Appeal No. UKEAT/0251/19/VP

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 November 2020
Judgment handed down on
26 November 2020

Before

THE HONOURABLE MR JUSTICE GRIFFITHS

(SITTING ALONE)

MRS G COLE APPELLANT

ELDERS' VOICE RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr Benjamin Gray (of Counsel) instructed by: Advocate
For the Respondent	Mr Colin McDevitt (of Counsel) instructed by: Ellis Whittam

SUMMARY

JURISDICTIONAL/TIME POINTS

(1) A litigant in person who had argued that a COT3 could not be relied upon because of misrepresentation and estoppel (and possibly also by way of interpretative construction) should have been allowed to refer to without prejudice material in support of those submissions.

Oceanbulk Shipping and Trading SA v TMT Asia Ltd [2010] UKSC 44 [2011] 1 AC 662 and *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436 applied.

(2) A COT3 can be challenged on the same basis as any other agreement in common law or equity.

Industrious Ltd v Horizon Recruitment Ltd [2010] IRLR 204 and *Greenfield v Robinson* [1996] EAT/811/95 applied.

Patel v City of Wolverhampton College [2020] UKEAT/0013/20/RN held to be *per incuriam* and not followed.

(3) ET decisions on a Preliminary Issue that there was no jurisdiction to hear the Claimant's substantive claims were based on errors of law. It was wrong to find that the Claimant could not go behind the COT3 or rely on without prejudice or other evidence to show that it was not valid.

(4) As the Claimant was a litigant in person with no legal qualifications, particular care had to be taken to make sure that what she was saying was heard and understood and acted upon. *Mensah v East Herfordshire NHS Trust* [1998] IRLR 531 and *Drysdale v Department of Transport* [2014] EWCA Civ 1083 [2014] IRLR 892 applied.

(5) The Claimant's submission that the COT3 should be set aside, or not enforced, by reason of misrepresentation, or that the Respondents were estopped from relying on it, or that it should be construed to exclude settlement of claims arising before the TUPE transfer, was not precluded by the involvement of a person holding himself out as a barrister (although disbarred) on her behalf.

Redgrave v Hurd (1881) 20 Ch D 1 and *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386 considered.

(6) Case remitted to a differently constituted ET.

Mr Justice Griffiths :

1. This is an appeal by Mrs Gloria Cole ("Mrs Cole") against the determination of Employment Judge Henry ("the Judge"), following a hearing on 15 October 2018, that there was no jurisdiction to hear her complaints of direct discrimination and/or harassment pursuant to the Equality Act 2010 against the Respondent to her claims and to this appeal, Elders' Voice. Elders' Voice ("EV") is a private limited company by guarantee, which is also a registered charity.

2. The basis of the Judge's decision was that Mrs Cole's claims were precluded by a valid ACAS conciliated agreement for the purposes of section 144(4)(a) of the Equality Act 2010, which was in writing, and signed by the parties in December 2017, on a standard COT3 form ("the COT3").

3. On appeal, Mrs Cole argues that she had a proper basis for challenging the validity of the COT3 which the EJ failed to deal with correctly.

4. For the purposes of this appeal, Mrs Cole has had the considerable benefit of representation before me by Benjamin Gray of Counsel, acting *pro bono* under the auspices of Advocate (formerly the Bar Pro Bono Unit). I am most grateful to him for his submissions. His appearance has been in the finest traditions of the Bar, and has been of incalculable assistance in ensuring that the appeal is disposed of correctly and fairly.

5. I am grateful also to Colin McDevitt of Counsel, who represented EV before me with professional skill and integrity.

Procedural history

6. The procedural history is essential to a proper understanding of the appeal.

The initial stages

7. On 2 October 2017, Mrs Cole presented a claim (ET1) against "Brent Floating Support Services Sanctuary Group" for unfair dismissal and race discrimination. Sanctuary's name in the proceedings was subsequently amended to Sanctuary Housing Association ("Sanctuary"). In her ET1, Mrs Cole gave her dates of employment by Sanctuary as 7 November 2011 to 31 August 2017. With her ET1, she submitted an early conciliation certificate which named Sanctuary as her employer.

8. EV successfully tendered for the local authority service that had previously been provided in Brent by Sanctuary and maintains that, by operation of law, EV succeeded to the employment rights and liabilities of Sanctuary under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") with effect from 1 September 2017. This was not because Sanctuary and EV had ever dealt directly with each other by contract, or had ever been part of the same corporate structure. It was simply because EV had taken over that part of Sanctuary's business undertaking in which Mrs Cole had (until the day before the TUPE transfer) been employed. It seems that Mrs Cole continued in her employment after 1 September 2017, with EV as her new employer. EV put the Claimant at risk of redundancy and her employment eventually terminated.

9. The ET, following correspondence in relation to Mrs Cole's claim, asked Mrs Cole whether she proposed to add EV as a Second Respondent to her claim against Sanctuary. In due course, EV did become the Second Respondent. This was effected at a Preliminary Hearing before EJ McNeill QC on 26 April 2018 at which Mrs Cole was in person and the Respondent (named as Sanctuary alone, still) did not attend and was not represented. EJ McNeill noted that, in addition to her original claims of unfair dismissal and race discrimination (including harassment) against Sanctuary, "the claimant wishes to bring a claim for unfair dismissal against the Second Respondent".

10. Discussions took place, which I will examine in more detail later in this judgment. Eventually, the COT3 was signed, in December 2017.

The COT3

11. The COT3 was headed: "Advisory, Conciliation and Arbitration Service – Agreement in respect of an Actual or Potential Claim to the Employment Tribunal". It named Mrs Cole as the Claimant and EV (not Sanctuary) as the Respondent. In the body of the COT3, Mrs Cole was also referred to as "the Employee" and EV (not Sanctuary) was named as "the Employer".

12. In clause 1 of the COT3, EV agreed to pay Mrs Cole certain sums of money. In clause 2, it was agreed that "the Employee has left her employment with the Employer on 30 November 2017". Clause 3 of the COT3 provided:-

> "The payments referred to in clause 1 is [sic] in full and final settlement of:
>
> a) the claim(s) referred to ACAS during the Early Conciliation (EC) process by the Employee against the Employer under EC number R177201/17 ("the Claim(s)"); and
>
> b) all and any claims which the Employee has or may have at the time of this Agreement and in the future against the Employer or any of its associated companies or its or their officers or employees whether arising from her employment with or appointment by the Employer or otherwise. For the avoidance of doubt, Sanctuary Group is not an associated company of the Employer."

The Hearing

13. The hearing before EJ Henry on 15 October 2018 in respect of which this appeal is brought ("the Hearing") was to determine, as a preliminary issue, whether the ET had jurisdiction to hear the claim notwithstanding the COT3.

14. At the Hearing, Mrs Cole was in person, Sanctuary (the First Respondent) did not attend and was not represented, and EV (the Second Respondent) was represented by Colin McDevitt of Counsel (who also appeared before me).

15. Mr McDevitt has prepared a note of the Hearing, which has been typed up and placed in the bundle. It is not a verbatim note, and it is not based on any shorthand note, or

audio recording, neither of those being available. It cannot, therefore, be expected to be either complete or perfect. It is, however, the best record we have of the Hearing, being based on handwritten notes taken by Mr McDevitt at the time. Both parties were content to rely on it, so far as it goes. It runs to 10 pages, the hearing lasting, I am told, approximately 2 hours ("the Respondent's Hearing Note").

16. I will be considering what happened at the Hearing in detail later in this judgment. In brief, however:

    i) The Judge introduced what he saw as the issues, centred on the effect of the COT3 (paras 1-11 of the Respondent's Hearing Note).

    ii) There was then discussion between the EJ and Mrs Cole during which she was, apparently, making her submissions and the EJ was responding to them (paras 12-38).

    iii) In the course of this, Mrs Cole referred to the last sentence of clause 3(b) of the COT3 ("Sanctuary Group is not an associated company of the Employer") (para 12).

    iv) As she continued her dialogue on the effect of the COT3 with the EJ, "Counsel for the Second Respondent raised an objection to looking at without prejudice material" (para 18). It is common ground that this objection was effective, and the EJ did not look at any of the without prejudice material, containing correspondence leading up to the COT3, although it was in the bundle.

    v) Mrs Cole raised "misrepresentation by the Respondent" (para 21) and the EJ was "asked to look at the misrepresentative statements" (para 21). She said "The Respondent made [a] clear statement – I trusted the Respondent's representative and relied on it. I am not a legal person, but after my research I think it is estoppel… The Respondent cannot later deny those facts" (para 21). But the EJ did not "look at the misrepresentative statements", which were in the without prejudice material in the bundle to which objection had successfully been taken.

    vi) The Respondent's Note of Hearing does not say much about Mr McDevitt's own submissions. That is not surprising, since it is based on his own notes, and no-one makes notes of their own submissions while they are making them.

The ET decision: J1, J2 and J3

17. At the end of the Hearing, EJ Henry announced his decision, for which he orally gave reasons (paras 39-52 of the Respondent's Hearing Note). He said (quoting the less-than-verbatim Respondent's Hearing Note, including square brackets in the original):

    i) "Irrespective of how you got to [the] COT3 that's it" (para 40).

    ii) "What matters is the COT3 – I can't go behind what is written" (para 42).

    iii) "If the Claimant was misrepresented to or didn't understand, this won't be a basis for challenging [the] COT3" (para 45).

iv) "What the Claimant seeks to bring against Elders' Voice has been settled. Going against Sanctuary House brings us back to the same place – back to Elder's Voice [and the] COT3 settles the claim" (para 46).

v) "The signed contract covers everything, no matter how it arises. The settlement is all encompassing." (para 51)

vi) "[The] claim is dismissed against Elders Voice" (para 52).

I will call this *ex tempore* judgment "J1".

18. On 6 November 2018, EJ Henry sent out a brief written Judgment of 3 paragraphs, each containing only a single sentence, stating that the COT3 was "valid" (para 1), the ET accordingly did not have jurisdiction (para 2) and the claim against EV was dismissed (para 3). I will call this "J2". For all the imperfections of the Respondent's Hearing Note, J1 is a much clearer (because fuller) explanation of the Judge's reasoning than the three sentences in J2, although J2 is in no way inconsistent with J1.

19. The day after the Hearing and *ex tempore* J1 given on 15 October, Mrs Cole submitted a detailed written Request for Reconsideration dated 16 October 2018. She referred to the Respondent's objection to her referring to any of the documents in the Without Prejudice section of the bundle, and said:-

i) "In view of this, all of the document that I had relied on to show that the COT3 is invalid, could not be referred to" (para 3).

ii) She asked for EJ Henry's decision to be reconsidered in the interest of justice (para 6) (as rule 70 of the ET Rules entitled her to).

iii) She said: "I also ask that the decision be revoked, and for the Without Prejudice rule to be waived, in order for a fair hearing to take place" (para 7).

iv) "The respondents have a lot that they are covering, and it is only when access can be granted to the Without Prejudice documents, that the truth will be able to reveal itself" (para 12).

20. The Judge rejected the application for reconsideration on 17 December 2018 in a written Judgment (J3) containing his reasons in two numbered paragraphs, including the following:

i) "There is no reasonable prospect of the original decision being varied or revoked, because there is a valid agreement… The tribunal can find no basis to go behind the agreement." (para 1).

ii) "The submissions of the claimant had been fully addressed at the hearing and determined, which determinations are not affected by the claimant's current argument as to pre-hearing discussions had with the respondent on the day of the hearing" (para 2).

21. Para 2 of J3, quoted at (iii) above, was an indirect reference to the Respondent's objection to Without Prejudice material being referred to, because in para 2 of her Request for Reconsideration Mrs Cole said that EV's 'solicitor' (in fact, Counsel) told

her before the Hearing "that I will not be able to refer to any of the documents in the Without Prejudice section of the folder". J3 makes no other reference to her request "for the Without Prejudice rule to be waived".

The appeal, and the request for written reasons

22. The Notice of Appeal to the EAT was presented, within the time limit, on 19 December 2018.

23. In conjunction with the appeal, Mrs Cole asked the ET for full written reasons on 17 December 2018. In response, the Judge on 27 January 2019 referred her to J3, "the Judgment sent on 17/12/2018 which addresses the Claimant's application for reconsideration".

24. A full hearing was ordered of the appeal under rule 3(10) of the EAT Rules by a Judge of the EAT on 16 October 2019 who, at para 6 of her Order, requested the ET:

> "…to provide, to both the Employment Appeal Tribunal and to the parties, written reasons for the judgement given orally at the preliminary hearing held on 15 October 2018."

25. These written reasons were not immediately forthcoming, although Mrs Cole pressed the ET for them on a number of occasions. As a result, the hearing of the appeal was (I am told) adjourned. The ET continued to be pressed. It seems that the Judge had difficulty in locating the bundle of papers from the Hearing on 15 October 2018.

The final version of the Judge's Reasons - J4

26. Eventually, EJ Henry sent to the parties on 2 March 2020 full written Reasons running to 8 pages ("J4").

27. The gap between the Hearing on 15 October 2018 and J4 sent out on 2 March 2020 – over 1 year and 4 months later – is emphasised by Counsel for Mrs Cole, and I will return to that.

28. For whatever reason, J4 does not sit comfortably with J1, J2 and J3, and, in particular, refers to the Without Prejudice material which it is common ground had been objected to at the Hearing and was not looked by the Judge at the Hearing. Para 7.17 of J4 says (inserting extra line breaks for ease of reference and comparison):-

> "In discussions relevant to this agreement [i.e. the COT3], it is noted that the claimant had asked whether the agreement would prevent her from pursing a complaint against Sanctuary Housing Association
>
> for [sic] which it was made clear to the claimant that, the respondent, Elders' Voice, had no relationship with Sanctuary Housing Association and did not represent them and therefore could not comment on their behalf. It was further noted and recorded by the agreement that, Sanctuary Housing Association was not an associated company of Eider's Voice.

> It was also made clear that the agreement compromised all claims arising out of her employment and the termination thereof, as well as the specific complaint she had further raised under EC number R177201/2017."

29. Counsel for Mrs Cole suggests that this may have been taken from the Grounds of Resistance in EV's ET3 para 23 (to which the passage from J4 corresponds almost exactly and, in parts, *verbatim*) which said:

> "In the discussions that led to this agreement [i.e. the COT3] being reached:
>
> a. The Claimant did ask whether the agreement would prevent her from pursuing a complaint against Sanctuary Housing Association.
>
> b. It was made clear to the Claimant that Elders' Voice has no relationship with Sanctuary Housing Association, does not represent Sanctuary Housing Association and cannot make any comments on their behalf/that bind them. It was also made clear that Sanctuary Housing Association was not a party to the agreement and is not an associated company.
>
> c. It was made clear that the agreement compromised all claims arising out of her employment or the termination thereof as well as the specific complaint to ACAS under the claim number intimated in the wording above."

30. I agree that the similarity is very striking and it does look as if EJ Henry, trying in 2020 to reconstruct reasons he had given *ex tempore* at a Hearing in 2018 of which he had no record, unfortunately adopted the formulation in the ET3 that matters were "made clear" which were, in fact, very much disputed; and did so on the basis of the ET3's treatment of without prejudice material which EV (notwithstanding its own reference to it in its ET3, which might be said to have waived any privilege) had successfully objected to at the Hearing, and which had therefore not been considered at the Hearing at all.

31. Moreover, in mirroring EV's (disputed) treatment of the without prejudice material from para 23 of the ET3, the Judge did not apparently refer to the underlying documents themselves. He does not quote from them, or discuss them in any way which goes beyond para 23 of the ET3. Instead, J4 proceeds directly from para 7.17 to the following (para 8):-

> "These are the salient facts which are not in dispute. The claimant's submission to the tribunal is that on the respondent, Elders' Voice, informing her that they were not reaching any agreement in respect of any claims she may have as against Sanctuary Housing Group, she states she did not then understand that it compromised her claim as she had presented against Sanctuary Housing, where at the material time Elders' Voice was

> not then a respondent to her proceedings then before the tribunal."

32. However:

    i) They were in dispute.

    ii) Mrs Cole's submission at the Hearing was not just that she did not "understand" but (quoting para 21 of the Respondent's Hearing Note) included a submission that the COT3 did not provide a defence to her claims because of "misrepresentation" and "estoppel".

33. J4 does not mention misrepresentation or estoppel anywhere.

34. J4 concludes by deciding that "there is a valid Acas conciliated agreement" (i.e. the COT3) and that there was "no jurisdiction to entertain the claimant's claims for direct discrimination or harassment pursuant to the Equality Act 2010 against the respondent Elder's Voice" (paras 10-11).

The basis of the Appeal

35. There are Grounds of Appeal, Revised Grounds of Appeal following the rule 3(10) hearing on 25 September 2019, and Further Amended Grounds of Appeal following receipt of J4.

36. Mr Gray advances the following arguments in support of Mrs Cole's appeal:

    i) EJ Henry erred in law in deciding that the COT3 was valid. It was void because of misrepresentations from EV's side contained in the without prejudice correspondence. Alternatively, EV was estopped as a result of its without prejudice representations.

    ii) EJ Henry erred in law in failing to grant Mrs Cole's request that he should look at the without prejudice material before deciding whether the COT3 was valid.

    iii) J4 is an impermissible reconstruction and also unsafe due to delay.

    iv) The appeal should be granted and the ET decision should be set aside and replaced with a finding by the EAT that the COT3 is void for misrepresentation because that is the only possible outcome when the without prejudice material is taken into account.

    v) Alternatively, it should be remitted to a differently constituted ET.

37. Mr McDevitt advances the following arguments in opposition to the appeal:-

    i) There was no misrepresentation in the without prejudice material.

    ii) Although the without prejudice material would have been admissible if an issue of misrepresentation (or estoppel) had been properly and clearly raised, there was no indication before the Hearing began that it would be raised, it had not

been mentioned at the point during the Hearing when the without prejudice objection was taken, and it was only mentioned in passing after that.

iii) The claim that the COT3 was void by reason of a misrepresentation is unsustainable, not only because there was no misrepresentation but, further or alternatively, because Mrs Cole was represented at the time of the without prejudice correspondence (although not at the Hearing) by a person who appeared to be a barrister (although it turns out he had been disbarred) and it was not reasonable for her to fail to take the opportunity to discover or fail to take account of the correct implications of a TUPE transfer in those circumstances.

iv) There is nothing wrong with J4.

v) If, however, it appears on appeal that there is a viable case against the COT3 based upon the without prejudice material, it cannot be decided by the EAT but must be remitted to the ET. There are issues of fact, such as whether there was any misrepresentation; whether Mrs Cole relied on any misrepresentation; and whether she was entitled to rely on any misrepresentation despite being represented by a person who held himself out as a barrister (although disbarred).

The law

38. The differences between the parties on the law narrowed to some extent during the course of the argument before me. Differences did, however, remain.

39. The Supreme Court in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2011] 1 AC 662 approved and applied the analysis by Robert Walker LJ in *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436 of exceptions to the without prejudice rule (paras 31-32 of *Oceanbulk*).

40. These exceptions include (per Robert Walker LJ in *Unilever* at [2000] 1 WLR 2436, 2444C-F) the following exceptions relevant to the present appeal:-

> "… there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.…
>
> (2) Evidence of the negotiations is… admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. *Underwood v Cox* (1912) 4 DLR 66, a decision from Ontario, is a striking illustration of this.
>
> (3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel. That was the view of

> Neuberger J in *Hodgkinson & Corby v Wards Mobility Services* [1997] FSR 178, 191, and his view on that point was not disapproved by this court on appeal."

41. In addition, *Oceanbulk* established, as a further exception to the without prejudice rule, "the interpretation exception" (per Lord Clarke at para 46). The effect of *Oceanbulk* (quoting the headnote at [2011] 1 AC 662 at 663A-B) is, in relation to this:-

> "…the interpretation exception would be recognised as an exception to the rule and the "without prejudice" communications on which the defendants sought to rely were in principle admissible in evidence as part of the factual matrix or surrounding circumstances on the true construction of the agreement…"

42. Per Lord Phillips PSC in *Oceanbulk* [2011] 1 AC 662, 683 at para 48:

> "When construing a contract between two parties, evidence of facts within their common knowledge is admissible where those facts have a bearing on the meaning that should be given to the words of the contract. This is so even where the knowledge of those facts is conveyed by one party to the other in the course of negotiations that are conducted "without prejudice"."

43. The exceptions to the "without prejudice" rule therefore include:-

    i) Cases in which it is argued that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation.

    ii) Cases in which it is argued that the without prejudice material gives rise to an estoppel.

    iii) Cases in which the without prejudice material is relied on as part of the factual matrix or surrounding circumstances for the purposes of ascertaining the true construction of the agreement.

44. These exceptions apply also to cases in which there is a challenge to the validity of a COT3, or a dispute about the true interpretation of a COT3, although it is not a private contract but an agreement having effect by statute (in this case, section 144 of the Equality Act 2010).

45. If there was ever any doubt about this, it was settled by Silber J in *Industrious Ltd v Horizon Recruitment Ltd* [2010] IRLR 204 (EAT), who reviewed the authorities and endorsed and applied the decision of Mummery J in *Greenfield v Robinson* [1996] EAT/811/95 (which he quotes in para 21) that (including the emphasis added by Silber J):-

> "On the basis of the ruling by Mr Justice Popplewell in the case of *Hennessy v Craigmyle & Co Ltd* [1985] ICR 879 at 885B–E, a tribunal can investigate the circumstances in which it is alleged

> that an agreement, within the meaning of s.140 of the Employment Protection (Consolidation) Act 1978, is liable to be avoided at common law or in equity. No doubt was cast on this statement when that same case went to the Court of Appeal: [1986] ICR 461. It is clear from the judgment of the Master of the Rolls, (Sir John Donaldson) with which the other two members of the court agreed, that they recognized that contracting-out agreements under s.140(2) can be avoided on grounds on which an agreement can be avoided at common law. See p.465B–C. That particular case dealt with economic duress as a ground of avoidance. There is no reason why actionable misrepresentation at common law cannot also form the basis on which an industrial tribunal could set aside a contract falling within that section."

46. Per Silber J in *Industrious Ltd v Horizon Recruitment Ltd* [2010] IRLR 204 at para 27:

> "Indeed if I had not been bound by authority, my conclusion would have been the same. In my view, s.203(2) of the ERA permits the parties to make valid compromise agreements but the word 'agreement' must mean a valid agreement and the employment tribunal has to ensure that any purported compromise agreement is valid. There is nothing in the ERA which precludes the employment tribunal from performing that task and the only reason of principle suggested by Mr Legard for taking a different view is that such a task might be too complex for an employment tribunal. Compared with the tasks facing employment tribunals in, for example, discrimination cases, it is not demanding or onerous to decide if an agreement can be set aside for misrepresentation. Indeed the employment tribunals frequently have to resolve difficult and complex issues of contractual law…"

47. Initially, Mr McDevitt argued to the contrary in reliance on *Patel v City of Wolverhampton College* [2020] UKEAT/0013/20/RN at para 50. However, that paragraph is based on a line of authority ending with *Freeman v Sovereign Chicken* [1991] ICR 853, and appears to overlook the later development of the law by Silber J in *Industrious Ltd v Horizon Recruitment Ltd* [2010] IRLR 204 and the cases after 1991 which Silber J cited in 2010.

48. *Patel* therefore appears to have been decided *per incuriam* and is not a reliable statement of current law on this subject. Indeed, Mr McDevitt had by the end of his submissions abandoned his reliance on *Patel.*

The submissions made by Mrs Cole at the Hearing

49. I cannot accept the Respondent's submission that Mrs Cole only mentioned misrepresentation and estoppel in passing. The papers make it clear beyond argument that Mrs Cole was relying at the Hearing on misrepresentation and estoppel (at least) and that she was saying that she needed to refer to the without prejudice material, as she was entitled to, in support of those arguments. This was not a point she made in

passing. It was the bedrock of her case at the Hearing. It was also included in her subsequent unsuccessful request for reconsideration, which again pressed for permission to refer to the without prejudice material (see para 19 above).

50. Mr McDevitt tells me that, during the Hearing, he remembers Mrs Cole reading from, or possibly paraphrasing, a prepared document she had with her in the course of her submissions to the Judge, for "about 10 minutes". That is quite a long time.

51. The Respondent's Hearing Note does not explicitly refer to her doing this and it is therefore not certain at what point it happened. Mrs Cole did not at that time show anyone her document, or provide copies of it. We do now have, however, her two speaking notes for the hearing on 15 October:

    i) The first of these ("the First Speaking Note") is entitled "Explanations which shows that COT3 did not Compromise current claim". It runs to 68 paragraphs, is written in the first person, and reads like a script. At the end it says "Mrs G Cole – 15th October 2018" (which is the date of the Hearing).

    ii) The second ("the Second Speaking Note") is in the same format and is entitled "Reasons why the Respondent's Argument should be rejected". (It is placed in my bundle after Mr McDevitt's written skeleton argument for the Hearing.) It runs to 46 paragraphs and, like the First Speaking Note, it is written in the first person, and reads like a script. It too says at the end "Mrs G Cole – 15th October 2018".

    Mrs Cole is not a lawyer. It looks as if the First and Second Speaking Notes were written by a lawyer, or with help from someone with legal knowledge, although they take the form of a script for Mrs Cole.

52. Mr McDevitt does not think Mrs Cole read the whole of either the First or Second Speaking Note, so far as he recalls. But he thinks that the following passage from the Respondent's Hearing Note (para 21) may reflect the point when she was reading or paraphrasing from a document in front of her (the square brackets are in the original):-

> "Mrs Cole: The Claimant says [this is] misrepresentation by the Respondent. The Employment Judge [is] asked to look at the misrepresentative statements. The Respondent made [a] clear statement – I trusted the Respondent's representative and relied on it. I am not a legal person, but after my research I think it is estoppel, but I don't know what it means. The Respondent cannot later deny those facts."

53. Bearing in mind how brief the Respondent's Note of Hearing is relative to the full length of that hearing (and relative to his recollection of Mrs Cole speaking from her written notes for as long as 10 minutes), this appears to me clearly to correspond to at least paras 5-6 of the following passage from paras 3-8 of the Second Speaking Note:

> "**I would like to bring the following to the attention of the Employment Judge:**

3) My initial ET1 claim form and supporting document (page 5 – 70 of the bundle) was submitted to the tribunal on 2 October 2017. This was stated to be against the First Respondent (who are no longer a party to this claim), and I would like to point out that this date was before the COT 3 was entered into.

4) Prior to my claim being accepted by the Employment Tribunal, the second respondent was made aware that I have submitted an ET1 against the first respondent, in a letter dated 26th October (a copy can be found on page 126 – 127 of the bundle). In this letter, the second respondent were asked to clarify some issues in order for this distressing matter to be resolved amicably.

5) The Clarifications that they gave during that time, as well as the reassurances, can now clearly be seen as a **Misrepresentation**, which I was not aware of at that time. In view of this, I ask that the Employment Judge uses the Without Prejudice exemption rule based on **Misrepresentation**, in order to look at the misrepresented statements which were made by them.

6) As part of the clarification and assurance which was given by the second respondent, they gave 'clear statements', in response to the issues, and it was on their response that I was reliant on, as I trusted their legal representative's clarification and assurance, that was given. I am surprised to know that, they are now stating that the COT 3 compromised the entire claim. I am not a legal person, however, from being asked to go and read and do research by the judge during the last preliminary hearing, I think what they have done in this instance, is referred to as 'Estoppel' and the meaning I have for this word as stated by Duhaime's Law dictionary is this:

> 'A rule of law that when a person A, by act or words, gives person B reason to believe a certain set of facts, upon which person B takes action, person A cannot later, to his (or her) benefit, deny those facts or say that his (or her) earlier act was improper'.

7) I therefore respectfully ask that the Employment Judge have a look at, these statements within the Without Prejudice conversation, in order for the judge to give his / her own interpretation of understanding. In view of this, I ask that the Employment Judge uses **The Interpretation exemption** of the Without Prejudice rule, in order to give his / her own interpretation, of what was said.

8) There are also, some statements made in the Chief Executive's letter as well as when she was speaking with me verbally, about the settlement, which were ambiguous, and needs to have the

> Interpretation Exemption rule applied to it, or the Ambiguous Impropriety exception to Without Prejudice rule, in order for the Employment Judge to give his / her own interpretation of what can be understood from what was said."

54. All the emphasis and underlining in that quotation is in the original.

55. The quotation conforms with the record in para 21 of the Respondent's Hearing Note that Mrs Cole made an allegation of "misrepresentation by the Respondent" and asked the Judge "to look at the misrepresentative statements" (compare para 5 of the Second Speaking Note).

56. The Second Speaking Note also conforms to the record in para 21 of the Respondent's Hearing Note that Mrs Cole made a submission that "The Respondent made [a] clear statement… I trusted the Respondent's representative and relied on it… after my research I think it is estoppel…" (compare para 6 of the Second Speaking Note).

57. Given the bold face and underlining in the next section of the Second Speaking Note, I think it is likely that Mrs Cole also referred to "**The Interpretation Exemption**" in para 7 of her Second Speaking Note or, if she did not, that this was only because she was not getting any traction in her submission that her reliance on misrepresentation and/or estoppel in the without prejudice material required the Judge to look at that material. A reference to "the interpretation exemption", if made, might be regarded as more obscure than her references to misrepresentation and estoppel, which could explain para 21 of the Respondent's Hearing Note not including it, even if made.

The significance of the submissions made by Mrs Cole at the Hearing

58. I do, of course, accept that when Mrs Cole made these points it was without prior notice and so it is not, perhaps, surprising, that the legal implications of what she was saying, and the relevance of the cases I have cited, were not immediately grasped by the Judge or by McDevitt.

59. However, Mrs Cole was a litigant in person with no legal qualifications. This meant that particular care had to be taken to make sure that what she was saying was heard and understood, and acted upon.

60. Peter Gibson LJ said in *Mensah v East Herfordshire NHS Trust* [1998] IRLR 531 "I would strongly encourage Industrial Tribunals to be as helpful as possible to litigants in formulating and presenting their cases"; a comment of particular importance when the litigant appears "in person or without professional representation". Sir Christopher Slade, in the same case, agreed: "I too would strongly encourage industrial tribunals to be as helpful as possible to litigants in formulating and presenting their cases, particularly if appearing in person."

61. The principles have been summarised from the authorities by the Court of Appeal in *Drysdale v Department of Transport* [2014] EWCA Civ 1083 [2014] IRLR 892, at para 49, as follows:-

> "(1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that

> they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.
>
> (2) What level of assistance or intervention is "appropriate" depends upon the circumstances of each particular case.
>
> (3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.
>
> (4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.
>
> (5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.
>
> (6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant."

62. Once Mrs Cole had raised misrepresentation and estoppel (and the interpretation exception, if she did raise that too), the without prejudice exceptions in *Unilever* and *Oceanbulk* which I have cited immediately came into play. This meant that she should have been allowed to refer the Judge to the without prejudice material, as she had requested. The failure to appreciate this and implement it was an error of law on the part of the Judge.

63. I can scarcely blame the Judge or Mr McDevitt for not being so supernaturally quick-witted, or for not having a knowledge of the law so encyclopaedic, as instantly to appreciate, without prior notice of or reflection upon the point, that, once the submissions noted in para 21 of the Respondent's Hearing Note had been made, the previous objection to reference to the without prejudice material should have been set aside, on the basis of *Unilever* and *Oceanbulk*.

64. But that is what ought to have happened. Mrs Cole's submissions entitled her to it. To his credit, Mr McDevitt recognised that this was the case, if she did raise the points other than in passing (as I have found she did).

65. J1, J2 and J3 are all based on this error of law, and cannot stand as a result. All the propositions I have stated in the extracts from J1 in para 17 above were wrong. J2 (para 18 above) did not correct them. The request for reconsideration, or at least those parts of it I have quoted in para 19 above, was well-founded. J3 (para 20 above) was wrong to refuse it.

66. Although I heard submissions on J4, I regard it as something of a red herring. *Kwamin v Abbey National and other appeals* [2004] IRLR 516 was a case in which appeals were allowed on the basis of ET judgments delayed by 7½ months, 12 months and 14½ months, but in those appeals no decision at all was given until after those delays, which Burton J ruled were so long as to justify the decisions being set aside and remitted for rehearing on the facts of those particular cases. In the present case, Mrs Cole was given, not only a decision, but reasons for that decision at the conclusion of the Hearing, as noted in J1. The general principles stated in *Kwamin* at para 15 examine whether "the decision is unsafe by virtue of the delay" (para 15.1). In this case, however, the decision was announced on the day, and so no delay made the decision unsafe (although I have said it cannot stand for other reasons). I do, however, agree that it is right to apply the dictum of Burton J in para 15.1 of *Kwamin* to J4 and "examine the delayed judgment for any sign of error due to faulty recollection".

67. That examination, to my mind, clearly demonstrates that J4 was vitiated by failure (a) to recollect that submissions had been made based on misrepresentation and estoppel (b) to recall that an objection to reliance on without prejudice material had been made and upheld throughout the Hearing (c) to appreciate that, notwithstanding anything in the ET3 Grounds of Resistance based upon the without prejudice material, since Mrs Cole had not been able to make her own submissions upon it as she wished, J4 could not put forward reasons for the decision made at the Hearing which were to any extent based upon the without prejudice material (see paras 28-33 above).

Examination of the without prejudice material and its effect on the enforceability of the COT3

68. The without prejudice material ought, therefore, to have been examined before a decision was made on whether the COT3 was enforceable.

69. For Mrs Cole, it is argued that, on examination of the material, the misrepresentation is so clear that I can myself decide that the COT3 cannot be relied on. For EV, it is argued that the misrepresentation argument is so obviously unfounded that I can dismiss the appeal.

70. On either argument, I must now look at the without prejudice material.

Mrs Cole's representative, Mr Anoom

71. At the time of the without prejudice correspondence, Mrs Cole was represented by Mr Joseph Anoom ("Mr Anoom"), who signed himself (for example in his letter to EV's solicitors dated 26 October 2017) "Joseph Anoom Barrister" and described himself on the letterhead as "Joseph Anoom, LLB, LLM, PgDipLaw, barrister".

72. It has since emerged, however, that, whatever his training and qualifications may have been, he was not at that time a practising barrister, having been disbarred. According to the judgment of Rose J in *Anoom v Bar Standards Board* [2015] EWHC 439 (Admin):

    i) Mr Anoom's first career was as a police officer, but at the age of about 33 in 1990 he was made bankrupt and was convicted of the offence of obtaining a pecuniary advantage by deception (para 6).

    ii) He then studied for his LLB and LLM at Buckingham University and was called to the Bar in 1998 (para 8).

    iii) During his practice at the Bar, he was subject to five adverse disciplinary findings (para 8).

    iv) In 2007, he admitted three charges of professional misconduct (and three charges of inadequate professional service) at a disciplinary hearing and was disbarred and expelled from his Inn of Court, the Middle Temple (paras 9-12).

    v) In 2013, he applied for readmission (para 13). This was refused, after a hearing before an Inns of Court Conduct Committee panel in 2014, at which Mr Anoom was represented by Leading Counsel (paras 22 and 38).

    vi) He applied for a review of this decision by the Qualifications Committee of the Bar Standards Board, which upheld the decision of the Conduct Committee (para 40).

    vii) He appealed to the Administrative Court, which dismissed his appeal in January 2015 (para 63).

73. There is no evidence that either Mrs Cole or EV and its representatives were aware of these facts, although the judgment in *Anoom v Bar Standards Board* [2015] EWHC 439 (Admin) is a matter of public record.

The without prejudice correspondence

74. The correspondence began with a letter from EV to Mrs Cole dated 15 October 2017 marked "Without Prejudice and Subject to Contract". In this letter, EV indicated that Mrs Cole had been "one of the lower scorers" in a redundancy selection process, and said "…in these circumstances, one option is to offer you a settlement agreement to bring our employment relationship to an end…" They proposed payment of outstanding holiday entitlements, payment in lieu of 10 weeks' notice, a statutory redundancy payment, an ex-gratia payment, and an agreed reference.

75. Mr Anoom responded on behalf of Mrs Cole on 26 October 2017, saying as follows:-

> "There are a number of issues that would need to be Clarified in order for this distressing matter to be resolved amicably.
>
> 1. The issue of the relationship between Sanctuary and Elders Voice? The recent ETl was sent, quiet [sic] properly, to the Sanctuary group which in turn was sent to Elders Voice does this

> mean Sanctuary and Elders Voice are both culpable in terms of liability for damage caused to Mrs Cole?
>
> 2. If Sanctuary are going to accept liability for damage caused to Mrs Cole then this must be reflected in an admission from them with a formal letter from Elders Voice.
>
> 3. If points 1 and 2 above are left in any doubt then the claim against Sanctuary must persist to a Tribunal Hearing early next year
>
> 4. The grievance appeal would proceed to its natural conclusion forcing Mrs Cole to resign and pursue a claim for constructive dismissal against Elders Voice.
>
> 5. I am confident these matters can be resolved as soon as possible then, of course, Mrs Cole can properly and equitably negotiate further terms of settlement. I look forward to hearing from you in due course?"

76. EV's solicitors, Ellis Whittam, responded by email on 2 November 2017 which said, in part, as follows:-

> "I have responded to each of your points contained in your letter dated 26th October below:
>
> 1. There is no relationship between Sanctuary Housing and Elders Voice.
>
> Elders Voice successfully tendered for the Floating Support Service to which Gloria was assigned at Sanctuary Housing and Gloria transferred under TUPE to Elders Voice on 1st September 2017.
>
> Elders Voice accepts no liability in terms of any claims that Gloria may have that occurred before 1st September 2017.
>
> 2. Elders Voice cannot comment on Sanctuary Housing's liability and it would be inappropriate for Elders Voice to write any letters on their behalf. We do not represent Sanctuary Housing.
>
> 3. My client are attempting to settle any claims Gloria may have against Elders Voice only and they feel the offer made is a reasonable one. As a reminder, in return for settling any claims against Elders Voice, they are prepared to offer: a payment for outstanding holiday entitlements, subject to tax and NI; a payment of £4,953 in lieu of 10 weeks' notice period subject to tax and NI; a lump sum payment of £7,226 free of tax and NI which is comprised of: ● £2934 as a statutory redundancy

> payment ● £4292 as an ex-gratia payment an agreed reference an agreed termination date
>
> Subject to final agreement of full terms
>
> None of he [sic, presumably 'this'] would affect any potential claim against Sanctuary Housing…"

77. Mr Anoom responded to this by email on 13 November 2017 which said in part:

> "I had a lengthy conference with Gloria Cole and I am pleased to say she agrees in part to your proposed settlement detailed in your email of 7th November subject to the following points:
>
> Points 1 to 2 are accepted subject to any litigation that might ensue with Sanctuary Housing
>
> Point 3 is accepted subject to the ex-gratia payment which must reflect the trauma and psychological hurt suffered and the amount ought to be £8292. (My client Gloria Cole has sought Counsel's advice and attended 3 case conferences and has been put through expenses she would otherwise not have incurred these all amount to £1500).
>
> Subject to the above we are prepared to accept your proposals and bring this matter to an amicable conclusion…."

78. Ellis Whittam replied on 14 November saying:

> "I have taken instruction from my client and unfortunately it seems that we have come to an impasse.
>
> My client refutes that they have caused any trauma or psychological hurt towards Gloria and therefore are unable to increase the ex-gratia payment which they feel is a reasonable goodwill payment in relation to her exit from the charity.
>
> Elders Voice is a registered charity and unfortunately the funds are not as freely flowing for these matters as they may be in other organisations.
>
> Furthermore, any legal fees that Gloria has incurred are in no way related to my client.
>
> My client's settlement offer is still open until 16th November; I look forward to hearing from you."

79. Mr Anoom emailed on 15 November 2017 to say "my client has rejected your offer dated 2nd November".

80. However, it seems that negotiation did continue, leading eventually to the COT3 which was signed on behalf of Mrs Cole on 11 December 2017 and on behalf of EV on 21

December 2017. Before that, on 4 December 2017, an ACAS conciliator emailed EV's solicitors on 4 December 2017 saying:

> "The Claimant's rep [i.e Mr Anoom] has asked if two points can be clarified in the COT3;
>
> 1. [not relevant]
>
> 2. In clause 3b can it be clarified that your client has no connection with Sanctuary Group (the other Respondent) for the avoidance of doubt?
>
> I look forward to hearing from you."

81. To this, EV's solicitors replied on 5 December 2017:

> "Thank you, point 2 will be fine and I will add some wording to that effect."

82. The "wording to that effect" which was added to the COT3 as the last sentence of clause 3(b) was, as quoted in para 12 above:

> "For the avoidance of doubt, Sanctuary Group is not an associated company of the Employer."

The alleged misrepresentations

83. Does the without prejudice material set out above arguably include:

i) misrepresentations entitling Mrs Cole to have the COT3 set aside?; or

ii) statements relied upon by Mrs Cole creating an estoppel against EV which prevents them from relying on the COT3 to exclude claims in respect of Mrs Cole's employment by Sanctuary?; or

iii) statements which, when included as part of the factual matrix or surrounding circumstances known to both sides, support a construction of the COT3 which excludes claims in respect of Mrs Cole's employment by Sanctuary on the true construction of the COT3?

84. I have to consider those questions in order to decide whether (i) to allow the appeal because of clear misrepresentations on the basis of which the COT3 should be set aside, as Mr Gray submits I should; or (ii) whether to dismiss the appeal on the basis that none of these arguments is sustainable, as Mr McDevitt submits I should; or (iii) whether to remit those questions to the ET, which both Counsel submit as an alternative course.

Representations A to F

85. The EV solicitors' email of 2 November (para 76 above) has to be read in conjunction with the questions it was answering (para 75 above).

86. Question 1 demonstrated that Mr Anoom did not understand that there had been a TUPE transfer or (most importantly) that it had the effect of transferring liability for Mrs Cole's claims against Sanctuary (in respect of her employment before the transfer) to EV. Hence, noting that the ET1 against Sanctuary had been sent to EV, Mr Anoom asked in Question 1 "does this mean Sanctuary and Elders Voice are both culpable in terms of liability for damage caused to Mrs Cole?".

87. The correct answer to this question was that Sanctuary was culpable (as the alleged wrongdoer) but only EV was liable (as the TUPE transferee). The answer given, however, was:

> "1. There is no relationship between Sanctuary Housing and Elders' Voice" ("Representation A")
>
> and
>
> "Elders Voice accepts no liability in terms of any claims that Gloria may have that occurred before 1st September 2017." ("Representation B")

88. Representation A was arguably wrong, because they stood in the relationship of transferor and transferee for the purposes of TUPE which, in the context, was the most important relationship they could possibly have had.

89. Representation B was also arguably wrong. The phrase "any claims that Gloria may have" is strongly hypothetical. Representation B is not referring to specific claims, and (arguably) cannot be construed (as EV now says it should) as denying liability for specific claims on the basis that they were not well founded. Instead, it is saying, in respect of "any" claims that Mrs Cole "may" have, "Elders Voice accepts no liability". But now it is saying that it was liable, with the result that the COT3 disposed of those claims.

90. It is right to say that Representation A and Representation B were separated by the following paragraph:

> "Elders Voice successfully tendered for the Floating Support Service to which Gloria was assigned at Sanctuary Housing and Gloria transferred under TUPE to Elders Voice on 1st September 2017."

91. A trained employment lawyer knows that "TUPE" was shorthand for the Transfer of Undertakings (Protection of Employment) Regulations 2006. But that shorthand was not explained in the email, and neither Mrs Cole nor Mr Anoom were trained employment lawyers, so far as EV's solicitors were aware. If they had looked into that, they would have found that Mr Anoom was not a barrister at all. But even without that background knowledge, they knew from the very question from Mr Anoom which they were answering (para 86 above) that Mr Anoom did not understand that there had been a TUPE transfer which rendered EV liable for Sanctuary's acts before the transfer. Representation B did not correct that lack of understanding; on an objective reading it appeared to confirm the misunderstanding.

92. EV's solicitor's email of 2 November went on to say:

> "2. Elders Voice cannot comment on Sanctuary Housing's liability and it would be inappropriate for Elders Voice to write any letters on their behalf. We do not represent Sanctuary Housing." ("Representation C")

93. This was also, arguably, a misrepresentation.

i) EV could certainly comment on Sanctuary Housing's liability if they were going to say (as they now do) that Sanctuary Housing had no liability, all its liabilities to Mrs Cole for the matters raised in her ET1 having passed to EV because of TUPE.

ii) Moreover, it would not be "inappropriate for Elders Voice to write any letters on their behalf" if, as EV now says, EV was liable for the ET1 claims against Sanctuary by operation of law.

iii) Finally, the solicitors did represent EV, and EV claimed to have succeeded to any liabilities incurred by Sanctuary in respect of the matters in the ET1.

94. In context, the gist of Representations A, B and C, as a response to Mr Anoom's questions, was that EV had nothing to do with Mrs Cole's claims against Sanctuary. But now they say that the settlement with EV settled precisely those claims, the very point that Mr Anoom was trying to clarify. This misrepresentation is (arguably) reinforced by para 3 of their email of 2 November, which immediately follows Representation C:

> "3. My client are attempting to settle any claims Gloria may have against Elders Voice only and they feel the offer made is a reasonable one." ("Representation D").

95. I note "against Elders Voice only". That appears to be a clear exclusion of the ET1 claims against Sanctuary – but now EV says that those claims having passed to EV under TUPE, they were not excluded at all. Moreover, the offer which was then recapped in the remainder of para 3 was entirely in respect of Mrs Cole's rights against EV after the transfer; it was broken down in a way which demonstrated that there was nothing in it which reflected (with or without admission of liability) her ET1 claims against Sanctuary in respect of her employment before the transfer (para 73 above).

96. Finally, in the same email of 2 November , EV's solicitors said:

> "None of [this] would affect any potential claim against Sanctuary Housing…" (Representation E)

97. Now it is said that it would, in fact, settle all the ET1 claims against Sanctuary Housing, because liability for those claims had passed to EV under TUPE.

98. All of this supports an argument that Representations D and E were also misrepresentations.

99. Mr Anoom's response of 13 November 2017 confirmed, it seems to me, that he had understood Representations A-E in the sense that I have outlined, because he said (para 74 above):

> "Points 1 to 2 are accepted subject to any litigation that might ensue with Sanctuary Housing"

100. EV did not put him right in any of the subsequent correspondence.

101. This also provides the context for Mr Anoom's later query, conveyed through the ACAS email to EV's solicitors on 4 December 2017, asking, in respect of the draft COT3:

> "2. In clause 3b can it be clarified that your client has no connection with Sanctuary Group (the other Respondent) for the avoidance of doubt?"

To this EV responded:

> "Thank you, point 2 will be fine and I will add some wording to that effect." ("Representation F")

102. Representation F was of double effect:

i) It represented that EV has "no connection" with Sanctuary Group; and

ii) It represented that the wording added to clause 3b (namely, "For the avoidance of doubt, Sanctuary Group is not an associated company of the Employer"; see para 79 above) was "to that effect".

103. Again, this was all in the context of Mr Anoom's efforts to make it clear that the COT3 did not cover Mrs Cole's ET1 claims against Sanctuary. However, EV's connection with Sanctuary Group was that it had succeeded to all its liabilities to Mrs Cole including (critically) liability for all the claims she had raised against Sanctuary in the ET1. I think it is difficult to erase the impression given by Representation F that the opposite was the case: namely, that there was "no connection", so that EV had nothing to do with the ET1 claims against Sanctuary.

104. Mr McDevitt (and the Judge in paras 35 and 37 of the Respondent's Hearing Note) argue that the statement in clause 3b that "Sanctuary Group is not an associated company of [EV]" is "a true statement", "a fact" and "correct". This is based on arguing that "associated company" is to be used in the sense used in various statutory definitions, such as section 256 of the Companies Act 2006, which essentially define only companies in common ownership within a single corporate structure as "associated companies". Again, that might be reasonable if the discussions were taking place between company lawyers, to whom such statutory definitions are second nature. But that was not the case. EV's solicitors did not refer to any such statutory definitions, and I do not think they can now say that any statutory definition was to be applied to the ordinary English phrase "an associated company" without reference to any statute. On the contrary, the context in which they produced the drafting in clause 3b was Representation F, which was that it was to the same effect as Mr Anoom's request for

clarity that EV had "no connection" with Sanctuary Group, a much broader concept than connection through a corporate structure. I think it is at least arguable that a company which succeeds to all the liabilities of another company under TUPE has "a connection" with that company, and is therefore "associated" with that company, especially when the subject matter is whether claims being settled by one company include claims that had been raised against the other company.

105. I have concentrated my discussion on whether Representations A-F can arguably support a claim that the COT3 was based upon misrepresentations which made it invalid or unenforceable, because misrepresentation was the focus of Mr Gray's submissions to me. However, I should not overlook Mrs Cole's argument to the ET in paras 3-8 of her Second Speaking Note. Representations A-F are also, in my judgment, capable of supporting arguments based on estoppel, which were noted in para 21 of the Respondent's Hearing Note, and also arguments about the true construction of the COT3, which were in paras 7-8 of her Second Speaking Note.

The relevance of Mrs Cole's representation by Mr Anoom

106. Mr McDevitt argues that if (contrary to his primary submission, which I have now rejected) it is arguable that there were misrepresentations, Mrs Cole's representation by Mr Anoom is fatal to any argument that the COT3 can be affected by them. He says that Mr Anoom, and therefore Mrs Cole whom he advised, ought to have known that the effect of the TUPE transfer was that EV had become liable for all Mrs Cole's ET1 claims against Sanctuary in respect of her employment before the transfer. Whether or not he did know that, he argues, is irrelevant.

107. He says that EV's solicitors were under no obligation to advise Mr Anoom or Mrs Cole, because they were not acting for them. It is true that they were not obliged to give legal advice. But this does not excuse them from the consequences of any misrepresentations.

108. On the question of reliance and the role of Mr Anoom, Mr McDevitt refers to *Redgrave v Hurd* (1881) 20 Ch D 1 CA and *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386.

109. In *Redgrave v Hurd* (1881) 20 Ch D 1, a solicitor selling his practice and his premises represented to the purchaser that the practice brought in about £300 a year. Summaries of business in the last three years amounted to less than £200 a year. The solicitor told the purchaser that additional business referred to in other papers, which he produced, made up the difference. In fact, the papers did not show that, and the purchaser could have seen that for himself if he had examined them. The Court of Appeal found for the purchaser and rescinded the contract of sale on the grounds of misrepresentation.

110. The leading judgment was given by Sir George Jessel MR, one of the greatest jurists of his generation. His decision on this point is trenchant and clear, and it is enough to give the gist of it by quoting the following passages:-

> "If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, "If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of

> them." I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer…" (p 13).
>
> "Nothing can be plainer, I take it, on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence" (pp 12-13).

111. Sir George Jessel MR gave a number of practical illustrations of this principle, which are worth repeating:

> "One of the most familiar instances in modern times is where men issue a prospectus in which they make false statements of the contracts made before the formation of a company, and then say that the contracts themselves may be inspected at the offices of the solicitors. It has always been held that those who accepted those false statements as true were not deprived of their remedy merely because they neglected to go and look at the contracts.
>
> Another instance with which we are familiar is where a vendor makes a false statement as to the contents of a lease, as, for instance, that it contains no covenant preventing the carrying on of the trade which the purchaser is known by the vendor to be desirous of carrying on upon the property. Although the lease itself might be produced at the sale, or might have been open to the inspection of the purchaser long previously to the sale, it has been repeatedly held that the vendor cannot be allowed to say, "You were not entitled to give credit to my statement."
>
> It is not sufficient, therefore, to say that the purchaser had the opportunity of investigating the real state of the case, but did not avail himself of that opportunity." (p 13)

112. Sir George Jessel MR also says that reliance need not be proved:

> "…when a person makes a material representation to another to induce him to enter into a contract, and the other enters into that contract, it is not sufficient to say that the party to whom the representation is made does not prove that he entered into the contract, relying upon the representation…
>
> Where you have neither evidence that he knew facts to shew that the statement was untrue, or that he said or did anything to shew that he did not actually rely upon the statement, the inference remains that he did so rely, and the statement being a material statement, its being untrue is a sufficient ground for rescinding the contract." (p 21-22)

113. Negligence on the part of the representee is not, therefore, a defence to a claim for rescission based on misrepresentation.

114. If it is shown that (as a result of subsequent events, or existing knowledge, or otherwise), the representee did not, in fact, rely on the misrepresentation, the action could fail for that reason. Sir George Jessel MR made that point in *Redgrave v Hurd* when distinguishing *Attwood v Small* (1838) 6 Cl. & F 232, 7 ER 684, HL. He minutely examined the *ratio decidendi* of *Attwood v Small* and concluded (at p 17 of *Redgrave v Hurd*):

> "The three grounds taken by the three noble Lords, one of which grounds was taken by one only of the Lords, and each of the others by two, were that there was no fraud - that there was actual knowledge of the facts before the contract, and that no reliance was placed upon the representation. In no way, as it appears to me, does the decision, or any of the grounds of decision, in *Attwood v. Small*, support the proposition that it is a good defence to an action for rescission of a contract on the ground of fraud that the man who comes to set aside the contract inquired to a certain extent, but did it carelessly and inefficiently, and would, if he had used reasonable diligence, have discovered the fraud."

115. Against this, Mr McDevitt cites *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386. However, *Peekay* cites *Redgrave v Hurd* as "The starting point when considering this question" (at para 30) and quotes it at length, without doubting its authority. Moore-Bick LJ in *Peekay* also quotes (at para 36) the judgment of Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 2 CLC 242 where Clarke LJ said (at paras 63-64):-

> "63. Where the insured or reinsured corrects the misrepresentation or discloses the material fact before the insurer or reinsurer enters into the contract, the latter will not be entitled to avoid the contract for misrepresentation or non-disclosure. In such circumstances it may be said that there was no longer any or any material misrepresentation or non-disclosure or it may be said that there was no inducement. Perhaps it does not matter.
>
> 64. The correction must be fairly made to the insurer or reinsurer such that the corrected picture is fairly presented on behalf of the insured or reinsured and comes to the knowledge of the insurer or reinsurer. It is not sufficient to say that he would have discovered the true position if he had acted with all due care: see e.g. *Chitty on Contracts*, 28th edition, vol. 1 paragraph 6-036 and *Redgrave v Hurd* (1881) 20 Ch D 1. As I see it, it will in each case be a question of fact whether the misrepresentation was corrected so as to ensure that the corrected facts came to the knowledge of the insurer or reinsurer or whether, when the contract was made, the insurer or reinsurer was induced to make it by the original material misrepresentation or non-disclosure."

In the present case, it is not argued, nor in my opinion could it be, that any of Representations A-F was subsequently corrected, for example by each other, or by anything in the COT3.

116. After referring, also, to *Flack v Pattinson* [2002] EWCA Civ 1820, Moore-Bick LJ says in *Peekay* [2006] EWCA Civ 386 at para 40 (with Moore-Bick LJ's own emphasis):

> "It can certainly be said that these decisions support the conclusion that whether a person has been induced by misrepresentation to enter into a contract is a question of fact. As such is it always open to the defendant to show, if he can, that since the claimant was aware of the true facts, he was not induced by the misrepresentation to act as he did. For that purpose, however, it is not enough to show that the claimant *could have* discovered the truth, but that he *did* discover it. This seems to me to be the explanation of the decisions in all three of the cases to which I have referred."

117. There is nothing in the papers before me to suggest that Mr Anoom, or Mrs Cole, did not in fact rely on the representations which (as my summary above has shown) Mr Anoom was particularly anxious to obtain, and which appear to have constituted almost the whole subject matter of the discussions (so far as they appear from the papers) which resulted in the COT3.

118. Mr McDevitt refers me to a suggestion in *Treitel on the Law of Contract* 15th edition para 9-033 that the dicta of Moore-Bick LJ are "not easy to reconcile with the decision in the *Peekay* case", but I am concerned with the principles, rather than the facts of another case, and the statements of principle which I have quoted are all in the same direction. None of them provides a basis that I can see for saying that, just because Mrs Cole was represented by a person who held himself out as a barrister, any misrepresentations by EV can be left out of account, because he ought to have known better. He did not know better, and he did not say anything to suggest he did know better. What he said, on the contrary, demonstrated that he was looking for clarification from EV and that he relied on the representations made to him in that respect.

119. EV's reference to the TUPE transfer in their solicitors' email of 2 November 2017 (para 76 above) may have been regarded as a word to the wise, but it was not addressed to the wise. The effect of the representations which surrounded that reference (Representations A-E) was to render Mr Anoom and Mrs Cole none the wiser; indeed, at least arguably, to mislead them.

120. The reference to TUPE was notable, when taken with the questions to which Representations A-E responded, for what it did *not* say about TUPE and its effect.

> "Elders Voice successfully tendered for the Floating Support Service to which Gloria was assigned at Sanctuary Housing and Gloria transferred under TUPE to Elders Voice on 1st September 2017."

This made it clear that "Gloria was transferred under TUPE to Elders Voice". It did not even mention, let alone make clear, that another effect of TUPE was that all her claims against Sanctuary were also transferred, although they had arisen before the transfer.

121. The COT3 did nothing to correct Representations A-E. Instead, it added Representation F to the tally.

122. I am not, therefore, persuaded that, if there were otherwise actionable representations, the role of Mr Anoom can be relied upon to make them irrelevant, or not actionable.

Disposal of the appeal

123. The appeal must, therefore, be allowed. However, there remains the question of how it should be disposed of.

124. The key defect of the Hearing, and of the Judge's decisions at the end of and following it, was that there was no examination of the without prejudice material. Indeed, no evidence was taken at all, from any witness from either party.

125. Although I have expressed certain views, based on the papers I have been shown, I am not convinced that I am in a position to decide all the issues raised by the arguments in paragraphs 3 – 8 of Mrs Cole's Second Speaking Note and by the material which I have discussed in this judgement. These are really questions of fact, a point also made in the authorities I have cited. The EAT has no jurisdiction to decide issues of fact, unless the parties consent. Mr McDevitt, having taken instructions, confirms that EV does not consent to me disposing of the appeal, unless it is in their favour.

126. It may also be that, now the issues have been identified more clearly than they were understood by the ET below, there is evidence I have not seen, or which either or both parties might wish to call, which could be relevant to the fact-finding exercise. I note that, even in Mrs Cole's Second Speaking Note, para 8 says:

> "There are also, some statements made in the Chief Executive's letter as well as when she was speaking with me verbally, about the settlement, which were ambiguous, and needs to have the Interpretation Exemption rule applied to it… in order for the Employment Judge to give his/her own interpretation of what can be understood from what was said."

I do not know what verbal statements from the Chief Executive are referred to here.

127. I will therefore allow the appeal and remit the Preliminary Issue to the ET for rehearing. For the avoidance of doubt, the ET should consider (if argued) all three of the points advanced in paras 3-8 of Mrs Cole's Second Speaking Note and, of course, any other arguments that either side may wish to make relevant to the Preliminary Issue of whether and, if so, to what extent, the COT3 can be relied upon to exclude Mrs Cole's claims.

128. Similarly, the ET will not be limited to the evidence placed before EJ Henry at the Hearing on 15 October 2018, not least because no notice of Mrs Cole's points had been given before that hearing and so EV was not in a position to decide what evidence it would wish to produce in relation to them. Mrs Cole, too, can consider afresh the evidence she wishes to call. On both sides, the evidence may include further documents, and witnesses of fact (including evidence from Mrs Cole, if she wishes to give it). Any evidence must be relevant and admissible.

129. I hope that the parties will be able to agree directions for such a hearing, but, if not, the ET will need to give directions, including formulation of the issues, advance disclosure

of documents and witness statements, preparation of an agreed bundle of documents and authorities, and a time estimate for the hearing.

130. No purpose would be served by remitting the matter to the original Judge. He did not make any findings which can now be relied upon; and he may well have no useful recollection of a hearing now over two years in the past. In order to provide assurance that the Preliminary Issue is being examined entirely anew, putting aside J1, J2, J3 and J4, which I have found to be in error, I will order that a different EJ hears the Preliminary Issue. Remitting the matter to a different EJ may also offer more listing opportunities and, therefore, an earlier hearing.

131. I will invite Counsel to agree an order reflecting this decision, and dealing with any consequential matters, for me to review.