Neutral Citation Number: [2023] EAT 81

Case No: EA-2022-000849-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 May 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

LYCATEL SERVICES LIMITED **Appellant**

- and –

ROBIN SCHNEIDER **Respondent**

- -
- -

David Craig KC and Owen Lloyd (instructed by Lewis Silkin LLP) for the **Appellant**
Daniel Tatton Brown KC and Kieran Wilson (instructed by Kingsley Napley LLP) for the **Respondent**

Hearing date: 16 May 2023

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 26 May 2023

SUMMARY

Practice and procedure – stay of Employment Tribunal proceedings pending determination of concurrent claim before the High Court – rule 29 Schedule 1 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013

The claimant brought a claim before the Employment Tribunal ("ET") of unauthorised deductions from wages in respect of what was said to be his bonus entitlement in the sum of £7,995,124.89. The respondent disputed the claim and commenced High Court proceedings for negative declaratory relief in this regard. It then applied for a stay of the ET proceedings pending determination of the High Court claim. The ET refused that application.

On the respondent's appeal.

Held: allowing the appeal

The ET had applied the wrong test; failing to ask in which forum would this dispute most conveniently and appropriately be tried (**Bowater plc v Charlwood** [1991] ICR 798 EAT), and instead applying a test of adequacy, wrongly seeing there to be a presumption in favour of the claim proceeding before the ET (thus making the same error as that identified by the Court of Appeal in **Carter v Credit Change** [1979] ICR 908). It had, furthermore, failed to properly engage with the complexity of the issues raised in this claim (not least given the uncertainty of the nature of the claimant's case), and had wrongly characterised the respondent's High Court claim as "perverse". As the ET had erred in principle, had failed to have regard to that which was relevant, and had taken into account considerations that were irrelevant, its decision could not stand and would be set aside.

With the consent of the parties, the EAT then proceeded to determine the question of stay itself. Having regard to the complexity of the issues raised by the claim (which potentially raised questions of shadow directorship and/or agency), the sum involved (just short of £8 million), the technicality of the evidence (in particular in relation to issues of quantification), and the appropriateness of the procedures (the informality of pleadings before the ET was a factor that weighed against that forum; whilst the respondent had agreed that its High Court claim should be subject to the ET costs regime if this made a difference in choice of forum), it was determined that this was a matter most

appropriately determined by the High Court. In the circumstances, the appeal would be allowed and the ET's decision on the respondent's stay application set aside and replaced by a decision allowing that application and staying the ET proceedings pending determination of the respondent's claim before the High Court.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. The question raised by this appeal is whether the Employment Tribunal ("ET") erred in law in declining to stay the proceedings before it, pending High Court proceedings raising the same issue for determination between the same parties.

2. In giving this judgment, I refer to the parties as the claimant and respondent, as below. This is the full hearing of the respondent's appeal against the judgment of the East London ET (Employment Judge Housego, sitting alone, on 8 August 2022), by which its application for a stay of the ET proceedings, pending determination of its claim before the High Court, was refused. Mr Wilson and Mr Lloyd appeared (respectively) for the claimant and respondent before the ET.

3. The respondent contends that the ET erred in its decision by failing to apply the correct legal test, and/or by having regard to irrelevant factors and failing to have regard to that which was relevant. The claimant resists the appeal. It is, however, common ground that, if I allow the appeal, I should go on to determine myself whether the proceedings before the ET ought to be stayed pending the determination of the respondent's claim before the High Court.

The Relevant Background

4. The claimant commenced his employment with the respondent on 6 July 2020. It is the claimant's case that he was engaged as a portfolio manager; the respondent contends he was employed as an investment analyst. On 2 August 2021, the claimant was summarily dismissed from his employment for what was said to be gross misconduct.

5. By a letter of 10 December 2021, the claimant's solicitors wrote to the respondent setting out what was stated to be the claimant's claim "*for breach of contract and unlawful deduction from pay*". The letter was said to be:

> "… sent … in accordance with the Practice Direction on Pre-Action Conduct and Protocols (the "Practice Direction") contained in the Civil Procedure Rules ("CPR"). …"

6. It was stated that, notwithstanding his wrongful dismissal, the claimant remained entitled to receive a bonus payment; it was contended that the respondent had acted in breach of contract, and had made an unauthorised deduction from the claimant's wages in failing to pay this bonus, which was calculated due in the sum of £7,995,124.89. It was the claimant's case that the bonus arrangement had been agreed by the respondent, as confirmed in a document entitled "*Annex 4*", which was given to him by the respondent's founder and chairman, Mr Subaskaran, on 24 June 2021. In the final section of the 10 December 2021 letter, under the heading "*Action Required*", it was recorded:

> "Should you fail to make payment in full within 21 days, we reserve our client's right to commence proceedings against the [respondent] … for breach of contract and to seek an order for the total amount due plus costs.
> Further our client is also entitled to bring a claim before the Employment Tribunal for the unlawful deduction from his pay."

7. On 16 December 2021, the claimant presented a claim to the ET, stating that he was claiming "a*rrears of pay*" and "*other payments*". In the grounds of claim, the claimant set out his case that he was entitled to receive a bonus calculated as an amount equal to 20% of the gains achieved on stocks acquired following his advice; he did not, at that stage, set out the detail of how that entitlement had been agreed. In any event, the claimant clarified:

> "13.1 These Employment Tribunal proceedings are being issued as a protective measure being in mind the time limits for bringing claims in respect of Part II of the Employment Rights Act 1996.
> 13.2 As set out in the Pre-Action letter, the Claimant may issue Court proceedings, including for breach of contract, in respect of the matters referred to in these Grounds of Claim.
> 13.3 The Claimant reserves the right, in his discretion, at any time, to stay or discontinue these proceedings in the Employment Tribunal in respect of Part II of the Employment Rights Act 1996 so as to bring or continue with Court proceedings as referred to in paragraph 13.2 above.
> 13.4 The Claimant does not bring the matters referred to in these Grounds of Claim as a breach of contract claim in the Employment Tribunal. Such proceedings would be capped at £25,000, which is materially below the sums claimed."

8. On 7 January 2022, the then solicitors for the respondent replied to the claimant's pre-action letter of 10 December 2021; they contended that he had been dismissed lawfully and made clear that his claim for bonus (in particular, on the basis of 20% of profits) was denied, stating that any claims – whether pursued in the ET or the courts – would be defended.

9. Those acting for the claimant responded by further letters of 17 January 2022 and 8 February 2022. In the latter, the claimant's solicitors pointed out that the respondent had failed to address what the claimant had said regarding events on 24 June 2021 (when it was contended the bonus agreement had been confirmed by Mr Subaskaran).

10. On 16 February 2022, the respondent entered its ET3 and grounds of resistance in the ET proceedings, making clear that it took issue with the claimant's claim. In particular, it was stated that the claimant had advanced no basis for his case that he was entitled to a bonus on the basis asserted, and the respondent relied instead on the express terms in the claimant's written contract relating to bonus. It was also contended that the claimant had given different (and inconsistent) accounts of his claim that his bonus arrangements had been varied; that he had provided no consideration for such a variation, which would have required authorisation by a director of the respondent; and that the arrangement relied on by the claimant would be void for uncertainty.

11. By letter of 7 March 2022, the respondent's solicitors wrote as follows:

> "… we note that notwithstanding your repeated references to the Practice Direction – Pre-Action Conduct and Protocols of the Civil Procedure Rules ("CPR"), your client has not to date, provided any clarification with respect to the forum in which he ultimately intends to pursue his claim.
> Having issued proceedings in the Employment Tribunal, your client's Grounds of Claim state that (a) the claim was issued in the Employment Tribunal as a "*protective measure*"; (b) that he may "*issue Court proceedings, including for breach of contract, in respect of matters referred to in [the] Grounds of Claim*"; and (c) that he "*reserve[s] the right, in his discretion, at any time, to stay or discontinue these proceedings in the Employment Tribunal … so as to bring or continue with Court proceedings*".
> You have, more recently, reiterated your client's position in this regard, stating that … your client further "*reserves his right to issue proceedings [in the High Court] without further notice*".
> Despite such reservations, your client continues to litigate his complaints in the Employment Tribunal whilst at the same time attempting to rely on the Practice Direction. This is wholly unsatisfactory, and critically, not in compliance with either the overriding objective or the Practice Direction …
> In particular, we refer to section 1.1 of the CPR (which states that cases should be dealt with "*at proportionate cost*" whilst "*saving expense*") and paragraph 4 of the Practice Direction (which states that (a) "*a pre-action protocol or this Practice Direction must not be used by a party as a tactical device to secure an unfair advantage over another party*"; and (b) "*disproportionate costs*" incurred in complying with any pre-action protocol or the Practice Direction "*will not be recoverable as part of the costs of the proceedings*").
> The law is clear that multiplicity of legal proceedings should be avoided. We

> consider that your client's current approach of continuing to rely on the procedures of the civil courts, whilst simultaneously pursuing a claim in the Employment Tribunal, to be fundamentally contrary to the principles underlying the CPR.
> Whilst it is plainly for your client to choose whether to pursue his complaints either in the Employment Tribunal or in the High Court, he is not entitled to do both simultaneously. We invite you to clarify your client's position on this subject as soon as possible."

12. Those acting for the claimant replied by letter of 14 March 2022, observing that the respondent had still failed to engage with the claimant's case relating to events of 24 June 2021. As for the forum in which his claim was to be litigated, it was stated:

> "… it is for our client to choose whether to pursue his claim in the Employment Tribunal or the High Court. A fundamental purpose of the Practice Direction on Pre-Action Conduct is to encourage both sides of a dispute to set out their respective positions in sufficient detail to enable them to, amongst other things, make decisions about how to proceed (paragraph 3(b)).
> Given that our client's choice of venue may well be determined by your client's position in relation to these key events and documents, your client is in no position to demand clarification as to which route our client intends to pursue unless and until it has fully complied with the Practice Direction on Pre-Action Conduct.
> In the meantime it is entirely reasonable for us to protect our client's position entirely."

13. On the same day, the claimant filed amended grounds of claim in the ET proceedings, which more fully set out his case as to what was said to be his entitlement to bonus. In particular, it was averred:

> "2A The Claimant's entitlement crystallised or was confirmed on 24 June 2021 when Allirajah Subaskaran … the founder and chairman of Lycatel and the Lyca Group, presented the Claimant with a document entitled Annex 4 … which set out the Entitlement and the Basis of Calculation. In the Claimant's contract of employment, the clause referring to bonus … referred to Annex 4.
> 2B Mr Subaskaran provided the Annex 4 Document after the Claimant had sent a text to his wife, Prema Subaskaran, the previous day …. The Claimant will refer at trial to the conversations regarding his salary and bonus that had preceded his sending the text. Mrs Subaskaran replied to the text indicating she would "have a word" - implicitly with her husband, who was the key decision maker and shadow director of the Respondent.
> 2C By providing the Annex 4 Document to the Claimant, Mr Subaskaran was indicating that the entitlement set out in it was not an "empty promise". The Claimant shook Mr Subaskaran's hand signifying his agreement to the terms set out in the Annex 4 Document. Mr Subaskaran called the Claimant "a gentleman". Mr Subaskaran indicated he would not leave a copy of the Annex 4 Document with the Claimant (and did not do so) until it had been signed by Premananthan Sivasamy, a statutory director of the Respondent.

> 2D The Claimant will say that:
> (a) By providing him with the Annex 4 Document Mr Subaskaran was making an offer that the Respondent would pay the Claimant in accordance with the terms set out in it (i.e. the Entitlement and the Basis of Calculation);
> (b) That offer was not one that in the circumstances required acceptance by the Claimant. In any event (and without prejudice to that point) the Claimant accepted the offer when he shook Mr Subaskaran's hand;
> (c) As a result, the Claimant acquired a contractual entitlement to be paid a bonus in accordance with the Entitlement and the Basis of Calculation;
> (d) The Claimant provided consideration for the entitlement by (i) continuing to work for the Respondent; (ii) not continuing to press for clarification regarding his salary and/or bonus; and (iii) not carrying out the threat implicit in his earlier text message … to resign;
> (e) The offer constituted by the Annex 4 Document was not conditional on it being signed by Mr Sivasamy. Mr Sivasamy (as both parties understood) was subordinate to Mr Subaskaran and not the person who would ultimately decide the Claimant's contractual entitlement to a bonus. Mr Sivasamy's signature was a condition precedent to the Claimant retaining a copy of the Annex 4 Document – it was not a condition precedent to the offer itself;
> (f) It is assumed that Mr Subaskaran did not want the Claimant to retain a copy of the Annex 4 document until it had been signed by Mr Sivasamy because there was some perceived advantage (probably from the perspective of tax authorities) to the bonus decision appearing to have been authorised by him on behalf of the Respondent rather than (as was the case) Mr Subaskaran; and
> (g) Further, as both parties were aware, the Respondent (through Mr Subaskaran) would agree to contracts and leave them subsequently to be formally documented and signed off by Mr Sivasamy. …"

14. By letter of 6 May 2022, the respondent's solicitors set out their client's position in respect of the bonus claim, specifically taking issue with the claimant's account of events on 24 June 2021. Whilst maintaining that it had been entitled to summarily dismiss him, it was stated that the respondent was, however, prepared to pay the claimant his notice monies. As to the question of forum, it was contended:

> "… it is plain that your client's claim is not one that is appropriate for determination as an unauthorised/unlawful deduction from wages claim in the Employment Tribunal. We consider that your client's continued approach to seek the benefits of running parallel litigation in the Employment Tribunal and the High Court to be wholly inconsistent with the principles of both jurisdictions. …"

15. Responding on 19 May 2022, the claimant's solicitors did not accept that the offer to pay the claimant his notice monies would dispose of his wrongful dismissal claim, contending that the respondent's conduct in this regard went to credit. On the question of forum, the letter continued:

> "As regards forum, we maintain that, since the bonus claim is for an identifiable sum, it is very apt for determination by an Employment Tribunal as an unlawful deduction. Further, the Employment Tribunal is apt for a claim relating to wrongful dismissal, not least by virtue of the Tribunal's day-to-day experience of employment matters."

16. By letter of 21 July 2022, the respondent's present solicitors wrote to those acting for the claimant, stating that they were now instructed in relation to both ET and High Court proceedings. More specifically, it was explained:

> "High Court Proceedings
> Given your client's apparent ambivalence towards, and procrastination in, issuing High Court proceedings (despite his repeated threats to commence proceedings in that forum) our client has now issued proceedings in the High Court for negative declaratory relief in respect of your client's asserted entitlement to a bonus in the sum of £7,995,124.89 ("the Bonus Claim").
> …
> ET Proceedings
> The High Court is clearly the appropriate forum for the determination of the Bonus Claim and (in addition to the fact that the Tribunal in any event has no jurisdiction to hear the claim as an unauthorised deduction from wages), the ET Proceedings should be stayed pending determination of the High Court Proceedings …"

17. The respondent had issued a High Court claim (QB-2022-002294) on 20 July 2022, in which it sought negative declaratory relief, in the following terms (I paraphrase):

(1) No variation (written or oral) to the claimant's contract was agreed by the respondent at any time.

(2) Any payment of bonus to the claimant was entirely at the respondent's discretion.

(3) The claimant was not "*entitled to receive a bonus calculated as an amount equal to 20% of the gains achieved on stocks acquired following [his] advice*".

(4) The claimant was not entitled to bonus "*calculated annually, in respect of the period up to 30 June, and … converted to GBP on the last working day of June*" to be paid with his July salary.

(5) As a consequence of the termination of the claimant's employment on 2 August 2021, he had no entitlement to a bonus for the 2021 year.

(6) The claimant was not entitled to receive a bonus of £7,995,124.89 on 27 July 2021.

18. On 21 July 2022, the respondent wrote to the ET applying for a stay in those proceedings.

The claimant responded to this application on 29 July 2022, objecting to that course. The application was listed for hearing before the ET, leading to the decision that is now under appeal.

The ET's Decision and Reasoning

19. At the hearing before the ET on 8 August 2022 (conducted by telephone) the claimant applied to amend the proceedings to include a claim of wrongful dismissal; that was refused.

20. Turning to the respondent's application for a stay, the ET noted that the same issue was raised in both the High Court and the ET proceedings: indeed, that was the respondent's intention. The ET accepted, however, the claimant's submission that it was for him to choose where to pursue his claim:

> "14. … There has to be a very good reason why a judge in this Tribunal should refuse to hear a claim a person has a statutory right to bring to it. I can see no such reason."

21. The ET did not consider it to be fatal that the claimant had earlier said he was considering bringing a claim in the High Court:

> "15. … This means no more than that he was sensibly keeping his options open. Having then reviewed his options he has decided to proceed in the Employment Tribunal. He is entitled to do so. That he may have previously indicated that he intended something other is not a reason to deny him that choice. The Respondent was not misled. It suffered no disadvantage. …"

22. As for the question of complexity, the ET again accepted the claimant's submission:

> "16. … there is no great complexity to this claim, in principle. The law of contract referred to by Counsel for the Respondent is undergraduate level. The Tribunal has day in day out experience of deciding which of two (or more) differing oral accounts of any given claim are, on the balance of probabilities, likely to be true."

23. Addressing what it characterised as "*probably the [respondent's] strongest point*", regarding the claimant's contention that Mr Subaskaran was a shadow director, the ET set out the claimant's explanation of his case in this regard, as follows:

> "18 … It appears that the Respondent records another company as having significant influence over it. The individual named by the Claimant is a person with significant influence over that company. This is a very poorly phrased pleading in that regard. In fact, what the Claimant says is that the person who agreed the change is someone of great influence and power within the Respondent, such that its directors will be very likely to do as he wishes. It is

> not more than that. … The Claimant does not assert that there is a person who is a shadow director in the sense of the term defined in the Companies Acts."

24. More generally, the ET did not give weight to the respondent's submission that this was not a "*paradigm*" section 13 case; observing:

> "20. Employment Judges are used to dealing with matters of great complexity and value … There is nothing in this case that an experienced Employment Judge will not have seen before. This case will, as a five-day case, be listed before such a Judge. In particular, the financial centre that is Canary Wharf is within the area covered by London East. Cases where senior executives of financial institutions claim millions of pounds from former employers are not uncommon. I have experience in such a case myself (and the result was not appealed)."

25. Considering the comparative advantages and disadvantages of the claim proceeding in the ET or the High Court, it was further noted:

> "21. The High Court can apparently presently list cases of 5-10 days by October 2023. There is currently no application for such a listing. The High Court case was filed only recently. There is a listing in this Tribunal. By the time an application is made for the High Court to list a hearing that timeframe will have moved into the future. The difference is at best marginal. It is not such as to be of any significant weight in the decision whether or not to stay this claim."

26. The ET concluded:

> "22. The application is, at root, no more and no less than the Respondent seeking to dictate to the Claimant the forum in which he must bring his claim. It is his claim, not theirs.
> 23. There is something perverse about a High Court claim asserting that someone does not have a claim, meaning that the defence to that claim is that there is such a claim.
> 24. I see no factor making this Tribunal an inadequate forum to determine this claim.
> 25. I do not see this judgment as a trespass on the remit of the High Court. The High Court is asked to decide that there is no claim, not to determine any claim the Respondent has against the Claimant. They have not indicated that they have any claim against the Claimant."

27. The ET further recorded that the respondent sought to raise a preliminary jurisdictional question, contending there were issues as to whether the claim was calculable; it declined to set this point down for a separate listing, in advance of the full merits hearing, which was fixed, to determine liability only, for five days, commencing 3 October 2023.

28. On 16 September 2022, the respondent filed amended grounds of resistance in the ET

proceedings and I understand that there has since been disclosure of relevant documents between the parties.

The Appeal and the Respondent's Submissions in Support

29. The appeal is put on two bases: (1) the ET applied the wrong test; (2) the ET erred by taking into account irrelevant matters and failing to take into account relevant matters.

30. On the first ground, the respondent notes that it was agreed before the ET that the test to be applied was as set out in **Bowater v Charlwood** [1991] ICR 798 EAT, namely in which forum was the action most conveniently and appropriately to be tried bearing in mind all the circumstances, including the complexity of the issue, the amount involved, the technicalities of the evidence, and the appropriateness of the procedures? The ET had failed to ask which was the "*more appropriate forum*", considering the question to be whether it was "*an inadequate forum to determine this claim*" (ET, paragraph 24) and proceeding on the basis that there was a presumption in favour of the claim proceeding before the ET: "*There has to be a very good reason why [an ET] should refuse to hear a claim a person has a statutory right to bring to it*." (ET, paragraph 14). That was the same error identified by the Court of Appeal in **Carter v Credit Change** [1979] ICR 908 CA.

31. As for the second ground, the ET had presupposed a statutory right, when that was in issue (the respondent having raised a question going to the ET's jurisdiction; see **Coors Brewers Ltd v Adcock** [2007] EWCA Civ 19) and had failed to distinguish between a right to bring a claim in the ET and a right to have that claim determined by the ET. It had also wrongly concluded that "*there was no great complexity*" to the claim. While there was a straightforward factual dispute as to what happened on 24 June 2021, if the claimant's account was accepted a number of further questions arose.

(1) Assuming Mr Subaskaran was found to have acted as contended, what was the legal effect given that he was a director of the respondent's holding company, not a director or employee of the respondent? The claimant's case was unclear and legally incoherent. He had pleaded

that Mr Subaskaran was a shadow director (although without asserting an authority to agree a contractual variation) but resiled from that when downplaying the complexity of his claim before the ET, albeit this remained his pleaded case. In responding to the appeal, it was asserted that the respondent's directors were accustomed to act on the directions or instructions of Mr Subaskaran, which was the definition of a shadow director (section 251 **Companies Act 2006**). In oral argument, however, leading counsel for the claimant suggested Mr Subaskaran was acting as the respondent's agent (see paragraph 38 below), but that (i) begged the question as to the claimant's case on ostensible authority; and (ii) would contradict the shadow directorship pleading. The issue of shadow directorship was factually and legally complex (see, e.g. **Ultraframe (UK) Lt v Fielding Burden Group plc** [2005] EWHC 1638) and would require consideration of whether Mr Subaskaran was acting in that capacity at the relevant time (see **Smithton Ltd v Nagger** [2013] EWHC 1961 (Ch), approved on appeal at [2015] 1 WLR 189 CA). It was, furthermore, an issue that potentially had consequences extending beyond this case.

(2) If there was a discussion on 24 June 2021, was there (objectively) an intention to create legal relations and/or sufficient agreement that there was to be an immediately binding contract (see **Air Transworld Ltd v Bombardier Inc** [2012] EWHC 243 (Comm) at paragraph 75)? That was particularly so, given the claimant's case that Mr Subaskaran had said the agreement had to be signed by a statutory director (i.e. there was a further necessary step to be taken).

(3) Relatedly, was this a condition precedent to the claimant being given a copy of the document (the claimant's case, which the respondent contended was implausible) or to the offer itself?

(4) Even if the events relied on by the claimant were (i) accepted, and (ii) found to amount to a variation of his contract (notwithstanding the written contract contained an entire agreement clause), was this sufficiently certain to be contractually binding?

(5) Had the claimant provided any consideration for the alleged variation (the claimant's case on this question arguably raising an unsettled issue of law, see the discussion at paragraph [6-

070] **Chitty on Contracts** 34th edn)?

(6) Was there any offer and, if so, did that need to be accepted and, if so, was there acceptance as a matter of law?

(7) What was the proper construction of the original written contract of employment (if the respondent's construction was correct, this would undermine the claimant's case)?

(8) As regards quantum (and relating back to the issue identified at (4)), what was the correct test for entitlement?

(9) In addition, was the necessary degree of causality made out for each investment relied on, and/or would the claimant be required to account for losses incurred following his advice?

32. As for other factors, it was wrong to characterise the respondent's application as attempting to "*dictate*" the forum; it acted responsibly in commencing proceedings where it considered most appropriate (a view the claimant originally seemed to share) and had made an entirely proper application for a stay of the ET proceedings. It was also wrong to suggest that a claim for negative declaratory relief was "*perverse*", when that was a not uncommon course (e.g. for employees seeking a declaration as to the enforceability of restrictive covenants). The ET had (rightly) seen the timing of any hearing as neutral (even now, the High Court could accommodate a five-ten day listing in the early part of 2024; although the ET hearing was listed for October 2023, that was limited to liability); as for costs, if the claimant won in the High Court, he would stand to benefit; in any event, if this were the difference between the claim proceeding before the High Court and the ET, the respondent would be content that the High Court litigation should proceed on the basis of an agreement that the parties would apply the ET costs regime.

The Claimant's Case

33. Accepting that a right to bring a claim in the ET did not automatically mean there was a right to pursue a claim to determination by that forum, when the two sets of proceedings in issue raised identical (not simply overlapping) issues it was necessary to recognise the right of a claimant to

determine the forum in which those issues would be adjudicated. Where (as here) there was only one dispute between the parties, the claimant's right to choose the forum for determination was likely to be determinative. As the ET had correctly identified, in such a case, it would be for the respondent to demonstrate why that forum should not be chosen (see **Asda Stores Ltd v Brierley** [2016] ICR 945 CA). As had been recognised in the **Asda** case, there were particular considerations favouring ensuring that employees were not denied their right to pursue a claim before the ET (and see, more generally, **R (Unison) v Lord Chancellor** [2017] ICR 1037). In particular, the usual rule on costs (that costs should follow the event) did not apply before the ET. As Elias LJ had made clear in **Asda**, there was nothing wrong with starting from the presumption that the ET was the correct forum.

34. The ET in the present case had not erred in principle; its statement at paragraph 24 (as to the adequacy of the ET) had to be seen in the light of its reasoning as a whole. The relevant circumstances in this case differed fundamentally from those in **Bowater**, as the respondent's High Court claim precisely mirrored that brought by the claimant before the ET. The ET was entitled to find that the consequences flowing from this were of central relevance. Specifically, the ET had started with the finding that this was an attempt by the respondent to dictate the forum (ET, paragraph 22) and, that being so, there would need to be a compelling reason for a stay to be imposed on the forum chosen by the claimant.

35. Even if (contrary to the claimant's primary argument) the ET had erred in its application of the **Bowater** test, the decision ought to be upheld on the basis that the findings made on the relevant considerations arising in this case meant, adopting a multi-factorial approach, that it was entirely proper to refuse the application for a stay.

36. The ET had taken account of the relevant factors in this case, which included the claimant's relative position of vulnerability; the no-costs regime before the ET; the fact that Parliament had decided that unauthorised deductions claims should be determined by the ET, without any monetary cap; and the fact that the ET was plainly adequate to the task of adjudicating upon this claim. As for the jurisdictional issue raised by the respondent, as the ET had recorded (ET paragraph 27), it was

unclear how this was being put but, in any event, the claimant's claim was one of entitlement to an identifiable sum (in distinction to the claims in **Coors**); this was not a case where the claimant could lose before the ET but succeed in the High Court.

37. More specifically, the ET had expressly considered the question of complexity, making what was essentially a finding of fact that there was no great complexity in this case (ET, paragraph 16). It had been entitled to take the view that the principal dispute related to the discussion between the claimant and Mr Subaskaran on 24 June 2021. Acknowledging that if the claimant's evidence was accepted, it would then be necessary to determine the legal effect of what he said had happened, the claimant contended that the respondent was seeking to introduce complexity where none really existed. On the shadow director point, the claimant's case was plain: he was saying that it was clear to everyone that Mr Subaskaran would be obeyed. At paragraph 2B of the amended claim, the claimant had asserted that Mr Subaskaran was the key decision-maker and it was apparent (bearing in mind the informality of pleadings in the ET) that he was saying that everyone understood that Mr Subaskaran was acting as agent of the respondent. As for the suggestion that there was any uncertainty in the entitlement claimed, the disclosure provided in the ET proceedings (which showed that gains were split between three identifiable individuals, one of whom was the claimant) demonstrated that was not the case.

38. Asked whether the informality of pleadings in the ET might not be a relevant consideration as to appropriateness of forum in a case of this nature, Mr Tatton Brown KC said that the essence of the claimant's case was crystal clear. There was an issue as to Mr Subaskaran's authority: at present he was said to be shadow director and it would be for the claimant to prove that or not; there was no difficulty in understanding what that meant (it was defined in the **Companies Act**) and no difficulty regarding his ostensible authority as agent. If considered necessary, the case could be further clarified by way of amendment or the provision of further particulars.

The Law

39. The claim in issue in the ET proceedings in this case is brought under sections 13 and 23 **Employment Rights Act 1996** (the "ERA"). Section 13 provides (relevantly) that:

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
> …
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
> …."

40. By section 27 **ERA** "wages" are defined as:

> "… any sums payable to the worker in connection with his employment, including- (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise..."

41. Section 23 states that a complaint of an unauthorised deduction under section 13 may be presented to the ET. By section 24(1) **ERA** it is provided that, on a successful claim brought under section 23, the ET shall (relevantly) order the employer to:

> "(a) … pay to the worker the amount of any deduction made in contravention of section 13."

42. There is no limit on the sum that may be the subject of an award made under section 24(1) **ERA**, and a deduction for these purposes can include a complete failure to pay a sum due (**Delaney v Staples** [1992] AC 687 HL). In determining a claim of unauthorised deductions under section 13, where a dispute arises as to the amount of wages "*properly payable*" (the language used at section 13(3) **ERA**), it will be for the ET to determine that question as a necessary preliminary to discovering whether there has been an unauthorised deduction, see **Agarwal v Cardiff University**; **Tyne and Wear Passenger Executive v Anderson** [2018] EWCA Civ 2084, in which Underhill LJ (giving the judgment of the court in the joined appeals) observed:

> "There is no good – or even, frankly, comprehensible – policy reason for carving out from the jurisdiction of the ET one particular kind of dispute necessary to resolve a deduction of wages claim. On the contrary, to do so

> would be incoherent and would lead to highly unsatisfactory procedural demarcation issues. ETs are well capable of construing the terms of employment contracts governing remuneration and have to do so in many other contexts".

43. In determining claims under section 13 **ERA**, ETs may thus be required to deal with technical issues of contractual construction and to apply general rules of contract law, **Cleeve Link Ltd v Bryla** [2014] ICR 264 EAT. It has been held, however, that the ET has jurisdiction to determine an unauthorised deductions claim only in respect of an "*identifiable sum*"; **Coors Brewers Ltd v Adcock** [2007] EWCA Civ 19. **Coors** involved a replacement profit share scheme, promised by the employer after a take-over, which still had to be finalised. As various different schemes might stand in substitution for the previous arrangements, it was held that claims for sums equivalent to what would have been due under the old scheme could not be brought before the ET as an unauthorised deduction complaint. Drawing on the analysis provided in **Delaney** (in particular, as set out in the judgment of Nicholls LJ (as he then was) when that case was before the Court of Appeal, see [1991] ICR 331 at 340E-F), Wall LJ reasoned:

> "46. … the underlying facts of ***Delaney v Staples*** are a paradigm of the circumstances in which Part II of ERA 1996 is designed to operate. The employee complains that there has been an unlawful deduction from his wages. He has not been paid an identified sum. He makes a claim under Part II. The employer may have a number of defences. Those defences may raise issues of fact. Those issues will be for the Tribunal to determine. But the underlying premise on which the case is brought is that the employee is owed a specific sum of money by way of wages which he asserts has not been paid to him. That, it seems to me, is the proper context both of ***Delaney v Staples*** and Part II of ERA 1996."

44. As a matter of principle, it would not seem to be an obstacle for an unauthorised deductions claim that the sum in question has not yet been quantified, and might be difficult to quantify (see the *obiter* observations of HHJ Burke QC in **Lucy v British Airways** UKEAT/0033/08 at paragraph 35), although some question has been raised as to how far the ET's jurisdiction would extend where the quantification of the claim would involve an exercise of discretion or judgement (see **Jandu v Crane Legal Ltd** UKEAT/0198/13 at paragraph 51). This is not a point on which I have heard full argument, and I express no concluded view as to where the dividing line ought to be drawn (see the discussion

in this regard at paragraphs [355]-[357.01] **Harvey on Industrial Relations and Employment Law**); for present purposes, it is sufficient to note that this is an issue that has been raised by the respondent in the ET proceedings.

45. Turning then to the procedural issue that is at the heart of the present appeal, a decision whether or not to stay the proceedings before it is a matter of case management discretion for the ET, as provided by rule 29 schedule 1 **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"); see **Carter v Credit Change** [1979] ICR 908 CA. In thus exercising its discretion, the ET must have regard to the overall fairness to both parties; **O'Cathail v Transport for London** [2013] EWCA Civ 21.

46. In **Carter**, the High Court proceedings in issue had been commenced by the employer shortly before dismissing Mr Carter. Subsequent to his dismissal, Mr Carter brought ET proceedings complaining of unfair dismissal. On the employer's application for the ET proceedings to be stayed until after the hearing of the High Court claim, the ET granted the stay but, on Mr Carter's appeal the EAT took a different view and set it aside. In ruling that the decision of the ET should be restored, Stephenson LJ (with whom the other members of the court agreed) explained his reasoning, as follows

> "The appeal tribunal seems to me in this case to have stepped out of line in seeking to lay down a general principle that an [ET] must hear an application to it before High Court proceedings unless there are special reasons or unusual circumstances. I would not wish to underrate the importance of a quick and expeditious settlement of straight-forward claims for unfair dismissal; but I would deplore any attempt to take from the [ET] the discretion which the rule gives them to decide what is best to do in each individual case in all the circumstances when faced with an application to postpone. Naturally it is the employee who usually wishes to press on with his claim for unfair dismissal and I appreciate and give full weight to the employee's point that it would be disastrous if our decision could be interpreted as a precedent for encouraging employers to use the device of a stopping writ, as it were— a writ issued simply in order to stop and delay claims for unfair dismissal. But, in my judgment, it is for the [ET] in every case to consider the nature and the object of the High Court or other proceedings for which [it] is asked to postpone the hearing of an application to the tribunal, and any abuse of postponement proceedings is something which, in my judgment, [the ET] can be trusted to deal with robustly and clear-sightedly." pp 918H-919C

47. In **Bowater plc v Charlwood** [1991] ICR 798 EAT, it was noted that the Court of Appeal in **Carter** had been careful not to limit the factors that can properly be considered by the ET in deciding

whether or not to grant a stay in these circumstances. In going on to exercise the discretion *de novo*, the EAT considered the question it was required to answer was as follows:

> "In which court is this action most conveniently and appropriately to be tried bearing in mind all the surrounding circumstances including the complexity of the issue, the amount involved, the technicality of the evidence, and the appropriateness of the procedures?" p 804D-E

48. In **Mindimaxnox LLP v Gover** UKEAT/0225/10, the ET's refusal of a stay pending High Court proceedings was overruled by the EAT, on the basis that the High Court was the more appropriate forum for determining the complex factual issues that arose in the case. HHJ McMullen QC readily accepted that ETs are well used to determining complex issues of fact but considered the issue to be one of balance; as he emphasised, the issue is not that the ET might not have the relevant expertise:

> "30. … it is simply a question of where it is more appropriate to decide complex factual issues.
> 31. There are rules of evidence which are important to resolve in disputes such as this. It has been submitted … that a Judge of the High Court, sitting alone, with preparation time being provided by the court and reading time and making a decision on his or her own, is an expeditious way to deal with these matters. There may be some force in that."

49. A stay of ET proceedings will not, however, be granted where no proceedings have been instituted in the High Court, even if such proceedings have been intimated in pre-action correspondence; **Halstead v Paymentshield Group Holdings Ltd** [2012] EWCA Civ 524. In overturning the EAT's judgment in that case (and restoring the ET's refusal of a stay) the Court of Appeal acknowledged the various factors that might favour proceedings being stayed in the ET pending the determination of a concurrent claim before the High Court, but considered it would be:

> "21. … wrong in principle to deprive the appellant of a remedy which statute has provided for him because he has chosen, without commencing proceedings in the High Court, to indicate lines of claim which may be available to him there. By ventilating the possibility of such a claim, and stating an intention to pursue it, he has not deprived himself of his statutory right to make a claim in the employment tribunal.
> 22. … What the respondents categorise as an imminent threat of High Court proceedings, the appellant can fairly categorise as an attempt to bring the respondents to the negotiating table." (see per Pill LJ, with whom the other members of the court agreed)

50. When considering an appeal against a decision of the ET in these circumstances, given that the decision involves the exercise of judicial discretion, it will only be open to the EAT to interfere where the ET has erred in principle, has taken into account some irrelevant matter, or failed to have regard to that which is relevant, or has reached a decision that is properly to be characterised as perverse; **O'Cathail v Transport for London** [2013] EWCA Civ 21; **Noorani v Merseyside Tec Ltd** [1989] IRLR 184; **Carter** at 918F-919A; **Halstead** at paragraph 26.

Analysis and Conclusions

51. As was common ground below, the question the ET had to answer was as set out in **Bowater**; that is, taking into account all the relevant circumstances - including the complexity of the issues, the amount involved, the technicality of the evidence, and the appropriateness of the procedures - in which forum would this claim be most conveniently and appropriately be tried? The ET did not set out this test in its judgment, or refer to the relevant case-law; the Employment Judge stating "*I am familiar with the case-law, and do not burden this judgment with it*" (ET, paragraph 13). I do not assume that a failure to cite the leading authorities, or even to set out the relevant test, must mean that the ET erred in its approach to this case; I do, however, consider it is generally helpful for a judge to remind themselves of the legal principles they are required to apply. Certainly, the explanation provided for the decision taken in the present case – "*I see no factor making this Tribunal an inadequate forum to determine this claim*" (ET, paragraph 24) - would suggest that the ET unfortunately lost sight of the question it had to answer. As the EAT in **Mindimaxnox** was careful to emphasise, in deciding whether to stay an ET claim in favour of concurrent proceedings in the High Court, the issue is not whether the ET might not have the requisite ability to determine complex issues of fact (or law), it is simply a question of where it is more appropriate for the issues raised in the case in question to be determined (**Mindimaxnox** at paragraphs 30-31). There is a distinction between whether an ET *can* adjudicate upon a particular claim and whether, in preference to an alternative forum, it would be *more appropriate* for it to do so.

52. The claimant says that paragraph 24 of the ET's judgment should not be read as applying a test of adequacy rather than appropriateness, but needs to be seen in the context of the reasoning as a whole. While agreeing that the ET's decision is to be read holistically, I am, however, unable to see that this assists in demonstrating the application of the correct test in this case. Indeed, the ET's stated approach – "*There has to be a very good reason why a judge in this Tribunal should refuse to hear a claim a person has a statutory right to bring to it*." (ET, paragraph 14) – suggests that it made the same error as the EAT in **Carter**, in seeking to lay down a general principle that an ET must hear a claim before it, in preference to any concurrent High Court proceedings, unless there are special reasons why it should not do so (see *per* Stephenson LJ, **Carter** 918G-H).

53. For the claimant, it is argued that this is to misunderstand the ET's approach; as the Court of Appeal made clear in **Carter**, the factors that an ET may take into account are not closed and, in the present instance, it was permissible to give emphasis to the fact that this was not merely a case of concurrent proceedings dealing with overlapping issues, but where there was an exact identity in the questions to be determined. In such circumstances, the claimant contends, an analogy might be drawn with the approach laid down in the **Asda** case, where Elias LJ emphasised the prejudice that would be experienced by the employees in those proceedings were a stay to be granted so as to effectively require that they re-start their claims before the High Court.

54. I acknowledge that in **Asda**, Elias LJ identified various prejudicial consequences that might be suffered by the employees if their ET claims were stayed, which might be seen as having a more universal application. If a stay is granted to permit concurrent proceedings to first be determined before another forum, an employee or worker who has already filed their claim before the ET will then have to engage with those other proceedings, which may involve court fees and a risk of costs (generally) absent from the ET. It may also be the case that the ET could be seen as having particular expertise that might make it more suitable to hear certain types of claim; the **Asda** case was concerned with equal pay claims, which the ET might seem to be almost uniquely well qualified to determine, but other examples can readily be identified. I do not, however, consider that the guidance provided

in **Asda** assists the claimant in the present case. As the respondent points out, the observations made by Elias LJ in that case were focused on the particular statutory regime applicable to equal pay cases. Asda had applied for a general stay on the ET proceedings, so the employees would be obliged to pursue their claims – said to give rise to particular complexity – before the High Court. Allowing that the ET's normal case management powers (pursuant to rule 29 **ET Rules**) might permit an indefinite stay of proceedings in some circumstances, the Court of Appeal held that could not be so where Parliament had specifically legislated to enable the transfer of equal pay claims from the High Court to the ET (section 128 **Equality Act 2010**), but had not provided for the ET to relinquish its jurisdiction in favour of the High Court:

> "21. Given the structure of the primary legislation, I do not consider that the employment tribunal could use the very broad case management power in rule 29 for the purpose of relinquishing jurisdiction to the High Court merely because it considered that court to be a more appropriate forum. In my view, it is inconceivable that Parliament, having dealt expressly with the transfer of cases from the High Court to the employment tribunal, would have permitted the power to transfer the other way to be left to secondary legislation in the form of the Employment Tribunal Rules of Procedure. … the employee does have a right to have the civil claim heard in the tribunal because, in the particular circumstances of this case, there is no statute or rule of law which would permit the employment tribunal to relinquish jurisdiction in favour of the High Court."

55. Whilst, therefore, it is correct that Elias LJ went on to consider other factors weighing in favour of the claims being heard by the ET (as I have summarised above, and see paragraphs 22-23 of the judgment), those were expressly stated to be matters that "*reinforced*" the conclusion set out at paragraph 29, and need to be seen in the context of that reasoning. Of course, such other factors (in particular, the different costs regimes applying in the High Court and the ET) are likely to have a more general relevance when considering which is the more appropriate forum for a claim to be determined, but I do not read the **Asda** judgment as laying down any different test when determining an application for a stay under the ET's case management powers pursuant to rule 29 **ET Rules**.

56. I am also unpersuaded by the claimant's more general argument, that the fact that there was a precise coincidence in the issues to be determined in the two sets of proceedings in this case meant that the ET was entitled to give precedence to the claimant's right to choose which forum to use.

Although it may be more common for the claims in question to raise overlapping issues, I cannot see why any distinction of principle should arise from the fact that the issues to be determined are identical. Even where there is not an exact identity between the questions raised in the different proceedings, it will often be the case that the decision reached on a particular issue in dispute in one forum will be determinative of the same point (even if raised in a different legal context) in the other; it is to avoid the potential difficulties that might then arise (as well as the more general undesirability of a duplicity of proceedings) that it is considered appropriate to impose a stay on one set of proceedings. More generally, as both parties have accepted before me, a right to bring a claim before the ET does not carry with it an automatic right to have that claim determined by the ET. In the present instance, the respondent also had a "right" to bring proceedings in the High Court for negative declaratory relief. The question for the ET was (*per* **Bowater**) simply which forum was more appropriate to decide the issues in this case; there was no presumption that the ET ought to hear the claim simply because the claimant had first initiated proceedings in that forum.

57. The claimant argues that, even if the ET erred in how it characterised the approach it was required to adopt, it was apparent that it had, in any event, taken into account all relevant factors, had not had regard to matters that were irrelevant, and had reached a decision that was open to it on the particular facts of this case. In such circumstances, the EAT ought not interfere with such an exercise of case management discretion by the ET.

58. Adopting the claimant's approach, I have gone on to consider whether – assuming the ET was applying **Bowater**, and saw the claimant's choice of forum as simply one of the relevant factors (rather than something that gave rise to a presumption against the granting of a stay) – the reasoning demonstrates that all relevant matters were taken into account and the ET's decision was not tainted by any considerations that were irrelevant to its task. In undertaking this exercise, I approach the appeal keeping firmly in mind that the respondent is seeking to challenge an exercise of judicial discretion in the making of an interim order; as the Court of Appeal observed in **Noorani**:

> "Such decisions are, essentially, challengeable only on what may be called Wednesbury [**Associated Provincial Picture Houses Ltd v Wednesbury**

[1948] 1 KB 223 CA] grounds, …"

59. In thus adopting that approach, I do not consider it would be open to me to interfere with the ET's decision in respect of the jurisdictional issue raised by the respondent. Whether or not the point has merit (on its face, the claimant's claim would seem to relate to an identifiable sum but there may be an argument as to whether the quantification involves some element of judgement or discretion; see the discussion at paragraphs 43-44 above), the respondent failed to articulate its case in this regard before the ET and I cannot say it was wrong for this to be given little weight in the balancing exercise that had to be carried out at that stage.

60. Equally, the ET was entitled to take the view that its jurisdiction under section 13 was not simply limited to what might be characterised as the "*paradigm*" case (the term used in **Coors**); in determining what is "*properly payable*" (section 13(3) **ERA**), ETs are sometimes required to deal with technical issues of contractual construction and apply general rules of contract law (see the observations at paragraphs 42-43 above). The fact that Parliament has not imposed a statutory cap on the amount that may be awarded under section 24 **ERA** will also mean that such claims may sometimes involve very large sums; the statutory protection against deductions from wages has moved on very significantly since the **Truck Acts**. More generally, the ET was entitled to take into account that cases that are (factually/legally) very complex are commonly determined in that forum; in particular, discrimination claims will often raise difficult questions of fact and law, both in terms of liability and remedy. It would be wrong to think that the ET is the appropriate forum only for the most straightforward of claims.

61. That said, I consider the ET erred in the present case in its assessment of the question of complexity. This is not a case (as suggested by the ET, at paragraph 16) simply a matter of deciding "*which of two … differing oral accounts … are likely to be true*". While there is a fairly straightforward dispute of fact as to events of 24 June 2021, if the claimant's case is accepted a number of potentially difficult issues arise. The ET recognised this to some extent in seeing the shadow director point as "*probably the strongest point for the Respondent*" (ET, paragraph 17), but

then discounted this as merely a matter of "*poorly phrased pleading*" (ET, paragraph 18). The problem is that this then fails to identify the nature of the claimant's case as to the authority of Mr Subaskaran – neither a director or employee of the respondent - to enter into a binding variation to the claimant's contract on the respondent's behalf. The ET further failed to demonstrate any engagement with other issues that would seem to arise in this case, including the question how the claimed variation would take effect given the express provisions within the claimant's contract (and, relatedly, how those provisions were to be construed), or whether confirmation of the variation by a statutory director of the respondent was a necessary pre-condition to its enforceability. Whether or not each of the issues identified in the respondent's submissions ultimately prove to give rise to serious obstacles to the claimant's case, the ET's failure to acknowledge those questions – and, therefore, the potential complexity of the case before it – meant that it neglected to take into account a factor that was relevant to the balancing exercise it was required to carry out.

62. In my judgement, the ET further erred in its understanding (and characterisation) of the respondent's claim before the High Court. There is nothing "*perverse*" (ET, paragraph 23) about a claim for negative declaratory relief; indeed, that might be an entirely sensible course if it provides an effective resolution of a real and present dispute between the parties, and the ET was wrong to discount this as a relevant factor that it was required to weigh in the balance. Equally, I consider the ET was wrong to pejoratively characterise the institution of High Court proceedings as seeking to "*dictate*" the choice of forum. Not only had the claimant identified the High Court as the potentially appropriate forum for his claim in his pre-action correspondence, he had continued to reserve his right to bring a breach of contract claim before that court in his ET pleading (expressly stating that he was commencing the ET proceedings "*as a protective measure*"). It would not have been open to the respondent to simply rely on the claimant's earlier statements of intent as a basis for requesting a stay of the ET proceedings (*per* **Halstead**, *supra*); if, however, it genuinely considered that the High Court was the more appropriate forum for adjudicating its dispute with the claimant, it was entitled to commence proceedings in that jurisdiction. Having adopted that course, the respondent cannot be

criticised for then applying for the ET proceedings to be stayed.

63. For the reasons I have set out above, I consider that this is a case where the ET's exercise of its case management discretion demonstrates a fundamental error of approach and a failure to take into account relevant factors whilst also having regard to that which was irrelevant. I therefore allow the appeal.

Disposal

64. Given my conclusion on the appeal, the ET's decision must be set aside. In the normal course, this matter would then need to be remitted to the ET for determination afresh. In this case, however, the parties have agreed that, if the appeal is to be allowed, I should myself then proceed to determine the question whether the ET proceedings should be stayed (a course recognised as being open to parties before the EAT; see **Jafri v Lincoln College** [2014] EWCA Civ 449 and **Kuznetsov v Royal Bank of Scotland** [2017] EWCA Civ 43).

65. In thus approaching the question posed in **Bowater**, I consider the correct answer to be that this action is most conveniently and appropriately to be tried in the High Court.

66. This is a claim for a significant sum (just short of £8 million), which raises various potentially complex issues of fact and law. It is not a case that involves questions on which the ET might be seen to have a particular expertise (as might arise, for example, in a claim of equal pay or of unlawful discrimination); rather, it raises issues of contract law that are standardly dealt with in the High Court. Accepting – as I do – the ability of ET judges to grapple with difficult questions of contractual construction and interpretation, a number of the points raised are outside what might be seen as the more usual claim determined in that jurisdiction; shadow directorships and issues of ostensible authority might more commonly be expected to be matters adjudicated upon by the High Court. Certainly, the formal nature of proceedings in the High Court should mean that the issues raised by this claim are more precisely identified, and I consider this to be a very material factor in the balancing exercise I have to undertake. As leading counsel for the claimant emphasised in his oral submissions,

pleadings before the ET are relatively informal and that, in my judgement, makes that a less appropriate forum for a case of this nature. Although I recognise that greater precision might be achieved using the ET's general case management powers - for instance, by ordering the claimant to provide further particulars of his claim - the fact is that this matter has been permitted to proceed before the ET without any proper attempt to clarify the case being pursued, reflecting the less formal nature of that jurisdiction.

67. This point is most obviously made good by considering the claimant's case on what the ET acknowledged to be "*probably the strongest point*" for the respondent, namely whether Mr Subaskaran was acting as a shadow director of the respondent when (as the claimant asserts) he entered into an agreement for a variation to the claimant's contractual bonus entitlement. Although the pleaded claim asserts a shadow directorship, the claimant's counsel resiled from this averment in submissions before the ET, albeit he was not required to formally amend his pleading. In responding to the appeal, the claimant's case had been described in a way that would seem to bring his assertion of a shadow directorship back into play (albeit that still remains unclear). In oral argument on the appeal, the claimant's case was said to be that Mr Subaskaran was acting as agent of the respondent. In a case of this nature (both in terms of value and complexity), I consider that the greater formality of the process before the High Court renders that the more appropriate forum.

68. My view in this regard is further confirmed when I look ahead to the trial of the issues between the parties in this matter. It seems to me that this is a case where the preparation time that may more readily be available to a Judge in the High Court is likely to be invaluable, particularly if there are issues going to the quantification of the sums claimed (as is suggested by the respondent's particulars of claim before the High Court), which may raise evidential issues of some technicality. This is not a question of the adequacy of the ET, but of the appropriateness of that forum given the applicable procedures and resources available. For completeness, whilst I would not see it as determinative, I also consider it relevant that the jurisdictional issue raised by the respondent will fall away in the High Court proceedings.

69. In carrying out the requisite balancing exercise, I also bear in mind, however, the choice exercised by the claimant in commencing proceedings before the ET and the potential prejudice that he might face if a stay is imposed so that these matters are determined in the High Court.

70. Although I can see that the claimant's preference can be a relevant consideration, I note that his position in this regard seems to have changed over time. The pre-action correspondence might be read as suggesting that the claimant in fact considered the High Court to be the more appropriate forum, and his claim before the ET states that it was being "*issued as a protective measure*", with the claimant expressly reserving his right to commence proceedings in the High Court in respect of precisely the same matters as raised in his ET claim.

71. As for the potential delay that might arise if this matter is now to be determined before the High Court rather than the ET, I consider this has to be balanced against the continuing lack of certainty as to how the claimant's case is put in his ET proceedings. Moreover, while there is a fixed hearing date before the ET, for October this year, this will be limited to the determination of issues of liability. If the claimant is successful at that stage, there will then need to be a further hearing on remedy. Bearing in mind the present delays in listing before the ET, the alternative possibility of all matters being listed in the High Court in the early months of 2024 would suggest that the question of timing remains a fairly neutral consideration.

72. Finally, while I accept that the different costs regimes applicable in the High Court and the ET would generally be a relevant factor in a case of this nature (it would be naïve not to recognise that the risk of an adverse costs award in the High Court might be a very real concern to many litigants), this is effectively neutralised by the respondent's offer that its claim before the High Court should be subject to the same rules on costs as would apply in the ET if this were to be the difference between the case proceeding in the High Court rather than ET.

73. Carrying out the balancing exercise required, I am thus satisfied that – having regard to the complexity of the (factual and legal) issues raised, the amount involved, the likely technicalities of the evidence, and the different procedures applicable in each forum – the dispute between the parties

is most conveniently and appropriately to be tried before the High Court. In reaching that conclusion, I make clear that I have considered the respondent's offer on costs to be a material determining factor. As this is a balancing exercise, it is not the only relevant factor that has weighed in favour of granting a stay, but it has tipped the balance such that I consider it provides the requisite "*difference*" as envisaged by the respondent's offer and that the High Court proceedings should thus be understood as proceeding on that basis. In these circumstances, exercising the powers of the ET pursuant to section 35 **Employment Tribunals Act 1996**, I grant the respondent's application for a stay of the ET proceedings pending determination of its claim before the High Court.