Neutral Citation Number: [2024] EAT 135

Case No: EA-2023-001423-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 August 2024

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

ERHARD-JENSEN ONTOLOGICAL/PHENOMENOLOGICAL INITIATIVE LTD

Appellant

- and –

MR DANIEL ROGERSON **Respondent**

- -
- -

Edward Kemp & **Anirudh Mathur** (instructed by **Kingsley Napley LLP**) for the **Appellant**
Michael Polak (instructed on a pro bono basis) for the **Respondent**

Hearing date: 23 July 2024

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JUDGMENT

SUMMARY

Practice and Procedure

The Employment Appeal Tribunal ("EAT") allowed an appeal from the Employment Tribunal's ("ET") conclusion that judicial proceedings immunity did not apply to one of the alleged detriments relied upon by the claimant for the purposes of his claim under section 47B of the **Employment Rights Act 1996** for post-employment detriment on the ground of having made protected disclosures.

The EAT held that the ET had erred in approaching the question on the basis that the alleged detriment was the fact of the respondent commencing arbitration proceedings against the claimant in Singapore and in rejecting the applicability of the immunity on the basis that it did not apply to prevent the bringing of a second set of proceedings. The ET had misunderstood the basis upon which the immunity was asserted and had failed to focus on the detriment that was pleaded, namely that the respondent had initiated a groundless arbitration in Singapore based on false allegations. The ET had thus failed to appreciate that this claim was founded upon the contents of the documentation initiating the arbitration and that this brought it within the established ambit of judicial proceedings immunity. Although broad descriptions of the core immunity in earlier cases such as **Lincoln v Daniels** [1962] 1 QB 237 fell to be considered in the light of subsequent authorities, particularly (for present purposes) **Singh v Reading Borough Council** [2013] EWCA Civ 909, [2013] 1 WLR 3052 and **Daniels v Chief Constable of South Wales** [2015] EWCA Civ 680, these cases did not depart from the position that a claim founded upon the content of a statement of case filed in earlier proceedings would generally be caught by the immunity. The ET had failed to apply this approach, apparently confining the core immunity to words spoken or written in the course of giving evidence.

Furthermore, given that the ET accepted that the arbitration involved a quasi-judicial body (as required by **Trapp v Mackie** [1979] 1 WLR 377) and consistent with the observations of Sir John Donaldson MR in **Hasselblad (GB) Ltd v Orbison** [1985] QB 475, the common law principles of

comity and the strong public interest in ensuring harmony between English law and foreign jurisdictions in the context of foreign-seated arbitrations, it made no material difference to the application of the immunity that the arbitration proceedings were based in Singapore.

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE:

Introduction

1. I will refer to the parties as they were known below. The respondent appeals from the judgment of Employment Judge Fowell ("the EJ") sitting at the London South Employment Tribunal ("the ET") promulgated on 21 November 2023. The EJ decided that judicial proceedings immunity ("JPI") did not apply to the third alleged detriment relied upon by the claimant for the purposes of his claim under section 47B of the **Employment Rights Act 1996** ("**ERA 1996**") for post-employment detriment on the ground of having made protected disclosures. The judgment refers to this alleged detriment as "the respondent's action in commencing arbitration proceedings against him [the claimant] in Singapore".

2. The EJ accepted that the arbitration was "a quasi-judicial exercise" of the kind contemplated by the House of Lords in **Trapp v Mackie** [1979] 1 WLR 377 ("**Trapp**"), but held that JPI did not extend "to the mere bringing of a claim" and, in any event, the immunity did not apply generally to overseas bodies. The respondent challenges the EJ's conclusions in respect of the scope of JPI and its territorial reach. By an order sealed on 2 January 2024, HHJ Auerbach permitted the appeal to proceed to a full hearing. There is no cross appeal against the conclusion that the Singaporean arbitration was a quasi-judicial process for these purposes.

3. The single ground of appeal is formulated as follows:

> "The ET was wrong in law to hold that the Claimant's allegation that the Respondent's act of commencing arbitration proceedings against him in Singapore was not barred by judicial proceedings immunity. The Singapore arbitration was in the nature of quasi-judicial proceedings and the alleged act of commencing arbitration proceedings fell within the scope of judicial proceedings immunity that applies to anything done in the proceedings from the inception of the proceedings onwards. It was immaterial that the quasi-judicial proceedings were an arbitration located overseas. The Claimant's alleged act did not fall (and could not fall) within any of the exceptions to the absolute immunity rule."

4. The Answer filed by the claimant, relies upon the EJ's reasoning. It also contends that whilst JPI "may protect the inception of the proceedings from being the subject of litigation", there is a much weaker rationale for applying the immunity in these circumstances, as opposed to its application to things said in the course of proceedings by parties, judges, counsel and witnesses. The Answer also contends that extending JPI to the initiation of arbitration proceedings in Singapore would be a

disproportionate interference with the claimant's rights under Article 6 of the **European Convention on Human Rights** ("**ECHR**").

The ET proceedings

5. The respondent is a Singapore-based charity. The claimant worked in London at the residence of Mr Werner Erhard (who was initially the second respondent to the claim). On 26 April 2016, the claimant entered into a "Confidentiality and Independent Consulting Agreement" ("the Agreement") with the respondent. This contained an arbitration clause in favour of an arbitration seated in Singapore, to be conducted pursuant to the Rules of Arbitration of the International Chamber of Commerce ("ICC"). After the claimant resigned in April 2019 he made a number of allegations concerning the alleged mistreatment of members of staff who worked at the London residence by Mr Erhard. The allegations are denied by the respondent.

6. On 21 July 2021, the respondent instigated arbitration proceedings in the ICC International Court of Arbitration in Singapore on the basis that the claimant had breached his confidentiality obligations under the Agreement.

7. On 21 November 2021, the claimant filed his ET claim for post-termination detriment for making protected disclosures. It is accepted that the claimant is a "worker" for the purposes of this claim under section 47B **ERA 1996**. He relied upon three detriments. The first two are not relevant for present purposes, as it is not suggested that they are caught by JPI. The third detriment was described as follows at para 16g of the claimant's pleading:

> "On **21 July 2021**, the First Respondent commenced arbitration proceedings against the Claimant in the International Chamber of Commerce in Singapore. International Arbitration is an extremely costly and confidential process. The arbitration claim alleges that the Claimant has breached [the Agreement] by making '*communications of…allegations*'.
> The First Respondent is seeking the following relief…[which was then set out]
>
> Additionally, in the arbitration claim, the First Respondent accuses the Claimant of running an '*extortion scheme*' by making '*false claims*' which '*include various allegations of physical and verbal abuse…by Mr Erhard*'*…'in efforts to extract a settlement'*. In reality, the Claimant represented, as a friend, Dr Grisley and the Claimant's partner, Fiona Hannon (who is also a former staff member of the Second Respondent), as they sought repayment of the money that the Second Respondent unlawfully deducted from their pay and compensation for various other labour violations. (The amounts of money requested were signed off by a UK employment lawyer).

> The Claimant believes that the accusation that he is attempting to extort money has been communicated widely amongst the Second Respondent's staff and associates. For example…[examples were then given]
>
> Please note: the Second Respondent and organisations associated with him have a history of attempting to use strategic litigation to prevent disclosure of information in relation to their harmful behaviour, and the Tribunal should be aware of this pattern." [Emphasis in original.]

8. In his skeleton argument and in his oral submissions to me, Mr Polak confirmed that the claimant's case as to the third detriment is not simply that he was put to the trouble and expense of having to face the arbitration proceedings, but that the crux of his complaint is that these proceedings were groundless and brought maliciously. For example, para 16 of his skeleton argument refers to "the malicious bringing of the arbitration proceedings to punish him for his whistleblowing and to seek to stifle the free discussion of Mr Erhard's abusive behaviour".

9. The respondent's Amended Grounds of Resistance asserted that this third detriment was barred by JPI. It was said that the arbitration proceedings were quasi-judicial proceedings and that the third detriment fell "four-square within the absolute privilege that covers everything done in those quasi-judicial proceedings from the inception of the Arbitration proceedings onwards" and the judgment of Devlin LJ (as he then was) in **Lincoln v Daniels** [1962] 1 QB 237 ("**Lincoln**") at ps. 257 – 258 was cited in support.

10. The parties' agreed list of issues described the third detriment relied upon by the claimant as, "On 21 July 2021, the Respondent commenced arbitration proceedings against the Claimant in Singapore (paragraph 16(g) POC)".

11. The Preliminary Hearing on the JPI issue was held on 24 and 26 October 2023. The respondent relied upon a witness statement from Mr Fong Zhiwei Daryl, the respondent's solicitor in Singapore who had conduct of the arbitration proceedings. The claimant also provided witness evidence, in which he set out his account of events. As I have indicated, the ET found that JPI did not apply to the third detriment. The EJ gave his decision along with oral reasons on the second day of the hearing. He subsequently provided written reasons, as requested.

12. Counsel informed me that the substantive hearing is listed to commence on 18 November 2024. I mention for completeness that the claimant's claim and his account of events is heavily

disputed. It is not my role to resolve any of that dispute at this stage.

The ET's decision

13. The EJ summarised Mr Daryl's evidence at para 7 of the Reasons. The arbitration proceedings are recognised in Singaporean law and the arbitration is one to which a Singaporean statute, the International Arbitration Act 1994, applies. The arbitration tribunal has a wide range of powers similar to those of a court or tribunal; for example, it can require security for costs, order the discovery of documents or evidence to be provided on affidavit; it can hear evidence on oath and grant interim injunctions. Its role is to adjudicate on the law and to make an award which is final and binding on the parties. None of this appears to have been contentious. The EJ did not find it necessary to address the contents of the claimant's witness statement in his reasons.

14. The EJ referred to the agreed list of issues and described the third detriment as the respondent's decision on 21 July 2021 "to commence arbitration proceedings in Singapore. Those proceedings concerned an alleged breach of a clause in his contract that various matters remain confidential" (Reasons, para 4). The EJ did not refer to the way that the third detriment was characterised in the claimant's pleading.

15. The EJ's Reasons did not contain a separate section setting out the relevant caselaw on JPI, but he introduced a number of the cases when summarising the parties' submissions. These included: **Lincoln**; **Trapp**; **Hasselblad (GB) Ltd v Orbison** [1985] QB 475 ("**Hasselblad**"); **Darker v Chief Constable of West Midlands** [2001] 1 AC 435 ("**Darker**"); **Heath v Commissioner of Police of the Metropolis** [2005] ICR 329 ("**Heath**"); **Lake v British Transport Police** [2007] ICR 1293 ("**Lake**"); **Singh v Reading Borough Council** [2013] EWCA Civ 909, [2013] 1 WLR 3052 ("**Singh**") ; and **P v Commissioner of Police of the Metropolis** [2016] EWCA Civ 2, [2016] IRLR 301 and [2017] UKSC 65, [2018] ICR 560 ("**P**"). I address these authorities when I review the caselaw from para 27 below.

16. Before the ET, the respondent submitted that the circumstances fell within the second category

of JPI described by Devlin LJ at p. 257 in **Lincoln** ("everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purposes of the proceedings and starting with the writ or other document which institutes the proceedings"); and that **Lincoln** remained good law in this respect. By contrast, the claimant submitted that there was a distinction between absolute immunity, which was granted in relation to things said in the course of the proceedings by the parties, witnesses, counsel or judges; and immunity which applied to anything else done from the inception of proceedings, where the public interest arguments in favour of immunity were much weaker. Furthermore, that there was insufficient public interest to support the extension of the immunity to proceedings outside the jurisdiction. The claimant also relied upon Article 6, **ECHR**, submitting that the combination of the territorial issue, the respondent's motive for bringing the arbitration and the fact that the circumstances were not within the core immunity, meant that the imposition of JPI would be an unjustified interference with his right to pursue his whistleblowing claim in respect of the third detriment.

17. While summarising the parties' submissions, the EJ indicated that he was satisfied that the arbitration proceedings fell "squarely within the type of quasi-judicial exercise contemplated" in **Trapp** (para 33).

18. When he came to setting out his conclusions, the EJ said that he would first address whether the present situation came within the scope of the core immunity. He said that the cases since **Lincoln** had shown "an evolving position", reflecting changes in the legal landscape in terms of the introduction of European law and the **ECHR**, which had "resulted in a subtle but noticeable change in emphasis over that time" (Reasons, para 49). He then referred to the respondent's reliance upon the second category of JPI described by Devlin LJ in **Lincoln** and continued:

> "51. The interpretation is that it prevents someone bringing proceedings on the basis that some other legal proceedings *have already been begun*. But it is not clear to me that this is the correct interpretation of these words. In the context of the previous type of situation [a reference to Devlin LJ's first category], which is essentially everything said or done in court, 'including the contents of documents put in as evidence' it suggests that a person may not bring proceedings in response to the facts set out in a claim form or similar document. There is a distinction therefore between the act of putting in a claim and the contents of the claim form. As noted by Lewison LJ in **Singh**, it if applied to everything necessary to bring a case then it would not have been necessary to add a third category.

> 52. **Lincoln** was a case which concerned a claim for damages from a QC who said that he had been defamed in a letter sent to the Bar Council alleging professional misconduct on his part. It was not the fact of sending that letter which gave rise to judicial proceedings immunity but the contents and so there is no reason to apply a broader interpretation to the second category of cases described. In fact, the words quoted are perfectly apt to describe the position in that case. The immunity applies not just to the evidence before the Bar Council but to the contents of the initial letter sent to them.
>
> 53. Hence, I conclude that **Lincoln** is not authority for the proposition that merely bringing proceedings elsewhere will give rise to judicial proceedings immunity. All that is prevented is any further claims arising out of what is said or written from the outset of those proceedings.
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> 54. I will illustrate the point further with a simple example. If A sues B for theft, and B is subsequently prosecuted for the theft in a criminal case, B cannot say that this is contrary to public policy and that he has immunity as a party to the civil case. In a more mundane example, commonly encountered, a person may bring a claim in the county court and an employment tribunal at the same time alleging a breach of contract. No arguments about judicial proceedings immunity will arise. Either the court or tribunal will usually stay its own proceedings until the outcome of the other case or one case will be struck out as an abuse of process if they are entirely overlapping. That is part of the court or tribunal's delegated powers of case management rather than the application of a common law principle.
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> 55. Adopting that view, the apparent inconsistencies between this case and later ones fall away. **Lincoln** was followed by **Trapp v Mackie** in 1979 where Lord Diplock emphasised the scope of the immunity, but this was confined (378H) to:
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> > ' …words spoken or written in the course of giving evidence in proceedings in a court of justice…'.
>
> 56. I can see nothing is [sic] that case to extend the scope of immunity to the mere bringing of a claim, or in any authority. On that short ground therefore, the application should be dismissed…"
> [Emphasis in original]

19. After addressing the territorial question (which I return to below), the EJ returned to the scope of the immunity from para 64 of his Reasons. The first few paragraphs bear on the earlier passages that I have just set out. (He may have intended his observation in para 68 of the Reasons regarding **Lake**, to refer to **Roy** (given the mention of the solicitor)). The EJ said:

> "64. Having found that there is no immunity simply for bringing other proceedings and no automatic immunity in respect of proceedings in other jurisdictions, how far does it apply?
>
> 65. In **Heath** Auld LJ made clear that the scope of the existing core immunity was unaffected by Article 6, but all of the descriptions of core immunity are limited to the position of witnesses and other participants, and to things said by them. He also explained at para 53 that the basis of the rule was necessity.
>
> 66. Similarly in **Darker,** Lord Hope made a number of references to a core case as one involving a claim based on what a witness said in the course of proceedings. I can only conclude from these passages that their Lordships did not choose to adopt that earlier description in **Lincoln** of what amounts to a core case, and nowhere is there a statement to the effect that immunity attaches to everything that is done from the inception of the proceedings onwards, including the bringing of proceedings.
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> 67. Mr Polak drew a distinction between these core cases and other situations, describing them as JPI 1 and JPI 2 [a reference to Devlin LJ's first two categories], but Mr Kemp maintained that there was no such division. My own view is that the test in **Lincoln** cannot continue to be relied on as a reliable statement of the extent of the immunity, since it has been followed in a

> series of cases at House of Lords level, none of which has specifically endorsed the full extent of that definition, at least as it is being interpreted in this case.
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> 68. It seems to me that the scope of the doctrine has been restricted by degrees, slowly but perceptibly, in these later decisions…Although earlier cases such as **Lake** (concerning the solicitor) involved clear and separable misconduct, the same distinction was less obvious in **Singh** with the pressure applied to a witness, and subsequent comments were then made in that case about the immunity only being applied where necessary, and [to] protect persons who are acting bona fide. Hence the scope of the core immunity now appears to apply to cases against participants in legal proceedings and on the basis of what they have said and done in the course of those proceedings in their capacity as witnesses etc."

20. Having determined that the third detriment was not caught by JPI, the EJ said that for completeness he would also address what he described as the "territorial issue". He noted that there were "very few cases" in which JPI had been applied to bodies outside the United Kingdom (Reasons, para 57). He then referred to three cases that had been cited by the respondent on this point. Of those cases, Mr Kemp now relies upon one of them, **Hasselblad**. In relation to this authority, the EJ observed that the court "started with an enquiry into whether the EU Commission was a quasi-judicial body and did not need to go any further". He then continued:

> "58. …It does not follow that the operation of judicial proceedings immunity automatically applies to proceedings worldwide and that the worldwide application was too obvious to have been raised in either case. I consider that I am essentially without any authority on this point, or at least none has been located, and so I will have to start from first principles.
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> 59. In a typical or core case involving an attempt to bring a claim based on something which a witness has written or said in the course of proceedings in the UK, the public interest is in ensuring that the witness is not menaced by the prospect of being sued for what they say. If they are giving evidence in the UK it will be important to ensure that they are not at risk of being sued overseas. Ordinarily that would be a remote possibility. Cross-border disputes are relatively few. But if they were apprehensive about what they could and could not say in evidence, because they may be sued abroad, that would also affect the integrity of the judicial system in the UK…But that is not something over which courts in the UK have any control. They cannot ban or prevent claims being brought against that witness overseas if that is permitted in the other jurisdiction.
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> 60. What is being suggested in this case by the respondent is that on public policy grounds the arbitration in Singapore should attract judicial proceedings immunity under UK law. That must be on the basis that witnesses in that arbitration would otherwise be inhibited in the evidence they might give and so the integrity of the Singaporean system would be undermined. That appears to be a remote concern from the UK and they may take a different view of the competing public interest considerations in such cases. There is therefore certainly nothing automatic, even in a 'core' case of that sort, about immunity applying.
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> 61. The integrity of the process is not of course the only public interest involved. There is also an interest in avoiding a multiplicity of proceedings, but again the UK interest is largely in avoiding a multiplicity of proceedings in the UK. This is a case in which there is only one set of proceedings in the UK so that interest has no real application. A further consideration is the undesirability of one court pronouncing judgment on the decisions of another…but the exercise to be carried out in Singapore is fundamentally different and this Tribunal is not concerned with any breach of confidentially by Mr Rogerson.
>
> 62. I appreciate that there is a shared and multi-national interest in arbitrations being

> conducted, and in awards being enforceable elsewhere. I was not addressed about any such considerations but is it hard to see how they could amount to a strong countervailing factor. Overall, I am unable to find any clear legal authority for the proposition that judicial proceedings immunity applies to overseas bodies, and approaching the matter from first principles I cannot discern any clear public interest in such an approach. And given the repeated injunctions in **Darker** to the effect that protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice, that it should only be allowed with reluctance and resisted unless absolutely necessary, I do not accept that it does apply generally to overseas bodies."

21. The EJ went on to make some supplementary observations between paras 69 – 73. I do not propose to set them out, save for his reliance upon section 43J of the **ERA 1996** which I include as the claimant continues to rely upon this point (albeit not at the forefront of his submissions). Neither party relied upon the contents of those other paragraphs. At para 73 the EJ said:

> "73. Then there is the applicability of section 43J of the 1996 Act. This seems to be a point of some force and one which was absent in any of the previous cases considered. It is clear that if the respondent's claim for breach of confidentiality had been brought in the UK it would not have been effective to prevent any protected disclosure. The clause…would not be effective to prevent qualifying whistleblowing allegations and so the subject matter of that claim would not trespass at all on the subject matter of this one. It would be very difficult to distinguish between an argument that Mr Rogerson could not pursue his claim because of the confidentiality agreement (which would be impermissible under s.43J) and an argument that he could not pursue his claim because the respondent had commenced proceedings to enforce that confidentiality agreement (the basis of the claimed immunity)."

Applications to the Employment Appeal Tribunal

22. The claimant applied to the Employment Appeal Tribunal ("EAT") to admit the Partial Award from the Singapore arbitration, which had been sent to the parties in November 2023. He said that the award was relevant to the balancing exercise that had to be carried out between the rationale for the immunity (on the one hand) and his lack of access to a remedy (on the other), as it showed that the arbitration should never have been brought. By order sealed on 8 May 2024, HHJ Auerbach refused the application. He was not persuaded that the introduction of this new evidence was necessary for the fair determination and disposal of the appeal. The ET had decided the questions of law raised by the appeal in the claimant's favour; he had not made any decision about the respondent's motives and had not decided whether, if JPI has potential application (contrary to his conclusion), the outcome would be subject to a balancing exercise of the type sought by the claimant. HHJ Auerbach observed that the appeal required the EAT to decide as a matter of law whether JPI applied or could

apply to the impugned conduct and that if the EAT concluded that this depended upon conducting a balancing exercise of the kind sought by the claimant, then it could decide to remit the matter to the ET to undertake that exercise, at which point the claimant could put forward his case as to the relevance of this evidence to that exercise.

23. By order sealed on 17 July 2024, I refused the claimant's application to rely upon the witness statement that he submitted to the ET. I was asked to admit it on the basis that it would provide context regarding the nature and circumstances of the arbitration and evidence about the respondent's motivation. My reasoning was similar to that of HHJ Auerbach. I did not consider that admission of the witness statement was necessary to resolve the legal questions raised by the appeal and I noted that the EJ had not found it necessary to rely upon it. I pointed out that the ET had yet to undertake any fact-finding on these disputed matters and that the EAT did not have jurisdiction to embark upon a fact-finding exercise of its own. I repeated HHJ Auerbach's observations as to the opportunity that the claimant would have to seek to adduce evidence before the ET, should the EAT take the view that the applicability of JPI could only be resolved by a balancing exercise of the kind that the claimant envisaged. I also noted the scale of the evidence that the claimant sought to admit (the 50 exhibits to his statement were said to run to thousands of pages) and I concluded that admission of the same was disproportionate given its lack of relevance to the issues arising in the appeal.

24. Although he had made some references to the claimant's account of events in his skeleton argument, in his oral submissions Mr Polak did not suggest that this was of direct relevance to the issues before the EAT.

The legal framework

ERA 1996 – material provisions

25. Section 43J **ERA 1996** applies to any agreement between a worker and his employer. Subsection (1) provides that any provision in the agreement "is void in so far as it purports to preclude the workers from making a protected disclosure".

26. Pursuant to section 47B(1), a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done on the ground that the worker has made a protected disclosure. For present purposes, it is unnecessary to set out the provisions defining what amounts to a protected disclosure.

Judicial proceedings immunity

27. **Lincoln** concerned a defamation claim brought by a Queen's Counsel in respect of letters sent by the defendant to the secretary of the Bar Council alleging professional misconduct on his part. The Court of Appeal rejected the defendant's plea of absolute privilege; although an inquiry before the Bench of an Inn of Court was a judicial process recognised by law to which absolute privilege attached to the full extent applicable to a court of law, the same did not apply to communications sent to the Bar Council, which was not a step in an inquiry before an Inn of Court. At p.255 Devlin LJ explained the requirement that the body in question should be recognised by law:

> "But absolute privilege is granted only as a matter of public policy and must therefore on principle be confined to matters on which the public is interested and where therefore it is of importance that the whole truth should be elicited even at the risk that an injury inflicted maliciously may go unredressed. The public is not interested in the membership of a private club. The significance of the third requirement – that the court or tribunal should be recognised by law – is that it shows that the public is interested in the matter to be determined by the court. Parliament would not, for example, regulate the disciplining of solicitors if it were not that there is a public interest in the sort of men who practice as solicitors. The same consideration applies to the Bar."

28. Mr Kemp relied upon this passage as indicating that the balance between the competing public interests is struck at the stage when it is accepted that the body in question is a judicial or quasi-judicial entity to which the immunity can apply. Whilst this is a pre-requisite for JPI, I do not consider that the existence of such a body necessarily concludes the questions of where the public interest lies and whether the immunity applies; it will also depend upon whether the circumstances in question come within the established parameters of the immunity and, if they do not, public interest considerations will directly inform the question of whether an extension of the immunity should be granted. Before leaving this passage, I note the acknowledgement – that is repeated in many of the subsequent authorities – that the imposition of absolute privilege carries with it the risk that

maliciously caused injury will not be redressed (as opposed to maliciously caused injury being an exception to the imposition of the immunity).

29. At ps 257 – 258 Devlin LJ described the scope of the privilege as follows:

> "The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses and includes the contents of documents put in evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of *Watson v M'Ewan,* in which the House of Lords held that the privilege attaching to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor…"

30. At p.260 Devlin LJ explained that the third category was required as otherwise "the absolute privilege granted for matters said and done coram judice might be rendered illusory" and that this was the consideration that had animated the reasoning of Lord Halsbury LC in **Watson v M'Ewan** [1905] AC 480.

31. As I have already indicated, Mr Kemp relied upon the second of Devlin LJ's categories, which he submitted has not been materially restricted by the subsequent authorities. Mr Polak accepted that the claimant's third detriment fell within Devlin LJ's description of the second category, but he contended that the scope of the immunity has been narrowed by later caselaw, so that only the first of his categories can be regarded as constituting the core immunity; and that outside of this, the public interest in applying an immunity is much weaker. In response, Mr Kemp pointed out that Devlin LJ did not draw a distinction between the first and second categories in terms of the strength of the applicable public interest, whereas in relation to his third category he indicated at p.263 that the privilege ought not to be extended to matters outside of the proceedings "except where it is strictly necessary to do so in order to protect those who are to participate in proceedings from a flank attack".

32. As regards the scope of the second category, Devlin LJ's focus was upon whether the communications to the Bar Council initiated proceedings before the Inn of Court (p. 258) and Sellers LJ considered that absolute privilege applied "from the time the charge is made on which the conduct of the barrister is assessed" (p.252).

33. In **Roy v Prior** [1971] AC 471("**Roy**") the House of Lords held that JPI did not apply to the

claim for malicious arrest. The defendant was a solicitor who had issued a witness summons requiring the plaintiff, a doctor, to give evidence on behalf of his client at his criminal trial. Subsequently, the defendant considered that the doctor was evading service and so he instructed counsel to apply for a bench warrant to compel his attendance and he gave evidence in support of that application. The warrant was duly issued and the plaintiff was arrested in consequence. Their Lordships held that an action in respect of an alleged abuse of the processes of the court was not to be defeated even though one step in the abuse involved the giving of evidence (479H – 480A). Lord Morris of Borth-Y-Gest, who gave the leading speech, considered that the Court of Appeal had been wrong to regard the immunity as applying, explaining at 477C-E:

> "…I consider that this reasoning fails to give due regard to the nature of an action for malicious arrest. What the plaintiff alleges is that the defendant, acting both maliciously and without reasonable cause, procured and brought about his arrest. The plaintiff is not suing the defendant on or in respect of the evidence which the defendant gave in court. The plaintiff is suing the defendant because he alleges that the defendant procured his arrest by means of a judicial process which the defendant instituted both maliciously and without reasonable cause. The fact that in order to procure the arrest someone…would have to give evidence on oath…does not have the result that an action, if otherwise sustainable, could not be brought. The gist of the complaint, where malicious arrest is asserted, is not that some evidence is given…but that an arrest has been secured as a result of some malicious proceeding for which there was no reasonable cause."

34. Lord Morris noted that, similarly, actions for malicious prosecution often involved the defendant who was sued having given evidence in the earlier criminal proceedings, but the immunity did not apply because the actions are "not brought on or in respect of any evidence given but in respect of malicious abuse of process" (477H – 478A). He also referred to other examples where the courts had distinguished between actions brought in respect of a malicious process and those brought in respect of evidence given in proceedings, including **Melia v Neate** (1863) 3 F. & F. 757, which involved a claim for damages against the defendant for having maliciously and without reasonable or probable cause procured an order for the arrest of the plaintiff for an alleged debt (478D – 479A). In his concurring judgment, Lord Wilberforce observed that: "Immunities conferred by the law in respect of legal proceedings need always to be checked against a broad view of the public interest" (480F).

35. As confirmed by the later authorities (paras 50, 52, 63 and 68 below), the basis of the House of Lords' decision in **Roy** was that JPI did not apply because the essence of the cause of action relied

upon involved a malicious abuse of the court's process (as with claims for malicious prosecution). Their Lordships did not decide that any claim, whatever cause of action was involved, that alleged malicious wrongdoing fell outside the immunity that would otherwise apply. Apart from anything else, were that the case then witnesses could be sued for giving malicious testimony, which is plainly not the law, and this would also have been a complete answer to the contention that the immunity applied in the line of authorities culminating in **Darker**, that considered JPI in the context of claims for misconduct in public office.

36. In **Trapp** the House of Lords held that absolute privilege applied to evidence given at a local inquiry held before a commissioner appointed by the Secretary of State under powers in the Education (Scotland) Act 1946, as the inquiry was of a sufficiently judicial nature. The case was therefore concerned with Lord Devlin's first category of the immunity. Lord Diplock explained that the privilege extended to evidence given before tribunals which acted in a manner similar to courts of justice (379A). At 379G – 380A, he said that in order to decide whether a tribunal acts in a manner similar to a court of justice, and thus is of a kind that will attract absolute privilege for witnesses when they give testimony before it:

> "…one must consider first, under what authority the tribunal acts, secondly the nature of the question into which it is its duty to inquire; thirdly the procedure adopted by it in carrying out the inquiry; and fourthly the legal consequences of the conclusion reached by the tribunal as a result of the inquiry.
>
> To attract absolute privilege for the testimony of witnesses the tribunal, by whatever name it is described, must be 'recognised by law'…This is a sine qua non; the absolute privilege does not attach to purely domestic tribunals. Although the description 'recognised by law' is not necessarily confined to tribunals constituted or recognised by Act of Parliament…"

37. In a similar vein, Lord Frasher of Tullybelton referred to tribunals having "similar attributes" to courts of justice (385G).

38. **Hasselblad** concerned a complaint made by a company to the Commission of the European Communities (as it was at that time) that the plaintiff, who distributed Swedish made cameras in the United Kingdom, was carrying on business in breach of article 85 of the **EEC Treaty**. The Commission commenced proceedings to investigate the complaint pursuant to article 89 of the **Treaty and Council Regulation (EEC) No. 17/62**. During these proceedings, the company sent a letter to

the Commission signed by the defendant, making various allegations about the plaintiff's business. The plaintiff brought a defamation action, contending that the allegations were untrue. The Court of Appeal held that absolute privilege did not apply to the contents of the letter because the article 89 investigation was more in the nature of administrative proceedings, rather than judicial proceedings before a court or tribunal.

39. For present purposes, the potential significance of **Hasselblad** is that the Commission was based outside of the jurisdiction. Sir John Donaldson MR noted that the Commission's procedure was "wholly dissimilar to that of any court or judicial tribunal operating under the common law system, but I do not think that that is the test" (496H). After referring to Lord Diplock's and Lord Fraser's indications in **Trapp** that the immunity applied to tribunals that were similar to courts of justice, Sir John Donaldson observed at 497B - C:

> "…I think that they must have had a wider concept in mind which would embrace courts of justice operating both under common law and civil law procedures…the fact that the decision is reached by Commissioners, who have not attended the hearing, on the basis of advice from representatives of the European Community nations, who are not directly concerned, seems to me to show that the Commission is acting in a manner which is dissimilar to that of either civil or common law courts of justice and that its attributes are dissimilar to such courts."

40. Mr Kemp submits that Sir John Donaldson's references to courts operating under civil law proceedings indicates that he envisaged the immunity applying beyond judicial and quasi-judicial bodies within our own jurisdiction. He also notes that the applicability of the privilege was not rejected on the basis that the Commission was based abroad. Mr Polak, on the other hand, suggests that the absence of reference to the territorial aspect was simply because it was unnecessary to do so, given the court concluded that the Commission was an administrative body for these purposes.

41. **Darker** concerned claims for misfeasance in public office and conspiracy to injure. A prosecution against the plaintiffs was stayed as an abuse of process because of various disclosure issues and they subsequently sued the Chief Constable alleging that police officers involved in the investigation had fabricated evidence against them. The House of Lords allowed their appeal against the claim being struck out on the basis that it was caught by JPI. Given the nature of the claims, their Lordships were concerned with Devlin LJ's third category and whether this was a situation that required an extension of the immunity in order to prevent the absolute immunity that applied to

witness evidence from being outflanked. In summary, the House of Lords distinguished between the immunity that attached to what a witness, including a police officer, would say in evidence in court or in a witness statement made for the purposes of court proceedings (on the one hand) and things done during the course of the investigation which could not fairly be said to form part of their participation in the judicial process and which were never intended to be a part of their testimony, such as the planting of false evidence (on the other): see in particular: 448A – E, 449B – D, 450A – B, 469E – 469H, 470G – 471D and 471H – 472B.

42. Lord Hope of Craighead described the immunity that applied when a police officer gave evidence in the following terms at 445H – 446B:

> "This immunity, which is regarded as necessary in the interests of the administration of justice and is granted to him as a matter of public policy, is shared by all witnesses in regard to the evidence which they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceedings in a court of justice. The same immunity is given to the parties, their advocates, jurors and the judges. They are all immune from any action that may be brought against them on the ground that that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable and probable cause…The immunity extends also to claims made against witnesses for things said or done by them in the ordinary course of such proceedings on the grounds of negligence."

43. Lord Hope explained that the case did not involve any challenge to the core immunity, the question raised "relates to the further extent of the immunity. Where are the boundaries to be drawn?" (446C). He continued:

> "It arises because there is another factor that must always be balanced against the public interest in matters relating to the administration of justice. It is the principle that a wrong ought not to be without a remedy. The immunity is a derogation from a person's right of access to the court which requires to be justified."

44. Lord Hope identified two policy reasons for the immunity: (i) to protect persons who acted in good faith from the vexation of defending actions; and (ii) to avoid a multiplicity of actions in which the truth of what was said would be tried over again (446G – H). In relation to the first of these reasons, Lord Hope cited Auld LJ's observation in the court below that: "the whole point of the first public policy reason for the immunity is to encourage honest and well-meaning persons to assist justice even if dishonest and malicious persons may on occasion benefit from the immunity" (447B).

45. Lord Cooke of Thorndon emphasised that absolute immunity "is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical

reasons", but that it "should not be given any wider application than is absolutely necessary in the interests of the administration of justice" (453E). Similarly, Lord Clyde observed that the immunity ran counter to the policy that no wrong should be without a remedy and it should only be allowed with reluctance and "should not be readily extended" save where it was necessary to do so (456H – 457A).

46. Under the sub-heading "The core of the immunity", Lord Hutton characterised this as "the rule that a party or witness has immunity in respect of what he says and does in court" (463G). As Lord Hope had done, he referred to Kelly CB's description of the immunity in **Dawkins v Lord Rokeby** LR 8 QB 255 ("**Dawkins**") at 264:

> "no action lies against parties or witnesses for anything said or done, although falsely and maliciously and without any reasonable or probable cause, in the ordinary course of proceedings in a court of justice."

47. Noting that **Dawkins** concerned the defendant's oral evidence before a military court of inquiry and a statement that he had handed into the court immediately afterwards, Lord Hutton observed that Kelly CB's reference to "anything…done" was "probably intended to cover the submission of a witness statement to a court" (464B – C).

48. Addressing the rationale for the immunity (as it might apply in that case), Lord Hutton noted that it was to protect a witness who gave evidence in good faith from being harassed and vexed by a subsequent defamation action in respect of their testimony and that if the protection did not apply witnesses might be deterred from giving evidence. He said that in order to shield honest witnesses "the courts have decided that it is necessary to grant absolute immunity to witnesses in respect of their words in court even though this means that the shield covers the malicious and dishonest witness as well as the honest one" (464D – E). In a similar vein he referred to Auld LJ's observation below that where the immunity exists it is also given to those who deliberately and maliciously make false statements, "the immunity is not lost because of the wickedness of the person who claims immunity" (468C).

49. Lord Hutton also emphasised that the "predominant requirement of public policy is that those who suffer a wrong should have a right to a remedy, and the case for granting an immunity which

restricts that right must be clearly made out" (468G).

50. **Heath** concerned the application of JPI to a claim for sex discrimination in respect of the conduct of proceedings by a disciplinary board held under the **Police (Discipline) Regulations 1985**. The disciplinary board heard the claimant's complaint that an officer had sexually assaulted her at work. Her subsequent sex discrimination claim alleged that she had felt intimidated by the all male board and that the board had permitted the police officer's barrister to question her in a humiliating way. The Court of Appeal concluded that the ET had no jurisdiction to hear the complaint since it concerned the conduct of judicial or quasi-judicial proceedings and was caught by JPI. (Neuberger LJ (as he then was) dissented on the applicability of JPI to the composition of the board issue.) At para 17 Auld LJ rejected the claimant's submission that the immunity did not apply to actions in discrimination:

> "Mr Hand submitted, and I agree, that there is no basis for the proposition that the absolute immunity rule only attaches to defamatory statements…it attaches to anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made in respect of such behaviour or statement, except for suits for malicious prosecution and prosecution for perjury and proceedings for contempt of court. That is because the rule is there, not to protect the person whose conduct in court might prompt such a claim, but to protect the integrity of the judicial process and hence the public interest. Given that rationale for the rule, there can be no logical basis for differentiating between different types of claim in its application…"

51. Mr Kemp relied upon this passage for two reasons. Firstly, for the confirmation that JPI applies to all causes of actions, save for a few recognised exceptions. Secondly, for the description of JPI as attaching to "anything said or done by anybody in the course of judicial proceedings". However, this second aspect was the subject of further consideration in **Singh** and in **Daniels v Chief Constable of South Wales** [2015] EWCA Civ 680 ("**Daniels**"), as I set out below.

52. Auld LJ went on to hold that from a domestic law perspective there was no basis to exclude a claim for unlawful discrimination from the application of the immunity; save for the exceptions identified in para 17, it applied "to all forms of collateral action however worthy the claim and however much it may be in the public interest to ventilate it" (para 52). He rejected counsel's characterisation of the issue as whether there was a public interest in *extending* the immunity to cover claims for discrimination; the question in the case of such a well established and generally applicable immunity was "whether it is necessary to make special provision for them by removing the immunity

in relation to such claims" (para 52).

53. Auld LJ considered that the claimant's reliance on article 6 **ECHR** added little to her argument, whether JPI operated as a substantive bar to her claim so as to negative any civil right, meaning that article 6(1) was not engaged (as he was inclined to think), or it acted as a procedural bar, so that article 6(1) applied. Referring to **A v United Kingdom** 36 EHRR 917 (concerning Parliamentary privilege) he observed that both privileges were "fundamental to our public interests, the one in our legislation and governance, the other in the integrity of our judicial system" (para 70). He concluded in relation to the immunity at para 71:

> "…I have no hesitation…in concluding that its purpose is legitimate and is necessary and proportionate in the public interest for the protection of the integrity of the judicial system. And I can see no basis in human rights terms for holding that the statutory recognition in the 1975 Act or eradicating unlawful discrimination in our system, however important it is, should outweigh it…".

54. Auld LJ went on to reject an argument based on **Equal Treatment Directive 76/207**. However, in **P** the Supreme Court held that the reasoning in **Heath** in relation to EU law was unsound (para 35) and overruled it. (EU law does not arise in the present case.)

55. In **Lake** the claimant brought a claim for unfair dismissal under section 103A **ERA 1996** (dismissal by reason of making a protected disclosure). A police disciplinary board had found him guilty of charges relating to his conduct at a fatality and had directed his dismissal. The chief constable of his force had upheld the decision. The ET held that the proceedings before the board and the board's decision were immune from suit, such that the tribunal's jurisdiction to hear the claim was restricted to the actions of the chief constable. The claimant's appeal was allowed on the basis that his claim did not engage JPI; he was simply seeking to put to the tribunal the case that he had unsuccessfully put to the board.

56. The issue before the Court of Appeal was a narrow one. The respondents had argued that the claimant could not "impeach" the decision of the board. However, before the Court of Appeal their counsel accepted that the ET was not bound by the board's decision (paras 27 – 28). Giving the leading speech, Pill LJ noted that this was not a case in which the manner in which the board had conducted proceedings was challenged; the claimant simply wanted to argue that the board had

reached the wrong conclusion and that the ET had jurisdiction to make its own decision as to whether a section 103A dismissal had been established (para 30). This conclusion is unsurprising. Had the Court of Appeal upheld the immunity contention, the right of police officers (who, in general, cannot sue for unfair dismissal) to claim unfair dismissal for whistleblowing, conferred by section 43KA **ERA 1996**, would have been negated simply because the initial decision is made by a quasi-judicial body, the board (para 31).

57. In addition, Maurice Kay LJ emphasised at para 40:

> "Immunity from suit protects those to whom it applies from being sued or otherwise subjected to a mandatory process – for example, by way of a witness order. There is no question of the board or its members being sued or so subjected in the present proceedings in the employment tribunal. It seems to me that for the reasons given by Pill LJ, the respondents have taken a false point and the employment tribunal and Employment Appeal Tribunal fell into legal error when they acceded to it."

58. In giving the leading judgment at the Court of Appeal stage in **P,** Laws LJ stressed "the extremely limited scope of the decision" in **Lake;** characterising it as no more than the chief constable as the effective dismissing officer was not bound by the findings of the board (para 20).

59. **Singh** concerned a claim brought by a head teacher for constructive dismissal. The "final straw" act that she sought to rely upon was that her employer, the local education authority ("LEA"), had put undue pressure on an employee at the school to make a witness statement containing false allegations against her in ongoing proceedings in which she claimed that she had suffered racial discrimination and harassment from parents, staff and school governors. The Court of Appeal allowed an appeal from the EAT's decision that the final straw allegation should be struck out as JPI applied. Giving the leading judgment, Lewison LJ explained that the gist of the unfair dismissal cause of action was not the contents of the allegedly false statement or anything that the witness might say in evidence in the discrimination claim, but conduct outside of the tribunal, namely the alleged breach of contract by the LEA in procuring evidence by putting undue pressure on a potential witness and thereby destroying or damaging the trust inherent in the employment relationship with the claimant (paras 70 – 72).

60. Lewison LJ began his analysis of the earlier caselaw by noting: "The starting point is that any

wrong should not be without a remedy; and that any exception to that basic principle of any system of justice must be necessary, strict and cogent" (para 20). He referred to the same two policy considerations that Lord Hope had discussed in **Darker** (para 44 above). After noting that counsel for the LEA relied upon Kelly CB's broad description of the immunity in **Dawkins** (para 46 above), Lewison LJ commented:

> "But (a) this statement must be read in context and (b) the cases to which Kelly CB referred in making that observation were cases in which the foundation of the cause of action was evidence itself. The context was the demonstration of Kelly CB's concluding proposition, at p 265 that 'Upon all these authorities it may now be taken to be settled law, that no actions lies against a witness upon evidence given before any court or tribunal constituted according to law."

61. Lewison LJ went on to say at para 43 of his judgment that Auld LJ's broad statement of principle at para 17 in **Heath** (para 50 above) could not "be taken literally". He gave, as examples, that advocates and expert witnesses could now be sued in negligence for acts or omissions arising out of their conduct of litigation (paras 43 – 45). Accordingly, it could no longer be said that immunity from civil suit "attaches to anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made" (para 46).

62. Lewison LJ then referred to the description of the immunity in **Lincoln** (para 29 above) and to counsel for the LEA's submission that Devlin LJ's second category "embraced everything that was necessary to bring a case to court". He pointed out that if this submission were correct, then Devlin LJ's third category would have been redundant and he would not have begun it with an examination of the **Watson v M'Ewan** line of cases (para 47). Pausing here for a moment, whilst the EJ in the present case interpreted these observations as Lewison LJ casting doubt upon Devlin LJ's three categories; that is a misunderstanding, Lewison LJ was explaining at this point why he rejected counsel's submission that the second category covered everything necessary to bring a case to court.

63. At paras 48 – 49 Lewison LJ discussed **Taylor v Director of the Serious Fraud Office** [1999] 2 AC 177 ("**Taylor**"), where Lord Hoffman said at 215: "As the policy of the immunity is to encourage freedom of expression, it is limited to actions in which the alleged statement constitutes the cause of action". He also noted Lord Hope's observation in **Taylor** regarding the continuing availability of claims in malicious prosecution because "it is the malicious abuse of process, not the

making of the statement, which provides the cause of action".

64. After citing passages from the speeches in **Darker** and in **Roy**, Lewison LJ observed that: "The key point is that an action will be allowed to proceed if it is not 'brought on or in respect of any evidence given'" (para 60). He then identified further examples that undermined counsel's submission that no civil liability lay for "anything said or done" in the course of litigation. His first example was that if a party alleges that a judgment against him was procured by fraud, they may bring a second collateral action to set aside the judgment (para 64). His second example was that a party who commenced court proceedings in breach of an arbitration agreement or exclusive jurisdiction clause, could be restrained by the grant of a stay or anti-suit injunction and there was no reason in principle to deny the remedy of damages in a claim for breach of contract (para 65). Immediately after giving this second example Lewison LJ said: "The initiation and service of process fall squarely within the second of Devlin LJ's three categories" (para 65). As I understand it (contrary to Mr Kemp's suggestion that at this juncture the Judge was reaffirming the width of the second category), the point being made by Lewison LJ was that despite the apparently broad terms of Devlin LJ's second category, such claims were not caught by JPI. In other words that this was a further indication that earlier broad judicial descriptions of the scope of JPI were not to be read too literally.

65. Lewison LJ then summarised a number of principles that he drew from the caselaw (para 66). Both Mr Kemp and Mr Polak indicated that they did not take issue with this summary. He said:

> "…(i) the core immunity relates to the giving of evidence and its rationale is to ensure that persons why may be witnesses in other case in the future will not be deterred from giving evidence by fear of being sued for what they say in court; (ii) the core immunity also comprises statements of case and other documents placed before the court; (iii) that immunity is extended only to that which is necessary in order to prevent the core immunity from being outflanked; (iv) whether something is necessary is to be decided by reference to what is practically necessary; (v) where the gist of the cause of action is not the allegedly false statement itself, but is based on things that would not form part of the evidence in a judicial injury, there is no necessity to extend the immunity; (vi) in such cases the principle that a wrong should not be without a remedy prevails."

66. In **Daniels**, claims were brought for malicious prosecution, false imprisonment and misfeasance in public office by a number of police officers who had been charged with conspiring to pervert the course of justice in relation to their involvement in the original investigation into the murder of Lynette White (which led to the wrongful conviction of the "Cardiff Three"). The Crown

offered no evidence in the criminal proceedings against the officers after various disclosure failings came to light. In the civil claim, the claimants applied to amend their pleadings to add allegations in misfeasance in public office, including: that the prosecution against them had been continued when it was clear that they could not have a fair trial due to breaches of disclosure obligations, that documents which should have been retained had been destroyed during the trial; that there had been no proper system of disclosure; and there had been failures to properly describe and identify documentation that might help the officers' defence. The majority of the amendment applications, including the allegations I have just summarised, were refused on the basis that JPI applied to these claims. This decision was reversed by Gilbart J, with whom the Court of Appeal agreed. The latter's decision was on the basis that the defendant chief constable had failed to establish that the conduct alleged in these proposed amendments "clearly fell within the scope of the absolute immunity" (para 40). Giving the leading judgment, Lloyd Jones LJ (as he then was) concluded that the most appropriate course was to grant permission to make the contested amendments and for the issue of immunity to be revisited by the trial judge based on his findings of fact (para 40).

67. On a broad view of the immunity, complaints about disclosure failings in the earlier criminal proceedings might be thought to constitute "anything done" in the ordinary course of proceedings (albeit the police were not a party to those earlier proceedings). However, the Court of Appeal explained that the scope of the immunity was more restrictive than this. I note that the EJ did not refer to **Daniels**; I do not know whether it was cited to him.

68. Lloyd Jones LJ reiterated the position explained in earlier authorities that where the immunity applied, it "bars a claim whatever the cause of action, with the exception of suits for malicious prosecution (and analogous claims involving malicious initiation of criminal proceedings) and prosecution for perjury and proceedings for contempt of court" (para 33).

69. At para 34 Lloyd Jones LJ referred to Lord Phillips' identification of the justifications for witness immunity in **Jones v Kaney** [2011] UKSC 13, [2011] 2 AC 398 (paras 16 – 17), namely: (i) to protect witnesses who have given evidence in good faith from being harassed; (ii) to encourage

honest and well meaning persons to assist justice, in the interests of establishing the truth and to secure that justice may be done; (iii) to secure that the witness will speak freely and fearlessly; and (iv) to avoid a multiplicity of actions in which the value or truth of the evidence of a witness would be tried all over again. Lloyd Jones LJ emphasised that as the effect of a plea of immunity was, in many cases, to leave a wrong without a remedy, the immunity must be limited to cases where it is necessary to achieve these objectives.

70. Lloyd Jones LJ noted that in **Darker**, Lords Hope, Mackay and Hutton emphasised the immunity's character as a witness immunity (para 38). He considered that Auld LJ's description of the immunity at para 17 in **Heath** (para 50 above) was "too broad" and agreed with Lewison LJ's observation in **Singh** that this statement "cannot be taken literally" (para 40). He said that Auld LJ's description "fails to recognise that the immunity is essentially a witness immunity concerned with the giving of evidence and the making of statements in judicial proceedings". He expressed agreement with Lord Hutton's observation at 446B – C in **Darker** (paras 46 - 47 above) regarding the intention behind Kelly CB's "anything said or done" formulation in **Dawkins**, adding that it was "not, to my mind, intended to extend the immunity to conduct unconnected with the giving of evidence or the making of statements" (para 40).

71. Mr Polak highlighted the emphasis upon JPI being essentially a witness immunity; Mr Kemp submitted that Lloyd Jones LJ envisaged that conduct that was "connected" to the giving of evidence or the making of statements would be caught by the immunity.

72. Lloyd Jones LJ concluded that in refusing the amendments, the Judge had taken too broad a view of the immunity, proceeding on the basis that there was a general immunity from suit "for a prosecutor in respect of the initiation, continuation and conduct of criminal proceedings and that the immunity is not limited to what is said or done by witnesses" (para 42). He continued that the immunity applied:

> "…essentially to statements made by witnesses in the course of giving evidence and to certain limited but necessary extensions of that principle. The fact that an activity may be intimately associated with the judicial phase of the criminal process, as distinct from the administrative or investigatory function, does not in itself, necessarily give rise to immunity. Neither the decisions in previous authorities nor the identified objectives of the immunity justifies a rule of the breadth

> which he identified."

73. Lloyd Jones LJ went on to emphasise that the authorities included frequent statements that for the immunity to apply, the cause of action must be in respect of the evidence given or the statement made (para 44). He considered that Lewison LJ was correct in **Singh** when concluding at para 66 that where the gist of the cause of action was not the allegedly false statement itself "but is based on things that would not form part of the evidence in a judicial enquiry, there is no necessity to extend the immunity" (para 45). He considered that the proposed amendments in **Daniels** were not founded on "the content of any express or implied statement associated with service of the schedule of unused material. On the contrary, the substance of the complaint relates to the way in which the disclosure exercise was performed" (para 46).

74. For present purposes, the last case I need to refer to is **In re MBI International & Partners Inc (in liquidation)** [2021] EWCA Civ 1190, [2022] Ch 212 in order to highlight that after reviewing the leading cases on JPI, Asplin LJ observed at para 60:

> "It seems to me, therefore, that what emerges from these authorities is that despite the very broad statements of the principle which have been made and reiterated, the existence of immunity from suit has been approached on a context specific basis. Even in cases in which the immunity is described in broad terms, the court has conducted a close examination of the particular circumstances of the case, bearing in mind the policy considerations, in order to determine whether the immunity applies. That iterative approach is unsurprising given the significant consequences which flow from the application of the principle."

75. She continued that it was "essential, therefore, that the precise nature of the immunity and the context in which it is said to arise, are considered in detail" (para 61).

Article 6(1) ECHR

76. Article 6(1) **ECHR** provides (as relevant) that, "In the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

77. In **Fayed v United Kingdom** 18 EHRR 393 the European Court of Human Rights ("ECtHR") explained that article 6(1) embodied the "right to a court" of which "the right of access, that is the right to institute proceedings before courts in civil matters constitutes one aspect". The right only

extends to disputes over civil rights and obligations which can be said, at least on arguable grounds, to be recognised under domestic law (para 65). In the same paragraph, the court went on to confirm that article 6(1) "may have a degree of applicability" in instances where procedural bars prevented or limited the possibility of bringing potential claims to court. Citing from earlier authority, the ECtHR described the principles as follows:

> "(a) The right of access to the courts secured by Article 6(1) is not absolute but may be subject to limitations: these are permitted by implication since the right of access 'by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals',
>
> (b) In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.
>
> (c) Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

Submissions

The respondent's submissions

78. Mr Kemp submitted that the act of commencing the arbitration by the arbitration notice fell squarely within the second category of JPI identified by Devlin LJ in **Lincoln** and that this category (as opposed to his third category) was an aspect of the core immunity. He said that there was no support to be found in the authorities for the distinction drawn by Mr Polak as to the differing strength of the public interest in favour of the immunity in Devlin LJ's first and second categories. Accordingly, the application of JPI in this case did not involve any extension of the immunity, such as would require an evaluation of where the balance lay between the competing public interests. He contended that the EJ's interpretation of the immunity as confined to claims "arising out of what is said or written" in the earlier proceedings was unduly restrictive and deprived Devlin LJ's description of the second category as comprising "everything that is done from the inception of the proceeding onwards" of any content.

79. Mr Kemp took issue with the proposition that the subsequent authorities had materially reduced the scope of Devlin LJ's second category. He noted that both Lords Hope and Hutton in

Darker included references to "anything done", as well to as "anything said", in their respective descriptions of the immunity (paras 42 and 46 above), and that "done" must mean something different to "said" in this context. In terms of Lloyd Jones LJ's analysis in **Daniels**, he submitted that the act of commencing proceedings was self-evidently and inextricably "connected to" the submission of written statements, which would include (for example) the document that initiated the claim and the skeleton arguments, as well as statements made by witnesses; and that nothing said in **Daniels** precluded these from coming within the immunity. He suggested that in para 45 of his judgment, Lloyd Jones LJ was simply drawing a distinction between things that occurred inside and outside of the proceedings. He also noted that the present circumstances did not concern the particular inroads into Auld LJ's description of JPI in **Heath** that were identified in **Singh** and in **Daniels**. He contended that the arbitration notice was equivalent to the statements of case that Lewison LJ acknowledged came within JPI in his summary of the principles at para 66 of his judgment (para 65 above).

80. Mr Kemp submitted that including the act of commencing proceedings within the immunity accorded with its rationale, as otherwise those acting in good faith would be deterred from initiating proceedings through fear of facing a subsequent claim for having done so.

81. As regards the **ECHR**, Mr Kemp's position was that **Heath** established that JPI was a true immunity rather than a procedural bar, so that article 6(1) had no application. In the alternative, any interference with rights guaranteed by article 6(1) pursued a legitimate aim and was a proportionate means of achieving that aim. Furthermore, contrary to the claimant's suggestion to the contrary, the outcome of the arbitration was irrelevant to the balancing of the competing public interests.

82. Mr Kemp submitted that it did not matter where the earlier proceedings had taken place, provided that the body in question was judicial or quasi-judicial in nature, so as to meet the **Trapp** criteria. Lord Diplock in **Trapp** had not confined the application of JPI to tribunals that were constituted or recognised by Act of Parliament, so there was no requirement that the body in question was recognised by English law or located here; **Trapp** was both the starting point and the end point for resolving this question. He emphasised Sir John Donaldson's references in **Hasselblad** to a body

operating under "civil law" procedures (para 39 above). He indicated that his interpretation of **Hasselblad** was supported by the authors of *Gatley on Libel and Slander* (13th edition) who observe in relation to this authority at para 14-018: "It would seem that foreign courts operating under the civil law system or the European Court of Justice are to be regarded for this purpose as 'courts'…even though their procedures may be very different from those of the common law systems".

83. Mr Kemp submitted that such an approach was a logical corollary of the common law principle of comity, which requires the interpretation of the common law rule of JPI to work in harmony with related foreign law, including the Singaporean law governing arbitrations. Furthermore, that there was a particularly strong public interest in ensuring harmony between English law and related foreign law in the context of foreign-seated arbitrations, in order to support the integrity and proper functioning of arbitral proceedings. In this regard he cited a number of authorities that had referred to English law's strong pro-arbitration policy, for example in **Nori Holding Ltd v Public Joint Stock Company 'Bank Otkritie Financial Corpn'** [2018] EWHC 1343 (Comm), [2019] Bus LR 146 Males J (as he then was) referred to "the strong international public policy in support of arbitration reflected in the New York Convention" (para 106). Mr Kemp also drew my attention to article II of the New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention", para 121 below).

84. He submitted that it followed that the EJ had misunderstood or misapplied the caselaw in a number of important respects.

The claimant's submissions

85. Mr Polak submitted that JPI is focused on the protection of evidence given before a judicial body and that this was to be regarded as the core immunity. Whilst potential immunity for the commencement of proceedings had "some legal support", it did not apply with the same force as Devlin LJ's first category. He said that the rationale behind that first category – allowing witnesses to be able to give their evidence freely – was much stronger than the rationale identified in respect of

the second category, namely, to prevent a multiplicity of actions. In this context, Mr Polak emphasised the public interest in providing a remedy for whistleblowers. Furthermore, the judgments in **Singh** and in **Daniels** confirmed that the focus of the immunity was upon witnesses' evidence and that it could no longer be said that JPI attached to anything said or done by anybody in the course of proceedings. The core immunity did not apply here as the claimant's claim for the third detriment was not based on what was said in the arbitration. Lewison LJ's judgment in **Singh** also indicated that the immunity was not intended to protect malicious and untruthful persons, but those who acted in good faith; and the application of the immunity in this case would protect malicious and untruthful persons if the claimant's case was made out at trial.

86. In addition, Mr Polak relied on the House of Lords' decision in **Roy** as showing that JPI did not apply where the complaint related to the malicious bringing of proceedings, submitting that the present case was analogous. He also submitted that the decision of the Court of Appeal in **Lake** was "on all fours" with the present issue and that the instant circumstances were analogous to those in **Singh**.

87. Mr Polak further submitted that there was no authority that extended Devlin LJ's second category to protect the bringing of proceedings overseas; **Hasselblad** was decided on the basis that the body in question was administrative rather than quasi-judicial and in any event the Commission was recognised by our domestic legal system. It was against public policy, and the need to construe the immunity as strictly as possible, for it to be extended to cover an overseas arbitration. It would otherwise leave the claimant, who had been wronged, without a remedy and this was the first call on the public interest. He contended that to extend the immunity in the way the respondent sought would allow it to apply to abusive overseas proceedings, which our domestic courts had no power to control in the way that they could with abusive proceedings in this jurisdiction. Furthermore, the multiplicity of actions rationale and concerns about overburdening domestic courts and tribunals could not apply with any force, as the present situation did not concern more than one proceedings in this jurisdiction.

88. Mr Polak continued to derive support from section 43J **ERA 1996**, contending that it would

be contrary to the wider public interest for (on the one hand) the respondent to be able to bring the arbitration in Singapore in reliance on the claimant's alleged breach of the confidentiality clause in the Agreement, when that clause could not found an equivalent action in this jurisdiction as it would be treated as void; and (on the other hand) for the respondent to be immune from suit in this jurisdiction for the bringing of that arbitration claim.

89. Mr Polak also submitted that to extend JPI as the respondent sought would amount to a disproportionate interference with the claimant's rights under article 6(1) **ECHR**. He contended that there was no legitimate aim for JPI to extend to the bringing of foreign proceedings and, even if there was, it was not of such a strength as to render the absolute bar afforded by JPI proportionate to any such aim. He supported his argument on disproportionality by referring to the same factors that he said militated against the extension of the immunity at common law.

90. Whilst he did not seek to support every aspect of the EJ's reasoning, Mr Polak submitted that the EJ's legal analysis was broadly correct and that he had come to the right conclusion that the immunity did not extend to protect the bringing of overseas litigation.

Discussion and conclusions

General observations

91. In light of the EJ's decision and the parties' submissions, the following issues arise for my consideration:

i) Would the claimant's pleaded claim in respect of the third detriment come within the established parameters of JPI if there was no jurisdictional issue involved;

ii) If so, does it make a material difference that the arbitration proceedings were in Singapore;

iii) If the application of JPI would involve an extension of the immunity, is that extension necessary to prevent the core immunity from being outflanked; and

iv) Would the application of the immunity involve an interference with the claimant's

rights under article 6(1) **ECHR**?

After making some general observations, I will address each of these points in turn.

92. As the caselaw I have reviewed illustrates, it is important to focus on the nature of the particular claim - the cause of action in question, what that cause of action is founded upon and the extent to which this relies upon what is said or done in an earlier judicial or quasi-judicial proceeding, as opposed to events outside of the earlier proceedings.

93. Whilst I return to the specifics of the EJ's approach at paras 112 – 115 below, it is useful to note at this stage that his reasoning at paras 51 – 56 of his Reasons (para 18 above) indicates that he wrongly approached the issue on a level of generality, asking whether "merely bringing proceedings elsewhere" would give rise to JPI, rather than focusing on the claimant's pleaded claim, which was not referred to at all in the Reasons, despite the list of issues explicitly cross-referring to para 16g of the pleading (paras 7 and 10 above)).

94. I have some sympathy for the EJ in this regard, as their skeleton arguments for this appeal tend to indicate that neither counsel's submissions were focused on the pleaded case at the hearing below. I raised the terms of the pleaded third detriment with counsel at the start of the appeal hearing and gave them a chance to address me in detail on this during their submissions.

95. The claimant's claim in this regard is that because he made certain protected disclosures, the respondent subjected him to the detriment of a maliciously brought groundless arbitration, (paras 7 – 8 above). Accordingly, the pleaded detriment is not simply that the respondent initiated costly arbitration proceedings against the claimant, it is that the respondent initiated a groundless arbitration process against the claimant that was based on false allegations.

96. When I put this to Mr Polak, he suggested that the detriment should be seen as the bringing of the arbitration, rather than the making of the false allegations that the arbitration was based upon, contending that the former could be separated from the latter for the purposes of considering whether JPI applied. (He appeared to accept that JPI would apply to preclude a section 47B detriment that was based on the contents of the arbitration claim, but then seemed to resile from that position as his

submissions continued, so I do not treat this as a formal concession.)

97. In any event I do not accept the submission that the two can be treated separately, as proposed. Firstly, that is not how the claim is pleaded, as I have already set out (paras 7 and 8 above). Secondly, given the nature of the pleaded detriment it would be completely artificial to separate out the bringing of the arbitration proceedings from the basis upon which they were brought. Thirdly, as I have already indicated, it is important to consider what the claim is founded upon. In this instance, in order to determine whether the pleaded detriment was established, the ET would need to assess whether the arbitration was brought on a groundless basis, which would, in turn, inevitably involve the tribunal in considering and making findings on the contents of the arbitration notice (and, potentially, subsequent forms and statements in those proceedings as well). Mr Polak disputed this proposition, indicating that all that would be needed in the current tribunal proceedings to establish the third detriment would be for the claimant to give evidence that the earlier proceedings were groundless and malicious. This is unrealistic; the ET would only be able to decide if the earlier proceedings were groundless and maliciously brought (and thus the alleged detriment established) if it ascertained what was said in those earlier proceedings and made an assessment of the documentation that the respondent submitted in initiating and supporting the arbitration. I therefore approach the question of whether JPI applies to the third detriment on this basis.

The pleaded claim and the established parameters of the immunity

98. As I have already indicated, Mr Polak accepts that, on a literal reading, the third detriment claim comes within Devlin LJ's second category in **Lincoln** (para 31 above). I am also quite clear that Devlin LJ regarded his second category, as well as his first category, as constituting a part of the core immunity (para 31 above). However, as I have explained when reviewing the caselaw, subsequent judicial observations of high authority have refined or clarified the breadth of the core immunity; and, accordingly, the scope of Devlin LJ's second category must be considered and applied in light of this later caselaw. Mr Kemp's submission that the second category "has been followed

without demur by all of the later authorities" is incorrect. However, I also consider that the core immunity is not only confined to witness evidence, as Mr Polak suggested at some points in his submissions.

99. Whilst Mr Kemp is right to point out that Lord Hope in **Darker** described the immunity as applying to "anything said or done" by witnesses, parties, advocates, jurors and judges "in the ordinary course of any proceedings" (para 42 above), his Lordship did not specifically discuss the "anything…done" aspect of the immunity (which did not directly arise for consideration in that particular case). Lord Hutton, on the other hand, expressed the view that the intended compass of that phrase when it was originally used in **Dawkins** (paras 46 – 47 above), was a limited one, referring to the submission of a witness statement.

100. In **Singh**, Lewison LJ explained that it could no longer be said that immunity from civil suit "attaches to anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made" (para 61 above); and I have already indicated why I reject Mr Kemp's interpretation of para 65 of Lewison LJ's judgment (para 64 above). However, in the overall summary at para 66 of his judgment, Lewison LJ accepted that the core immunity "also comprises statements of case and other documents placed before the court" (para 65 above). Thus, this would appear to include the document that commenced the earlier proceedings, whether it was, for example, a claim form, an application notice or an arbitration notice, there being no rational reason to differentiate between these initiating documents and subsequent statements of case.

101. Lloyd Jones LJ's judgment in **Daniels**, is consistent with the Court of Appeal's approach in **Singh**. He agreed with Lewison LJ that the "anything done" formulation was not to be read literally, stressing that the fact that an activity was "intimately associated with the judicial phase" of the earlier proceedings "does not in itself necessarily give rise to the immunity" (paras 71 – 72 above). Furthermore, he characterised the core immunity as applying to the giving of evidence and the making of statements (para 71 above). In that case it was unnecessary for Lloyd Jones LJ to identify precisely where the boundaries of the core immunity lay (as opposed to distilling its essence), but I consider

that his reference to conduct "unconnected" with the giving of evidence or the making of statements as being outside its scope and his acknowledgement that there were "certain limited but necessary extensions of the principle" (paras 71 and 72 above), indicate that he accepted that the core immunity would encompass matters that were inextricably linked to the giving of evidence or to the making of statements. I accept that this would include statements of case, including the claim or notice that initiated the claim. Such a proposition is consistent with Lloyd Jones LJ's reasoning, his application of the principles to the case before him (para 73 above) and if he had disagreed with Lewison LJ in this respect, I would have expected him to have said so.

102. As the judgments in both **Singh** and **Daniels** emphasise, for the immunity to apply it is also necessary for the claim to be founded upon the statement of case (or evidence) in the earlier proceedings, as opposed to, for example, being based upon extraneous events such as the alleged witness suborning in **Singh** (paras 65 and 73 above).

103. Whilst the emphasis in most of the recent cases has been on the immunity as it applies to witnesses (given the nature of the particular claims), I can see nothing that suggests that the core immunity does not continue to apply to parties, provided that the circumstances meet the requirements I have highlighted in the preceding three paragraphs. Indeed, Lewison LJ's reference to "statements of case" positively supports this proposition.

104. In the present instance, for the reasons I have identified at paras 92 – 97 above, I do not have to decide whether the immunity would apply if the pleaded detriment was simply that costly / inconvenient arbitration proceedings were initiated against the claimant and I do not express a view upon this. As I have explained in those paragraphs, I am quite clear that the pleaded third detriment is founded upon the initiating arbitration notice, as it is alleged that the respondent commenced groundless arbitration proceedings comprising deliberately false allegations. By contrast with, for example, the constructive dismissal claim in **Singh,** the claimant does not found his claim upon something extraneous to the arbitration process, it is the very nature and content of those proceedings that he relies upon as constituting the detriment.

105. It also appears to me that the applicability of the immunity to these circumstances is entirely consistent with both central planks of its rationale (para 44 and 60 above). If subsequent claims can be brought on the basis that the first proceedings were groundless, potential litigants may be deterred from suing and/or subject to the vexation of defending the subsequent action and there would be a potential multiplicity of proceedings, the second proceedings arising out of things said in documents in the first proceedings.

106. I am therefore quite clear that if there was no jurisdictional dimension, the pleaded claim in respect of the third detriment would be caught by JPI.

107. In arriving at this conclusion I have had full regard to Mr Polak's submissions. Whilst I have already addressed the central issue, I will summarise why I reject the supporting points that he relied upon.

108. I do not accept that **Roy** is authority for the proposition that the immunity does not apply where the earlier proceedings were said to have been brought maliciously. As the authorities explain, there are certain specific causes of action that are regarded as well-established exceptions to JPI (paras 35, 50, 52, 63 and 68 above). So far as malicious prosecution and analogous torts are concerned, the alleged malicious abuse of the court's process is inherent in and integral to the cause of action and this provides the distinction with other causes of action. There is no equivalence with the cause of action of being subjected to a detriment by reason of making protected disclosures under section 47B **ERA 1996**, where abuse of the court's processes is not inherent in the nature of the claim.

109. Furthermore, as will be apparent from judicial dicta I have referred to, where the immunity applies, it benefits the malicious as well as those who act in good faith (paras 28, 44, 48 above); it is not the position, as Mr Polak appeared to suggest, that whatever the cause of action pleaded, whether the immunity applies or not is determined on a case by case basis, after assessing whether the conduct in the particular case was malicious or not. If that were the position the assessment of the facts to determine whether the immunity applied or not would itself defeat the purpose of having the immunity; and there is simply no support for such an approach in the authorities. In this regard Mr

Polak referred to Lewison LJ's citation of **Surzur Overseas Ltd v Koros** [1999] CLC 801 (at para 61 of **Singh**). However, the passage from Waller LJ's judgment does not support such an approach; it simply stresses the need for the claim to be founded on the earlier evidence (or statement of case), a requirement I have already taken account of at paras 102 and 104 above.

110. Mr Polak also placed emphasis upon this being a claim related to whistleblowing. Whilst I readily accept that there is a recognised public interest in the ability to litigate for those who suffer detriment or dismissal in consequence of whistleblowing, the same can be said with equal force for numerous causes of action including in relation to claims for discrimination and claims for misconduct in public office, to which JPI applies. In circumstances where the core immunity would otherwise apply (that is to say, save for the recognised exceptions that I have referred to at para 108 above); it is well established that the public interest in the application of JPI is regarded as outweighing the public interest in permitting the litigation of the claim.

111. I have already explained why, contrary to Mr Polak's submissions, this case is not analogous to or on all fours with either **Lake** (paras 56 - 58 above) or **Singh** (paras 59 and 104 above). I mention for completeness, that in so far as Mr Polak contended that **Lake** also decided that the laying of charges was not within the immunity, the same was a concession made by counsel in the circumstances of the issue in that case, as appears from para 10 of the judgment.

112. It follows from the conclusion that I have already expressed, that I consider the EJ's analysis and his application of the caselaw to be flawed. As I have indicated, I have some sympathy with the fact that it appears that the submissions made to him did not direct his attention to the specifics of the claimant's pleaded case (para 94 above). I also note that this was a particularly challenging case in which to provide oral reasons in the first instance, as the EJ did on the second day of the hearing.

113. In general terms, the EJ was correct in detecting a trend towards a more restrictive articulation of the core immunity in the later authorities. However, his approach was erroneous in a number of significant respects. I will identify the main points, rather than go through all of his reasoning. As I have already highlighted, the EJ failed to refer to or focus upon the way that the third detriment was

pleaded (paras 93 – 97 above). In turn, this led him to approach the JPI issue as though the question for him was a broad generic one as to whether the immunity applied to "the mere bringing of a claim" (para 56, Reasons). He failed to appreciate that the question of whether the immunity applied involved considering what this particular pleaded claim was based upon. He wrongly thought that the question was simply whether the immunity prevented a second set of proceedings being brought, that is to say irrespective of whether the second set of proceedings was founded upon an aspect of the first proceedings. This error is confirmed by the EJ's formulation of the issue he believed he had to decide at paras 51, 53 and 56 of the Reasons and the examples he gave at his para 54 (para 18 above). There are many circumstances in which there may be more than one set of proceedings relating to the same or a similar subject matter without any question of JPI arising, but that in itself sheds no light on the scope of the immunity when the second claim, for example, is founded upon evidence or statements of case from the first proceedings.

114. The EJ did not refer to the key passages identifying the ambit of the core immunity that I have drawn from **Singh** and from **Daniels** and applied to the present circumstances (paras 100 - 106 above). At para 51 of his Reasons, he misunderstood para 47 of Lewison LJ's judgment in **Singh** (para 62 above). At para 55 of his Reasons, he wrongly treated **Trapp** as confining the core immunity to words spoken or written in the course of giving evidence. As I explained at para 36 above, **Trapp** was concerned with whether witness evidence to a local inquiry attracted the immunity (which depended upon whether it was a quasi-judicial body); hence the focus on witness evidence in that case. Lord Diplock did not discuss **Lincoln** or purport to confine its parameters. (I also note that there is some inconsistency with this passage at para 55 of his Reasons and the EJ then saying at para 68 that the immunity applied to what participants had said "and done" in the course of proceedings.). Auld LJ in **Heath** did not limit the application of the core immunity to things said by witnesses and other participants; and Lord Hope in **Darker** did not limit the core immunity to a claim based on what a witness said in the course of proceedings (paras 50 and 42 above). (Albeit those judgments need to be read in light of the judgments in **Singh** and in **Daniels**, as I have explained).

115. Lastly, the EJ perceived section 43J **ERA 1996** as a point of "some force", as he said at para 73 of his Reasons. The reasoning is a little hard to follow; I do not see why, as he suggested, it would be difficult to distinguish between an argument that the claimant could not pursue his claim because of the confidentiality clause (which would fail because of section 43J) and an argument that one of the pleaded detriments could not be pursued because it came within JPI. Mr Polak made a different submission to me regarding section 43J and the balance of the public interest (para 88 above); which he accepted would only be of relevance if the application of JPI to the third detriment would involve an extension of the immunity, rather than the application of the core immunity.

The significance of the arbitration being based in Singapore

116. The starting points for my consideration of this issue are the EJ's unchallenged finding that the Singapore-based arbitration was a judicial or quasi-judicial proceeding and my conclusion that the pleaded third detriment would clearly come within the core immunity if there was no jurisdictional issue in relation to the arbitration. For the reasons I identify below, I consider that the EJ erred in concluding that JPI does not apply "generally to overseas bodies" and the fact that the arbitration was based outside the jurisdiction does not prevent the application of the core immunity that would otherwise apply.

117. Whilst Mr Kemp is correct to say that the House of Lords in **Trapp** did not suggest that the applicability of JPI was limited by territorial or jurisdictional considerations, I can only attach limited significance to this, as their Lordships did not need to address that aspect. However, I accept that **Hasselblad** does afford support for the respondent's position. Whilst it is true that the application of the immunity was in any event rejected (on the basis that the Commission's proceedings were administrative in nature), Sir John Donaldson did address in terms the fact that the Commission's procedure was wholly dissimilar to that of any court or tribunal operating under our common law jurisdiction; he regarded this as insignificant and he accepted the potential applicability of the immunity to a civil law system (para 39 above). If he had considered that JPI could not apply to extra-

territorial proceedings he could easily have said so and this would have been a complete answer to the application of the immunity.

118. Accordingly, it follows that the EJ did not appreciate the significance of **Hasselblad** and was in error when he said that he was "essentially without any authority on this point" (para 58, Reasons).

119. The position is reinforced, as Mr Kemp submits, by the common law principle of comity and the strong public policy interest in ensuring harmony between English law and foreign jurisdictions in the context of foreign-seated arbitrations.

120. In their joint judgment in **Re B (A Child)** [2016] AC 606 at para 61, Baroness Hale and Lord Toulson adopted a description of the principle of comity given by US Supreme Court Justice Breyer in his book *The Court and the World* (2015), pp 91 – 92 as follows:

> "the court must increasingly consider foreign and domestic law together, as if they constituted parts of a broadly interconnected legal web. In this sense, the old legal concept of 'comity' has assumed an expansive meaning. 'Comity' once referred simply to the need to ensure that domestic and foreign laws did not impose contradictory duties upon the same individual; it used to prevent the law of different nations from stepping on one another's toes. Today it means something more. In applying it, our court has increasingly sought interpretations of domestic law that would allow it to work in harmony with related foreign laws, so that together they can more effectively achieve common objectives."

121. As Mr Kemp submitted, comity in the present context points to an interpretation of the common law rule of JPI which works in harmony with related foreign law, namely here the Singaporean International Arbitration Act 1994 (para 13 above) and the relevant international treaty, the New York Convention, to which both the United Kingdom and Singapore are signatories. Article II of the Convention guarantees recognition of agreements to arbitrate disputes, providing:

> "1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

122. A harmonious interpretation of JPI requires recognising the legal authority of the Singapore-seated arbitral tribunal and accepting that its proper functioning is a matter of significance. Added to

this is the further significant feature of the particular recognition afforded to foreign-based arbitration proceedings. Mr Polak did not take issue with Mr Kemp's contention that the English courts have long recognised foreign arbitration awards and foreign judgments by giving full effect in this regard to common law doctrines such as estoppel, res judicata and abuse of process (Dicey, Morris & Collins, *The Conflict of Laws* (16th edition) at paras 14-007, 14-034 – 14-047 and 16-124 – 16-125). This is consistent with the English courts' acknowledgement of "the strong international public policy in support of arbitration" (para 83 above).

123. I turn to the EJ's reasoning as to where the public interest lay (in a situation that he regarded as free from authority). His reasoning at para 59 addressed the converse situation to the present case, namely whether a witness could be sued abroad for something they said in an English court. The EJ accepted that this prospect would "affect the integrity of the judicial system in the UK". Accordingly, this in fact underscored the importance of judicial comity in this area, rather than the reverse.

124. In his next paragraph the EJ characterised the prospect of a witness being inhibited in arbitration proceedings in Singapore and the undermining of the Singaporean system as "a remote concern from the UK". This appears to conflict with, rather than follow from his observation at para 59 that I have just discussed. It also fails to recognise the fundamental importance attached to comity and to foreign-based arbitrations in this jurisdiction, as I have described. (Mr Kemp explained that the EJ was not addressed in detail on these matters - as the EJ acknowledged at para 62 of the Reasons - because it was not appreciated that this was in issue.)

125. Similarly, the EJ does not appear to have had regard to the principle of comity when suggesting that a multiplicity of actions was not a public interest that has any real application if the first proceedings are based overseas (para 61, Reasons). Then the consideration referred to in the last sentence of para 61 (one court pronouncing judgment on the decision of another) would be of more relevance to an abuse of process or issue estoppel argument, than to JPI; however, as I have already indicated, overseas judgments and arbitration awards have been recognised in the application of those common law principles.

126. Whilst at para 62 of his Reasons, the EJ acknowledged "the shared and multi-national interest in arbitrations being conducted, and in awards being enforceable elsewhere", he was in error in observing that it was "hard to see how they could amount to a strong countervailing factor" for the reasons I have already indicated.

127. Furthermore, whilst the EJ referred to their Lordships' warnings in **Darker** against *extending* the immunity any wider than is absolutely necessary, he was approaching matters on the basis of his earlier finding that the third detriment could not come within the core immunity in any event. I have explained why I arrive at the contrary conclusion that this would be a core immunity situation if no issue of jurisdiction arose. In addition, I am satisfied that the core immunity applied to the pleaded allegation in respect of the Singaporean arbitration and that no extension of the ambit of JPI is involved in light of **Hasselblad** and the supporting policy considerations that I have just identified.

128. Mr Polak's submissions to me were also predicated on the basis that applying JPI to the pleaded third detriment involved an *extension* of the immunity. I acknowledge that if this was an extension situation, the point that he made concerning the lack of control that domestic courts would have over abusive overseas proceedings might have some force. However, in those circumstances I still do not consider that it would outweigh the strong public interests that I have identified. Furthermore, as my earlier consideration of the authorities underscores, the application of the immunity has to be approached on the basis of the position of those who litigate in good faith and that where it is appropriate to apply it, the immunity also protects those who act maliciously or abusively, rather than such qualities provided an exception to the application of the immunity (paras 28, 44 and 48 above).

Extending the immunity

129. In the previous two sections of my judgment, I have explained why the pleaded third detriment comes within the established parameters of JPI. Accordingly, the question of extending the immunity and evaluating competing public interests in order to determine whether it is necessary to extend it in

order to prevent an outflanking of the immunity do not arise.

130. For the avoidance of doubt, I do not accept Mr Polak's suggestion that the courts have drawn a distinction between the strength of the applicable public interests within those circumstances where the application of the immunity is established, such that in instances not involving witness evidence the public interest balance is to be re-assessed on each occasion on an individual case by case basis. None of the authorities that I have discussed afford any support for such an approach. Whilst Mr Polak placed particular emphasis in this regard on passages from the speeches in **Darker**, as I have already explained, this was a case involving Devlin LJ's third category where an extension of the immunity was under consideration (paras 41 and 43 above).

Article 6(1) ECHR

131. As the pleaded third detriment falls within the established parameters of JPI, the compatibility of the immunity with article 6(1) has already been determined in **Heath** (paras 52 - 53 above). As I have discussed, the judgments in **Singh** and in **Daniels** have indicated that Auld LJ's description of the immunity at para 17 was too broad, however I have not been shown any authority that casts doubt on his analysis in respect of the **ECHR** position and there is no basis to depart from it. In so far as Mr Polak submitted that there is no or no sufficiently legitimate aim for JPI to extend to the bringing of foreign proceedings, I have addressed the point at paras 119 – 122 above.

Outcome

132. For the reasons I have identified above, I allow the respondent's appeal and set aside the ET's finding that JPI does not apply to the third pleaded detriment. The question is one of pure law and the only tenable conclusion in the circumstances is that the detriment is within the established parameters of the immunity. Accordingly, I substitute a finding that the immunity applies to the detriment pleaded at para 16(g) of the Particulars of Claim and strike out this part of the claim. I remit the claim to the ET for determination of the outstanding issues identified in the agreed list of issues.