Michaelmas Term
[2024] UKSC 41
On appeal from: [2023] EWCA Civ 551

JUDGMENT

Secretary of State for the Department for Environment, Food and Rural Affairs (Respondent) v Public and Commercial Services Union (Appellant); Commissioners for His Majesty's Revenue and Customs (Respondent) v Public and Commercial Services Union (Appellant); Secretary of State for the Home Department (Respondent) v Public and Commercial Services Union (Appellant)

before

Lord Reed, President
Lord Sales
Lord Burrows
Lady Rose
Lady Simler

JUDGMENT GIVEN ON
20 November 2024

Heard on 1 and 2 July 2024

Appellant
Oliver Segal KC
Darshan Patel
(Instructed by Thompsons Solicitors LLP)

Respondents
Daniel Stilitz KC
Jack Feeny
(Instructed by the Government Legal Department)

LORD SALES AND LADY ROSE (with whom Lord Reed and Lady Simler agree):

1. INTRODUCTION

1. The respondent employers are three Government departments. Some of their employees, including the individual claimants in these proceedings, are members of the Public and Commercial Services Union ("the Union"). The Union is recognised for collective bargaining purposes by those employers. The individual claimants chose in the past to have their union subscription deducted from their salary at source through the pay roll system. The sum deducted would then be paid over to the Union by the employer. This is referred to as a check-off arrangement.

2. In 2014 or 2015, the employers stopped the check-off arrangements leaving the employees to make their own arrangements for paying their union subscription. It is now accepted by the Government that the unilateral withdrawal of the check-off arrangements was a breach by the respondent departments of their employees' contracts of employment. The withdrawal of the check-off arrangements led to a substantial reduction in the subscription income of the Union.

3. A number of employees brought actions against the employers for breach of their contracts of employment in these and earlier proceedings. Those claims were successful but they could only address the position of each individual employee who brought a claim. Further, it was not clear what loss the employees had suffered, given that the result of the breach was that they received more in their monthly salary than they had before. The person who had really suffered the loss was the Union, but the Union was not a party to the contract of employment and so did not, under common law, have a right to sue for that breach.

4. The Union considered that this difficulty was precisely the kind of difficulty that had been addressed – and resolved in their favour – by the enactment of the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act"). The Union therefore also brought its own claims against the employers alongside those of the individual employees, asserting that the contracts of employment in dispute fulfilled the criteria set out in the 1999 Act. They claimed to be entitled to rely on the third party right provided by section 1 to enforce the term of the contracts of employment containing the check-off arrangements.

5. The individual claimants and the Union succeeded in the High Court in the three separate actions which have directly led to this appeal. The actions were:

a. *Cox and others v Secretary of State for the Home Department* in which judgment was given on 23 March 2022 by Choudhury J: [2022] EWHC 680 (QB); [2023] ICR 283; [2022] IRLR 502 ("the *Cox* judgment");

b. *Crane and others v Secretary of State for the Department for Environment, Food and Rural Affairs* in which judgment was given on 24 June 2022 by Choudhury J: [2022] EWHC 1626 (QB); [2023] ICR 373; [2022] 1RLR 778 ("the *Crane* judgment")**;** and

c. *Smith and others v The Commissioners for HM Revenue and Customs (HMRC)* in which judgment was given on 13 December 2022 by Freedman J [2022] EWHC 3188 (KB); [2023] ICR 611; [2023] IRLR 197 ("the *Smith* judgment").

6. Appeals brought by the respondent departments from all three judgments were heard together by the Court of Appeal (Underhill LJ, Vice President of the Court of Appeal Civil Division, Stuart-Smith and Lewis LJJ). In their judgment handed down on 19 May 2023 ([2023] EWCA Civ 551; [2023] ICR 914; [2023] IRLR 679), the Court of Appeal unanimously dismissed the appeals as regards the individual claimants and confirmed the respondents' liability to them. But by a majority they allowed the appeals as regards the Union's claims under the 1999 Act and dismissed those claims.

7. Only one of the many arguments raised in this series of cases is still relied on by the respondent employers before this court. That issue, which arises from the application of section 1(2) of the 1999 Act, is whether on a proper construction of the contracts of employment, it appears that the employer and the employee who are the parties to each contract did not intend the check-off arrangements to be enforceable by the Union.

8. The majority of the Court of Appeal held that the parties did not so intend. The main reason for that conclusion was that the check-off arrangements derived originally from a collective agreement between the predecessor to the current employer and the predecessor to the Union concluded many years ago. It is well known that agreements arrived at by collective bargaining are not intended by the parties to be legally enforceable by either party against the other. That was originally a matter of custom and practice in industrial relations but it is now provided for by section 179 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). To construe the contracts of employment as conferring third party rights on the Union to enforce the check-off arrangements would, the majority held, circumvent that prohibition and allow the Union

to achieve by an indirect route what it could not achieve by the direct route of suing on its own agreement with the employer.

9. This appeal therefore raises the issue of the correct interpretation of the 1999 Act and the proper construction of the contracts of employment of the individual claimants in these proceedings.

2. THE CONTRACTS OF EMPLOYMENT IN DISPUTE

(a) The individual employees

10. Claims against the Secretary of State for the Home Department ("the *Cox* case") are brought by four individual claimants as well as by the Union itself. They are James Cox, Malcolm Davey, Owen Hughes and Denise Speakman. They started working for the Home Office at various dates between 1987 and 2014 and in various roles, for example as an immigration officer or in His Majesty's Passport Office. Claims against the Secretary of State for the Department for Environment, Food and Rural Affairs ("DEFRA") were brought by three individual claimants, Keith Crane, Elspeth Ganon Wagg and Caroline Mackenzie ("the *Crane* case"). They started working for DEFRA's predecessor departments in 1986, 2007 and 1990 respectively. The claims against HM Revenue and Customs ("HMRC") were brought by four individual claimants, Colette Smith, Andy O'Donnell, Ian Lawther and Wendy Turner ("the *Smith* case"). Two of them had previously been employed by the Inland Revenue and two by HM Customs & Excise before the merger of those two departments in 2005.

11. All the individual claimants were and are members of the Union and chose to pay their union subscriptions using the check-off arrangements until those arrangements were withdrawn by their employers.

(b) The check-off arrangements

12. Historically, the terms and conditions of service for Government employees were determined centrally by HM Treasury which was responsible for pay bargaining with the relevant unions. Terms and conditions were largely the same across departments and were set out in the Civil Service Pay and Conditions of Service Code ("the CSPCSC") which employing departments had to adopt.

13. The background to the adoption of check-off arrangements was described by Choudhury J in his judgments in the *Cox* case and the *Crane* case. Choudhury J said that the origins of the check-off arrangements lie in collective agreements reached between the Government and the relevant trade unions in the 1960s. He was not shown any documentation from that time but referred to a research paper from 1966 which confirmed that in July 1965 HM Treasury offered to provide check-off to the staff associations recognised by the Government at that time (including the Union's predecessor). This was, it appears, the source of check-off for civil servants working for central Government: see para 6 of the *Crane* judgment.

14. Voluntary deductions from pay were dealt with in para 4051 of the CSPCSC. That provided that a civil servant who wished to authorise deductions from his pay for any of the organisations listed in an Annex to the CSPCSC should complete a form and send it to the organisation which would then forward it to the officer paying their salary. The particular Annex which listed organisations for which there was no charge for arranging the deduction included nationally and departmentally recognised unions representing civil servants. There was a particular provision which applied to them and not to other organisations in that Annex. Para 4100 provided that in the event of industrial action and for the duration of such action, the employer could withdraw the method of payment in whole or in part in respect of any union with members officially involved in the industrial action.

15. During the 1990s responsibility for pay bargaining was transferred from HM Treasury to individual Government departments and responsibility for terms and conditions was delegated to the Ministers of the various departments. This gave rise to the Civil Service Management Code ("the CSMC"). The CSMC did not itself set out those terms and conditions but it also dealt with voluntary deductions from pay. Para 7.3 of the CSMC made similar provision for check-off arrangements as the CSPCSC, including the ability of the employer to stop deductions in the event of official industrial action, although any such withdrawal needed the approval of the Cabinet Office.

16. The identification of the sources of the employment terms applicable to some of the individual claimants in the three cases proved to be a difficult and complex exercise for the parties and for the judges at first instance. A variety of codes, staff handbooks, manuals, policies, memoranda, draft model contracts, web pages and notices were described: see paras 12 to 24 and para 48 of the *Cox* judgment, paras 9 to 19 of the *Crane* judgment and paras 16 to 34 of the *Smith* judgment. For our purposes, it is enough to say that each of the individual claimants had a contractual entitlement to require their employer to deduct their Union subscription from their salary at source and pay that over

to the Union, along the lines of paras 4051 and 4100 of the CSPCSC and para 7.3 of the CSMC.

(c) Collective agreements and individual contracts of employment

17. In the circumstances prevailing in industrial relations in the 1960s there was authority which established that a collective agreement was not legally enforceable by the parties to it, because they did not intend it to have legal effect: *Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers & Others* [1969] 2 QB 303; [1969] 1 WLR 339 ("*Ford Motor Co*"). It is unnecessary to examine whether the same inference should be drawn in the different social and economic conditions of today because the position is now governed by section 179 of TULRCA.

18. Section 179(1) provides that a collective agreement "shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract" unless (a) it is in writing and (b) it "contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract". Subsection (2) provides that a collective agreement that satisfies those conditions "shall be conclusively presumed to have been intended by the parties to be a legally enforceable contract". In both cases, what is referred to is the legal enforceability of the collective agreement itself as between the parties to it, the union and the employer.

19. In unionised workplaces it is often the case that an individual contract of employment (that is, a contract of employment between an individual employee and the employer) incorporates terms which have been negotiated between a union and the employer as part of a collective agreement. Union officials who negotiate such terms with the employer do not act as agents of the individual employees for this purpose. Indeed, it may be that the term is incorporated into the individual contract of an employee who entered into employment long after the collective agreement was negotiated. Rather, the basis for inclusion of the term in the individual contract of employment is that the employer and the employee agree that this provision in the collective agreement should be incorporated by reference into that contract of employment. The ordinary principles governing interpretation of a contract apply in relation to the individual contract of employment: it is interpreted objectively, that is as it would have been understood by a reasonable person with all the relevant background knowledge which would reasonably have been available to the parties when they made the contract: *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ("*ICS*"), 912; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 ("*Wood v Capita*"), paras 10-13. However, some adjustment may be required to accommodate the fact that

the term incorporated in the individual contract of employment has been derived from a collective agreement which also requires to be interpreted objectively in light of the background knowledge reasonably available to the parties to that agreement (the union and the employer): *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers* [2024] UKSC 28 ("*Tesco*"), para 4 (Lord Burrows and Lady Simler) and paras 151-153 (Lord Reed). It is not necessary in this judgment to examine whether and to what extent any such adjustment might be required, since it is not suggested that there is any doubt about the meaning and effect of the check-off term.

20. As a matter of legal principle, the position where an individual contract of employment incorporates a particular term in this way is no different from that where an individual employee negotiates on his own behalf for such a term and the employer agrees it. In the former case, the employee and the employer agree that the term shall be that set out in the collective agreement. In the latter case, they agree that the term shall be that identified in a bespoke way in the agreement between them. In both cases the inclusion of the term in the individual contract of employment depends on what the parties (the employer and the employee) have agreed. In both cases, the question whether the term is legally enforceable depends on the intention of those parties. That falls to be determined in the usual way by reference to all relevant and admissible evidence bearing on that issue. If they intend that a term set out in a collective agreement is to be included in the individual contract of employment and is to be legally enforceable as between themselves, it does not matter that in the context of a different agreement between different parties (that is, the collective agreement between the employer and the union) section 179 of TULRCA creates a different and specific regime governing whether that collective agreement is legally enforceable or not. For the parties to the individual contract of employment, the collective agreement is simply a convenient reference point to identify a term which they wish to be included in that contract.

(d) The withdrawal of the check-off arrangements and its consequences

21. In December 2013, the Minister for the Cabinet Office wrote to the Permanent Secretaries for civil service departments. The letter stated that the Minister for the Cabinet Office considered that it was:

> "not desirable for Civil Service employers to provide an unnecessary service on behalf of the Trade Unions and their members which can impose additional costs as well as constraints on the way employers administer their payrolls.

> Departments are requested to review any such arrangements they have in place."

22. The Minister attached Cabinet Office guidance and said that the recipients of the letter were "strongly advised" to speak to their Permanent Secretaries and departmental lawyers about the issue and to nominate a "lead legal adviser" for that purpose.

23. The guidance attached to the letter described the current position, stating that "some unions are significant beneficiaries" of the check-off arrangements with most of their subscriptions gathered in that way. Other unions preferred to collect subscriptions directly from their members. The advice given was that there were "compelling reasons" for departments to consider removing check-off arrangements. These included that at a time of "fiscal consolidation", departments should no longer provide unnecessary services on behalf of trade unions and that when an employer offers such services, they place themselves under a legal obligation to do so: "If an employer breaches these legal obligations they can find themselves at risk of Employment Tribunal claims".

24. Each of the respondent departments decided to withdraw their check-off arrangements in respect of the Union. The Home Office did so in December 2014, DEFRA in January 2015 and HMRC at the end of April 2015.

25. Choudhury J records the effect of the withdrawal of the check-off arrangements on the Union in his judgment in the *Cox* case, where he explained (para 30):

> "Meanwhile, in an attempt to maintain the flow of subscriptions affected by the proposed withdrawal of check-off, [the Union] had commenced a campaign to encourage members to move to direct debit payment of subscriptions. This was described by [the Union's witness] as an 'existential' matter for the union. As at November 2014, just prior to the withdrawal of check-off, [the Union] had 13,584 members in the Home Office paying subscriptions by checkoff; of these, 5,816 members had not signed a direct debit mandate in favour of the union by the time check-off ceased. This represented a 43% loss of subscription income for [the Union] from members in the Home Office. That position was somewhat further mitigated over subsequent months, but, as at 1 March 2015, there were approximately 3000 members whose subscriptions had been lost."

26. In his judgment in the *Crane* case Choudhury J said (para 25):

> "Meanwhile, in an attempt to maintain the flow of subscription income from staff affected by the withdrawal of check off, [the Union], in May 2014, had adopted a policy of moving members to Direct Debit arrangements. It was clear to [the Union] that the removal of check-off would mean that the collection of trade union subscriptions would be rendered less secure and reliable. [The Union] claims to have suffered loss in the form of lost subscriptions following the removal of check-off. [The Union's witness], in his evidence, states that 195 out of 625 [Union] members within DEFRA had not signed a Direct Debit mandate after the withdrawal of check-off, representing a 31.2% loss of subscriptions. Similarly, in [the Rural Payments Agency], 320 out of 1,156 and in [the Animal Plant and Health Agency], 90 out of 310, [Union] members had not signed a Direct Debit mandate representing a 27.7% and 29% loss of subscription income respectively from the membership in these agencies."

27. In his judgment in the *Smith* case, Freedman J said (para 77(k)):

> "after check-off had been removed, steps were provided by HMRC to facilitate each individual member's transfer from check-off to direct debit after check-off had been removed until the end of October 2015. By the end of August 2015 there had been an 87% take up of direct debit by [Union] members."

3. THE 1999 ACT

(a) The common law privity rule

28. At common law, the principle of privity of contract applied. This meant that a person could only enforce a contract if they were a party to it. It had the effect that even if a contract was made with the purpose of conferring a benefit on someone who was not a party to it, that person had no right to sue for breach of the contract. This came to be perceived as unsatisfactory and potentially unjust, since it meant that a common intention of the contracting parties to benefit a third party would be thwarted and reasonable

expectations of the third party that he or she could enforce the agreement would be defeated. There were repeated calls for the law to be reformed to allow for a third party to sue on the contract in appropriate cases: see, eg, the Sixth Interim Report of the Law Revision Committee on Statute of Frauds and the Doctrine of Consideration (1937) (Cmd 5449); *Beswick v Beswick* [1968] AC 58, 72 (Lord Reid); *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277, 300 (Lord Scarman). In 1991, therefore, the Law Commission for England and Wales commenced a project to review the case for reform of the law and issued a consultation paper on Privity of Contract: Contracts for the Benefit of Third Parties (1991) (LCCP No 121) ("the Consultation Paper").

(b) The Law Commission Report

29. In the Consultation Paper the Law Commission proposed that the test for when a third party should have the right to enforce a contract made by others should be when the parties to the contract intended that he or she should receive the benefit of the promised performance and also intended to create a legal obligation enforceable by him or her (referred to as "the dual intention test"). However, although there was some support for the dual intention test from consultees, there were also a number of responses which were critical of that proposal. The main point made in those responses was that it might be difficult to draw inferences in the circumstances of a case regarding the precise nature of the intentions of the parties, with the result that the dual intention test would produce unacceptable uncertainty.

30. As a result of those consultation responses, the Law Commission was persuaded to recommend a different solution in its final report published in 1996, accompanied by a draft Bill, on Privity of Contract: Contracts for the Benefit of Third Parties (1996) (Law Com No 242) (Cmnd 3329) ("the Report" and "the draft Bill", respectively). This solution aimed to increase legal certainty, albeit at the cost of being somewhat more mechanistic in its application. It had two limbs, as set out in recommendation 8 in the Report:

> "(a) a third party shall have the right to enforce a contractual provision where that right is given to him – and he may be identified by name, class or description – by an express term of the contract (the 'first limb');
>
> (b) a third party shall also have the right to enforce a contractual provision where that provision purports to confer a benefit on the third party, who is expressly identified as a beneficiary of

> that provision, by name, class or description (the 'second limb'); but there shall be no right of enforceability under the second limb where on the proper construction of the contract it appears that the contracting parties did not intend the third party to have that right …."

31. This recommendation was carried into clause 1(1)-(3) of the draft Bill, which eventually became section 1(1)-(3) of the 1999 Act: see para 36 below. The present case is concerned with application of the second limb of the statutory test.

32. The Report observed (para 7.7) that the law on intention to create legal relations draws a distinction between commercial and domestic arrangements, with a presumption being made in favour of an intention to create legal relations in the former case, but that such an approach would be inappropriate when considering the parties' intentions as regards the legal rights of third parties, particularly in respect of commercial arrangements. The Report also rejected an approach dependent on the application of the test for implication of terms: para 7.8. The recommendation in the Report, therefore, was that a novel approach to contractual intention was required that did not rest on the existing law relating to intention to create legal relations or to implied terms: para 7.9.

33. The second limb of the test, addressing those situations where the parties do not expressly contract to confer a legal right on the third party, was described in para 7.17 of the Report as establishing "a rebuttable presumption in favour of there being a third party right where a contractual provision purports to confer a benefit on an expressly designated third party. But that presumption is rebutted where on the proper construction of the contract the parties did not intend to confer a right of enforceability on the third party". This is different from the double intention test proposed in the Consultation Paper, which depended on it being shown by positive evidence that the parties to the contract intended that the third party should have the right to enforce it. Instead, a presumption to that effect is introduced, and it is required to be shown on the proper construction of the contract that the parties did *not* intend that result.

34. Consultees had raised concerns that care should be taken to ensure that the 1999 Act did not operate so as to disrupt established practices and patterns of contractual responsibility in the construction industry. In that industry there might be chains of contracts for the provision of particular construction services in which it was contemplated that the employer developer at the top of the chain would be the ultimate beneficiary of services provided further down the chain, but liability under each later contract in the chain would be confined to the parties to that contract and not be owed

more widely, such as to the employer developer. Consultees wished to ensure that the proposed legislation would not cut across this established pattern, which was well understood and formed the context in which the various parties framed their contractual duties and sought insurance.

35. At para 7.18(iii) the Report explained:

> "The presumption of enforceability is rebutted where the proper objective construction of the contract is that the parties did not intend the third party to have the right of enforceability. The onus of proof will be on the contracting parties (usually in practice the promisor), so that doubts as to the parties' intentions will be resolved in the third party's favour. A promisor who wishes to put the position beyond doubt can exclude any liability to the third party which he might otherwise have had. But to allay the fears of the construction industry we should clarify that, even if there is no express contracting out of our proposed reform, we do not see our second limb as cutting across the chain of sub-contracts that have traditionally been a feature of that industry. For example, we do not think that in normal circumstances an owner would be able to sue a sub-contractor for breach of the latter's contract with the head-contractor. This is because, even if the sub-contractor has promised to confer a benefit on the expressly designated owner, the parties have deliberately set up a chain of contracts which are well understood in the construction industry as ensuring that a party's remedies lie against the other contracting party only. In other words, for breach of the promisor's obligation, the owners' remedies lie against the head-contractor who in turn has the right to sue the sub-contractor. On the assumption that that deliberately created chain of liability continues to thrive subsequent to our reform, our reform would not cut across it because on a proper construction of the contract - construed in the light of the surrounding circumstances (that is, the existence of the connected head-contract and the background practice and understanding of the construction industry) - the contracting parties (for example, the sub-contractor and the head-contractor) did not intend the third party to have the right of enforceability. Rather the third party's rights of enforcement in relation to the promised benefit were intended to lie against the head-contractor only and not against the promisor. For similar

reasons we consider that the second limb of our test would not normally give a purchaser of goods from a retailer a right to sue the manufacturer (rather than the retailer) for breach of contract as regards the quality of the goods."

(c) The provisions of the 1999 Act

36. The Report led to the passing of the 1999 Act, which closely followed the draft Bill proposed by the Law Commission. Section 1 provides in relevant part as follows:

> "**1. Right of third party to enforce contractual term.**
>
> (1) Subject to the provisions of this Act, a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if—
>
> (a) the contract expressly provides that he may, or
>
> (b) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.
>
> (3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.
>
> …"

37. It is common ground that the individual contracts of employment at issue in these appeals did not make express provision falling within section 1(1)(a) for enforcement by the Union. It is also common ground that the Union, which is within the class mentioned,

is sufficiently identified as a third party so as to satisfy section 1(3) and that the check-off term derived from the collective agreements and incorporated in the individual contracts of employment purports to confer a benefit on it, so as to fall within section 1(1)(b). The issue, therefore, is whether section 1(2) applies.

38. Section 10(2) of the 1999 Act provided that, unless the parties agreed otherwise, the 1999 Act did not apply to contracts entered into in the period of six months after it came into effect on 11 November 1999; that is, there was to be a grace or notice period to allow information about the new regime to be disseminated and contracts to be adjusted. The respondent departments therefore had the opportunity under that provision and generally to adjust the terms of individual contracts of employment entered into thereafter to ensure that third parties were not given rights under them by making express provision to that effect. No such express provision was included in the relevant individual contracts of employment.

39. Other points pertaining to the operation of the 1999 Act in relation to the individual contracts of employment should be noted:

a. Section 1(5) provides that where a third party has the right to enforce a term, "there shall be available to [that party] any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly)". By virtue of this provision the Union claims damages for its losses suffered by reason of the respondent departments' breaches of the check-off terms in the individual contracts of employment.

b. Section 2 imposes limits on the extent to which the parties to a contract may vary its terms or rescind it without the consent of the third party. There was an issue in the proceedings at first instance as to whether there had been a variation of the check-off term so that the employees had accepted that it would not apply, and whether that had been done in such a way as to negate any rights the Union might have in relation to it. However, the respondent departments lost on that issue and it is not a live matter on this appeal.

c. Section 6(3) protects employees and workers from being subject to any right of a third party to enforce a contract against them. This provision has not given rise to any difficulty for the Union in these proceedings.

(d) Some cases on the 1999 Act outside the employment context

40. Authorities on the operation of the 1999 Act outside the employment context were referred to, as follows. *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm); [2004] 1 All ER (Comm) 481 ("*Nisshin Shipping*") concerned time charters which included a term for payment of commission by the shipowners to the brokers, who were third parties, and an arbitration clause. The shipowners denied that they were obliged to pay the commission and the brokers sought to refer that issue to arbitration, notwithstanding they were not a party to the arbitration agreements. The arbitrators ruled that they had jurisdiction since the brokers had third party rights to enforce the commission provision in the charterparties under the second limb of section 1(1) of the 1999 Act and section 8 had the effect that they could rely on the arbitration provision. The shipowners challenged this conclusion on the basis that the intention of the parties should be taken to be that the commission term should be enforceable only by the charterers, who had to be joined as co-claimants.

41. Colman J rejected that argument. The shipowners submitted that there was no positive indication in the charterparties that the parties intended the brokers to have enforceable rights (para 22). This was, in effect, an attempt to invoke the double intention test. However, Colman J correctly pointed out (para 23) that section 1(2) is structured differently, requiring that for section 1(1)(b) to be disapplied it has to be shown that on its proper construction the contract did not intend to allow for third party enforcement: "In other words, if the contract is merely neutral on this question, subsection (2) does not disapply subsection (1)(b)". The charterparties were neutral in this sense: they did not express any intention contrary to the statutory presumption that the brokers were entitled to enforce the commission term.

42. *Chudley v Clydesdale Bank plc (trading as Yorkshire Bank)* [2019] EWCA Civ 344; [2020] QB 284 ("*Chudley*") was a case in which the claimants paid money to an investment company to finance a property development scheme. Unknown to the claimants, the investment company had a banking agreement with the defendant bank under a letter of instruction which required the bank to open a segregated client account for the scheme and not to withdraw funds from it unless certain conditions were met, the intention being to ensure that the moneys were indeed used for the development. In fact, no such segregated account was set up and the claimants paid their money into a general account of the investment company with the bank. The bank allowed the company to withdraw the funds for use in other ways. The investment company became bankrupt and the scheme foundered. The claimants sued the bank for damages for breach of contract, claiming to be entitled pursuant to the 1999 Act to enforce as third parties the banking

agreement between the investment company and the bank contained in the letter of instruction. The claimants lost at first instance but succeeded in the Court of Appeal.

43. The Court of Appeal found that the letter of instruction comprised a binding contract between the investment company and the bank, that the claimants were sufficiently identified as third parties in that contract within the meaning of section 1(3) and that it purported to confer a benefit on them for the purposes of the application of section 1(1)(b). There was no requirement that the claimants should be aware of the contractual arrangement for their benefit. They were entitled to claim damages for the loss they had suffered by reason of the breach of the terms contained in the letter of instruction. The Court of Appeal did not refer to the double intention approach, nor focus on whether the parties to the banking contract positively intended that the claimants should be able to enforce the contract terms in the letter of instruction, as those issues are not relevant under section 1 of the 1999 Act.

44. In *Laemthong International Lines Co Ltd v Artis* [2005] EWCA Civ 519; [2005] 2 All ER (Comm) 167 ("*Laemthong International*") a ship was chartered to the first defendant charterers. The second defendants were the receivers of the cargo shipped on board. Discharge was to be on presentation of the original bills of lading, failing which delivery could be made to the receivers if letters of indemnity were provided to the owners by the charterers and the receivers. The cargo was delivered to the receivers upon provision of letters of indemnity, including one to which the charterers and the receivers were parties. A bank subsequently asserted a claim to the cargo, relying on the bills of lading, and the ship was arrested. The shipowners sought a declaration that under the letters of indemnity they were entitled to be indemnified in respect of any liability arising from the bank's claim and other consequential losses. The receivers argued that their letter of indemnity did not cover the shipowners, who were not a party to it. The Court of Appeal found that the shipowners fell within a category of person ("agents" of the charterers) described in the letter as having the benefit of the indemnity and therefore qualified as a third party entitled to enforce the terms of that letter of indemnity pursuant to section 1 of the 1999 Act.

45. The Court of Appeal then addressed an argument for the receivers based on section 1(2). They contended that there was a chain of letters of indemnity (in that the charterers provided one to the shipowners and the receivers provided one to the charterers; and the shipowners did not ask for a letter of indemnity directly from the receivers, as they could have done) so that the reasoning in para 7.18 of the Report (para 35 above) should be applied. That would lead to the conclusion that the intention of the parties to the receivers' letter was that it was not to be enforceable by the shipowners. The trial judge rejected this argument and so did the Court of Appeal, at para 55. There was no tradition of chain

letters of indemnity equivalent to the situations discussed in the Report to support the inference of such an intention as a matter of established custom and understanding; moreover, there were positive reasons to think that the intention was that the shipowners, as persons within the class named as having the benefit under the letter of indemnity, were intended to be covered by it. The court noted the overlap in the reasoning relevant to application of section 1(1) and (3) and that relevant to the non-application of section 1(2).

(e) Earlier cases on the withdrawal of check-off arrangements

46. Previous authorities at first instance have held that equivalent check-off terms are enforceable as a matter of contract. In *Hickey v Secretary of State for Communities and Local Government* [2013] EWHC 3163 (QB); [2014] IRLR 22 ("*Hickey*"), Popplewell J rejected an argument for the employer department that the check-off arrangement was only or primarily for the benefit of the union and was not enforceable by the individual employees, because it was not for their benefit. There was a real benefit to employees in the administrative convenience of not having to make their own arrangements for payment of their union subscriptions each month and the cost savings for the union in being able to take subscriptions via the check-off arrangement enured to the benefit of its members, who each benefitted from the efficient and secure collection of dues from other members. This case is of relevance in the present context, since the reasons identified as to how the union benefited from the check-off arrangement and the way in which that benefit also incidentally affected the interests of the individual employee indicate that the negative test of intention in section 1(2) of the 1999 Act is not satisfied. Indeed, those reasons also tend to indicate that the reverse inference should be drawn regarding the intention of the parties to the individual employment contracts in relation to the whether the check-off term was intended to be enforceable by the Union.

47. In *Cavanagh v Secretary of State for Work and Pensions* [2016] EWHC 1136 (QB); [2016] ICR 826 ("*Cavanagh*") Elisabeth Laing J upheld claims brought by individual employees and the Union that the check-off term was enforceable both by the employees and, pursuant to the 1999 Act, by the Union. In relation to the employees' contractual rights, the judge followed the decision in the *Hickey* case. As regards the Union's claim under the 1999 Act, the judge found that the check-off arrangements clearly purported to confer a benefit on the Union, and that conclusion was not defeated by the fact that the check-off arrangement also benefited the employees: para 73. At para 74 she rejected the defendant department's argument under section 1(2): there was simply no contractual material which showed that the parties to the individual employment contracts did not intend them to be enforceable by the Union, whether expressly or by necessary implication.

(f) Academic commentary

48. Professor Andrew Burrows (now Lord Burrows) was the Law Commissioner with primary responsibility for the Report. In 1996 he published an article, "Reforming Privity of Contract: Law Commission Report No 242" [1996] LMCLQ 467, to explain the main features of the reform proposed in the Report. In relation to the second limb of the test for enforceability by third parties he commented (p 473) that the Law Commission had concluded that the preferable way to proceed was through a presumption of intention to create legal rights enforceable by an identified third party, and said:

> "Although this was not spelt out in the Report, it is my view that that presumption is a strong one. I would anticipate that it would not normally be rebutted unless there is a term in the contract expressly negating the third party's legal rights, or unless the parties have entered into a chain of contracts which gives the third party a contractual right against another party for breach of the promisor's obligations under the alleged 'third party' contract (as for example is presently the position in the construction industry)."

49. We prefer to leave open the question raised there as to whether it would be sufficient to satisfy the test in section 1(2) of the 1999 Act for there simply to be a chain of contracts in which the third party has a contractual right against another party in respect of the dispute. As we explain below, the question under section 1(2) is whether it appears "on a proper construction of the contract" that the parties did not intend to create rights which the third party could enforce and that will depend on whether a term to that effect can be implied. It is a feature of the contractual context in the present case that there is no relevant chain of contracts arrangement which confers on the Union a contractual right against another party for breach by the respondent departments of the check-off term.

50. Professor Burrows published another article on this topic in 2000: "The Contracts (Rights of Third Parties) Act 1999 and its implications for commercial contracts" [2000] LMCLQ 540. In that article Professor Burrows explained (p 544) how section 1(1)(b), read with section 1(3), creates a rebuttable presumption that the term conferring a benefit on a third party should be enforceable by that party "[b]ut the presumption can be rebutted if, as a matter of ordinary contractual interpretation, there is something else indicating that the parties did not intend such a right to be given". He explained further how section 1(2) could operate to rebut that presumption by incorporation in the contract of an express provision to that effect or "because of other inconsistent terms". For example, in a contract

between A and B providing for payment to C, the contract might prohibit assignment to C of B's right to enforce the payment term without A's written consent and "[t]hat would indicate that the parties did not intend to confer on C an immediate right of enforceability". In this discussion, the focus for the operation of section 1(2) is rightly on what appears as a matter of construction of the contract.

51. We refer at paras 79-82 below to academic commentary on the Court of Appeal's judgment in the present case which calls into question the reasoning of the majority.

4. THE PROCEEDINGS BELOW

(a) The High Court claims

52. All three sets of claims were brought as CPR Part 8 claims for a declaration that the termination of the individual claimants' entitlement to have their subscriptions to the Union collected by means of check-off arrangements amounted to a breach of their contracts of employment. The claims were heard without live evidence. Although some of the issues addressed in the three judgments at first instance are no longer pursued, it is useful to consider how they were dealt with since some of the unsuccessful arguments deployed by the respondents against the individual claimants have been repurposed to contest aspects of the Union's claim under the 1999 Act.

53. Looking first at the *Cox* judgment, Choudhury J addressed whether the individual claimants had a contractual entitlement to the check-off arrangements. One of the arguments put forward by the Home Office as to why the check-off arrangements were not binding was because "it would lead to the absurdity that the department may be contractually obliged to make deductions in respect of a host of other bodies, including a lottery and the 'Hospital Saturday Fund'": see para 53 of the *Cox* judgment. That argument is now put forward by the respondents in the appeal before this court as one of the reasons why the parties must have intended not to confer third party rights on the Union. Choudhury J rejected that argument, concluding that the check-off arrangements were binding contractual terms (para 53).

54. Choudhury J went on (para 62) to reject the argument that there was an implied term that the check-off arrangements could be terminated on reasonable notice and concluded therefore that the removal of check-off had been a breach of the employees' contracts of employment.

55. He then turned to the issue whether the employees had waived the breach, acquiesced in it or accepted a contractual variation by continuing to perform under their contracts. The Home Office argued, amongst other things, that the employees' continued working was inconsistent with a refusal to accept the change. In discussing this, Choudhury J discussed the expectations of the individual claimants and the Union as to which was more likely to be the appropriate person to enforce the contractual arrangements. Although the particular issue of waiver or acquiescence is not before this court, what Choudhury J had to say is relevant to the parties' intentions under the contract as to whether the Union should be able to enforce the check-off arrangements under the 1999 Act.

56. Choudhury J cited from the judgment of Underhill LJ in *Abrahall v Nottingham City Council* [2018] EWCA Civ 796; [2018] ICR 1425 ("*Abrahall*"). Underhill LJ had described the proper approach to the question of whether continuing to work constitutes acceptance of a change. He said that "protest or objection at the collective level may be sufficient to negative any inference that by continuing to work individual employees are accepting a reduction in their contractual entitlement to pay, even if they themselves say nothing…" (see para 88 of *Abrahall*). That was particularly so where the change was entirely detrimental to the employees as it was in *Abrahall*, so it could not be said that the employees had accepted a package of measures with some good and some bad elements. Applying the points specified by Underhill LJ in that earlier case, Choudhury J rejected the argument that the employees had accepted the removal of check-off.

57. The judge then turned to the Union's claim under the 1999 Act: para 74 onwards. He recorded that the Home Office had accepted that the check-off arrangements conferred a benefit on the Union. He described the test in section 1(2) of the 1999 Act as requiring him to be satisfied that on a proper construction of the contract the employees and the employer intended that check-off arrangements should not be enforceable by the Union.

58. The Home Office's principal argument before Choudhury J, as before this court, was based on the absence of any intention at the collective level that the Union should be able to enforce obligations agreed in that collective agreement. Choudhury J rejected that argument for the reasons set out in para 80 of his judgment. The principal reasons were first, the argument assumed that intentions at the collective level are relevant to construing the intentions of the parties to the individual contracts. He referred to the decision in *Hooper v British Railways Board* [1988] IRLR 517 as making it clear that this was not correct. Secondly, it assumed further that the Union's intentions at the collective level were not only relevant to the individual level but that those intentions must necessarily be consistent with the intentions of the parties at the individual contract level. He rejected that as a non-sequitur at para 80.2:

> "… A collective agreement may contain many provisions, few of which might confer any direct benefit on the union itself. Whilst the union may be content with the non-enforceable status of that agreement generally, it does not follow that individual employees, into whose contracts collectively agreed terms have been incorporated, must have intended [the Union] not to be able to enforce those terms which did confer a benefit on the union. It is advantageous to the employees that [the Union] can directly enforce those arrangements since the employees then have the security of knowing that their union subscriptions will continue to be paid uninterrupted."

59. The disconnect between intentions at the collective and individual levels was particularly clear where the terms derived from an earlier collective agreement persisted in the individual contract of service after the collective agreement had been terminated.

60. Thirdly, the Home Office also relied on the range of organisations which could benefit from check-off arrangements under the individual contracts of employment. The Home Office "invoke[d] the inherent implausibility of such organisations having third party rights as a reason to find that none exist in respect of [the Union]". The judge rejected this at para 80.5, saying:

> "… However, s 1(2) of the 1999 Act establishes a rebuttable presumption in favour of enforceability by a third party where the relevant term purports to confer a benefit on that third party. The starting point is therefore simply whether or not the term confers a benefit on the third party. The fact that an organisation is an unlikely candidate for third party rights might be one factor to be taken into account in construing the intentions of the parties to the contract in relation to that organisation, but it would be far from determinative. Accordingly, the [Home Office's] plea as to the implausibility of the position of other parties does not advance matters as far as [the Union] is concerned."

61. Finally, he said at para 80.6:

> "As a matter of construction, the [Home Office] has not been able to point to any part of the check-off provisions that could

> be construed as negating the presumption of enforceability by [the Union] as a third party. The provisions are, at worst (as far as the Claimants are concerned) neutral. In those circumstances, the presumption applies: *Nisshin* at [23]."

62. Turning to the *Crane* case, the hearing before Choudhury J took place shortly after the *Cox* judgment had been handed down. Nevertheless, DEFRA presented many of the same points which had been decided against the Home Office in the *Cox* judgment. DEFRA argued, again unsuccessfully, that the check-off arrangements did not have contractual effect; that the arrangements could be withdrawn by giving reasonable notice; and that the claimants had accepted a variation of their contracts or waived the breach. On this last point, again, Choudhury J rejected it on the basis that the claimants were relying on the Union to protest against the withdrawal of the arrangements on their behalf: see paras 46-54.

63. Choudhury J's discussion of the Union's claim under the 1999 Act proceeded along the same lines as the discussion in the *Cox* judgment. Again, he recorded that DEFRA accepted that the check-off arrangements conferred a benefit on the Union. Again, DEFRA raised the argument that since the respondent and the Union were expressly agreed that check-off would not be enforceable as part of the agreement at the collective level, it followed that there could have been no intention as between the individual claimants and DEFRA that the Union would be able to enforce check-off: para 69. The judge held that the reasoning he had relied on in the *Cox* judgment applied.

64. Finally, we consider the judgment of Freedman J in the *Smith* case. That hearing took place after both the *Cox* judgment and the *Crane* judgment had been handed down. By this time the Court of Appeal had granted the Home Office permission to appeal the *Cox* judgment in respect of the issue of waiver/variation and the 1999 Act but had refused permission on the issue of whether the employees had a binding contractual entitlement to check-off. Nevertheless, HMRC still argued that there was no binding contractual entitlement, submitting that there were factual differences between those cases and HMRC's employees. Freedman J rejected the relevance of these factual differences and held that the check-off arrangements were incorporated as binding terms in the contracts of employment: para 49. He held that HMRC did not have an implied right to withdraw the arrangements unilaterally (para 58) so that its conduct had been a breach of contract.

65. HMRC put forward a range of factors to argue that the claimants had accepted a variation of their contracts and/or had waived any breach and/or were estopped from alleging breach. In rejecting these Freedman J referred to the evidence of the individual

claimants that during the consultation on the proposal to remove check-off, they knew that the Union was protesting against the withdrawal (para 77(e)) and they also knew about the *Cavanagh* litigation (para 87(iii) and (iv)).

66. Freedman J then turned to the 1999 Act claim by the Union: para 99. HMRC contended that it was sufficient to rebut the presumption raised by the 1999 Act if one of the contracting parties did not intend for the third party to have the right of enforcement. The judge rejected that. He then recorded HMRC's submission that it "makes no employment common sense for a collective term to become enforceable through the medium of the employment contract; it is to attempt to get through the back door when one cannot get through the front door": para 111. He rejected this argument because it failed to take into account that the agreement sought to be enforced here was not the collective agreement but the individual's contract of employment. He rejected other arguments put forward by HMRC, adopting the reasons given by Choudhury J in the earlier cases.

67. The main judgment in the Court of Appeal was given by Lewis LJ. He dealt first with the issue whether the individual claimants had varied their contracts to exclude check-off and waived any prior breach through their conduct. He held that they had not. The key question in considering that issue was whether there had been an unequivocal acceptance of the variation. In all three cases he recognised that the Union dealt with the issue on behalf of their members by making protests: para 61. Further the Union had initiated the *Cavanagh* litigation which was regarded as a test case. The departments had not presented the change to their employees as a contractual variation for which their agreement was sought. The judges at first instance had been entitled to draw the factual inferences that they did in each case. These matters do not arise in the appeal to this court.

68. Turning to the application of the 1999 Act, Lewis LJ referred to the Report at paras 7.1(iii) and 7.4-7.5. He read those paragraphs as indicating that the Law Commission proposed the adoption of the "dual intention" test (para 29 above). Lewis LJ said that the recommendation, as he understood it to be, appeared in the draft Bill which became without amendment section 1 of the 1999 Act.

69. At this point we note that it is important to bear in mind the relationship between the draft provision consulted upon and the provision finally recommended in the Report and enacted in the 1999 Act. The Report explained at paras 7.4-7.6 that it was not the "dual intention test" as such which was being recommended, but a modified form of test as set out above. In explaining, further, how the test should be applied Lewis LJ said (para 75):

> "… The ultimate question is to determine whether the parties to a contract intended that a contractual term should be enforceable by a third party. Sub-section 1(1)(b) concerns whether the term purports to confer a benefit on a third party. Sub-section 1(2) concerns the qualification, namely that the contractual term will not be enforceable if the parties to the contract did not intend the term to be enforceable by a third party. It is unlikely that the fact that the qualification is expressed in the negative ('that the parties did not intend the term to be enforceable by the third party') will materially affect the outcome in a particular case. The likelihood is that courts will be in a position to determine whether, on the proper construction of the contract, the term was or was not intended to be enforceable by the third party."

70. Lewis LJ then discussed the process for interpreting contracts set out in some of the leading authorities: *ICS*, at pp 912-923; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8; and *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, para 15. He said it was accepted that the contractual term "purports to confer a benefit" on the Union. He described the issue before him as "to ascertain the intention of the parties, having regard to the factual context and the wording of the contract": para 81.

71. He considered that the factual background or context for ascertaining the intention of the parties was that the employers and the Union entered into non-legally enforceable collective agreements. The context was not therefore one where the parties to the individual contracts of employment were seeking to confer a benefit on the Union but rather the other way round – the Union and the employers had agreed that certain benefits should be conferred on employees by incorporating provisions from the collective agreement into the contract of employment: para 82. Although this was not a conclusive factor, he held that the judges below had erred in considering that the fact that the contractual provisions originated in a non-enforceable collective agreement was irrelevant. Secondly, he considered the words of the provision which, he said, offered a facility to employees who may if they wish authorise deductions from pay for a variety of purposes: para 85. Thirdly, it could not have been intended that every organisation to whom deductions from salary could be paid should have third party rights. Some of these were savings schemes, lotteries or social clubs. He therefore allowed the appeal on those three grounds.

72. Stuart-Smith LJ dissented on the issue of the application of the 1999 Act. He referred to the rebuttable presumption in favour of third party rights created by the 1999

Act and pointed out that the surest and simplest means of rebutting the presumption is expressly to exclude it: para 103. He noted that a "ready explanation" for the respondents' failure to deal with the Union's rights in the contract may be found in the fact that even after the decisions in *Cavanagh* and *Hickey*, the employers continued to dispute the existence of binding contractual obligations to provide check-off at all: "Had they been right about that, no question of third party enforcement could have arisen; but they were not, and it did": para 104.

73. Where Stuart-Smith LJ disagreed with the majority was whether on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the Union. On the key point about the context of the collective agreement, he considered that the majority neglected two vital features of the case. First, that the check-off arrangements had ceased to be merely a non-enforceable provision of a collective agreement and had become a legally binding term in the individual contracts of employment. Secondly, unless the contract demonstrates the joint intention of the employers and employees to be different, the term is enforceable by the Union. He continued (para 108):

> "… It follows, to my mind, that one cannot assume or deduce from the fact that the check-off agreement had previously been the product of a non-contractual agreement between other parties (A and C) that the employers and employees (A and B) did not intend it to be enforceable by a third party (C) once it had been included as a contractual term of their (A and B's) agreement. It is self-evident that the check-off obligation need not have been included as a term of the contracts entered into between the employers and the employees; but it was, which fundamentally changed the nature of the obligation and its consequences. Put simply, the fact that the check-off obligation was not enforceable by [the Union] while it remained in the sphere of being merely the product of a non-enforceable collective agreement tells us nothing about whether the employers and employees intended that it should not be enforceable by [the Union] once the parties had chosen to include it as a contractual obligation which purported to confer a benefit upon [the Union]."

74. Stuart-Smith LJ further rejected the relevance of the other organisations to whom deductions from salary were to be paid: para 110. The third party rights of each organisation should be considered separately.

75. Underhill LJ's judgment considered only the third party rights issue substantively. He agreed that section 1(2) of the 1999 Act created a rebuttable presumption in favour of third party enforceability. He also agreed with Lewis LJ's observation that in the generality of cases, the court is likely to be able to reach a conclusion one way or the other about the parties' intentions on the evidence before it, so that the burden of proof created by the statutory language will not be determinative. But, he said, that was not necessary to his reasoning in this case: para 117.

76. Underhill LJ agreed with Lewis LJ that "the decisive element in the factual matrix in this case" was the fact that there can have been at the collective level no common intention as between the employers and the Union that any third party rights be conferred because of what is now section 179 of TULRCA. The absence of any intention to grant the Union any enforceable rights was not altered by the incorporation of the term into the individual contracts of employment. He added in parenthesis (para 120):

> "… (For what it is worth, however, I think that the correct analysis is that, although formally the relevant intention is that of the employees as the parties to the contract in question, the intention of the negotiators who made the agreement on their behalf should be attributed to them – cf., though the issue was not quite the same, *Tyne and Wear Passengers Transport Executive v National Union of Rail, Maritime and Transport Workers* [2022] EWCA Civ 1408, [2023] ICR 148, at para. 32)."

77. That for him was the decisive point, though he expressly agreed with the further reasoning of Lewis LJ.

78. This court granted permission to appeal to the Union in each of the three cases and refused permission for a cross-appeal on the issue of whether any breach of the individual contracts of employment had been waived or varied.

79. The reasoning of the majority in the Court of Appeal has been the subject of academic criticism. In a case-note, "Enforcement of check-off facilities by third parties" (2024) 140 LQR 171, Professor Paul S Davies describes the decision as going "against the trend" of the limited case law dealing with contracts which did not expressly confer or exclude 1999 Act rights. As regards the application of section 1(2), he refers to Lewis LJ's statement (para 82) that a key consideration was that the parties to the individual contracts of employment "were not intending that the [check-off] provisions be

enforceable by the trade union", in light of the fact that they were found in collective agreements which were not themselves legally enforceable. However, Professor Davies points out that the intentions of the third party are in principle irrelevant, as *Chudley* demonstrates, since the third party did not even know about the term which was enforced. There is no solid basis for any contention that the intentions of the employees and the Union should be treated as one and the same. On the contrary, even if the Union did not intend that it should be able to enforce the check-off facility (which is itself a very doubtful proposition, for the reasons given by Stuart-Smith LJ at para 108: see para 73 above), the employees might themselves objectively intend that all the terms in their contracts of employment should be enforced in the usual way, including by third parties (p 173).

80. Professor Davies is critical of Lewis LJ's statement that the statutory presumption is unlikely to affect the outcome in a particular case, describing it as resting "upon shaky foundations". To the contrary, Professor Davies argues that the presumption plays a real substantive role and will often affect the outcome. He cites a string of decisions which have made it clear that where the contract is silent on enforceability by a third party, the presumption is unlikely to be rebutted, referring to *Nisshin Shipping*, *Chudley* and *Laemthong International*. He described Stuart-Smith LJ's judgment as showing a more orthodox approach to the 1999 Act.

81. Pascale Lorber, Associate Professor at Leicester Law School, also regards Stuart-Smith LJ's dissenting judgment as better adapted to the facts of the case: "Check off, variation of contract and collective voice: Secretary of State for the Home Department v Cox" (2023) 52 Industrial Law Journal 944. She points out (pp 953-4) an inconsistency in the way that Lewis LJ regards the actions of the Union:

> "… if the identity of the third party is to be considered, it is arguable that a union would typically be a party that would wish to enforce such a right, not only because it benefits from it, but because the nature of a union is to defend its members. As a result, when employees join a union, they primarily wish for the unions to better their working conditions and defend them, but also to speak or act on their behalf. This was recognised by Lewis LJ when he accepted a trade union's action to contest a contractual variation should be accepted as sufficient proof that there was opposition without the intervention of the individual. It should therefore follow naturally that if that opposition is not necessary for the individual, the collective actor should also be able to enforce that right because they also benefit from it."

82. Lorber points out that the intentions of the parties in such cases can be difficult to infer and may be contradictory. If there is doubt, the presumption should apply. Hence the reasoning of Stuart-Smith LJ should be preferred.

5. THE GROUNDS OF APPEAL AND THE ISSUES RAISED

83. The issues now before the court focus on the nature of the test under section 1(2) of the 1999 Act and how it applies in this case.

84. In ground 1 the Union asserts that the majority of the Court of Appeal erred in that they misinterpreted section 1(2) and hence applied the wrong test. In particular they failed to give appropriate weight to the statutory presumption which arises in favour of the grant of third party rights once the other criteria in the 1999 Act have been satisfied.

85. By ground 2, the Union asserts that because the majority in the Court of Appeal misinterpreted section 1(2) and failed to give due weight to the statutory presumption in favour of third party rights, they entered into an impermissibly wide-ranging analysis of the surrounding circumstances in order to conclude that there was no intention to confer such rights.

86. Ground 3 is the final ground of appeal. It only arises if, contrary to the Union's case under grounds 1 and 2, it is relevant to examine the circumstances surrounding the making of the individual contracts of employment in order to see whether or not the parties positively intended that the Union should be able to enforce the check-off term. The Union says that the proper inference to be drawn on analysis of those surrounding circumstances is that the parties did intend that the Union should be entitled to enforce the check-off term.

87. The respondents submit that the majority in the Court of Appeal were right in their analysis and their conclusion. On their case, the relevance of the phrase "on a proper construction of the contract" in section 1(2) is to make clear that, when construing the contract, one applies the ordinary principles of contractual construction so that it is the objective rather than the subjective intention of the parties which is relevant and certain material, such as pre-contract negotiations or post-contract conduct, are not to be relied upon. They say, as regards ground 2, that the majority in the Court of Appeal correctly applied those ordinary principles of contract law and that their approach reflected the approach taken in the earlier cases applying section 1(2).

(a) The principles to be applied when construing contracts of employment

88. There was no real difference between the parties as to the principles to be applied generally to the construction of contracts and in relation to implying terms. They are a matter of settled law. So far as relevant for present purposes, the leading authorities on interpreting a contract may be taken to be *ICS*, *Wood v Capita* and *Arnold v Britton*. The leading authorities on implication of terms in fact, in the particular circumstances of a specific contract, are *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 and *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 ("*Marks and Spencer*"). (There is no question in the present case of any relevant term being implied as a matter of law as an incident of a particular class of contractual relationship, on the model of *Liverpool City Council v Irwin* [1977] AC 239). Terms are implied into a particular contract because, on its proper construction, the parties must have intended to include them: see *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988 ("*Belize Telecom*"). The law has been reviewed very recently in this court in the *Tesco* decision and there is no need for us to go through the authorities again in detail. *Tesco* confirms that the ordinary rules on interpretation of express terms and the test for the incorporation of terms implied by fact apply to contracts of employment and, further, establishes that where the contract is silent about a particular matter, the test for implication of a term in fact on the basis of the officious (or objective) bystander or business efficacy approaches is a demanding one.

89. The task of the court under the 1999 Act is first to gather together the express terms of the contract. This may be straightforward in the case of a single, legally drafted document or more may be involved as in the present cases (see para 16 above) or in cases concerning which provisions of a bill of lading are incorporated into a voyage charterparty (see *Herculito Maritime Ltd v Gunvor International BV* [2024] UKSC 2, [2024] Bus LR 580, paras 76-87) or where the contract is formed from a chain of emails supplemented by oral discussions as happened in *Carmichael v National Power plc* [1999] UKHL 47; [1999] 1 WLR 2042. Once all the express terms have been identified, the court's task is then to construe those express terms and to consider whether any additional terms should be implied. The principles set out in *ICS*, *Wood v Capita* and *Arnold v Britton* on construing contracts are directed at determining the meaning of ambiguous words in the express terms of the contract. They are not directed at and do not permit or require a wide-ranging look at surrounding circumstances beyond the express and implied terms of the contract as a way of determining what rights are created: see *Arnold v Britton*, para 77 (Lord Hodge). They cannot be used to supplement the words of the contract in a way which does not conform to the recognised test for the implication of terms.

90. In the article published in 2000 considered at para 50 above, Professor Burrows gives a good example of a case in which section 1(2) would apply, involving a contractual stipulation that a particular obligation should not be capable of assignment and hence a clear indication in the contract that the parties positively intended that it should not be enforceable by the third party. In that sort of case, the test for implication of a relevant term that the obligation should not be enforceable by the third party would be satisfied on the officious (or objective) bystander and business efficacy approach.

91. The main area of contention in the present case concerned the role of the objective intention of the Union and the employers in making the collective agreements, as regards enforceability of the check-off term, and how far it can be assumed that that was also the objective intention of the employees and the employers when agreeing to the incorporation of that term in their individual contracts of employment. By virtue of section 179 of TULRCA the intention of the parties to the collective agreements was that the check-off term, as it appeared in those agreements, should not be enforceable. The respondents say that this should ground the inference that the employees and employers, as the parties to the individual contracts of employment, had a common intention that the check-off term which featured in those contracts should not be enforceable.

92. We do not agree: see para 20 above. The mere fact that the check-off term was not intended by the parties to the relevant collective agreement to be enforceable as a term of that agreement does not necessarily ground an inference as to the objective intention of the different parties to the individual contracts of employment as to whether it should be enforceable as a term of those contracts. As a result of section 179 of TULRCA, the whole of the collective agreement is taken to be intended to be unenforceable. But the individual contracts of employment are intended by the employees and the employers to be enforceable so far as the generality of the terms contained in them is concerned.

93. The relationship between the intentions of the parties to the collective agreement and the intentions of the parties to the individual contract of employment was discussed by this court in *Tesco*: see para 4 (Lord Burrows and Lady Simler) and paras 151-153 (Lord Reed). Their conclusion that in the circumstances of that case, the intention of Tesco and the recognised union as to the scope of the retained pay clause incorporated into the individual contracts of employment was relevant to the construction of the employees' rights does not undermine our conclusion in this case. It may, however, temper what Choudhury J said in paras 79 and 80.1 of the *Cox* judgment, by reference to *Hooper v British Railways Board*, if he was suggesting that the employer's and union's intentions at the collective level can never be relevant to the proper construction of the terms of the individual contracts of employment. In *Tesco* it was not suggested that the union and the individual employees had different intentions as to the meaning of the

clause. However, the common intention of the employer and the union that the collective agreement would be unenforceable certainly did not prevent the retained pay clause being binding as between Tesco and its employees (see para 4). It was also common ground that the collective agreement, despite being pre-contractual material, was relevant to the proper construction of the individual contracts (see paras 5 and 6). That was hardly surprising given that the conclusion of the collective agreement and the incorporation of the retained pay entitlement into the individual contracts were close in time and there was no doubt that that entitlement was intended to be part of the employees' contracts. The retained pay clause was not a clause which purported to confer a benefit on the union so the question of third party rights was not raised.

94. The position in the present appeal is very different. Several decades separate the collective agreement to provide check-off arrangements and the conclusion of the individual contracts of employment. It is now, finally, not disputed by the respondents that the check-off arrangements form part of the legally binding agreement between the individual employees and their employer. One therefore needs to identify some special reason why the common intention of the parties to those contracts was that the check-off provision, as a term of those contracts, should not be enforceable. There is none.

(b) Grounds 1 and 2: The presumption in favour of third party rights

95. Grounds 1 and 2 raise aspects of the same underlying issue, which is the proper interpretation of section 1(2) of the 1999 Act. It is convenient to consider them together.

96. We consider that Lewis LJ and Underhill LJ fell into error in their interpretation and application of section 1(2). As identified in the commentaries referred to in paras 48-50 above, where the criteria in section 1(1)(b) and (3) of the 1999 Act are satisfied, a presumption arises that the relevant term in favour of the identified third party is enforceable. We agree with the view expressed in those commentaries that the presumption is a strong one. That is because, ex hypothesi, there is no express term stating the contrary, so in order to conclude as a matter of proper construction of the individual contracts of employment that the parties did not intend that the check-off term should be enforceable by the Union, it would be necessary to find that there was an implied term to that effect. As stated above, the test to imply a term where the contract is silent is a demanding one.

97. Where the statutory presumption of enforceability by the third party arises pursuant to section 1(1)(b), that is the starting point for analysis pursuant to section 1(2). In order for the presumption to come into play, it does not have to be shown that the

parties positively intended that the relevant contract term should be enforceable by the third party. This is where the solution eventually adopted by the Law Commission in the Report and the draft Bill departs from the double intention approach which it originally proposed in the Consultation Paper. Under that abandoned approach, the difficulty of implying a term where the contract is silent would have meant that it was correspondingly difficult to find that the requisite positive objective common intention in favour of third party enforceability was made out. However, that impediment is removed by the application of the statutory presumption where the criteria in section 1(1)(b) and (3) are satisfied.

98. The statutory presumption is only rebutted under section 1(2) "if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party". This means that it has to be shown that, on the usual objective approach to interpretation of contracts, the parties had a positive common intention that the obligation should *not* be enforceable by the third party. That is a different question from that which would have been posed under the double intention test approach. Under the 1999 Act the usual difficulty involved in implying a contractual term means that it is correspondingly difficult to find that the presumption of third party enforceability is rebutted.

99. The majority in the Court of Appeal were therefore in error, including in what was said in the passage quoted at para 69 above, when they suggested that section 1(2) merely shifted the burden of proof as to the parties' common intention so that the burden of proving that there was no intention to confer third party rights fell on the promisor rather than on the third party who is asserting those rights. We disagree therefore with their comment that it would be rare for the existence or otherwise of third party rights to turn on the application of section 1(2) because once the court is apprised of the full factual background it will usually be possible to arrive at a positive decision as to the parties' common intention rather than having to fall back on the application of the burden of proof.

100. This incorrectly elides the double intention test approach with the different approach adopted in the 1999 Act. Section 1(2) involves a different object of inquiry from that supposed by the majority. They focused on whether there was a common intention of the parties to create a right which would be enforceable by the Union as third party, as an aspect of the double intention test approach. But section 1(2) only has application where the criteria in section 1(1)(b) and (3) are satisfied so as to give rise to the statutory presumption of third party enforceability, and its true focus is whether there is established a common intention of the parties as a matter of construction of the contract that the third party should *not* be able to enforce the contract.

101. As Stuart-Smith LJ explained (para 105), this was the nub of the dispute between him and the majority. He rightly held (para 108) that the consequence of the adoption of the check-off provision as a term in the individual contracts of employment, to which section 179 of TULRCA did not apply, "is that, unless the contract demonstrates the joint intent of the employers and employees to be different, the term is enforceable by [the Union]" and (para 109) that the individual contracts of employment "include nothing that indicates a joint intention of the parties that the obligation should not be enforced by [the Union]".

102. Underhill LJ's reference to the Court of Appeal decision in *Tyne and Wear Passengers Transport Executive* case does not affect this analysis. The issue in that case concerned rectification of individual employment contracts where a collective agreement might have to be rectified in relation to a term which had been incorporated in those contracts. That is to say, it concerned the meaning of a term incorporated in individual contracts of employment, not whether the parties to those contracts intended the term to be legally enforceable (ie by the employees): it was common ground that, as is usual, since the term had been incorporated in the individual contracts of employment (with whatever meaning was to be given to it) the parties to those contracts intended that it should be legally enforceable. The Court of Appeal decision in that case does not lend any support to the respondents' argument in the present case that the intention of the parties to the collective agreement that it should not be legally enforceable must be carried over into an intention on the part of the employees and the employers that any part of the individual contracts of employment should not be legally enforceable. The decision was appealed to this court: see now the judgment of this court at [2024] UKSC 37.

(c) Ground 3: a positive joint intention that the Union should be able to enforce the check-off term?

103. Ground 3 as formulated by the Union raised the issue of whether, if the majority in the Court of Appeal were right to explore the industrial relations context of the check-off arrangements when seeking to identify the common intention of the parties to the individual employment contracts regarding the enforceability of those arrangements by the Union, they had correctly analysed that context. It follows from the reasoning above in relation to grounds 1 and 2 that we consider that the majority should not have embarked on this exercise. The question under section 1(2) of the 1999 Act was whether there was a term which could be implied, applying the usual strict test, in the contracts of employment that the Union should not be able to enforce the check-off arrangements.

(d) The respondents' contention that the individual employment contracts contained an implied term that the check-off arrangements were not enforceable by the Union

104. Ground 3 does not therefore arise in the form in which it was put forward. But it is still necessary to address the points on which the majority relied in the Court of Appeal when considering whether a term should be implied as a matter of fact into the individual contracts of employment on the footing that it must have been the unexpressed intention of the individual employees and the respondents that the Union would not be entitled to enforce rights pursuant to the 1999 Act despite those contracts conferring a benefit on it.

105. Mr Oliver Segal KC for the Union said that there had been no suggestion in the courts below that there could be an implied term rebutting the presumption that the Union should be able to enforce the check-off arrangements. Mr Daniel Stilitz KC, for the respondents, did not dispute this but nonetheless submitted that the court should imply such a term. This was based on the contention that because "everyone knows" that collective agreements are not legally enforceable, the individual employees and the respondents must be taken to have known and so have intended that a term incorporated from a collective agreement into the individual contract is not enforceable by the Union. Does the implication of such a term pass the test set out in *Marks and Spencer*?

106. The parties disagreed about what the notional reasonable person would have thought was the parties' intention at the time that the check-off arrangements were first introduced into individual contracts of employment many years ago: see *Belize Telecom*, para 25. Mr Stilitz submitted that an officious or objective bystander would have assumed that the parties to those employment contracts did not intend the term to be enforceable by the Union. Mr Segal submitted that at the time the term was included in the collective agreement and first incorporated into civil servants' individual contracts, prior to the 1999 Act, the individual contracts could not create enforceable third party rights, so the question would not have occurred to the parties or the bystander at all. It is not suggested that the meaning of the check-off term has changed following the introduction of the 1999 Act and it has been determined in *Hickey* and in the proceedings below that it is enforceable by the individual employees.

107. The relevant individual contracts of employment at issue in the present case were entered into after the 1999 Act came into force. The question, therefore, is whether there is a term implied in fact in those contracts to the effect that the check-off arrangement should not be legally enforceable by the Union, so as to rebut the statutory presumption. In our view it is not at all clear that an objective bystander would have concluded that the parties to the individual contracts of employment must have intended that the check-off

arrangement should not be legally enforceable by the Union; therefore, the test in *Marks and Spencer* would not be satisfied. If anything, in the circumstances existing when the contracts of employment were entered into, we think the more natural assumption of the parties and an objective bystander would probably have been that the Union should be able to enforce the arrangement.

108. Mr Stilitz said that there had been a long tradition in industrial relations practice to treat collective agreements as non-enforceable which must be taken to inform the understanding of the parties to the individual contracts of employment at issue in this case. However, in our view it is not possible to derive any determinate guidance from this background as to the parties' common intention as regards the enforceability of those contracts. Mr Stilitz sought to go back to the 1960s, but the industrial relations landscape was very different then. In the *Ford Motor Co* case, Geoffrey Lane J set out at p 355 several passages from the Report of the Royal Commission on Trade Unions and Employers' Associations (1965-1968) (Cmnd 3623) under the chairmanship of Lord Donovan ("the Donovan Report"). Lord Donovan made clear that the unenforceability of collective agreements was not the result of any legal impediment but arose from a lack of intention to make a legally binding contract. The Donovan Report said (para 471):

> "This lack of intention to make legally binding collective agreements, or, better perhaps, this intention and policy that collective bargaining and collective agreements should remain outside the law, is one of the characteristic features of our system of industrial relations which distinguishes it from other comparable systems. It is deeply rooted in its structure."

109. However, in *Ford Motor Co* Geoffrey Lane J also cited evidence from the Confederation of British Industry ("CBI") provided to the Donovan Commission in 1965 making clear that it was the employers who were pushing for collective agreements to be enforceable. The employers, the CBI said, felt that the greatest single contribution which could be made to the better working of the industrial relations system would be better observance of agreements and that simplest change would be to make them enforceable at law.

110. What emerges from this is that there is no special public policy imperative that collective agreements should be unenforceable. As the Donovan Report made clear, this was a matter of choice for the parties to such agreements. That ability for the parties to a collective agreement to choose whether it should be enforceable was carried forward into section 179 of TULRCA. That provision does not require collective bargains to be

unenforceable or prohibit the legal enforcement of such agreements. It provides only that they are presumed "not to have been intended by the parties" to be legally enforceable; however, if the agreement is in writing and contains a provision, however expressed, that the parties do intend it to be legally enforceable, then it is legally enforceable: section 179(2). Further, the parties can specify in their agreement that some but not all of the terms are enforceable: section 179(3). Therefore, the suggestion by the respondents that for the Union to be able to rely on the 1999 Act somehow allows it to circumvent some legislative policy or achieve by the backdoor rights that they ought not to have is mistaken. There is no policy embodied in section 179 that the Union should not have rights; even in relation to a collective agreement it all turns on the parties' intentions.

111. Coming to more recent events, the Union responded to the respondents' proposals in 2014 and 2015 by pointing out that in earlier times employers had regarded the role of unions in representing their members in a more positive light than suggested by the Cabinet Office's guidance. In a letter quoted by Choudhury J in the *Crane* judgment (para 20), the Union wrote:

> "Yet your rationale indicates a complete failure to understand or appreciate the essential role that unions play in the workplace. The Civil Service attaches importance to ensuring effective consultation and involvement of staff. Indeed staff are encouraged to join an appropriate trade union and to play an active part within it (see the Employee Relations pages on the Defra's intranet – 'Defra encourages you to join and play an active role in your appropriate Trade Union')."

112. Similarly, the written particulars provided to James Cox when he started at the Home Office in 2002 show a different and more cooperative attitude at the time he started his employment, contrasted with the attitude in the 2013/2014 letters:

> "There are various Trade Unions which can support an officer in reasonable claims and represent points of view on all kinds of questions affecting welfare and terms and conditions of service.
>
> The Civil Service attaches importance to effective consultation and involvement of staff. It is, of course a personal decision whether or not to join a trade union, but we encourage staff to

> join an appropriate trade union and to play an active part within it, making sure your views are represented."

113. In the *Smith* judgment, Freedman J said (para 119):

> "Given the industrial relations backdrop to the agreement of the term entitling check-off – namely, that government departments were expressly telling their staff of the advantages of collective representation by trade unions and encouraging them to become members of those trade unions – if it were necessary under the legislation to infer the parties' combined intention on this point (which it is not), then one could readily infer an intention that the term should be enforceable by the unions for whose direct benefit it was in essence introduced."

114. There is nothing in the Court of Appeal judgment to undermine that evidence or the conclusions that Choudhury J and Freedman J drew from it. A unilateral change in attitude by one party towards trade union representation cannot change the meaning or effect of a term that has been carried forward into individual contracts over many years.

115. A conclusion that the parties would think that it "went without saying" that the 1999 Act rights were excluded would also be inconsistent with the findings of the first instance judges as regards the waiver issue, upheld by the Court of Appeal. The judges found that the employees had not waived the breach by continuing to work because they were relying on the Union to enforce the check-off rights on their behalf. In the *Cox* judgment Choudhury J said (paras 68-69):

> "68. First, the continuation of work here does not unequivocally give rise to the inference that the Individual Claimants had accepted the change in check-off. The evidence of the Claimants is clear that in matters of pay, including check-off, the expectation was that [the Union] would take the lead in dealing with management. As such, the employees had relied on their union to advance the protest about the removal of check-off on their behalf, which it had done, and the continuation of work in these circumstances is not, therefore, an act that is only referable to an acceptance of the removal; it is an act equally consistent with leaving the task of registering an objection to the union on their behalf. …

> 69. Second, there was protest at the collective level. That was sufficient, in the circumstances of this case, to negate any inference based on a continuation of work, even if the employees raised no individual protest: see *Abrahall* at [88]. [Counsel for the Home Office] contended that these protests were inadequate and highlights the fact that [the Union] did not pursue grievances properly by identifying named individuals. However, there is equally nothing to suggest that [the Union] had ever withdrawn its objection. [The Union] could undoubtedly have made its position clearer by stating that any continuation of work was under protest or that [the Union] reserved its position until the outcome of test cases. …"

116. In the *Crane* judgment, Choudhury J also rejected DEFRA's contention that the individual employee claimants had accepted a variation of their contracts or waived the breach. He described the protests that were made by the Union at the collective level. He also quoted from the evidence of Mr Crane as to his awareness of the decisions of the court in *Hickey* and *Cavanagh*:

> "47 … The evidence as to the Individual Claimants' view of *Cavanagh* is contained in the statement of Mr Crane as follows:
>
> > '16 I was aware that [the Union] had strenuously protested against the withdrawal of check-off on behalf of its members at the time that it was withdrawn. I am aware that [the Union] took the government to court over the removal of check-off in what we in [the Union] believed was the 'test case' of my fellow member, Mr Cavanagh, against the DWP. I am aware that this was settled weeks before the final hearing on loss in late 2018. The union and its members have always regarded that case as testing the water for mine and other cases; and I expected that, if Mr Cavanagh and the union was successful in that litigation, then DEFRA would no longer contest the claims of myself and my colleagues. However, that has not happened.'
>
> 48. The evidence of the other Individual Claimants is in similar terms. … In my judgment, the evidence is clear that the

> *Cavanagh* litigation was regarded as test litigation by the Individual Claimants and [the Union] at the relevant time, and I so find."

117. This evidence militates firmly against any suggestion that either the employees or the respondents regarded it as obvious that the Union would have no power to enforce the check-off arrangements if the respondents breached those terms. It seems to us that there is considerable force in the reasoning of Popplewell J in *Hickey* (para 46 above) that the check-off term operates for the benefit of the individual employees. Although it is not necessary to go this far in order to rebut the respondents' submission based on an alleged implied term to satisfy the test in section 1(2), we would comment that since employees will often find it simpler and beneficial from their point of view to have their union take action to promote and protect their interests – as was recognised in relation to the waiver issue in the proceedings below – and as employers would reasonably understand that to be the position, there is force in the contention by the Union that on an objective view the individual employees and the respondents would have had a common intention that the check-off term as incorporated in the individual contracts of employment should be enforceable by the Union. This accords with the assessment of Freedman J in the *Smith* judgment at para 119 (quoted at para 113 above).

118. One can also posit a situation where check-off arrangements are included in an individual contract of employment without there having been any pre-existing collective agreement between the beneficiary union and the employer, or a situation where the collective agreement had not referred at all to collection of subscriptions. In those situations, the employer would be forced to argue that even in the absence of any applicable collective agreement, the presumption in favour of third party rights is rebutted simply because "everyone knows" that unions cannot enforce rights against employers. The link between the 1999 Act and the role of unions generally in the workplace would be very attenuated in that situation. It would be an odd result if that union were in a stronger position under the 1999 Act than a union which has specifically bargained for the employer to confer a right to such arrangements on the individual employees.

119. We therefore conclude that there is no basis for implying a term into the individual contracts of employment in this case to rebut the presumption that third party rights under the 1999 Act are conferred on the Union. We agree with the analysis of Stuart-Smith LJ at paras 108 and 109 of his judgment that there is nothing in those contracts that indicates a joint intention of the parties that the obligation should not be enforced by the Union.

(e) The wide range of potential third parties

120. A different argument relied on by the majority in the Court of Appeal for deciding that the Union enjoyed no third party rights under the 1999 Act arose from the long list of organisations to which deductions from pay could be forwarded by the employee using the check-off arrangements. These included organisations into which the employee could pay an amount to build up savings or to pay for life assurance as well as charitable funds such as the Civil Service Benevolent Fund or the Civil Service Medical Aid Association. The majority reasoned that it could not be right that each of these organisations was intended to have third party rights and drew the inference that none of them was intended to have third party rights. But that is a non-sequitur: the issue whether the statutory presumption under the 1999 Act had been rebutted would have to be addressed in light of the particular circumstances surrounding each identified organisation.

121. We agree with the judgment of Stuart-Smith LJ at para 110 that the arrangements in respect of some or all of those other organisations to whom direct payment can be implemented may raise different issues from the issues raised by the deduction of union subscriptions. As is apparent from the role that the Union has played from the start of this dispute, one purpose of membership of the Union is to redress the imbalance of bargaining power between the employers and the employees and to counter the difficulty of the individual effectively to enforce their rights unless they are prepared to risk losing their job over a small amount of money. The special role of unions sets them apart from the other organisations in the Annex, for example, the Civil Services Sports Council or the Civil Service Benevolent Fund. This is recognised in other statutory contexts: see for example section 189 of TULRCA discussed recently in *R (Palmer) v North Derbyshire Magistrates* [2023] UKSC 38; [2024] ICR 288.

122. We do not need to decide which if any of the other organisations whose subscriptions could be made directly from payroll would benefit from rights under the 1999 Act. The existence of check-off arrangements for those organisations is wholly insufficient to rebut the statutory presumption so far as the Union is concerned.

(f) The check-off arrangements as a facility provided to employees

123. Finally, the respondents argued that the purpose of the check-off arrangement was to provide a facility to employees in the form of a convenient way to pay sums to a wide range of organisations; the benefit to the Union was incidental, similar to the benefit conferred on a neighbour when a householder hires someone to trim the hedge between two properties or on a beneficiary where a solicitor draws up a will. Again, the suggestion was that it was obvious that the intention of the parties to the individual employment contracts was that the Union should not be entitled to enforce the arrangement.

124. The facts recounted by the first instance judges show that this submission must be rejected. The drop in subscription income for the Union coupled with the previous encouragement of the respondents to their employees to join the Union show that a very clear benefit was intended to be conferred on the Union: see paras 25-27 above as regards the former point and para 112 as regards the latter. We note that the submissions in this appeal made by Mr Stilitz are the reverse of the respondent department's argument recorded in the judgment in *Hickey*. There it was argued that the check-off arrangements were not incorporated into the individual contracts "because the checking-off system enures primarily for the benefit of the union and does not significantly affect the interest of the members in their capacity as employees": see para 17 of Popplewell J's judgment.

125. As regards the negligent drafting of a will, the Law Commission described this as the situation with which they encountered the most difficulty: see para 7.19 of the Report. They stated that the wording of their proposed reform was not intended to include negligent will-drafting. In our judgment, there is no proper analogy between the check-off arrangements and the incidental benefit conferred on a neighbour by improvements to a property or on a potential beneficiary under a will.

CONCLUSION

126. For all the above reasons, we would allow the appeal.

127. As regards the appropriate order for the court to make, in the *Cox* case, Choudhury J ordered that the Union's claim for damages should proceed to a full hearing, as a Part 7 claim following a pause for possible alternative dispute resolution. He gave detailed directions for the provision of information by both parties, for the service of witness statements and expert evidence from forensic accountants. That order was then varied by the Court of Appeal's final order. The final orders in the *Crane* case and the *Smith* case were less detailed since it was known that the *Cox* case was proceeding to the Court of Appeal.

128. We will invite submissions from the parties as to the appropriate order for this court to make to enable the Union's claim to go forward.

LORD BURROWS (CONCURRING):

1. INTRODUCTION

129. I agree with Lord Sales and Lady Rose that this appeal should be allowed. My reasoning is similar to theirs but this judgment sets out my own reasoning in my own words. I gratefully rely on their judgment for the facts of the three cases that have been consolidated on this appeal, for the history of the "check-off" term with which we are concerned, and for the description of the reasoning and decisions of the courts below: see above paras 5-6, 10-16, 21-27 and 52-77.

130. The Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act") created a wide-ranging exception to the rights, or benefit, side (but not the duty or burden side) of the privity of contract doctrine. Under that long-established common law doctrine, a contract can only be enforced by, and is only enforceable against, the parties to the contract. The 1999 Act was enacted following the Report of the Law Commission on Privity of Contract: Contracts for the Benefit of Third Parties (1996) (Law Com No 242) (Cmnd 3329) ("the Law Commission's Report"). I should declare at the outset that I was the Law Commissioner with primary responsibility for that Report.

131. Section 1 of the 1999 Act lays down two tests (or, one might say, two limbs of a single test) for determining whether a third party has a right of enforceability (ie a right to enforce a particular contract term). The first test is straightforward. A third party (provided expressly identified in the contract by name, class or description, as required by section 1(3)) has a right of enforceability where "the contract expressly provides that he may" (section 1(1)(a)).

132. The second test is more difficult. A third party (provided expressly identified by name, class or description, as required by section 1(3)) has a right of enforceability where the contract term "purports to confer a benefit on him" (section 1(1)(b)) unless "on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party" (section 1(2)). By the application of section 1(1)(b) and 1(3), the second test sets up a rebuttable presumption of an intention to confer the right of enforceability. It is important to note that the presumption rests on both the requirements (in section 1(1)(b) and 1(3)) being satisfied: see the Law Commission's Report at paras 7.17 – 7.18 (and I should add that, as both parties accepted, reference to the Law Commission's Report, given that it was the foundation for the 1999 Act, is permissible as an aid to interpreting that Act: see, eg, *Yaxley v Gotts* [2000] Ch 162, 182, 188-190). The presumption may then be rebutted by applying section 1(2).

133. Examination of Part VII of the Law Commission's Report, especially paras 7.4 – 7.5 and 7.7 – 7.9, makes clear that a principal purpose of the rebuttable presumption of intention was to help to resolve potential uncertainty as to the parties' objective (common) intention to confer a right of enforceability on a third party.

134. This consolidated appeal concerns the application of the second test. Although there have been a significant number of reported cases on the 1999 Act, most of which have been concerned, in whole or in part, with the application of the second test, this is the first case on the 1999 Act to reach the highest court.

2. THE CHECK-OFF TERM AND THE REBUTTABLE PRESUMPTION OF INTENTION UNDER THE 1999 ACT

135. The check-off term in question is a term in the contract of employment between the employer and the employee under which, if the employee authorises the employer to do so and without charge, the employer must deduct from wages/salary the amount that the employee owes as his or her trade union subscription and the employer must then pay over that sum to the union. The trade union itself is not a party to any of the employment contracts.

136. The check-off term is beneficial to the trade union and the employee. It is important to the trade union because it makes it more likely than would otherwise be the case that it will receive the subscription payments owed by its members. For the employee, check-off is an easy way of ensuring that the subscription is paid and prevents the employee falling into arrears or having insufficient funds to pay the subscription owed.

137. Applying the provisions of the 1999 Act, the third party, the trade union, is expressly identified in the contract by class (Annex 1, cross-referred to in the check-off term, lists, inter alia, "nationally or departmentally recognised unions representing civil servants") so that section 1(3) is satisfied. It is also not now in dispute that, for the purposes of section 1(1)(b), the check-off term purports to confer a benefit on the third party trade union. One can say that section 1(1)(b) is satisfied because the employer is bound to deduct the subscription, if authorised to do so, and, once deducted, the employer is bound to pay the subscription over to the trade union; and, as has been said in the previous paragraph, this makes payment of the subscriptions more certain than would otherwise be the case.

138. As the requirements of section 1(1)(b) and 1(3) are both satisfied, there is a rebuttable presumption that the trade union may enforce the check-off term. The whole dispute before this court centres on whether, applying section 1(2), that presumption is rebutted.

3. THE COLLECTIVE AGREEMENT BACKGROUND

139. What makes this case particularly difficult, and appears to have been the primary reason for the split of views in the Court of Appeal between the majority, Lewis and Underhill LJJ (who decided that the third party trade union had no right of enforceability under the 1999 Act), and the dissenting judge, Stuart-Smith LJ, is the industrial relations context or, as one might otherwise put it, the collective agreement background to, or genesis of, the check-off term in question.

140. If we were to ignore the collective bargaining background, this would appear to be a straightforward type of case. That this is so can be illustrated by two hypothetical examples. The first concerns a simple payment term. The second concerns a check-off term. Let us assume that neither involves a collective agreement.

(i) Example One

An employer (A) contracts with an employee (B) that, as an additional benefit on top of salary, A will pay to a trade union (C) B's subscription. That term has been agreed after direct negotiation between A and B (and, as I have already made clear, without any initial collective agreement between A and C). Applying the presumption created by section 1(1)(b) and 1(3) of the 1999 Act, C will have the right to enforce the payment term unless on a proper construction of the contract of employment it appears, objectively, that A and B did not intend C to have that right. Subject to there being further facts about the contract or context denying this, there is nothing to indicate that that presumption would be rebutted. C would therefore have the right to enforce the payment term against A under the 1999 Act.

(ii) Example Two

An employer (A) agrees with an employee (B) to apply check-off, so that B's subscription to a trade union (C) is to be deducted by A from B's salary and paid over to C. That term has been agreed after direct negotiation between A and B (and, as I have already made

clear, without any initial collective agreement between A and C). Applying the presumption created by section 1(1)(b) and 1(3) of the 1999 Act, C will have the right to enforce the check-off term unless on a proper construction of the contract of employment it appears, objectively, that A and B did not intend C to have that right. Subject to there being further facts about the contract or context denying this, there is nothing to indicate that that presumption would be rebutted. C would therefore have the right to enforce the check-off term against A under the 1999 Act.

141. The difficult question in this case is whether the collective agreement background to, or genesis of, the check-off term in the employment contract makes a decisive difference. That is, in this case, in contrast to those two hypothetical examples, the check-off term was the result of a collective agreement between the employer and the trade union; and it was then incorporated into the individual contracts of employment by express reference or as a matter of custom and practice. It is long-established, and is now enshrined in statute as section 179 of the Trade Union and Labour Relations (Consolidation) Act 1992, that a collective agreement is not legally enforceable unless there is a written term to the contrary. Absent such a term (and there is no such term in the collective agreement in this case), the parties to that collective agreement are conclusively presumed not to have intended the collective agreement to be legally enforceable. In other words, they are deemed not to intend legal relations, in respect of the collective agreement, as between themselves.

142. It can be argued – and has been argued by Daniel Stilitz KC, counsel for the employers – that that collective bargaining context means that the parties to the employment contract in this case cannot have objectively intended that the trade union would be given a right to enforce the check-off term against the employer. Otherwise, so the argument goes, the trade union would be achieving, indirectly, by means of the 1999 Act, what it could not achieve directly by suing on the collective agreement.

143. In deciding on this difficult question, I regard two closely linked (or overlapping) arguments that were initially put forward by Oliver Segal KC, counsel for the trade union, in support of the trade union's case, as unconvincing. They are, first, that the collective bargaining context is of no relevance once a term has been incorporated into a contract of employment; and, secondly, that it is only the objective intentions of the employer and employee that count (ie the objective intentions of the trade union, through its union representatives, in negotiating the check-off term are irrelevant because the trade union is not a party to the employment contract). In my view, the collective bargaining context is relevant, as are the objective intentions of trade union representatives. See on this, *Tesco Stores Ltd v USDAW* [2024] UKSC 28, paras 3 – 5, 150 – 153, which was decided subsequent to the hearing of this case. As Lady Simler and I said in that case, at para 4:

> "at least where it is not being suggested that the union and the employee had different intentions, the objective intentions initially of employer and union and, subsequently, of employer and employee may all be relevant in deciding on the correct interpretation of a term that was agreed in a collective agreement and incorporated into a contract of employment."

4. WHY THE PRESUMPTION OF INTENTION IS REBUTTED

144. Mr Segal put forward as an alternative submission that the collective bargaining context was relevant provided one could link that context to the words in section 1(2) that "*on a proper construction of the contract* it appears that the parties did not intend the term to be enforceable by the third party" (emphasis added). Applying the normal rules for construing a contract, the material must be part of the "factual matrix" or "admissible background" in order for it to be taken into account (see, eg, *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 997, per Lord Wilberforce; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913, per Lord Hoffmann; *Chitty on Contracts*, 35th ed (2023), paras 16-056 – 16-062). It was insufficient that there might be material, which was *not* part of the factual matrix or admissible background, to indicate that objectively the parties did not intend to confer a right of enforceability on a third party.

145. I agree with that alternative submission. Section 1(2) is not an invitation to a court to apply a free-standing search for the objective intention of the parties derived from material that is inadmissible applying the normal rules on construing a contract (albeit that, as explained in *Tesco Stores Ltd v USDAW*, paras 3 – 5, there is some flexibility required because of the two-stage process involved where terms are incorporated from a collective agreement). On the contrary, and although the exercise is concerned with whether a presumption of intention has been rebutted, section 1(2) requires the application of the normal rules of contractual construction.

146. Applying the normal rules on construing a contract, the collective bargaining context is part of the factual matrix or admissible background in interpreting those express terms of the employment contract that have been incorporated from the collective agreement, which includes the check-off term. The factual matrix or admissible background may also be relevant in determining whether there are any implied terms. Section 1(2) means that those normal rules of construction apply in determining whether the objective (common) intention of the parties was that the third party should not have a right of enforceability so that the presumption is rebutted.

147. Taking account of the collective bargaining context, including, as I have indicated in para 143 above, the objective intentions of the union representatives, and therefore not confining oneself to the contracts of employment in isolation, it is my view that the presumption set up by sections 1(1)(b) and 1(3) has not here been rebutted. Under section 1(2) of the 1999 Act, the burden of proof to rebut the presumption is on the employer and I agree with Mr Segal that the employer has not established that, on a proper construction of the employment contract, the employer and employee objectively intended that the union should not have the right to enforce the check-off term. The employer has not established that, on a true interpretation of the express terms in the contract of employment the parties did not intend the trade union to have the right to enforce the check-off term. So, for example, there is no express term that the third party shall not have the right to enforce the check-off term. Nor is there any other express term (eg a no assignment clause) indicating that the third party should not have that right. The employer has also not established that there is a term implied by fact to that effect applying, for example, the standard "officious bystander" obviousness test. As the presumption has not been rebutted, the union has the right to enforce the check-off term.

148. Just as it would be wrong to ignore the collective bargaining background, it would also be wrong to regard that background as here being decisive against the union having a right to enforce the check-off term under the 1999 Act. It follows that there is ultimately no inconsistency between recognising, on the one hand, that a collective agreement is unenforceable as between employer and trade union and, on the other hand, allowing a trade union a right of enforceability against the employer under an employment contract by reason of the 1999 Act. Put another way, the fact that a collective agreement is legally unenforceable does not entail that the parties to the employment contract could not, and did not, objectively intend that the union should have a right of enforceability against the employer under the 1999 Act.

149. In reaching that decision, I have been influenced by the difficulty of rationally distinguishing between the two hypothetical examples in paragraph 140 above and the facts of this case. Can it really be said that, just because a term results from a collective agreement process, rather than being negotiated directly between employer and employee, that makes all the difference under the 1999 Act?

150. In considering the proper construction of the contract, I have also been influenced by the fact that the most efficient and effective way for the check-off term to be enforced is by an action by the trade union. In practice, if the parties give the union a right of enforceability, the union can stand alone in protecting the contractual rights of the employees. For each individual employee to bring an action for breach of the check-off term would be far less efficient and effective, as a means of enforcement, than for the

union to bring an action. Indeed, it would appear that the individual employee will not normally have been caused any loss by breach of the check-off term because he or she will have been paid more by the employer than if check-off had been applied. Once the check-off term has been incorporated into the individual contracts of employment, the most efficient and effective way of enforcing that term is through the union being given a right of enforceability under the 1999 Act. As part of the relevant background in construing the contract, that is a legitimate factor to take into account in considering the objective (common) intention of the contracting parties.

151. It follows that I essentially agree with the dissenting judgment of Stuart-Smith LJ in the Court of Appeal. I also agree with the decision of Elisabeth Laing J in *Cavanagh v Secretary of State for Work and Pensions* [2016] EWHC 1136 (QB); [2016] ICR 826, in which a check-off term was held to be enforceable by a trade union under the 1999 Act. That decision was not appealed (and the parties reached a settlement on damages).

5. A FOOTNOTE

152. We were referred by both parties to *Chudley v Clydesdale Bank Plc* [2019] EWCA Civ 344; [2020] QB 284 ("*Chudley*"). The decision in that case is controversial: see, eg, Paul S Davies, "Excluding the Contracts (Rights of Third Parties) Act 1999" (2021) 137 LQR 101. One ground of criticism is that the presumption in the second test should have been rebutted on the facts of that case because otherwise the third parties (investors in a building development) were being given a right of enforceability against a bank even though, applying normal rules of construction, that could not realistically have been the objective (common) intention of the contracting parties (the bank and its corporate customer). But in my view, which I put forward without having heard submissions on the point, there appears to be a prior problem with the reasoning of the Court of Appeal in *Chudley*. Applying section 1(3), it is not easy to accept that there was *express* (as opposed to implied) identification of the third party in the contract by name, class or description. It would therefore appear that one of the two requirements for the presumption to arise was not satisfied on the facts of the case so that there should have been no question of needing to rebut the presumption under section 1(2). See on the express identification requirement, the Law Commission's Report at para 8.1: "under our recommended reforms, third party rights cannot be conferred on someone who is impliedly in mind. We consider that the possibility of such an implication would give rise to unacceptable uncertainty."

6. CONCLUSION

153. For all these reasons, I would allow the appeal.