Michaelmas Term
[2024] UKSC 37
On appeal from: [2022] EWCA Civ 1408

JUDGMENT

National Union of Rail, Maritime and Transport Workers and another (Respondents) *v* Tyne and Wear Passenger Transport Executive T/A Nexus

before

Lord Lloyd-Jones
Lord Sales
Lord Leggatt
Lord Burrows
Lady Simler

JUDGMENT GIVEN ON
13 November 2024

Heard on 14 May 2024

Appellant
David Reade KC
Joseph Bryan
(Instructed by Addleshaw Goddard LLP (Leeds))

Respondents
Oliver Segal KC
Madeline Stanley
(Instructed by Thompsons Solicitors LLP (Newcastle))

LORD LEGGATT AND LADY SIMLER (with whom Lord Lloyd-Jones, Lord Sales and Lord Burrows agree):

Introduction

1. Collective agreements reached through collective bargaining between an employer and a recognised trade union exist in a legal twilight. Unless expressly stated to be so, such agreements are not legally enforceable contracts. Yet typically, through express words of incorporation or custom and practice, terms of collective agreements dealing with pay and conditions are incorporated in contracts of employment between the employer and its employees. As terms of those contracts, such terms are legally enforceable.

2. This appeal raises questions about what happens if the written record of a collective agreement, by mistake, does not accurately reflect what the employer and the union representatives agreed. If a document inaccurately records the terms of a contract, a court may rectify it. But a collective agreement is not a legally enforceable contract. Is rectification possible? Alternatively, if a mistake is made in recording terms of a collective agreement, can contracts of employment which incorporate those terms be rectified? In either case, if rectification is possible, who should the parties to the claim for rectification be? And must any such claim be made in the High Court, or can the relevant question be decided by an employment tribunal?

3. The claim which gives rise to these questions has been brought by the Tyne and Wear Passenger Transport Executive, known as "Nexus", against two independent trade unions which Nexus recognises as entitled to conduct collective bargaining on behalf of employees working on the Tyne and Wear Metro. The unions are the National Union of Rail, Maritime and Transport Workers and Unite the Union. The claim seeks rectification of a document recording a collective agreement made between Nexus and the unions in 2012.

The letter agreement

4. At that time the pay of relevant employees of Nexus (in grades 1 to 3) included, in addition to basic pay, a shift allowance which gave a percentage uplift to basic pay for working particular shifts, and a "productivity bonus". Despite its name, the "productivity bonus" was not discretionary and was calculated as 25.5% of basic pay. In the 2012 pay negotiations Nexus made an offer to "consolidate the productivity bonus (25.5%) into basic salary", which Nexus said "will benefit employees by having an official higher basic salary". The unions accepted this offer. It was recorded in a letter dated 10 October 2012

sent by Nexus to the unions. This letter, and the collective agreement which it records, have been referred to as "the letter agreement".

5. A dispute arose about the meaning of the letter agreement. The unions contended that the effect of agreeing to consolidate the productivity bonus into basic pay was to increase basic pay by 25.5% and, since the shift allowance is calculated by reference to basic pay, to increase the shift allowance by this amount. Nexus denied that this was the intention or effect of the letter agreement. In line with its position, Nexus continued to pay its employees without increasing the shift allowance in this way.

Status of the letter agreement

6. The principal collective agreement setting out the "Conditions of Service for Metro Staff" is embodied in a document known as the "Red Book". When Nexus and the unions reach a collective agreement, such as the letter agreement, which amends the terms and conditions set out in the Red Book, the document recording that agreement is placed with the original Red Book document and from then on forms part of the Red Book.

7. By section 179(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"), a collective agreement is conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement (a) is in writing and (b) contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract. The Red Book, including the letter agreement, does not contain such a provision. It is common ground that, as a result, the Red Book, including the letter agreement, does not constitute a legally enforceable contract between Nexus and the unions.

8. The written statement of particulars of employment provided by Nexus to each relevant employee as required by section 1 of the Employment Rights Act 1996 ("the 1996 Act") is expressed to constitute the definitive record of the contract of employment, and includes the following clause:

> "Your Terms and Conditions of employment incorporate the Collective Agreement between Nexus and its recognised Trade Union for the negotiation of the Conditions of Service for Metro Staff ('Red Book')."

9. As already mentioned, the fact that a collective agreement is not itself a legally enforceable contract does not prevent its terms when incorporated in contracts of

employment from being legally enforceable: see eg *Marley v Forward Trust Group Ltd* [1986] ICR 891, 896. A contract of employment is objectively intended to create legally enforceable rights and obligations between the employer and employee. The parties to the contract are not the same as the parties to the collective agreement and the presumption in section 179(1) of the 1992 Act that the collective agreement was not "intended by the parties to be a legally enforceable contract" therefore does not apply. Thus, it is not in dispute that, as terms of the contracts of employment between Nexus and its relevant employees, the terms of the letter agreement regarding the consolidation of the 25.5% productivity bonus into basic pay are legally enforceable.

The Anderson proceedings

10. In 2015 Mr Steven Anderson and 69 other claimants brought a complaint against Nexus in an employment tribunal claiming that they had been underpaid because the shift allowance paid to them had not been increased in accordance with what they argued was the correct interpretation of the letter agreement. The Anderson claimants alleged that Nexus had, as a result, made unauthorised deductions from their wages contrary to section 13 of the 1996 Act.

11. The employment tribunal ruled that the claim was well founded. The tribunal gave the parties time to reach an agreement on remedy, failing which the case was to be listed for a "remedies hearing". Because of the subsequent proceedings that we will describe, no such hearing has yet taken place.

12. Nexus appealed from the decision of the employment tribunal to the Employment Appeal Tribunal, which dismissed the appeal: see *Tyne and Wear Passenger Transport Executive v Anderson* [2018] ICR 1207. A further appeal to the Court of Appeal (heard together with an appeal in another case) was also dismissed: see *Agarwal v Cardiff University* [2018] EWCA Civ 2084; [2019] ICR 433. In March 2019 the Supreme Court refused Nexus permission to appeal from that decision.

Other claims

13. Since the Anderson proceedings were begun in 2015, seven similar claims have been brought by other employees (or groups of employees) in the employment tribunal alleging that Nexus has made unauthorised deductions from their wages. The claimants in these further claims rely on the decision, ultimately of the Court of Appeal, in the Anderson proceedings about the correct interpretation of the letter agreement. Nexus has defended the claims, but all are currently stayed pending the outcome of the present proceedings.

These proceedings

14. Having had its case on the correct interpretation of the letter agreement rejected, Nexus changed course. In May 2020 Nexus began these proceedings in the Chancery Division of the High Court claiming rectification. But whereas the question about the correct interpretation of the letter agreement had been decided in proceedings between Nexus and employees (to which the unions were not parties), Nexus brought this claim against the unions. None of the employees whose contracts of employment are affected was made a defendant.

15. In its particulars of claim Nexus claims that the result of the interpretation placed on the letter agreement in the Anderson proceedings - now accepted by Nexus to be correct - is that the letter agreement does not accurately record the common intention of Nexus and the unions. That common intention is said to have been that the consolidation of the 25.5% productivity bonus into basic pay would not increase the shift allowance. Nexus seeks rectification of the letter agreement on the basis of this alleged common mistake. Alternatively, Nexus contends that, if the unions did not share its understanding of the letter agreement, they must have known what Nexus intended its effect to be, and that the letter agreement should accordingly be rectified on the basis of a unilateral mistake made by Nexus.

16. The unions served a defence to the claim in which they denied that, on the facts, Nexus is entitled to rectification on the basis of either common mistake or unilateral mistake. They also raised a number of preliminary objections to the claim. The main objections were: (1) that the court has no power to grant rectification of a collective agreement which is not legally binding; and (2) that the Anderson proceedings have given rise to a "cause of action estoppel" which prevents Nexus from bringing this claim; alternatively, it is an abuse of process for Nexus to do so. As a further alternative ground, the unions have since also relied on the related principle of issue estoppel.

The High Court decision

17. The court directed that the question whether the claim cannot proceed by reason of cause of action estoppel and issue estoppel should be decided as a preliminary issue. The trial of that issue was heard by Mr Stuart Isaacs QC, sitting as a deputy High Court judge, at the same time as an application by the unions for the claim to be struck out or summarily dismissed. For reasons given in a judgment dated 28 May 2021, the judge decided the preliminary issue in favour of Nexus and also dismissed the unions' application for an order striking out the claim or giving summary judgment: see [2021] EWHC 1388 (Ch).

18. In short, on the preliminary issue the judge held that there is no cause of action estoppel (or issue estoppel) because the points raised by Nexus in these proceedings were not decided in the Anderson proceedings. Nor, he considered, could they have been decided in the Anderson proceedings, as rectification is not a remedy which an employment tribunal has the power to grant. For similar reasons, the judge rejected the unions' argument that the claim for rectification is an abuse of process. He also rejected their contention that the court has no power to grant rectification of a collective agreement which is not legally binding, holding that rectification is not confined to legally binding contracts. He did not accept that the appropriate defendants to the rectification claim are the employees into whose contracts the terms of the letter agreement were incorporated. Finally, the judge rejected an argument - which has not been further pursued on appeal - that the claim is barred by "laches, acquiescence and delay" on the part of Nexus.

The decision of the Court of Appeal

19. The unions appealed to the Court of Appeal, which allowed the appeal: see [2022] EWCA Civ 1408; [2023] ICR 148. Each member of the court (Underhill, Newey and Males LJJ) gave a separate judgment. The issues were considered under two heads: (1) can the court in principle rectify the letter agreement; and (2) if so, is Nexus estopped from bringing a claim for rectification - or is it an abuse of process to do so - because of the decision in the Anderson proceedings?

20. On the first question Underhill LJ accepted the unions' submission that the fact that the letter agreement, viewed purely as a collective agreement, is legally unenforceable is "an insuperable barrier to its rectification" (para 26). He recognised that the letter agreement has legal consequences for Nexus and its employees but considered that "the correct target" for rectification is not the letter agreement as such but the individual contracts of employment which embody those legal consequences (para 27). He concluded that the action is "formally defective" because "although the letter agreement is capable of rectification to the extent that its terms are incorporated in the individual contracts of employment, those contracts are not the target at which Nexus has aimed and it has in consequence proceeded against the wrong defendants" (para 31). Newey and Males LJJ agreed with this reasoning.

21. Nexus had submitted that, if the Court of Appeal reached this conclusion, Nexus should be allowed to apply to amend its claim to seek rectification of the individual employment contracts and to add the individual employees as defendants. The Court of Appeal rejected this submission primarily because Nexus had made and persisted in a deliberate decision not to sue the employees affected, but only the unions, and should live with the consequences. The Court of Appeal therefore dismissed the action, leaving Nexus, if so advised, to bring fresh rectification proceedings against the employees (without deciding whether the unions would also be proper parties).

22. The Court of Appeal still went on to consider the arguments based on cause of action estoppel, issue estoppel and abuse of process. All the members of the court agreed that it would be an abuse of process for Nexus to seek to rely on rectification at the remedy stage of the Anderson proceedings. Underhill LJ thought that Nexus is also precluded from doing so by cause of action and issue estoppel, while Males and Newey LJJ considered it unnecessary to decide that question. All the members of the court further agreed that the court is not in a position to decide whether or to what extent Nexus may be precluded from relying on rectification in answer either to any future claims which may be made by the Anderson claimants in relation to periods after those covered by their current claims or to claims made by other employees. In giving their reasons for these conclusions, the members of the Court of Appeal expressed different views on the question whether Nexus could and should have raised rectification as an issue before the employment tribunal in the Anderson proceedings.

This appeal

23. The primary ground on which Nexus was given permission to appeal to the Supreme Court is that the Court of Appeal erred in law in holding that rectification is not available for a collective agreement which is not intended to be a legally enforceable contract and/or in holding that it would be necessary to sue on the individual contracts of employment into which such a collective agreement is incorporated. These were indeed important steps in the Court of Appeal's reasoning. Ultimately, however, the reason why the Court of Appeal decided that this action should be dismissed was that Nexus had sued the wrong defendants and that any claim for rectification ought to be brought against the employees whose pay will be affected if the claim succeeds. Unless it is shown that this conclusion was wrong, this appeal against the decision to dismiss the claim cannot succeed.

24. The case advanced by Nexus assumes that, if either or both steps in the Court of Appeal's reasoning challenged by Nexus were erroneous, then it must follow that the Court of Appeal's conclusion that Nexus has sued the wrong defendants was also erroneous. In our view, that assumption is misplaced. For the reasons which follow, we consider that the Court of Appeal was indeed wrong to hold: (1) that, because the letter agreement is not legally enforceable, it is incapable of being rectified; and (2) that, to achieve the result desired by Nexus, it would be necessary (or possible) to bring a claim to rectify the individual contracts of employment which incorporate the terms of the letter agreement. But the Court of Appeal was, in our opinion, nevertheless, right to decide that the proper defendants to a claim for rectification are the individual employees whose legal rights are affected and that these proceedings are therefore defective because none of those employees is a defendant.

25. Before seeking to untangle these issues, there are some points about the remedy of rectification, none of which is controversial in these proceedings, which provide relevant legal context.

The nature of rectification

26. The first and fundamental point is that the basic role of rectification is not to correct mistakes in transactions, but to correct mistakes in documents recording transactions. As explained in *Snell's Equity*, 34th ed (2020), para 16-001:

> "Where the terms of a written instrument do not accord with the true agreement between the parties, equity has the power to reform, or rectify, that instrument so as to make it accord with the true agreement. What is rectified is not a mistake in the transaction itself, but a mistake in the way in which that transaction has been expressed in writing."

In short, rectification is about "putting the record straight": *Allnutt v Wilding* [2007] EWCA Civ 412, para 11 (Mummery LJ).

27. This point can sometimes be obscured by the ambiguity of the word "agreement" (or "contract"). In its primary meaning the word refers to a transaction involving an exchange of promises. But the word is also often used to refer to a document which records such a transaction. Thus, references to the "letter agreement" may denote either the letter dated 10 October 2012 described at para 4 above or the promises recorded in that letter. It is important not to lose sight of this distinction.

28. A second point to note is that, although claims for rectification are typically aimed at rectifying written contracts, the jurisdiction to rectify is quite general and is not confined to documents of particular types. As described in *Snell's Equity*, paras 16-004 - 16-006, documents which have been rectified include mercantile documents such as a policy of marine insurance, a bill of exchange, a transfer of shares, and a bill of quantities; conveyancing documents such as a conveyance and a lease; and unilateral instruments, such as marriage settlements, trust deeds, voluntary dispositions by trustees, and a notice of severance of a joint tenancy. There is also a power conferred by statute to rectify a will. We will mention later examples of documents which have been held to be rectifiable even though they do not themselves record any legally enforceable right or obligation.

29. In the common case where the document is contractual, there was at one time a school of thought that rectification could only be ordered to bring the document into conformity with a prior concluded contract. That view was decisively rejected by the Court of Appeal in *Joscelyne v Nissen* [1970] 2 QB 86. That case authoritatively established that the claim need not be based on a legally enforceable contract and that a common intention continuing when a contract is made is sufficient, provided there has been an "outward expression of accord".

30. Sometimes the mistake sought to be rectified is simply a clerical error in drawing up the document. But this need not be so. The document as drawn up may contain the exact words which it was intended to contain; but the words may be construed by a court as having a meaning that is different from the meaning which the parties understood and intended them to have. This possibility arises because of the "objective" approach which English law adopts to the interpretation of contractual documents (and other documents on which reliance is intended to be placed), giving them the meaning which the document would convey to a reasonable person regardless of whether this reflects what the maker(s) of the document or parties to the transaction subjectively understood or intended the document to mean. Rectification is available as a safety-valve to prevent the injustice that would occur if a party could take advantage of an objective interpretation which is inconsistent with what (in the case of a bilateral transaction) both parties actually intended the document to mean.

31. Doubt was cast on this understanding of the law by obiter dicta in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] AC 1101, paras 48-66, which suggested that the objective test should be applied, not only in interpreting the document sought to be rectified, but also in identifying the prior common intention on which the claim for rectification is based. Among other objections to this approach, it was never explained why the objective meaning of a formal written instrument intended to create legally binding obligations should be displaced in favour of the objective meaning of earlier less formal and less considered communications which were never intended to be binding if the objective meaning of those communications did not accord with the parties' shared subjective intention. In the words of *Snell's Equity*, para 16-015, the "traditional orthodox approach" was restored by the judgment of the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd* [2019] EWCA Civ 1361; [2020] Ch 365, holding that the parties must in fact have made a mistake and had the same actual intention for rectification to be granted. There must also be an "outward expression of accord" - meaning that, as a result of communication between them, the parties understood each other to share that intention: see *FSHC Group Holdings*, para 176.

32. There is an exception to the general rule that rectification is only available to correct a mistake in verbal expression common to all the parties to the transaction. Rectification may also be granted where it is shown that the document did not accurately

reflect the intention of one party to a bilateral transaction and that the other party knew and took advantage of that fact: see eg *Agip SpA v Navigazione Alta Italia SpA (The "Nai Genova")* [1984] 1 Lloyd's Rep 353, 359-362. A claim for rectification based on such a unilateral mistake, however, still requires proof of subjective states of mind.

33. It is relevant that the test for rectification, unlike interpretation, is subjective and depends on the parties' states of mind when considering the correct "target" for rectification in this case.

34. Although rectification alters documents and not the agreements or other transactions recorded in documents, its effect is to alter legal rights. It does so because the document must thereafter be interpreted in accordance with the reformed wording. In principle, the effect is retrospective. Because the words are rewritten into the form in which the document should have been written when it was created, the document is treated as if it had originally been expressed in its rectified form: see eg *Craddock Brothers v Hunt* [1923] 2 Ch 136, 151 to 152.

35. Being an equitable remedy, rectification may be refused if the effect of granting it would be unfairly to prejudice the rights of third parties: see eg *Thames Guaranty Ltd v Campbell* [1985] QB 210, 240; *Snell's Equity*, para 16-025. Alternatively, because the remedy is discretionary and may be shaped to meet the justice of the case, it would be open to the court to grant the remedy on terms which will avoid such prejudice if such terms can be identified.

Are the employment contracts rectifiable?

36. We will come in a moment to the question whether it is possible in law to rectify the record of an unenforceable collective agreement. If it is, and if the letter agreement were to be rectified in the way that Nexus seeks, we do not understand the unions on this appeal to dispute that the result would be to alter the rights of individual employees under their contracts of employment with Nexus. It is clear that it would. As discussed, their contracts incorporate the Red Book, including the letter agreement. Nexus seeks an order that the letter agreement be rectified so as to include words expressly stating that "the consolidation of the productivity bonus shall not operate so as to increase basic salary or pay for the purposes of calculating any shift allowance or other allowance, which will continue to be calculated by reference to basic salary or pay as if the productivity bonus had not been consolidated by this agreement." If the letter agreement were to be rewritten to include such words, its terms as incorporated in individual contracts of employment would have the effect that the relevant employees are not entitled to be paid the increased shift allowances which - as the courts have held and Nexus now accepts - they are entitled to receive on the current wording.

37. The Court of Appeal considered that there is another way in which that outcome could theoretically be achieved through rectification. They distinguished between "rectification of the letter agreement as such - that is, as a collective agreement reached between Nexus and the unions - and rectification of the individual contracts of employment into which the relevant term is incorporated" (see para 23 of the judgment). Although they held that the letter agreement "as such" cannot be rectified, they considered that in principle the individual contracts of employment into which the relevant term is incorporated can be rectified.

38. It may be said not to matter to the unions whether this alternative method of rectification is in principle available or not. Indeed, their position and that of the employees would be impregnable if rectification is not available at all as a remedy. However, the Court of Appeal thought that such a conclusion would be "unacceptable": see para 27. No doubt recognising that an analysis which produces that conclusion is, if not unacceptable, then at least unlikely to be accepted, the unions have defended the view that a claim could in principle be brought by Nexus to rectify the individual contracts of employment.

39. We do not accept this contention. The first - and in our view fatal - problem for it is to explain how the individual employees can be said to have made any mistake. They were not parties to the letter agreement or to the negotiations which preceded it. There is therefore no basis for suggesting that they shared with Nexus a common subjective intention which the letter did not accurately express. Similarly, there is no basis for suggesting that they were aware of any mistake made by Nexus in the way the letter was expressed.

40. Underhill LJ did not consider that this point gives rise to any difficulty. His answer to it was that "The employees have agreed that the terms in question should be negotiated on their behalf by the recognised unions. That being so, what matters (as regards common mistake) must be what was intended and expressed by the union negotiators or (as regards unilateral mistake) whether those negotiators have acted unconscionably by taking advantage of a mistake on the part of Nexus" (para 32). We disagree with this analysis. We do not discern either in the general nature of collective bargaining arrangements or on the facts of this case any agreement between the employees and the recognised unions under which the unions were authorised by the employees to negotiate terms on their behalf. Although it may be said - and is said, for example, in Schedule A1, paragraph 35 of the 1992 Act - that a recognised union conducts collective bargaining "on behalf of" employees falling within the relevant "bargaining unit", this phrase must be understood in a loose sense to mean that the union is acting in the collective interest of those employees. It cannot mean that there is in law an agency relationship between them.

41. That must at any rate be so where, as here and generally, the union is bargaining "on behalf of" employees some of whom may not be members of the union. In the absence of some specific agreement, a union could have no authority to represent someone who has not joined it (and who may not be a member of any union). Other intractable problems for an agency analysis are how to account for those who are employed after the relevant agreement is made or for the position of an employee who makes it clear that he does not wish the union to negotiate for him (as happened in *Singh v British Steel Corpn* [1974] IRLR 131). The general view of commentators, which we consider to be legally correct, is that a union which negotiates a collective agreement does so as principal and not as an agent of its members, let alone as an agent of any other individual employees: see eg *Harvey on Industrial Relations and Employment Law*, Division AII Contract of Employment, paras 43, 67; *Chitty on Contracts*, 35th ed (2023), vol II, para 43-051.

42. Courts have held that, even if the terms of a contract are negotiated by a person without authority to bind the contracting party, the intention of the negotiator may still be relevant in a claim for rectification, if it can be shown that the decision-maker(s) intended simply to give effect to the negotiator's intentions without having any independent intention of their own: see eg *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] EWCA Civ 55; [2012] 2 All ER (Comm) 748, para 43. This is a difficult area: see the analysis by Paul S Davies, "Agency and Rectification" (2020) 136 LQR 77. Such cases cannot assist here, however, as the employees are not decision-makers. If they are members of the union, they may be balloted by the union on whether an offer made by the employer should be accepted. But it is the union and not the employees who conclude any collective agreement with the employer at the end of the negotiation.

43. The way in which the employees become bound by relevant terms of any collective agreement is through the incorporating provision in their contracts. This mechanism renders their understanding of those collectively agreed terms irrelevant. What is incorporated is the wording of the collective agreement, in this case the Red Book as amended by the letter agreement. There is no scope for an argument that this wording does not accurately record the subjective intentions of the employees, as they were not parties to the letter agreement or the negotiations which led to it and the letter embodying the agreement does not purport to record their intentions. Nor, as discussed, is there any basis for attributing to them any intentions or knowledge of the union negotiators. The position may be different where the exercise involved is one of interpreting the contract of employment. In that context, the objective intentions of the employees and of the trade union negotiators might all be relevant in construing the contract of employment because it can be assumed, unless there is reason to the contrary, that the objective intentions of the trade union negotiators are the same as those of the employees: see on this *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers* [2024] UKSC 28, paras 3–5.

44. At one point in the oral argument Mr Oliver Segal KC for the unions appeared to suggest that the incorporation clause in the contracts between Nexus and its employees should be understood as incorporating the terms which Nexus and the unions intended to express in the written record of their agreement even if, because of a mistake, the terms were not accurately recorded. This submission was not developed and is not sustainable. Its consequence would be the improbable one that any mistake in recording the terms of a collective agreement would, when those terms are incorporated into individual contracts of employment, be automatically self-correcting. In our view, the reference in the incorporation clause to the "Red Book" can only reasonably be understood to mean the text of the Red Book, however it is worded at any given time. The reasonable intention to impute to the parties to the employment contracts is that they are bound by what the Red Book says and not by what the Red Book should have said but did not say. If, as we consider, this is the correct interpretation of the incorporation clause, there is no basis for suggesting that on the facts alleged by Nexus the employment contracts do not accurately record the parties' intention. Those contracts are therefore not a possible "target" for rectification.

45. The crucial misstep in the Court of Appeal's analysis, as we see it, is the distinction drawn between (1) rectification of the letter agreement as a collective agreement reached between Nexus and the unions and (2) rectification of the letter agreement insofar as its terms are incorporated in the individual contracts of employment. This neglects the principle that rectification is aimed at documents and not the agreements recorded in those documents. The document which is said by Nexus to have been inaccurately expressed is the letter dated 10 October 2012. That letter does not have a dual existence. There was only one letter and what it purported to record were the terms of a collective agreement reached between Nexus and the unions. The result of incorporating the wording of the letter into the individual contracts of employment is that, if the wording of the letter is rectified, the terms of those contracts will change. There is no separate document recording the terms of the contracts of employment which could independently be rectified. The Court of Appeal was therefore in error in holding that the claim for rectification made by Nexus is aimed at the wrong target.

Is the letter agreement rectifiable?

46. The question then is whether it is legally possible to rectify the record of a collective agreement which is not intended by the parties to be a legally enforceable contract. The Court of Appeal accepted the unions' submission that the fact that a collective agreement is legally unenforceable is an "insuperable barrier" to its rectification. No authority was cited for this proposition. But it was thought to follow from the fact that courts are, necessarily, concerned only with legal rights and that a collective agreement (of the kind with which we are concerned) creates no legal rights: see para 26 of the judgment.

47. We agree that courts are concerned only with legal rights. We also agree that the fact that promises recorded in a document are not legally enforceable would normally be a good reason for rejecting a claim to rectify the document. But the reason for this is not that the court lacks power to require the wording to be corrected. It is that to make such an order would be legally futile. It is a time-honoured principle that equity will not act in vain. If correcting the wording of a document would not alter any legal rights, there is no point in granting the remedy of rectification.

48. That is not the position here. Although the letter agreement is not itself legally enforceable, it does create legal rights: not between the parties to the agreement but indirectly between the employer and employees into whose contracts the wording of the letter agreement is incorporated. In the manner that we have explained, rectifying the wording of the letter agreement would alter the contractual rights of the affected employees. There is no legal dogma which prevents a court from making an order for rectification which will have that legal effect, if the ordinary requirements for granting the remedy are satisfied.

49. The question whether it is possible to rectify wording of a collective agreement which is legally unenforceable when that wording has been incorporated into contracts of employment does not appear to have arisen previously. Because the situation is an unusual one, it is also unsurprising that no directly analogous case has been found. There is, however, authority which supports the conclusion that it is not a bar to rectification that the document sought to be rectified does not itself record any legally enforceable right or obligation.

50. In *Persimmon Homes Ltd v Hillier* [2019] EWCA Civ 800; [2020] 1 All ER (Comm) 475 the Court of Appeal upheld an order for rectification of a disclosure letter provided by the seller in connection with an agreement for the sale of the shares in a company. The disclosure letter contained statements that the company did not own certain freeholds which, as the court found, were intended to pass to the control of the purchaser upon the sale. The effect of these statements was to exclude these freeholds from the scope of warranties given by the seller regarding the property which the company owned. The seller argued on appeal that, as a matter of law, the disclosure letter was not a document that could be the subject of an order for rectification because it simply contained information (whether accurate or not). The Court of Appeal rejected this argument on the ground that, as David Richards LJ put it at para 41 of the judgment, the letter was "an integral part of the suite of documents designed to give effect to the parties' intended transaction". There is an analogy with this case. The disclosure letter, like the letter agreement, was not a document which itself created, or recorded any agreement which created, any legal rights. But its content had an effect, albeit indirect, on legal rights and that was a sufficient basis on which to rectify the document.

51. Another example of a situation where it has been held that a court may order rectification of a document which does not by itself have any legal effect involves exchange of contracts for the sale of land. Under what is now section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 if, when contracts are exchanged, the two counterpart documents are not in exactly the same terms, no contract will come into existence. In *Domb v Isoz* [1980] Ch 548, 559, Buckley LJ (with whom Bridge and Templeman LJ agreed) had "no doubt whatever" that rectification would be available if it were shown that the discrepancy occurred because one of the documents did not accurately record the parties' common intention. The possibility of rectification in these circumstances is now expressly recognised in section 2(4) of the 1989 Act.

52. Counsel for the unions submitted that such a case can be distinguished because in granting rectification the court is giving effect to the parties' intention to create a legally enforceable contract, whereas in the case of a collective agreement (unless otherwise provided) the parties are conclusively presumed not to have such an intention. This case is nonetheless relevant, in our view, in showing that there is no legal rule or principle which requires that the document rectified should have to be one which, considered on its own, has legal effect. It is sufficient that rectifying the document is not legally futile because it will give rise to legally enforceable rights and obligations which will not exist unless rectification is granted.

53. Counsel for the unions founded their case on this issue on what were said to be two well established principles of law. The first is that, as stated in *Chitty on Contracts*, Vol I, para 5-098: "Rectification will only be ordered so long as there is an issue between the parties as to their legal rights inter se." The second is that the courts have no jurisdiction to adjudicate between employers and trade unions as to the terms of collective agreements made by them. In support of this proposition, they cited the decision of Scott J in *National Coal Board v National Union of Mineworkers* [1986] ICR 736 and particularly relied on his explanation for refusing in that case to decide questions about the interpretation, effect and terminability of a legally unenforceable collective agreement. He said, at p 762, that:

> "… it is for the parties to a collective agreement to decide whether or not they want it to be legally enforceable. If they intend it to be legally enforceable and so state, then it will be legally enforceable and the courts will have jurisdiction to decide questions that arise under it. But if they do not intend it to be legally enforceable, then no rights of which the law or courts can take cognisance will be created under it. The parties cannot have it both ways. They cannot, on the one hand, keep their collective agreement outside the area of legal recognition and, it might be said, legal interference by the courts, and, on

> the other hand, ask the courts to decide questions that arise under it."

Counsel for the unions submitted that this reasoning applies to a claim to rectify such an agreement as much as to a claim about its meaning and effect unless rectified.

54. We agree that these principles are sound. They do not, however, go to show that rectification is never available in relation to the record of a collective agreement which is not a legally enforceable contract. Rather, they go to whether the claim which Nexus has brought seeking to rectify the letter agreement ought to have been brought against the employees whose legal rights will be affected if rectification is ordered rather than against the unions. It is to this question that we now turn.

Who are the proper defendants?

55. There are two objections to the procedural course which Nexus has adopted of bringing this claim against the unions and not against any of its employees. Both are fundamental. First, Nexus has no cause of action against the unions and there is no dispute between Nexus and the unions as to the existence or extent of any legal right between them. We do not understand Nexus to argue that there is any such dispute. Nexus accepts that the letter agreement is not legally enforceable. The effect of the statutory presumption in section 179 of the 1992 Act is that it "negatives the existence of any contract at all": see *Monterosso Shipping Co Ltd v International Transport Workers Federation* [1982] ICR 675, 682B (per Lord Denning MR, addressing the predecessor section, section 18 of the Trade Union and Labour Relations Act 1974, which was in similar terms). Rectifying the wording of the letter agreement would not change its legal status. As between Nexus and the unions no legal rights would be affected because there are no legal rights to affect. The particulars of claim therefore do not disclose a legal claim.

56. Nexus submits that the proceedings would nevertheless serve a useful purpose because the effect of rectification of the letter agreement would be to achieve, automatically, the retrospective reformation of the individual contracts of employment, which would be treated as having always incorporated the letter agreement as rectified. We agree that this would be the effect of rectification. But it demonstrates the second flaw in these proceedings. Nexus is asking the court to make an order which would alter the legal rights of many individuals (the employees whose salaries will be reduced if the letter agreement is rectified) without giving any of them the opportunity to adduce evidence or make submissions on this question. That is contrary to the most basic principle of procedural justice.

57. To justify its approach, Nexus has appealed to practical considerations. Nexus argues that it is the unions, who conducted the negotiations leading to the formation of the letter agreement, rather than the individual employees (who may not even be members of either union), that can give relevant evidence on the question of mistake. Nexus also submits that proceeding against the individual employees would have undesirable practical consequences. These are said to be that Nexus might have to sue every affected member of its workforce, which would be damaging to industrial relations. Although Nexus acknowledges that this could in principle be avoided by bringing an action against representative defendants under CPR Part 19, it suggests that using that procedure could conceivably give rise to problems and that a claim brought against the unions is a much simpler and more satisfactory way of determining the issue.

58. We are unimpressed by these arguments. The fact that one or more persons (or representatives of an association) can give relevant evidence makes them suitable as witnesses but has no bearing on whether they are the proper defendants to the claim. In any case we find it hard to think that, if a claim for rectification were brought against the affected employees, the unions would decline to assist the employees by providing relevant documentation and witness evidence. In practice they are likely to have the conduct of the employees' defence. Courts in any event have ample powers to order non-parties to disclose or produce documents. As for the allegedly undesirable practical consequences of proceeding against the employees, it is fanciful to suggest that Nexus might have to join every affected member of its workforce as a defendant. To see the unreality of this suggestion, it is sufficient to note the history of the Anderson proceedings (see para 12 above). The dispute about the correct interpretation of the letter agreement was conclusively resolved by the decision of the Court of Appeal in those proceedings. As we discuss below, the issue of rectification could also have been decided if Nexus had raised it. There is no reason why this issue could not be resolved in a future action between Nexus and a single employee or group of employees.

59. If it were thought necessary to obtain a judgment which is formally binding on every employee, the representative procedure available under CPR Part 19 is designed for just this purpose: see *Lloyd v Google LLC* [2021] UKSC 50; [2022] AC 1217. That procedure was used without any apparent difficulty in a case recently decided by this court involving a dispute about the meaning and effect of terms incorporated from a collective agreement into contracts of employment: see *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers* [2024] UKSC 28. We see no reason why that procedure could not be used here.

60. We therefore do not accept that there is any significant practical impediment to bringing a claim for rectification of the letter agreement against employees whose legal rights are directly affected by such a claim. Even if there were, it could not justify

departing from the basic legal principle that the proper parties to proceedings are those whose legal rights will be adjudicated upon by the court.

The *Rolls-Royce* case

61. Although it was not cited in argument by either party, after the hearing of this appeal the court invited and received additional submissions in writing on the decision of the Court of Appeal in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387; [2010] 1 WLR 318 and its relevance to this case. Rolls-Royce and Unite the Union were parties to two legally unenforceable collective agreements about the criteria that would be used to select employees for redundancy. One criterion was length of service. After new statutory regulations came into force making discrimination on grounds of age unlawful, a question arose as to whether using length of service as a criterion would breach these regulations. With the agreement of the union, Rolls-Royce brought a claim against the union under CPR Part 8 asking the court to determine this question. Despite misgivings about the procedure, the judge (Sir Thomas Morison, a former President of the Employment Appeal Tribunal) was persuaded to entertain the claim and decided that the length of service criterion was not unlawful.

62. Rolls-Royce appealed to the Court of Appeal, which considered as a preliminary question whether they should hear the appeal. With some hesitation, they decided that they should. Their chief concern was that, as Wall LJ observed, the outcome of the case could directly affect a large number of people (those employees made redundant in future by the company) without any of them having a say in it (para 52). The main reasons given by Wall LJ for concluding that the appeal should be heard were: first, that the question raised was one of interpretation of statutory regulations, which was both a matter of public importance and a proper function of the court; and, second, that although there was no "immediate lis" between the parties, the point was not academic, and "if not resolved by this court will lead to a dispute between the company and the union, who do not agree on it" (para 55). Wall LJ concluded that it would be "unduly purist" to decline to adjudicate on a point which had been brought to the Court of Appeal by a procedure which the parties and the court below had deemed to be appropriate (para 58). But he made it clear that employees selected for redundancy would still be entitled to raise before an employment tribunal arguments that the redundancy process was unfair and that they had been unfairly dismissed (para 60).

63. Arden LJ agreed that the court should entertain the appeal for the reasons given by Wall LJ. Aikens LJ took a different approach. He thought it wrong for the court to do any more than address two narrow questions of statutory interpretation about the meaning of the regulations. More fundamentally, he explained that he would have declined to entertain the claim at all if he had been confronted with it sitting at first instance (para 126). His "basic concern" was that "insufficient consideration has been given to the fact

that those most affected by the decision, the employees who might be made redundant, are not before the court. They have been unable to adduce any factual evidence or make submissions that might be relevant …" (para 127). Aikens LJ agreed with Wall LJ that any employee who wished to raise the issue that the redundancy process was unfair because of the length of service criterion and the effect of the regulations must be entitled to do so in an employment tribunal. But in his view (para 122) this inevitably prompted the question whether "the present exercise [is] legitimate and serving any useful purpose if these issues will, or might well be, reconsidered all over again in the context where it really matters, viz when disputes arise between Rolls-Royce and individuals who have been made redundant by Rolls-Royce?" His answer to this question was: "I doubt it. In my view, the initial opposition of Unite to these proceedings by Rolls-Royce was right".

64. We consider that the concerns expressed by the Court of Appeal, in particular by Aikens LJ, about the propriety of the procedure adopted in *Rolls-Royce* were amply justified. Wall LJ (at para 19) cited the following statement of Viscount Maugham in *London Passenger Transport Board v Moscrop* [1942] AC 332, 345:

> "[T]he courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made."

Although the Court of Appeal sought to avoid such prejudice by stating that employees would be entitled to raise the issues of unlawful discrimination in proceedings before an employment tribunal, it is hard to see what this entitlement would amount to when on questions of law the tribunal would be bound as a matter of precedent by what the Court of Appeal had decided.

65. It is also apparent that neither party, in what was presented as a "friendly" action, pointed out the significance of the fact that the redundancy criteria were contained in collective agreements that were not intended to be legally enforceable. When Wall LJ said that the question raised, if not resolved by the court, would lead to a dispute between the employer and the unions, he did not address the nature of any such dispute and whether it would be justiciable. Arden LJ did address this, stating (para 151):

> "I would add that I have read [Wall LJ's] reference to there being no 'lis' to there being no immediate claim brought by an alleged victim of age discrimination. But there is a 'lis' in the sense of a dispute between the respondent union and the

> appellant employer as to the lawfulness of the length of service criterion in the assessment matrices provided for in the collective agreements on which individual employment contracts are based. The collective agreements are not legally enforceable agreements, but that point only matters if the parties do not comply with them."

66. We do not agree that the non-binding nature of a collective agreement only matters if the parties do not comply with it. It has the consequence spelt out by Scott J in the *National Coal Board* case (see para 53 above) that "no rights of which the law or courts can take cognisance will be created under it". It makes no sense to refer to a dispute between Rolls-Royce and the union about the lawfulness of the length of service criterion in their collective agreements, as provisions of an agreement which has no legal effect cannot be unlawful. The only potential dispute about legal rights was a dispute about whether, in terminating the employment contracts of individual employees on grounds of redundancy, it would be lawful for Rolls-Royce to apply the length of service criterion provided for in the collective agreements. We cannot see how it could be said that the union had any legal interest in the determination of that dispute.

67. For these reasons the procedure adopted by the parties and acquiesced in by the courts in the *Rolls-Royce* case is one which, in our view, is illegitimate and ought not to be followed. At all events, no support can be derived from that case for the course taken by Nexus of bringing this claim against the unions rather than any of its employees. This is not to adopt an "unduly purist" or formalistic approach as Nexus suggests. As a matter of basic principle, the proper parties to an action are those whose legal rights will be determined by the court. In this case those parties are the employees into whose employment contracts the letter agreement was incorporated and whose legal rights will therefore be altered by any order to rectify it. If Nexus wishes to establish its obligations to those employees by taking legal action, it must bring a claim against them (or representatives of them) and not against the unions, to whom Nexus has no relevant legal obligations and who have no relevant legal rights.

68. It follows that, in our view, the Court of Appeal was right to dismiss this action. This appeal must therefore be dismissed. But it remains relevant to consider - as the Court of Appeal did - whether, if Nexus brings fresh proceedings against employees seeking an order for rectification of the letter agreement, the outcome of those proceedings could affect the claims made in the Anderson proceedings. The Court of Appeal held that it could not as, even if the letter agreement were to be rectified in the way that Nexus seeks, it would be an abuse of process for Nexus to contend that, for this reason, the sums claimed in the Anderson proceedings are not properly payable. Underhill LJ also held that Nexus is precluded from doing so by the doctrines of cause of action estoppel and issue estoppel. Nexus challenges the correctness of those conclusions.

Can the employment tribunal rectify?

69. In considering these questions, it is relevant to know whether Nexus could have raised a defence based on rectification in the Anderson proceedings themselves. The unions argue that Nexus both could and should have done so. Nexus responds that this was not possible because, as the judge accepted (see para 18 above), an employment tribunal has no power to order rectification.

70. The three members of the Court of Appeal each expressed a different view on this question. Underhill LJ held that, while an employment tribunal has no power to order rectification, the argument that the letter agreement ought to be rectified could have been raised as a defence in the Anderson proceedings, as it was open to the employment tribunal in law to treat the document as if it had been rectified and to dismiss the complaint on that basis (see paras 56-58 of the judgment). Males LJ went further and said that an employment tribunal does have power to order rectification if it is necessary to do so in order to determine whether a deduction from wages is unauthorised. Thus, a claim for rectification could have been determined in the Anderson proceedings (paras 132-135). Newey LJ preferred to leave both questions open. He did not accept that, even if rectification *could* have been raised in the employment tribunal in either of the ways suggested, Nexus *should* have pursued either course, as both appeared to be novel and contrary to the general understanding of lawyers (paras 115-117).

71. On this point we agree with the view of Underhill LJ. The starting point is that, unlike the High Court, employment tribunals have no inherent jurisdiction to hear and determine claims. They are creatures of statute and have only those powers which statute provides. The claim in the Anderson proceedings was made under section 23(1)(a) of the 1996 Act, which provides that a worker may present a complaint to an employment tribunal that their employer has made a deduction from wages in contravention of section 13. Section 24(1) provides that, where a tribunal finds such a complaint well-founded, "it shall make a declaration to that effect and shall order the employer – (a) … to pay to the worker the amount of any deduction made in contravention of section 13". There is also provision in section 24(2) for the tribunal to order the employer to pay, in addition, compensation for any financial loss attributable to the unauthorised deduction. These are the only remedies which the tribunal has the power to order if it finds the complaint well-founded. Thus, the tribunal has no power to make an order for rectification.

72. We do not agree with Males LJ that the operative provisions of the 1996 Act can be construed as giving an employment tribunal such a power in the event that it is necessary to rectify a document in order to decide whether a deduction from wages is unauthorised. Males LJ relied for that assertion on the predecessor to section 13(3) of the 1996 Act, as interpreted by the Court of Appeal in *Delaney v Staples* [1991] 2 QB 47; [1991] ICR 331. Section 13(3) provides:

> "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker …, the amount of the deficiency shall be treated for the purposes of this Part as a deduction …"

In *Delaney v Staples*, pp 56C-D, Nicholls LJ (with whom Ralph Gibson LJ and Lord Donaldson MR agreed) said about the predecessor of this provision, section 8(3) of the Wages Act 1986:

> "… section 8(3) makes plain that, leaving aside errors of computation, any shortfall in payment of the amount of wages properly payable is to be treated as a deduction. *That being so, a dispute, on whatever ground, as to the amount of wages properly payable cannot have the effect of taking the case outside section 8(3). It is for the industrial tribunal to determine that dispute, as a necessary preliminary to discovering whether there has been an unauthorised deduction*." (emphasis added)

73. On the appeal in the Anderson proceedings the Court of Appeal treated *Delaney v Staples* as binding authority that an employment tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under Part II of the 1996 Act is properly payable, including an issue as to the meaning of the contract of employment (as was raised in that case): *Agarwal v Cardiff University* [2018] EWCA Civ 2084; [2019] ICR 433, para 27.

74. We do not doubt these authorities. But they do not decide that an employment tribunal has jurisdiction to grant relief over and above that provided for by section 24 of the 1996 Act if the grant of such relief would lead to the result that there has been an unauthorised deduction. We do not consider that, even on the most generous purposive interpretation of the statute, the relief specified in section 24 is capable of being expanded in this way. In our view, Underhill LJ was right to treat it as axiomatic that an employment tribunal exercising jurisdiction under Part II of the 1996 Act has no power to order rectification, since the only relief that it can grant is that specified in section 24.

75. We also agree with Underhill LJ, however, that the issue of rectification could have been raised as a defence in the Anderson proceedings without the need to seek an order for rectification. That is because equity can treat as done that which ought to be done and can treat a document as if it had been rectified to record the parties' intention accurately without the need to make a formal order for rectification. This principle applies

in the civil courts, and we see no reason why it should not equally apply when an employment tribunal has to determine whether there has been an unauthorised deduction.

76. Underhill LJ relied on two cases cited in *Snell's Equity*, para 16-003, for the proposition that "any Division [of the High Court] may give effect to a defence of rectification as regards past transactions without actually rectifying the instrument" (para 53). The first of these cases is *Mostyn v The West Mostyn Coal and Iron Co Ltd* (1876) 1 CPD 145. In its defence to a claim under a lease brought in the Common Pleas Division of the High Court the defendant pleaded facts on which, it asserted, a court of equity would set aside the lease. The claimant argued that, as under section 34 of the Supreme Court of Judicature Act 1873 all causes and matters for the purposes of "rectification, or setting aside, or cancellation of deeds or other written instruments" were assigned to the Chancery Division alone, another Division of the High Court could not entertain a question about setting aside the lease. The court rejected this argument. Brett J said, at p 150:

> "If a defendant in an action in this Division sets up facts in his answer which in the Chancery Division would entitle him to have an instrument reformed or set aside, though this Division cannot reform or set it aside with regard to its effect in future, it may, for the purpose of determining the action, treat it as set aside."

Archibald and Lindley JJ agreed.

77. In *Breslauer v Barwick* (1876) 36 LT 52 this decision was followed in a case where the claimant relied on facts which would support an order for rectification. The claim was brought in the Common Pleas Division by an individual claiming as charterer of a steamship. The defendant owner denied that the claimant was the charterer of the ship. In reply, the claimant pleaded that, although a printed form of charterparty was used which named one of his companies as the charterer, that name was left in by mutual mistake contrary to the common intention of the parties that the claimant was the contracting party. The court rejected an argument that, to maintain the claim, the claimant ought to ask for the charterparty to be rectified and that for this purpose the case should be transferred to the Chancery Division. Brett J said, at p 53, that:

> "… the decision in *Mostyn v The West Mostyn Coal and Iron Company* shows that in such a case as this it is not necessary to go through the manual labour of reforming the agreement, but that if such facts are shown as would cause the Chancery

> Division to reform it, we may treat it as reformed, and give judgment accordingly."

78. Nexus submits that these decisions turned on the particular wording of the Supreme Court of Judicature Act 1873. They point out that in *Mostyn* Brett J based the statement quoted at para 76 above on section 24(2) of the 1873 Act, which provided that, in every case commenced in the High Court of Justice, every judge of that court was required to give to every equitable ground of relief claimed by the defendant the same effect as the Court of Chancery should have given it before the Act was passed. Nexus adopts the view taken of these cases by Males LJ in the Court of Appeal. He said, at para 131, that:

> "… for my part, I do not think that nice distinctions between the remedies available in law and in equity and the resulting allocation of jurisdiction between different divisions of the High Court, let alone the ingenious ways in which 19th century judges would get round those distinctions in order to do justice in particular cases, has any role to play in determining the scope of the jurisdiction of an employment tribunal in the late 20th and 21st centuries."

79. We accept that *Mostyn* and *Breslauer* could be narrowly interpreted as decisions on the effect of the 1873 Act. But those cases can also be viewed as authority for a general principle which accords with equity and good sense. If it is clear that, because of a relevant mistake, a document does not accurately record the true position between the parties to proceedings, a court is entitled in determining their mutual rights and obligations to treat the document as if it had been rectified without the need to make an order for rectification. We would add that this principle is not, as *Snell's Equity* suggests, limited to "a defence of rectification". As *Breslauer* illustrates, it applies equally where the claimant asserts that a document ought to be treated as if it had been rectified.

80. As authority for this principle, *Mostyn* and *Breslauer* do not stand alone. Other cases in which it has been recognised include: *Wilson v Wilson* [1969] 1 WLR 1470, 1474; *Pink v Lawrence* (1977) 36 P & CR 98, 101; and *OTV Birwelco Ltd v Technical and General Guarantee Co Ltd* [2002] EWHC 2240 (TCC); [2002] 4 All ER 668, para 39. A particularly clear modern authority on the point is *Hamed el Chiaty & Co (t/a Travco Nile Cruise Lines) v Thomas Cook Group Ltd* (*The "Nile Rhapsody"*) [1992] 2 Lloyd's Rep 399 (Hirst J); and [1994] 1 Lloyd's Rep 382 (Court of Appeal). The claim in that case was brought in England by an Egyptian company under contracts by which the defendant, an English travel company, agreed to charter a vessel to take tourists for cruises on the River Nile. The contracts were expressed to be governed by Egyptian law but were silent about jurisdiction. The defendant applied for a stay of the proceedings on

the ground that the parties had orally agreed that all disputes should be subject to the exclusive jurisdiction of the Egyptian courts. A trial of this issue was ordered at which the judge found that such an oral agreement had indeed been made. The defendant argued that effect could be given to the oral agreement by treating the written contracts as rectified so as to provide that they were subject to exclusive Egyptian jurisdiction as well as Egyptian law. But the defendant refrained from asking the court to make an order for rectification for fear that, if it did so, it might be regarded as having submitted to the jurisdiction of the English courts.

81. Hirst J was satisfied on the authority of *Mostyn* and *Breslauer*, which he described as cases of "quite general application" and "of the highest authority" (p 409), that the court could treat the contracts as rectified without making an order for rectification. The Court of Appeal upheld this decision: [1994] 1 Lloyd's Rep 382. Neill LJ, at p 390, emphasised that rectification is an equitable remedy and considered it "quite unnecessary that any formal rectification should take place". He continued:

> "Equity can treat as done that which ought to be done. Once it has been found that there was an oral agreement relating to jurisdiction, the Court should give effect to it."

Staughton LJ addressed an argument that the court can only deem a contract to be rectified when it has no power actually to order rectification. Such an argument would not assist Nexus since, as discussed above, an employment tribunal is in that position as it has no power to order rectification. But we agree with Staughton LJ's view that there is no such limit on the court's power.

82. We are therefore satisfied that, where the conditions for rectifying a document are met, the document may be treated for the purpose of determining the parties' legal rights as rectified without a formal order for rectification. There is no reason why this principle should not apply in proceedings in an employment tribunal. If the question whether there has been an unauthorised deduction from wages turns on a dispute about whether a document accurately records what was agreed to be payable, the reasoning in *Delaney v Staples* requires that the principle should be applied. Justice could not be done if, in a case where by mistake the written employment contract does not accurately record the wages actually agreed to be payable, the employment tribunal was obliged to decide the case on the basis of what the written contract mistakenly says and to ignore the true agreement.

83. Employment tribunals are as well able to determine a question about whether there has been a relevant mistake as any other contractual issue falling within their jurisdiction. Indeed, it might be thought that the tribunal's specialist expertise in

addressing questions arising out of the negotiation and agreement of employment terms, including wages, makes them particularly suited to do so.

84. There was therefore nothing to prevent Nexus from raising as a defence to the claim made in the Anderson proceedings the case pleaded in this action that, because of a common or unilateral mistake, the letter agreement does not accurately express the intended effect of consolidating the productivity bonus into basic pay. If that case had been established, the employment tribunal could have treated the letter agreement as rectified and dismissed the complaint on that basis.

Can Nexus raise rectification now against the Anderson claimants?

85. All the members of the Court of Appeal agreed that it would be an abuse of process for Nexus to make any claim for rectification which seeks to prevent the claimants in the Anderson proceedings from recovering the sums claimed in those proceedings from Nexus. In reaching that conclusion the Court of Appeal applied the test authoritatively stated by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31, that what is required is a "broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before". As Lord Bingham also emphasised, the interests involved include the important public interest in finality in litigation which "is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public".

86. Even apart from the question of abuse, we do not think it open to Nexus to raise a new case involving mistake or rectification in the Anderson proceedings themselves. To seek to do so at the remedies hearing would be inconsistent with the decision already made by the employment tribunal that the claimants' complaint is well-founded. The only way to challenge that decision was by way of appeal, and all rights of appeal have been exhausted. The employment tribunal has no power to alter or revisit its decision. The footing on which the remedies hearing must be conducted is therefore that the shift allowance payable to each of the claimants is to be calculated in the way the tribunal has decided (by reference to basic pay increased by the productivity bonus). All that remains, if the figures cannot be agreed, is for the tribunal to carry out this calculation.

87. The question of abuse of process would become relevant only if Nexus were to seek to undo the result of the Anderson proceedings in any fresh action. We have no doubt that this would be an abuse. As noted earlier, the members of the Court of Appeal differed in their views about whether rectification could and should have been raised as an issue

for determination by the employment tribunal. But they were unanimous in holding that Nexus should at least have indicated at an early stage in the Anderson proceedings its intention to argue that, if its case on the interpretation of the letter agreement was rejected, the document should be rectified to express what Nexus says was its intended meaning: see paras 89, 114, 130 and 137-140 of the judgment. Raising the matter would have enabled the parties and the employment tribunal to consider how the issue should best be dealt with as a matter of efficient case management. It would also have avoided creating the reasonable expectation that the validity of the claim would be finally determined by the decision of the employment tribunal, subject only to any appeal. After years of litigation on that basis, it would be abusive for that expectation to be frustrated. Thus, in the words of Males LJ at para 138, any claim for rectification which would deprive the Anderson claimants of their victory in the employment tribunal and all the way up to the Court of Appeal is barred by the abuse of process principle.

88. In our view, this reasoning and conclusion are unimpeachable. Indeed, counsel for Nexus were not able to advance any serious contrary argument: their submissions were almost entirely directed to the question whether the employment tribunal could itself have decided the issue of rectification. We have held that it could. In those circumstances there is much to be said for Underhill LJ's view that Nexus should not merely have raised the issue as a matter of case management but - in the absence of any agreement that it should be determined in another action - should have raised it as a defence in the Anderson proceedings.

89. Newey LJ was not persuaded that Nexus should have raised such a defence and Males LJ did not think that the court was in a position to decide that question. Both were influenced by an impression that the legal possibility of treating a document as rectified without an order for rectification, if it exists at all, is contrary to a widespread understanding of the law, at any rate among employment lawyers: see paras 116-117 and 130-131. Certainly, the Court of Appeal does not appear itself to have received the assistance to be expected on the relevant law. But, as discussed above, there is nothing recondite or obscure about the equitable principle that a document may be treated as rectified without an order for rectification. It is supported by authorities which, whether well-known or not, are all reported and can readily be found. The principle is mentioned not only in *Snell's Equity* but also in other standard textbooks such as *Treitel on The Law of Contract*, 15th ed (2020), para 8-063, and *Chitty on Contracts*, Vol I, para 5-058. We have concluded that the point is one that could and should with reasonable diligence have been raised.

90. We also note that, before the point was raised in these proceedings, the possibility of raising a defence based on mistake in recording the letter agreement had not escaped Nexus. Nexus has pleaded such a defence in its grounds of resistance to five other claims in the employment tribunal. It was first pleaded shortly after the judgment of the Court of

Appeal in the Anderson proceedings was handed down in grounds of resistance dated 26 October 2018 to a claim made by Bolam and others. Underhill and Males LJJ were both satisfied that the only reason why no case of mistake or rectification was raised earlier was that it had not occurred to Nexus or its lawyers. Plainly that is not a good reason.

91. We do not need, however, ourselves to decide whether the decision in the Anderson proceedings has given rise to a cause of action or issue estoppel. It is sufficient to endorse, as we do, the ground on which the Court of Appeal unanimously held that it would be abusive for Nexus to make any future claim which is calculated to alter the result of the Anderson proceedings.

Other issues

92. All the members of the Court of Appeal also agreed that it would not be right or practicable to attempt to decide whether or to what extent Nexus may be precluded from relying on rectification in answer either to any future claims which may be made by the Anderson claimants in relation to periods after those covered by their current claims or to claims made by other employees. The unions applied to this court for permission to cross-appeal on this point. That application was refused. These wider questions which the unions sought to raise are therefore not an issue before us.

93. The only further issue which either party was given permission to raise on this appeal is whether, as Nexus contends, Underhill LJ erred in law in holding that there was privity of interest between the unions and the Anderson claimants. That question could only arise if the present action were permitted to proceed. The unions would then want to argue that any cause of action estoppel created by the decision of the employment tribunal in the Anderson proceedings would extend to them because they are "privies" of the Anderson claimants. On the conclusions we have reached, this question does not and will never arise. We therefore do not address it.

Conclusion

94. For the reasons given, we would dismiss this appeal. The Court of Appeal was right to dismiss the action and allow Nexus, if so advised, to bring fresh proceedings claiming rectification of the letter agreement against the affected employees. It would, however, be an abuse of process for Nexus in any such proceedings to make any claim which relates to the wages and unauthorised deductions from wages which are the subject of the current Anderson proceedings.