[2024] UKSC 28
On appeal from: [2022] EWCA Civ 978

JUDGMENT

Tesco Stores Ltd (Respondent) *v* Union of Shop, Distributive and Allied Workers and others (Appellants)

before

Lord Reed, President
Lord Lloyd-Jones
Lord Leggatt
Lord Burrows
Lady Simler

JUDGMENT GIVEN ON
12 September 2024

Heard on 23 and 24 April 2024

Appellant
Oliver Segal KC
Stuart Brittenden KC
(Instructed by Thompsons Solicitors LLP (Manchester))

Respondent
Anthony de Garr Robinson KC
Amy Rogers KC
Andrew McLeod
(Instructed by Freshfields Bruckhaus Deringer LLP (London))

LORD BURROWS AND LADY SIMLER (WITH WHOM LORD LLOYD-JONES AGREES):

1. Introduction

1. Standing back from the details of this case, it may be said that the claimants are seeking to establish that they fall within rare exceptions to two fundamental common law principles that are generally applicable in the realm of contracts of employment. The first is that an employer generally has the right, under contract law, to terminate a contract of employment by giving the requisite notice to the employee. The second is that an injunction, amounting to indirect specific performance, will generally not be ordered against an employer that, in substance, requires the employer to continue employing an employee.

2. The defendant and respondent is Tesco Stores Ltd ("Tesco"). The claimants and appellants are the Union of Shop, Distributive and Allied Workers ("USDAW"), as the relevant trade union recognised by Tesco for collective bargaining purposes, and three employees of Tesco who are also union representatives. Those three employees are employed by Tesco at three different distribution centres: Daventry (Clothing), Lichfield, and Daventry (Grocery). The proceedings were brought not only for the benefit of the three individual employees themselves but also on behalf of all 22 affected union members at Daventry (Clothing) and all 20 affected union members at Lichfield. The fourth appellant is the only union member affected at Daventry (Grocery) (having moved there from Daventry (Clothing) in 2014). In total, at the start of these proceedings in early 2021, there were approximately 367 union members affected across the UK (with 324 being at the Livingston distribution centre in Scotland).

3. Central to this appeal is the correct interpretation of an express term, concerning "retained pay", agreed in a collective agreement. By reason of section 179 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") (and consistently with the general position at common law), a collective agreement is not legally binding as between the union and the employer unless in writing and containing a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract. However, where apt for incorporation, terms agreed under the collective agreement will commonly be incorporated into the employees' contracts of employment and, if so, will be binding as between employer and individual employee: see, eg, *National Coal Board v Galley* [1958] 1 WLR 16; *Alexander v Standard Telephones & Cables Ltd (No 2)* [1991] IRLR 286; *Henry v London General Transport Services Ltd* [2002] ICR 910, [2002] IRLR 472; *Kaur v MG Rover Group Ltd* [2004] EWCA Civ 1507, [2005] ICR 625. It is common ground in this case that the retained pay term was incorporated, expressly or by established custom and practice, into the employees' contracts of employment.

4. Although this two-stage process (collective agreement followed by individual contracts of employment) differs from the usual way in which contracts are made, there is no particular difficulty in applying the usual objective and contextual approach to contractual interpretation. In his seminal speech in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ("*ICS"*), at 912, Lord Hoffmann expressed the aim of contractual interpretation as being to ascertain "the meaning which [the contract] would convey to a reasonable person having all the [relevant] background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract." In the collective bargaining setting, the same objective and contextual approach to interpretation applies. But, importantly, that objective and contextual approach applies to the interpretation of both the collective agreement (where the parties are the employer and the union) and the individual contracts of employment (where the parties are the employer and the employee). Put another way, at least where it is not being suggested that the union and the employee had different intentions, the objective intentions initially of employer and union and, subsequently, of employer and employee may all be relevant in deciding on the correct interpretation of a term that was agreed in a collective agreement and incorporated into a contract of employment. See, generally, *Adams v British Airways plc* [1996] IRLR 574, especially at para 22; and *Anderson v London Fire & Emergency Planning Authority* [2013] EWCA Civ 321, [2013] IRLR 459, especially at para 22.

5. Given the two-stage process that applies in the context of collective agreements, it would appear that the usual principles determining what, if any, extrinsic material is admissible as an aid to interpretation should be applied with a corresponding degree of flexibility. It was not in dispute between the parties in this case that various statements made, prior to the collective agreement, as explanations for employees of the express term in question, were admissible as aids to interpretation of that express term. Neither side regarded it as necessary for the lower courts or this court to examine leading cases, such as *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, in order to decide whether one of the exceptions to the general bar on using pre-contractual material to interpret the meaning of a particular provision was made out. In other words, counsel for the parties accepted, without detailed analysis, that the pre-contractual material relied on (and set out at paras 20 – 29 below) was admissible and merely disputed the weight that should be attached to it. In the light of the parties' submissions, but also because we acknowledge the need for flexibility in the context of collective agreements, we shall treat the pre-contractual material relied on as an admissible aid to interpretation. However, had it been necessary to do so, we would have regarded the pre-contractual material relied on as coming within the exception that explanatory material can be admissible in interpreting a contract: see Lewison, *The Interpretation of Contracts,* 8th ed (2024), paras 3.38 – 3.42, citing, inter alia, the reliance on the explanatory notes that accompanied the contract in *ICS.*

6. There is another somewhat unusual feature of this case which differentiates it from the standard way in which a contractual term is negotiated and agreed. As set out in the main particulars of their written contracts, each individual claimant was receiving

retained pay from the dates in September 2007 when they moved from their existing distribution centre at Crick in Northamptonshire to the distribution centres at Daventry (Clothing) and Lichfield. The pre-contractual material relied on pre-dated those moves. Yet the focus of the submissions by both parties has been on the interpretation of the express retained pay clause in a collective agreement that was only agreed some two years later in 2009 and signed on 18 February 2010. It was only at, or shortly after, that later date that that express term became incorporated into the individual contracts of employment. The best analysis of this sequence of events appears to be that, while the full articulation of retained pay was not incorporated into the individual contracts until 2010, the same meaning of retained pay applied throughout the relevant period. There is no suggestion that the meaning changed in 2010. The parties were therefore in agreement that the judicial task is to interpret the full retained pay provision taking into account the pre-contractual material that also pre-dated the moves in September 2007.

2. The factual background

7. Tesco recognises USDAW for collective bargaining purposes within the meaning of section 178(3) of the 1992 Act. Tesco has a series of recognition and procedural agreements with USDAW, the practical effect of which is that USDAW is recognised by Tesco as the sole representative and negotiating trade union for certain staff at certain sites, and in particular, staff below the grade of Team Manager employed at distribution centres including those at Daventry (Clothing), Lichfield and Daventry (Grocery). There is an agreed process for negotiations between Tesco and USDAW concerning employment conditions (including pay) following which USDAW will ballot its members on whether to accept any offer made by Tesco. If accepted by the majority of union members voting, changes to contract terms are incorporated into the employment contracts of all employees at those centres.

8. In 2007, Tesco embarked on an expansion programme which resulted in the closure of certain existing distribution centres (including Crick), the expansion or restructuring of certain others, and the opening of new sites (including Lichfield). In relation to the sites which were to be closed, a redundancy situation arose for the purposes of section 139(1)(a)(ii) of the Employment Rights Act 1996, by reason of the fact that Tesco was going to cease, or intended to cease, "to carry on that business in the place where the employee was so employed".

9. Retained pay was negotiated by representatives of USDAW and Tesco as an incentive to staff who worked at Crick (and other affected sites) to relocate to another site. This was an alternative to the offer of a lump sum redundancy payment, and was agreed by Tesco in order to ensure that it did not lose all of its existing experienced employees through redundancy at a critical time when it was expanding and opening new distribution centres. Once agreed at a collective bargaining level, the proposed retained pay term was put to a ballot of USDAW members and was accepted.

10. Each of the three individual claimants relocated from Crick to Daventry (Clothing) or Lichfield. They relocated rather than accepting a redundancy payment of between £6,000 and £8,000. Each individual claimant indicated in his witness statement that he took out a mortgage obtained on the basis of his overall income, which included retained pay and which he had no reason to believe would be withdrawn. Mr Kumar (the fourth appellant) also took out two additional loans. Each individual claimant noted the significant impact upon his family's finances which the withdrawal of retained pay would cause. Each asserted that the reason for his agreement to transfer to the new site, rather than accept a redundancy payment, was the offer of retained pay.

11. The individual claimants were paid retained pay from the time when they first relocated to the particular new site in September 2007. It constituted approximately 32% to 39% of their wages.

12. By 2021, Tesco wished to bring retained pay to an end. On 18 January 2021, Tesco formally announced its intention to remove retained pay, having notified USDAW of that intention (on an embargoed basis) on 15 January 2021. On 3 February 2021, in a "Questions and Answers" document, Tesco explained why it was doing this. Tesco explained that:

> "Retained Pay arrangements achieved what they were designed to achieve, but we feel it is now the right time to phase those arrangements out."

Tesco indicated that retained pay added unnecessary complexity to the development of a new payroll system and that some colleagues (it would appear raising equal pay issues) had raised concerns about the minority of employees who received retained pay.

13. Employees on retained pay were offered an advance payment of 18 months of retained pay to agree to termination of their retained pay rights. If they did not agree to that, they were informed that they would be dismissed and re-engaged on the same terms but with their retained pay rights removed. This has been referred to as being "fired and rehired".

14. The individual claimants, along with others, refused to consent to the removal of retained pay and therefore faced the threat of dismissal and re-engagement on terms that did not include retained pay.

15. On 17 March 2021, the claimants issued proceedings in the High Court under CPR Part 8 against Tesco. They sought declaratory relief as to the nature and extent of the employees' contractual entitlement to retained pay, and injunctive relief to restrain Tesco

from removing their contractual entitlement to retained pay through the mechanism of dismissal and re-engagement on revised terms.

16. The claims succeeded before Ellenbogen J: [2022] EWHC 201 (QB), [2022] ICR 722. But her decision was overturned by the Court of Appeal, Bean LJ giving the leading judgment, with which Newey and Lewis LJJ agreed: [2022] EWCA Civ 978, [2022] ICR 1573.

3. The express retained pay term in the 2010 collective agreement

17. The express retained pay term was contained in a collective agreement that was signed on 18 February 2010. That term read as follows:

> "SITE SPECIFIC AGREEMENTS
>
> RETAINED PAY
>
> Certain staff under the arrangements for moving to Lichfield from other Tesco sites may receive retained pay. Retained pay will be uplifted by any future negotiated pay increases.
>
> Retained pay is individually calculated and confirmed in individual statements of employment. It is an integral part of contractual terms and is included in calculations for pension and other benefits such as Shares in Success.
>
> Retained pay will remain a permanent feature of an individual's contractual eligibility subject to the following principles:
>
> (i) retained pay can only be changed by mutual consent
>
> (ii) on promotion to a new role it will cease
>
> (iii) when an individual requests a change to working patterns such as nights to days the premium payment element will be adjusted

(iv) if Tesco make shift changes it will not be subject to change or adjustment."

18. It is common ground (see para 3 above) that the above term was incorporated into each affected employee's contract of employment (with the relevant new site at which the employee would be based, if not Lichfield, substituted for "Lichfield" at the start of the clause).

19. It is also convenient to mention at this point that the rights of the employee and employer to terminate the contract by giving notice – with the relevant notice periods specified – were expressly set out in the individual contracts of employment. It was also there specified that no notice was required in a case of gross misconduct by the employee.

4. Pre-contractual material

20. Three sets of pre-contractual material, issued in February 2007, were relied on by the claimants; and the second set was also relied on by Tesco.

21. Although concerning the Livingston distribution centre in Scotland, and not Lichfield or Daventry, both parties also relied on a letter and documents produced in January 2007. At first instance it was noted by Ellenbogen J at the end of her judgment that, whilst this case is not concerned with employees at Livingston, all parties contended that the objective intention behind the contractual entitlement to retained pay is evidenced by the documentation relating to the same entitlement for staff who relocated to Livingston.

22. We have emphasised with italics those passages that, in line with the submissions of one party or both parties, are of central importance to interpreting the retained pay term.

(1) Compensation package summary

23. In February 2007, Tesco provided its employees with a "Compensation Package Summary", setting out, in tabular form, entitlements if staff were to move to Lichfield or "any other Tesco site with the new Tesco contract" and the sums which would be paid were they to opt for redundancy. For those who chose to remain in employment, it was said that there would be "new terms and conditions supported by individual retained pay - *protection for life at new Tesco contract site* . . . Please refer to previous joint statements for details."

(2) Q & A document

24. Staff were further provided with a "Q & A" document, which was disseminated by Tesco on 20 February 2007. This included the following questions and answers, numbered 32 and 33:

> "32. Will I receive any protection to support me moving to the new site with new terms and conditions?
>
> Yes, we will support you in this instance by applying our 'Retained Pay' policy.
>
> 33. What does 'Retained Pay' mean?
>
> If you transfer to a newly opened site in Tesco Distribution you will be on a new contract of employment. However, any difference in value between your old contract and your new employment contract will be protected *by a concept called 'Retained Pay' which remains for as long as you are employed by Tesco in your current role*. *Your retained pay cannot be negotiated away by either Tesco, USDAW or USDAW Shop Stewards.* Your retained pay will increase each year in line with any annual pay rise. All elements of retained pay will count towards the calculation of any current and future benefits. You will also benefit from any future improvements in terms and conditions at the new Depot."

(3) Joint statement of Tesco and USDAW

25. A joint statement was published by Tesco and USDAW in respect of Lichfield on 23 February 2007, which included the following text:

> "Lichfield depot
>
> Retained pay
>
> The new site at Lichfield will operate on the new Tesco Terms and Conditions which are different to those at Crick. In order to protect the existing employees staff who transfer to Lichfield

> will be entitled to 'retained pay'. This is an arrangement, which is designed to protect the difference between the value of employee's current contractual pay and the proposed contractual pay at the new site. This excludes casual overtime. *The retained pay is guaranteed for life* and will increase in line with any future pay increases. Retained pay also counts for the purposes of calculating benefits such as Shares in Success and Pensions . . ."

26. Tesco issued a similar joint statement to employees who relocated to the Daventry (Clothing) and Daventry (Grocery) distribution centres.

(4) The January 2007 documents regarding Livingston

27. In January 2007, Jim Hoggan (Tesco's Regional Distribution Director), wrote to affected staff regarding relocation to the Livingston depot. He explained as follows:

> "We have secured *a process that will protect the value of your existing contractual terms and conditions for the remainder of your employment with Tesco*."

28. With the letter, he enclosed a document entitled: "Questions from Briefings Commencing 21/01/07 Livingston Depot". This included the following:

> "Q6 *Will Retained Pay be guaranteed forever?*
>
> A6 *Yes, providing your circumstances do not change*.
>
> …
>
> Q8 Why change the contract if we are not losing any money?
>
> A8 We want to introduce the concept of Retained Pay *to ensure that there is long term protection for you.*
>
> *Making Retained Pay an individual contractual entitlement prevents any possibility of this being subject to negotiation or*

change in the future via a ballot of the membership of which existing staff would be in the minority.

Retained pay ensures that this will never happen."

29. Further, a document produced by USDAW for its members stated that the then proposed terms agreed for Livingston satisfied certain key principles. Amongst those principles was stated to be, "*Guaranteed protection of these arrangements — they cannot be altered by Tesco, USDAW or USDAW shop stewards in future negotiations at the new site*."

5. The decisions of the courts below

(1) Ellenbogen J

30. The essential reasoning of Ellenbogen J can be summarised as follows:

(i) It was of central importance that the express term as to retained pay provided that retained pay "will remain a permanent feature" (see para 17 above) of an individual's contractual eligibility.

(ii) While, devoid of context, that might have meant that retained pay would be permanent only so long as the contract endured, that would defeat the objective mutual intention of the parties as shown by the pre-contractual material. In the judge's precise words, at para 40:

> "It is clear, from the undisputed evidence in this case, that the mutual intention of the parties was that the entitlement to Retained Pay would be permanent for as long as each affected employee was employed in the particular role, save in the circumstances expressly articulated in his or her contract. There is no other way in which to make sense of the use of expressions such as 'guaranteed/protection for life', and, in particular, 'for as long as you are employed by Tesco in your current role', all against the background of the defendant's need and desire to retain a stable, experienced workforce, which it could only achieve by incentivising employees who were not contractually obliged to do so to relocate to a place of work some 45 miles away from that at which they had previously been employed … Accordingly, the word permanent would be understood by the

> reasonable person, having all of the background knowledge which would have been available to the parties in the situation in which they were at the time of the agreement, and should be construed, to mean for as long as the relevant employee is employed by the defendant in the same substantive role."

(iii) Although the pre-contractual material also showed, as counsel for Tesco had argued, that the objective intention of the parties was to prevent the entitlement to retained pay being taken away by a majority of USDAW members through the normal collective bargaining process, that was only a part of the objective intention.

(iv) There was therefore a conflict between the employee's express permanent entitlement to retained pay and Tesco's express right to terminate the contract on notice. To resolve that conflict between two mutually inconsistent express terms, a term should be implied, whether based on business efficacy or obviousness, to the effect that Tesco's right to terminate on notice could not be exercised "for the purpose of removing or diminishing the right of that employee to Retained Pay." (para 42)

(v) This approach was consistent with the cases on the contractual right to permanent health insurance, namely *Aspden v Webbs Poultry and Meat Group (Holdings) Ltd* [1996] IRLR 521 ("*Aspden*") and *Awan v ICTS (UK) Ltd* UKEAT/87/18, [2019] ICR 696 ("*Awan*"), and the decision in *Jenvey v Australian Broadcasting Corpn* [2002] EWHC 927 (QB), [2003] ICR 79 ("*Jenvey*"), which was concerned with a contractual enhanced redundancy benefit.

(vi) If the submission on behalf of Tesco were correct, it would logically have had the consequence that, on the day following the agreement entitling the employee to retained pay, Tesco had the contractual right to terminate the contract for the purpose of removing retained pay by giving the required notice. That served to underline that the obvious mutual intention of the parties was that that should not be contractually permissible.

(vii) The term implied would not prevent Tesco from exercising the right to terminate for any reason other than for the purpose of taking away retained pay (eg for genuine redundancy or for gross misconduct).

(viii) Turning to remedy, a declaration setting out the rights of the employee in respect of retained pay was granted. Moreover, because damages would be an inadequate remedy, a final injunction was ordered whereby Tesco could not give

notice to terminate the relevant contract of employment for the purpose of removing or diminishing the right of that employee to receive retained pay.

(2) The Court of Appeal

31. The Court of Appeal overturned the decision of Ellenbogen J. Bean LJ gave the leading judgment. His essential reasoning was as follows:

(i) If one looked just at the terms of the 2007 contracts of employment or the 2010 collective agreement, there was nothing to indicate that the employer could not give notice to terminate the contracts in the usual way. In other words, the entitlement to retained pay was to last only as long as the particular contract.

(ii) The pre-contractual material did not establish that the objective intention of *both* parties was to prevent Tesco terminating the contract in the normal way. In Bean LJ's words at para 36:

> "Whether one focuses on the phrase 'guaranteed for life' or the word 'permanent' I cannot accept that it has been shown that it was the mutual intention of the parties to the collective agreement, or the parties to the individual contracts of employment into which the 2010 Retained Pay clauses were incorporated, that the contracts would continue for life, or until normal retirement age, or until the closure of the site concerned."

(iii) The interpretation for which Tesco contended did not deprive "permanent" of all meaning. What was meant, as was stressed in the Q & A document of 20 February 2007 (see para 24 above), was that retained pay could not be negotiated away by collective bargaining.

(iv) There was also a problem with an implied term analysis because, just as the pre-contractual statements did not have a clear or precise meaning, it was far from clear what term should be implied. Moreover, the obviousness test was not satisfied. While the claimants might have had unfair dismissal claims, had the contracts been terminated with notice almost immediately after the conclusion of the retained pay agreement, there would have been no dismissal in breach of contract (ie no wrongful dismissal).

(v) Although *Aspden* was correctly decided, it was distinguishable from this case. As Bean LJ expressed it at para 51:

> "If the collective agreement signed in February 2010 had included a clause such as 'provided the site remains open Retained Pay will continue until you reach the age of 65' then the present case would be analogous to *Aspden* or to *Awan*. But it does not. I do not accept, therefore, that the [permanent health insurance] line of cases gets the claimants home."

(vi) Even if the judge had been right to find for the claimants on liability, there was no justification for granting an injunction. Indeed, Bean LJ said that he was not aware of any case in which a final injunction has been granted to prevent a private sector employer from dismissing an employee for an indefinite period. In any event, the terms of the injunction granted by the judge were not sufficiently clear.

6. What is the proper interpretation of the retained pay term and its relationship to the notice provision?

(1) The approach to contractual interpretation and the implication of terms by fact

32. As we have indicated, the context of this case is not one of a commercial contract but of employment contracts which contain a term incorporated from a collective agreement. But, as we have explained in paras 4 – 5 above, despite the special characteristics inherent in the industrial bargain reflected by a collective agreement, such terms must be interpreted applying an objective and contextual approach like any other contractual terms. Business (or commercial) common sense may also be relevant. However, evidence of the subjective intentions of the parties is not relevant in determining what the contractual language means. For the applicable principles of interpretation, which were not in dispute, see, for example, *ICS; Arnold v Britton* [2015] UKSC 36, [2015] AC 1619; and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173.

33. The court must be alive to the possibility that one party may have agreed to something which, with hindsight, did not serve that party's interest. As Lord Neuberger of Abbotsbury explained in *Arnold v Britton*, the focus must be on the meaning of the words used in the contract, and

> "… commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement,

> if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made." (para 19)

34. Construing the express words used by the parties in their contract and implying terms by fact into the contract both involve determining the scope and meaning of the contract. There is an overlap in the material relevant both to interpretation on the one hand and implication by fact on the other. But, as is well-recognised, the implication of contractual terms by fact involves a distinct exercise from that of contractual interpretation because it involves deciding whether, objectively, the parties would have said something in their contract that they did not in fact say had the point occurred to them. As Sir Thomas Bingham MR put it in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481:

> "The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties have themselves expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power …"

35. This justification for the strict constraint applied to the implication of terms by fact was approved by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, where, at paras 15 to 31, Lord Neuberger authoritatively restated the long-established and consistent learning on this question. It is unnecessary to rehearse the principles that govern when a court may properly imply a term by fact into a contract. They are not in dispute. It is sufficient for our purposes simply to reiterate that, to imply a term by fact, the term must be necessary for business efficacy or the term must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract. Importantly, as Lord Hughes emphasised in *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2, [2017] ICR 531 ("*Ali*"), at para 7, "… the process of implying a term into the contract must not become the rewriting of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated."

36. The starting point, accordingly, is to interpret the express words of the contract. Having done so, the next stage is to consider whether and what (if any) term must be implied by fact.

(2) Tesco's submissions (as regards interpretation and implication)

37. There are two express terms in the contracts of employment that are central to this appeal. They have both been referred to at paras 17 – 19 above. The first is the retained pay term (set out in full in para 17 above) which can be regarded as an express term even where it has been incorporated into the contracts of employment by custom and practice. The second is the notice provision which gives Tesco an unrestricted right to terminate the employment contracts for any reason or none on the provision of specified notice (save in the case of gross misconduct, where no notice is required). This is the contractual right Tesco sought to exercise in 2021 to effect the planned dismissals that are at issue in this case.

38. Tesco maintains that the meaning of each of these two express terms is clear and obvious and that they function consistently with one another. Tesco submits that each affected employee's entitlement to retained pay remains a feature of their employment contract for as long as the contract lasts. It cannot be changed save by agreement between Tesco and the individual (so it is removed from collective bargaining) or in the circumstances expressly specified. But, like any other entitlement under a contract of employment, it is subject to Tesco's express and unqualified contractual right to terminate the contract on notice at any time of Tesco's choosing. In other words, so Tesco argues, the word "permanent" ensured that retained pay could not be removed through collective bargaining. But it gave no guarantee about how long the contract of employment itself would last, nor did it guarantee retained pay entitlements for any period. Rather, retained pay would last only for as long as the existing contract lasted and, accordingly, there was no inconsistency between the two express terms.

39. The logical and, on the face of it, alarming consequence of Tesco's submissions is that it would have been open to Tesco to terminate (on appropriate notice) the contracts of all affected employees immediately after they had relocated. On behalf of Tesco, this was accepted by Mr de Garr Robinson KC. But he submitted that practical and commercial considerations, including the likely industrial relations impact of such a course of action, made this a fanciful prospect. That may be true but it does not obviate the objection that the interpretation favoured by Tesco is legally problematic and produces a potentially absurd consequence. As we shall now explain, this stems from the underlying problem that Tesco's suggested interpretation of the parties' objective intentions does not stand up to scrutiny.

(3) The underlying problem with Tesco's submissions

40. The underlying problem, in our view, with Tesco's argument is that, for the reasons that follow, it gives no substance to the express promise (see para 17 above) that retained pay "will remain a permanent feature of an individual's contractual eligibility" (where it is accepted that eligibility means entitlement). First, an employee's contractual benefits only ever last as long as the contract providing them lasts. If this is all the word "permanent" means, it adds nothing and could simply be deleted from the clause. Secondly, as a matter of ordinary language, the promise of permanence in the retained pay term is plainly not defined by, or to be read as coextensive with, the principles that follow. Rather, it establishes a foundational position that is qualified by the three principles (numbered (i), (ii) and (iii)) that are then set out: notwithstanding that retained pay is otherwise a permanent feature, it can be changed by mutual consent, it will cease on promotion to a new role, and it will be adjusted where the employee requests a change to working patterns. The fourth principle (numbered (iv)) is merely clarificatory: shift changes by Tesco will not affect retained pay. Thirdly, the natural and ordinary meaning of the word "permanent" does not itself convey any indication that it is limited to meaning that retained pay is not subject to removal by collective bargaining. Fourthly, the qualification in the first principle is significant. This states expressly that retained pay can only be changed by mutual consent (of Tesco and the individual concerned): accordingly, the word permanent must mean something more than merely that retained pay cannot be removed by collective bargaining.

41. We accept that, in the normal course of events, the collective bargaining arrangements meant that changes to employees' rates of pay could be achieved by USDAW and Tesco proposing a collective agreement which was then approved by a majority of union members voting at the distribution centre in question. As the Court of Appeal observed, there was an obvious concern that the minority of employees in receipt of retained pay might see their differentials eroded in future collective bargaining in the interests of the majority. The Q & A document issued at Lichfield on 20 February 2007 (see para 24 above) emphasised that retained pay "cannot be negotiated away by either Tesco, USDAW or USDAW shop stewards". But, although this was plainly a relevant risk to be guarded against, it is difficult to accept that it could have been the only risk employees would have been concerned about. Like Ellenbogen J, we consider that another equally important and obvious concern for relocating employees must have been the risk that Tesco might exercise its contractual right to dismiss on notice, in order to circumvent the contractual obligation to continue paying retained pay.

42. The word "permanent" in the retained pay term conveys that the right to retained pay is not time-limited in any way and would continue to be paid to employees for as long as their employment in the same role continues (that it must continue in the same role follows from the subsequent qualification that "on promotion to a new role it will cease") and subject only to the other two qualifications set out in the retained pay term. But if Tesco's case were correct, that promise is defeated (or deprived of its value) as there is

nothing to prevent Tesco from removing it unilaterally by dismissal on notice at any time of Tesco's choosing and offering re-engagement on contractual terms that do not include retained pay. Accordingly, in our view, the real question is whether there is a term implied by fact that qualifies Tesco's otherwise unrestricted contractual right to terminate the employment contracts on notice in order to deprive employees of the right to permanent retained pay.

(4) The need for a term implied by fact

43. We agree with the submission on behalf of the claimants that it is necessary, applying the business efficacy test, to imply a term in the contracts to qualify Tesco's right to dismiss on notice so that it cannot be exercised for the purpose of depriving the claimants of their right to permanent retained pay. That implied term is necessary (or, alternatively, it is so obvious that it goes without saying) in order not to undermine the promise that retained pay would be a "permanent" feature of contractual entitlements for the relevant employees (subject only to the qualifications specified by the retained pay term).

44. In our judgment, the circumstances in which the right to retained pay was agreed make clear that the offer of permanent retained pay was intended as an inducement to employees to accept the terms of the collectively negotiated agreement and make permanent changes to their lives by relocating to the new distribution centres rather than accepting redundancy. The mutual objective intention of the parties was to preserve the higher retained pay offered because Tesco needed experienced employees to relocate and wished to retain them in employment at the new sites and, without the inducement offered, relocation would not have been palatable to employees. Objectively, it is inconceivable that the mutual intention of the parties was that Tesco would retain a unilateral right to terminate the contracts of employees in order to bring retained pay to an end whenever it suited Tesco's business purposes to do so. This would have been viewed, objectively, as unrealistic and as flouting industrial common sense by both sides. It would have been open to Tesco to negotiate a longstop date for the entitlement to retained pay or to make clear that the retained pay could be withdrawn if an employee were dismissed with notice and then re-employed in the same role. Neither was done.

45. However, although the pre-contractual documents issued by Tesco and USDAW contained statements to the effect that employees were offered "protection for life" or that retained pay is "guaranteed for life", this cannot have been intended literally and we do not consider that it would have been reasonably understood by any of the parties in that way. The promise of retained pay was not a promise of permanent employment. On the other hand, employees would not reasonably have expected to be at greater risk of having their employment terminated merely because of that entitlement. That would frustrate the promise of permanent retained pay. In our view accordingly, it is necessary to imply a term by fact applying the business efficacy test (or, alternatively, applying the

obviousness test) which would preclude exercise of Tesco's otherwise unqualified termination rights, to dismiss the affected employees, in order to deny them the very benefit they were promised would be paid permanently. The implication is essential to the proper functioning of the contractual promise of permanent retained pay, to give effect to its purpose. The proposed implied term is necessary to ensure that the employment contracts work as promised. Without it, the employees' right to permanent retained pay would be capable of being immediately defeated.

46. Importantly, this implied term does not prevent Tesco from terminating the contracts for a purpose unconnected with retained pay, albeit that the practical effect will be to bring the entitlement to retained pay to an end. As a matter of contract law (and putting to one side the statutory unfair dismissal regime), termination of employees' contracts of employment for any purpose unrelated to depriving employees of retained pay remains open to Tesco as a matter of managerial discretion. This would include termination for, for example, lack of capability, misconduct or redundancy, provided that the purpose was not to remove retained pay.

47. Mr de Garr Robinson objected that such an implied term would impose a serious and perpetual constraint on Tesco's ability to manage and operate its business, interfering with Tesco's ability to give notice of termination for good or bad reason, or no reason at all. He argued that it would have made no commercial sense for Tesco to agree to a bargain with this outcome. We disagree with both the objection and the argument built upon it. The industrial context of this case is far from usual. It does not involve an employee's ordinary entitlement to an ongoing contractual benefit as consideration for work, which will inevitably be defeated by a lawful dismissal. As we have said, the particular circumstances make it inconceivable that, in negotiating the retained pay term, USDAW and Tesco objectively intended that Tesco should retain the unilateral right to bring retained pay to an end by dismissing those employees, whenever it suited Tesco to do so. In any event, as we have explained, the only contractual limit on Tesco's managerial ability to operate the business is as regards dismissal for the purpose of ending an individual's retained pay entitlement. Otherwise, there is no additional contractual constraint on Tesco's ability lawfully to dismiss employees with retained pay terms (whether on grounds of incapacity, redundancy or for any other reason). Moreover, we see no reason why Tesco is contractually constrained not to close down its new distribution centres if they are uneconomic to run (provided only that employees are not selected for dismissal because of their retained pay entitlement while those without it are retained). But even if the concerns now expressed by Mr de Garr Robinson, that this would have been a bad bargain for Tesco to make, were sound, that would not be a reason for departing from the correct interpretation of the language used or for rejecting the implication of a term: see paras 33 and 35 above. The purpose of interpretation and of a term implied by fact is to identify what the parties have expressly or impliedly objectively agreed, not what the court thinks that they should have agreed. Nor is it the function of a court when interpreting an agreement or implying a term by fact to relieve a party from the consequences of poor advice or bad judgment.

48. Here, the proposed implied term is capable of clear expression and goes no further than is necessary in this case. It is, as Ellenbogen J described it, that Tesco's contractual right to terminate the contract on notice cannot be exercised for the purpose of removing or diminishing the right of that employee to receive retained pay. It operates to qualify (rather than contradict) the express contractual right to terminate on notice. It does not mean that Tesco cannot dismiss for any other unrelated reason (including lack of capability, misconduct, or redundancy). The stringent tests applicable to the implication of a term by fact are satisfied.

(5) The pre-contractual material

49. The pre-contractual material to which we have referred at paras 20 – 29 above reinforces our view as to the correct interpretation of the retained pay term and the need for the proposed implied term. Those documents were created by Tesco or were joint statements published by Tesco and USDAW or, as regards the statement in para 29, were produced by USDAW, for all relevant staff at the conclusion of the collective bargaining process. They were produced to explain to the very individuals who would be Tesco's contractual counterparties (if the term was approved in the ballot) the extent of the proposed entitlement to retained pay, and were given to them as the basis on which they would vote in a ballot to determine whether the retained pay term would be accepted. The pre-contractual material was also designed to persuade employees to accept the collectively negotiated retained pay term.

50. The statements contained explanations of the retained pay term including as follows: "… individual retained pay – protection for life at new Tesco contract site …"; "Retained pay … remains for as long as you are employed by Tesco in your current role"; and "retained pay is guaranteed for life". They reflect the mutual objective intention of the parties that employees who accepted relocation with retained pay would retain the benefit of it for so long as their employment in the new role would otherwise have lasted; in other words, until they left the new role (on promotion or resignation) or were dismissed for an unrelated reason (capability, misconduct, redundancy, etc).

(6) Analogy with the permanent health insurance and related cases

51. Our view as to there being an implied term is also supported by a line of cases concerning employment contracts offering valuable long-term sickness or permanent health insurance benefits ("the PHI cases"). In these cases, courts have concluded that an employer's otherwise unrestricted power to terminate the employment contract on notice is qualified by an implied term that the employer shall not terminate the contract as a means of depriving the employee of such entitlements. For examples, see *Aspden* at p 525, which was approved (obiter) in *Brompton v AOC International Ltd* [1997] IRLR 639, para 32 (per Staughton LJ); *Adin v Sedco Forex International Resources Ltd* [1997]

IRLR 280; and *Awan*. In *Briscoe v Lubrizol Ltd (No 2)* [2002] EWCA Civ 508, [2002] IRLR 607, para 107, Ward LJ (with whom Bodey J agreed) said:

> "the principle to emerge from those cases is that the employer ought not to terminate the employment as a means to remove the employee's entitlement to benefit but the employer can dismiss for good cause whether that be on the ground of gross misconduct or, more generally, for some repudiatory breach by the employee…".

52. Plainly there are limits to the principle established by the PHI cases, and it should be sparingly and cautiously used to avoid turning the traditional principles of contract upside down. It should not be used to imply a term that conflicts with the express terms of the contract. The clear, consistent requirements for a term to be implied by fact into a contract are not in dispute (see paras 34 – 35 above). It is clear that, for such a term to be implied, either the business efficacy or obviousness test must be satisfied. A term should not be implied by fact on the basis that it is reasonable to do so.

53. Mr de Garr Robinson relied on *Reda v Flag Ltd* [2002] UKPC 38, [2002] IRLR 747, where the Privy Council upheld the exercise of the employer's express contractual right to dismiss employees without cause at any time during the contract period, in circumstances where this prevented the employees from being able to qualify for an impending share option scheme. The contracts contained entire agreement clauses. The employees' contention that the implied term of trust and confidence operated as a fetter on the employer's express power of dismissal was rejected by the Board (Lord Millett giving its advice), which held that the implied term had to yield to the express terms and could not sensibly be used to circumscribe an express right to dismiss without cause as this "would run counter to the general principle that an express and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification …" (para 45). The Board considered the effect of the PHI cases at para 51 and distinguished them as follows:

> "*Aspden* ... was not concerned with the implied term of trust and confidence at all. The question was whether the employer's express right of dismissal could be limited by implication arising from the unusual circumstances in which the contract had been entered into and the inherently contradictory terms which resulted. The better course might have been to rectify the contract to include the term contended for as an express term, an unusual course but one which would appear to have been justified by the evidence. But even if the case is taken as a rare example of a term being implied into a contract to qualify an express right, the justification for this course lay in the need to

> reconcile express terms of the contract which were mutually inconsistent. No such problem arises in the present case."

54. We do not consider that the reasoning in *Reda* assists Tesco. It was an unusual case that might be said to turn on its own particular facts. The very nature of the power to dismiss without cause meant that its exercise did not have to be justified. There was an entire agreement clause. The implied term sought to be relied on was of trust and confidence implied by law, and there was simply no room to imply that term to circumscribe the express power in these circumstances. Importantly, *Reda* was not a case where two express contractual terms were mutually inconsistent when properly interpreted and it did not address the question how such terms could or should be reconciled.

55. The principle derived from the PHI cases has also been applied outside that sphere, albeit rarely. In *Jenvey* the claimant was entitled to a valuable contractual payment if dismissed for redundancy. The employer had resolved to dismiss the employee by reason of redundancy but instead relied on the power to dismiss on notice (and not by reason of redundancy) precisely to deprive the employee of his valuable contractual redundancy payment. Elias J held that it would be contrary to the functioning of the particular redundancy scheme to permit the employer to exercise contractual powers to deny the employee the very benefits which the scheme envisaged would be paid. Accordingly, the employer was not entitled without justification to defeat the employee's claim to redundancy compensation by dismissing him for any reason other than redundancy, unless the dismissal was for good cause. That did not, however, mean that the employer was obliged to dismiss for redundancy. The employer could retain the employee in post. It simply required that, given the employer had already resolved to dismiss the employee for redundancy, if the employee was to be dismissed, absent good cause, the dismissal had to be for redundancy. A similar approach was adopted in *Ali*, where the agreement made – that Mr Ali's obligation to repay a loan from his employer would be waived on completion of five further years' service – was unworkable without a term implied by fact. The term implied was that the employer would do nothing on its own initiative to prevent Mr Ali from completing the five years of service, justified dismissal for repudiatory breach and compulsion excepted, and, that if it did, a similar waiver would operate. The Privy Council held that this was the minimum necessary to make the contract workable and to give effect to the promised waiver.

56. The promise that retained pay would remain a permanent contractual entitlement for as long as employment in the same role continued and would have continued absent that right means that there is an analogy with *Jenvey, Ali* and the PHI cases, although the three situations are not identical. Retained pay represents an important part of the total consideration for which the claimants worked and continue to work. It is a valuable benefit and was offered as a significant inducement for them to move to the new sites against the background of Tesco's need to retain an experienced workforce. Just as in *Jenvey, Ali* and the PHI cases, where it would have been contrary to the functioning of

the particular scheme to permit the employer to exercise contractual powers to deny the employee the very benefits which the scheme envisaged would be paid, so too here. There is no magic in the nature of the particular scheme involved. These cases exemplify the principle that a term implied by fact may be required to qualify an employer's otherwise unqualified contractual right to dismiss in circumstances where to do so would defeat or undermine the purpose of the contract by denying the very benefit that was promised.

(7) Conclusion

57. We would therefore hold that, applying the test of business efficacy (or obviousness) Tesco is precluded by an implied term from exercising the contractual right to dismiss the claimants on notice for the purpose of removing or diminishing their right to receive permanent retained pay.

7. What is the correct remedy: damages or an injunction?

(1) Introduction

58. Ellenbogen J granted not only a declaration of the employees' contractual right to retained pay but also ordered a final injunction because damages would not be an adequate remedy (see para 30(viii) above). The terms of the final injunction were set out in para 55 of Ellenbogen J's judgment and were as follows:

> "In the orders which follow, 'Affected Employee' is defined to mean each of the second, third and fourth claimants in these proceedings and each employee named in the Appendix to the judgment of Ellenbogen J, handed down on 3 February 2022 ('the Judgment').
>
> The defendant shall be restrained from, directly or indirectly:
>
> A. giving notice to terminate the contract of employment under which the Affected Employee is employed by the defendant as at the date of the Judgment contrary to the implied term of that contract whereby the right to terminate cannot be exercised for the purpose of removing or diminishing the right of that employee to receive Retained Pay; and/or

> B. otherwise withdrawing or diminishing, or causing the withdrawal or diminution of, Retained Pay from any Affected Employee (including by unilateral variation of the contract of employment), other than in accordance with the express term in each contract by which the entitlement to Retained Pay is conferred (as that term is construed in the Judgment).
>
> For the avoidance of doubt, the above orders do not preclude the defendant from dismissing any Affected Employee for reasons wholly unrelated (directly or indirectly) to the removal or diminution of Retained Pay, notwithstanding that the practical effect of so doing will be to bring that employee's entitlement to Retained Pay to an end."

59. Ellenbogen J did not discuss whether that injunction might indirectly infringe the general rule that specific performance will not be ordered of a contract for personal service of which the prime example is a contract of employment. Nor did the Court of Appeal overtly refer to this possible objection, although Bean LJ perhaps had this in mind when he pointed out that he was unaware of a final injunction having ever been ordered preventing a private sector employer from dismissing an employee for an indefinite period and when he said, at para 56: "The remedy for a wrongful dismissal at common law is almost invariably financial."

60. In this court, it was common ground between the parties that, although the injunction was expressed in negative terms, its practical effect was that Tesco would be compelled to continue to employ the affected employee on retained pay terms because Tesco could not dismiss the employee for the purpose of removing retained pay. Put another way, if prevented from dismissing the employee for the purpose of removing retained pay, Tesco would, in reality (and bearing in mind that the sole issue between Tesco and the employee is the retained pay), be compelled to comply with its positive obligation to continue to employ the employee on retained pay terms. Although this is not in form an order of specific performance, in substance it amounts to the same. It can be regarded as indirect specific performance and should be governed by the same principles as apply to an order of specific performance.

61. That the parties were correct to treat the injunction as indirect specific performance, governed by specific performance principles, may be regarded as deriving support, albeit that the facts were very different, from the well-known decision in *Page One Records Ltd v Britton* [1968] 1 WLR 157. There the manager of the pop group, "The Troggs", was refused an injunction to restrain his employers (the members of the group), in breach of contract, from employing a different manager. See also *Warren v Mendy* [1989] 1 WLR 853 in which that decision was approved (cf *LauritzenCool AB v Lady Navigation Inc* [2005] EWCA Civ 579, [2005] 1 WLR 3686).

62. We therefore agree with the parties on the issue of indirect specific performance. In practice, the grant of the injunction would amount to indirect specific performance of Tesco's obligation to continue to employ the employees on retained pay. The question therefore becomes, should indirect specific performance be ordered against Tesco even though one is dealing with a contract of employment?

(2) Should an injunction amounting to indirect specific performance be ordered in this case?

63. Mr de Garr Robinson submitted that there was no justification for Ellenbogen J's grant of an injunction given that this amounted to indirect specific performance. He pointed primarily to the well-established rule that specific performance will not be granted of a contract of employment whether against the employee or, as here, against the employer. In any event, he submitted that damages were adequate for the employees and specific performance will not be granted where damages are adequate. He also faintly mentioned that specific performance would fall foul of the "want of mutuality" bar ie that specific performance should not be granted against Tesco given that Tesco could not be granted specific performance against the employees.

64. Mr Segal KC for the appellants rejected those submissions. He argued that these facts fell within an exception to the general rule against specific performance of this type of contract because Tesco retained sufficient confidence in the employees, ie Tesco had no complaint about their work performance and had not lost trust and confidence in them, as shown by the fact that Tesco was offering them a new contract on the same terms except as to retained pay. He also submitted that damages were inadequate because they would be very difficult to calculate accurately and would not reflect the mental benefit of job satisfaction. He further submitted that lack of mutuality was not a problem.

65. It is not in dispute that the general rule is that a contract of employment is not specifically enforceable. As regards specific performance against an employee this is enshrined as an absolute rule in the 1992 Act, section 236, which provides:

> "No court shall, whether by way of – (a) an order for specific performance … of a contract of employment, or (b) an injunction … restraining a breach or threatened breach of such a contract, compel an employee to do any work or attend at any place for the doing of any work."

66. As regards specific performance against an employer, with which we are concerned, there is certainly a general rule against specific performance which is long-established: see, eg, *Johnson v Shrewsbury and Birmingham Rly Co* (1853) 3 De GM & G 914; *Brett v East India and London Shipping Co Ltd* (1864) 2 Hem & M 404; and *Rigby*

v Connol (1880) 14 Ch D 482. But on this side of the relationship, the courts have recognised exceptions. Two cases in particular were drawn to our attention.

67. The first is *Hill v C A Parsons & Co Ltd* [1972] Ch 305. Here the Court of Appeal upheld the grant of an interim injunction which amounted to temporary indirect specific performance of a contractual obligation to employ the claimant. The defendant employer had made a closed shop agreement with a trade union and gave the claimant one month to join that union. When he failed to do so, he was given one month's notice of termination of employment. The claimant sought an interim injunction restraining the defendant from implementing its notice of termination. The court held that the defendant was in breach of contract by giving only one month's notice. However, the important point for present purposes is that the majority (Lord Denning MR and Sachs LJ, Stamp LJ dissenting) held that the interim injunction should be granted, even though this amounted to temporary specific performance of a contract for personal service. Both Lord Denning MR and Sachs LJ emphasised that the rule barring specific performance against an employer in a contract for personal service was not absolute. Lord Denning MR said, at pp 314-315:

> "The rule is not inflexible. It permits of exceptions. The court can in a proper case grant a declaration that the relationship still subsists and an injunction to stop the master treating it as at an end … It may be said that … the court is indirectly enforcing specifically a contract for personal services. So be it."

68. The majority thought that an exception to the general rule was justified because damages were inadequate and, by granting the injunction, the claimant would remain an employee until the coming into effect of the Industrial Relations Act 1971 by which he would be protected if dismissed for not joining the union. Importantly, Sachs LJ also stressed that there was no breakdown in mutual confidence between employer and employee.

69. The second case is *Powell v Brent London Borough Council* [1988] ICR 176. The claimant was appointed principal benefits officer for the defendant local authority. A few days after starting work, she was told that her appointment was invalid because there might have been a breach of the defendant's equal opportunity code of practice in appointing her. She sought an interim injunction requiring the defendant to treat her as if she was properly employed as principal benefits officer and, even though that would amount to temporary indirect specific performance, the Court of Appeal granted it. Ralph Gibson LJ, giving the leading judgment, relied on *Hill v C A Parsons & Co Ltd* and particularly Sachs LJ's judgment, to justify a departure from the general bar to specific performance. In an important statement of the relevant principles underpinning an exception to the general rule, Ralph Gibson LJ said the following, at p 194:

> "Having regard to the decision in *Hill v C A Parsons & Co Ltd* ... and the long-standing general rule of practice to which *Hill v C A Parsons & Co Ltd* was an exception, the court will not by injunction require an employer to let a servant continue in his employment, when the employer has sought to terminate that employment and to prevent the servant carrying out his work under the contract, unless it is clear on the evidence not only that it is otherwise just to make such a requirement but also that there exists sufficient confidence on the part of the employer in the servant's ability and other necessary attributes for it to be reasonable to make the order. Sufficiency of confidence must be judged by reference to the circumstances of the case, including the nature of the work, the people with whom the work must be done and the likely effect upon the employer and the employee's operations if the employer is required by injunction to suffer the plaintiff to continue in the work."

70. Therefore, according to Ralph Gibson LJ, indirect specific performance may exceptionally be ordered against an employer where, first, it is otherwise just to make the order and, secondly, the employer retains sufficient confidence in the employee.

71. Other cases, in which an interim injunction was granted, amounting to temporary indirect specific performance of a contract of employment against an employer, include *Irani v Southampton and South West Hampshire Health Authority* [1985] ICR 590; *Hughes v Southwark London Borough Council* [1988] IRLR 55; and *Wadcock v Brent London Borough Council* [1990] IRLR 223. We also consider that obiter dicta of Lord Wilson in *Geys v Societe Generale, London Branch* [2012] UKSC 63, [2013] 1 AC 523, at para 77, are pertinent. He said that, although outside the scope of the appeal in that case, it is a "big question whether nowadays the more impersonal, less hierarchical, relationship of many employers with their employees requires review of the usual unavailability of specific performance."

72. Applying Ralph Gibson LJ's statement of principle to the facts of this case, we agree with Mr Segal that there has been no breakdown of mutual confidence. Tesco had no complaints about the employees' work performance and maintained confidence in them. The clear proof of this was that Tesco was offering the employees a new contract on the same terms except as to retained pay.

73. What about the first principle, that it must be "otherwise just" to make the order? This appears to be, essentially, a reference to the primary restriction on specific performance, applicable to all types of contract, that the claimant must show that damages are inadequate. For example, the general rule that specific performance will not be ordered of a contract to sell non-unique goods (see, eg, *In re Wait* [1927] 1 Ch 606) rests

on damages for such a contract being an adequate remedy because damages, assessed according to market value, will enable the purchase of substitute goods. It is clear, therefore, that in addition to overcoming particular objections to specific performance, such as that the contract is one of employment, a claimant must always show that damages are inadequate.

74. Would damages for the employees be adequate in this case? Ellenbogen J said, at para 55, that damages would not be an adequate remedy for breach because they "would be limited to the losses recoverable in any claim for unfair dismissal, with all the difficulties attendant upon such a claim". Mr de Garr Robinson submitted that this was confused and wrong because there was no question, in this case, of common law damages being limited to what could be recovered for unfair dismissal. Mr Segal accepted that the judge had here made an error.

75. At first sight it might have been thought that what Ellenbogen J had in mind was that, within the so-called "*Johnson* exclusion zone" (following the decision of the House of Lords in *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518), the quantum of common law damages for wrongful dismissal, if falling within the scope of that decision, could not exceed the statutory cap on compensation for unfair dismissal. But ultimately that is an unconvincing explanation not least because the judge had earlier decided, on a separate point that was not appealed, that the claims in this case "sit outside the *Johnson* exclusion zone" (para 48).

76. We therefore agree with counsel for both parties that, in this respect, Ellenbogen J's reasoning is incorrect. The Court of Appeal did not touch on this "adequacy of damages" issue, but we have all the necessary material to decide the question afresh.

77. In our view, damages would be an inadequate remedy in this case. To work out the quantum of damages would require speculation as to how long the employees would have otherwise remained employed by Tesco and, if they were to be lawfully dismissed, what their prospects would be of mitigating their loss by finding alternative employment. In short, the assessment of damages would be very difficult and prone to error. Moreover, it would be resource intensive and potentially costly (perhaps requiring expert labour market evidence). Of course, if there were no alternative, the courts would assess the damages as best they could in the light of the relevant evidence. But an injunction, amounting to indirect specific performance, avoids all such difficulties.

78. Furthermore, damages for wrongful dismissal have not traditionally reflected the non-pecuniary loss – for example, the loss of job satisfaction, the anxiety and upheaval – caused by losing one's job. Even in a case where mental distress was caused by the harsh manner in which an employee was wrongfully dismissed, the decision in *Addis v Gramophone Co Ltd* [1909] AC 488 laid down the principle that damages for the mental

distress are irrecoverable. Again, therefore, on the facts of this case, injunctive relief, amounting to indirect specific performance, would avoid the problem that damages might fall short of compensating the claimants fully for all losses suffered. If this is regarded as, to some extent, side-stepping *Addis v Gramophone Co Ltd*, so be it. That an order of specific performance may be appropriate, precisely so as to avoid what would otherwise be a restriction on a claim at common law, is illustrated by, for example, *Beswick v Beswick* [1968] AC 58 (where the reasoning of the majority of the House of Lords was that the contracting party, on a contract for the benefit of a third party, would otherwise have been entitled to nominal damages only). See also, in the context of an interim prohibitory injunction, *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349, 380.

79. Mr de Garr Robinson submitted that difficulty in assessing damages does not, in itself, make damages inadequate. He relied on *Fothergill v Rowland* (1873) LR 17 Eq 132. There an injunction preventing breach of an output contract, amounting to indirect specific performance, was refused. It was denied that damages were inadequate because of difficulty in assessment. The difficulty in assessment arose not only because of the speculation required in working out market prices in a long-term contract but also because one could not state in advance the exact quantity of goods to be supplied. Yet Sir George Jessel MR, sitting at first instance, said at p 140:

> "To say that you cannot ascertain the damage in a case of breach of contract for the sale of goods, say in monthly deliveries extending over three years … is to limit the power of ascertaining damages in a way which would rather astonish gentlemen who practise on what is called the other side of Westminster Hall. There is never considered to be any difficulty in ascertaining such a thing, therefore I do not think it is a case in which damages could not be ascertained at law."

80. However, there are cases going the other way on this question. These include *Taylor v Neville* (unreported but cited in *Buxton v Lister* (1746) 3 Atk 383), which concerned a contract for the sale of 800 tons of iron involving delivery in instalments over a number of years, and *Adderley v Dixon* (1824) 1 Sim & St 607 which dealt with a contract for the sale of debts proved in bankruptcy. See also, more recently, *AB v University of XYZ* [2020] EWHC 2978 (QB) at para 102 (and, albeit outside the context of direct or indirect specific performance, difficulty of assessment has been a reason for regarding damages as inadequate for the purposes of the grant of an interim prohibitory injunction: see, eg, *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361, 371-372; *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349, 380). Moreover, as a matter of principle, it must be correct that, when considering specific performance, damages are inadequate where there is grave doubt about whether they will put the claimant into as good a position as if the contract had been performed. See, generally, Edwin Peel, *Treitel's Law of Contract*, 15th ed (2020), para 21-022.

81. In our view, therefore, in agreement with the submissions of Mr Segal, damages would be inadequate here because of the difficulties of assessment and because non-pecuniary loss would be irrecoverable.

82. Nor do we think there is any "want of mutuality" objection to indirect specific performance at least on the facts of this case. For discussion of this objection see, for example, *Price v Strange* [1978] Ch 337. Although it is correct that, if there were to be a breach of contract by the employees, specific performance could not be ordered in favour of Tesco (see para 63 above), Tesco would have its normal contractual remedies and there is no reason to think that they would be inadequate.

83. We add that, contrary to what Bean LJ said in the Court of Appeal, we do not regard the injunction as ordered by Ellenbogen J as being too uncertain. Rather, it is clear what Tesco is required to do and not to do in order to comply with it.

84. Our conclusion is that an injunction, even though amounting to indirect specific performance, should be ordered in this unusual case. Although we considered whether a narrower formulation of the injunction granted by Ellenbogen J might be preferable, Mr de Garr Robinson offered no assistance with such a narrower formulation and submitted that Tesco's case on this remedy issue was all or nothing. In the circumstances, it would be inappropriate for us to revisit the wording.

8. Conclusion

85. We would therefore allow the appeal and reinstate the injunction granted by Ellenbogen J.

LORD LEGGATT (concurring):

86. I agree that this appeal should be allowed substantially for the reasons given by Lord Burrows and Lady Simler. But I wish to add some further explanation of why I consider that a term is necessarily implied in the claimants' contracts of employment which prevents the power to terminate their employment on notice from being exercised so as to defeat an important contractual purpose.

The question of interpretation

87. As explained by Lord Burrows and Lady Simler, the claimants are among a group of Tesco's employees who in or around 2007 agreed to relocate to a different (and distant)

place of work in return for an offer of "retained pay". Retained pay is a sum of money, calculated individually for each such employee, which was incorporated in the individual's new contract of employment to ensure that he or she did not suffer a reduction in pay as a result of agreeing to move to the new site. A key attraction of Tesco's offer was a promise that retained pay would increase in line with any future pay rise and would be a "permanent feature" of the individual's contractual entitlement. It is self-evident, without the need to have recourse to any pre-contractual documents, that Tesco must have thought it commercially necessary to offer this incentive to persuade enough employees to relocate to avoid serious disruption to its business.

88. The clause providing for retained pay was negotiated collectively by the claimants' trade union and incorporated as a term of their individual contracts of employment. I repeat for convenience the main part of this term:

> "Retained pay will remain a permanent feature of an individual's contractual eligibility subject to the following principles:
>
> (i) retained pay can only be changed by mutual consent
>
> (ii) on promotion to a new role it will cease
>
> (iii) when an individual requests a change to working patterns such as nights to days the premium payment element will be adjusted
>
> (iv) if Tesco make shift changes it will not be subject to change or adjustment."

It is common ground that the opening words quoted above are a somewhat convoluted way of saying that retained pay will remain a permanent contractual entitlement.

89. The central issue in this case is what impact, if any, the retained pay term has on the further term of each claimant's employment contract which gives Tesco the power to terminate their employment by giving a prescribed period of notice. This term states:

> "If you want to leave the Company or if we end your employment, details of notice periods required are given in the attached addendum."

The notice periods specified in the addendum are the minimum periods permitted by statute. They vary according to length of service up to a maximum period of 12 weeks' notice required to terminate the employment of an individual who has served the company for more than 13 years.

90. Tesco has relied on this termination provision to seek to remove the claimants' contractual entitlement to retained pay. It has offered them and others in their position a sum of money (equivalent to 18 months' retained pay) if they agree voluntarily to the removal of the retained pay clause from their contracts. Unless this offer is accepted, Tesco proposes to terminate the individual's employment by giving the required period of notice and to offer to re-engage the individual under a new contract in the same role as before but on terms which do not include a right to retained pay.

91. It seems obvious that, if this scheme is permissible, the benefit of retained pay will prove to have been anything but permanent. It will turn out to be a merely transient feature of the claimants' contractual entitlement which is, and was always, capable of being removed whenever Tesco chose to remove it by the expedient of terminating their employment on notice and making any offer of re-employment an offer to enter into a new contract without the retained pay term. It is less obvious what, contractually, prevents Tesco from adopting this expedient.

92. The question is purely one of contractual interpretation, as the claimants' case is based solely on what has been agreed in their contracts of employment. They do not rely on any statutory remedies for unfair dismissal, and I agree with their submission that the availability or otherwise of such remedies is not material in deciding what the relevant terms of their contracts mean.

Tesco's case

93. The nub of Tesco's case is simple. Tesco argues that the promise that retained pay will remain a permanent contractual entitlement can mean only that the right to retained pay will last for as long as Tesco's contractual obligation to employ the individual lasts. It cannot reasonably be understood to confer a right which continues after the employment relationship has ended. For as long as that relationship endures, the right can only be removed or otherwise changed by mutual consent (as the retained pay clause provides). But, like every other entitlement under the contract, it is subject to Tesco's right of termination on notice. Therefore, it is said, the retained pay clause does not preclude Tesco from terminating the claimants' employment on notice as it now proposes to do if the retained pay term is not removed by mutual agreement.

An ambiguity in the claimants' case

94. The argument in the courts below seems to have been confused by an ambiguity in the claimants' case. Their contention (repeated in their written case on this appeal) was that the promise that retained pay will remain a permanent contractual entitlement meant that the right would last for so long as the affected employees were employed by Tesco at the new location in their original role. It is unclear from this formulation whether the claimants meant to suggest that the right to retained pay would survive the termination of their employment provided they were re-employed by Tesco at the same location in the same role. It appears that the judge may have understood the claimants to be so submitting, as she perceived a conflict between the entitlement to retained pay and termination of the contract to remove that right "in circumstances in which a fresh contract will be offered, in relation to the same substantive role, which will confer no such entitlement": [2022] EWHC 201 (QB); [2022] ICR 722, para 40.

95. This certainly seems to be how the Court of Appeal understood the claimants' case: see [2022] EWCA Civ 978; [2022] ICR 1573, para 36. So understood, Bean LJ gave a conclusive answer to it, when he said:

> "[I]t does not … make any sense to say that if, having given notice of termination, the company makes no offer of a new job it has no liability for breach of contract; if it then offers the employee a new job in a different role there is no continuing entitlement to Retained Pay; but that if it makes an offer to re-engage the employee in the same role as before it can only be on the original terms."

96. In oral argument in this court Mr Oliver Segal KC (who did not appear below) made it clear that the claimants do not maintain that the entitlement to retained pay can ever survive the termination of their employment and do not contend that it makes any difference in this regard whether, following termination, the employee is re-engaged in the same role. The claimants accept that the entitlement to retained pay will last only for as long as their employment under their existing contract lasts. The submission that the entitlement will continue for as long as the employees are employed by Tesco in their original role should be understood simply as a reference to the qualification in the retained pay clause that "on promotion to a new role [the right] will cease."

97. It is therefore common ground between the parties that, on the proper interpretation of the retained pay clause, the entitlement to retained pay is "permanent" only while the existing employment relationship endures. The real issue is whether Tesco's power to terminate the employment by giving notice is completely unqualified, as Tesco submits,

or whether, as the claimants submit, it is subject to an implied restriction that it may not be exercised for the purpose of removing or diminishing the right to receive retained pay.

Interpretation and implication

98. Although this question is one of interpretation of the contract, it is necessary to keep in mind that there are two distinct, albeit closely related, methods of contractual interpretation in English law. The first is the method used to determine the meaning of the express terms of a contract. The applicable principles have been authoritatively explained in many cases at this appellate level, including *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912, and more recently *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173, paras 10-13. The essential task is to identify what a reasonable person with all the relevant background knowledge which would reasonably have been available to the parties when they made the contract would have understood the language used to mean.

99. The second method is used to determine whether, in addition to the express terms of the contract, any further term is implied. We are not concerned here with terms implied by law, which operate by default as standard terms of any contract of a particular type unless the parties agree otherwise. The question is whether a term is to be implied "in fact". This kind of implied term is a term of a particular contract which, although not expressly stated, the parties have implicitly agreed. Such a term is identified by a process of interpretation which has much in common with the method used to ascertain the meaning of the express terms. The test is also objective and involves an inquiry into what reasonable people in the position of the parties at the time of contracting would have understood the effect of their agreement to be. Any implied term of this kind is derived from the express terms construed in the light of commercial common sense and the circumstances known (or presumed to be known) to the parties at the time of contracting: see *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742, paras 15, 23.

100. Although the implication of a term is an exercise in interpretation, however, it is not an "orthodox instance" because it does not involve assigning a meaning to one or more express provisions: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 345 (Mason J). Rather, it involves what Sir Thomas Bingham MR described as "a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision": *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481. (By this, he evidently meant "no express provision".) He went on to say: "It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power."

101. In *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988, Lord Hoffmann, giving the advice of the Privy Council, maintained that there is only one principle of interpretation, which is to determine what a reasonable person would understand the instrument to mean. He also said that the established rules for deciding whether a term is implied are not to be treated as "different or additional tests" or "as if they had a life of their own." Rather, they are to be understood as different ways of expressing "the central idea that the proposed implied term must spell out what the contract actually means" (para 27). This account brings out the point that the implication of a term does not involve adding something to the parties' agreement: it identifies part of that agreement which is not expressed in the contractual document. But it is misleading in so far as it suggests that the process for deciding whether a term is implied is no different from the process of identifying the meaning of the express terms. That suggestion was decisively rejected by a majority of the Supreme Court in the *Marks and Spencer* case. Lord Neuberger of Abbotsbury, who gave the main judgment, recognised that implying a term is an exercise of interpretation, in that it involves determining the meaning and scope of the contract. But he emphasised that this should not be allowed to obscure the fact that determining the meaning of the express terms and deciding whether a term is implied are different processes governed in English law by different rules: see para 26. The conceptual and legal importance of this distinction is not diminished by the fact that there is often scope for difference of opinion about precisely where the meaning of the express terms runs out and the need to imply a term arises.

The tests for implication

102. The main rule governing the implication of a term is that, to be implied, the term must be necessary either to spell out what is so obvious that it goes without saying or to give business efficacy to the contract. The first of these tests is sometimes called the "officious bystander test", referring to a personification of it described by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227. He imagined an "officious bystander" present while the parties were making their agreement who suggests that they should include a term as an express provision. The test for implication is met if the parties "would testily suppress [the bystander] with a common 'Oh, of course!'." As was rightly pointed out in *Belize Telecom*, para 25, this thought experiment, colourful as it is, is unhelpful because it invites speculation about how the actual parties to the contract might have responded rather than adopting the objective approach which the law requires. The law is not concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in their position at the time of contracting: see eg *Marks and Spencer*, para 21. This may account for why judges sometimes imagine the officious bystander answering the relevant question rather than posing it to the parties (as the original version of the test envisages): see eg *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56; [2012] SLT 205, para 33, where Lord Clarke of Stone-cum-Ebony (with whom Baroness Hale of Richmond, Lord Mance and Lord Kerr of Tonaghmore agreed) said:

> "If the officious bystander had been asked whether such a term should be implied, he or she would have said 'of course'."

103. A broader criticism is that a test of obviousness is purely impressionistic and unreasoned. Perhaps this contributes to the enduring attraction of the officious bystander, who may be felt to give a semblance of objectivity to what is really no more than the judge's own hunch. It may also explain why judges seldom rely on the test of obviousness alone. Although a separate test, it is generally applied in combination with the second, "business efficacy" test. In *Marks and Spencer*, para 21, Lord Neuberger suggested that in practice it would be a rare case where only one of those two requirements would be satisfied.

104. The business efficacy test has its origin in Bowen LJ's classic statement in *The Moorcock* (1889) 14 PD 64, 68, that "if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have." Bowen LJ further explained that "what the law desires to effect by the implication is … to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of [the] perils or chances [of the transaction]."

105. In *Marks and Spencer*, para 21, Lord Neuberger aired a suggestion made by Lord Sumption in argument in that case that another way of putting the business efficacy test might be to say that "a term can only be implied if, without the term, the contract would lack commercial or practical coherence." While that would no doubt be a sufficient reason to imply a term, it seems to me to invite consideration of the wrong question. The question is not whether the contract would work at all without the implied term, but whether, without the implied term, the contract would work in the way the parties must reasonably have intended and expected it to work. I agree with Sir Kim Lewison that that is the idea that Lord Steyn was expressing in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, when he described the implication of a term as "essential to give effect to the reasonable expectations of the parties": see Lewison, *The Interpretation of Contracts*, 8th ed (2024), para 6.85; *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718; [2020] QB 418, para 150. It also accords with the original statement of the test in *The Moorcock*. as seeking to give to the transaction "such efficacy as both parties must have intended that at all events it should have." I agree too with the Supreme Court of New Zealand that formulating the test in terms of commercial or practical coherence risks distracting from the purpose of implication, which is to give effect to the parties' bargain as objectively assessed. It is the parties' bargain, not some broader concept of business coherence, that is the focus of implication: see *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85; [2021] 1 NZLR 696, para 110.

106. Properly understood, Bowen LJ's famous statement of the law describes a more analytical approach. The first step is to identify, from one or more express terms of the contract construed in their factual setting, a relevant contractual purpose. The question then is whether the implication of a term is necessary to give effect to that purpose and prevent it from being defeated. Any term implied must be both strictly necessary and no wider than is necessary give the contract such efficacy. It must also, of course, be consistent with the express terms of the contract.

Equitable Life

107. The *Equitable Life* case provides a paradigm illustration of this approach. Life assurance policies issued by a mutual society provided for payment of an annuity at a guaranteed rate when the policy matured. The annuity was calculated by reference to a base sum which included bonuses declared from the society's investment returns. The contract also incorporated the society's articles of association which (in article 65) gave the directors of the society an "absolute discretion" to decide the amount of any bonus declared. When the current market rate for annuities fell below the guaranteed annuity rate, the society adopted a practice of declaring a lower final bonus to policyholders who took an annuity at the guaranteed rate than the amount declared to other policyholders. The issue was whether the society was entitled to adopt this practice. The House of Lords held that it was not.

108. Lord Steyn, who gave the main speech, observed that everything hinged on the meaning of article 65. He thought it impossible to assign to the language of that provision a meaning which precluded the directors from adopting an approach to the declaration of bonuses which overrode or undermined the guarantee of an annuity rate. The question was therefore whether a relevant restriction was to be implied into article 65. Lord Steyn, at p 459, described the inquiry as "entirely constructional in nature: proceeding from the express terms of article 65, viewed against its objective setting, the question is whether the implication is strictly necessary." He identified "the self-evident commercial object of the inclusion of guaranteed rates in the policy" as being "to protect the policyholder against a fall in market annuity rates by ensuring that if the fall occurs he will be better off than he would have been with market rates." He reasoned that it was necessary to imply a term which prevented the directors from defeating this contractual purpose by awarding lower final bonuses to policyholders who exercised their right to receive an annuity at the guaranteed rate. As Lord Steyn put it: "The supposition of the parties must be presumed to have been that the directors would not exercise their discretion in conflict with contractual rights."

The analysis of these contracts

109. Similar reasoning applies here. As in *Equitable Life*, the critical question is whether there is an implied restriction on the exercise of what, on the face of the contract, is an unqualified contractual power: in this case the power of the employer to terminate the employment on notice. As in *Equitable Life*, I do not think it possible to read the language of the term conferring that power as imposing any restriction on when or for what reason the power may be exercised. The question is therefore whether a relevant restriction is to be implied.

110. To answer this question, the first step is to identify the purpose of the promise included in the retained pay clause that retained pay "will remain a permanent feature" of the employee's contractual entitlement. Tesco submits that the purpose of this promise was to protect the employee against the risk that in future pay negotiations the unions might agree to the removal or dilution of the right to retained pay as part of a collective bargain which was in the interests of most of the workforce even though not in the interest of those entitled to retained pay. I accept that this is a risk that reasonable people in the position of the parties might well have had in contemplation. But this risk was addressed by the stipulation that "retained pay can only be changed by mutual consent". The more obvious and substantial risk attaching to the offer of retained pay was that, if an employee accepted the offer and relocated to the new site, Tesco would seek to remove this valuable benefit once the inducement had achieved its objective of avoiding disruption to Tesco's business. Any employee considering whether to relocate would naturally be concerned about that risk; and any reasonable person in the position of Tesco or the union would have anticipated the need to allay that concern by including protection against it if the offer of retained pay was not to be perceived as writ in water. The plain purpose of the promise that retained pay would remain a permanent contractual entitlement was to afford such protection.

111. Tesco's case, if correct, would make the protection effectively worthless. It would mean that there was nothing to stop Tesco, at any time of its choosing, from removing the right to retained pay by terminating the individual's employment on a few weeks' notice and offering to re-engage the individual on the same terms as before but without retained pay - just as Tesco is now proposing to do. This is accordingly a case in which, in the words of Lord Wright in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, 137, "some term must be implied if the intention of the parties is not to be defeated".

112. To determine what term must be implied, it is necessary to identify more precisely the reasonable expectations created by the language of Tesco's promise. It was not a promise of permanent employment. No reasonable employee would have understood literally the statement in one of the pre-contractual documents that "Retained Pay is guaranteed for life" (see para 25 above). Employees considering whether to move to a new site in return for the right to retained pay would have understood that their continued

future employment by Tesco was subject to numerous contingencies: for example, the risks that their employment would be terminated if they became unable to work through injury or long-term illness, or because Tesco later took a business decision to close the site to which the employee had moved and make everyone who worked there redundant, or because their conduct gave Tesco cause for dismissal. They must be taken to have understood too that, contractually, Tesco could decide to end their employment by giving notice even without cause, in which case their only source of legal protection would be the law governing unfair dismissal. The promise that retained pay "will remain a permanent feature" of the individual's contractual entitlement would not reasonably be understood as affording protection against these or any other risks to which the employee was already exposed. Put another way, it would not reasonably be understood as a promise that the individual's employment would continue for longer than it would have done if their contract had not incorporated the retained pay clause.

113. The minimum, however, that employees promised that retained pay would remain a permanent contractual entitlement would reasonably expect is that they would not, by the very fact of possessing that entitlement, be exposed to *greater* risk of having their employment terminated than if they did not have that entitlement. To prevent the purpose of the promise from being defeated and to give it such efficacy as both parties must have intended that it should have, it is necessary to imply a limitation on the power to terminate the employment contract that it may not be exercised for the purpose of removing the right to retained pay.

Is there a special rule for termination clauses?

114. In objection to this reasoning, Tesco relies on various judicial statements to the effect that, where a contractual termination clause is expressed in unqualified terms, no qualification will generally be implied. To see whether there is force in this objection, it is necessary to examine the reasons given for this proposition.

115. There is now a substantial body of case law holding that, where a contract confers on one party a discretionary power, then in the absence of a clear contrary intention the exercise of the power will be subject to an implied restriction that the power must be exercised in good faith and not arbitrarily, capriciously or irrationally or for an improper purpose. The leading case is *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 1 WLR 1661, a decision of this court where the relevant contractual power was a power under a contract of employment to award a death in service benefit. As a shorthand, I will refer to an implied restriction of the kind recognised in *Braganza* as a "good faith restriction". Most of the judicial statements that Tesco relies on were made in response to arguments that a contractual termination clause was impliedly qualified by such a good faith restriction.

116. I reject Tesco's initial submission that "the right of termination is not a discretionary power; it is a right." The word "right" is notoriously ambiguous. But in its primary legal sense it refers to what has been called a "claim right", meaning a legally enforceable claim against another person who owes a corresponding duty to the holder of the right. A contractual termination clause does not confer a right in this sense. There is no corresponding legal duty. It is a classic instance of a provision that confers a power to alter a legal relationship between parties. There is no conceptual reason why the exercise of such a power should be unconstrained.

117. Equally unsound, in my view, is a suggestion made that there is a material distinction between (1) a discretion that involves making an assessment or choosing from a range of options and (2) a provision that gives a party a binary choice (such as whether or not to terminate the contract), such that only the former and not the latter can be subject to a good faith restriction: see eg *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200; [2013] BLR 265, para 83; *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm); [2016] 2 Lloyd's Rep 229, para 266; *TAQA Bratani Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm); [2020] 2 Lloyd's Rep 64, paras 35, 51. There is no reason as a matter of logic or legal principle why this should be so. A binary choice, just as much as one made from a range of options, may involve an exercise of evaluative judgment to be made in good faith and not arbitrarily, capriciously or irrationally or for an improper purpose. *Braganza* itself is an example. The death in service benefit claimed in that case was not payable if, in the opinion of the employer, the employee had committed suicide. The decision for the employer was a binary one: either that it was or was not of the opinion that Mr Braganza had committed suicide. There was no other option. But this did not prevent the implication of a good faith restriction on how the decision was made.

118. Tesco also relies on *Lomas v JFB Firth Rixson Inc* [2012] EWCA Civ 419; [2012] 2 All ER (Comm) 1076, para 46, where the Court of Appeal characterised as "hopeless" an argument (abandoned during the appeal) that the power of the Non-Defaulting Party under the ISDA Master Agreement to bring the agreement to an end upon the occurrence of an Event of Default was subject to a good faith restriction. Longmore LJ said:

> "The right to terminate is no more an exercise of discretion, which is not to be exercised in an arbitrary or capricious (or perhaps unreasonable) manner, than the right to accept repudiatory conduct as a repudiation of a contract. … no one would suggest that there could be any impediment to accepting repudiatory conduct as a termination of the contract based on the fact that the innocent party can elect between termination and leaving the contract on foot. The same applies to elective termination."

This statement was made, however, with regard to an Event of Default which is treated contractually as a repudiatory breach of the contract. Such a breach has the effect of releasing the innocent party from any obligation to continue to perform the contract. There is in that event no justification for implying any restriction on the freedom of the innocent party to treat the parties' obligations of further performance as at an end. It does not follow that the same is true when there is no repudiatory breach or similar failure or refusal to perform by the party whose contractual rights are being terminated.

119. A more substantial argument is that the rationale for recognising a good faith restriction does not extend to a decision whether to terminate the contract. The gist of this argument is that, although contracting parties may reasonably expect each other to act in good faith and in a spirit of cooperation in carrying out the contract - particularly where the contract is a relational one such as a contract of employment (see eg *Braganza*, paras 54 and 61, per Lord Hodge) - this does not apply when it comes to ending the relationship. At this point, it is suggested, the parties "are no longer engaged in what may be characterised as a joint endeavour, but considering whether that joint endeavour should continue" and must be expected in making that decision to have regard solely to their own self-interest: see *Monk v Largo Foods Ltd* [2016] EWHC 1837 (Comm), para 87(ii); *Monde Petroleum*, para 272; and David Foxton, "A Good Faith Goodbye? Good Faith Obligations and Contractual Termination Rights" [2017] LMCLQ 360, 381-383.

120. For my part, I find it difficult to see why the expectation that the employer will not abuse its contractual powers should be supposed to evaporate when the decision in contemplation is whether to terminate an individual's employment. Such a decision is made at a time when the employment relationship is still subsisting and subject to a mutual duty of trust and confidence. The fact that in deciding whether to end the relationship the employer must be expected to have regard solely to its own business interests does not mean that the employer must be free to exercise a contractual power of termination on the basis of its "uninhibited whim" (to adopt the phrase used by Leggatt LJ in *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star)(No 2)* [1993] 1 Lloyd's Rep 397, 404).

The "*Johnson* exclusion"

121. In *Johnson v Unisys Ltd* [2001] UKHL 13; [2003] 1 AC 518 the House of Lords held that the mutual duty of trust and confidence implied in an employment contract does not apply to the manner in which an employee is dismissed so as to give rise to a claim for damages for psychiatric injury caused by breach of this duty; nor can an obligation be implied that the power of dismissal must be exercised fairly and in good faith. This was said to be because to develop the common law in this way would cut across the statutory scheme enacted by Parliament to provide compensation for unfair dismissal. In the High Court Tesco argued that what has been called the "*Johnson* exclusion" applies to the claims made here. That argument was rejected by the judge and has not been maintained

by Tesco in the Court of Appeal or on this appeal. As Ellenbogen J pointed out at paras 48-49 of her judgment, the claimants are not arguing that there is an implied obligation not to act in a particular manner, which Tesco is threatening to breach. Their case is that there is an implied restriction on the grounds on which the power of dismissal may lawfully be exercised which would make the dismissals themselves wrongful. This is one reason why the "*Johnson* exclusion", as Bean LJ said at para 21 of the Court of Appeal judgment, "has nothing to do with the issues in the present case".

Alleged inconsistency with the express term

122. There are dicta in the speeches of Lord Hoffmann and Lord Millett in *Johnson* suggesting that, where a contractual power of dismissal is expressed in unqualified language, to imply a term which qualifies the grounds on which the power may be exercised would be inconsistent with the express terms of the contract: see paras 37-42, 71 and 79. Both referred to the classical approach of the common law that an employer can terminate the contract of employment at any time and for any reason or for none: see *Ridge v Baldwin* [1964] AC 40, 65. Both also quoted a statement of Lord Reid in *Malloch v Aberdeen Corpn* [1971] 1 WLR 1578, 1581:

> "At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid."

123. Lord Millett took this further in giving the advice of the Judicial Committee of the Privy Council on an appeal from Bermuda in *Reda v Flag Ltd* [2002] UKPC 38; [2002] IRLR 747 - a case on which Tesco particularly relies. The respondent company had terminated the appellants' employment in order to prevent them from participating in a stock option plan which it was about to introduce. In doing so, the company relied on a clause in the appellants' contracts which gave the company a power to terminate their employment at any time during the contract period "without cause". The appellants argued that the exercise of this power was vitiated by a collateral purpose. In rejecting that argument, Lord Millett said, at para 43, that "in the present context there is no such thing as a 'collateral' or improper purpose; a power to dismiss without cause is a power to dismiss for any cause or none."

124. The Judicial Committee also rejected an argument that the termination of the appellants' employment in order to avoid having to grant them stock options was a breach of the implied duty of trust and confidence. In justifying this conclusion Lord Millett said, at para 45, that this implied duty "in common with other implied terms … must yield to the express provisions of the contract". He went on:

> "As Lord Millett observed in *Johnson v Unisys* it cannot sensibly be used to extend the relationship beyond its agreed duration; and, their Lordships would add, it cannot sensibly be used to circumscribe an express power of dismissal without cause. This would run counter to the general principle that an express and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification: see *Nelson v British Broadcasting Corporation* [1977] IRLR 148 …"

125. Three points may be made about this reasoning. First, to say that an implied term cannot sensibly be used to extend the relationship beyond its agreed duration is undeniable but begs the question of what the parties have agreed (expressly or impliedly) will be the duration of the employment relationship. If the parties have impliedly agreed that a power of dismissal is subject to a good faith restriction, a purported exercise of the power of dismissal which infringes that restriction will not extend the relationship beyond its agreed duration because ex hypothesi the parties have not agreed that the relationship can be ended by such an act.

126. Second, the inconsistency in *Reda* was between a putative implied term that the employer "would not without reasonable and proper cause destroy the relationship of trust and confidence which should exist between employer and employee" and an express power to dismiss "without cause". There would have been no such inconsistency if the express power had simply been a power to terminate the employment on notice.

127. Third, I think it wrong to say that there is a "general principle that an express and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification". As shown by the *Braganza* line of cases, the law is in fact to the opposite effect. A contractual power, even though expressed in unqualified terms, is in general circumscribed by an implied qualification that the power must be exercised in good faith and not arbitrarily, capriciously or irrationally or for an improper purpose. Nor does the case cited by Lord Millett support the proposition for which it was said to be authority. In *Nelson v British Broadcasting Corpn* [1977] ICR 649; [1977] IRLR 148 an industrial tribunal had found that it was a term of the claimant's contract of employment as a broadcaster, arising by necessary implication from the express terms, that he was employed only for the purposes of broadcasts to the Caribbean. The Court of Appeal held that such an implied term was inconsistent with a term of the contract which gave the corporation the express right to direct the employee to serve when, how and wherever the corporation required, and imposed a corresponding express duty on the employee to comply with any such order and direction. The inconsistency identified was entirely specific to the facts of the case and the Court of Appeal did not espouse any broader principle.

128. If the implication of a good faith restriction on the exercise of a contractual power of dismissal involves an inconsistency, it is not generally with the express language of the contract but with the traditional approach of the common law. The real question is whether the old common law rule that an employer "can act unreasonably or capriciously if he so chooses but the dismissal is valid" (see para 122 above) is any longer consistent with community expectations and values; and, in particular, whether it should now give way to the implication as a matter of law of a term of the kind recognised in *Braganza*.

129. Whatever the general position under the common law may now be, however, it does not prevent the implication in fact of an individualised term derived from the express terms of the contract which limits the grounds on which the employer may exercise a contractual power to dismiss. If on a correct interpretation of their bargain the parties have implicitly agreed such a term, giving effect to it accords with even the most hard-nosed application to the employment relationship of the principle of freedom of contract.

Analogous cases

130. In *Reda* there was no basis for implying a term which prevented the company from terminating the appellants' employment to avoid having to grant them stock options because there was nothing in their contracts which gave rise to any expectation that the company would introduce a stock option scheme while they were employed by the company. So no contractual purpose was defeated by terminating their contracts to prevent them from participating in the scheme which the company later decided to introduce. Lord Millett's dictum that "in the present context there is no such thing as a 'collateral' or improper purpose" must be read in relation to these facts and not extrapolated beyond that context.

131. A number of cases show how an express power of dismissal may be circumscribed by an implied term that prevents the power from being used for a purpose which is improper because it is contrary to the purpose of another provision of the contract. In *Aspden v Webbs Poultry and Meat Group (Holdings) Ltd* [1996] IRLR 521 the claimant's contract of employment incorporated permanent health insurance which was intended to provide an income if the employee was unable to work due to illness or injury for more than a specified period. Sedley J held that there was an implied term which prevented the employer from depriving the claimant of this benefit by terminating the contract (save by summary dismissal) while he was incapacitated for work. This decision has been approved and followed in later cases, in which the formulation of the implied term has also been refined. As subsequently formulated, the term implied is simply that the employer will not dismiss the employee on the grounds of continuing incapacity to work: see *Earl v Cantor Fitzgerald International* [2000] EWHC 555 (QB), para 41; *Awan v ICTS (UK) Ltd* [2019] ICR 696, para 55. This formulation of the term is appropriately tailored to the necessity of the case.

132. Tesco has argued that the cases involving permanent health insurance should be distinguished on the ground that there was in those cases an internal inconsistency in the contract between the entitlement to be paid an income when unfit to work through illness and the exercise of the power to terminate the employment on the ground that the employee was unfit to work through illness. Tesco submits that there is no similar inconsistency involved here in terminating the claimants' employment to bring an end to their entitlement to retained pay. That would be true if the contracts in this case had said nothing about how long the entitlement to retained pay would last. But they contain a promise that retained pay will remain a permanent contractual entitlement. The purpose of that promise would likewise be defeated if the employee could be dismissed for the very reason of having that entitlement.

133. In the Court of Appeal, at paras 50-51 of the judgment, Bean LJ accepted that the permanent health insurance cases were rightly decided and that this case would be analogous to them if the promise made in the retained pay clause had been that the entitlement to retained pay "will continue until you reach the age of 65". In that event the promised benefit would be rendered valueless if the employer could dismiss the employee at any time on notice in order to remove that benefit. Bean LJ said, however, that, because this is not how the retained pay clause is worded, the present case is not analogous. He gave no reason to justify this assertion and I can see no rational distinction between the two cases. It makes no sense to say that a promise that retained pay would be a "permanent" contractual entitlement puts the employee in a far worse position than a promise that retained pay would be a contractual entitlement until the individual reaches the age of 65. In each case the promised benefit would be rendered valueless if the employer could dismiss the employee at any time on notice in order to remove it.

134. The permanent health insurance cases do not stand alone. In *Jenvey v Australian Broadcasting Corpn* [2002] EWHC 927 (QB); [2003] ICR 79, the claimant was contractually entitled to a payment if dismissed for redundancy, which his employer sought to avoid making by terminating his employment on notice. Elias J held, at para 26, that there was an implied term of the contract which prevented the employer, having resolved to dismiss an employee for redundancy, from dismissing the employee for any other reason (or for no reason) in the absence of good cause. He reasoned that it would be contrary to the purpose of the redundancy scheme to permit the employer in these circumstances to exercise its contractual power of dismissal on notice so as to deny the employee the very benefits which the scheme envisaged would be paid.

135. In *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2; [2017] ICR 531 an employee received a loan from his employer to study abroad on terms that the loan would be waived if after completing his course he returned and worked for the employer for a further period of five years. The Privy Council held that there was an implied term that the employer "would do nothing of its own initiative to prevent him from providing such service, justified dismissal for repudiatory breach and compulsion excepted and that, if it did, a similar waiver would operate": para 11.

136. All these cases are illustrations of the proposition that a term may be implied which restricts the grounds on which a contractual power of dismissal may be exercised if and to the extent necessary to prevent the power from being used to defeat the purpose of a separate contractual obligation. I do not agree with the Court of Appeal that it is difficult in this case to define clearly or precisely what term should be implied. The formulation adopted by the judge, at para 54.4 of her excellent judgment, is both clearly expressed and tailored to the necessity of the case. The implied term is that the power to terminate the employment on notice "cannot be exercised for the purpose of removing or diminishing the right of that employee to receive retained pay".

Conclusion

137. For these reasons, I agree with Lord Burrows and Lady Simler that there is a term of the claimants' contracts of employment to this effect, implied in fact. I also agree with them that the judge was entitled to grant a permanent injunction to restrain Tesco from violating that implied term. Like them, I do not think it a valid objection that the injunction would have the practical effect in this case of compelling the employer to continue to employ the individuals concerned. In my view, there is no rule of law that a court should not compel an employer to perform a contract of employment. Rather, there is a principle that a court should not compel the employer to continue to employ an individual in whom the employer has lost confidence. That principle does not apply here. So much is plain from Tesco's proposal for the removal of the retained pay clause which, by its very terms, demonstrates Tesco's willingness to continue to employ the individuals to whom it is addressed. It is equally plain that, for the reasons given by Lord Burrows and Lady Simler, damages would not be an adequate remedy. The judge's order should therefore be restored.

LORD REED (concurring):

138. I also agree that this appeal should be allowed for the reasons given by Lord Burrows and Lady Simler. I add only a few comments.

139. The critical facts appear to me to be the following. In 2007 Tesco planned an expansion and restructuring of its distribution network. This involved the closure of existing distribution centres and the opening of new ones some distance away. It needed to retain the experienced staff who worked at the existing centres, and sought to encourage them to relocate to the new centres (or to existing centres which were being retained), rather than accepting the redundancy payment which would otherwise have been due. As an incentive, it agreed to pay them a substantial pay increment, described as "retained pay", following negotiations with the first claimant, the Union of Shop, Distributive and Allied Workers ("USDAW").

140. The staff affected were informed by Tesco of the outcome of the negotiations, and were told that those who relocated would receive retained pay for as long as they were employed by Tesco in their current role. Those who agreed to relocate were paid the retained pay. Each of the claimants moved house and took out a mortgage on the basis of an income which included retained pay.

141. On 18 February 2010 Tesco and USDAW entered into a collective agreement which includes a clause concerned with retained pay, which I shall refer to as the retained pay clause. It provides:

> "Retained pay will remain a permanent feature of an individual's contractual eligibility subject to the following principles:
>
> (i) retained pay can only be changed by mutual consent
>
> (ii) on promotion to a new role it will cease
>
> (iii) when an individual requests a change to working patterns such as nights to days the premium payment element will be adjusted
>
> (iv) if Tesco make shift changes it will not be subject to change or adjustment."

It is common ground that the words "contractual eligibility" mean "contractual entitlement". Accordingly, the opening words of the clause mean that retained pay will remain a permanent feature of an individual's contractual entitlement.

142. The collective agreement is not legally binding, by virtue of section 179 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"). However, it is common ground that it was incorporated into the claimants' contracts of employment at or shortly after the time it was signed.

143. The claimants' contracts of employment also contain a clause, which I shall refer to as the termination clause, that entitles Tesco to terminate the employment on giving a specified period of notice. It provides:

> "If you want to leave the Company or if we end your employment, details of notice periods required are given in the attached addendum."

144. In January 2021 Tesco announced its intention to end the payment of retained pay. It gave notice to all staff in receipt of retained pay that it intended to seek their agreement to remove the retained pay clauses from their contracts. Any employees who did not give their agreement would be dismissed and offered re-engagement on terms which excluded retained pay.

145. Against that background, the primary question in dispute is whether the retained pay clause has the effect of preventing Tesco from exercising its power to terminate the claimants' contracts of employment in order to re-employ them on terms which make no provision for retained pay.

146. I do not find it possible to answer that question simply by construing the contract, in the sense of carrying out "the process (sometimes referred to as *interpretation*) by which a court arrives at the meaning to be given to the language used by the parties in the express terms of a written agreement" (*Chitty on Contracts*, 35th ed (2023), para 16-047). The meaning of the termination clause is clear: Tesco can dismiss the claimants on giving the requisite period of notice. The power to terminate is not subject to any other qualification.

147. As for the retained pay clause, the words "retained pay will remain a permanent feature of an individual's contractual eligibility" mean no more (and no less) than that retained pay will continue to be paid to the employee in question for as long as his or her employment continues (that it must continue in the same role follows from the subsequent provision that "on promotion to a new role it will cease").

148. On that interpretation of the relevant clauses, Tesco cannot be prevented from exercising its power to terminate the claimants' contracts unless a term can be implied in the contracts to the effect that Tesco's right to terminate the contract is qualified, so that it cannot be exercised for the purpose of depriving the employee of the right to retained pay. I am in no doubt that such a term can indeed be implied. The circumstances in which the right to retained pay was agreed make it clear that it was intended as an inducement to experienced employees to relocate rather than accepting redundancy and receiving the redundancy payments to which they were otherwise entitled. That intention would be completely undermined if the contract permitted Tesco to dismiss the employees whenever it pleased in order to avoid paying retained pay. No reasonable person in the position of Tesco or the relevant employees could have intended the contract to have that effect.

149. In relation to this matter, although I agree with Lord Leggatt's analysis at paras 110-113 above, and also agree with him that the so-called *Johnson* exclusion (*Johnson v Unisys Ltd* [2001] UKHL 13; [2003] 1 AC 518) has nothing to do with this case, I do not find it necessary to rely on the reasoning set out at paras 114-120. Nor would I endorse the statement at para 127 that "a contractual power, even though expressed in unqualified terms, is in general circumscribed by an implied qualification that the power must be exercised in good faith and not arbitrarily, capriciously or irrationally or for an improper purpose". That is a wider proposition than has been adopted in earlier cases in this court, such as *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 1 WLR 1661, and it is inconsistent, as Lord Leggatt recognises, with dicta in the House of Lords in cases such as *Ridge v Baldwin* [1964] AC 40, 65, and *Malloch v Aberdeen Corpn* [1971] 1 WLR 1578, 1581. The question he poses at para 128, as to whether what he describes as "the old common law rule" is any longer consistent with community expectations and values, does not require to be decided on this appeal.

150. There is one other matter on which I should comment, arising from para 4 of the judgment of Lord Burrows and Lady Simler. Considering the situation where a provision in a collective agreement is incorporated into a contract of employment, they state, correctly in my view, that "at least where it is not being suggested that the union and the employee had different intentions, the objective intentions initially of employer and union and, subsequently, of employer and employee may all be relevant in deciding on the correct interpretation of a term that was agreed in a collective agreement and incorporated into a contract of employment".

151. It may be desirable to say something more about this point, as the relationship between the intentions of the parties to a collective agreement and the intentions of the parties to employment contracts into which the terms of the collective agreement are incorporated is not a straightforward matter.

152. In *Adams v British Airways plc* [1996] IRLR 574 ("*Adams*"), to which Lord Burrows and Lady Simler refer, the intentions of the parties to a collective agreement were examined by the Court of Appeal in order to arrive at the meaning of a term in that agreement as incorporated into individual contracts of employment. The doctrinal basis of that approach was not discussed. In *Anderson v London Fire & Emergency Planning Authority* [2013] EWCA Civ 321; [2013] IRLR 459 ("*Anderson*"), to which Lord Burrows and Lady Simler also refer, *Adams* was treated (at para 16) as anticipating the approach to construction described by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 (an approach which in reality had much older antecedents): that is to say, "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". That approach, applied to an employment contract, focuses on the intention of the parties to that contract, objectively ascertained in the context of what Lord Hoffmann described as the "matrix of fact". The implication of what

was said in *Anderson* is that the intentions of the parties to an antecedent collective agreement can form part of that factual matrix.

153. Although this is an unusual application of the contextual interpretation of a contract, in so far as it takes account of the intentions of the parties to an antecedent agreement, it appears to me that it can be justified in this context. Where a term of a collective agreement is incorporated into numerous individual employment contracts, as ordinarily occurs, one can infer from that background, absent any indication to the contrary, that the parties to the employment contracts intend that the term should have the same meaning in each of those contracts, and that that meaning should be the same as the meaning which it has in the context of the collective agreement. That is, in general, the whole point of incorporating collectively agreed terms into individual contracts of employment. I refer to "meaning" rather than "effect", since the term in the collective agreement is unlikely to be intended to have any legal effect in that context, having regard to section 179 of the 1992 Act.