**OUTER HOUSE, COURT OF SESSION**

**[2023] CSOH 45**

**GP1/22**
**P305/22**
**P657/22**

OPINION OF LORD WEIR

In the cause

HUGH HALL CAMPBELL KC

Representative party

against

JAMES FINLAY (KENYA) LIMITED

Defenders

**Representative party: Smith KC, C Smith; Thompsons**
**Defenders: Lord Davidson of Glen Clova KC, A McKenzie KC, Boffey; CMS**

11 July 2023

**Introduction**

[1] This opinion is issued following a preliminary proof of 6 days' duration which I heard at parties' invitation for consideration of the defenders' pleas on the issues of jurisdiction and *forum non conveniens.*

[2] For reasons which are well known the group proceedings have given rise to a number of procedural complexities, a flavour of which may be derived from a previous note I issued on 30 September 2022 and the opinion I issued in connection with an application by the defenders to recall the interim interdict granted in the petition process P657/22 on

20 December 2022 ([2022] CSOH 94; [2022] CSOH 95). It was, however, a matter of agreement between the parties that, so far as concerns those group members who joined the group proceedings after 30 September 2022, and who were not therefore affected by the injunction granted by the Employment and Labour Relations Court of Kenya ("the ELRC") on 28 July 2022, an evidential hearing should be held in order, if possible, to resolve the defenders' preliminary pleas.

[3] The defenders' pleadings on both jurisdiction and *forum non conveniens* are adopted in both petition processes and they called at the same time as the group proceedings for the preliminary proof. For convenience, however, I shall refer to the parties hereafter as "the representative party" and "the defenders".

**The issues**

[4] The issues which I was asked to address were set out in a note prepared by the defenders in advance of the procedural hearing on 3 February 2023 at which the preliminary proof was appointed. I did not understand the representative party to disagree with the defenders' articulation of those issues, which are:

a. Whether the group members and the defenders are bound by agreements which are governed by Kenyan law and under which, properly construed under Kenyan law, the exclusive jurisdiction of the Kenyan courts in respect of the disputes articulated in these proceedings is prorogated;

b. Whether section 16 of the Kenyan Work Injury Benefits Act 2016 ("WIBA") ousts the jurisdiction of courts in claims arising from an occupational accident or disease causing disablement or death in the course of work;

c. Whether a work-related injury claim that has been filed outside the provisions of the WIBA is a nullity;

d. Whether this court has jurisdiction; and

e. Whether, in the event this court has jurisdiction, it is *forum non conveniens*.

**The pleadings**

[5] The parties' pleadings in the group proceedings on these matters are in relatively short compass. In order to focus the areas of dispute it is convenient if I narrate their terms. The defenders address jurisdiction in answer 2 in the following way:

> "…Explained and averred that the defenders employ approximately 4,000 people. They are employed on four farms within an estate. Choice of law is governed by Regulation (EC) No, 864/2007 on the law applicable to non-contractual obligations ('Rome II'). The applicable law in terms of article 4 of Rome II is Kenyan law. In terms of article 15 of Rome II the applicable law applies to *inter alios* the basis and extent of liability, any limitation of liability, the existence, nature and the assessment of damage or the remedy claimed, and the rules of prescription and limitation. The members of the group register ('the group members') and the defenders are bound by agreements which are governed by Kenyan law and under which, properly construed under Kenyan law, the exclusive jurisdiction of the Kenyan courts in respect of the disputes articulated in these proceedings is prorogated. The Kenyan Work Injury Benefits Act 2007 ('WIBA') is the applicable legislation in Kenya in respect of claims made by employees relating to work-related injuries and diseases contracted in the course of their employment. The preamble to WIBA provides that it is: 'An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes'. Section 16 of WIBA ousts the jurisdiction of the courts in claims arising from an occupational accident or disease causing disablement or death in the course of work at an initial stage. An employer will bear no liability for compensation for any occupational accident or disease unless such action is taken in accordance with the provisions of WIBA. Under those provisions only the Director of Occupational Safety and Health has the jurisdiction to determine liability of employers and compensation payable to employees arising from work-related injuries. Section 16 thereof provides as follows: *'16. No action shall lie by an employee or any dependent of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.'* In terms of the WIBA scheme, the Director of Occupational Safety and Health makes enquiries

> and reaches a decision on a claim. Reference is made to section 23 of WIBA. The decision of the Director can subsequently be challenged in the Kenyan Industrial Court. Reference is made to section 52 of WIBA. The Industrial Court has the same status as the Kenyan High Court. On 3 December 2019, the Kenyan Supreme Court held that a workers compensation claim for work related injury must first proceed via WIBA. The Kenyan Supreme Court held that the WIBA scheme did not breach the constitution of Kenya. A judgment that is delivered by a Court in respect of a work-related injury claim that has been filed outside the provisions of WIBA has been held by the Kenyan courts to be a nullity. Accordingly, this Court does not have jurisdiction. *Esto* this Court has jurisdiction (which is denied) *forum non conveniens.* Allowing these proceedings to continue in Scotland risks inconsistent judgments arising between this Court and the Supreme Court of Kenya on a matter of Kenyan law. This is undesirable. It also offends against the principle of preserving comity between sovereign nations. The appropriate forum for hearing this case is Kenya…"

[6] The defenders' position on *forum non conveniens* is developed in answer 3 in the following way:

> "…In Kenya the case will be more suitably tried, taking into account the interests of all of the parties and the ends of justice. Other than the domicile of the defenders every material aspect of the case is Kenyan. Kenyan law applies to all aspects of the group members' claims, including without limitation liability, quantum and time bar. The domicile of the defenders is historic. The defenders were incorporated as a Scottish company in 1925. The defenders' business, in so far as relevant to this litigation, is in Kenya. The defenders regularly submit to the jurisdiction of the Kenyan courts. The defenders have submitted to the Kenyan courts in other claims brought by its employees and former employees. All of the group members reside in Kenya. All the tea estates are based in Kenya. The work conditions in so far as relevant requiring to be considered were Kenyan. All material investigations will be carried out in Kenya. The place of the alleged harm is in Kenya. The group members and other witnesses in Kenya will have no right to give evidence remotely from Kenya unless the Kenyan authorities give permission for that to happen. Reference is made to Agbabiaka (evidence from abroad: Nare guidance [2021] UKUT 00286 (IAC)) and to the position of the Secretary of State for Foreign, Commonwealth and Development Affairs, as recorded in the decision of the Upper Tribunal in that case. The action is not one which raises a straightforward issue of ascertaining and applying a foreign law rule of delict/tort. There are statutory provisions in Kenya overriding any non-statutory rules that might otherwise have been relevant and the claims and applicable Kenyan law require to be understood in the context of the Kenyan industrial relations system. *Separatim* WIBA provides a compulsory statutory scheme for compensation for work related injury…So far as the defenders are aware, no application has been made by the [group members] under WIBA…It is inequitable that the representative party can seek to ignore the provisions of Kenyan law and seek to oust the jurisdiction of the compulsory statutory scheme. The cause is likely to raise issues which require an understanding

> of Kenyan culture, behaviour and custom. Such matters are outwith Scottish judicial knowledge. The cause is also likely to raise issues regarding the topography and environmental factors of the Kenyan landscape on which the tea estates are based. Comity, together with the principle of territorial sovereignty means a judicial site visit by the Lord Ordinary is unlikely to be possible. Separately, [both parties] are likely to incur additional costs and prejudice in defending and pursuing this cause in Scotland compared to Kenya. All of the witnesses in the cause are located in Kenya. The majority of the group members do not speak English. Many of the group members cannot read or write. Most of the group members do not have passports. Most of the group members have never travelled internationally before. The taking of evidence of witnesses in the cause is likely to take substantially longer than would be the case in Kenya, because this Court, and the professionals practising before it, do not speak the same language as the witnesses appearing before it. More than one language interpreter may be required, as several different dialects are spoken by the witnesses. Substantial travel, accommodation, subsistence, visa, expert and interpreter costs are likely to be incurred. Expert evidence will be required on what Kenyan law is in order for it to be applied by the Scottish judge. A Kenyan judge can apply Kenyan law directly, without the need for expert evidence. A cost-effective forum (WIBA) for the resolution of any disputes the group members have with the defenders is available in Kenya. The Kenyan legal system offers the group members an effective route to the prosecution of any claims they may have against the defenders. For the avoidance of doubt, the existence of WIBA goes to (i) the defenders' plea of no jurisdiction, as well and (ii) the defenders' plea of *forum non conveniens.* Access to justice is a right guaranteed by the Constitution of the Republic of Kenya. The Kenyan legal system adopts a proactive approach to access to justice. Multi-claimant or representative suits (akin to group proceedings) are available in Kenya. The natural forum for this cause is Kenya. As Kenyan case law shows, Kenyan employees of plantation owners in Kenya can and do succeed in claims against their employers in respect of injuries sustained as a result of their employment. In any event, resolution of the group members' claims under WIBA does not require a lawyer. It is free to the group member to pursue."

[7] In response to the defenders' averments in answer 2 concerning jurisdiction the representative party avers that WIBA is an administrative scheme rather than a judicial scheme. It offers an alternative means of dispute resolution. The intention and purpose of section 16 of WIBA is neither to limit access to courts nor to oust the jurisdiction of the Kenyan Court or any other foreign court to determine work-related injury claims. On *forum non conveniens* the representative party, in condescendence 3, avers as follows:

> "Explained and averred that the group members' claims against the defenders are brought as of right in the Scottish Courts as the defenders are domiciled in Scotland. Consequently, the Scottish Court is the proper and appropriate forum for the group

> members to bring a claim against the defenders. The Scottish Court is the only court in which the group members' cases can be suitably tried for the interests of the parties and the ends of justice. There is no prospect of the group members obtaining substantial justice before the Kenyan courts. There is no analogous provision for group proceedings in Kenya to those that exist under Scots law. As a consequence, if the group members are prevented from pursuing their claims in Scotland, they would require to advance unitary claims before the Kenyan courts. Such a process is likely to be unwieldy and subject to delay. The group members are very poor and cannot afford to pay privately to pursue their claims. There is no practical and effective provision for legal aid in Kenya. A Legal Aid Act was enacted in Kenya in 2016, however it remains embryonic and underdeveloped. It receives limited state funding. The scheme does not cover litigation costs such as those associated with the instruction of skilled witnesses. Further, contrary to what is averred by the defenders, there is no prospect that the group members are able to acquire assistance from an NGO to advance their claims before the Kenyan courts. The size and complexity of the group members' cases dwarves the financial resources available to NGOs in Kenya, which rely solely on funding from private backers. The services provided by NGOs to users are generally provided on a *pro bono* basis by a pool of volunteer legal professionals. The size and complexity of the group members' cases means that it is highly unlikely that an NGO would be able to [find] any legal professional in Kenya who would be prepared to advance the group members' cases on a *pro bono* basis. There is no provision under Kenyan law for conditional fee arrangements, unlike in Scotland where funding is available to the group members. Further, there is no costs protection for claimants in Kenya, unlike in Scotland where the group members have the full protection of the newly enacted Qualified One Way Cost Shifting provisions. For [these reasons] there is no prospect that the group members would obtain substantial justice in Kenya."

[8] Addressing specifically the defenders' averments about the efficacy of the WIBA scheme of compensation, the representative party avers:

> "…Whilst WIBA does not require the instruction of a lawyer, in practical terms it is impossible for individuals of no education, illiterate and geographically removed from any place when examination and inquiry might take place to present a claim. The process is complex, indeed troubling the Supreme Court in Kenya and practitioners on a daily basis. Challenge of any initial assessment by the Director is equally complicated. The costs of doing so are prohibitive, as the cost of a medical report is at least one month's salary for most claimants. Most are uneducated. Many are illiterate. The Act is of uncertain meaning and practical application. Without a lawyer - and even with a lawyer - it is virtually impossible to navigate a claim. The damages under WIBA are lower than common law damages, being restricted in amount. Claims not listed in the Schedules are not covered by the system. The contents of the Schedules to WIBA are calculated *inter alia* to allow parties to know what claims are competent under WIBA, and to allow the insurance industry to assess the level of risk. Without that certainty, the insurance industry will be incapable of assessing the risk reasonably. Claims over a year old are not competent.

> Without claims proceeding in Scotland, it is highly likely that they will not proceed at all. Without doubt, even if the occasional claimant could proceed in Kenya, vast numbers from the current cohort would simply require to give up."

**The evidence**

[9] During the defenders' proof I heard evidence from (i) Mr Simeon Hutchinson, (ii) Mr Daniel Kirui, (iii) Mr Reuben Langat, (iv) Professor Githu Muigai SC, and (v) Dr Musa Nyandusi. For the representative party I heard evidence from (i) Ms Anne Ireri, (ii) Mr Eric Theuri, and (iii) Mr Wilfred Nderitu SC. To the extent that they each provided signed witness statements, or provided reports, in advance of the proof the witnesses adopted the evidence contained in those documents as comprising substantially all of their evidence-in-chief.

**Defenders' proof**

***Simeon Hutchinson***

[10] Mr Hutchinson, 60, is currently the defenders' managing director. In his signed witness statement Mr Hutchinson described the history of the defenders' tea-growing operations in Kenya and their place in the corporate structure of the Swire Group. The defenders were originally set up in 1925 under the name The African Highlands Produce Company Limited. Apart from a historical registered office address in Aberdeen the defenders had no other connection with Scotland. There was no particular reason why the defenders continued to be registered in Scotland.

[11] The defenders are currently members of the Kenya Tea Growers Association ("the KTGA"). The KTGA is responsible for negotiating on behalf of its members, including the defenders, the collective bargaining agreements ("CBAs") for the time being in force

between the Kenya Plantation and Agricultural Workers Union ("the Union"). The Union is the trade union organisation which represents the defenders' employees. There is a recognition agreement ("the Recognition Agreement") which lays out how the KTGA and the Union engage with each other. Asked in evidence whether the CBAs had been correctly registered with the industrial court, his response was that he believed them to have been.

[12] The defenders operated as a branch in Kenya and were subject to Kenyan law, including the provisions of the Work Injury Benefits Act 2007 ("WIBA") and the jurisdiction of the Kenyan courts. WIBA was very specific on how injuries at work should be reported by both employees and the employer. WIBA offered a compensation system which was favourable to employees as the process was undertaken by the defenders at no cost to the employee. The defenders carried the requisite insurance cover for WIBA claims. Mr Hutchinson had no reason to think that the defenders would be unwilling to pay out on the claims of injured workers.

[13] Mr Hutchinson's evidence was that there would be practical difficulties for the defenders if the group proceedings continued in Scotland. Those difficulties arose from the requirement for current employees to absent themselves while giving evidence in Scotland, the need to recruit cover for that situation, and the court's likely lack of understanding of Kenyan culture, the role of domestic physical labour within that culture, and how that might impact individual claims.

***Daniel Kirui***

[14] Mr Kirui, 57, is the HR director of the defenders, reporting directly to the managing director. His signed witness statement addressed his role in the company management structure which included a company medical officer who dealt with the running of medical

services within the defenders. Those services included clinical services for individual patients, conducting medical examinations for the purposes of WIBA claims, overseeing occupational health matters and wellness programmes.

[15] The defenders have around 4,800 employees, the majority of whom live on the defenders' estate or the surrounding area. The defenders have established 12 primary schools, 2 secondary schools and 31 early childhood development centres within their estate, and pay for all costs associated with those schools, save for teachers employed by the Kenyan government. The defenders also provide free healthcare through 13 dispensaries across the estate.

[16] Mr Kirui described how the defenders operated the compensation system established under WIBA. He explained that it was a system which had been introduced against a background of "ambulance-chasing" and a streamlining of the Kenyan labour laws in 2007 of which WIBA was part. Mr Kirui considered the process to be very clear, transparent, and favourable towards the employee. Every accident at work has now to be reported to the Directorate of Occupational Safety and Health Services ("DOSH"). It was now the position that all injuries occurring at the workplace were subject to compensation.

[17] Addressing the contractual matrix between the KTGA and the Union, Mr Kirui explained that all of the defenders' employees are what is termed "unionisable" because they are subject to both the Recognition Agreement and the current CBA by virtue of the latter being referenced in the employee contracts (a sample of which was lodged at JB3201). There was a statutory obligation on the defenders to explain to employees the terms of the contract of employment. His evidence was that around 80% of the defenders' tea estate employees were illiterate. However, although the master version was in English it would be translated, where necessary, into the employees' native language. For example, if they

wished a native Kiswahili version to sign, that would be facilitated. Union shop stewards had a role in that process too.

[18] Asked how the most recent example of a CBA in the joint bundle could have been dated 1 November 2021 when its stated duration was 1 January 2020 to 31 December 2021, Mr Kirui referenced a practice in the defenders' "set-up" whereby the preceding CBA would remain in effect until the subsequent one was signed off. He acknowledged that the CBA contained no definition of the term "industrial sickness" where it appeared in clause 12c (clause 12c stating that "In the case of industrial sickness it is agreed that the terms of WIBA shall apply").

***Reuben Langat***

[19] Mr Langat, 47, is the defenders' environmental health and safety and sustainability officer. Senior counsel for the representative party took objection, at the outset of his evidence, to certain aspects of the witness's signed statement which dealt with matters of background. Although the passages concerned were admitted subject to relevancy and competency the objection was not renewed at the stage of submissions and the material covered was not material to any decision I had to reach. Mr Langat's signed witness statement covered primarily his involvement in the administration and operation of the WIBA system of compensation within the defenders' organisation (and for whose oversight he is responsible). That evidence was plainly relevant.

[20] It would be helpful, at this stage, to set out the process which the witness described. Thus, employees are eligible for compensation if they are off work for three or more days due to a work-related injury. The defenders must notify DOSH, by completion of a DOSH 1 form, within 7 days of receiving notice of an occupational accident, or 14 days in the case of

an occupational disease. DOSH will transmit a form acknowledging receipt of the notification ("DOSH 3"). The defenders will then initiate the process of compensation by returning part 2 of DOSH 1, following its completion by the designated medical practitioner ("DMP") who examined the employee upon their return to work. It is a matter for the DMP to assess whether the presenting injury is the result of an accident at work.

[21] The first schedule to WIBA guides the DMP as to the degree of disablement which is expressed in a percentage (loss of life, a limb or sight being 100% disablement) which is then applied to the monthly earnings of the employee over a period of 96 months. The return of part 2 of DOSH 1 will generate a further form ("DOSH 4") which is sent to the defenders with the computed compensation payment. The DOSH 4 is forwarded to the defenders' insurers such that payment of the sum brought out can be facilitated.

[22] If the employee is dissatisfied with the proposed compensation there is an appeal process. The employee can either have another doctor of their own choosing assess the injuries and their calculation, or DOSH may constitute a panel of doctors as a review team in Nairobi. The assessment of the DOSH panel is considered to be final. If the employee remains dissatisfied with the outcome they may take an appeal to the ELRC. The ELRC appeal may only be taken once the DOSH process has been exhausted.

[23] Mr Langat explained that because the whole process was so simple - and working well - there was no need for a lawyer. He rejected as being inconsistent with his own experience any suggestion that the WIBA system of compensation was overly complicated and inaccessible to employees. He referenced three anonymised WIBA claims which resulted in compensation claims being met in periods measurable in months. He gave evidence that employee appeal rights were explained and that transport and subsistence costs were available to employees who wished to appeal to the medical panel convened by

DOSH in Nairobi. He claimed to be aware of cases of RSI which had been compensated under WIBA.

[24] The witness had never encountered either a lawyer or the Union involved in the WIBA process. Nor, until now, had he any experience of an employee complaining of a work-related injury after leaving the defenders' employment.

[25] In cross-examination Mr Langat's evidence was that the defenders processed on average ten WIBA claims per year. He accepted that, within the DOSH process, the initial medical assessment would usually be by a doctor employed by the defenders, with the relevant form being completed by the company medical officer. Mr Langat appeared to dispute that most of the defenders' employees were illiterate. In contrast to the evidence of Mr Kirui, he thought around 80% could read and write. There were, in any event, ample sources of advice for employees going through the WIBA process, including the DOSH office itself. The process was fair and easy to follow, even for someone who was illiterate. Lawyers were not required. Mr Langat did accept that an employee who sought a second medical opinion would likely have to pay for it themselves.

***Dr Musa Nyandusi Lwegado***

[26] Dr Nyandusi, 51, is the Director of Occupational Safety and Health for the Republic of Kenya and serves as the head of DOSH. DOSH is a department within the Ministry of Labour and Social Protection. DOSH is responsible for ensuring compliance with the Occupational Safety and Health Act 2007 ("OSHA") and for the administration of work injury claims under WIBA. OSHA and WIBA are complimentary, the former containing preventive provisions and the latter being concerned with compensation - where those provisions have failed. They were enacted to address perceived gaps in the existing

workman's compensation legislation. Following the enactment of WIBA certain of its provisions were challenged as being unconstitutional in respect that they appeared to restrict access to the courts. The High Court initially agreed but no order was made suspending the processing of claims under WIBA, which continued until greater clarity was lent to the position by the Supreme Court in *Law Society of Kenya* v *Attorney General and another* [2019] eKLR (Petition no 4 of 2019) whose judgment in the matter was issued on 3 December 2019.

[27] All WIBA claims now require to be presented to DOSH and are processed there. For that reason Dr Nyandusi explained that it was not advisable for claimants to rush to court as their first source of recourse. WIBA provides for internal dispute resolution. Dr Nyandusi described the WIBA process in terms which accorded with the evidence of Mr Kirui. He added that there was a DOSH office in Kericho, about 2 kilometres from the defenders' tea estate. Dr Nyandusi was unaware of any process in Kenya other than WIBA for making a claim for injury sustained at work.

[28] Under the WIBA system it was open to both the employer and a disappointed claimant to appoint a doctor of their own choice (at their own cost) to undertake a re-assessment but most of these assessments, in the witness's experience, were done in government hospitals, in which case they were state funded. The resulting assessments, if different from the initial assessment of the DMP, would be considered, and a final report produced, by a panel of usually three of DOSH's medical practitioners. If matters remained unresolved it was open to the aggrieved party to appeal to the ELRC. Dr Nyandusi considered that WIBA offered a fair process which was an improvement on what went before.

[29] The services of DOSH, including examinations by the panel of doctors within DOSH, are free to the claimant. Dr Nyandusi's evidence was that claimants did not need to be able to read and write to seek compensation. The manner of computation was prescribed in WIBA. There was no necessity for either a lawyer or Union representative while the process was administered within DOSH (although there was no prohibition on representation either).

[30] Dr Nyandusi explained the approach of DOSH to WIBA coverage. He described a holistic approach in which "one should not dwell too much on the word 'accident' and what it means, as occupational disease was also compensable under WIBA." A chronic back injury was the same as a chronic back disease. What was required was a relationship between the injury claim and exposure to work. Schedule 1 of WIBA provided the basic framework for common injuries in the workplace. The schedule was not exhaustive, nor could it be. Many injuries and diseases might fall outwith the schedule. DOSH often invoked paragraph G(c) of schedule 1, whereby "the Director shall prescribe the compensation criteria for musculoskeletal disorders and occupational injuries not elsewhere covered". Thus, DOSH had received claims for repetitive back strain injuries from nurses working in ICU, as well as other musculoskeletal injuries. Occupational injury and disease was causal and relational and still had to be linked with the work being undertaken for there to be a claim under WIBA. Work injury assessment for chronic and repetitive injuries was common in DOSH clinics. That said, Dr Nyandusi acknowledged in evidence that back pain from a potentially work-related cause was not listed in schedule 1, and that to include degenerative types of disease would require there to be a process of consultation and amendment to the schedule because of potentially difficult issues of causation.

[31] Although WIBA did not explicitly provide a discretion for DOSH to accept a claim which is lodged more than 12 months after an accident, the words "may not be considered" in section 26(2) afforded a window of discretion which had been adopted in practice. A party aggrieved by the exercise of such discretion would have a right to take an appeal to the ELRC under part VIII of WIBA.

[32] On the matter of appeals Dr Nyandusi provided statistical information from 2018/19 to the effect that, while the number of claims processed by DOSH was measurable in thousands, there had been 11 appeals since 2018/2019. Two of those appeals had been at the instance of employers and nine were appeals by employees. In cross-examination Dr Nyandusi acknowledged that there were two potential explanations for these results; (i) people were generally content with the awards, and (ii) absent legal representation in the original presentation of a claim people were unaware of their right to appeal - or the basis upon which they could do so.

[33] Finally, asked about the capacity of DOSH to handle a very substantial influx of claims, Dr Nyandusi provided a recent example in which over a 2 to 3 week period, and through what he called a special programme, the department had processed some 501 National Police Service claims arising from injuries which were said to have caused disability. The majority of the claims were said to have come from 2019 but some dated from 2010.

***Professor Githu Muigai SC***

[34] Professor Muigai is a professor of law at the University of Nairobi. He is both a senior counsel and senior partner of the law firm of Mohammed Muigai LLP. Between August 2011 and February 2018 he served as Attorney General of the Republic of Kenya.

Professor Muigai prepared, for the purposes of the proof, a report dated 3 March 2023, and a supplementary report dated 16 March 2023. He also provided, by email, further comments on the views expressed by Dr Willy Mutunga, an expert witness who had been due to give evidence in the representative party's proof, on the matter of limitation. In evidence Professor Muigai adopted the contents of each of these reports and adhered to the evidence contained in them.

[35] In the first of those reports Professor Muigai was charged with addressing the following issues, namely (i) whether, under Kenyan law the claims brought by the representative party in the group proceedings are subject to the exclusive jurisdiction of the Kenyan courts; (ii) whether, and how readily, the justice system of the Republic of Kenya allows claims of the type being pursued in the group proceedings to be brought and determined in Kenya. Professor Muigai then offered certain comments on Dr Mutunga's expert report from 10 August 2022. I will rehearse his evidence in relation to each issue in turn.

**(i) Whether, under Kenyan law the claims brought by the representative party in the group proceedings are subject to the exclusive jurisdiction of the Kenyan courts:**

[36] For the purposes of addressing the first issue Professor Muigai provided a helpful overview of the statutory sources of labour and employment law in Kenya. He described how employment is governed by a combination of the 2010 Constitution of the Republic of Kenya, a reforming legislative framework in which the Employment Act 2007, the Labour Relations Act 2007, OSHA and WIBA complimented each other, the general law of contract and principles of the common law. Under the Kenyan legislative framework, statutory

provisions provide the minimum terms of employment and override any contractual terms unless the contract offers better terms of employment to the employee.

[37] The legislative and policy intent of the Kenyan Parliament in enacting WIBA, in particular, was to create a comprehensive and modern framework for providing compensation to employees who suffer work-related injuries. It marked a deliberate shift towards an administrative type of process as a means of addressing difficulties said to have arisen through the activities of "ambulance-chasing" lawyers.

[38] Professor Muigai also reviewed both the Recognition Agreement negotiated between the KTGA and the Union dated 23 November 2000 and the CBA entered into between the KTGA (Kericho/Sotik/Nandi branches) and the Union for 1 January 2020 to 31 December 2021 together with other historic CBAs between the parties.

[39] Since the defenders place reliance on the terms and effect of the CBAs for the time being concluded between the KTGA and the Union it is necessary to record Professor Muigai's description of the process by which, in the field of Kenyan industrial relations, both recognition agreements and CBAs are negotiated between employers' organisations and trade unions. To that end it is sufficient to notice that a recognition agreement provides the mechanism by which a trade union is authorised to negotiate terms and conditions of employment on behalf of groups of workers through a process of collective bargaining (*Kenya Plantation and Agricultural Workers Union* v *Carnation Plants Ltd* [2013] eKLR Clause 828 of 2011). Recognition of a trade union by a group of employers gives rise to a statutory obligation, in terms of section 57(1) of the Labour Relations Act 2007, to conclude a CBA with the recognised union setting out the terms and conditions of service for all unionisable employees covered by a recognition agreement. Once a CBA has been executed section 59 of the Labour Relations Act 2007 establishes its binding nature as

between the parties. More specifically, a CBA binds for the period of its duration all parties to it, including (a) the unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the CBA and (b) the employers who are or become members of an organisation party to the CBA to the extent that it relates to their employees.

[40] A CBA binds the parties who were members at its commencement and their members, even if the members subsequently resign from the organisations who are party to it. Moreover, the terms of a CBA agreement must be incorporated into every contract of employment of every employee covered by it (Industrial Relations Act 2007, section 59(3)). However, the validity and legitimacy of a CBA can only take effect upon its successful registration by the ELRC (Industrial Relations Act 2007, section 59(5); *Nairobi City County Government* v *Kenya County Government Workers Union and another* [2019] eKLR).

[41] Turning to the circumstances of the instant case, Professor Muigai noted that the parties' dispute arises from claims on the part of group members who seek compensation from the defenders for loss, injury and damage sustained in the course of their employment on the defenders' tea estates. Such a dispute falls to be resolved according to the provisions of the CBA which specifically deal with the handling of sickness and illness claims by employees.

[42] Professor Muigai observed that the CBA does not specify the mode of dispute resolution. In that situation he explained that, according to Kenyan law, the provisions of part B of the Kenyan Industrial Relations Charter would be implied into the CBA such that conciliation and voluntary arbitration would be the first port of call in resolving any dispute (*Teachers Service Commission* v *Kenya National Union of Teachers and another* [2019] eKLR; *Kenya Game Hunting and Safari Workers Union* v *Lewa Wildlife Conservancy Ltd* [2014]

eKLR). Absent resolution by such means clause 12c of the CBA provides a specific mechanism for resolving disputes arising from industrial sickness. It states: "…In the case of industrial sickness, it is agreed that the terms of the Work Injury Benefits Act shall apply" By recognising and importing the terms of WIBA into the CBA the parties (ie the defenders and the group members) were contractually limited to seeking recourse under WIBA.

[43] Professor Muigai drew attention to the terms of section 16 of WIBA whereby no action shall lie by an employee for recovery of damages in respect of occupational accident or disease resulting in disablement of such employee against their employer and no liability for compensation on the part of the employer shall arise save under the provisions of WIBA. The claims of group members appeared premised on the occurrence of occupational disease. Section 38(1) of WIBA provides that an employee is entitled to compensation if the employee (a) contracts a disease specified in the second schedule that arose out of and in the course of the employee's employment, or (b) contracts any other disease that arose out of and in the course of the employee's employment. Section 38(2) further provides that an employee who contracts a disease in the circumstances contemplated in subsection (1) is deemed to have contracted an occupational disease and is entitled to compensation as if the disablement caused by the disease had been caused by an accident. Professor Muigai's evidence was that the combined effect of sections 16 and 38 of WIBA is that where an occupational disease is alleged to have been contracted from, and in the course of, a person's employment no claim shall arise save as provided for under WIBA. That process involves initial consideration by DOSH with ultimate recourse, in terms of section 52 of WIBA, to the appellate jurisdiction of the ELRC.

[44] Lest there be any doubt as to the exclusivity of WIBA, in *Law Society of Kenya* v *Attorney General and another, supra*, the Supreme Court rejected a challenge by the Law

Society to the effect that WIBA, in purporting to oust the jurisdiction of the courts, compromised the rights of employees to a fair adjudication of their claims and was thereby unconstitutional. That authoritative ruling has since been recognised by a slew of decisions in the ELRC (eg *Heritage Insurance Company Ltd* v *David Fikiri Joshua and another* [2021] eKLR No 21/2019; *Magot Freight Services Ltd and others* v *Samson Mwakenda Mangale* [2021] eKLR No 28/2020; *Austin Oduor Odira* v *Kenya Sweets Ltd and another* [2021] eKLR No 74/2021; *Perfect Scan Ltd* v *Harrison Kahindi Said* [2021] eKLR No 18/2020; *West Kenya Sugar Ltd* v *Tito Lucheli Tangale* [2021] eKLR No 4/2019; *Manuchar Kenya Ltd* v *Dennis Odhiambo* Olwete [2020] eKLR No 5/2019).

[45] For completeness, Professor Muigai explained that, in terms of section 87(1) of the Employment Act 2007, and once the remedies in WIBA have been exhausted, any dispute touching on injury of an employee can only be referred to the ELRC. In the instant case, however, the claims of group members relate to the recovery of damages in respect of occupational accident or disease. Section 10 of WIBA provides the mechanism for recourse. Kenyan law, in any event, requires that an aggrieved party exhaust all remedies available under contract or statute before proceeding to court (Labour Relations Act 2007, sections 52, 73; *Geoffrey Muthinja and another* v *Samuel Muguna Henry and others* [2015] eKLR). Either way, the group members should in the first instance have applied for compensation under WIBA before approaching any court.

[46] Professor Muigai rejected the notion, propagated by both Dr Mutunga and Mr Nderitu (who did give evidence), that a common law claim could be advanced in the ELRC, in exercise of its original jurisdiction under section 12 of the Industrial Court Act 2011 ("the 2011 Act"), without recourse to the compensation mechanism established under WIBA. His analysis as to the exclusivity of WIBA was consistent with the wording of section 12 of

the 2011 Act. He also rejected the proposition that a claimant could allow the 12 month limitation period under section 26 of WIBA to elapse and then, within the 3 year time limit prescribed by section 4(2) of the Kenyan Limitation of Actions Act, raise proceedings in the ELRC. As I understood it, Professor Muigai's position was that the general limitation regime under the Limitation of Actions Act gave way to the particular limitation provisions of WIBA where work-related injuries were concerned.

[47] Professor Muigai also rejected the contention of Mr Nderitu that musculoskeletal injuries are not covered by WIBA. "Injury" is defined in section 2 of WIBA as "a personal injury and includes the contracting of a scheduled disease". Such a definition does not exclude back injuries. DOSH has routinely handled claims relating to back injury. *Samuel Otieno Musumba* v *Industrial and another* [2022] eKLR was an example of a back injury having been dealt with by DOSH, and his finding in favour of the claimant left undisturbed by the court.

[48] In the circumstances Professor Muigai was of the opinion that the claims brought by the representative party in the group proceedings were according to Kenyan law subject to the exclusive jurisdiction of the Kenyan courts.

**(ii) Whether, and how readily, the justice system of the Republic of Kenya allows claims of the type being pursued in the group proceedings to be brought and determined in Kenya:**

[49] In his report dated 3 March 2023 Professor Muigai expressed the opinion that it is possible for claims to be instituted by the group members in Kenya and for them to secure legal aid and assistance in representation to advance their claims. To be clear, however, it was made known in advance of the proof that the defenders would not be maintaining that

legal aid was available for the claims nor would any case be made to the effect that funding would be available through the assistance of Non-Governmental Organisations. Professor Muigai reported that contingency fee arrangements were prohibited under Kenyan law.

[50] That said, Professor Muigai's evidence was that the system of compensation established under WIBA did not lend itself to group proceedings, not least because applications to DOSH did not require legal representation. The WIBA mechanism sought to promote access to justice by persons acting on their own behalf without the incurring of legal costs. As such, legal representation was the exception for such claims rather than the norm.

**Representative party's proof**

[51] The defenders originally intended to lead Dr Willy Mutunga SC, former Chief Justice of the Republic of Kenya, to speak to a report dated 28 February 2023 which he prepared in contemplation of giving evidence at the preliminary proof. In that report Dr Mutunga gave a written opinion that there was no legislative or contractual compulsion on the group members to use the WIBA system of compensation to advance their claims, even if the injuries giving rise to their claims were covered by WIBA - and potentially many may not be. For reasons that are unnecessary to rehearse Dr Mutunga was unable to be present and give evidence. He did not, therefore, speak to his report.

[52] In the result the defenders were content to rely on the evidence of their other skilled witness, Mr Wilfred Nderitu SC, who helpfully addressed the matter of WIBA exclusivity and limitation as well as other matters which were contained in his own report. I deal with his evidence below.

*Anne Ireri*

[53] Ms Ireri is the executive director of the Federation of Women Lawyers ("FIDA") in Kenya. Ms Ireri provided a witness statement in which she expressed the opinion that this court was the forum in which the group claimants were most likely to achieve substantial justice. That said, she was not offered as an expert witness but rather to enable her to discuss the role of FIDA in supporting legal claims in Kenya. In that respect her evidence was to the effect that FIDA would not be able to support the group members' claims if litigated in Kenya. That was because FIDA was an organisation focussed exclusively on the rights of women. Mixed gender claims were not attractive to FIDA given its finite and limited resources.

[54] FIDA did implement a programme involving tea estate workers in Kericho County in 2019. It was aimed at creating awareness amongst female tea workers of their rights and creating advocacy platforms for them to pursue legal assistance in support of those rights. The programme was not initiated for the purposes of litigation.

[55] Ms Ireri's evidence was not ultimately of significant moment since the defenders did not ultimately dispute at the preliminary proof that legal aid and NGO funding, and conditional fee arrangements, would probably not be available to group members for the advancement of their claims in Kenya.

*Mr Eric Theuri, advocate*

[56] Mr Theuri is an advocate of the High Court and currently holds office as the 50th president of the Law Society of Kenya.

[57] Mr Theuri provided a witness statement which addressed the availability in Kenya of group claims arrangements, funding and legal representation for claims such as those presented by the group members. There was an informal court protocol in Kenya which permitted parties to agree to deal with multiple unitary claims together. He offered as an example passengers on a bus injured in a road traffic accident. Mr Theuri had never seen the protocol operating in relation to claims such as were being advanced in the group proceedings.

[58] There was no equivalent to qualified one-way cost shifting in Kenya. Contingency fee arrangements were unenforceable under Kenyan law. Newer legal firms in Kenya tended not to have the funds or resources to carry high volume claims, and their business models did not lend themselves to expensive, complex, high risk and contentious claims. The larger "Ivy League" law firms tended to concern themselves with representing large commercial organisations. Mr Theuri thought it unlikely that such firms would be ready and willing to take on the kind of claims being advanced through the group proceedings (not least for fear of damaging their commercial practice).

[59] Mr Theuri described the level of awards of compensation being made under WIBA as negligible. They compared extremely unfavourably with the level of awards made in statutory and common law claims before the courts. He expressed further concerns about the adequacy of funding for DOSH and the limited level of medical expertise available within DOSH on matters relating to occupational injury and disease - albeit that limited expertise and the prohibitive cost of medical assistance in cases involving complex medical causation affected claims brought both under WIBA and through the courts.

[60] Cross-examined on his concerns about the operation of WIBA, Mr Theuri appeared to disagree with the decision of the Supreme Court in *The Law Society of Kenya* case while

recognising that it had to be complied with. He disagreed with the characterisation of the decision as having "excluded" lawyers. The Supreme Court just said that WIBA was not unconstitutional. Mr Theuri acknowledged that there are lawyers who can take claims to DOSH (although it was not clear whether either question or answer was referring to the initial claim or an appeal against the initial assessment by DOSH). Mr Theuri disputed that claimants under the WIBA system had easy access to justice. His experience was that the system lacked an effective enforcement mechanism. Mr Theuri also appeared to accept that the chances were that the defenders and their insurers would pay out on claims assessed by DOSH. Mr Theuri was unaware of any obstacle that would prevent the group claimants from taking their claims under WIBA. However, he adhered to the position that the WIBA system was unjust in respect that it lacked predictability and a proper procedure for assessing claims and awarding compensation.

[61] On the matter of taking evidence remotely, Mr Theuri referenced a practice direction on the hearing of civil claims which contains a presumption in favour of giving evidence virtually by video link, save where otherwise agreed by the parties in cases of complexity. He was unaware of any rule which impacted on that presumption where the hearing takes place outside of Kenya.

***Mr Wilfred Nderitu SC***

[62] Mr Nderitu is senior litigation counsel and managing partner of the firm of Nderitu & Partners, Advocates, Nairobi. He was appointed senior counsel in July 2020. A copy of his extensive *curriculum vitae* was appended as appendix II to the report dated 2 March 2023 which he prepared for the purposes of the proof. In evidence he adopted the contents of his report and adhered to the evidence contained in it. He also expanded on

certain aspects of his report during the proof, particularly with regard to (i) access to justice in Kenya and (ii) the place of WIBA in Kenyan industrial relations law. I propose to rehearse his evidence under reference to those two issues.

**(i) Access to justice in Kenya**

[63] Mr Nderitu considered that there was a material risk that the group members would not be able to obtain access justice in the Kenyan courts. It was highly unlikely that any individual group member would be able to obtain the services of a lawyer in Kenya. That was substantially on account of the exceptional poverty to which tea workers are said to be exposed on a daily basis. Lack of funding was and is a gateway inhibitor to obtaining access to the courts.

[64] Expanding on these points, Mr Nderitu described how, even by Kenyan standards, tea workers were exceptionally poor and, in the case of the present group members, dependent on the defenders for all aspects of their lives (which in turn made suing the employer very unattractive). They were physically isolated from other people due to the size of the tea estates on which they lived and worked. Against a background of impecuniosity (derived from various disparate sources set out in paragraphs 7.6 and 7.7 of Mr Nderitu's report) it would not be realistically possible for group members in Kenya to pay legal fees and disbursements in connection with a claim from their own resources.

[65] Moreover, notwithstanding the enactment of the Legal Aid Act in May 2016, inadequate funding and other structural issues meant that there was in reality no legal aid for claims such as these - a matter no longer disputed by the defenders. Mr Nderitu regarded as fanciful the idea that group members would be able to source financial assistance from either NGOs or a Union. NGOs usually fund legal claims against

government (in alignment with their organisational mission) rather than private companies. The number of claims would, in any event, involve expenditure which is likely to exceed the capacity of NGOs in Nairobi in terms of manpower and resources. Mr Nderitu was unaware of any case where there had been general Union backing for a very large number of essentially personal injury claims. Conditional fee arrangements were not available in Kenya (a point on which Mr Nderitu and Professor Muigai were agreed).

[66] Not being concerned with constitutional rights, Mr Nderitu did not consider that the claims of group members fell within the category of case for which group proceedings were permitted under Kenyan law. Even if such proceedings could be raised he doubted whether any law firm in Kenya would be prepared to take them on. That was a product of both capacity and lack of funding. Any law firm with the financial and human resources to take such proceedings would likely require payment of fees and disbursements as they accrued. The reality was that there were few lawyers in Kenya who had the skills to handle group proceedings on this scale, even if they were otherwise permitted to be brought.

[67] Finally, Mr Nderitu referenced a number of factors, set out in section 12 of his report, which would likely contribute to significant delay in resolving the claims of the group members through the ELRC. These touched on the significant caseload of, and backlog affecting, the ELRC, the length of procedural adjournments, and the availability of judges when account was taken of leave, annual holidays and time restrictions imposed by court term dates. Mr Nderitu explained that the neo-colonial perception locally of foreign companies operating within Kenya, and employing unskilled labour there, would act as a disincentive for a judge to fast-track the group members' claims which might have to wait for years before they could proceed to trial.

[68] In summary, Mr Nderitu considered that there was a substantial and material risk that if the group proceedings did not continue in Scotland the claims of group members may never be heard at all in the Kenyan courts or, if they were heard, they would never be concluded.

**(ii) WIBA**

[69] Mr Nderitu drew attention to what he conceived to be limitations in the WIBA system. While it offered a supposedly speedy assessment of damages for injuries listed in the schedules to WIBA, there were many injuries not so listed and which could not therefore be the subject of a WIBA claim. WIBA was essentially a no fault compensation system. In the witness's opinion, a system that did not recognise fault when it was there, and provide full compensation when there was fault, was not really a justice system. It was, as he put it, an unjust way of trying to grow justice and the system tended to be used by those on the bottom rung of the ladder.

[70] That said, Mr Nderitu shared Dr Mutunga's view that WIBA did not oust the jurisdiction of the ELRC to which there was a constitutional right of access by virtue of Article 162 of the 2010 Constitution. Article 162, so far as relevant, provides as follows:

> "**162 System of courts**
>
> (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
> (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
> (a) employment and labour relations; and
> (b) the environment and the use and occupation of, and title to, land.
> (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)."

[71] Pursuant to Article 162(2)(b) of the 2010 Constitution the Kenyan Parliament, by the 2011 Act, established the Industrial Court (now the ELRC). Section 12(1)(c) of the 2011 Act conferred on the court

> "exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of [the 2011 Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations…".

That section 12 expressly conferred exclusive *original* jurisdiction on what is now the ELRC explained why the enactment of WIBA cannot have ousted the jurisdiction of the ELRC to entertain claims which had either progressed through the WIBA system to what the claimant considered to be an unsatisfactory conclusion, or had not been advanced through WIBA at all. There was nothing in the decision of the Supreme Court in the *Law Society of Kenya* case which detracted from that result. In Mr Nderitu's opinion, therefore, it was open to a claimant to present a common law claim for damages without first recourse to the WIBA system, whether or not the injury or illness giving rise to the claim was a scheduled condition under WIBA.

[72] Mr Nderitu was of the further opinion that claims which concerned non-listed conditions, or which had not been channelled through WIBA timeously (ie within the 1 year limitation period provided under section 26 of WIBA), could nonetheless competently be advanced before the ELRC. Indeed, Mr Nderitu stated that unless all of the group members had sustained injuries which were listed in the schedules to WIBA and had occurred less than 1 year ago, their claims could not be brought under WIBA. Far from ousting the jurisdiction of the other Kenyan courts they obliged a litigant to go to those other courts.

**Submissions**

***Defenders' submissions***

[73] The defenders formally invited the court to sustain their first plea-in-law (jurisdiction), which failing their second plea-in-law (*forum non conveniens*). Although I was formally moved to dismiss the action in either eventuality senior counsel submitted that if I were disposed to sustain either plea then the case should be put out By Order for discussion.

[74] Senior counsel then addressed what is characterised in the defenders' written submissions as the central issue in dispute, namely WIBA exclusivity and coverage. He commended to me the evidence of Professor Muigai concerning the background to the enactment of WIBA and what was a deliberate policy shift from a system reliant on claims being advanced in court in favour of the an alternative dispute resolution mechanism which, according to Professor Muigai, was a necessary first port of call before the jurisdiction of the court could be invoked. That was precisely what the Supreme Court had decided in the *Law Society of Kenya* case in rejecting the argument of the Law Society that section 16 of WIBA was unconstitutional in respect that it impeded the right of an employee to fair trial contrary to what are now Articles 40 and 50 of the 2010 Constitution. I was invited to accept Professor Muigai's opinion, expressed under reference to a number of cases decided in the ELRC, that WIBA was now the sole mechanism for addressing work injury and sickness claims. Parliament had (consistent with section 12 of the Industrial Court Act 2011) conferred on the ELRC an appellate jurisdiction but all claims had first to be submitted to, and processed by, DOSH.

[75] I was urged to reject Mr Nderitu's opinion that, by reason of Article 162 of the 2010 Constitution and section 12 of the 2011 Act, the ELRC had an original jurisdiction to

entertain claims which had not previously been processed by DOSH. Such an approach was unvouched by case law or any other authority. The court had no basis to treat the views of Mr Nderitu as superior to those expressed by a range of Kenyan judges, and which were at odds with Supreme Court's ruling on the matter. Followed through to its logical conclusion, Mr Nderitu's analysis had the potential to create a two-track system of work-injury compensation which made no sense and was at odds with the legislative intent of WIBA.

[76] I was also urged to reject Mr Nderitu's opinion that if a condition was not listed in the WIBA schedules then no compensation could be awarded under the WIBA system. That argument was rested on too narrow a view of the schedules, interpretation of which was neither literal nor exhaustive. Professor Muigai's evidence that there was nothing to preclude DOSH from compensating back injuries should be preferred. That evidence was consistent with that of Dr Nyandusi, who said that such cases were routinely compensated (cf *Samuel Otieno Musumba* v *Industrial & Commercial Development Corporation, supra*). In short, Mr Nderitu's opinion was supported by neither legal analysis not administrative practice.

[77] Turning to the matter of jurisdiction, senior counsel submitted that the representative party's position rested on a misapprehension that WIBA operated as a legislative ouster of this court's jurisdiction. That was not the defenders' position, which was advanced squarely under paragraph 6 of schedule 8 to the Civil Jurisdiction and Judgments Act 1982. The defenders' submission was that where the Scottish court would otherwise have jurisdiction (which was, by reason of its domicile, not disputed) that jurisdiction may be excluded where the parties had prorogated the exclusive jurisdiction of courts elsewhere (*Maher and Rodger: Civil Jurisdiction in the Scottish Courts*, W Green, para 17.04). That was the position in the instant case. The group members and the defenders are, under Kenyan law, bound by the

terms of the individual contracts of employment of the group members. A specimen example was lodged (JB3203) and no suggestion was put to any of the defenders' witnesses that it did not accurately reflect the terms and conditions under which the group members were employed.

[78] The contracts of employment imported the "relevant national legislation". That phrase clearly comprehended WIBA. They also specified that terms and conditions of service were "as per the current Collective Bargaining Agreement" (as discussed in the evidence of Daniel Kirui). In all post-WIBA versions of the CBAs between the KTGA and the Union clause 12(c) provides that: "In the case of Industrial sickness it is agreed that the terms of the Work Injury Benefits Act shall apply."

[79] Senior counsel submitted that the term "industrial sickness", as used in both the contracts of employment and the CBAs, was broad enough to encompass work-related injuries. It envisaged a situation where the worker was unable to work because their body was impaired as a result of injury or illness which had occurred as a result of their employment (*Maloney* v *St Helens Industrial Co-operative Society Ltd* [1933] 1 KB 293, at pp 296-298). The contracts of employment and CBAs were in writing - or at least evidenced in writing - or (consistent with the evidence of Mr Kirui) were in a form which accorded with practices which the parties had established between themselves. The group members were all "unionisable employees". The defenders were and are members of the KTGA. As such, both the group members and the defenders were bound by the terms of the CBAs (Labour Relations Act 2007, section 59). It follows that the application of WIBA was provided for in terms of both clause 9 of the contracts of employment and, via their incorporation into the contracts of employment, clause 12(c) of the CBAs. Section 16 of WIBA deprived the courts of original jurisdiction to hear and determine matters relating

to work injury. Section 23 of WIBA provided for initial resolution of disputes via DOSH before one can approach the court. Section 52 of WIBA allowed parties aggrieved by the determination of a claim within the office of DOSH to seek redress in what is an appellate process to the ELRC. As a general principle of Kenyan law, where a dispute resolution mechanism existed outside the courts, that must be exhausted before the jurisdiction of the courts is invoked (*Geoffrey Muthinja and another* v *Samuel Muguna Henry and others* [2015] eKLR). Professor Muigai's evidence on that point was unchallenged.

[80] In summary, under Kenyan law, the group members were contractually bound by the terms of their employment contracts, and by the incorporation of the CBA for the time being in force, to advance their work-related injury claims under WIBA to DOSH. If aggrieved either party may then - but only then - appeal to the ELRC whose jurisdiction in such matters was and is exclusive. The jurisdiction of this court was therefore contractually excluded.

[81] On the hypothesis that this court determined that it had jurisdiction, senior counsel submitted that it was *forum non conveniens*. It was clearly and distinctly more appropriate that the claims of the group members be determined in Kenya, that being the country with which their claims had the most real and substantial connection (*RAB* v *MIB* 2009 SC 58; *Spiliada Maritime Corporation* v *Cansulex Ltd* [1987] AC 460; *Airbus Industrie GIE* v *Patel* [1999] AC 119). In support of that proposition the defenders relied, in no particular order of priority, on a number of separate but related factors. Thus, the evidence pointed to the defenders having no employees, operations, factories or business in Scotland. The harm alleged to have been suffered by the group members occurred in Kenya which was, in principle, the natural forum for resolution of the claims (*Berezovsky* v *Forbes Inc* [2000] 1 WLR 1004, at pp 1013, 1031; *Spiliada Maritime Corporation* v *Cansulex Ltd*, *supra*, at p 477).

Every aspect of the claims by group members (limitation, liability, causation and *quantum*) fell to be determined according to Kenyan law and it was preferable for Kenyan law to be applied in Kenya (*Spiliada Maritime Corporation, supra*, at p 486; *Societe du Gaz de Paris* v *Societe Anonyme de Navigation* 1926 SC (HL) 13; *Credit Chimique* v *James Scott Engineering Group Ltd* 1979 SC 406 at pp 414-415; *Morrison* v *Panic Link Ltd* 1993 SC 631). The group members were able to advance their claims in Kenya as of right (*Lubbe* v *Cape plc* [2000] 1 WLR 1545). Kenyan law required that the group members advance their claims via WIBA in the first instance. To allow the claims to be advanced in this court would amount to circumvention of the compulsory statutory scheme with the potential for inconsistent judgments between sovereign nations on a matter of Kenyan law. The fact that the defenders were registered in Scotland was of no moment where *forum non conveniens* was concerned (*Societe du Gaz de Paris, supra*, at p 18). Any proof would require to be conducted through interpreters. This was a factor of particular significance in the event that the credibility of witnesses was in issue (*De Mulder* v *Jadranska Linijska (Jadrolinija)* 1989 SLT 269; *Sheaf Lance* v *Barcelo* 1930 SLT 445). Witnesses would require to travel from Kenya to give evidence unless permission was granted for their evidence to be given from there. There would require to be no objection to that course of action by the Kenyan state, which was not a given (*Agbabiaka (evidence from abroad: Nare guidance)* [2021] UKUT 00286 (IAC)).

[82] In the face of these factors it was for the representative party to show that justice required that the claims of group members be heard in Scotland. In that respect the representative party's reliance on the unavailability of legal aid, NGO funding or conditional fee arrangements in Kenya overlooked the fact that one of the main aims of WIBA, whose constitutionality had been upheld in the Kenyan Supreme Court, was to establish a system of compensation for workplace injury where lawyers would not be

required. There was, in any event, no evidence before the court from which any assessment could reliably be made about whether the group members would be better off litigating their claims in Scotland rather than in Kenya where WIBA was available at no cost to them.

[83] Moreover, standing that Kenyan law applied, the availability of group proceedings in Scotland conferred no procedural advantage, nor ought they to result in the prospect of higher damages than would be available in Kenya. The contention that WIBA did not apply to claims brought between 1 and 3 years after an accident was misconceived, WIBA being the sole and exclusive mechanism for handling claims by employees in respect of all workplace injury and sickness.

[84] In summary the preponderance of the evidence justified the court in finding as follows:

(i) The group members and the defenders are, under Kenyan law, contractually bound by their respective contracts of employment, and the terms of the CBAs entered into between the KTGA and the Union;

(ii) Properly construed according to Kenyan law, the effect of the contracts of employment and CBAs is to prorogate the jurisdiction of the ELRC in respect of claims for compensation arising from death or disablement resulting from an occupational accident or disease, the group members being bound in the first instance to invoke the compensatory system established by WIBA;

(iii) The group members' contracts of employment and also the CBAs are in writing and in a form which accords with practices which the parties have established between themselves;

(iv) Accordingly, the jurisdiction of this court is excluded by the operation of paragraph 6 of schedule 8 to the Civil Jurisdiction and Judgments Act 1982;

(v) In any event, there is no connection between Scotland and the claims of the group members save to the extent that the defenders are registered in Scotland - a factor which has no relevance to the question of *forum non conveniens*;

(vi) There is an available forum of competent jurisdiction which is clearly more appropriate than Scotland for resolution of the claims of the group members;

(vii) The representative party has not demonstrated, on the evidence, that the group members will be unable to obtain substantial justice in Kenya; rather, the evidence shows that the group members will be able to obtain substantial justice through the compensatory system established by the Kenyan Parliament under WIBA;

(viii) Accordingly, even if the court has jurisdiction, the defender's plea of *forum non conveniens* should be sustained.

***Representative party's submissions***

[85] Senior counsel submitted that it was for the defenders to establish, in relation to each of the claims by group members, that this court lacked jurisdiction or was *forum non conveniens* failing which the pleas of no jurisdiction and *forum non conveniens* could not be sustained. That the defenders had failed to do.

***Jurisdiction***

[86] Dealing first of all with jurisdiction the defenders' position appeared to rest on the proposition that, by reason of the terms of both WIBA and the CBA, the jurisdiction of the court was ousted. However, WIBA could not operate legislatively to oust the jurisdiction of

the foreign court. Moreover, the defenders had failed to prove (i) that whichever CBA was in force at the material time had been properly registered with the ELRC; (ii) how it bound all of the group members individually; (iii) which version of the CBA was current, and when; (iv) how the CBA had either prospective or retrospective effect, and (v) in so far as it appeared to be material to the defenders' argument, what clause 12 (c) of the CBA actually meant. In the absence of either averment or proof on these matters, the CBA was of no relevance.

[87] The starting point to the argument concerning jurisdiction was that the defenders were admittedly domiciled in Scotland. Moreover, in terms of section 15C of the 1982 Act, the claims of group members, being claims whose subject matter related to individual contracts of employment, could have been brought in Scotland on the basis of the defenders' domicile. The defenders' contention that, by the enactment of WIBA, the jurisdiction of this court was ousted, was unprecedented and misconceived. Even Professor Muigai was unable to point to any circumstances in which one country by legislation controlled the ability of another to hear a dispute involving a company domiciled there (cf *Dicey, Morris and Collins on the Conflict of Laws*, 16th Edition, para 1-037).

[88] Before turning to the evidence of WIBA exclusivity relied on by the defenders the representative party submitted that I should proceed with caution in adopting a close textual analysis of decisions of the Kenyan courts. What was of greater assistance was not the content of the decisions but the terms of relevant primary legislation. The decisions should only be considered to the extent that the expert witnesses on Kenyan law could justify their applicability and interpretation (*Dicey*, para 3-019).

[89] On the exclusivity of WIBA senior counsel criticised the evidence of Professor Muigai as an enthusiastic proponent of the legislation who was unwilling to recognise its troubled

history and unlikely to see it as anything other than good law (he having defended its constitutionality before the Kenyan courts). On the matter of whether there was any bar in Kenya to a claimant proceeding direct to the ELRC, either directly without recourse to the WIBA system of compensation or after proceedings under WIBA had been exhausted, I was invited to prefer the evidence of Mr Nderitu who had, either directly or indirectly, been engaged in claims to DOSH and also claims direct to the ELRC. His opinion was that there was no such bar. His evidence on the matter was supported by a number of distinct features. Thus, there was nothing in WIBA itself stating that a claimant could not bring a claim outwith the jurisdiction of Kenya. Under the 2010 Constitution there was guaranteed a right to go direct to the ELRC to determine disputes relating to employment and labour relations. Section 12 of the Industrial Court Act 2011 conferred on the ELRC *both* original and appellate jurisdiction in employment-related matters. The 2011 Act post-dated WIBA whose provisions Parliament be assumed to have taken into account. It also post-dated the 2010 Constitution which enshrined the constitutional right of access to the ELRC. Professor Muigai, it was submitted, was unable in cross-examination to offer any coherent answer to Mr Nderitu's reasoning. In particular, he could not explain properly why section 12 of the 2011 Act did not mean what it actually said.

[90] The defenders' reliance on the Supreme Court decision in *Law Society of Kenya* case was misplaced because it read into the decision more than it could reasonably be expected to bear. The Supreme Court was addressing whether WIBA breached constitutional rights by restricting access to the courts in Kenya. It did not address the issue of whether there could be a direct application to the ELRC (as contended for by the representative party in this case). In other words, the issue before this court was neither considered nor determined. If anything, the decision of the Supreme Court, particularly paras [62]-[63],

favoured the position of the representative party that such a direct right of access was available. To the extent that Professor Muigai referenced a series of first instance ELRC decisions purportedly in support of the proposition that claimants were bound to exhaust the WIBA process before recourse to the ELRC, none of these decisions considered the points referenced by Mr Nderitu concerning the 2010 Constitution and section 12 of the 2011 Act. They therefore added nothing to the discussion.

[91] It was plain that back injuries could not be compensated under WIBA since they did not appear in the schedules thereto. Mr Nyandusi provided an explanation for why there might be good reason not to schedule certain injuries, largely on account of concerns regarding causation of injury in the workplace. That was why there was a process of advertisement and consultation before the WIBA schedules could be amended. Professor Muigai's evidence that back injuries could be read into the schedules was incredible. There was no evidence before the court as to how Kenyan law would deal with the calculation of compensation for non-scheduled conditions, and it was not considered in the *Law Society of Kenya* case. WIBA did not provide the comprehensive solution contended for by the defenders.

[92] Moreover, the result of requiring all claims for occupational injury to be dealt with exclusively under WIBA was that the right to do so would be lost after a year according to the limitation provisions under WIBA. That would result in claimants being stripped by implication of their right to bring a claim up to 3 years after the cause of action arose which was otherwise provided for under the Limitation of Actions Act.

[93] In summary, the representative party invited me to find that WIBA did not compel any person to apply in the first instance to DOSH for compensation for work-related injury or disease; WIBA did not oust the jurisdiction of either this court or the ELRC, and if it did

purport to oust the jurisdiction of this court such would be struck out as contrary to public policy.

[94] Turning to the effect of the contractual documents, the representative party submitted that the defenders had failed to prove that there was any agreement to prorogate the jurisdiction of the Kenyan courts in respect of all of the group members. In the first place, clause 9 of the letter of engagement was too imprecise to amount to an exclusive jurisdiction clause. In that respect it stood in contrast to the clear terms in which (for example) a contractual arbitration clause ought to be expressed. On the matter of the CBAs, the defenders would have to demonstrate that all of the group members were members of the Union or at least "unionisable" if not actually members. There was no such evidence led at the proof. Secondly, absent any evidence to this effect, the defenders had failed to prove that the CBA referenced in court was actually registered with the ELRC. That was a legal requirement if the CBA was to have effect (Industrial Relations Act 2007, section 59(5)). It was within the gift of the defenders to lodge proof of registration but they had not done so. That was not resolved by Mr Hutchinson's "belief" that registration had taken place (or senior counsel for the defenders' suggestion to Professor Muigai, in re-examination, that there was apparently no issue over registration of the CBA). Thirdly, the last in the series of CBAs lodged in process bears to have expired in January 2022. There was no basis for the court to hold that such a CBA bound group members who joined the group proceedings in September 2022 (or who may do so in the future). As a matter of contractual interpretation the CBAs relied on by the defenders were time-sensitive and had long since expired. That group members could be bound by the terms of expired agreements was inconsistent with the terms of section 59 of the 2007 Act. Fourthly, the terms of clause 12(c) of the CBAs did not clearly and unambiguously prorogate the exclusive jurisdiction of the ELRC via the

WIBA compensation mechanism. In any event, since the Supreme Court in *Law Society of Kenya* did not decide that WIBA ousted the jurisdiction of the courts, clause 12(c) did not assist. Finally, the CBAs were not on the face of it enforceable at the instance of group members individually (section 73) and no evidence had been led by the defenders to demonstrate the mechanism by which they could have been.

[95] For all of these reasons I was invited to hold that the defenders had failed to establish that the jurisdiction of this court had been ousted.

***Forum non conveniens***

[96] Following a helpful review of the authorities on *forum non conveniens* senior counsel drew from them the following principles; (i) once jurisdiction is established the court will generally be reluctant to decline to hear a case (*Clements* v *Macaulay* (1886) 4M 583; *Sokha* v *The Home Department* 1992 SLT 1049, at p 1054); (ii) the initial onus is on the defenders to raise and justify the plea, and the test may be summarised as asking the question whether "it can be shown that the case cannot, consistently with fairness and justice, be tried in this country" (*Sim* v *Robinow* (1892) 19R 665, at p 666); (iii) once the initial onus is discharged, the court will then consider the whole circumstances; (iv) the matter is not one of "convenience", the purpose of the exercise being to attempt to establish whether there is another court of competent jurisdiction in which the case may be tried more suitably for the interests of all parties and for the ends of justice (*Societe du Gaz de Paris, supra*, at p 18); (v) the mere fact that foreign law is involved is not enough (*Clements* v *Macaulay, supra*), and (vi) at the heart of the consideration is the issue of "justice" (*Societe du Gaz de Paris, supra*, at p 23).

[97] Applying these principles it was submitted that neither the defenders' pleadings nor the evidence they led came close to demonstrating that the case could not, consistently with fairness and justice, be tried in Scotland. The pleadings were substantially directed towards matters of convenience, such as the geographical location of the witnesses, and the fact that issues of Kenyan law would require to be addressed. On the supposed difficulties in taking evidence by video link from Kenya, and the potential for a diplomatic incident should that be attempted, there was simply no evidence. All that the defenders had done was point to some guidance from another court and the observations of a single judge in circumstances which were different to the present case (*Agbabiaka (evidence from abroad: Nare guidance), supra*).

[98] On the assumption, though, that the defenders had discharged the initial onus of showing that it would be more appropriate to litigate in Kenya, the question to be addressed was whether there was a real risk that the group claimants would not get substantial justice if the cases were not heard in Scotland. Viewed in that context it was apparent that the defenders' pleadings focussed on issues of convenience. In substance, however, it was clear on the evidence that there was such a risk. It was no longer disputed that legal aid, NGO support and contingency fee arrangements were not available in Kenya. Any costs associated with the WIBA process and appeal to the ELRC (and, contrary to the submission of the defenders, resort to that process, to its fullest appellate extent, would give rise to costs) would have to be borne by the group members, a substantial number had an insufficient level of literacy even to understand their rights under the WIBA compensation system. Moreover, Mr Nderitu's essentially uncontested evidence was that poverty, and fear of the consequences of suing a large employer remained a barrier to litigation for tea estate workers. Lawyers in Kenya lacked both the skills and resources to pursue mass

litigation in Kenya, which would in any event likely be beset by structural delays inherent in the justice system there. That was the context against which the fairness, or rather unfairness, of the WIBA system fell to be judged.

[99] Moreover, if Mr Nderitu's evidence that WIBA was not compulsory were to be accepted, there was no sensible basis to think that group members, individually or cumulatively, would have the level of intellectual skill, literacy and resources to litigate before the Kenyan courts. In short, the court should hold that, without the group proceedings progressing in Scotland, the group members would not obtain justice in Kenya. The plea of *forum non conveniens* should be repelled.

**Analysis and decision**

***Kenyan law***

[100] I was not addressed in detail on how this court should approach the interpretation of foreign law, largely because it was not a matter of substantial dispute between the parties. That said, it will be apparent from the foregoing that much of the evidence led during the proof concerned the effect and application of Kenyan statute law as well as a consideration, at least to some degree, of cases decided by the Kenyan courts. The construction of the material provisions of WIBA, the 2010 Constitution, and other legislation must of course be guided by the expert evidence led. Since the effect of foreign sources is primarily a matter for the expert witness, it is usual and desirable, when proving a foreign statute, to obtain evidence as to its interpretation (*Dicey, Morris & Collins on the Conflict of Laws*, 16th Edition, para 3-017). On that matter the defenders did not lead evidence specifically on how the Kenyan courts approach the interpretation of either contracts or statutes. Mr Nderitu's evidence was essentially to the effect that on interpretation of both law and contract the

approach does not differ to that which would be adopted by a Scottish court. I note in passing that the court in *AAA and others* v *Unilever PLC and another* [2017] EWHC 371 (QB) appears to have been uninhibited about interpreting and drawing conclusions from the Kenyan Limitation of Actions Act 1968 (see paras [112]-[123]). Accordingly, where there is disagreement between the experts as to the effect of foreign law, as there was in this case, I consider that the court can, and should, look at the relevant sources of law for itself in order to resolve that conflict (*Dicey et al,* para 3-016).

[101] In my approach to Kenyan law I am also guided by the following passage in *Dicey et al,* at para 3-019:

> "3-019 – Considerable weight is usually given to the decisions of foreign courts as evidence of foreign law, though such decisions can only, it seems, be referred to if in the evidence of an expert witness, and, further, must be interpreted in the light of the meaning attributed to the decisions by the expert rather than according to the court's independent research involving material not referred to by the expert. But the court is not bound to apply a foreign decision if it is satisfied, as a result of all the evidence, that the decision does not accurately represent the foreign law. Where foreign decisions conflict, the court may be asked to decide between them, even though in the foreign country the question still remains to be authoritatively settled"

[102] The passage just quoted was invoked by the representative party in inviting the court to proceed with caution in its examination of those cases which were referred to in the evidence of the experts. In particular it was submitted that many of the ELRC cases on the subject of WIBA application mentioned in Professor Muigai's evidence attracted little more than cursory examination. I have borne in mind that cautionary invitation. I would only observe that those first instance ELRC decisions to which Professor Muigai referred, and which were not especially long and involved in their discussion of the issues under consideration, did not seem to me to stand at odds with what had been decided by the

Supreme Court in the *Law Society of Kenya* case. That case was of considerably greater importance to my consideration of the WIBA issues in this case.

**The issues**

[103] I turn now to address the issues set out in para [4] above in the order in which they are listed.

***Issue 1***

*Whether the group members and the defenders are bound by agreements which are governed by Kenyan law and under which, properly construed under Kenyan law, the exclusive jurisdiction of the Kenyan courts in respect of the disputes articulated in these proceedings is prorogated*

[104] The starting point for analysis of this issue is paragraph 6 of schedule 8 to the 1982 Act. It provides *inter alia* as follows:

> "…6(1) If the parties have agreed that a court is to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court shall have jurisdiction.
>
> (2) Such an agreement conferring jurisdiction shall be either –
>
> (a) in writing or evidenced in writing; or
>
> (b) in a form which accords with practices which the parties have established between themselves; or
>
> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contract of the type involved in the particular trade or commerce concerned."

[105] The defenders submit that the effect of that provision is that where a Scottish court would otherwise have jurisdiction (and it is accepted that that would be the position standing the defenders' domicile), that jurisdiction may be excluded where parties have prorogated the exclusive jurisdiction of a court elsewhere. The defenders further submit

that that is the effect of the evidence in this case. Why? Both the defenders and the group members are bound by the terms of individual contracts of employment which not only make provision for the application, in circumstances of "industrial sickness", of WIBA, but also (as required by section 59 of the Labour Relations Act 2007) import the terms of the applicable CBA negotiated between the KTGA and the Union, which provides, at clause 12(c), that in case of industrial sickness, WIBA shall apply. The employment contracts and CBAs all being evidenced in writing, or alternatively in a form which accords with practices which the parties have established between themselves, and WIBA, by section 16 establishing an exclusive process for work injury claimants under Kenyan law, the group members are bound to advance their claims under WIBA to DOSH and thereafter, if dissatisfied, by appeal to the Kenyan ELRC whose jurisdiction in that respect is exclusive.

*The contract of employment*

[106] The sample contract of employment upon which the defenders' argument rests is contained in the Joint Bundle (JB3201-3204). The first matter I require to resolve is whether the defenders have established that the terms contained in the sample contract reflect the terms under which the group members were, or are, engaged. Examination of the document reveals that the personal details of the employee have been redacted. The contract bears the date 3 November 2016. It is described as an appointment letter for "ungraded staff". Under the heading "Job Description" the position is described as "General Worker/Tea Harvester". Tea harvesting work is then further described as including mechanical tea harvesting, hand plucking and shear plucking or any other method of harvesting that may be introduced from time to time. The contract states that a shear plucker is expected to use a shear to harvest "good and acceptable" tea leaves. A mechanical tea harvester is expected to be part

of a team of harvesters who will use a motorised tea harvester to harvest tea leaves. The monthly salary is stated to be Kshs 11,616/=, which according to Mr Kirui is about $100.

[107] Senior counsel for the representative party submitted that the defenders had failed to prove that the specimen contract reflected the terms of all of the group members, which was a necessary precursor to them being considered at all. I am not in sympathy with this submission. The issue arises in the context of group proceedings in relation to which it is averred that the group members have all sustained injury as a result of common working conditions of employees engaged in harvesting tea. Both Mr Hutchinson and Mr Kirui were cross-examined on the terms of the specimen contract in the context of a discussion about the hypothetical employee's likely understanding of the contractual terms contained within it, the requirement for those terms to be translated and explained, and the process by which the contract was signed by the employee. All of that discussion appeared to proceed on an assumption that the sample contract reflected the terms under which the group members were engaged. Mr Kirui's evidence, which I accept, was to the effect that the contractual terms were standard even if the specific job description (which I took to mean "title") of the individual employee would require to be inserted. To none of the defenders' witnesses was it suggested that the specimen contract, which by agreement between the parties is what it bears to be (*viz* an appointment letter for a general worker/tea harvester), did not reflect the terms under which the group members were engaged. The matter is one requiring consideration of the balance of probabilities. In the absence of challenge I am prepared to proceed on the basis that the specimen produced accurately reflects the contractual terms of engagement of the group members.

[108] Clauses 2 and 9 are of immediate relevance. Clause 2 makes the following provision:

> "**2. Salary**
>
> As a General Worker you will be paid a monthly salary of Kshs 11,616/= applicable to your category. This rate also applies to tea harvesting jobs.
>
> Please note that you are expected to complete allocated tasks for assigned jobs for you to earn the a [sic.] day's wage. Setting and communication of the task would be done by management.
>
> Your other terms and conditions of service are as per the current Collective Bargaining Agreement.
>
> *The Collective Bargaining Agreement…referred above is negotiated, agreed and registered every two years between the [KTGA] and [the Union]*".

Clause 9 makes the following provision:

> "**Industrial Sickness**
>
> The terms of the relevant national legislation shall apply."

[109] The representative party submitted that clause 9 was devoid of meaning, and effect should not be given to it even if the form of contract was held to apply to the group members. I am not persuaded that is so. The position might have been different had the clause not been preceded by the heading "industrial sickness". But it is, and meaning has to be given to the whole of clause 9. In that respect, I note that the word "sick" is used in clauses 5 and 7 of the specimen contract (in the context of annual leave entitlement and sick leave) in a broad and general sense and I agree with the defenders' submission that, as a matter of contractual construction "industrial sickness" ought to be construed likewise (*Maloney* v *St Helens Industrial Co-operative Society, supra*), and that therefore it is wide enough to cover the situation where a worker is unable to work because their body is impaired as a result of injury or illness which has occurred as a consequence of their employment. On that basis, it seems to me that Mr Hutchinson's evidence that "relevant

national legislation" would include WIBA is well-founded, it being (as the long title states) an Act of Parliament whose purpose is to provide for compensation to employees for work-related injuries and diseases contracted in the course of their employment. I therefore conclude that the contract produced does make provision for the application of the provisions of WIBA in circumstances where injury or illness arises from employment, and the nature of the injury or illness is covered by WIBA. In such circumstances it would be necessary for a claim to be processed through DOSH with subsequent recourse, by section 52, to the ELRC.

[110] I would, however, add this important caveat. In inviting me not to apply too narrow a construction clause 9 senior counsel for the defenders submitted that it would be absurd if the contractual documents (including any relevant CBA, to which I will return shortly) compelled recourse to WIBA only in cases of some work-related illness which could not be characterised as an "injury". That is, in my view, to overstate the position. Clause 9 does not compel recourse to WIBA. It only makes provision for the application of WIBA. Whether the claims of group members fall within the ambit of WIBA at all is a separate matter which requires consideration of the relevant provisions of WIBA, in so far as there was evidence led at the preliminary proof as to their effect. That is a subject to which I will require to return in addressing issue 3.

[111] Finally, in relation to the contract, some aspects of the questioning by the representative party appeared to raise a question as whether the ability of employees to comprehend the meaning and implications of certain of the terms discussed might have a bearing on the enforceability of the contractual term which purports to apply "the relevant legislation". That line of questioning may, of course, have been intended to foreshadow arguments in relation to *forum non conveniens* and lack of availability of professional

representation. It is necessary nonetheless to record that it is not, as I understand it, any part of the representative party's case that the form of contract produced contained terms which were in any sense unfair to the point of being unenforceable according to Kenyan law. Had that been the case I would have expected to hear clear evidence on the point. No such evidence was led and I am not in a position to make any such finding.

*Collective bargaining agreements*

[112] Clause 2 of the specimen contract provides *inter alia* that "[Y]our other terms and conditions of service are as per the current Collective Bargaining Agreement". By way of further elucidation, the contract states that

> "The Collective Bargaining Agreement referred to above is agreed and registered every two years between Kenya Tea Growers' Association and the Kenya Plantation and Agricultural Workers Union".

Clause 12c of the most recent CBA lodged by the defenders, which bears to cover the period 1 January 2020 to 31 December 2021 (albeit it bears the date 1 November 2021) states that "[I]n the case of industrial sickness, it is agreed that the terms of the Work Injury Benefits Act shall apply" (clause 12c); JB, p 3004). The same provision is made in earlier versions of the CBA lodged in process.

[113] Since I am satisfied that the specimen contract produced probably reflects the terms under which the group members were engaged as tea harvesters, it may be thought unnecessary to decide whether in addition the terms of any CBA were contractually incorporated into the group members' terms of engagement. However, since the matter was the subject of submission on both sides, I should record in that connection that I am not convinced that the representative party's submission about the enforceability of rights under a CBA by individuals is relevant. Reference was made in submissions, but not at the

proof, to section 73 of the Labour Relations Act 2007 in the context of a submission that enforcement of rights embodied in a CBA on the employees' side could only be at the instance of the Union. That provision is concerned with "trade disputes". I emphasise that I heard no evidence on the meaning and effect of section 73 and, in particular, its relevance in the context of a claim for personal injury. I confine myself to the observation that it is not immediately obvious that such a claim amounts to a "trade dispute" for the purposes of the 2007 Act. What I did hear evidence about was the provision in the same Act (section 59(3)) which requires that the terms of a registered CBA be incorporated into the employee's terms of service. That was why Professor Muigai insisted that the parties had contracted on the basis that WIBA would apply. No compelling evidence was offered to the contrary view and I am bound to accept that, in principle, the "WIBA clause" in the CBAs referred to in evidence would, all other things being equal, direct the application of WIBA to a claim arising from industrial sickness.

[114] On the matter of whether the defenders have established that the group members are either members of the Union or "unionisable" (such that they would be subject to the provisions of any registered CBA and recognition agreement) I would have had little difficulty in concluding in principle that they would at least fall into the category of "unionisable". However, it requires to be noticed that clause 2 of the specimen contract refers specifically to registration of the CBA every 2 years. Section 59 of the Labour Relations Act 2007 establishes the binding nature of the CBA and, as Professor Muigai expressed it in para [36] of his principal report, is the basis upon which employers, employees, the employee union and any relevant employer organisation will be bound in all matters pertaining to the terms of employment. Crucially, section 59(5) provides:

> "(5) A [CBA] becomes enforceable and shall be implemented upon registration by [the ELRC] and shall be effective from the date agreed upon by the parties."

In other words, a CBA is only binding upon registration at the ELRC.

[115] The defenders' reliance on the terms of the CBA to evidence a contractual prorogation of the jurisdiction of the Kenyan courts, via the application of the terms of WIBA to the terms under which employees are engaged, gives rise to two significant difficulties. Firstly, I have neither seen nor heard any evidence as to the existence and terms of any CBA which might have been in force at the time when any of the group members (post 30 September 2022) joined the group proceedings. Secondly, and more significantly, I have seen no evidence of actual registration with the ELRC of any of the CBAs to which reference was made in the evidence of either Mr Hutchinson or Mr Kirui. That is surprising in view of the importance that section 59 of the 2007 Act appears to attach to the process of registration as a pre-requisite to enforceability.

[116] Mr Hutchinson said no more than that he believed that the CBAs lodged in process had been "correctly registered". No evidence was led from which I could infer that his belief was in fact justified. Nor did Mr Hutchinson's response seem to me to justify the suggestion put to Professor Muigai, in re-examination, and readily assented to by him, that there was no issue about whether registration had taken place or not. In my view, there is. In relation to the specimen contract to which reference has already been made there was specific evidence that its terms remained unchanged, even if the job title might not do so. The same cannot be said of the CBAs, for which I would have expected evidence not only of the version in force at the time when the group members formally joined the group proceedings but also of its registration with the ELRC as the necessary precursor to it becoming an enforceable agreement covering the period when the group members joined

those proceedings. No such evidence has been led. Another important difference between the situation of the CBAs and the specimen contract produced is that section 59(1) only binds unionisable employees for the period of the agreement. In that respect I agree with the representative party's submission to the effect that CBAs are time-sensitive and that the evidence of a practice of rolling over agreements is no more than that. It is not the law.

[117] In short, I am not satisfied that it has been established that the current group members are bound by the terms of any CBA to navigate their claims via WIBA.

***Issue 2***

*Whether section 16 of WIBA ousts the jurisdiction of courts in claims arising from an occupational accident or disease causing disablement or death in the course of work*

[118] I turn now to what the defenders characterised as the central issue which emerged during the course of the proof, namely whether or not WIBA establishes an exclusive process for work injury claims under Kenyan law. Relying on the analysis of Professor Muigai, and the evidence of Dr Nyandusi, the defenders maintain that it does so through an initial process of dispute resolution with resort thereafter to the ELRC, albeit only on appeal. The representative party submits that I should prefer the evidence of Mr Nderitu to the effect that WIBA does not prevent a claimant who has suffered a work injury from resorting direct to court without invoking the DOSH process.

[119] WIBA is one of a number of statutes enacted by the Kenyan Parliament in and about the year 2007 as part of what Professor Muigai termed the culmination of a great reform movement affecting, amongst others, Kenya's labour laws. WIBA itself was enacted in response to a very specific concern, or perceived concern, about the activities of ambulance chasing lawyers in the litigation field. Whether such a concern extended to the activities of

lawyers in the field of work injury was disputed by Mr Nderitu. I find it unnecessary to make any finding in this respect. But Professor Muigai's evidence, which I had no reason to doubt on this point, was that the enactment of WIBA reflected a deliberate policy shift on the part of the Kenyan Parliament which was designed to take work injury claims out of the hands of lawyers in favour of an administrative process. At its heart was the establishment of a no-fault scheme of compensation scheme for injuries suffered by employees in the course of their employment.

[120] Such is the background to the case of *Law Society of Kenya* v *Attorney General and another* in which the Law Society of Kenya argued that WIBA, in purporting to oust the jurisdiction of the courts, compromised the rights of employees to a fair adjudication of their claims. The flavour of Professor Muigai's evidence was that in taking the case the Law Society was motivated not by concerns about constitutionality but rather the interests of its members. It is not necessary for me to reach any view on that matter. It would be entirely possible to have concerns about both without ascribing an ulterior motive to either. But how the Supreme Court dealt with the Law Society's argument that section 16 of WIBA was unconstitutional is central to my consideration of the parties' arguments on WIBA exclusivity.

[121] The basic right to compensation for an employee who is involved in an accident resulting in disablement or death, or who contracts an occupational disease in the course of their employment, is set out in respectively sections 10 and 38 of WIBA. I have already summarised the evidence of Mr Kirui and Dr Nyandusi about how the compensation system established by WIBA operates in practice, which I accept as uncontroversial.

[122] The framework for the compensation system established under WIBA derives from *inter alia* the following provisions:

> **"10. Right to compensation**
>
> (1) An employee who is involved in an accident resulting in the employee's disablement or death is subject to the provisions of this Act, and entitled to the benefits provided for under this Act.
>
> (2) An employer is liable to pay compensation in accordance with the provisions of this Act to an employee injured while at work…
>
> **16. Substitution of compensation for other legal remedies**
>
> No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death…
>
> **21. Notice of injury or accident by employer to Director**
>
> Written or verbal notice of any accident provided for [in section 22] which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or a notice of the verbal notice shall be sent to the Director within twenty-four hours of its occurrence in the case of a fatal accident…
>
> **23. Inquiry by Director**
>
> (1) After having received notice of an accident or having learned that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.
>
> (2) An inquiry made under subsection (1) may be conducted concurrently with any other investigation.
>
> (3) An employer or employee shall, at the request of the Director, furnish such further particulars regarding the accident as the Director may require.
>
> (4) A person who fails to comply with the provisions of subsection (3) commits an offence…

**26. Claim for compensation**

(1) A claim for compensation in accordance with this Act shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death.

(2) If a claim for compensation is not lodged in accordance with subsection (1), the claim for compensation may not be considered under this Act, except where the accident concerned has been reported in accordance with section 21.

(3) If an employer fails to report an accident or to provide information requested by the Director as specified in the request, the Director may—

(a) conduct an investigation and recover the cost of the investigation from the employer as a debt due from the employer; or

(b) levy a penalty on the employer.

(4) An employer or insurer against whom a claim for compensation is lodged by the Director under this section, shall settle the claim within ninety days of the lodging of the claim.

(5) The Director shall, within thirty days of receipt of the money claimed under subsection (1), pay the money to the employee who made the claim or his dependants.

(6) An employer or an insurer who fails to pay the compensation claimed under this subsection commits an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both…

**51. Objections and appeals against decisions of the Director**

(1) Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.

(2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined…

**52. Director's reply**

(1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

(2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision..."

[123] Section 16 is the provision which underlies the exclusivity argument in this case. In my opinion the evidence of Professor Muigai is to be preferred in his analysis of what was decided in the *Law Society of Kenya* case and the consequences of the Supreme Court's judgment at least as far as immediate recourse to the Kenyan courts is concerned. The representative party submitted that the argument advanced by Mr Nderitu was not argued in the Supreme Court. For what it is worth I agree with that submission. It was not. The position advanced by the Law Society was that the effect of section 16 of WIBA was to extinguish an employee's right to file an action for the recovery of damages from an employer in respect of any occupational accident or disease resulting in the disablement or death of such an employee. This infringed the employee's rights of access to justice and a fair hearing under Articles 48 and 50 of the 2010 Constitution. Conversely, the Attorney General (by then, Professor Muigai's successor in that office) argued that section 16 was not unconstitutional but was merely an ouster clause which was permissible under Kenyan law.

[124] The Supreme Court rejected both arguments. Its decision on the Law Society's argument was to the effect that section 16 prevented an employee from commencing recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against the employee's employer, other than in the forum and manner provided for in WIBA. The Kenyan courts had no jurisdiction to receive

such matters as first ports of call. The Supreme Court held that a plain reading of section 16 revealed that its intention was not to limit access to the courts but to create a statutory mechanism where any claim by an employee *under the Act* [my emphasis] was subject, initially, to a process of dispute resolution starting with an investigation by DOSH and thereafter, under section 52, an appeal mechanism to the ELRC (para [62]). Consequently, addressing the argument of the Attorney General, it could not be the case that section 16 amounted to an ouster clause. Rather, it was merely facilitative of what may eventually end up in court (para [69]). So, what the section did was to allow "the use of alternative dispute resolution mechanisms to be invoked before one can approach a court" (para [70]). While the word "allow" was employed by the court it is, in my view, tolerably clear from a wider consideration of the judgment that the Supreme Court was interpreting WIBA, and in particular section 23 thereof, as mandating an initial process involving DOSH. That was the tenor of Professor Muigai's evidence and I accept that evidence.

[125] Thus, in para [62] of its judgment, the Supreme Court said this:

> "…we further find that section 16 cannot be read in isolation so as to create the impression that it curtails the right to immediately access the courts, because by looking at the intention of section 16 the purpose it fulfils is apparent. That purpose is revealed in section 23 which calls for initial resolution of dispute via [DOSH] and this can be deemed as an alternative dispute resolution mechanism. But what if one is aggrieved by the decision of [DOSH]? The answer to that question lies in section 52 of the Act which allows aggrieved parties to seek redress in a court process. In the circumstances, access to justice cannot be said to have been denied."

[126] It might be said, perhaps with some justification, that that statement hints at a degree of inconsistency in respect that a process that compels initial consideration of a claim by DOSH necessarily curtails the right immediately to access the courts. In that respect the Supreme Court's reasoning is not entirely straightforward. But the end result is made clear in paras [64] and [66], as follows:

> "[64] [DOSH]'s inquiries are also essentially preliminary investigations. Such mechanisms, set out by statute, must be left to run their full course *before* (my emphasis) a court intervenes. Not only does this simplify procedures to ensure that courts focus on substantive rather than procedural justice, but also potentially addresses the problem of backlog of cases, enhances access to justice, encourages expeditious disposal of disputes, and lowers the costs of accessing justice…
>
> …[66] In addition, [DOSH] is in essence performing a quasi-judicial function under section 23 and by dint of article 165(6) [of the Constitution] '*The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.*' His actions and decisions, even without review or appeal, are therefore still subject to the over-riding authority of the High Court."

[127] What the Supreme Court did not do was to interpret section 16 in such a way as to leave open the possibility of an immediate right of access to the ELRC without recourse to DOSH at all. Senior counsel for the representative party invited me to accept Mr Nderitu's evidence (foreshadowed as it was in an opinion provided to the court by the former Chief Justice of Kenya, Dr Mutunga) that WIBA could not be said to have ousted the jurisdiction of the ELRC, to which there was a constitutional right of access by virtue of Article 162 of the 2010 Constitution, and whose exclusive original, as well as appellate, jurisdiction was confirmed by section 12 of the Industrial Court Act 2011 - an Act which post-dated the enactment of WIBA. Meaning and content required to be given to the "original" jurisdiction conferred on the ELRC which clearly indicated that there was no requirement to exhaust the WIBA process before resort was had to it. The Supreme Court in the *Law Society of Kenya* case was deciding a different issue, namely whether WIBA was contrary to the Kenyan Constitution. It was open to this court to accept Mr Nderitu's evidence that there was a continuing right of direct access to court.

[128] This aspect of the case is one which is not easy to resolve. The line of argument put forward by Mr Nderitu was rather disparaged by Professor Muigai in cross-examination. In doing so, however, Professor Muigai's reasoning was neither easy to follow nor at times

was it convincing. It appeared to be based on the proposition that because section 12 of the 2011 Act conferred on the ELRC original and appellate jurisdiction to hear and determine disputes referred to it in accordance with Article 162 of the 2010 Constitution, the provisions of the 2011 Act itself or any other written law which extended jurisdiction to the court, and because WIBA was written law which extended appellate jurisdiction to the ELRC, that was the extent of the court's jurisdiction where claims for work injury were concerned. Pressed on what meaning should be ascribed to the words "original and" in section 12 of the 2011 Act, Professor Muigai's response was that "[I]t is of no consequence" without providing a clear answer to the question he had been asked.

[129] Any misunderstanding of Professor Muigai's evidence on this potentially significant issue may be mine. In seeking to resolve that issue, however, it is impossible to ignore the fact that the Supreme Court, in the *Law Society of Kenya* case, does not appear to have been addressed on any argument that a direct and immediate right of access of the ELRC could be read into Article 162 of the Constitution and section 12 of the 2011 Act when it was invited to consider the constitutionality of WIBA. The representative party submits that that is unsurprising because the Supreme Court's focus was on the constitutionality of WIBA. That is of course so. But it ignores what the Supreme Court actually decided where section 16 is concerned. What the court decided was that section 16 did not infringe the Constitution because it did not extinguish an employee's right to file an action for damages in respect of any occupational accident or disease resulting in disablement or death against their employer. Why? Firstly, the purpose of section 16 was fulfilled by provision for initial dispute resolution via DOSH, with provision for redress for an aggrieved claimant by appeal under section 52 to the ELRC (para [62]). Secondly, by being merely facilitative of what may eventually end up in the ELRC, section 16 did not operate as an ouster clause.

The practical outcome, at least as far as concerns claims in respect of occupational accident or disease which fall within the ambit of WIBA, is that they must follow the route to compensation prescribed by WIBA.

[130] Accordingly, if one were to assume meantime that the group members claims do fall within the ambit of WIBA, then I take leave to doubt whether it is open to this court to look beyond what the Supreme Court actually decided in the *Law Society of Kenya* case in order to come to an independent view on how different the outcome might have been had the argument outlined to me by Mr Nderitu been made and considered. Whether that argument in any way casts doubt on what the Supreme Court decided in 2019 must ultimately be a matter for the Kenyan courts to resolve, not for me.

[131] The same point could be made about the representative party's contention, which arose primarily in cross-examination of Professor Muigai (under reference to the report by Dr Mutunga which was not spoken to in evidence) to the effect that because WIBA could not impliedly repeal the 3 year limitation period for tort claims provided for in section 4 of the Kenyan Limitation of Actions Act 1968, it must be possible to bring a claim otherwise than under WIBA. Professor Muigai's answer was to the effect that the general limitation provision in the 1968 Act was a default provision which referred to general tortious liability and not work-related compensation. Work-related compensation was regulated by the specific provisions of WIBA which included a specific time limit. So far as the case report discloses, that argument too was not considered (probably because it was not argued) before the Supreme Court. I am not in a position to resolve, certainly without evidence on the point, how the reasoning of the Supreme Court might have been influenced by any such argument, whatever its underlying logic. The only conclusion I can properly draw is that there is a 3 year limitation period which may apply to tortious claims not otherwise covered

by the provisions of WIBA. But, since limitation may for aught yet seen become an issue in these proceedings, I propose to say nothing more on the matter.

[132] In summary, I accept Professor Muigai's evidence that the current state of the law in Kenya, as laid down in the *Law Society of Kenya* case, is that WIBA provides by section 16 the sole mechanism *in Kenya* for addressing those work injury and sickness claims which fall within its ambit, and such claims that do must first of all be advanced through the DOSH process before recourse to court. That view of matters would appear to be supported by consideration of a number of decisions of the ELRC in the aftermath of the Supreme Court decision and to which reference was made in the evidence, reflecting a relatively settled position in Kenyan law, whatever legal uncertainty (or even turmoil) may have arisen from the original decision of the High Court in 2010 to hold WIBA to be in certain respects unconstitutional and section 16 to be an ouster clause. I refer in this connection to *Musumba* v *Industrial &amp* [2022] eKLR, para [75]; *Heritage Insurance Company Ltd* v *David Fikiri Joshua and another, supra,* p 5/7; *Magot Freight Services Ltd and others* v *Samson Mwakenda Mangale, supra,* paras [7]-[11]; *Austin Oduor Odira* v *Kenya Sweets Ltd and another* [2021] eKLR No 74/2021; *Perfect Scan Ltd* v *Harrison Kahindi Said, supra,* p 6/6, and *Manuchar Kenya Ltd* v *Dennis Odhiambo Olwete, supra,* paras [16]-[17]. A point was made about Mr Nderitu not having been fully equipped to respond to the citation of some of the first instance decisions just mentioned. I recognise that, for whatever reason, he was disadvantaged in not having seen them in advance of giving evidence. That did not detract from the evidence he otherwise gave on the constitutional and statutory justification for immediate recourse to courts. However, I consider that for WIBA claims the current state of Kenyan law is against him. I also quite accept that the *Law Society of Kenya* litigation started life before the 2010 Constitution and the 2011 Act. But that does not, in my view, detract

from the point which is that the Supreme Court was required to analyse the effect of section 16 on immediate access to court, and that is what it did.

[133] To conclude on this part, I do not consider that I can properly give effect to Mr Nderitu's argument that there is an unlimited right of immediate access to the court for work injury claims standing my understanding of what the Supreme Court decided in the *Law Society of Kenya* case. That argument, in my view, does not give sufficient deference to the wording of section 16 itself. To that extent Professor Muigai's evidence is to be preferred.

[134] For completeness, standing the way in which this issue is expressed, it is necessary to sound a cautionary note because it will be recalled that the Supreme Court decided that section 16 did not operate as an ouster clause. What it did was to allow the use of alternative dispute resolution before any approach to the court (paras [68]-[70]).

***Issue 3***

*Whether a work-related injury claim that has been filed outside the provisions of WIBA is a nullity*

[135] In my opinion, an answer to the question underlying this issue may be found in the particular circumstances of this case by addressing what was termed in the representative party's written submissions as "the non-scheduled injury problem".

[136] Another issue not addressed in the *Law Society of Kenya* case was how the WIBA regime could be said to apply to claims for injury or illness which are not listed in the schedule to the Act. That issue requires some unpicking.

[137] I take as a starting point the interlocutor dated 16 February 2022 which followed the original permission hearing in the group proceedings. As required by Rule of

Court 26A.12(1)(b) that interlocutor granting permission for the proceedings to be brought defined the group and the issues as

> "claims in respect of musculoskeletal injury arising from common conditions of employment of employees engaged in harvesting tea on estates owned and/or operated by the defenders in Kenya".

In the pleadings, at condescendence 4, the representative party, on behalf of the group members, avers that

> "[I]n the course of their employment within tea harvesting roles on the Kenyan Tea plantations operated by the defenders, [the group members] have all sustained musculoskeletal injuries including injuries to the lumbar and cervical spine arising out of unsafe working practices and working conditions"

To the extent that there are any averments about psychiatric and psychological injury they are described as sequelae to the physical injuries averred. Consistent with the definition of the issues in the interlocutor of 16 February 2022 the claims of the group members are said to arise by reason of the "musculoskeletal injuries suffered through want of reasonable care by the defenders towards their employees". In these circumstances the representative party submitted that claims of that nature did not fall within any of the schedules. If the defenders sought to maintain that Kenyan law compelled the group members to follow the WIBA compensation system of initial dispute resolution through DOSH it was incumbent on them to prove that unscheduled injury could be dealt with under WIBA. That they had failed to do.

[138] While both Mr Kirui and Dr Nyandusi explained the operation of the DOSH procedure in the generality neither witness did so under detailed examination of the pertinent provisions of WIBA. Mr Kirui was, however, shown a document which bears to have been generated by DOSH (no 7/36 of process; JB3062) and which summarised the procedure which had been developed to process non-fatal claims in respect of injuries at

work. Standing the terms of the joint minute I proceed that the document is indeed what it bears to be. The process outlined, which aligns with Mr Kirui's description of it, even if he was not familiar with the document itself, requires there to be an assessment by the primary doctor providing medical treatment of the percentage incapacity of the claimant pursuant to section 30(2) of WIBA (paragraph (iii)). Section 30(2) provides that

> "…if an employee has sustained an injury specified in the first column of the First Schedule, the employee shall for the purposes of [WIBA] be deemed to be permanently disabled to the degree set out in the second column of the First Schedule".

[139] Schedule 1 contains a compendium of injuries which are then related to a degree of disablement, expressed as a percentage, so that compensation can then be computed. Dr Nyandusi explained that schedule 1 of provided the basic framework for common injuries at the workplace. It was not an exhaustive list and many injuries and diseases might fall outwith the schedule. For that reason Dr Nyandusi explained that DOSH often invoked paragraph G(c) of that schedule, which states: "the Director shall prescribe the compensation criteria for Musculoskeletal disorders and occupational injuries not elsewhere covered". Consequently, DOSH had entertained claims of repetitive strain injury and other musculoskeletal injuries. That said Dr Nyandusi accepted, in a cautious exchange in cross-examination, that there may be good reasons why non-scheduled injuries, like back injuries, might not be included in schedule 1 arising from concerns about proof of causation, and that adding to the list of scheduled injuries required a statutory process of advertisement and consultation to be followed. In re-examination Dr Nyandusi was asked whether - putting the matter very broadly - back injury was compensable, to which the witness replied in the affirmative.

[140] What is to be made of this evidence? If one thing is clear it is that the only reference to "musculoskeletal" conditions is that contained in paragraph G(g) of schedule 1. The tenor of Dr Nynadusi's evidence was that DOSH had in effect exercised a discretion to entertain RSI claims. I heard no evidence that DOSH had actually prescribed any criteria for the admission of such claims, which is what the terms of paragraph G(g) would seem to require, far less what such criteria might have been. The evidence allows me to conclude only that claims relating to back injury *may* have been accepted and processed by DOSH in the past in the exercise of what it conceived to be a broad discretion. In that respect the answer given to the very broad question asked in re-examination, to which I have just referred, is not a complete answer. It is quite a different matter to say that claims for unscheduled injury must be processed initially through DOSH. On that critical matter the evidence is silent.

[141] I regard this as a point of central significance. The schedules are far from straightforward to digest, and their relationship with the remainder of the compensation provisions in WIBA was not explored in any depth. For example, there was no discussion about the significance or effect of section 30(3) so far as concerns injury not specified under schedule 2, or section 38(1) so far as concerns unscheduled occupational diseases. I do not consider that I am equipped to make any findings in respect of those provisions. They did not feature in Dr Nyandusi's explanation for why DOSH had previously entertained RSI claims. Moreover, in determining whether the group members' claims relate to any scheduled condition, matters were further complicated by differences that emerged in the evidence of Dr Nyandusi and Professor Muigai about which schedule (if any) might be relevant. Dr Nyandusi concentrated on the effect of paragraph G(g) of schedule 1. Professor Muigai's proceeded, at least for the most part, on the basis that musculoskeletal conditions could be read into the schedule 2 as being "consistent" with the occupational

diseases listed there, and that there was no need to amend the schedule if it could be interpreted. When that proposition was tested by reference to a hypothetical claim for Covid (which is nowhere listed in schedule 2) contracted at the workplace, it seemed to me to run into difficulty.

[142] For completeness, schedule 2 to WIBA lists a number of occupational diseases which are capable of attracting compensation under the provisions of WIBA. Other than a singular reference to cramp of the arm or forearm due to repetitive movement, which does not assist, none are examples of musculoskeletal conditions. In short, I do not consider that the evidence allows me to conclude that the types of claims advanced by the group members, being concerned with non-scheduled injury or illness, can be processed under the provisions of WIBA or that the defenders have established that that is so. To that extent I agree with what is set out in paras 2.31-2.33 of the representative party's written submissions. Nor do I consider that the evidence compels me to any different view by the terms of section 16 itself. When once you accept the proposition that there can be unscheduled injury claims which cannot be processed under WIBA without amendment to the relevant schedule (as I understood Professor Muigai to accept under reference to the discussion about Covid in the evidence) then section 16 must be interpreted in that light. The wording of the section cannot compel any and every claim for workplace injury to be processed through WIBA. What it does is to require claims which are covered by WIBA to be processed according to its provisions.

[143] Moreover, standing the requirement in section 31 of WIBA for gazetting and advertisement of additions to schedule 1, and absent any evidence to the contrary, I can see no justification for the view that previous discretionary willingness on the part of DOSH to accept claims in respect of unscheduled injury or illness compels all such claims to be

presented in the first instance through DOSH. Professor Muigai referred to the case of *Musumba* v *Industrial &amp* as a recent illustration of an award by DOSH for back problems sustained as a result of long working hours (in that case as a driver). However, the competence of the original award of compensation was not addressed, the claim for enforcement of the DOSH award having been taken to the ELRC by the claimant. As far as the evidence in the present case is concerned I have not had sight of any case which addresses the extent of DOSH's jurisdiction to process compensation claims where unscheduled injury and illness is concerned.

[144] Finally, I do not consider that the conclusion I have reached means that the group members are left without any remedy under Kenyan law. In that respect I return to one aspect of Mr Nderitu's evidence when he described how section 12 of the Industrial Court Act 2011 conferred on the ELRC both original and appellate jurisdiction. In my view, content can after all be given to the word "original" where a claimant has no right of recourse under WIBA because his condition is not covered in the sense of being listed in the schedules to WIBA. Moreover, at para [94] of his original report, Professor Muigai referred to a decision of the ELRC, *Linet Kadzo Kenga* v *Indiana Beach Apartment Hotel Ltd* [2015] eKLR, in which the court was said to retain the power to award general damages based on the principles of English common law, albeit that any WIBA compensation previously awarded would require to be taken into account in any award of damages. My reading of the case to which he referred did not suggest that the court was exercising any kind of "appellate" function under section 52 of WIBA. All of which leads me to conclude that if the group members are not compelled down the WIBA route - and, for the reasons given, I do not consider that they are - an avenue of recourse to court for the recovery of damages along

common law principles remains open under Kenyan law following what may be relatively familiar common law principles.

***Issue 4***

*Whether this court has jurisdiction*

[145] The contractual documents to which I refer (including, *quantum valeat*, the CBAs which were exhibited during the evidence) do not expressly exclude the jurisdiction of this court. Nor do the defenders argue that they do. Rather, the defenders' submission is that the parties have agreed that WIBA shall apply to claims for "industrial sickness", meaning that the appellate jurisdiction of the ELRC is necessarily invoked. However, consistent with what has already been discussed under reference to the earlier issues, I am not satisfied that the defenders have established that the claims of group members involve injuries or conditions which are covered by WIBA and which must therefore be dealt with under its compensation regime. It follows that the jurisdiction of this court has not been excluded by agreement. The defenders' plea of no jurisdiction must therefore be repelled.

***Issue 5***

*Whether, in the event that this court has jurisdiction, it is forum non conveniens*

[146] I have already recorded at length parties' competing submissions on *forum non conveniens.* I accept that, from the case law cited, the plea will be sustained if the court is satisfied that there is some other court or tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all parties and for the ends of justice (*Clements* v *Macaulay, supra,* p 668; *Credit Chimique* v *James Scott Engineering Ltd, supra,* p 410). I also accept that the initial onus is on the defenders to raise and justify the plea, and

that the matter is not simply one of convenience (*Societe du Gaz de Paris, supra,* pp 13, 18). Where the initial onus is discharged it will be for the party asserting jurisdiction to show that justice requires otherwise (*Spiliada Maritime Corporation* v *Cansulex Ltd, supra,* pp 477-478; *De Mulder* v *Jadranska Linijska, supra,* p 274D-F).

[147] As to the relevance of foreign law, in some cases the questions to which it gives rise may be relatively simple and the application of that law by a Scottish court may not present undue difficulties. In such cases the necessity to apply foreign law would not suffice to found the plea. In other cases the questions of foreign law likely to be involved may be numerous and complex and in such cases the necessity to apply the law might properly be a factor which the court would take into account in deciding whether or not to exercise its discretion to sustain the plea (*Credit Chimique* v *James Scott Engineering Group Ltd, supra,* pp 412-3).

[148] Applying these principles to the circumstances of the instant case, the defenders rely on a number of other factors in support of the submission that it is clearly and distinctly more appropriate that the claims of the group members be determined in Kenya. Thus the defenders have no employees, factories or business in Scotland and their registration in Scotland has no relevance to the plea of *forum non conveniens*. The harm alleged by the group members having been suffered there, Kenya is in principle the natural forum for resolution of their claims. Kenyan law is applicable to all aspects of the group members' claims. There are substantial practical implications arising from the fact that foreign witnesses will require to give evidence in person unless arrangements for the giving of remote evidence could be effected. That would require there to be no objection by the Kenyan state.

[149] Much of what was said on behalf of the representative party in oral submissions about the issue of *forum* revolved around the practical implications for group members of having to follow through the administrative process of compensation by DOSH at all. The defenders too, albeit from a different perspective, made much of the impracticality of doing so in a Scottish court given the solely appellate nature of the ELRC in that process (which would have to be replicated in some way in resolving the group claims). But given that I am not satisfied that the defenders have established that claims of the group members, being concerned with non-scheduled injury or illness, can be processed under the provisions of WIBA, the concerns about the fairness of, or replicating, that process in Scotland do not arise. Nor does the defenders' concern that the court would effectively be allowing the group members to avoid a compulsory statutory scheme. That is a point of some significance because, had the position been otherwise, I should own to having had considerable difficulty in understanding how this court would be in any position to assess "WIBA compensation" in the context of what is, initially at least, a no fault administrative process.

[150] Leaving those legal and practical complexities to one side, I am unpersuaded on the pleadings and the evidence led that there are significantly complex and disputed issues of Kenyan law that would require to be resolved in dealing with the group members' substantive claims. Mr Nderitu's unchallenged evidence was that on the matter of duties owed at common law Kenyan law was in essence the same as Scots law. As previously noticed, Professor Muigai referenced the case of *Linet Kadzo Kenga* v *Indiana Beach Apartment Hotel* in which the court dismissed a submission that damages were only available under WIBA and that the ELRC had power to award general damages "based on the principles of English common law", due account having been taken of compensation previously awarded

by DOSH. In short, it seemed to me that the point of greatest complexity concerned the position of WIBA in the relationship between the group members and the defenders (including the differing limitation periods provided for in WIBA and the Limitation of Actions Act 1968).

[151] There are, however, other matters relied on by the defenders in support of their position that it is clearly and distinctly more appropriate that the group members' claims be heard in Kenya. Since the harm alleged occurred in Kenya then that was the appropriate forum for resolution of the group claims. Mr Hutchinson's evidence supported the view that the proceedings were likely to raise issues which required an understanding of Kenyan culture, behaviour and custom. At an important, though practical level, investigations would require to be undertaken locally. There was uncertainty over the enforceability of any order made by this court concerning the inspection of property, including judicial accessibility for site inspections. It was unsatisfactory, from the point of view of assessing credibility and reliability of evidence, that interpreters would be required to translate evidence, the nuances of which could be lost. The requirement for translation would inevitably prolong proceedings. Moreover, there was also no certainty that the evidence of numerous witnesses to fact could be heard remotely. The attitude of the Kenyan state had to be considered and the correct processes followed.

[152] I have considered the submissions of parties carefully and I conclude, at this stage, that the defenders have discharged the initial onus which is incumbent on them to show that it is more appropriate to litigate these claims in Kenya. It is not entirely correct that there is nothing in the pleadings to disclose any dispute about the terms of Kenyan law. As both sides highlighted during the procedural stages of these proceedings there is at least the potential for disagreement as to the effect of the Kenyan law of limitation on individual

claims and how the law might address the situation of late onset of symptoms. That will of course require to be the subject of expert evidence. But there are other factors which clearly point to Kenya as being the appropriate forum. The group members all live in Kenya. They all sue on the basis of having sustained injury on tea estates in Kenya as a result of the defenders' breach of duty there. The defenders, although retaining a registered office in Scotland, have no other operations, factories or other discernible business in Scotland. They operate as a branch in Kenya. I observe that those senior officers who came to Scotland to give evidence for the defenders are all based, and live, in Kenya. Ordinarily the group members may be expected to give evidence in court in support of their claims. The circumstances giving rise to those claims, including the processes said to have given rise to injury, will inevitably require to be investigated in Kenya. Moreover, the defenders have raised practical but nonetheless important issues about the extent to which orders normally pronounced as a matter of routine (eg specifications of documents and property, and the taking of evidence remotely) could be enforced in Kenya. One example of that potential difficulty mentioned in the representative party's submissions arises from an order for inspection of property issued, in an action raised before it, by the All Scotland Sheriff Personal Injury Court which has been the subject of challenge in the ELRC, an injunction against its enforcement secured, and in respect of which a decision is now awaited from the Kenyan Supreme Court. Cumulatively, these considerations lead me to conclude that, all other things being equal, Kenya would be the appropriate forum for disposal of the group members' claims.

[153] But the matter does not rest there. I still require to consider whether there is cogent evidence of a material risk that the group members may not obtain justice if they are obliged to litigate their claims in Kenya. In that respect the representative party's submissions

devoted much attention to the practical difficulties faced by substantially illiterate and unrepresented employees navigating their way through the WIBA system. Indeed, a fair proportion of the evidence was devoted to that exercise to the point where the representative party submitted that WIBA is everything in practical terms that is contrary to a responsible system of justice.

[154] I wish to make it clear that I offer no criticism of the WIBA system. It is one established by the Kenyan Parliament in 2007 as part of what was a deliberate process of legislative reform of the existing laws regulating industrial relations across Kenya. The extent to which it meets the expectations of those who seek to claim compensation under its provisions is not a matter upon which I require to adjudicate. All I have sought to do is construe its provisions in light of the evidence I have heard. But, as I have already made clear, having rejected the defenders' argument that the claims of the group members can be processed under the provisions of WIBA, the perceived difficulties touched on by the representative do not arise.

[155] I am, however, satisfied that, for substantially the reasons set out by Mr Nderitu and Mr Theuri, there is a real risk that the group members will not obtain substantial justice were they to have to litigate their individual claims before the ELRC for damages at common law. That is a conclusion I can only make on the basis of cogent evidence. Unchallenged evidence is not necessarily cogent evidence. It is nonetheless right to observe that much of the evidence about not just the resources of the group members but also the lack of available legal representation was not disputed (save in relation to the procedure before DOSH). The following findings are material to the conclusion I have reached:

(i) The group members' duties involve tea harvesting on the defenders' tea estates. The evidence, derived from the specimen contract, was that tea

harvesters earned about Kshs 11,616/=. Although I was not furnished with a direct sterling equivalent Mr Nderitu's evidence, which I accept, was that Kshs 15,000 was worth about £100 at current rates (March 2023). Mr Theuri's evidence was that a medical report might cost around Kshs 10,000. That evidence, which I also had no reason to doubt, would suggest that a tea harvester who was looking to source their own medical report for litigation purposes would have to spend an entire month's salary to meet the cost of doing so.

(ii) Tea harvesters working on the defenders' tea estates were afforded accommodation but required to purchase their own food. Their remuneration can properly be described, as it was by Mr Nderitu, as subsistence pay.

(iii) It is probable that many of the group members cannot read or write. That conclusion is consistent with the evidence of both Mr Hutchinson and Mr Kirui to the effect that about 80% of the defenders' employees were illiterate in English, and Mr Kirui's evidence that "slightly below" 80% of those employees were illiterate in Kiswahili. In that respect I preferred their evidence to that of Professor Muigai, whose evidence that the majority of the group members would likely be substantially literate was at odds not only with the more immediate experience of the defenders' witnesses but also the defenders' own pleadings.

(iv) It is unlikely that any non-governmental organisation in Kenya would be in a position to fund litigation of the nature and character of these proceedings in Kenya.

(v) Although a Legal Aid Act came into force in Kenya in 2016 it is not yet fully implemented and the group members are unlikely to be able to secure legal aid and assistance in representation to advance their claims in Kenya.

(vi) Contingency fees are prohibited under Kenyan law and group members would be potentially liable for adverse awards of costs.

(vii) Although there are provisions within the Kenyan Civil Procedure Rules 2010 which permit a group's interests to be canvassed through a single pursuer or defender (an example given being where injured passengers on a bus might seek to bring common claims), there are no provisions equivalent or comparable to the rules governing group proceedings in Scotland. The group members' claims do not fall into any of the limited categories of claim which would allow for the pursuit of such proceedings, there being no formal procedural basis to enable that to be done.

(viii) There are few lawyers in Kenya who would have the skills and resources to handle mass litigation of this kind. For those larger farms which could theoretically do so, there are likely to be a commercial disincentives because of (i) the likelihood that such firms would be looking for payment of fees and disbursements as and when they occurred, and (ii) the commercial undesirability of litigating against substantial commercial entities in Kenya.

(ix) In the foregoing circumstances, it is unlikely that the group members would be able to prosecute their claims, individually or collectively and whether or not represented, to a conclusion and to secure justice.

[156] Mr Nderitu made reference to certain systemic features in the Kenyan court system which were said to give rise to delay. These matters were discussed in the generality and

did not feature significantly in the decision which I have otherwise reached that the combination of poverty and lack of representation justify Mr Nderitu's conclusion that should the group proceedings be dismissed the group members would not be able to access the Kenyan courts and secure substantial justice for their claims. The considerations which gave rise to his conclusion, and which I accept, far outweigh the justification put forward by the defenders for the group claimants to advance their claims in Kenya.

[157] I wish to make it clear that my acceptance of Mr Nderitu's opinion on accessing justice carries with it no suggestion that the Kenyan courts cannot come to a proper and considered decision on the group members' claims. But that is not the issue. The issue is one of accessibility, and what I conceive to be the insuperable difficulties dictated by circumstances which face the group members in litigating their claims to a conclusion in court.

[158] I should nonetheless address the defenders' submission that any application to have the evidence of witnesses heard remotely from Kenya could only be granted without objection by the Kenyan state. I have considered carefully the terms of the guidance in *Agbabiaka, supra.* That guidance recognises the need to follow a process for securing the taking of evidence from abroad, and how that might be followed. But the guidance does not, in my view, constitute evidence that would justify me in deciding *ab ante* that objection would be taken by the Kenyan state to the making of such an order. That is especially so in circumstances where (i) the claimants seek to recover damages from their Scottish domiciled employer, and (ii) this court has now considered, and determined after evidence, that it does have jurisdiction to entertain the group proceedings. The assistance I have derived from the expert evidence on either side at the preliminary proof inspires confidence that the court

will be fully instructed on those further issues of Kenyan law which are likely to arise during their progression.

[159] Accordingly, addressing the final issue which I am asked to consider, I am not satisfied that this court is *forum non conveniens.*

**Conclusion**

[160] In the foregoing circumstances I shall repel the defenders' first and second pleas-in-law. I shall cause the group proceedings, and both petition processes to which this opinion also relates, to call by order on a date to be afterwards fixed for consideration of further procedure. All questions of expenses are meantime reserved.