Neutral Citation Number: [2023] EWCA Civ 379

Case No: CA 2022/001944

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE EMPLOYMENT APPEAL TRIBUNAL
THE HONOURABLE MRS JUSTICE EADY (PRESIDENT)
[2022] EAT 118

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 April 2023

Before:

LORD JUSTICE BAKER
LADY JUSTICE SIMLER
and
LORD JUSTICE POPPLEWELL
Between:

THE REVEREND PAUL WILLIAMSON	**Appellant**
- and -	
THE BISHOP OF LONDON AND OTHERS	**Respondents**

- -
- -

James Wynne (instructed by **Scott-Moncrieff & Associates Ltd**) for the **Appellant**
Edward Kemp and Bláthnaid Breslin (instructed by **Winckworth Sherwood LLP**) for the **Respondents**

Hearing dates: 15 March 2023
- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 5 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Simler:

Introduction

1. Section 42 of the Senior Courts Act 1981 ("SCA 1981") enables the High Court to restrict the rights of vexatious litigants to institute legal proceedings by imposing an order requiring leave before such proceedings may be commenced. The question that arises on this appeal is what as a matter of statutory construction Parliament intended should be the consequence if civil proceedings are started without first obtaining leave in breach of the prohibition contained in a civil proceedings order made under section 42(1A) SCA 1981. Are those proceedings a nullity or may they simply be stayed unless and until the leave required by section 42 is granted? There may be cases where this will not matter. But here, because of the expiry of the relevant limitation period, the consequence makes a material difference to the ability of the appellant to pursue his claim of unlawful age discrimination.

2. The appellant, The Reverend Paul Williamson, was made the subject of a civil proceedings order ("CPO") pursuant to section 42(1A) SCA 1981 in 1997. The CPO prohibited him from instituting any civil proceedings in any court or tribunal "unless he obtains the leave of the High Court having satisfied the High Court that the proceedings are not an abuse of the process". For reasons that do not matter on this appeal, the appellant commenced proceedings on 1 April 2019, in the employment tribunal, without first obtaining such leave.

3. Following a contested hearing, on 8 January 2020 the employment tribunal (EJ McNeill KC) held that the appellant's claim could not progress because it was a "nullity" brought in breach of a CPO and there was no jurisdiction to entertain it. The appellant appealed. By a judgment dated 1 August 2022, the Employment Appeal Tribunal (Eady P) ("the EAT") dismissed his appeal against the decision that the claim was a nullity. The EAT added as a postscript, that the EAT's own judgment was a nullity because permission had not been obtained from the High Court to bring the appeal.

4. The appellant submits that both tribunals below were wrong. He submits that the interests of courts and respondents or defendants are fully served by the ability of a court or tribunal to strike out or stay proceedings within their existing rules of procedure, and there is simply no need for the concept of a claim being a nullity. It offends the overriding objective. There is no concept of a claim being treated as a nullity in the Employment Tribunals Act 1996 or the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules") (save for rule 6 which does not apply). This consequence is also not expressly provided for by section 42 SCA 1981, which establishes the jurisdiction for a court to make an order in the form of a CPO, imposes the conditions for permission to be granted, but does not identify the consequences of a claim brought in breach of such an order. In these circumstances, the breach is plainly to be treated as a procedural bar that can be cured.

5. For their part, the respondents submit that a claim presented without first obtaining the necessary permission of the High Court is a nullity. Further, the High Court cannot grant retrospective permission to bring such a claim. The terms of section 42(1A) SCA 1981 are clear: where an individual is subject to a CPO "no civil proceedings shall without the leave of the High Court be instituted in any court by the

person against whom the order is made". This is consistent with the object and purpose of a CPO, which is to "avoid the unnecessary use of court time and resources on unjustified litigation and to protect prospective defendants from the expense which that involves": see *Ewing v News International* [2010] EWCA Civ 942 per Patten LJ at paragraph 18. This purpose requires that an individual subject to a CPO be "debarred" from commencing proceedings without permission of the High Court. Case law including highly persuasive dicta supports this approach.

6. Although there are five grounds of appeal, it is common ground that there is essentially one question for determination by this court: what is the meaning and effect of section 42, and in particular, in a case to which it applies, where proceedings are brought without leave, does it operate as a jurisdictional or merely a procedural bar?

The relevant factual background

7. On 16 July 1997, on the application of the Attorney General, the appellant was made the subject of a CPO issued by a Divisional Court of the High Court (Rose LJ and Jowitt J) under section 42(1) SCA 1981. The terms of the order prohibited the appellant from:

> "1. instituting any civil proceedings in any Court and
>
> 2. continuing any civil proceedings instituted by him in any Court before the making of this Order and
>
> 3. making any application other than an application for leave as required by section 42 of the [SCA] in any civil proceedings instituted in any Court by any person unless [the appellant] obtains the leave of the High Court having satisfied the High Court that the proceedings or application are not an abuse of the process of the Court in question and that there are reasonable grounds for the proceedings or application."

8. The term "any court" in section 42(1A) SCA 1981 has been held to extend to all inferior courts including tribunals. The term accordingly embraces employment tribunals.

9. The appellant purported to present a claim in the employment tribunal on 1 April 2019. The claim alleged unlawful age discrimination in relation to the termination of the appellant's tenure as Priest-in-Charge at the Parish of St George, Hanworth, when he reached the age of 70 on 18 November 2018. Subject to the effect of the CPO on the proceedings, it is not otherwise suggested that the claim itself is vexatious or would amount to an abuse of process. The appellant did not obtain the permission of the High Court before presenting the claim. On 8 May 2019, the respondents filed their substantive defence to the claim by way of Grounds of Resistance, and also pleaded that the claim was a nullity in the absence of leave of the High Court. A preliminary hearing to consider jurisdiction was listed to be heard in the employment tribunal on 8 January 2020.

10. Meanwhile, on 12 September 2019, the appellant sought leave of the High Court, either to continue the proceedings he had issued on 1 April 2019 or for permission to issue fresh proceedings in the employment tribunal. His application was supported by a witness statement from his solicitor, who acknowledged that proceedings had been issued in the employment tribunal without having first obtained the leave of the High Court. Reference was made to the fact that the respondents had contended that the employment tribunal proceedings were a nullity. The application was dealt with on paper, without notice to the respondents. David Pittaway KC, sitting as a deputy High Court Judge expressed himself satisfied that the claims made in the employment tribunal proceedings were not in themselves an abuse of process. He made an order dated 24 September 2019 ("the Pittaway Order") as follows:

> "1. The Applicant do have permission to pursue the proceedings issued by him in the Watford Employment Tribunal on 1st April 2019 under Case Number 3313470/2019 against (1) The Bishop of London (2) The London Diocesan Fund and (3) The Church Commissioners for England (the "ET" Respondents) in respect of a claim for Age Discrimination contrary to the Equality Act 2010.
>
> In the alternative
>
> 2. The Applicant do have permission to issue proceedings in the Watford Employment Tribunal as regards the termination of his tenure as the Priest-in-Charge of St. George Hanworth against the (1) The Bishop of London (2) The London Diocesan Fund and (3) The Church Commissioners of England."

11. The parties disagreed about the meaning and effect of this order, but that disagreement is now academic and it is agreed by counsel on both sides that nothing turns on it for present purposes. It is now common ground that the first paragraph was intended to take effect if, but only if, at the preliminary hearing it was determined that the proceedings were not a nullity.

12. On 8 January 2020 the preliminary hearing in the employment tribunal took place. Following argument, EJ McNeill KC ruled that the April 2019 employment tribunal claim was a nullity having been presented without permission of the High Court. There was therefore nothing to which paragraph 1 of the Pittaway Order could attach. The appellant appealed to the EAT.

13. Meanwhile, on 23 January 2020 the appellant presented a second claim for unlawful age and religious discrimination pursuant to paragraph 2 of the Pittaway Order. On 22 June 2021 that claim was dismissed because it was presented out of time and the employment tribunal held that there was no good explanation for the significant delay (11 months). The appellant has not appealed this decision.

14. On 1 August 2022 the EAT dismissed the appeal from the employment tribunal decision that the 2019 claim was a nullity. Eady P held that section 42(1A) SCA 1981 imposed a substantive (and not merely a procedural) barrier to the institution of proceedings by the subject of a CPO, and that this was entirely consistent with the context and purpose of the legislation in question.

The legislative framework

15. The power to make a CPO is provided by section 42(1) SCA 1981. This is a power that can be traced back to the Vexatious Actions Act 1896 (59 & 60 Vict. c. 51). It has existed in its present form (more or less) since the Supreme Court of Judicature (Consolidation) Act 1925, section 51. Section 42 now provides:

> "42. **Restriction of vexatious legal proceedings**
>
> (1) If, on an application made by the Attorney General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground –
>
> (a) instituted vexatious civil proceedings, whether in the High Court or the family court or any inferior court, and whether against the same person or against different persons; or
>
> (b) made vexatious applications in any civil proceedings, whether in the High Court or the family court or any inferior court, and whether instituted by him or another, or
>
> (c) instituted vexatious prosecutions (whether against the same person or different persons),
>
> the court may, after hearing that person or giving him an opportunity of being heard, make a civil proceedings order, a criminal proceedings order or an all proceedings order.
>
> (1A) In this section –
>
> "*civil proceedings order*" means an order that –
>
> (a) no civil proceedings shall without the leave of the High Court be instituted in any court by the person against whom the order is made;
>
> (b) any civil proceedings instituted by him in any court before the making of the order shall not be continued by him without the leave of the High Court; and
>
> (c) no application (other than one for leave under this section) shall be made by him, in any civil proceedings instituted in any court by any person, without the leave of the High Court;
>
> *"criminal proceedings order"* means an order that –
>
> (a) no information shall be laid before a justice of the peace by the person against whom the order is made without the leave of the High Court; and
>
> (b) no application for leave to prefer a bill of indictment shall be made by him without the leave of the High Court; and

> *"all proceedings order"* means an order which has the combined effect of the two other orders.
>
> (2) An order under subsection (1) may provide that it is to cease to have effect at the end of a specified period, but shall otherwise remain in force indefinitely.
>
> (3) Leave for the institution or continuance of, or for the making of an application in, any civil proceedings by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the High Court is satisfied that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the proceedings or application.
>
> (3A) Leave for the laying of an information or for an application for leave to prefer a bill of indictment by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the High Court is satisfied that the institution of the prosecution is not an abuse of the criminal process and that there are reasonable grounds for the institution of the prosecution by the applicant.
>
> (4) No appeal shall lie from a decision of the High Court refusing leave required by virtue of this section.
>
> (5) A copy of any order made under subsection (1) shall be published in the London Gazette."

16. Thus if any of the conditions in section 42(1)(a) to (c) is met the High Court has a discretion whether or not to make a CPO on the application of the Attorney General. In *Attorney General v Barker* [2000] 1 FLR 759 Lord Bingham of Cornhill CJ described this jurisdiction in the following terms (at 764C-D):

> "'Vexatious' is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

17. As for the requirement of habitual and persistent litigation, Lord Bingham held (at 764H):

> "The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been

> unsuccessful and when on any rational and objective assessment the time has come to stop."

18. In deciding whether to make such an order a balance must be struck between the individual's important right to access the jurisdiction of the court on the one hand, and the need on the other hand to protect the court's processes and the rights of others not to be faced with vexatious claims. In *Attorney General v Jones* [1990] 1 WLR 859 Staughton LJ described this balance as follows (at page 865 C-D):

> "The power to restrain someone from commencing or continuing legal proceedings is no doubt a drastic restriction of his civil rights, and is still a restriction if it is subject to the grant of leave by a High Court judge. But there must come a time when it is right to exercise that power, for at least two reasons. First, the opponents who are harassed by the worry and expense of vexatious litigation are entitled to protection; secondly the resources of the judicial system are barely sufficient to afford justice without unreasonable delay to those who do have genuine grievances, and should not be squandered on those who do not."

19. It is now well-established both at common law and as confirmed by the Strasbourg jurisprudence, that courts may regulate their own procedures to prevent abuse, and that this entails that the right of access to the courts may be subject to restriction, provided always that this does not reduce the access that remains to the individual to such an extent that the very essence of the access right is impaired; and provided that any restriction pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. While CPOs inevitably create an impediment to access to justice, they have been held to be justified, proportionate and compatible with article 6 of the European Convention on Human Rights: see *Attorney General v Covey* [2001] EWCA Civ 254.

The case law

20. The point to be determined in this case has not previously been addressed at this level, save indirectly in relation to analogous legislation in *Seal v Chief Constable of South Wales Police* [2007] UKHL 31; [2007] 1 WLR 1910 ("*Seal*"), a case concerned with section 139(2) of the Mental Health Act 1983 ("MHA"). Section 139(2) has a different context to section 42, but is framed in similar terms. It provides:

> "No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court"

21. The question that arose in *Seal* (as with this case) concerned the consequences where civil proceedings requiring the grant of leave under section 139(2) were commenced without obtaining such leave. Mr Seal argued that the lack of leave was merely an irregularity which could be rectified, and was not a jurisdictional condition that invalidated the proceedings he wished to bring, rendering them null. The Court of Appeal held that such proceedings were a nullity. Mr Seal appealed. Lord Bingham (giving the leading speech with which the majority of the House of Lords agreed)

rejected the notion that the statutory language was determinative in this case. He explained:

> "7. I see considerable force in both these submissions. On the one hand, "No civil proceedings shall be brought …" in section 139(2) reads as a clear and emphatic prohibition. Although, speaking of section 17 of the Charitable Trusts Act 1853 (16 & 17 Vict c 137), Bowen LJ said in *Rendall v Blair* 45 Ch D 139, 158, that "this section is not framed in the way in which sections are framed when it is intended that some preliminary steps should be taken before the action is maintainable at all", the House has been referred to no enactment in which clearer or more emphatic language is used than in section 139(2). … On the other hand, the variation of language as between section 139(2) and section 17 of the Charitable Trusts Act 1853 (considered in *Rendall v Blair* 45 Ch D 139) or section 285(3) of the Insolvency Act 1986 (considered in *In re Saunders* [1997] Ch 60) is not so marked as, without more, to warrant a radically different conclusion, and the welcome tendency to prefer substance to form must generally discourage the invalidation of proceedings for want of compliance with a procedural requirement. While, therefore, I incline to favour the Chief Constable's reading of section 139(2), I do not think the answer to a question such as this should ordinarily turn on a detailed consideration of the language used by Parliament in one provision as compared with that used in another. The important question is whether, in requiring a particular condition to be satisfied before proceedings are brought, Parliament intended to confer a substantial protection on the putative defendant, such as to invalidate proceedings brought without meeting the condition, or to impose a procedural requirement giving rights to the defendant if a claimant should fail to comply with the requirement; but not nullifying the proceedings: see *R v Soneji* [2006] 1 AC 340, paragraph 23. To answer this question a broader inquiry is called for."

22. Lord Bingham traced the legislative history of section 139(2) starting with the Lunacy Acts Amendment Act 1889 and considered the background to the enactment of the MHA, demonstrating (by reference among other things to the leading authority at the time, *R v Bracknell Justices, Ex p Griffiths* [1976] AC 314) that when Parliament legislated in 1982 and again by way of a consolidating Act in 1983, there was a clear consensus of judicial, professional and academic opinion that lack of the required consent rendered proceedings null. Lord Bingham concluded that Parliament must be taken to have legislated to enact the MHA (and its predecessor) on that basis. He recognised Mr Seal's contention that such a strict interpretation of section 139(2) could lead to injustice for a litigant who found that his proceedings were invalidated by failure to comply with a statutory leave requirement of which he was ignorant at the time, but continued:

> "18. I would respectfully echo and endorse the principle enunciated by Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286, which implicitly underpinned the argument for Mr Seal:
>
> > "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. This is … a 'fundamental rule' from which I would not for my part sanction any departure."
>
> But the words first introduced in section 16(2) of the 1930 Act ("No proceedings, civil or criminal, shall be brought …") appear to be clear in their effect and have always been thought to be so. They were introduced with the obvious object of giving mental health professionals greater protection than they had enjoyed before. They were re-enacted with knowledge of the effect the courts had given to them. To uphold the decision of the three courts which have already considered the issue in this case and decided it in accordance with a clear consensus of professional opinion is not to sanction a departure from what Viscount Simonds rightly considered to be a fundamental rule."

23. Lord Bingham concluded that the Court of Appeal had reached the right decision. He agreed with the opinion of Lord Brown of Eaton-under-Heywood. In this regard, and relevantly for the appellant's argument on the present appeal, Lord Brown, who had reached the same conclusion, made the following observation in relation to section 42:

> "74. …the requirement for leave here was to safeguard prospective defendants from being faced with proceedings (which might not be sufficiently meritorious to deserve leave) unless and until a High Court judge thought it appropriate that they be issued. And that is not a protection that can be secured save by a clear and inflexible rule such as section 139(2) (and its legislative predecessors) have always hitherto been understood to provide. *Just such a rule applies in respect of those adjudged vexatious litigants under section 42 of the Supreme Court Act 1981 and Parliament clearly intended to achieve the same result under the Mental Health Act legislation.* Whether or not such protection is necessary or desirable is, of course, open to question and has, indeed, been extensively debated over recent years. But your Lordships' task is not to decide whether it is desirable but whether presently the legislation confers it."
>
> (My emphasis)

24. The meaning and effect of section 42 SCA 1981 was raised directly in *Attorney General v Edwards* [2015] EWHC 1653 (Admin), in the context of proceedings

instituted without leave contrary to a CPO made against Mr Edwards under section 42(1A). This decision is not, however, binding on this court.

25. Wilkie J refused Mr Edwards' application for retrospective leave to pursue a claim in the employment tribunal, holding that the claim was brought without the permission required under the CPO and was a nullity and of no effect so that there was nothing to which any retrospective grant of leave could attach. In reaching that decision, Wilkie J made clear that he considered *Seal* to be "binding authority": see paragraph 25. Mr Wynne takes issue with that conclusion. He is plainly right to do so. *Seal* is binding in relation to the meaning of section 139(2) MHA and Lord Brown's observation in relation to section 42 is plainly obiter. On the other hand, given the similarity of the two provisions in question, the judgment of the majority in *Seal* is persuasive.

The arguments in support of the appeal

26. In addition to the summary arguments identified above, Mr Wynne relied on the following additional matters by way of his principal submissions. First, he submitted that the approach of the majority in *Seal* could be distinguished. Unlike section 139 MHA, section 42 SCA 1981 merely enables the court to impose a CPO rather than imposing it under the Act. Further, since CPR 3.4 and 81.4 prescribe the consequences for breach of any order, treating breach as a procedural matter, these provisions are equally available and sufficient to enforce CPOs. To interpret the grant of power to make a CPO as also creating the concept of a nullity when there is express provision in the CPR for the enforcement of such orders (and other jurisdictions have similar case management powers), is a step beyond interpretation of a statutory provision and moves into the realm of legislation by the courts.

27. Secondly, he submitted that the ET Rules and jurisdiction over discrimination and other claims require that a claim properly brought and otherwise within the employment tribunal's statutory jurisdiction be treated as effective until struck out, and not as a nullity. Further, if proceedings brought in time are a nullity it may not be possible in practice to bring a valid claim in time given the usual three month limitation period for many claims. The impact of the short limitation periods is amplified further in the employment tribunal jurisdiction where interim relief is available under section 128 Employment Rights Act 1996, which imposes a 7-day limitation period (section 128(2)), making it difficult to see how the subject of a CPO could ever bring an interim relief application, however meritorious.

28. Thirdly, he submitted that in jurisdictions other than employment tribunals, CPOs have not been treated as rendering a nullity any claim brought in breach. For example, he relied on the fact that the concept of an application brought without permission being a nullity was addressed, albeit expressly not decided, in the context of judicial review and costs in *Ewing v Office of the Deputy Prime Minister and another* [2005] EWCA Civ 1583; [2006] 1 WLR 1260. At paragraphs 28 and 29 Carnwath LJ said he could "see much force" in an approach that did not treat improperly constituted proceedings as a nullity and relied on the fact that the prohibition under section 42 SCA 1981 is imposed by an order of the court not the Act itself, and that breaches of court orders are treated by the CPR as procedural matters. However, as indicated, he did not decide the point.

29. Mr Wynne also relied on the fact that in other comparable jurisdictions (such as charities and insolvency) where there is a requirement for permission to bring proceedings, proceedings brought in breach are as a matter of established practice not treated as a nullity but are stayed pending the grant of permission. He also relied on the comparable jurisdiction to make a civil restraint order and submitted that these orders are analogous with CPOs and expressly provide for a less draconian response to claims brought in breach of the terms of a civil restraint order. What is sufficient for civil restraint order purposes should be sufficient for CPO purposes.

Discussion and analysis

30. The language of section 42 "no civil proceedings shall without the leave of the High Court be instituted…" clearly envisages that leave will be a condition precedent to the institution of proceedings (save in relation to existing proceedings at the time of the CPO). The "institution" of proceedings without permission is prohibited by section 42(1A)(a) SCA 1981 and permission can only be granted to *continue* proceedings where those proceedings were instituted before the making of the CPO: section 42(1A)(b) SCA 1981. There is no provision made for the grant by the High Court of retrospective permission to continue proceedings which were initiated without permission.

31. Mr Wynne pointed out correctly that section 42 does not specify the consequences of a claim brought in breach of a CPO. Moreover, although on the face of it section 42 appears to envisage that leave will be a condition precedent to the *institution* of proceedings (save in relation to existing proceedings at the time of the CPO), he pointed out that this is achieved by saying that that will be the nature of the order made by way of a CPO, rather than by providing for it directly (unlike section 139(2) MHA). Accordingly, and since court orders with conditions precedent (like unless orders) have always been subject to relief from sanction, he submitted that the same must be true here. These are legitimate points to make, but it does not follow that that was the statutory intention. No doubt section 42 had to take this form because CPOs are to be granted on a litigant by litigant basis. In any event, I do not consider that this distinction can dictate the right answer. Nor is the statutory language on its own determinative, as Lord Bingham in *Seal* made clear.

32. As Lord Bingham explained in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687 at paragraph 8:

> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

33. It is plain that the mischief at which section 42 is directed is to "avoid the unnecessary use of court time and resources on unjustified litigation and to protect prospective

defendants from the expense which that involves": see *Ewing v News International* (cited above, per Patten LJ at paragraph 18).

34. Moreover, unlike the analogous provision made by the MHA, a CPO is directed only at vexatious litigants, who are as often as not motivated more by a desire to enjoy the oxygen of the legal process than any desire for or expectation of redress from it.

35. A CPO can only be imposed where it is shown that the litigant in question has not only instituted civil proceedings or made applications in civil proceedings which can properly be stigmatised as "vexatious", but also acted in one or other of these ways "habitually and persistently and without any reasonable ground". In other words, the ordinary case management powers available to the court or tribunal will have proved insufficient to control the conduct of the litigant in question before a CPO can be made; and the vexatious litigant will be well aware of the situation. Thus Parliament clearly intended that an order under section 42(1A) would only be made where there is a proven need to protect the interests of the opposing party and the public against vexatious and abusive claims brought by the individual in question, and to protect the wider interests of justice by ensuring that the time and resources of courts and tribunals are not taken up by wholly unmeritorious litigation.

36. The exercise of discretion to make a CPO is governed by clear safeguards: an application for an order may only be made on the authority of the Attorney General (or the Solicitor General acting on her behalf); and a CPO may only be made by the High Court. There is an oral hearing before the judge for this purpose unless the judge grants permission without a hearing or considers that the application is a substantial repetition of one which has already been refused.

37. Moreover, a CPO operates as a filter and not a barrier. Once a CPO is made, it regulates a vexatious litigant's access to the courts, rather than barring it. The vexatious litigant may not institute or continue or make an application in any civil proceedings unless a High Court judge is satisfied that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the proceedings or application. The vexatious litigant who is the subject of a CPO will know about the restriction that has been placed on their right of access, and the responsibility for making an application for leave must therefore lie on the subject of the CPO. Putative respondents or defendants (and the courts and tribunals themselves) may not have the same ready knowledge. While it is true that this process may act as a deterrent to further proceedings, it does not deny rights of access to justice.

38. It seems to me that the filter is intended to ensure that neither respondents nor the courts and tribunals, are required to respond to, or otherwise deal with, claims sought to be brought by vexatious litigants unless and until the vexatious litigant has satisfied the High Court that the proceedings are not an abuse of process and there are reasonable grounds for instituting them (section 42(3) SCA 1981). This can only be achieved if permission is sought before proceedings are instituted. The requirement of permission will not operate as a filter or a safeguard against vexatious litigation if it can be given retrospectively (as this case demonstrates). Moreover, if proceedings can be instituted without permission, the onus will fall on others (instead of the vexatious litigant who is well aware of the restriction) to take the initiative and raise the

question of permission. This reverses the deliberate onus provided for by section 42, and may undermine altogether the protection intended by section 42 SCA 1981.

39. Thus the consequences of proceedings instituted in breach of a CPO made under section 42(1A) being a nullity do not involve any unfair prejudice or disproportionate breach of fair trial or access to justice rights. In particular, the vexatious litigant is afforded the safeguards just described. Further, the vexatious litigant will know that a CPO has been made and can apply timeously for leave. Even in the context of a relatively short limitation period of three months for proceedings to be commenced in the employment tribunal, I am in no doubt that this allows ample time to apply for and obtain leave to institute proceedings in the ordinary case. Moreover, an application can be made and heard urgently where necessary, for example in cases where urgent interim relief is sought. It is also the case that the fact that a vexatious litigant took reasonable steps to seek the permission of the High Court in good time before the expiry of the relevant limitation period, is likely to be a relevant consideration in deciding whether to extend time in relation to a fresh claim if that becomes necessary.

40. Finally in this context, I reject Mr Wynne's argument that respondents might suffer prejudice in fighting and winning a claim in ignorance of a CPO, and then not being able to recover costs on the grounds that the proceedings were a nullity. This should not arise. CPOs are gazetted and respondents always have the means available to discover whether a CPO is in force in respect of a litigant believed or known to be vexatious.

41. On the other hand the adverse consequences of potential retrospective validation, where the claim is abusive, are considerable. Respondents and the court will have to incur the time and expense of being involved in that process. It may involve repeated applications as to when and how the stay application is to be heard. If the proceedings are not a nullity, the respondent will have to apply to strike out or stay the proceedings, and the vexatious litigant can invoke all sorts of procedures abusively, in relation to that application. In the experience of members of this court, lengthy written evidence, recusal applications, adjournment applications, disclosure and third party disclosure applications, applications to cross examine, consolidation with other applications are all weapons in the armoury used regularly by vexatious litigants intent on abusing the court's processes. Respondents are also potentially exposed to having to engage with the substance of the claim because they can never be sure whether a discretionary retrospective validation will be sought and granted later. The deterrent of having to apply for leave first and pay a fee for it is altogether undermined.

42. Nor do I accept Mr Wynne's argument that the absence of provision in the ET Rules that a claim is a nullity means that employment tribunals are bound to exercise jurisdiction to hear a claim otherwise presented in accordance with the employment tribunal's statutory jurisdiction and/or the procedural requirements for instituting such proceedings. If the statutory intention in section 42 is that CPOs should require prior leave as a jurisdictional hurdle, that must apply to all "courts". The position must be the same in whichever "court" the vexatious litigant seeks to litigate. Notwithstanding that employment tribunals have statutory jurisdiction to hear and determine claims of unlawful discrimination under the Equality Act 2010 when presented in accordance with the ET Rules, their jurisdiction will be limited in precisely the same way as any court by a statutory requirement to obtain the leave of a High Court judge (effected

through the mechanism of a CPO) before instituting such proceedings. The question must be a question of interpretation of section 42 and its effect.

43. Equally it is by no means clear that every "court" to whose proceedings a CPO could apply, has the power to stay them on appropriate terms as Mr Wynne suggests, pending an application made subsequently to the High Court for retrospective leave under section 42. The only realistic terms on which such a stay might be ordered would be a time limited stay that is conditional on leave being sought and granted within a short time-frame, in default of which the claim should stand struck out without further order. Even if an employment tribunal has power to make such an order (as to which there might be some doubt given that there is no express rule providing for a stay order to be made, and although rule 29 empowers tribunals to make "a case management order", the definition of "case management order" in the ET Rules might be said not to extend to such a limited and conditional stay that potentially results in the dismissal of the claim), Mr Wynne was not able to satisfy the court that the numerous different courts and tribunals to which this provision applies, all have the necessary power to stay proceedings on such terms. He frankly accepted that the power to stay or strike out proceedings, in criminal courts in particular, is limited, and may well not be available at all where proceedings are initiated in breach of a criminal proceedings order made under section 42. I consider this likely to be the case in relation to criminal proceedings in the Magistrates' Courts in particular.

44. The analogy Mr Wynne sought to draw with civil restraint orders does not advance his case either. First, while directed at a similar problem, CPOs and civil restraint orders are different powers. It is clear that CPOs are at the top of the hierarchy of orders available to restrain vexatious litigants in terms of their severity and the seriousness of the circumstances in which they apply. Unlike a civil restraint order, a CPO under section 42 covers all the litigation and all the applications a vexatious litigant may wish to bring, and if a High Court judge refuses permission in relation to any attempt the litigant may wish to make to bring a matter to the attention of a court that is the end of the matter. It involves the publication of the litigant's name on a list which receives widespread circulation, and although CPOs may be made for a fixed period of time, they can be of unlimited duration, as was the CPO in the appellant's case. Further, the statutory criteria for making an order under section 42 are different from, and more stringent than, the criteria for a civil restraint order which is made in exercise of the court's inherent jurisdiction in accordance with CPR 3.11 and PD 3C. Accordingly, the fact that CPR 3.11 permits the relevant practice direction to set out the circumstances in which the civil restraint order power may be exercised, the procedure to be applied, and also "the consequences" of such an order, tells one nothing about the consequences of a more draconian CPO. There is no proper analogy between the two that can assist the appellant's case.

45. Mr Wynne placed significant emphasis on paragraph 4.3 of PD 3C – Civil Restraint Orders, which provides that:

> "Where a party who is subject to a general civil restraint order – (1) issues a claim or makes an application in a court identified in the order without first obtaining the permission of a judge identified in the order, the claim or application will automatically be struck out or dismissed …"

He submitted that these consequences are noticeably different from the concept of a claim being a nullity because jurisdiction over a civil restraint order is maintained in the sense that the possibility of seeking relief from sanctions under the general provisions in CPR 3.9 continues to apply. I am far from satisfied that he is correct and that relief from sanctions is available in the case of an automatic strike out where a civil restraint order is breached (or indeed that *Couper v Irwin Mitchell LLP* [2017] EWHC 3231 (Ch); [2018] 4 WLR 23, at paragraphs 28 to 29, was correct in this respect, and note that the point was not argued or fully addressed).

46. In any event, a CPO is consciously made in more serious circumstances and with more draconian effect: see *Bhamjee v Forsdick* [2003] EWCA Civ 1113; [2004] 1 WLR 88 at paragraphs 20 to 24 and 39 to 47. Accordingly, whatever the consequences of a civil restraint order, that does not mean that the same consequences must or do apply where proceedings are commenced in breach of a CPO.

47. Nor, contrary to the arguments developed by Mr Wynne, is there any real analogy with the provisions of section 285(3) Insolvency Act 1985 and section 115 Charities Act 2011, both of which have been interpreted as providing that the failure to obtain the necessary permission does not render proceedings a nullity. The interpretation of different statutory provisions in a different context, does not advance the appellant's case for the following shortly stated reasons.

48. Dealing with the insolvency context first, the purpose of section 285 of the Insolvency Act 1985 is to prevent the liquidator or administrator's task being made difficult "by a scramble among creditors to raise actions, obtain decrees or attach assets" (see Lord Coulsfield in *Carr v British International Helicopters Ltd* [1993] 8 WLUK 52, cited by Lindsay J in *In Re Saunders* [1997] Ch 60; [1997] 3 All ER 992 at paragraph 79). This purpose is not undermined if proceedings instituted without the necessary permission are not a nullity. Further, an obvious injustice would arise if proceedings brought by a creditor in that position were subsequently treated as a nullity. By contrast, the subject of a CPO is necessarily someone who has been held to have "habitually and persistently and without any reasonable ground… instituted vexatious civil proceedings… or made vexatious applications… or instituted vexatious prosecutions …" and no obvious injustice arises in a case where the vexatious litigant has knowingly chosen to institute proceedings without obtaining leave first. It is also significant that Lindsay J expressly recognised that his interpretation (that proceedings were not a nullity) went against the literal meaning of the words of section 285 in any event: see paragraphs 72 and 82 to 83.

49. The short answer to the comparison drawn by Mr Wynne in the charities context is that section 115 Charities Act 2011 uses significantly different language to that used in section 42 SCA 1981. It provides that no charity proceedings are to be "entertained or proceeded with" unless "the taking of the proceedings" is authorised by an order of the Charities Commission. It does not restrain the institution of charity proceedings without permission. Those words do not contain the same clear prohibition against the institution of proceedings as section 42(1A) SCA 1981. Indeed, in *Park v Cho* [2014] EWHC 55 (Ch); [2014] PTSR 769 at paragraphs 39 to 40 the "taking of" proceedings was held not to be limited to the commencement of proceedings and extended to the continuation of proceedings already commenced. Charity proceedings are therefore expressly capable of being continued despite their commencement without the permission of the Charities Commissioner. This does not undermine the purpose of

section 115(2) of the Charities Act 2011 (or its predecessor provision in section 33(2) of the Charities Act 1993) because the court can place a stay on the proceedings pending authorisation by the Charities Commission and thus ensure that charitable funds are not frittered away in the pursuit of litigation relating to internal disputes.

50. There are good reasons why as a matter of general principle procedural failures should not lead to proceedings being a nullity. But that does depend on the purpose and importance of the provision in its statutory context. It seems to me to be evident for all the reasons I have given, that the express terms of section 42 SCA 1981, read in context and in light of the object and purpose of the section, impose a jurisdictional (and not merely a procedural) barrier on a litigant subject to a CPO wishing to institute proceedings. In my judgment Parliament intended to make leave under section 42 SCA 1981 a jurisdictional bar to the institution of effective proceedings where a CPO has been made. Neither the prospective respondent nor the court is required to take action where a proposed claim is made by a vexatious litigant unless and until the proceedings have the required leave of a High Court judge. As with section 139(2) MHA and as Lord Brown observed in *Seal*, the very inflexibility of the provision is an integral part of the protection it affords.

51. It follows that the tribunals below were correct to conclude that the employment tribunal proceedings commenced by the appellant without first obtaining the necessary leave of the High Court were and remain a nullity. For these reasons, which are essentially the same as those given by Eady P, the grounds of appeal cannot succeed. I would dismiss this appeal accordingly.

Lord Justice Popplewell:

52. I agree.

Lord Justice Baker:

53. I also agree.