Neutral Citation Number: [2023] EWCA Civ 551

Case No: CA-2022-000689, CA-2022-001397, CA-2023-000010

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
THE HONOURABLE MR JUSTICE CHOUDHURY
[2022] EWHC 680 (QB)

AND THE HONOURABLE MR JUSTICE CHOUDHURY
[2022] EWHC 1626 (QB)

AND THE HONOURABLE MR JUSTICE FREEDMAN
[2022] EWHC 3188 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 May 2023

Before:

LORD JUSTICE UNDERHILL
(VICE-PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION))
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE LEWIS

- -

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
(1) JAMES COX **(2) MALCOM DAVEY** **(3) OWEN HUGHES** **(4) DENISE SPEAKMAN** **(5) PUBLIC AND COMMERCIAL SERVICES UNION**	**Respondents**

SECRETARY OF STATE FOR THE DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Appellant**
- and -	

(1) KEITH CRANE
(2) ELSPETH GANON WAGG
(3) CAROLINE MacKENZIE
(4) PUBLIC AND COMMERCIAL SERVICES UNION **Respondents**

The COMMISSIONERS FOR H.M. REVENUE AND CUSTOMS **Appellants**
- and -
(1) COLETTE SMITH
(2) ANDY O'DONNELL
(3) IAN LAWTHER
(4) WENDY TURNER
(5) PUBLIC AND COMMERCIAL SERVICES UNION **Respondents**

Clive Sheldon KC and Jack Feeny (instructed by **the Treasury Solicitor**) for the **Appellants in all three appeals**
Oliver Segal KC and Darshan Patel (instructed by **Thompsons**) for the **Respondents in all three appeals.**

Hearing dates: 22 and 23 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. These are three appeals involving individual claimants who are employed either by the Home Office, the Department for Environment Food and Rural Affairs ("DEFRA") or the Commissioners for H.M. Revenue and Customs ("HMRC"). The individual claimants are also members of a trade union, the Public and Commercial Services Union ("PCS"), which was also a claimant in all three cases.

2. In brief, the union subscriptions of the individual claimants were formerly collected by means of what were known as check-off arrangements, that is the employer offered a facility to individual employees whereby they could authorise the deduction of union subscriptions from their wages and the money was then paid to PCS. At various dates in 2014 and 2015, the check-off arrangements were withdrawn by the relevant government department or HMRC.

3. In each of the three cases, the High Court held that the check-off arrangements constituted a term of the individual employees' contracts of employment. Permission to appeal in relation to that matter has been refused.

4. The High Court also held in each case that the individual claimants had not accepted any variation of their contracts of employment by continuing to work after the change had been introduced and had not waived any prior breaches of their contractual rights. The High Court also held that PCS was entitled to enforce the contractual provision in the individual claimants' contracts of employment whereby the employer was required to offer employees the facility of having union dues deducted from salary and paid to the union by reason of section 1 of the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act"). It is these two matters which are at the heart of these three appeals. The Home Office, DEFRA and HMRC all appeal. Although phrased differently, the grounds of appeal essentially are that the judge in each case erred in finding that:

    (1) the individual claimants had not varied their contracts of employment to exclude the check-off arrangements and had not waived any prior breach by their conduct in continuing to work after the check-off arrangements were withdrawn; and

    (2) the parties to the contracts of employment did not intend the contractual term offering the facility for check-off arrangements to be enforceable by PCS.

5. In addition, in the *Cox* case, the Home Office appeals the finding that two claimants employed by the Home Office, Mr Davey and Ms Speakman, entered into new contracts on or after 11 May 2000 (as the 1999 Act applied to contracts entered into after that date) so that PCS was able to enforce the contractual term relating to the check off facility in relation to their contracts. Choudhury J. held that agreeing to a fundamental variation in the contracts of employment would amount to entering into a contract for the purpose of the 1999 Act. In the case of Mr Davey, a change in salary and a change to a new basis of calculating working hours (moving to annualised hours working) were fundamental changes such that Mr Davey had entered a new contract. In the case of Ms Speakman, a temporary promotion for a significant length of time and a change from part-time to full-time working were fundamental changes such that Ms Speakman had

entered a new contract. Consequently, as these two claimants had entered into contracts after 11 May 2000, the 1999 Act applied to those contracts and PCS were able to rely on section 1 of the 1999 Act to enforce the term relating to check-off arrangements in respect of their contracts of employment. The Home Office appeals on the basis that Choudhury J. erred in law as the circumstances identified as amounting to entering into a new contract set the threshold too low.

THE FACTUAL BACKGROUND

The check-off arrangements

6. Historically, the terms and conditions of service for Government employees were determined centrally and were largely uniform. The Treasury was responsible for negotiating terms and conditions with the relevant unions. The check-off arrangements originated in collective agreements reached between the Government and the relevant trade unions in the 1960s. The terms were included in the Civil Service Pay and Conditions of Service Code ("the Code"). The 1987 version of the Code contained a section on "Voluntary Deductions from Pay" which included the following:

> "4040. This section sets out the arrangements relating to the voluntary authorisation of deductions from the pay or pension of civil servants.
>
> …..
>
> 4051. A civil servant who wishes to authorise deductions from his pay for any of the purposes or organisations listed in Annex 1 and 2 should obtain from the organisation concerned the standard form of authority approved by the Treasury, complete it and forward it to the organisation. The organisation will forward the completed forms … to the officer paying salary, wages or pension … Deductions for union subscriptions will be made from the earliest date practicable after receipt of the authority. Notice of termination for authority should be given direct to the paying officer of the departments. However, this method of payment may be withdrawn in respect of union subscriptions in the circumstances described in para 4100 …"

7. Paragraph 4100 provided for the withdrawal of this method of payment of union subscriptions during any period of industrial action. Annex 1 set out a list of organisations where deductions could be made free of charge. Annex 2 set out a list of organisations, principally insurance companies, where deductions could be made but a collection charge would be levied. Annex 1 is in the following terms:

> "LIST OF ORGANISATIONS FOR WHICH DEDUCTIONS MAY BE MADE FREE OF CHARGE"
>
> "Deductions may be made from salaries, wages or pensions free of charge for the payment of premiums and subscriptions to the following:

Civil Service SAYE Scheme

National Savings Bank Clubs

Civil Service Medical Aid Association

Civil Service Retirement Fellowship

Hospital Saving Association

Hospital Saturday Fund

Post Office and Civil Service Sanitorium Society

Local Hospital Funds, Hospital Contributory Scheme and Provident Funds

Civil Service Benevolent Fund

United Kingdom Civil Service Benefit Society

Departmental Benevolent Funds ….

Civil Service Insurance Society ….

Post Office Insurance Society

Civil Service Sports Council

Department Sports Association ….

Nationally or departmentally recognised unions representing civil servants."

""

8. Subsequent developments are described in detail at paragraphs 6 to 11 in the judgment of Choudhury J. in *Cox*. In brief, from 1 April 1996, the Treasury ceased to have responsibility for pay negotiation. Responsibility for determining terms and conditions of service was delegated to the Ministers in the various departments in accordance with the Transfer of Functions (Treasury and Minister for the Civil Service) Order 1995. Terms and conditions of service had to comply with the provisions of the Civil Service Management Code ("the CSMC"). Paragraph 7.3 of the CSMC deals with voluntary deductions from pay and is in the following terms:

"**Voluntary Deductions from Pay**

7.3.1 Where departments and agencies have arrangements for voluntary deductions from pay to be offered to staff, the following conditions apply.

Conditions

> 7.3.2. Departments and agencies must ensure that:
>
> a. no liability is to be attached to the department, agency or pension-paying authority in the event of default by a member of staff or recipient organisation. Legal advice should be taken if necessary; and
>
> b. in providing such facilities, they offer no assurance of the soundness or integrity of recipient organisations.
>
> **Trade Union Subscriptions**
>
> 7.3.3. Where departments and agencies offer arrangements for deducting subscriptions to trade unions, they must ensure that:
>
> "a. they comply with the relevant statutory provisions (including those concerned with political levies, where appropriate);
>
> "b. they recover the costs of the provision of the facility from the trade unions concerned; and
>
> "c. subscriptions deducted during the quarter in which an officer ceases to be a subscriber will be paid to the relevant trade union.
>
> "In the event of official industrial action by non-industrial civil servants, departments and agencies may withdraw the facility, in whole or in part, in respect of deductions payable to any union with members officially involved in the industrial action for the duration of that action. Withdrawal is subject to approval by the Cabinet Office."
>
> 7.3.4 For those trade unions whose subscriptions include a political levy, arrangements must be made to ensure that the department or agency concerned shall not at any time have information about the numbers or identities of members contributing to the levy."

The Individual Contracts of Employment in the Cox case.

9. The *Cox* case involved four employees of the Home Office. The first claimant, James Cox, joined the Home Office in 2001 as an administrative assistant and is now a Technical Specialist in asylum casework. The second claimant, Malcolm Davey, started working in the Civil Service in 1987 and was deployed to the Home Office as an immigration officer. Mr Davey provided a witness statement but that does not deal with the details of his employment. The documentary evidence indicates that Mr Davey was transferred to work as an immigration officer at Waterloo International Terminal in 1994. In about September 2001, he was posted to the asylum screening unit at Croydon for an initial period of 6 months. It is unclear what happened after the end of the 6 month period. In any event, it appears that he was transferred to work as an immigration officer in the third country unit at Croydon. That transfer of location became permanent on 22 December 2003. He was notified of his salary by letter dated 23 March 2004. It is not clear if the salary for an immigration officer located at Croydon

differed from that at Waterloo and, if so, there is no evidence as what the difference was. By letter dated 1 March 2014, the Home Office wrote to confirm the contractual changes following Mr Davey's decision to opt into what was called the Home Office Annualised Hours Working scheme. That was described as "a permanent variation of the contract of employment". Mr Davey's basic pay did not change but, it appears, the requirement that he work certain hours a week was replaced by a requirement that he work a certain number of hours over the course of a calendar year. The full extent of any changes to his work pattern, and consequential changes to any other entitlement do not appear from the evidence before this Court.

10. The third claimant, Owen Hughes, began working in the Home Office in 2006. His current role is as an immigration officer based at Lunar House in Croydon. The fourth claimant, Denise Speakman, began working for the Civil Service in the late 1970s. Ms Speakman provided a witness statement but that does not deal with the details of her employment. The documentary evidence indicates that, amongst other things, she was the subject of a temporary promotion in October 1999 to the role of executive officer, with a salary increase, but reverted to her previous grade of Passport Officer Grade 3 in April 2000. Ms Speakman was temporarily promoted to the role of higher executive officer with effect from 22 April 2004 and her salary increased accordingly. In June 2008, Ms Speakman reverted to her role of Passport Officer Grade 3. In February 2005, Ms Speakman changed from what was described as "term time working" to working 30 hours a week from Monday to Thursday. That was referred to in an e-mail from the Home Office as a variation to her contract of employment. In January 2010, Ms Speakman's hours changed from 30 hours a week to 37 hours, described as a move from part-time to full-time working and her salary was adjusted accordingly. The other terms and conditions of her service remained the same.

11. None of the claimants employed by the Home Office had a copy of a contract of employment. They each relied on a statement of terms and conditions provided to them at various dates by the Home Office. The summaries were in materially similar terms. None expressly referred to the check-off arrangements. The summaries indicated that details of terms and conditions of employment were in the Code, the CSMC, Home Office manuals and the Staff Handbook.

12. Choudhury J. referred at paragraphs 19 and 20 of his judgment to extracts from two Home Office Handbooks applicable to the Passport Office. The section of the first handbook dealing with check-off arrangements provided that:

> "Voluntary deductions from pay
>
> The SSC will, if you so authorise, make deductions from your salary for direct payment to the following organisations or other 'approved' organisation:
>
> • Trade union membership fee
>
> • Certain insurers and assurance societies and companies
>
> • Local hospital funds and hospital contributory schemes
>
> • Payroll donations to charity

> • The Home Office Sports and Social Association ('HOSSA') lottery or similar
>
> • Civil Service organisations, including the Civil Service Sports Council (from which HOSSA derives most of its funds)
>
> • Additional Voluntary Pension Contributions ('AVCs')
>
> If you are unsure whether an organisation is 'approved', check with the SSSC section.
>
> If you wish to authorise deductions from pay, you should obtain a standard form of authority from the organisation concerned and complete and forward the form back to that organisation. Once the authorisation has been accepted SSC will forward the contributions due and:
>
> • make payments on the due date …
>
> • continue to make payments on this basis as instructed until you wish to cease making payments then you must notify the SSC direct in writing to the address above. You should also advise the organisation concerned."

13. The second extract from a version of the handbook dating from 1995 said this:

> "5.5 If you wish, Pay Service may make voluntary deductions from your salary in respect of subscriptions or contributions to:
>
> • Civil Service trade unions
>
> • certain insurance and assurance societies and companies
>
> • local hospital funds and hospital contributory schemes• payroll donations to charity ('Work Aid')
>
> • the HOSSA lottery or similar
>
> • Civil Service organisations, including the Civil Service Sports Council (from which the Home Office Sports and Social Association derives most of its funds)
>
> If you are not sure whether an organisation is 'approved', Pay Service will be able to advise you.
>
> 5.6 If you take official industrial action as a non-industrial civil servant, payment of your union subscriptions by the method described above may be withdrawn, in whole or in part, while you take part in the action. You will be advised by a Home Office Notice or other communication of any decision to do so."

> 5.7 If you wish to authorise deductions from pay you should obtain from the organisation concerned a standard form of authority approved by HM Treasury or the Home Office, complete it and forward it to the organisation. If, on the other hand, you wish to cease making the payments, you should notify Pay Service yourself in writing. You should also advise the organisation concerned."

Withdrawal of the Check-Off Arrangements by the Home Office

14. In December 2013 the Minister for the Cabinet Office wrote to the Permanent Secretaries at government departments setting out his view that it was not desirable for Civil Service employers to provide what he described as an unnecessary service on behalf of the trade unions and their members, which could impose additional costs as well as constraints on the way employers administered their payrolls. He asked departments to review their check-off arrangements.

15. On 21 July 2014, the Home Office indicated to PCS that it was minded to remove check-off arrangements within the department. By letter dated 24 July 2014, PCS wrote to Ms Gooch, the interim head of employee relations at the Home Office stating, amongst other things, that PCS was "opposed to the removal of check-off" arrangements. There was a consultation meeting between representatives of the Home Office and PCS on 7 August 2014. A note of the meeting records that PCS re-affirmed its strong disagreement with the proposal to remove the check-off arrangements, and put forward the view that the provision of check-off facilities was a matter of "custom and practice". The Home Office representatives are recorded as saying that the Home Office view was that the Home Office was under no obligation to continue providing the check-off facility. PCS are recorded as saying that their members wanted check-off arrangements to continue and suggested that only new staff and those promoted be subject to the changes. On 18 August 2014, Mr Jones, the Home Office Group secretary for PCS, e-mailed Ms Gooch saying that its members believed that the check-off arrangement "was a contractual agreement".

16. On 1 September 2014, Ms Gooch notified Mr Jones that the check-off facility would be removed for PCS trade union subscriptions with effect from 1 December 2014. There was further correspondence. On 1 December 2014 the check-off facility was withdrawn.

17. On 5 December 2014, PCS sent a letter setting out its objections to the change and asking that the letter be treated as a collective grievance on behalf of all members of PCS Home Office Group from whom the check-off facility had been withdrawn. It said that PCS formally objected to the removal of the facility, that PCS believed that the removal of the facility was a breach of the contracts of employment of individuals and asked that the decision be reversed. By letter dated 15 December 2014, PCS was told that the grievance would only be dealt with if the individuals on whose behalf it was made were identified and that complaints about policy as distinct from the application of the policy could not be dealt with under the grievance process. On 13 January 2015, PCS replied indicating that the grievance was filed on behalf of all those members who had had the check-off facility removed and the Home Office could identify those from their systems. The Home Office replied indicating that they considered that PCS needed

to obtain confirmation from individuals that they wished to be part of the grievance. In the event, the grievance was never processed.

18. Following notification of the withdrawal, PCS conducted a campaign to encourage members affected by the withdrawal of the check-off facility to make arrangement to pay their direct debit payment in an attempt to maintain the flow of subscriptions. In addition, PCS brought proceedings against a different department, the Department for Work and Pensions, on behalf of two employees in that department with PCS contending that the provision of the check-off facility was a term of the individual claimants' contract and that the PCS could enforce that term (see the reported decision in *Cavanagh v Secretary of State for Work and Pensions* [2016] ICR 826). It appears that PCS regarded this as a test case, that is, one that would establish whether the employees had a contractual right to be offered a facility for check-off. It appears that PCS did not inform the Home Office that that was their understanding although it appears that the Home Office was aware of the litigation. The claimants and PCS succeeded in their claim in 2016 and reached agreement on the amount of damages payable to PCS in 2018.

The Claim and the Judgment in Cox

19. On 3 December 2019, solicitors acting for PCS sent a letter before claim to the Home Office. On 9 October 2020, the four individual claimants issued a claim under CPR Part 8 for a declaration that the termination of their entitlement to have their subscriptions to PCS collected by means of check-off amounted to a breach of their contracts of employment. The fifth claimant, PCS, sought a declaration that the material terms of the individuals' contract of employment purported to confer a benefit on PCS within the meaning of section 1(1)(b) of the 1999 Act and that the Home Office could not show that the parties to the contract of employment did not intend that term not to be enforceable within the meaning of section 1(2) of the 1999 Act. PCS also sought damages for the breach of that term in the individual claimants' contracts of employment and of the same breach in the contracts of employment of other members of PCS.

20. Choudhury J. held that the offering of the check-off facility was a term of the individual claimants' contracts of employment and there was no implied term that the facility could be removed on reasonable notice. He concluded therefore that the removal of the check-off facility did amount to a breach of the individual claimants' contracts of employment. Permission to appeal on the ground that the conclusion that individual claimants had a contractual right to check-off was refused. There was no appeal on the issue concerning termination on reasonable notice. Those issues are not, therefore, before this Court. This Court proceeded on the basis that the individual claimants in the *Cox* case (and the other cases) had a contractual right to be offered the check-off facility.

21. Choudhury J. next considered whether the individual claimants had agreed to vary the terms of their contracts of employment by continuing to work and had waived any previous breach. Having summarised the decision of this Court in *Abrahall v Nottingham City Council* [2018] EWCA Civ 796, [2018] ICR 1425, Choudhury J. concluded that the individual claimants had not accepted the withdrawal of the check-off facility for the following reasons.

22. First, the fact that the individual claimants had continued to work did not give rise to an unequivocal inference that they had accepted the change in the terms of employment governing the check-off arrangements. The employees had relied on PCS to put forward their protest about the change on their behalf and PCS had done so. Continuing to work in those circumstances was not only referable to an acceptance of the change of terms; it was consistent with leaving the task of registering objections to PCS. Further, this was a case where the change in terms was entirely detrimental to the employees and in those circumstances it was more difficult to infer an unequivocal acceptance of the change in terms.

23. Secondly, there had been protest at the collective level and that was sufficient to negate any inference based on a continuation of work. While the grievance had not been processed, it had not been withdrawn. PCS could have made its position clearer and could have made it clear that it regarded the litigation brought in the *Cavanagh* case against a different department as applicable to the Home Office. Equally, the Home Office could have informed the employees that continuing to work after the check-off facility was withdrawn would be seen as acceptance and failed to clarify the position with PCS. There was equivocality on both sides.

24. Thirdly. the setting up of direct debits to ensure continued payment of union subscriptions was not an unequivocal act implying acceptance. The employees were faced with a situation where their union subscriptions would cease, leaving them without the benefit of union membership. The union faced a substantial loss of income. Choudhury J. viewed entering into direct debit arrangements as "reasonable mitigating steps that the employees could be expected to take when faced with a breach".

25. Fourthly, the time between the making of the objection and the letter before claim did not alter matters. Once PCS had made its objection clear, nothing was done or said that would have unequivocally indicated that the objection was being withdrawn. The mere passage of time thereafter did not in the circumstances of this case lead to the inference that the objection was withdrawn or that the employees had accepted the change.

26. Next Choudhury J. held that PCS was entitled to enforce the term in the individual claimants' contract of employment. It was accepted that the contract purported to confer a benefit on PCS within the meaning of section 1(1)(a) of the 1999 Act. Choudhury J. therefore considered that the question was whether he was satisfied that, on a proper construction of the contract, the parties did not intend the term to be enforceable by PCS. Choudhury J. held that he could not be satisfied of that for the following reasons. He rejected the argument that, as the parties to the collective agreement (the employer and the union) did not intend the agreements relating to the check-off facility to be enforceable by the union, the parties to the individual contract of employment could not have intended that result either. First, he considered that the intentions of the parties to the collective agreement were not relevant to construing the intentions of the parties to the individual contracts. Secondly, it could not be presumed that the intentions of the parties to the collective agreement must be consistent with the intention of the different parties to the individual contracts of employment. Thirdly, the provisions in an individual contract continued to have force even where the collective agreement ceased to have force. That indicated that the union may retain a continuing interest in enforcing the contractual terms as a third party after the collective agreement terminated. Fourthly, the fact that the term might confer a benefit on other third parties where it

was unlikely that the intention was that they could enforce the term was not determinative of whether a term was enforceable by a different third party.

27. Finally, Choudhury J. considered whether any of the individual claimants entered into a contract after 11 May 2000, the date on which the Act become enforceable, so that PCS could rely on section 1 of the 1999 Act to enforce that term. The issue concerned the second and fourth claimants, Ms Davey and Ms Speakman. They had begun their employment, and entered into contracts, before 11 May 2000 but there had been changes after that date. Choudhury J. held that a fundamental variation of the terms of the contract of employment could amount to entering into a new contract. A temporary promotion effective for any significant length of time would amount to a fundamental variation of the contract and therefore involve the entering of a new contract. Transfer to another unit might not involve a fundamental variation and much would depend on the circumstances. Changes to a new basis of calculating working hours or a change from part-time to full-time work would be likely to involve a fundamental change. For those reasons, Choudhury J. held that Mr Davey and Ms Speakman had entered into contacts after 11 May 2000 by reason of the changes to their terms and conditions that he had identified in his judgment. Accordingly, the 1999 Act applied to their contracts.

The Individual Contracts of Employment in the Crane case

28. The *Crane* case concerned an employee of DEFRA and two employees of executive agencies of DEFRA and PCS. The first claimant in the *Crane* case, Keith Crane, joined the Ministry of Agriculture, Fisheries and Food ("MAFF") in May 1986 as an Administrative Officer, and remained within that department until it merged with part of the Department for Environment, Transport and the Regions to form DEFRA in 2001. He was promoted to Executive Officer in around 2001, Higher Executive Officer in 2015 and then Senior Executive Officer in DEFRA in 2017. He did not have a copy of his contract of employment but there was a memorandum of terms and conditions of service signed by him at the time of his appointment. That provided that further information about conditions of service was contained in MAFF's Staff Manual and a handbook. Those were no longer available. Choudhury J. inferred that, given the common origin of the Code across Government departments at the time, one or both would have referred to the provisions of the Code. There was also a draft model contract in existence and Choudhury J. accepted that that draft, or something substantially similar, applied to Mr Crane's employment. The draft model code provided that it set out the employee's principal term and conditions. A footnote provided that references to the staff handbook was a reference to departmental or agency documents which, in compliance with the CSMC, set out the terms and conditions of service. There was no express reference to check-off arrangements in the model contract.

29. The second claimant in the *Crane* case, Elspeth Wagg, began employment with the Rural Payments Agency ("RPA") as an agency worker in 2001. The RPA is an executive agency of DEFRA. She became a permanent employee in 2007. Ms Wagg did not have a copy of her contract of employment. However, there was a written statement of her employment particulars (signed as having been accepted on 9 February 2006) which stated that Ms Wagg's terms and conditions of service were published in the CSMC and in an "on-line Staff Handbook". An extract from the RPA Handbook issued, it seems in September 2000, was exhibited to her witness statement. That dealt with "Voluntary Deductions from Pay" and provided, so far as relevant, that:

> "80 There are facilities for the deduction from pay, at the request of staff, of periodic payments to organisations with which the Agency as arrangements for the collection and remittance of such payments.
>
> …
>
> Trade Unions
>
> 84. Under an arrangement known as 'check-off', members of staff can arrange for trade union subscriptions to be paid directly from their salaries, free of charge. In the past, authorisation for such payments was only required when staff first joined a trade union. Now, under the Trade Union Reform and Employee Rights (TURER) Act 1992 , all union members have to sign new authorisations every three years.
>
> 85. Staff are notified in advance of any increase in subscriptions, and can withdraw from the check-off arrangements on publication of such a notice, or at any time, although a reasonable period should be allowed between an instruction to stop and cessation of deductions.
>
> 86. Currently a number of staff contribute to the following:-
>
> FDA Administrative Grades
>
> IPMS Scientific Grades
>
> PCS Executive, Clerical, Secretarial and Support grades."

30. The third claimant, Caroline MacKenzie, joined MAFF in 1990 as an Assistant Scientific Officer. She was promoted to Scientific Officer prior to 2001 and, in 2014, transferred to the role of Executive Officer. She did not have a copy of her contract of employment but believed the terms were similar to an unsigned document of MAFF's "Schedule of Terms and Conditions" she exhibited to her witness statement. Paragraph 4 of that document indicated that departmental rules implementing the CSMC were in the process of being published in a "Staff Handbook". There is also a letter of appointment dated 16 February 1990 and signed by Ms MacKenzie on 6 March 1990, with a memorandum of conditions of service attached. The letter set out certain terms and conditions and provided that details of conditions of service applicable to civil servants were published in the "CSMC, Industrial Memoranda and section Kb (relating to discipline) of Estacode etc."

31. Choudhury J. referred to two other DEFRA documents which dealt with voluntary deductions from pay. The first was a document entitled "Interim Defra Staff Handbook". Under the heading, "Trade Union Subscriptions", the interim handbook provided that:

> "You may arrange for your trade union subscriptions to be debited directly from your pay. Contact your local trade union representative for details."

32. The second document was paragraph 3.4.1 of DEFRA's Pay Policy which provided that:

> "3.4.1. You may authorise deductions from your salary for direct payment to organisations such as trade unions, the Civil Service Sports Council, the Civil Service Benevolent Fund, the Civil Service Retirement Fellowship or charitable organisations via "Give As You Earn". Notification should be made in writing or e-mail to Shared Services Enquiries."

Withdrawal of the Check-Off Arrangements by DEFRA

33. Following the December 2013 letter requiring departments to review check-off arrangements, DEFRA wrote to PCS in early August 2014 indicating that it was minded to review the check-off arrangements operating in DEFRA. PCS replied by letter dated 15 September 2014 stating that PCS "is opposed to the removal of check-off". It set out the reasons why that was the case and said, amongst other things, that "you state that you have sought legal advice; our understanding is that some staff have a contractual right for have their union subscriptions collected by check-off."

34. On 21 October 2014, DEFRA wrote stating that the check-off arrangements would be withdrawn on 30 January 2015. The letter stated that DEFRA would provide trade unions with reasonable workplace access to assist in the transition from check-off. That would include the use of DEFRA IT to access the PCS website so that members could sign up for direct debits. On 21 October 2014 Mr Papasavva replied on behalf of PCS. He stated that "PCS remained opposed to the removal of check-off" and referred to the letter of 15 September 2014. He asked various questions in connection with the proposal to remove check-off.

35. There were no individual or collective grievances raised against the removal of check-off by DEFRA. There was little in the way of further correspondence between PCS and DEFRA. Choudhury J. found that PCS had not informed DEFRA about the *Cavanagh* litigation and the issue was not raised with DEFRA but he inferred that senior officers at DEFRA did know of the *Cavanagh* litigation. PCS sent a letter of claim on behalf of the individual claimants in the *Crane* case on 11 December 2020. Meanwhile, in an attempt to maintain the flow of subscription income from employees affected the removal of the check-off facility, PCS sought to move members to payment of subscriptions by direct debit.

The Claim and the Judgment in Crane

36. A claim form was issued on 27 January 2021 on behalf of the three individual claimants with PCS seeking remedies in the same terms as the claimants in the *Cox* case.

37. Choudhury J. found that the employees did have a contractual right to be offered the check-off facility for essentially the same reasons as he found the employees in the *Cox* case did. There is no appeal against that finding.

38. Choudhury J. further held that the individual claimants had not unequivocally accepted a variation to their contracts of employment and had not waived any earlier breaches. He accepted that the individual claimants had not raised any objections but they were

members of a union and they had let PCS take the lead on registering objections. PCS had done so in its letters of 15 September 2014 and 23 October 2014. Further, the claimants considered that the issue would be resolved by the litigation in the *Cavanagh* case. In those circumstances, PCS' relative inactivity at DEFRA "could not reasonably be construed as unequivocal acceptance of the position" (see paragraph 50 of the judgment). He did not regard the period of time between removal of the check-off arrangements and the bringing of a claim as indicating acceptance of the change. Further, as in *Cox*, the judge regarded the switch to payment of union subscriptions by direct debit to be reasonable mitigation not acceptance of the change in terms. Choudhury J. also rejected the argument that the individual claimants in *Crane* had accepted new contractual terms on taking up new roles with their employer and that the new contracts did not include any provision of the check-off facility. He held that the new contract did not seek to replace all the terms of the earlier contract and, indeed, in the case of the third claimant, for example, the letter of appointment and summary of terms and conditions said that she was subject to the CSMC which included provision for the check-off facility.

39. Finally, Choudhury J. held that PCS was entitled to enforce the term providing for the offering of the check-off facility by reason of section 1 of the 1999 Act for the same reasons as in *Cox*. On the facts, it was not necessary for Choudhury J. to express a view on whether the Home Office would have a defence to a claim under section 2 of the 1999 Act on the basis of variation, as there had been no such variation. He expressed the view, obiter, that a defence under section 2 would not have succeeded as PCS had not consented to the variation.

The Individual Contracts of Employment in the Smith case

40. The first, second, third and fourth claimants in the *Smith case* were employed by HMRC. HMRC was established by an Act of Parliament in 2005. It was a merger between the Inland Revenue and HM Customs and Excise. At the time of the merger, approximately 24,000 civil servants transferred to HMRC from Inland Revenue and 85,000 from HM Customs and Excise. Prior to the merger, the first and second claimants were employed by the Inland Revenue, and the third and fourth Claimants were employed by the HM Customs & Excise. All four were members of the fifth claimant, PCS.

41. The first claimant, Ms Smith, was sent written particulars of contract on about 23 November 2010 stating that further details on all terms and conditions were to be found on the intranet. The second claimant, Mr O'Donnell, received a statement of written particulars which stated that details of conditions of service were to be found in the staff code. The section on voluntary deductions in the Inland Revenue Handbook stated:

> "109. You may have deductions from salary or wages for premiums or subscriptions to the following organisations.
>
> [this lists a number of organisations, which includes a predecessor to PCS]
>
> …

> You should obtain forms of authority from the organisations concerned…Staff association subscriptions may begin in any month. Other deductions may begin from the start of a quarter only. You should forward your authorities to the organisations in time for them to be sent to FDW (Pay Section) 14 days before the deductions are due to commence….

42. The latest set of written particulars received by both the third and fourth claimants, Mr Lawther and Ms Turner, before the removal of check-off arrangements stated that the main terms and conditions were set out in section GS of the Establishment Instructions. That provided, so far as material, that:

> "17.2 Introduction
>
> ADP Chessington has arrangements with a number of charities, companies and organisations to make voluntary deductions from pay. You can arrange direct with them for certain subscriptions/premiums to be deducted from your salary. A list of these organisations is shown in Appendix E….The Department has no involvement in the administration and accepts no liability for these arrangements so you must ensure that deductions are correct and in accordance with your instructions.
>
> 17.3 How to arrange for deductions to be made from your salary
>
> If you want to authorise new deductions from your salary you must complete a form that the organisation you have joined will give you. You should send the completed form back to the organisations who will forward it to ADP Chessington.
>
> 17.4 Cancelling your deductions from salary
>
> If you want to stop any voluntary deductions from your salary you should write to the organisation and ask them to cancel the deduction.
>
> 17.5 Trade Union Subscriptions
>
> The two Civil Service unions with recognition rights in this Department are the:
>
> Public and Commercial Services Unions…"
>
> 3.4.1. You may authorise deductions from your salary for direct payment to organisations such as trade unions, the Civil Service Sports Council, the Civil Service Benevolent Fund, the Civil Service Retirement Fellowship or charitable organisations via "Give As You Earn". Notification should be made in writing or e-mail to Shared Services Enquiries".

43. Following the creation of HMRC, terms and conditions were included in a new document entitled the Blue Book. This did not expressly refer to the check-off facility. HMRC contended that this meant that the check-off arrangements did not continue after merger. The claimants contended that the Blue Book contained only the main terms and conditions and not other terms including the check-off facility. They relied on various pay policy documents produced after the creation of HMRC, and referred to in the judgment of Freedman J. which, essentially, reflected the provisions governing the check-off facility. Freedman J. accepted the claimants' arguments on this issue.

Withdrawal of the Check-Off Facility by HMRC

44. By letter dated 11 November 2014, HMRC indicated that they were beginning a process of consultation to determine whether to remove the check-off facility. On 12 January 2015, PCS wrote to the Chief Executive of HMRC saying, amongst other things, that:

> "Our view remains that Check-off is a contractual right that has been employed without any problem for decades. More importantly perhaps it is something that is seen as a key benefit by our members & something that they would prefer not to give up.
>
> The Civil Service Management Code continues to allow for Check-off & sets out a number of conditions for its operation by civil service employers. All of these conditions are currently being met including the requirement for the administration costs to be covered. You will be aware that the current arrangements are "paid for by PCS at the rate of 50p per member per month.

45. Various consultation meetings took place. On 15 January 2015, HMRC gave PCS notice that the check-off facility would be removed with effect from the end of April 2015.

46. No individual grievance was made by any of the four claimants (nor, it seems, was there any collective grievance). Freedman J. notes that complaints were made by three employees in early 2015 and a letter before claim sent by two other employees (neither of whom were ultimately claimants) on 15 April 2015. Freedman J. also found that the four individual claimants were aware of the litigation in *Cavanagh* and inferred that senior officials at HMRC also knew of that litigation. Following the withdrawal of the check-off facility, PCS sought to arrange for members to pay their union subscriptions by direct debit.

The Claim and the Judgment in Smith

47. A claim form was issued on 24 March 2021 on behalf of the four individual claimants with PCS seeking remedies in the same terms as the claimants in the *Cox* case.

48. Freedman J. found that the employees did have a contractual right to be offered the check-off facility for essentially the same reasons as Choudhury J. found in the *Cox* and *Crane* cases. There is no appeal against that finding.

49. Freedman J. further held that the individual claimants had not unequivocally accepted a variation to their contracts of employment and had not waived any earlier breaches. They had not done so at the time of the withdrawal of the check-off facity in April 2015. There was no agreement to the change and, on 12 January 2015, PCS had stated their view that the arrangement was contractual. There was no acceptance during the next couple of years notwithstanding the fact that the individual claimants continued to work for HMRC. There was no reason to believe that the protests against withdrawal of check-off had been removed. PCS were pursuing the litigation in *Cavanagh*. The use of direct debits by the individual claimants was not evidence of an acceptance of the change but reasonable mitigation to enable them to retain the benefits of union membership. Thereafter, the gap until the claim was brought did not alter the fact that there had been no unequivocal acceptance of the variation.

50. Finally Freedman J. held that PCS was entitled to enforce the term providing for the offering of the check-off facility by reason of section 1 of the 1999 Act essentially for the same reasons given by Choudhury J. in the *Cox* and *Crane* cases.

THE GROUNDS OF APPEAL

51. Each of the three appeals contains the following grounds, namely that the judge below erred in concluding that:

    (1) the individual claimants had not varied their contracts to exclude check-off and waived any prior breach through their conduct; and

    (2) the parties to the individual contracts of employment did not intend that the term relating to offering the check-off facility would not be enforceable by PCS pursuant to section 1(2) of the 1999 Act.

52. In *Cox*, there is a third ground of appeal, namely that Choudhury J. erred in finding that the second and fourth claimants, Mr Davey and Ms Speakman, entered into contracts on or after 11 May 2000 within the meaning of section 10 of the 1999 Act.

THE FIRST ISSUE – VARIATION AND ACCEPTANCE

Submissions

53. Mr Sheldon KC, with Mr Feeny, for the appellants in all three cases, submitted that the employees had in all three cases accepted the variation in terms represented by the withdrawal of the check-off arrangements by continuing to work and also waived any prior breach of contract. In essence, he submitted that the judges below had misapplied the principles in *Abrahall* to the particular facts of the three cases. The only proper conclusion on the facts was that the individual employees had accepted the variation and waived any breach and, further, that the judge drew the wrong factual inferences.

54. He submitted that the common facts here were that the individual employees continued to work after the check-off facility had been withdrawn. There was total silence on the part of the individual employees and PCS for over five years after the check-off facility had been withdrawn. No individual employee said that they were working under protest. None brought a grievance. In *Cox*, PCS had brought a collective grievance but that was brought before the check-off facility was withdrawn and not proceeded with

afterwards. Neither the individual employees nor PCS indicated that the *Cavanagh* litigation was intended, or seen by them, as a test case which would determine the rights of the employees of other departments such as those in these appeals. Even after judgment was given in *Cavanagh* in 2016, and after damages were settled in 2018, nothing was done or said to indicate that the decision was relevant to the employees in these appeals. Further, the judges below misinterpreted the decisions of the individual claimants to pay union subscriptions by direct debit. In context, Mr Sheldon submitted, where the individual employees worked without protest for years, if they were not accepting the withdrawal of the check-off facility they needed to say so explicitly. Mr Sheldon relied upon the observations of Sir Patrick Elias in *Abrahall* to the effect that, given that the employment relationship was a continuing relationship, based on good faith, it would be appropriate to infer that a failure to complain about a proposed variation of the contract for the future amounted to agreement to the variation. Mr Sheldon submitted that, if the individual claimants had by their conduct accepted the variation for the future, they must also have waived past breaches.

55. Mr Segal KC, with Mr Patel, for the claimants in all three cases submitted that the issue was whether there had been an unequivocal acceptance of the removal of the check-off facility. He submitted that the judges below were entitled to conclude that there had been no unequivocal acceptance. In all three cases, there had been protest at the collective level and that protest had not been withdrawn. It did not matter whether the protest came before or after the variation was implemented. Further, PCS, who were dealing with matters on behalf of individual members, was pursuing a contractual claim against other departments, as was known to the three departments in the present appeals. That fact too indicated that there was no unequivocal acceptance of the variation. Further, the judges were entitled to regard the conduct of the employers as itself equivocal. Finally, on waiver of past breaches, there was no unequivocal representation that prior contractual rights were being waived and no evidence of reliance on the part of the employers.

Discussion

56. The relevant principles governing situations in which an employee may be taken to have accepted a variation of a contract by continuing to work after implementation of the variation are discussed in *Abrahall*. That case involved a situation where the employers imposed a two year pay freeze with effect from 1 April 2011. The trade unions representing the employees affected by the pay freeze did not agree the freeze. There was, however, insufficient support for industrial action. There were only two communications after the implementation of the pay freeze. At a budget consultation meeting on 15 April 2011, there was reference to the fact that members of the union were concerned about changes to the terms and conditions. At a similar meeting on 27 May 2011, a union representative said words to the effect that the pay freeze was in breach of agreements on pay. No individual employee raised a grievance. The union did not raise a formal dispute. No further complaints were made. The individual employees worked from 1 April 2011 for two years receiving only the reduced pay. At the end of the two year pay freeze, individual employees brought a claim for unlawful deductions from wages. One principal issue was whether the individual employees had accepted a variation to their terms of employment by continuing to work after the variation had been made.

57. First, as the Court of Appeal held, the conduct of an employee in continuing to work in circumstances where an employer has indicated that it wishes to vary or modify the contract may be capable of being understood as indicating acceptance of the variation. Whether or not it does so depends on what inferences may be drawn from the particular facts of the case. That appears from paragraphs 85 to 86 of the judgment of Underhill LJ, with whom Ryder LJ Senior President of Tribunals and Sir Patrick Elias agreed, which provide so far as material that:

> "85. However, to take the position that to continue to work following a contractual pay cut could never constitute acceptance would be contrary to the dicta of both Browne-Wilkinson J in *Jones v Associated Tunnelling Co Ltd* [1981] IRLR 477 and Elias J in *Solectron Scotland Ltd v Roper* [2004] IRLR 4, in an area where the specialist expertise of the Employment Appeal Tribunal must be accorded particular respect; and I do not believe that it would be right in principle. A contractual offer can of course be accepted by conduct, and that must include the offer of a variation. Under a contract of employment the parties are in a complex relationship in which they are both required to perform their mutual obligations on a continuous basis, and those obligations are frequently modified by their conduct towards each other. I can see no reason why an employee's conduct in continuing to perform the contract, in circumstances where the employer has made clear that he wishes to modify it, may not—in principle—be reasonably understood as indicating acceptance of the change. …..
>
> 86. However, to say that in some circumstances continuing to work following a contractual pay cut may be treated as acceptance does not mean that it will always do so. On the contrary, what inferences can be drawn must depend on the particular circumstances of the case. Neither Browne-Wilkinson J in the *Jones* case nor Elias J in the *Solectron* case went further than saying that continuing to work following a contractual pay cut *might* constitute acceptance: the language used was "may well be taken to have … agreed" and "it may be possible to infer". The authorities illustrate some specific points about the proper approach to the question of when continuing to work may constitute acceptance. I briefly identify them as follows.

58. Secondly, Underhill LJ then identified the three specific points as follows at paragraphs 87 to 89 of his judgment:

> "87. First and foremost, the inference must arise unequivocally. If the conduct of the employee in continuing to work is reasonably capable of a different explanation it cannot be treated as constituting acceptance of the new terms: that is why Elias J in the *Solectron* case used the phrase "*only* referable to". That is simply an application of ordinary principles of the law of contract (and also of waiver/estoppel). It is not right to infer that an employee has agreed to a significant diminution in his or her

> rights unless their conduct, viewed objectively, clearly evinces an intention to do so. To put it another way, the employees should have the benefit of any (reasonable) doubt."
>
> 88. Secondly, protest or objection at the collective level may be sufficient to negative any inference that by continuing to work individual employees are accepting a reduction in their contractual entitlement to pay, even if they themselves say nothing. This is clear from *Rigby v Ferodo Ltd* [1988] ICR 29: see para 74 above.
>
> 89. Thirdly, Elias J's use in para 30 of his judgment in *Solectron* of the phrase "after a period of time" raises a point of some difficulty. It is easy to see how it may not, depending on the circumstances of the particular case, be right to infer acceptance of a contractual pay cut as from the day that it is first implemented: the employee may be simply taking time to think. Elias J's formulation is intended to recognise that a time may come when that ceases to be a reasonable explanation. However, it may be difficult to identify precisely when that point has been reached on anything other than a fairly arbitrary basis. In *Khatri* Jacob LJ discomforted counsel for the employers by making that very point: see para 47 of his judgment. But, again, that passage needs to be read in the context of the fact that in that case the variation had not yet bitten, and I do not think that the difficulty in identifying the precise moment at which an employee should be treated as first accepting a contractual pay cut means that the question has to be answered once and for all at the point of implementation."

59. It is correct that Sir Patrick Elias, with whose judgment Ryder LJ, agreed, made further observations on why it would not be appropriate to proceed simply on the basis that an employee cannot be held to have accepted a variation by working without protest and why, on the facts of this case, the employees should not be taken to have accepted any variation. He said this at paragraphs 110 to 111 of his judgment:

> "110. It may be said that the employee should never be held to have accepted a variation simply by working without protest under the new terms without more. After all, a party can bring a claim for breach of contract within the limitation period without having to notify the other party that he objects to the breach, and why should this be different? I think that the answer lies in the fact that the employment relationship is typically a continuing relationship based on good faith, and exceptionally in that context it might be appropriate to infer that a failure to complain about a proposed variation of the contract for the future may be taken as agreement to that variation which prevents it constituting a breach. It might also be said that an employer can always put the position beyond doubt by lawfully terminating the contract on notice and introducing the varied contract which includes the new disadvantageous term or terms. No doubt the

> employer's reluctance to do that is in part motivated by a desire to avoid potential unfair dismissal claims. But there are also less selfish reasons. In the context of a continuing relationship based on good faith, dismissing and re-employing might appear to be an unnecessarily hostile stance, only to be adopted as a last resort. Attempts to secure agreement should not be discouraged and exceptionally the circumstances may justify the inference that the employee has agreed to the new terms even where he has been reluctant to do so formally."
>
> 111. [Counsel for the employer] put forward some powerful reasons why the employment judge ought to have found that there was acceptance of the pay variation here, in particular the lengthy period of almost two years without complaint when no pay increments were given. However, I agree with Underhill LJ that the judge was entitled to take the view he did. There was initially objection to the change and thereafter, once the decision not to take industrial action had been taken, neither the unions, the employees nor the employer clarified their position. It could not in these circumstances be said that the employees had unequivocally by their conduct shifted their position and accepted the change in terms.

60. Applying those principles to the facts of these three appeals, I am satisfied that the judges below were entitled to reach the conclusion that the individual employees had not accepted the variation of their contracts represented by the removal of the facility for payment of union subscriptions by check-off. The key question is whether there was an unequivocal acceptance of the variation. If all that had happened was that the variation was implemented, the employees continued to work and nothing was done for over five years, it might be possible to take the view that the individual employees had, at some stage accepted the variation. That was not, however, all that was done and that would not represent the full factual situation in these cases.

61. In all three cases, PCS, who were dealing with this issue on behalf of their members, did make protests. In the *Cox* case, they notified the employer that they objected to the change and began a collective grievance. That was not processed because the employer required individual employees to be named and give their consent to the grievance being brought and would not consider a grievance on a policy issue. The fact that the grievance was not processed does not, therefore, indicate a change of mind on the part of PCS and an acceptance of the changes. In *Crane*, PCS wrote on 15 September 2014 indicating that they opposed the removal of the check-off facility and that some staff had a contractual right to have the check-off facility offered. In *Smith* PCS wrote on 8 January 2015 indicating that the check-off facility amounted to a contractual right which was seen as a key benefit. In all three cases, there had been protest at the withdrawal of the check-off facility.

62. It is correct that the protests were made prior to the variation being implemented. There is, however, no rule of law that the protests must be made after the implementation of the variation. The issue is whether the facts, taken as a whole, indicated that the individual employees had, by their conduct, accepted the variation. Here, the judges below were entitled to take the view that the protests had been made and not withdrawn

and that there were also other facts indicating that PCS, acting for its members, had not accepted the variation. In particular, PCS had initiated the *Cavanagh* litigation against another department. The outcome of that case would be likely to be applicable or at least highly relevant to the employers in these cases. PCS could, as the courts below accepted, have done more to ensure that the employing departments understood that they had not abandoned their protest at the withdrawal of the check-off facility and that they regarded the *Cavanagh* litigation as a test case relevant to those departments. The protest, and the litigation, were both strong pointers that PCS, and its members, did not accept the variation of the contract.

63. Further, the judges below were entitled to have regard to the fact that the employing department had not presented the change as a contractual variation to which the agreement of the individual employees was sought. Nor had they sought clarity on the position of the individual employees in the light of the *Cavanagh* litigation. In those circumstances, the judges below were entitled to conclude that, while PCS had not made the position as clear as it could have, the appellant departments had not made it clear that the continued working by the individuals would be treated as acceptance of the variation. The point is not that the employers must, as a matter of law, take steps to bring about acceptance of the variation. Rather the question is what inference, on the facts, should be drawn in these cases. Given that the actions of PCS had not indicated unequivocal acceptance of the variation, and given that the employers had not taken steps which would have required the situation to be clarified, the judges were entitled to conclude that the situation where there had not been an unequivocal acceptance persisted.

64. The other factors relied upon by the employers do not alter that fundamental picture. The judges were entitled to conclude that the setting up of direct debits was at least consistent with a desire to maintain the benefits of union membership rather than an acceptance of a variation of the contract of employment. The judges were entitled to find that the passage of time before litigation was instituted did not alter the fact that there had not been an unequivocal acceptance of the variation and that position had not changed. In particular, the observations of Sir Patrick Elias in *Abrahall* do not amount to the recognition of a rule that employees, who are party to a continuing relationship such as an employment relationship, must notify the employer if they object to a variation in their terms and conditions of service. Rather, Sir Patrick Elias was referring to reasons why, notwithstanding the fact that the time limit for instituting proceedings for breach of a contract had not passed, an employee might nevertheless be taken to have agreed a variation. Whether or not the employee has done so depends on all the facts of the case.

65. In the circumstances, therefore, the judges below were entitled to draw the factual inferences that they did in these three cases. They were entitled, having regard to the facts as a whole, to conclude that the evidence did not establish that the individual claimants had unequivocally accepted the variation of their contractual terms. Similarly, they were entitled to find that the evidence did not establish waiver of any past breaches. For those reasons, this ground of appeal fails.

THE SECOND ISSUE – THE 1999 ACT

Submissions

66. Mr Sheldon submitted that the term in the contract of employment was not intended to be enforceable by PCS. First, he submitted that on a proper construction of section 1(2) of the 1999 Act, having regard to section 6(c) of the Interpretation Act 1978, "parties" meant "either party". The employer in the present case would not have intended the provision governing check-off to be enforceable by the trade union. Secondly, he submitted that the judges below erred in treating as irrelevant the fact that the contractual provision owed its origin to a collective agreement which was not intended to be enforceable as between the union and the employer. That was part of the factual background to the making of the contract of employment and so was relevant having regard to the approach to interpretation set out in, amongst other cases, *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 WLR 896 and *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619. Given that the collective agreement would not have been intended to be enforceable by the union or employer, it would not have been the intention of the parties to the individual contract of employment which incorporated that collective agreement that the terms of the contract of employment could be enforced by the trade union.

67. Mr Segal submitted that the effect of the 1999 Act was to create a rebuttable presumption whereby, if a term purported to confer a benefit on a third party, the term would be enforceable by the third party unless on the proper construction of the contract both parties did not intend the term to be enforceable by the third party. The fact that the term derived from an historic collective agreement was irrelevant in seeking to infer the intention of the parties to the contract of employment. Further, the fact that the collective agreement would have been unenforceable as between the parties to that agreement shed no light on whether the parties to the contract of employment would have intended the term of that contract to be enforceable. There was nothing in the material context, or the terms of the contracts of employment entered into after 11 May 2001 (when the material provisions of the 1999 Act came into force), that implied that PCS should not be entitled to enforce the benefit conferred on it by the check-off provisions.

Discussion

68. The issue in this case involves the proper interpretation of section 1 of the 1999 Act. That involves considering the words of the statutory provision, read in context and having regard to the purpose underlying the statute, and bearing in mind any legitimate aids to statutory interpretation,

The Proper Interpretation of the 1999 Act

69. Section 1 of the 1999 Act provides that:

> "1.— Right of third party to enforce contractual term."
>
> (1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—
>
> (a) the contract expressly provides that he may, or

> (b) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.
>
> (3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.
>
> (4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.
>
> (5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).
>
> (6) Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.
>
> (7) In this Act, in relation to a term of a contract which is enforceable by a third party—
>
> *"the promisor"* means the party to the contract against whom the term is enforceable by the third party, and
>
> *"the promisee"* means the party to the contract by whom the term is enforceable against the promisor."

70. The 1999 Act was enacted to give effect to the proposals of the Law Commission contained in Law Commission Report (No. 242) on Privity of Contract: Contracts for the Benefits of Third Parties, considered as part of its sixth programme of law reform and submitted to Parliament in July 1996. The 1999 Act gives effect to the draft Bill annexed to the report. In those circumstances, it is permissible to take account of the Report in order to identify the mischief to which the provision was directed: see *Pepper v Hart* [1993] AC 593 at 635. Further, where Parliament enacts provisions in a draft Bill proposed by the Law Commission it is generally not the case that "Parliament meant anything different from the Law Commission" per Lord Bingham at paragraph 29 in *R v G* [2003] UKHL 50, [2004] 1 AC 1034.

71. The purpose underlying the Law Commission proposals was to reform the rule of law which provided that a contract could not confer enforceable rights on a person who was not a party to the contract. The aim was to enable contracting parties to confer on third

parties a right to enforce the contract: see sections 1, 2 and 3 of the report, especially at 1.2 and 3.28. The test of when a contractual provision should be enforceable was dealt with in section 7 of the report. The Law Commission proposed a "dual intention" test, that is that:

> " a third party may enforce a contract in which the parties intend that he should receive the benefit of the proposed performance and also intend to create a legal obligation enforceable by him (the "dual-intention" test)"

see paragraphs 7.1 (iii) and 7.4 to 7.5 of the report.

72. The way in which that test was to be achieved was as follows. First, the term would be enforceable if the contract expressly confers a right on the third party to enforce the contractual term (see paragraph 7.6(a) and the discussion at paragraphs 7.10 to 7.16 of the report). Secondly:

> "(b) a third party shall also have the right to enforce a contractual provision where the provision purports to confer a benefit on the third party, who is expressly identified as a beneficiary by name, class or description ("the second limb"); but there shall be no right of enforceability if the parties under the second limb where on the proper construction of the contract it appears that the contracting parties did not intend the third party to have that right (the "proviso")."

see paragraph 7.6 of the report and the discussion at paragraphs 7.17 to 7.18 of the report. As the Law Commission said at paragraph 7.17 of the report:

> "In general terms it establishes a rebuttable presumption in favour of there being a third party right where a contractual provision purports to confer a benefit on an expressly designated third party". But that presumption is rebutted where on a proper construction of the contact the parties did not intend to confer a right of enforceability."

73. Those recommendations appeared in the draft Bill which became, without amendment, section 1 of the 1999 Act. Viewed in that context, the purpose of section 1 is clear. It is to determine when a person is entitled to enforce a term contained in a contract to which he is not a party. That appears from the opening words of section 1 of the Act: it deals with the situation when "a person who is not a party to a contract" may "in his own right enforce a term of the contract".

74. The circumstances in which such a person can do so are set out in sections 1(1)(a) and 1(1)(b) read with section 1(2) of the 1999 Act. First, such a person may enforce a term of the contract if the contract expressly provides that he can do so: section 1(1)(a). Secondly, such a person may also enforce a term of the contract if (a) the term purports to confer a benefit on him (b) subject to the proviso in section 1(2) that that is not to be the case if "on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party": subsections 1(1)(b) and (2) of the 1999 Act.

75. The following observations can be made. First sub-sections 1(1)(b) and (2) of the 1999 Act need to be read together. The ultimate question is to determine whether the parties to a contract intended that a contractual term should be enforceable by a third party. Sub-section 1(1)(b) concerns whether the term purports to confer a benefit on a third party. Sub-section 1(2) concerns the qualification, namely that the contractual term will not be enforceable if the parties to the contract did not intend the term to be enforceable by a third party. It is unlikely that the fact that the qualification is expressed in the negative ("that the parties did not intend the term to be enforceable by the third party") will materially affect the outcome in a particular case. The likelihood is that courts will be in a position to determine whether, on the proper construction of the contract, the term was or was not intended to be enforceable by the third party.

76. Secondly, it should be borne in mind when considering the applicability of subsections 1(1)(b) and (2) that the contract may not expressly deal with the question of whether the contractual term is intended by the parties to be enforceable by a third party. If the contract did expressly provide that the term was to be enforceable, the situation would fall within section 1(1)(a). If the contract expressly provided that the term was not intended to be enforceable that would provide a clear answer to the question posed in subsections 1(1)(b) and (2). Those subsections, however, are also intended to include situations where the contract does not expressly deal with the question of enforceability of a term by a third party.

77. Thirdly, against that background, the question is what was the common intention of both parties, objectively ascertained, "on a proper construction of the contract". I reject Mr Sheldon's submission that section 1(2) means that it is sufficient if one of the parties to the contract did not intend the term to be enforceable by a third party.

The Proper Approach to the Interpretation of the Contract

78. The process for interpreting contracts is well established. As Lord Hoffmann observed in *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 WLR 896 at pages 912 to 923, the process of interpreting contracts involves:

> "… the 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."

79. Similarly, in the context of construing a settlement agreement, Lord Bingham observed in *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at paragraph 8 that:

> "….. In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course

> inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified course."

80. To like effect, in the context of the construction of leases, Lord Neuberger said at paragraph 15 of his judgment in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 that:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 , para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn* [1971] 1 WLR 1381, 1384-1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989 , 995-997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 , para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky* [2011] 1 WLR 2900, paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC."

The Application of the 1999 Act to the Facts of the Present Appeals

81. Against that background, I consider the application of section 1(1)(b) and (2) of the 1999 Act to the facts of these appeals. It is accepted that the contractual term in question purports to confer a benefit. The issue then is to ascertain the intention of the parties, having regard to the factual context and the wording of the contract.

82. First, the factual background is a relevant factor in the ascertainment of the intention of the parties. In that regard, the context is that the employer and the union entered into a non-legally enforceable collective agreement. So far as the provisions of the collective agreement were intended to give rise to rights that were to be enforceable by individual employees, the terms of the collective agreement would need to be incorporated into the individual contracts of employment. The context therefore was not, in truth, a situation where the parties to the contract of employment were seeking to confer a benefit on a third party. Rather, the situation was the reverse. The third party and the employer had agreed that certain benefits should be conferred on the employee and the contract of employment incorporated the relevant provisions of the collective agreement in order to ensure that the employees were able to enforce their right to those

benefits. That factual background is a relevant, albeit not conclusive, factor in the construction of the contract of employment. It would not be correct to take the view that, as a collective agreement was not intended to be enforceable by a trade union, then the parties to a contract of employment could never have intended that provisions included in that contract but originating in the collective agreement were to be enforceable by the trade union. The judges below erred, however, in considering that the fact that the contractual provisions originated in a collective agreement, that was not intended to be enforceable by the union, was irrelevant. The context is relevant and is a pointer that the parties to the contract of employment were not intending that the provisions be enforceable by the trade union. Rather, the parties were concerned with a different issue, namely ensuring that the provisions would be enforceable by the employees against the employer.

83. Secondly, it is important to consider the words of the contractual term. It is appropriate first to consider the nature of the contractual term. Here the term provides that the employer will offer a facility to the employee, that is, if the employee wishes, he or she may authorise the deduction of money for payment to specified bodies, including trade unions. The contractual provision therefore concerns the offering of a facility to the employee. It is not concerned, for example, with providing that a sum of money will be paid to a named, identified beneficiary or class of beneficiaries. It may well be (as the employers accept) that the offering of a facility to the employee may purport to confer a benefit on the unions because, if employees do authorise deductions for payment of union subscriptions, the employer will hand over the subscription to the union. The nature of the contractual provision, however, is to ensure that the employer offers a facility to the employee.

84. The nature of the contractual term appears from the language used in the provisions that were incorporated into the individual contracts of employment. In the Code, for example, paragraph 4051 talks of a "civil servant who wishes to authorise deductions from his pay for any of the purposes or organisations listed". The CSMC talks of circumstances where "departments and agencies offer arrangements for deducting subscriptions to trade unions". The HMPO handbook in *Cox* provides that the department "will if you so authorise make deductions from you salary for direct payment" to certain specified organisations. The other staff handbook is to like effect (see paragraph 11 above). In the handbook relevant to the second claimant in *Crane*, the handbook provides that there "are facilities for the deduction from pay, at the request of staff, of periodic payments to organisations with which the Agency has arrangements for the collection and remittance of payments". Further "members of staff can arrange for trade union subscriptions to be paid directly from their salaries". Similar provisions apply to the other two individual claimants in that case. In the case of HMRC, the staff handbook applicable to two of the individual claimants provided that the employee "may have deductions from salary or wages for premiums or subscriptions to the following organisations" which are then listed. The provisions applicable to the other individual claimants provided that there were "arrangements with a number of charities, companies and organisations to make voluntary deductions from pay."

85. The contractual term in question, therefore, is one that involves the employer offering a facility to employees who may, if they wish, authorise deductions from pay for a variety of purposes.

86. Thirdly, it is clear that the provision could not have been intended to be enforceable by all of those to whom deductions from salary were to be paid. In some cases, for example, the deductions were intended to be paid into saving schemes. Other organisations included lotteries or social clubs. It is unlikely that all of the schemes or organisations in respect of which deductions could be made were intended by the parties to be able to enforce the contractual provisions governing the check-off facility. That appears to have been accepted by the judges below. However, as Choudhury J. expressed it at paragraph 80.5 of his judgment in *Cox,* the fact that an organisation was an unlikely candidate for third party rights "might be one factor to be taken into account in construing the intention of the parties, but it would be far from determinative" and … "did not advance matters so far as PCS is concerned". Similarly, Freedman J. considered at paragraph 115 of his judgment in *Smith* that there was "no value in a comparison with the position of other organisations using check-off arrangements" and it "does not shed light on the question of whether the contracting parties intended that PCS should not be able to enforce the relevant contractual obligation".

87. The contractual provisions have to be considered as a whole. The provisions oblige the employer to offer a facility whereby employees can request deductions be made from their wages and paid directly to other organisations. The question is whether the obligation to offer that facility to employees was an obligation that was meant to be enforceable by the employees only, as the parties did not intend that the ultimate recipient of any authorised deductions should be able to enforce the provision requiring that employees be offered that facility. In context, it is difficult to see why the parties would take a different view as to the ability of third parties to enforce that contractual provision depending on the identity of that third party or the purpose for which the deduction was to be used. A more natural inference is that the parties intended the contractual provision to be enforceable by the employees and not by any third party who might ultimately be the recipient of any authorised deduction.

88. In summary, therefore, the contractual provision in question was not intended by the parties to be enforceable by a third party. That follows from the context in which the contractual provisions came to be included in the contract of employment, the nature of the contractual term, in that it offered a facility to employees, and the likelihood that the parties could not have intended the term to be enforceable by all the possible recipients of authorised deductions. On a proper construction of the contract, therefore, the contractual term was one that was not intended to be enforceable by third parties. I would allow the appeals on this ground.

Ancillary Matters

89. For completeness, I note that the appellants contended that PCS could not enforce the contractual provision in any event as there had been a variation of the term by the employees (to which PCS had impliedly consented) and a waiver of any past breach. That, the appellants contended, amounted to a defence under section 2 or 3. I have already found that the contracts were not varied, and there was no waiver of any past breach of contract. These questions do not therefore arise. Nor is it necessary in these circumstances to consider whether, if the contract had been varied, PCS had impliedly consented to that variation for the purposes of section 2 of the 1999 Act.

THE THIRD GROUND OF APPEAL – NEW CONTRACTS

90. In relation to the third issue, Mr Sheldon submitted that Choudhury J. erred in concluding that the second and fourth individual claimants in the *Cox* case had entered into new contracts after 11 May 2000 when their terms and conditions altered. Mr Segal submitted that Choudhury J. had been entitled to reach the conclusion that he did.

Discussion

91. In the light of my conclusion that PCS cannot enforce the contractual term providing that the individual claimants be offered the check-off facility, the third issue does not arise. As the matter has been argued, however, I set out my conclusions on that issue briefly.

92. Section 10(2) of the 1999 Act provides that:

> "(2) This Act comes into force on the day on which it is passed but, subject to subsection (3), does not apply in relation to a contract entered into before the end of the period of six months beginning with that day."

93. That sub-section is intended to ensure that the 1999 Act does not apply to contracts entered into prior to 11 May 2000, that is six months after the 1999 Act came into force. The problem in the employment context is that a contract of employment may have been entered into some years previously but there may have been changes or alterations in the employment relationship. In the context of section 10 of the 1999 Act, the question will be whether those changes take effect as variations of the pre-existing contract or whether the proper inference is that the parties intended to enter into a new contract regulating that changed employment relationship. If the contract is silent on that issue, then the intention of the parties will need to be determined from all the circumstances including the degree of change. Where terms and conditions have fundamentally changed, then, in the absence of indications to the contrary, the likelihood is that the courts will infer that the parties intended to terminate the former contract of employment and enter into a new contract of employment to regulate their relationship (even if some, or many, of the terms of the former contract are included in the new contract of employment). See, generally, *Potter v North Cumbria Acute Hospitals NHS Trust and others (No. 2)* [2009] IRLR 900 especially at paragraphs 72-73.

94. In the present case, the relevant changes in the case of Mr Davey are said to be changes in pay on moving from one work location to another and the change to annualised hours. In the present case, there is no evidence as to whether Mr Davey's pay did change when he re-located and certainly no evidence as to the extent of any change. Similarly, whilst there is evidence that his work pattern was now to be determined by annualisation of his working hours, there is no evidence as to whether the hours changed or the significance of this change. There is no assessment of the significance of the changes or whether the parties to the contract intended, given the changes, to terminate the existing contract and regulate their relationship by a new contract.

95. In relation to Ms Speakman, there is evidence that she was promoted on a temporary basis. There is, however, no evidence as to whether or not the promotion entailed

significant changes in her duties and no findings as to what the parties intended. Ms Speakman relied upon the decision in *FW Farnsworth Ltd v Lacy* [2012] EWHC 2830 (Ch), [2013] IRLR 198. There, however, the individual employee had been promoted but the promotion involved no change of duties (see paragraph 32(3)). The changes did entitle the employee to join a new pension scheme and, importantly, a new scheme providing medical benefits. The document containing these changes also included restrictive covenants restricting the activities of the employee on the termination of his employment. The employee applied to join the new medical scheme after receiving a copy of the contract which included the restrictive covenants. The High Court held that it was to be inferred that the employee had accepted the new contract given that he had applied for benefits in accordance with the terms of the new contract. The decision is not, therefore, authority for the proposition that any temporary promotion necessarily entails the termination of the former contract and the entering of a new contract. There are no findings in the judgment below as to the significance of any changes in the terms and conditions or what the parties intended in the light of those changes. Similarly, in relation to working hours, there is a reference to Ms Speakman changing from part-time to full-time work. This appears to be a reference to the fact that she increased her hours from 30 hours a week to 37, working Monday to Friday instead of Monday to Thursday. Again, there is no assessment of the significance of those changes or the parties' intention.

96. In the circumstances, therefore, if it had been necessary to do so, I would have allowed the appeal on this ground in relation to Mr Davey and Ms Speakman. I would have remitted the matter to the High Court to make findings of fact as to the changes made, their significance and, to determine whether, in the light of the evidence including the significance of the changes to the terms and conditions, the parties intended to vary their pre-existing contract or to terminate that contract and enter into a new contract.

CONCLUSION

97. The judges below were entitled to find that the individual claimants in all three cases had not accepted the change to their terms and conditions represented by the removal of the check-off facility. I would dismiss the appeal on this ground in relation to the individual claimants. I would allow the appeal on the ground that the parties to the contract of employment did not intend the contractual term whereby the employer was to offer a check-off facility to the employees to be enforceable by PCS.

LORD JUSTICE STUART-SMITH

98. I have the advantage of having seen in draft the judgments of Lewis and Underhill LJJ. I gratefully adopt Lewis LJ's summary of the background and the issues. I agree with his reasons and conclusion on the First Issue. I also agree, on the Third Issue, that the materials available to the Court below and to this Court do not permit reliable findings to be made on the questions whether Mr Davey or Ms Speakman had entered into new contracts after 11 May 2000. However, I disagree with his reasons and conclusion on the Second Issue, with the consequence that I would dismiss the appeal on the Second Issue but would allow the appeal on the Third Issue and would remit the matter to the High Court for findings to be made about their contractual status from time to time.

99. While recognising that I am in a minority on the Second Issue, and acknowledging the greater expertise of the majority in the field of employment law, I will try to explain the reasons for my disagreement.

100. There is no doubt about the mischief that the 1999 Act was intended to address. The mischief was the hardship caused by the common law's strict adherence to the third party rule that, subject to limited exceptions, a contract made between A and B as the parties to the contract did not confer rights on someone else (C) who was not a party to the contract but was a third party. That appears from the heading of section 1 ("Right of third party to enforce contractual term") without the need to refer to the Law Commission's Report which, as Lewis LJ explains, identifies the purpose of the Law Commission's proposals in similarly clear terms.

101. Equally, there is no doubt about the means by which the 1999 Act sought to address the mischief. For present purposes, it did so by section 1(1) and (2), the terms of which are clear even if their application may give rise to difficulties. I agree that there are two mutually exclusive categories of case that are of interest in this appeal. The first is those that arise under section 1(1)(a), which enables the third party to enforce a term of the contract if the contract expressly provides that they may. By contrast, sections 1(1)(b) and 1(2) are directly applicable to the facts of the present case because it is common ground that (i) the relevant term of the Claimants' various contracts with their departmental employers purported to confer a benefit upon the third party PCS; but (ii) the contracts do not expressly provide that the third party may enforce the relevant term. The consequence is that the term is enforceable by PCS unless "on a proper construction of the contract [i.e. the Claimants' various contracts with their departmental employers] it appears that the parties [i.e. the Claimants and their respective departmental employers] did not intend the term to be enforceable by the third party [i.e. PCS]."

102. This provision has been described, correctly in my view, as establishing a "rebuttable presumption." It was so described in the Law Commission Report: see sections 7.5, 7.17 and 7.18(iii). It is also plain from the words of the statute, without recourse to that Report. Two points may be made at this stage. First, the presumption is not dependent upon the actual (subjective) intentions of the parties; still less is it dependent upon the intentions of the third party. *Chudley and Ors v Clydesdale Bank plc (trading as Yorkshire Bank)* [2019] EWCA Civ 344, [2020] QB 284 may be seen as an illustration of this point: see *Davies,* "*Excluding the Contracts (Rights of Third Parties) Act 1999",* 2021 LQR Vol 137, 101, 106, 111-112.

103. Second, it is obvious, and has often been observed, that the surest and simplest means of rebutting the presumption is expressly to exclude it. Excluding the effect of section 1(1)(b) of the 1999 Act is obviously the prudent and simplest course for those parties who do not intend the term in question to be enforceable by the third party. It is the course that has been routinely adopted by parties having the benefit of competent legal advice ever since the 1999 Act came into force; and it was treated as a given by Longmore LJ at [92] of *Chudley*. The point was made early on by one of the Law Commissioners, then Andrew Burrows QC*,* in his article *"The Contracts (Rights of Third Parties) Act 1999 and its implications for commercial contracts"* [2000] LMCLQ 540, 542, 544; and see *Davies op cit* 101; *Wilmot-Smith on Construction Contracts* 4th Edition, para. 4.45 ("almost as a matter of routine" in development agreements); and *Cannon & McGurk Professional Indemnity Insurance*, 2nd edition para. 13.78 (professional indemnity policies providing that third parties shall not be entitled to

enforce their terms). I take it as a given that the departmental employers (and the Claimants) in these cases have always had access to competent legal advice.

104. In the present case, no attempt was made to address the question of enforceability expressly, either so as to bring the case within section 1(1)(a), or so as to rebut the presumption of enforceability. The reasons why the parties said nothing on the point may not matter: but a ready explanation may be found in the fact that, even after the decisions in *Cavanagh* and *Hickey v Secretary of State for Communities and Local Government* [2013] EWHC 3163 (QB) (where Popplewell J held that the employees in that case had a contractual right to require their departmental employer to continue to pay their union dues by way of check-off), the departmental employers in the present cases continued to dispute that the check-off provisions gave rise to any contractual obligations at all. Had they been right about that, no question of third party enforcement could have arisen; but they were not, and it did.

105. The nub of the dispute, and where I disagree with the majority, is whether *on a proper construction of the contract* it appears that the parties did not intend the term enforceable by the third party. I agree that the contractual provision in question concerns the offering of a facility to employees, the facility being that their employers would deduct their subscriptions at source and pay them direct to PCS. But this does not determine the issue we have to decide, because it is common ground that, in addition, it purported to confer a benefit on PCS, namely the right to receive the proceeds of check-off in cases where members have taken the necessary steps to avail themselves of the facility. It is that purporting to confer a benefit on PCS that brings the Act into play and generates the rebuttable presumption. Put in slightly different words: the consequence of the contractual check-off obligation owed by the departmental employers to the claimants was a rebuttable presumption that PCS was entitled to enforce the term. It is not right, in my view, to treat the check-off provisions as being solely concerned with offering the facility *to the employee*. Since the passing of the Act, the critical question is not simply what the term in question offers to the other party to the contract; rather it is whether the term in question purports to confer a benefit upon the third party. In these appeals it does, with the result that a right to enforce the contract was conferred on PCS unless, on a proper construction of the contract, it appears that it was the (joint) intention of the employers and employees that it should not be.

106. This is not the occasion for a detailed repetition of the principles of construction of such contracts, not least because they are so well known and Lewis LJ has provided a convenient summary at [78]-[80]. In particular, this is not the place to examine whether or to what extent the principles relating to the implication of terms are different (and involve a different exercise) from the principles of interpretation of contracts: see *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [25]-[29]. Suffice it to say that it would be impossible on the facts of these appeals to conclude that any of the legitimate approaches to implication would justify the imposition of an implied term that the rebuttable presumption was excluded. We are in the territory of interpreting the language that the parties used, not implying terms to supplement it.

107. I, of course, agree that the factual background to a contract may be a relevant factor in the ascertainment of the intention of the parties to the contract. I also agree that the original collective agreement to the effect that check-off should be introduced was not

legally enforceable either by the employers or the unions who were parties to the relevant agreements, the details of which appear to be lost in the mists of time. That, I understand, is true of myriad contractual terms covering any or all spheres of activity which are first negotiated and agreed in the non-binding sphere of collective bargaining before being taken up as legally binding terms of a contract.

108. That said, however, the analysis adopted by the majority seems to me to neglect the two vital features of the case. First, the check-off agreement has ceased to be merely a non-enforceable provision of a collective agreement between unions and management and has become a legally binding term of the contracts entered into by the employers and their employees. Second, the consequence of that adoption as a contractual term is that, unless the contract demonstrates the joint intent of the employers and employees to be different, the term is enforceable by PCS. It follows, to my mind, that one cannot assume or deduce from the fact that the check-off agreement had previously been the product of a non-contractual agreement between other parties (A and C) that the employers and employees (A and B) did not intend it to be enforceable by a third party (C) once it had been included as a contractual term of their (A and B's) agreement. It is self-evident that the check-off obligation need not have been included as a term of the contracts entered into between the employers and the employees; but it was, which fundamentally changed the nature of the obligation and its consequences. Put simply, the fact that the check-off obligation was not enforceable by PCS while it remained in the sphere of being merely the product of a non-enforceable collective agreement tells us nothing about whether the employers and employees intended that it should not be enforceable by PCS once the parties had chosen to include it as a contractual obligation which purported to confer a benefit upon PCS.

109. In my judgment, the terms of the contract entered into between the employers and employees, as outlined in the judgments below and summarised by Lewis LJ in his judgment, include nothing that indicates a joint intention of the parties that the obligation should not be enforced by PCS. While acknowledging the greater experience of the majority in the field of employment law, I do not think that they have identified anything other than an assumption that, because the provision for check-off in the collective agreement was not enforceable by PCS, that fact demonstrates that the employers and employees had a joint intention that it should not be enforceable by PCS in the different context of the employment contracts and the consequences that flowed from the terms of the Act. I am therefore unable to agree with Lewis LJ's assertion that the parties were (only) "concerned with a different issue, namely ensuring that the provisions would be enforceable by the employees against the employer." While I agree that the contractual term in question "is one that involves the employer offering a facility to employees who may, if they wish, authorise deductions from pay for a variety of purposes", it is common ground that it is also a term that purports to confer a benefit upon PCS, which brings the Act into play as I have explained.

110. Nor am I persuaded by Lewis LJ's third reason, namely that there are other organisations to whom deductions from salary were to be paid, for two reasons. First, it would - at least in theory - be a separate question of fact whether the incorporation of arrangements in favour of other organisations also purported to confer a benefit on them, a question which has not been separately addressed in this litigation. Second, the mere fact that the Act applies in relation to a number of disparate organisations (assuming that it does) does not detract from the consequences that follow from a proper

application of the Act to the check-off provisions relating to the union dues. It is not a proper construction of the contract so far as it relates to the union dues, in my view, simply to assert that it is unlikely that the parties intended all such organisations were intended to be able to enforce the provisions. That asserted intent does not emerge from the terms of the contract.

111. Nor is it clear to me that the majority's assumption that the parties did not intend the contractual check-off arrangements should be enforced by PCS is self-evidently or even probably true. In *Hickey* Popplewell J rejected the argument that the check-off arrangements were only or primarily for the benefit of the union, rather than for the benefit of its members in their capacity as employees. A similar approach emerges from the majority's emphasis upon the benefits of the facility to the employees. Accepting that approach supports an inference that, even if the employers would not have intended the arrangements to be enforceable by PCS, their employees may have had a contrary intention because of the benefit it conferred upon them. To my mind, there is nothing in the contracts to displace this inference or to justify a construction that rejects it. I agree with the majority that the intention of one party to the contract that the term should not be enforceable by the third party is irrelevant – what is required is a joint contractual intention.

112. I am not persuaded that the judges below erred in law in their application of the relevant principles. At [79]-[80] of his judgment in *Cox*, Choudhury J first identified the correct principle that he was obliged to apply. He then turned to the principal argument being advanced by Mr Sheldon KC on behalf of the employers which was:

> "based on the contention that the absence of any intention to enforce at the collective level must lead one to infer that there was no such intention at the level of individual contracts. Although it is well-established that once a collectively agreed term is incorporated into individual contracts of employment, the intentions of the parties entering into the collective agreement from which it originated are of no relevance to the construction of that term (see *Harvey on Industrial Relations and Employment Law , AII* at [62] and *Hooper v BRB* [1988] IRLR 517, CA), Mr Sheldon contends that the express intention disavowing enforceability at collective level (supported by the statutory presumption against enforceability) is a matter to be taken into account in construing the individual contracts. *Simply put, the argument (as I understand it) is that the parties to the individual contracts cannot contend that check-off was enforceable by PCS when PCS itself did not contend that it was enforceable.*" [emphasis added]

113. The reference to *Harvey* was to a passage where the editors state, correctly in my view:

> "Once incorporated into an individual contract of employment, a provision which owes its origin to a collective agreement, falls to be construed strictly in accordance with the rules of construction applicable to contracts. In consequence evidence may not be adduced as to what the parties to the collective agreement actually meant at the time of agreeing the collective

> term which has become imported into the individual contract of employment nor may any subsequent action on the part of the "contracting" parties (except of course an expressly agreed variation of the contract) be employed as evidence that the provision as construed in accordance with the normal rules of contract law, did not mean what it said."

114. Addressing the employers' argument that he had articulated, Choudhury J identified the first two difficulties with it as being:

> "80.1. First, it presumes that the intentions at collective level are relevant to construing the intentions of the parties (which are different from those at collective level) to the individual contracts. That is not correct, as is made clear in *Hooper*.
>
> 80.2. Second, it presumes that any intention that PCS had at collective level must necessarily be consistent with the intentions (of different parties) to be construed at the individual contract level. However, there does not appear to be any reason why that should be so. A collective agreement may contain many provisions, few of which might confer any direct benefit on the union itself. Whilst the union may be content with the non-enforceable status of that agreement generally, it does not follow that individual employees, into whose contracts collectively agreed terms have been incorporated, must have intended PCS not to be able to enforce those terms which did confer a benefit on the union. It is advantageous to the employees that PCS can directly enforce those arrangements since the employees then have the security of knowing that their union subscriptions will continue to be paid uninterrupted."

115. While I accept that the reliance on *Hooper* may not be fully justified, I consider that Choudhury J was correct in identifying that what matters for the purposes of the Act is the joint intention of the parties (A and B) to the contract being construed rather than those of a third party (C) who had been a party to the prior collective agreement. I would therefore endorse what the Judge said in [80.1]; and it will be apparent from what I have said already that I agree with what the Judge said in [80.2]. I do not understand the Judge's reasoning to involve an assertion that the fact that the contractual provisions originated in a collective agreement that was not intended to be enforceable by the union was necessarily irrelevant as background to the making of the contract that falls to be construed. The better view is that the judges below did not consider that it demonstrated that the parties jointly did not intend the check-off obligation to be enforceable by PCS. I respectfully agree with them, for the reasons I have attempted to explain.

LORD JUSTICE UNDERHILL

116. I agree with Lewis LJ that this appeal should be allowed. As regards the question whether the Claimants had accepted the variation of their contracts, I have nothing to add to what he says at paras. 56-65 above; but since we are differing from the Courts below on the issue of whether the parties intended the check-off agreements to be

enforceable by the Union for the purpose of section 1 (2) of the 1999 Act I think I should briefly state my reasons on that issue in my own words. I also have one observation on the issue of whether, in the case of employees first employed before 11 May 2000, changes in their terms of employment on or after that date meant that they had entered into new contracts for the purpose of section 10 (2) of the Act.

Section 1 (2)

117. The issue which the Courts had to decide in these cases was whether "it appear[ed] that the parties did not intend [the requirement to provide check-off arrangements] to be enforceable by" the Union. That language, and the structure of sections 1 (1) (b) and (2) generally, creates what the Law Commission describes as a "rebuttable presumption" in favour of third-party enforceability in any case where the contract purports to confer a benefit on the third party: see para. 72 of Lewis LJ's judgment. I agree with his observation at para. 75 that in the generality of cases the court is likely to be able to reach a conclusion one way or the other about the parties' intentions, so that the burden of proof created by the statutory language will not be determinative; but that is not necessary to my reasoning in this case.

118. Section 1 (2) provides explicitly that the question of what appears to have been the parties' intention about third-party enforceability is to be determined "on a proper construction of the contract", i.e. applying the ordinary rules for ascertaining the objective meaning of a contract. I agree with Lewis LJ that it follows that we must reject Mr Sheldon's argument that if it appears that only one of the parties would not have intended third-party enforceability that is sufficient for the purpose of the subsection. The intention in question must be the common intention of both parties.

119. Since, *ex hypothesi*, in a section 1 (2) case the express words of the contract do not provide for third-party enforceability, the Appellants' case that it "appears that" the parties did not have the necessary intention has to be established by reference to the context, or factual matrix, to the extent that that is in accordance with the usual contractual principles. As to that, Lewis LJ identifies the key authorities at paras. 78-80 above, but perhaps reference should be made also to *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1175, which is the culmination of the recent series of cases on this topic in the Supreme Court.

120. In my view the decisive element in the factual matrix in this case is the fact that there can have been at the collective level no common intention as between the Appellants and the Union that any rights as regards check-off facilities should be conferred on the Union because of (what is now) section 179 of the Trade Union and Labour Relations (Consolidation) Act 1992. I do not see how that absence of intention to grant the Union any enforceable rights can be altered by the fact that the effect of the collective agreement was (as the Courts below have held and is not in issue before us) to confer rights on the individual employees, through the mechanism of incorporation into their contract of employment; that does not imply or evidence any intention to confer rights on the Union. That is so whether the relevant intention is that of the union negotiators who actually made the agreement or of the individual employees: in either case the common intention of the Union and the Appellants not to confer rights on the Union is a central part of the objective context. (For what it is worth, however, I think that the correct analysis is that, although formally the relevant intention is that of the employees as the parties to the contract in question, the intention of the negotiators who made the

agreement on their behalf should be attributed to them – cf., though the issue was not quite the same, *Tyne and Wear Passengers Transport Executive v National Union of Rail, Maritime and Transport Workers* [2022] EWCA Civ 1408, [2023] ICR 148, at para. 32). Against that background, I believe that it unequivocally appears that the common intention of the Claimants and the Appellants was that the right to check-off facilities should not be enjoyed by the Union. I would add that I respectfully agree with Lewis LJ's observation at para. 82 above that in truth the situation here is the reverse of that envisaged by the Act: for the Union, as the party who actually made the (albeit unenforceable) agreement relied on, to be treated for the purposes of the Act as a "third party" is at odds with reality.

121. Although that is in my view the decisive point, I also agree with the further points made by Lewis LJ at paras. 83-87 of his judgment.

122. Since writing the foregoing I have read the judgment of Stuart-Smith LJ. I have carefully considered whether the features which he identifies at para. 108 should lead me to change my conclusion but I do not believe that they should. I remain of the view that the circumstance that the agreement was, and will have been clearly understood to be, unenforceable as between the actual parties who negotiated it does negate an intention on behalf of the parties that it should be enforceable by the indirect route of the individual contracts of employment. (I observe in that connection that Stuart-Smith LJ's language suggests a situation in which the check-off agreements were at first purely collective in character and only subsequently became incorporated into individual contracts of employment. I doubt if that is right: although, as he says, the origins of the agreements are lost in the mists of time, the likelihood must be that the effect of the individual contracts of employment in whatever form they then stood was that the check-off terms were automatically incorporated into those contracts as soon as agreed. I do not, however, think that this goes to the heart of the difference between us.)

Section 10 (2)

123. I agree with Lewis LJ that if this issue remained live it would have been necessary for the cases of Mr Davey and Ms Speakman to be remitted to the High Court for further findings of fact. My only observation concerns his reference, at para. 93, to the decision of the Employment Appeal Tribunal in *Potter*. Slade J's judgment contains a helpful review of the authorities on the question of whether changes in the employment relationship should be treated as giving rise to a new contract. But, while I do not necessarily disagree with her summary of their effect at paras. 72-73, the issue is not a straightforward one, and the correct approach may be sensitive to the purpose for which the question is being asked. That being so, and given that the issue does not now arise in this case, I would prefer not to treat her summary as the last word on the subject.