Neutral Citation Number: [2021] EWHC 1388 (Ch)

Claim No: BL-2020-000766

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 28 May 2021

Before:

STUART ISAACS QC (sitting as a Deputy Judge of the High Court)

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Between:

Tyne and Wear Passenger Transport Executive t/a Nexus

Claimant

National Union of Rail, Maritime and Transport Workers

First Defendant

Unite the Union

Second Defendant

- -
- -

Mr David Reade QC and Mr Joseph Bryan (instructed by Addleshaw Goddard LLP) appeared on behalf of the Claimant.

Lord Hendy QC and Ms Madeline Stanley (instructed by Thompsons Solicitors) appeared on behalf of the Defendants.

Hearing date: 12 May 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 28 May 2021.

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Stuart Isaacs QC:

Introduction

1. The claimant, which trades as Nexus, operates the Tyne and Wear Metro. It is an employer which recognised the defendants, both trades unions, for the purposes of collective bargaining.

2. In these proceedings, it claims rectification of an agreement on the terms of its letter dated 10 October 2012 to the defendants regarding the increase of the defendants' members' pay rates for employees working on the Metro within grades 1 to 3 of Nexus' "Red Book" pay structure effective from or from around April 2013 (the "Letter Agreement"). The Red Book is a document entitled "Conditions of Service for Metro Staff" which constitutes the principal collective agreement negotiated between the claimant and the defendants setting out the agreed terms and conditions of employees, including those in grades 1 to 3.

3. There are two matters before the court. The first is the trial of a preliminary issue as to whether the claimant is estopped from pursing its claim for rectification. The preliminary issue was ordered by deputy master Nurse on 14 December 2020 to be tried on the basis of an agreed statement of facts. The defendants originally relied only on cause of action estoppel as set out in paragraphs 58 to 65 of the Defence. However, by agreement between the parties, the scope of the preliminary issue was enlarged to include whether the claim cannot proceed by reason of issue estoppel.

4. The second matter before the court is an application by the defendants to strike out the Particulars of Claim or for summary judgment against the claimant. The strike out application is made under CPR 3.4(2)(a) and (b) on the grounds that the Particulars of Claim disclose no reasonable grounds for bringing the claim and are an abuse of the court's process or otherwise likely to obstruct the just disposal of the proceedings. The defendants maintain that the claim, even if not estopped, is an abuse of process; that the court has no power to rectify a collective agreement; and that the claim is unsustainable by reason of laches, acquiescence and delay.

5. The application is supported by a witness statement dated 10 September 2020 of Mr Neil Guss of the defendants' solicitors. It is opposed by a witness statement dated 16 April 2021 of Mr David Bartlett, the head of the claimant's Business Change and Technology Department. Deputy master Nurse's order was that the application be heard immediately after the trial of the preliminary issue and that it be decided on the basis of the agreed statement of facts and the witness statements, without the need for oral or any expert evidence.

6. The preliminary issue is concerned not with the merits of the rectification claim but, as already stated, with the question whether the claim cannot proceed by reason of cause of action or issue estoppel. If the claimant succeeds on the preliminary issue and the defendants' strike out or summary judgment application fails, the rectification claim will proceed to trial. If the defendants succeed on the preliminary issue, there will be no necessity to consider their application and the claimant's claim will fail.

The agreed facts

7. At the time of the negotiations which led to the Letter Agreement, the latest iteration of the original "Conditions of Service for Metro Staff" was dated 27 February 2009 (as last amended in or about September 2011). When the parties made subsequent collective agreements, including the Letter Agreement, the documents constituting those subsequent collective agreements were placed with the original Red Book which they amended. The terms and conditions of the subsequent collective agreements formed part of the Red Book and hence part of the collectively agreed terms of the relevant employees of the claimant. The Red Book, including the Letter Agreement, is a collective agreement within the meaning of section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the "TULRA"). It contains no provision that the parties intended it to be a legally enforceable contract and, as a result, in accordance with section 179 of the TULRA, it does not constitute a legally enforceable contract.

8. The Red Book was incorporated into the individual employment contracts of employees in grades 1 to 3 in accordance with the provisions of those contracts and regardless of whether or not the employees concerned were members of the defendants. The Letter Agreement was in the form of an offer by the claimant which the defendants accepted following a ballot of their respective relevant members to ascertain their majority view.

9. In 2015, Mr Steven Anderson and a large number of other employees of the claimant in grades 1 to 3 (the "*Anderson* claimants") who were all members of the first defendant (the "RMT") successfully brought an employment tribunal claim, which the RMT supported and funded, claiming that they had been subjected to an unauthorised deduction from wages under section 13 of the Employment Rights Act 1996 (the "ERA") on the ground that, on the proper construction of the Letter Agreement, they had been underpaid (the "*Anderson* proceedings"). The matter proceeded first to the Employment Tribunal, then the Employment Appeal Tribunal and finally to the Court of Appeal, whose judgment in the matter is reported as *Tyne and Wear Passenger Transport Executive t/a Nexus v Anderson and others* [2018] EWCA Civ 2084 (the "*Anderson* judgment"). The Supreme Court refused the claimant permission to appeal. Following the *Anderson* judgment, the claimant sent a letter before claim in respect of the present proceedings. Other employment tribunal claims based on the *Anderson* judgment brought by employees of the claimant who were RMT mmbers and members of the second defendant ("Unite") are currently stayed pending the outcome of the present claim.

10. It is common ground between the parties that, until 2012, employees of the claimant in grades 1 to 3 received a basic salary and were, in addition, eligible to receive various allowances, including (i) a shift allowance calculated by reference to the basic salary rate with a percentage uplift which varied according to the nature of the shift undertaken; (ii) a productivity bonus of 25.5%; and (iii) a so-called Red Book bonus.

11. By the Letter Agreement, it was agreed that £200 of the Red Book bonus would be consolidated into the basic salary and that the bonus would be reduced accordingly in future (clause 1(a)). Clause 1(a) also stated that "[i]*n making the consolidation amount fixed we aim to benefit those on lower pay with a higher percentage increase in basic pay*". It was also agreed that the productivity bonus of 25.5% would be consolidated

into the basic salary, which would "*benefit employees by having an official higher basic salary*" (clause 1(b)).

12. The claimant seeks to have the Letter Agreement rectified by the insertion immediately after clause 1(b) of the words: "*Save that it is expressly provided that the consolidation of the productivity bonus shall not operate so as to increase basic salary or pay for the purposes of calculating any shift allowance or other allowance, which will continue to be calculated by reference to basic salary or pay as if the productivity bonus had not been consolidated by this agreement*". The claim for rectification is based on an alleged common or unilateral mistake as to the effect of the consolidation of the productivity bonus into the basic salary. The financial consequences of the *Anderson* judgment for the claimant are substantial.

13. Section 13 of the ERA provides amongst other things:

> "***13 Right not to suffer unauthorised deductions***
>
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *…*
>
> *…*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*
>
> *…*".

14. Under section 23(1)(a) of the ERA, complaints by a worker that his employer has made a deduction from his wages in contravention of section 13 may be brought before an employment tribunal.

15. Following the Letter Agreement, the claimant maintained that the shift allowance was to be calculated by reference to the basic salary without regard to the productivity bonus which had been consolidated into the basic salary by virtue of the Letter Agreement. The defendants, on the other hand, maintained that the shift allowance was properly to be calculated by reference to the basic salary rate with a percentage uplift calculated on the basis of the basic salary including the productivity bonus. Therefore, according to the defendants, the resulting shortfall was a deficiency in the employees' wages which was to be treated as a deduction from their wages for the purposes of section 13 of the ERA. Their position was upheld by the employment tribunal and at each stage on appeal.

16. The defendants maintain that, in the present proceedings, the claimant is raising points which (i) had to be and were decided in the *Anderson* proceedings in order to determine whether the shift allowances (calculated by reference to the productivity bonus) were

properly payable to the *Anderson* claimants; and (ii) the claimant did not argue in the *Anderson* proceedings but could with reasonable diligence and should in all the circumstances have been argued which were not only relevant but which went to the essence of the question whether the shift allowances (calculated by reference to the productivity bonus) were properly payable to the *Anderson* claimants.

The preliminary issue

Cause of action estoppel

17. The legal principles relevant to cause of action estoppel were propounded in Lord Sumption's judgment in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, in which the Supreme Court applied the House of Lords decision in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 (the leading case on issue estoppel):

> " *17. Once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings… .*
> *…*
> *22. Arnold v National Westminster Bank plc [1991] 2 AC 93 is … authority for the following propositions. (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. .,.*"

18. *Arnold* also makes it clear that cause of action estoppel only arises "*where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter*": *per* Lord Keith at 104D-E.

19. The defendants submitted that the claimant is prevented by cause of action estoppel from pursuing its rectification claim because it is thereby seeking to challenge the outcome of the *Anderson* proceedings or is raising points which could with reasonable diligence and should have been raised in the *Anderson* proceedings. They also submitted, as they must, that they are the privies of the *Anderson* claimants.

Challenge to the outcome of the Anderson proceedings

20. The *Anderson* judgment determined (as did the lower tribunals) that the *Anderson* claimants had a contractual right to shift allowances with a percentage uplift calculated on the basis of their basic salary including the productivity bonus. According to the defendants, the claimant is therefore estopped from disputing that entitlement in the present proceedings.

21. The claimant submitted that no cause of action estoppel arises because the cause of action in the present proceedings - a claim for the equitable remedy of rectification - is different from the claim in the *Anderson* proceedings – a claim under sections 13 and 23 of the ERA. It submitted that no cause of action relating to mistake arose in the *Anderson* proceedings because the defendants in the present proceedings were neither parties to the *Anderson* proceedings nor parties to the individual employment contracts of their relevant members. Therefore, there could not have been a determination in the *Anderson* proceedings of whether or not there had been a common or unilateral mistake.

22. According to the defendants, there is no requirement for the later proceedings to have been brought under sections 13 and 23 of the ERA in order to found a cause of action estoppel. The defendants sought to illustrate this by reference to the complicated facts in *Virgin Atlantic*. In that case, the claimant airline ("Virgin"), which was the registered proprietor of a European patent for a seating system used on long-haul aircraft, brought High Court proceedings against the defendant ("Zodiac"), which manufactured an allegedly infringing product, for damages for the infringement of its patent. Virgin's claim failed at first instance but succeeded in the Court of Appeal, which declared the patent to be valid and infringed by Zodiac's product and directed an inquiry as to damages. Subsequently, the European Patents Office's technical board of appeal (the "TBA") amended the patent with retrospective effect so as to remove from the date of its grant all the claims which the Court of Appeal had determined to have been infringed. Zodiac thereupon applied for the discharge of the order for an inquiry as to damages but the Court of Appeal refused the application on the ground that it was no more than the mechanism for working out the effect of its decision, which was *res judicata*, that the patent was valid.

23. On Zodiac's appeal to the Supreme Court, Lord Sumption at [16] identified the question before the court as follows:

> "*The fundamental question is whether Zodiac is entitled to contend on the inquiry as to damages that there have been no damages because the patent has been retrospectively amended so as to remove the claims held to have been infringed. This depends on whether the Court of Appeal was right to say that its order declaring the patent to be valid continued to bind the parties per rem judicatam notwithstanding that the patent was later amended on the footing that in was not valid in the relevant respects.*"

24. The Supreme Court's answer to that question, summarised by Lord Sumption at [27], was that Zodiac was prevented by cause of action estoppel from asserting on the inquiry as to damages that in its un-amended form the patent was invalid or was not infringed but that, for two related reasons, it could not be precluded from relying on the TBA's decision on the inquiry as to damages. The first reason was that Zodiac was relying on the more limited terms of a different patent which, by virtue of the TBA's decision, must at the time of the inquiry be treated as the only one that had ever existed. The second reason was that Zodiac was not seeking to reopen the question of validity determined by the Court of Appeal. Accordingly, the Supreme Court allowed Zodiac's appeal.

25. In his concurring judgment in *Virgin Atlantic*, with which the other members of the court agreed, Lord Neuberger observed at [55] that:

> "*The purpose of res judicata is not to punish a party for failing to take a point, or for failing to take a point properly, any more than to punish a party because the court which tried the case may have gone wrong. It is, as explained above, to support the good administration of justice, in the public interest in general and in the parties' interest in particular. Assessed from either perspective, it seems to me wrong to prevent a person who has been held to infringe a patent from invoking in proceedings thereafter a subsequent revocation or amendment of the patent, in order to avoid liability for infringement (at least in the absence of exceptional facts).*"

26, At [62], he further observed that:

> "*When seeking to justify a conclusion that, though it applies, res judicata does not preclude a point being taken, it can be dangerous to invoke the observation of Lord Keith of Kinkel in Arnold ... that estoppel is "intended to work justice between the parties", because it is only too easy to fall back on it as an excuse for an unprincipled departure from, or an unprincipled exception to, the rule. However, in a case where the rule has been relied on, I consider that it is helpful for a court which is inclined to accept the argument that it does not prevent a point being taken, to consider whether that outcome would work justice between the parties.*"

27. In reliance on *Virgin Atlantic*, the defendant submitted that the fact that the present proceedings are concerned with a claim for the equitable remedy of rectification and not with the claim for the wrongful deduction of wages under sections 13 and 23 of the ERA did not mean that there can be no cause of action estoppel. As in the present case, in *Virgin Atlantic* the question to be determined by the court was different: in the earlier proceedings, the validity of the patent and, in the later proceedings, the quantum of any damages. Yet Zodiac was held to be prevented by cause of action estoppel from asserting in the later proceedings that in its un-amended form the patent was invalid or was not infringed because the earlier Court of Appeal proceedings had decided the contrary.

28. In my judgment, there is no cause of action estoppel on the basis submitted by the defendants that the claimant is seeking in the present proceedings to challenge the outcome of the *Anderson* proceedings. I reject the defendants' submission that the claimant is raising in the present proceedings points which were decided in the *Anderson* proceedings. The *Anderson* proceedings were concerned with the defendants' members' claims under their individual employment contracts as a matter of the construction of those contracts. The rectification claim is not concerned to challenge the Court of Appeal's determination of the proper construction of those contracts. Indeed, it proceeds, as it must, on the basis that the Court of Appeal's construction is correct but that the contracts should be rectified because of common or unilateral mistake. The mistake issue was not determined in the *Anderson* proceedings. The present case is distinguishable on its facts from *Virgin Atlantic*. In that case, Zodiac was seeking to assert on the inquiry as to damages the opposite of the very point which has been decided against it by the Court of Appeal, namely that, in its un-amended form, the

patent was valid and was infringed. That was, as Lord Sumption said at [17], a true cause of action estoppel, about which there could be little doubt.

Could and should the claimant have argued in the *Anderson* proceedings the arguments which it is now raising?

29. The defendants also submitted that the claimant is precluded by cause of action estoppel from pursuing its rectification claim on the basis that its mistake arguments could with reasonable diligence and should in all the circumstances have been argued in the *Anderson* proceedings. They submitted that the claimant chose to defend the *Anderson* proceedings purely as a matter of contractual construction but that it was also open to them to have argued that the *Anderson* claimants had no contractual entitlement on the basis of mistake. They point to the claimant's inclusion of the mistake arguments in its grounds of resistance in the employment tribunal proceedings brought by Mr Bolam, following Underhill LJ's observation in the *Anderson* judgment at [58] one month earlier that no argument had been advanced by the claimant that mistake might have allowed it to rescind the employment contracts.

30. The claimant submitted that the issue in the *Anderson* proceedings was one of contractual construction, unlike the issue in the present proceedings, in which the principal issues relate to common and unilateral mistake, which were not in focus in the *Anderson* proceedings and were not, therefore, subject to an adjudication. The claimant disputed that it could or should have raised in the *Anderson* proceedings the arguments which it raises in the present proceedings since rectification is not a remedy with an employment tribunal (or the Employment Appeal Tribunal or Court of Appeal on appeal) has the power to grant.

31. I reject the defendants' submission. The mistake, if there was one, arose in the context of the negotiation of the collective agreement. Rectification of the *Anderson* claimants' individual employment contracts (or the collective agreement) was not possible in the *Anderson* proceedings. It is difficult to see how the issue of mistake, whether common or unilateral, could be satisfactorily resolved given that the *Anderson* claimants were not parties to the collective agreement and the defendants were not parties to the *Anderson* claimants' employment contracts. Factors which might come into play in the exercise of the court's discretion whether or not to grant rectification would not have been relevant in the *Anderson* proceedings.

32. For those reasons, notwithstanding the claimant's grounds of resistance in the Bolam proceedings, I do not consider that it was possible with reasonable diligence for the claimant to have raised the mistake arguments in the *Anderson* proceedings. Even if had been possible, in my judgment, those arguments were not ones which in all the circumstances the claimant should have raised. This outcome also works justice since in my judgment it would not be just to deprive the claimant of the opportunity to advance the rectification claim against the defendants, whatever may be the claim's merits, on the basis of the outcome of the *Anderson* proceedings. Were the claimant estopped from pursuing a well-founded claim for rectification, it would mean that the outcome of the *Anderson* proceedings would have significant financial consequences in respect of every employee of the claimant in whose employment contract the Letter Agreement was incorporated.

Issue estoppel

33. The question whether the defendants may rely on issue estoppel was not raised in the statements of case in the present proceedings and only surfaced in the defendants' skeleton argument for the present hearing. It was accordingly not addressed in the claimant's skeleton argument but Mr Reade QC, who appeared for the claimant, was content for it to be argued, not least because the parties were in agreement that the applicable principles are not fundamentally different from those which apply to cause of action estoppel.

34. The principle of issue estoppel was referred to by Lord Sumption in *Virgin Atlantic* at [17]: "*even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties.*" At [22], he said that *Arnold* was authority for the proposition that "[e]*xcept in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised*".

35. For the reasons stated above in the context of cause of action estoppel, the claimant is not issue estopped from pursuing the rectification claim here. The mistake issue was not "*necessarily common*" to the *Anderson* proceedings and the present proceedings; nor could it with reasonable diligence or should it in all the circumstances have been raised in the *Anderson* proceedings. In view of the significant financial consequences referred to above, I would, had it been necessary to do so, therefore have held that special circumstances exist in which it would not be just to deprive the claimant of the opportunity to advance the rectification claim against the defendants.

Privity of interest

36. In order for the defendants to succeed on the preliminary issue, they must establish not only that the elements required for cause of action or issue estoppel already referred to exist but also that they are the privies of the *Anderson* claimants. In view of my conclusion that those other elements do not exist in the present case, it is strictly unnecessary to determine the privity issue. However, I do so in case my conclusions on the other elements should be wrong. (It would equally have been possible to decide the privity issue first which, if decided against the defendants, would have made it unnecessary to reach a conclusion on the other elements required for cause or action or issue estoppel). The privity issue was not addressed in the claimant's skeleton argument because it proceeded on the basis that the defendants were not advancing any case premised on they were privies of the *Anderson* claimants.

37. In *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No. 2)* [1967] 1 AC 853, Lord Reid stated at 910G that it had always been said that, in order to satisfy the requirement of privity between a party to the earlier litigation and a party to the later litigation, there must be privity of blood, title or interest; and that privity of interest "*can arise in many ways but it seems to me essential that the person now to be estopped from defending himself must have had some kind of interest in the previous litigation or its subject*

matter". In the present proceedings, the defendants submitted that they are the privies by interest of the *Anderson* claimants. Lord Hendy, who appeared on the defendants' behalf, submitted that Unite stood in no different position from the RMT: although the *Anderson* claimants were not Unite members, Unite was a party to the Letter Agreement. The claimant, on the other hand, submitted that there is no privity of interest between the defendants and the *Anderson* claimants.

38. The leading case on privity of interest is the Court of Appeal's decision in *Resolution Chemicals Limited v H. Lundbeck A/S* [2013] EWHC Civ 924 in which Floyd LJ, with whom Longmore and Moore-Bick LJJ agreed, reviewed the earlier authorities on the subject, in particular Sir Robert Megarry V-C's decision in *Gleeson v J Wippell & Co* [1977] 1 WLR 510. In *Gleeson*, one Denne had manufactured clerical shirts which were designed by the defendant ("Wippell"), whom Ms Gleeson alleged had copied her design of shirt. In earlier proceedings, Ms Gleeson had sued Denne and lost on the ground that Wippell had not copied her design of shirt. Wippell sought unsuccessfully to argue that it stood in privity of interest with Denne and that Ms Gleeson therefore was estopped from alleging that it had copied her design of shirt.

39. In a passage quoted in *Resolution Chemicals* at [24], the Vice-Chancellor considered the applicable principles at 515-516:

> "*First, I do not think that in the phrase 'privity of interest' the word 'interest' can be used in the sense of mere curiosity or concern. Many matters that are litigated are of concern to many other persons than the parties to the litigation, in that the result of a case will at least suggest that the position of others in like case is as good or as bad as, or better or worse than, they believed it to be. Furthermore, it is a commonplace for litigation to require decisions to be made about the propriety or otherwise of acts done by those who are not litigants. Many a witness feels aggrieved by a decision in a case to which he is not party without it being suggested that the decision is binding upon him.*
>
> *Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest'. Thus in relation to trust property I think there will normally be a sufficient privity between the trustees and their beneficiaries to make a decision that is binding on the trustees also binding on the beneficiaries, and vice versa.*
>
> *Third, in the present case, I think that the matter may be tested by a question that I put to Mr. Skone James in opening. Suppose that in the Denne action the*

> *plaintiff, Miss Gleeson, had succeeded, instead of failing. Would the decision in that action that Wippell had indirectly copied the Gleeson drawings be binding on Wippell, so that if sued by Miss Gleeson, Wippell would be estopped by the Denne decision from denying liability? Mr. Skone James felt constrained to answer Yes to that question. I say "constrained" because it appears that for privity with a party to the proceedings to take effect, it must take effect whether that party wins or loses. … In such a case, Wippell would be unable to deny liability to Miss Gleeson by reason of a decision reached in a case to which Wippell was not a party, and in which Wippell had no voice. Such a result would clearly be most unjust. Any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest of suspicions. A defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him.*"

40. As Floyd LJ pointed out in *Resolution Chemicals* at [25], the second principle referred to by the Vice-Chancellor was approved by Lord Bingham in *Johnson v Gore Wood* [2002] 2 AC 1, at 32C-G. The explanation in *Gleeson* of the meaning of the expression "privity of interest" was also more recently applied by Knowles J in *Deutsche Trustee Company Limited v Bangkok Land (Cayman Islands) Limited and Another* [2019] EWHC 657 (Comm).

41. In *Gleeson*, at 515A, the Vice-Chancellor described privity of interest as being a "*somewhat narrow*" doctrine. In the present case, I am satisfied that the defendants' interest goes beyond mere curiosity or concern. The question as put in *Gleeson* is whether, having due regard to the subject matter of the dispute, there is a sufficient degree of identification between the *Anderson* claimants and the defendants to make it just to hold that the *Anderson* judgment should be binding on the claimant in the present proceedings.

42. After his consideration of *Gleeson* and other cases, Floyd LJ in *Resolution Chemicals* concluded at [32] that:

> "*in my judgment a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party; and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation.*"

43. Adopting the approach taken by Floyd LJ, I accept that the defendants had an interest in the subject matter of the *Anderson* proceedings. However, I do not accept that the defendants can be said to be, in reality, the party to the *Anderson* proceedings. The facts that the *Anderson* claimants were members of the RMT, that their claim was being supported and funded by the RMT and that the Letter Agreement was in issue in the *Anderson* proceedings and is in issue in the present proceedings are, in my

judgment, insufficient for that purpose. The RMT could not have been a party to the *Anderson* proceedings and could not have brought the claim which the *Anderson* claimants brought. Whether or not the defendants could be said to be, in reality, the party to the *Anderson* proceedings, I do not consider that it would be just that the claimant should be bound by the outcome of the *Anderson* proceedings, for the reasons already stated. In my judgment, the fact relied on by the defendants that, from a practical viewpoint, the construction of the Letter Agreement arrived at in the *Anderson* proceedings would affect the collective negotiations going forward is a factor in favour of the claimant and not that of the defendants in determining whether it would be just that the claimant should be estopped from pursuing the rectification claim.

44. It should be added that the present situation differs from that in *Gleeson* and in *Resolution Chemicals*. In *Gleeson*, the party seeking to rely as against the plaintiff on an estoppel was arguing that it was in privity of interest with the successful defendant in the earlier proceedings brought by the plaintiff. In *Resolution Chemicals*, the question was whether it was just that the new party should be bound by the outcome of the previous litigation. The question in the present case is whether it is just that a party to the previous litigation - the claimant - should be bound by the outcome of that litigation as against the new party. I do not regard those differences as material to the outcome of the privity issue in the present case and the contrary was not suggested by the parties.

45. In the result, I conclude that the defendants are not in privity of interest with the *Anderson* claimants.

Conclusion

46. For the above reasons, the preliminary issue must be determined in the claimant's favour. The claimant is not estopped from pursing its claim for rectification.

The defendants' application

47. It therefore becomes necessary to consider the defendants' application to strike out the Particulars of Claim or for summary judgment against the claimant. The defendants advance three arguments: the proceedings are an abuse of process; the Letter Agreement is not susceptible to rectification; and the claim is unsustainable by reason of laches, acquiescence and delay.

Abuse of process

48. One of the legal principles which Lord Sumption identified in *Virgin Atlantic* at [17] was *Henderson v Henderson* abuse of process, which "*precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones*".

49. In *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31A-E, in a passage quoted with approval in *Virgin Atlantic*, Lord Bingham expressed his view on the principle in *Henderson v Henderson* being both a rule of public policy and an application of the law of *res judicata*:

> "*Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be vexed twice in the same manner. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it was necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the latter proceedings involve what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.*"

50. In *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321 at [38], Sir Andrew Morritt V-C said that it would only be an abuse of process to challenge the factual findings and conclusions in an earlier action if "*(i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute*".

51. In *Aldi Stores Ltd v WSP Group plc and others* [2007] EWCA Civ 1260, the Court of Appeal observed that, as was made clear in *Johnson v Gore Wood & Co*, the fact that a claim could have been raised in an earlier action did not mean that it was necessarily abusive to raise it in a subsequent action. The court reiterated that it was necessary to consider all the circumstances and make a broad merits-based judgment.

52. The defendants submitted that the rectification claim is an abuse of process on the ground that it amounts to a collateral attack on the *Anderson* judgment. According to the defendants, whose detailed written submissions on this issue are contained in paragraphs 91 to 108 of their skeleton argument, the claimant is seeking to re-litigate the *Anderson* claimants' entitlement to shift allowances as determined by the Court of Appeal. If the rectification claim were successful, the result would be inconsistent with the *Anderson* judgment. It was an abuse for the claimant to have failed to raise the mistake issue in the *Anderson* proceedings and to apply for a stay of the *Anderson*

proceedings in order to pursue the rectification claim. It would not be in the public interest to duplicate the *Anderson* proceedings by the rectification claim.

53. I reject the defendants' submissions. The fact that the *Anderson* claimants and the defendants are different "*is a powerful factor in the application of the broad-merits based judgment*", see *Aldi per* Thomas LJ at [10]. I do not accept that the claimant is seeking to re-litigate the *Anderson* claimants' entitlement to shift allowances as determined by the Court of Appeal in the *Anderson* judgment. The rectification claim was not and could not have been made in the *Anderson* proceedings. I also do not accept that, if the rectification claim were successful, the result would be inconsistent with the *Anderson* judgment. The *Anderson* judgment was concerned with the proper construction of the Letter Agreement. The rectification claim is concerned with whether the Letter Agreement, on its proper construction, was the result of a common or unilateral mistake such that it should be rectified. It does not involve a re-litigation of the construction of the Letter Agreement and does not constitute a collateral attack on the *Anderson* judgment.

54. In my judgment, the defendants also cannot rely on the claimant's alleged failure to raise the mistake issue in the *Anderson* proceedings or to apply for a stay of the *Anderson* proceedings in order to pursue the rectification claim. I accept the claimant's submission that its decision to exhaust the issue of contractual construction before issuing the rectification claim was commercially reasonable and proper. It may well be that the possibility of a rectification claim only became apparent to the claimant following the *Anderson* judgment, in which case the claimant's conduct in not taking the steps referred to above was not the product of any deliberate decision to defer making the rectification claim. Whether or not that is so, I consider that the claimant's conduct was not in any way culpable or improper and does not render the rectification claim an abuse of process.

55. For these reasons, having regard to all the circumstances and making a broad merits-based judgment, I am not satisfied that it would be manifestly unfair or would bring the administration of justice into disrepute if the claimant were allowed to pursue its rectification claim.

Rectification of the Letter Agreement

56. The defendants next submitted that the Letter Agreement is a collective agreement which is not legally binding or enforceable and, as such, the court has no power to rectify it. They submitted that rectification is "typically" a remedy sought in respect of a contract or other legally enforceable document. The claimant's position is that rectification is a remedy which is not confined to legally binding or enforceable documents. It is common ground between the parties that there is no authority which is directly in point on whether a collective agreement which is not legally binding or enforceable is capable of being rectified.

57. In support of their position, the defendants drew attention to the following matters: (i) they are not bound by the Letter Agreement; (ii) the claimant's employees to whom the Letter Agreement applies are bound by its terms through their individual employment contracts irrespective of whether they are members of the defendants; (iii) it would be next to impossible to determine the subjective intention of the parties

entering into the Letter Agreement given that the process for agreeing its terms involved not only the defendants' officers but also their respective members who were balloted about it; (iv) if the wording of a collective agreement was capable of being rectified, the appropriate defendants to the rectification claim are the employees into whose employment contracts the collective agreement was incorporated.

58. In my judgment, rectification is not confined to legally binding contracts. In *Marley v Rawlings* [2014] UKSC 2 at [28], Lord Neuberger found no convincing reason why the courts could not rectify a will "*in the same way as <u>any other document</u>*" (emphasis added). Rectification is an equitable remedy which acts on the conscience of the party who seeks to take advantage of the mistake in question. It would be inconsistent with the equitable nature of the remedy to confine it in the way contended for by the defendants. It would altogether take out of the ambit of the remedy documents which were made in error that were not legally binding and enforceable. There is no reason why it would be unfair to permit rectification of legally binding contracts but not of other documents which have consequences for the parties concerned. Here, it would be unfair to deprive the claimant of the opportunity to pursue its rectification claim and so permit the defendants to take advantage of the mistake alleged by the claimant in the collective agreement.

59. Moreover, as stated in *Snell's Equity* (34th edition, 2019) at 16-004, the jurisdiction to rectify is quite general and may be exercised in respect of a wide range of contracts and documents inter partes. The following paragraph in *Snell*, 16-005, continues to deal with voluntary documents which may be rectified such as marriage settlements and other unilateral instruments.

60. There is also Canadian authority which, while not deciding that a collective agreement is capable of rectification, is supportive of the conclusion that rectification of a collective agreement is available. In *Saanich Police Association v District of Saanich Police Board* (1983) 43 B.C.L.R. 132, the British Columbia Court of Appeal proceeded on the basis that the collective agreement in issue in that case was capable of rectification and the contrary was not argued by the union which (successfully) opposed the employer's rectification claim on the merits. In *Public Service Alliance of Canada v NAV Canada* (2002) 59 O.R. (3d) 284, to which the court drew the parties' intention following the hearing and on which they were invited to comment, the issue was whether a labour arbitrator had the power to rectify a collective agreement between NAV Canada, the employer, and the Public Service Alliance of Canada, the union, to correct certain scheduled hourly wage rates for the calculation of retroactive pay. The Ontario Court of Appeal, reversing the decision of the Divisional Court, held that the arbitrator did have that power. The question whether the collective agreement, which was subject to ratification by the union membership, was capable of rectification was not argued: it again appears to have been accepted that it was. The position in Canada with regard to the enforceability of a collective agreement appears to differ from that in England, *Toastmaster v Ainscough* [1976] 1 SCR 718. However, that does not affect the conclusion that rectification is not confined to legally binding contracts.

61. Accordingly, the facts that the parties which negotiated the Letter Agreement are not both bound by it; and that the claimant's employees to whom the Letter Agreement applies are bound by its terms through their individual employment contracts

irrespective of whether they are members of the defendants do not mean that it is not capable of being rectified. Nor is it correct that the appropriate defendants to the rectification claim are the employees into whose employment contracts the collective agreement was incorporated.

62. As to it being allegedly next to impossible to determine the subjective intention of the parties entering into the Letter Agreement, it may be that difficult questions will arise as to how the claimant can prove the mistake relied on and, in particular, as to the person(s) whose intentions are relevant for that purpose. However, that difficulty was not one which appears to have prevented Canadian courts from rectifying a collective agreement and, irrespective of the position under Canadian law, it does not seem to me that this difficulty is a ground for concluding that the rectification claim should be struck out or summary judgment entered for the defendants.

63. For the above reasons, I reject the defendants' submission that the court has no power to rectify the Letter Agreement.

Laches, acquiescence and delay

64. Finally, the defendants submitted that the rectification claim is unsustainable by reason of laches, acquiescence and delay. They submitted that, taking the evidence of Mr Bartlett at its highest, the claim is barred on those grounds.

65. It was common ground that an accurate modern statement of the laches principle is to be found in the judgment of Blackburne J in *KPMG LLP v Network Rail Infrastructure Ltd* [2006] EWHC 67 (Ch) at [197]:

> "*That merely leaves the laches defence. As to this, it is well established that the doctrine does not come into play before the person against whom it is raised as a defence has discovered the material facts, in this case the mistake. It must be shown that the subsequent delay in pursuing the claim renders it "practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were otherwise to be asserted". See Lindsay Petroleum Company v Hurd (1873) 5 App Cas 221 at 239 (per Lord Selborne). As Lord Selborne went on (at 240) to observe:*
>
> > *"Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy.*"

Thus, laches involves delay coupled with some form of relevant prejudice to the defendant.

66. In paragraphs 119 to 127 of their skeleton argument, the defendants made a series of submissions as to why Mr Bartlett's evidence demonstrates delay on the claimant's part. In paragraphs 128 to 133 of the skeleton argument, they seek to show how they

have been prejudiced by the delay. It is sufficient for present purposes to say that the defendants' submissions, even if well-founded, do not lead me to the conclusion that the rectification claim should be struck out or reverse summary judgment awarded to them. The court cannot on the present application resolve the competing arguments of the parties on the existence of delay and prejudice so as to be able to conclude that there are no reasonable grounds for bringing the rectification claim or that the claim has no real prospects of success. In particular, I regard the evidence of prejudice relied on by the defendants in Mr Guss' witness statement as thin.

67. The principle of acquiescence differs from the laches principle in that it involves the non-exercise of a right in circumstances where the obligor may reasonably assume that it will never be exercised, see *Transview Properties Ltd* [2008] EWHC 1221 (Ch) at [149] *per* Briggs J. The defendants argued that in failing to raise the mistake issue in the *Anderson* proceedings, the claimant acquiesced in the mistake: the claimant failed to exercise a purported right in such a manner that the defendants were entitled to believe that it would never be exercised and so has waived the right to bring the rectification claim.

68. In my judgment, this argument is without merit. The argument that the claimant acquiesced in the mistake is in substance the same argument which I have rejected in the context of the preliminary issue. I also do not consider that there is any or any sufficient basis in the evidence on which to conclude that the defendants had any justified belief that the mistake argument would never be raised.

Conclusion

69. For the above reasons, the defendants' application fails.

Disposal

70. In summary, on the preliminary issue I determine that the claimant is not estopped from pursing its claim for rectification. The defendants' application to strike out the Particulars of Claim or for summary judgment against the claimant is dismissed.

71. This judgment is being handed down remotely in accordance with the Covid-19 Protocol. The parties are requested to submit draft minutes of order for the court's consideration. In so far as there are consequential matters which require determination, they can be dealt with on paper unless either party should request an oral hearing, in which case the Chancery Listing Office should be contacted at the earliest opportunity to arrange one.