmations. It awards remedies including compensation. In addition, it was omitted from the architecture of the First-tier Tribunal and the Upper Tribunal, created by the Tribunals, Courts and Enforcement Act 2007. Mr Gray-Jones' broad construction fits with the policy of the 2010 Act. Mr Watson's narrow construction does not.

45. I therefore respectfully disagree with the judge's conclusion that he had no jurisdiction to entertain the claim as against Irwell.

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

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

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

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

50. The Law Commission report dealt with arbitration clauses at paragraphs 5.39-5.44. The Commissions recognised that the prevalence of arbitration clauses in employer's liability insurance contracts called for specific provision. They noted in the report that "under the ABI [Association of British Insurers] / Lloyds arbitration agreement most UK insurers have now

undertaken not to enforce arbitration clauses in standard-form policies if the insured prefers to have questions of coverage determined by a court" (paragraph 5.40).

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

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

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

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

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

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

57. Mr Watson suggested that an arbitrator could determine the liability of an insured in respect of employment tribunal claims. Section 2(7) of the 2010 Act allows the third party in

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

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

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

60. Those provisions would not be as fully functional as they would be if the arbitration clause were absent. If the clause is read with the law on transferred rights in section 2 of the 2010 Act and if it is invoked by the insurer, the third party is put in the position of either asking the arbitral tribunal rather than the employment tribunal to rule on the underlying dispute with the insured – probably against opposition from the insured, if made a defendant and if present – or litigating on two fronts before different tribunals; in the employment tribunal as against the insured (and any other party such as Mr Draycott in the present case) and in the arbitral tribunal as against the insurer.

61. I think those consequences are sufficient to render the arbitration clause void, though my observations to that effect are of course *obiter*. My reason for allowing this appeal is my decision that the learned judge below was wrong to reject jurisdiction over the claim against Irwell under the 2010 Act, for reasons I have given earlier.

62. I will therefore allow the appeal, set aside the judge's decision staying the claim as against Irwell and lift the stay imposed by the judge.