Neutral Citation Number: [2024] EAT 114

Case Nos: EA-2023-000695-LA
EA-2023-001099-LA
EA-2023-001106-LA

EA-2023-000695-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 July 2024

Before :

THE HONOURABLE MR JUSTICE GRIFFITHS

- -

Between :

EA-2023-000695-LA

ADDISON LEE LIMITED

Appellant

- and –

1) MR H AFSHAR & OTHERS
2) MR T MUSHTAQ & OTHERS
3) MR E AKINYEYE & OTHERS

Respondents

EA-2023-001099-LA

ADDISON LEE LIMITED

Appellant

- and –

1) MR H AFSHAR & OTHERS
2) MR T MUSHTAQ & OTHERS (DEBARRED)
3) MR E AKINYEYE & OTHERS

Respondents

EA-2023-001106-LA

ADDISON LEE LIMITED

Appellant

- and –

1) MR T MUSHTAQ & OTHERS (DEBARRED)
2) MR H AFSHAR & OTHERS
3) MR E AKINYEYE & OTHERS

Respondents

- -
- -

Christopher Jeans KC and **Sophie Belgrove** (instructed by Baker McKenzie LLP) for the **Appellant**
Oliver Segal KC and **Melanie Tether** (instructed by Leigh Day) for the **Respondents**
Mr T Mushtaq & Others the Respondents not opposing the Appeal in EA-2023-000695-LA and Debarred in Appeals EA-2023-001099-LA & EA-2023-001106-LA
Mr E Akinyeye & Mr B Isola-George not opposing all three Appeals

Hearing date: 18 June 2024, further written submissions 21 June 2024

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JUDGMENT

SUMMARY

Practice and Procedure, Employee, Worker or Self-Employed

When assessing whether specific allegations or arguments had little reasonable prospect of success for the purposes of making a deposit order (under rule 39 of the Rules of Procedure), an employment tribunal was entitled to consider the outcome of previous litigation between Addison Lee and different claimants raising the same arguments on identical facts. *Hollington v Hewthorn* distinguished.

The reasons given by the ET for declining to strike out the allegations and arguments in question were not inconsistent with proceeding to make deposit orders in respect of them. The test for striking out was different from the test for making deposit orders and the ET's reasoning did not require the same result.

The ET had jurisdiction to decide initial points of principle before making its final decision on the details of the deposit orders, including the names of the beneficiaries.

The procedure adopted by the ET was within its case management powers and fair.

The deposit orders were not disproportionate.

The ET was not bound to consider limitation issues or the existence of damages-based agreements when deciding whether to make deposit orders in respect of specific arguments under rule 39.

The Honourable Mr Justice Griffiths:

1. This is an appeal against deposit orders made under Rule 39 of the Employment Tribunals Rules of Procedure by Employment Judge Tynan sitting alone ("the Judge"). He ordered Addison Lee Ltd ("Addison Lee") to pay deposits in respect of 329 named claimants as follows:

i) A total of £75,000 in respect of the arguments raised in paragraphs 11 and 11(i) of Addison Lee's Amended Grounds of Response dated 6 October 2022.
ii) A total of £25,000 in respect of the arguments raised in paragraphs 15 and 16 of Addison Lee's Amended Grounds of Response dated 6 October 2022.
iii) A total of £25,000 in respect of the arguments raised in paragraphs 30 to 33 of Addison Lee's Amended Grounds of Response dated 6 October 2022.

BACKGROUND

The *Lange v Addison Lee* litigation

2. In 2016, three drivers for Addison Lee issued proceedings in the Employment Tribunal claiming that they were "workers" within the meaning of section 230(3)(b) of the Employment Rights Act 1996 ("limb (b)") and the related provisions of the Working Time Regulations 1998 and the National Minimum Wage Act 1998 ("the Lange proceedings"). The three drivers were Mr M Lange, Mr M Olszeski and Mr M Morahan ("the Lange claimants").

3. Section 230(3)(b) provides:

> "(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly."

4. The Lange claimants' case was heard over 5 days in July 2017 before Employment Judge Pearl and two lay members ("the Pearl tribunal"). The Pearl tribunal then deliberated for three days in chambers before delivering a reserved decision on 25 September 2017.

5. The decision was in favour of the Lange claimants ("the Lange decision"). It concluded that all the Lange claimants were, indeed, within the limb (b) definition of a worker. It also decided that

they were entitled to be paid as workers for the whole period of time that they were logged on to Addison Lee's system, whether or not they were actually driving. As the Lange decision said (in para 50) "…the drivers, when they logged on, were undertaking to perform driving services personally. No other conclusion is possible."

6. Paragraph 1 of the Lange decision said "These claims are in the nature of a test case…" However, this was only because it decided a point of general importance. There were no other claimants other than the three Lange claimants themselves.

7. On 21 November 2018 the Employment Appeal Tribunal dismissed an appeal against the Lange decision. It concluded (quoting its Summary of a 23-page decision) that Judge Pearl "did not err in law in finding that the Claimants were limb (b) workers and that the time spent logged on other than break times was "working time"".

8. Addison Lee applied to the Court of Appeal for permission to appeal. A hearing took place on 16 April 2021 and a reserved judgment was given by Bean LJ on 22 April 2021. Bean LJ noted that the question of whether Addison Lee should be given permission to appeal had been held in abeyance until the outcome of the appeals in *Uber BV v Aslam and others* [2021] UKSC 5, [2021] ICR 657, which considered similar issues. *Uber* itself cited an earlier relevant decision of the Supreme Court, which was *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157.

9. In February 2021, the Supreme Court in *Uber BV v Aslam* found against Uber, as had the Court of Appeal, the Employment Appeal Tribunal and the Employment Tribunal. The Supreme Court held that it was wrong in principle to decide the question of whether Uber drivers were limb (b) "workers" by looking at their written contracts. The question was to be decided on the facts and not on the documentation, having regard to the purpose of the statutory provisions and interpreting their language, so far as possible, in the way which best gave effect to that purpose, which was to protect vulnerable workers, in a position of subordination and dependency in relation to an organisation which exercised control over their work. The Supreme Court held that, on the facts found by the employment tribunal, which showed that the service performed by the drivers was very tightly

defined and controlled by Uber and that the drivers had little or no ability to improve their economic position through professional or entrepreneurial skill, the employment tribunal had been entitled to find that the drivers were "workers". It also held that the employment tribunal had been entitled to find, on the facts of the Uber case, that the drivers were working whenever they were logged into the Uber app within the territory in which they were licensed to operate and ready and willing to accept trips.

10. After consideration of the *Uber* decision, Bean LJ refused Addison Lee permission to appeal the Lange decision. He found that there was no arguable appeal in law and no arguable basis for challenging the findings of fact in the Lange decision. Although Bean LJ was refusing permission to appeal, rather than deciding a substantive appeal, he gave a formal and fully reasoned judgment on 22 April 2021, citing both facts and law at some length. He concluded "As the case is of some general significance I give permission for this judgment to be cited" (*Addison Lee Ltd v Lange and others* [2021] EWCA Civ 594 at para 20).

The current claims

11. Meanwhile, hundreds of Addison Lee drivers, almost all represented by Leigh Day (who had also represented all but two of the Uber drivers in *Uber BV v Aslam and others* [2021] UKSC 5, [2021] ICR 657, and all the Lange claimants in their proceedings against Addison Lee) had brought claims against Addison Lee. Like the Lange claimants, they alleged that they were limb (b) workers and claimed similar relief to the successful Lange claimants. The earliest ET1 of which I am aware was filed by Mr Veloso on 28 November 2017. Although the hundreds of claimants represented by Leigh Day in the proceedings before me ("the current claimants") brought their claims in three sets of proceedings (all three of which are before me), the pleadings, at least on Addison Lee's side, were (as the pleadings themselves put it) "generic", which is to say essentially identical, in respect of all the claimants.

12. It will be recalled that the deposit orders under appeal were in respect of:

i) Paragraphs 11 and 11(i) of Addison Lee's Amended Grounds of Response dated 6 October 2022.

ii) Paragraphs 15 and 16 of Addison Lee's Amended Grounds of Response dated 6 October 2022.

iii) Paragraphs 30 to 33 of Addison Lee's Amended Grounds of Response dated 6 October 2022.

13. In these paragraphs, Addison Lee argues against the current claimants' claims as follows. In paragraph 11:

> "11. The Claimants are not and/or were not workers of the Respondent (as defined in section 230(3)(b) of the ERA Employment Rights Act 1996 ("ERA"), Regulation 2 of the Working Time Regulations 1998 ("WTR") or Section 54 of the National Minimum Wage Act 1998 ("NMWA")). In particular
>
> (i) Drivers have at all material times carried on a business of which the Respondent was, by virtue of the Driver Contract, a client or customer."

And in paragraphs 15 and 16:

> "**Alternative contentions, if worker status were established**
>
> **Time of working/Working time issues**
>
> *Time before acceptance of journey (and after its completion)*
>
> 15. Even if, contrary to the above, any of the Claimants enjoyed "worker" status whilst performing journeys, none was required to accept any journey
>
> (i) at any time
>
> (ii) alternatively from the date when any adverse consequences of not accepting journeys had been removed.
>
> 16. It follows from paragraph 15 above that
>
> (i) none was working under a worker contract prior to accepting a journey (or after its completion): see *Uber v Islam* [2021] ICR 657 esp. at paras 121-130;
>
> (ii) no time prior to the acceptance of a journey (or after the completion of a journey) can amount to working time
>
> (a) for the purposes of the WTR
>
> (b) for the purposes of the NMWA
>
> (c) for any other relevant purpose."

And in paragraphs 30-33:

> "30. In accordance with Chapter 5, working time includes (and is limited to) the period from when the Claimant picks up a customer until the customer is dropped off at their destination.
>
> 31. If that is not accepted, in the alternative, working time includes (and is limited to) the period from when the Claimant accepts a customer job on his XDA device until the time when that job was completed.
>
> 32. If that is not accepted, in the alternative, working time includes (and is limited to) the period from when the Claimant is offered a customer job on his XDA device until the time when that job was completed.
>
> 33. If that is not accepted, in the alternative, working time includes (and is limited to) the period during which the Claimants either have their XDA device switched on and set to 'empty' or are on a customer job, and excludes any period when the XDA device is switched off or is set to 'break'."

The application for deposit orders and Decisions 1, 2 and 3

14. On 7 November 2022, the current claimants (all represented by Leigh Day) applied to strike out certain parts of Addison Lee's Amended Grounds of Resistance and for deposit orders in respect

of them. The precise scope of the attack was later clarified and refined. Addison Lee then filed a written response on 16 January 2023.

15. A hearing of the applications to strike out and for deposit orders took place before EJ Tynan on 30 and 31 March 2023. EJ Tynan took time to consider his decision. He sent it to the parties on 17 May 2023 ("Decision 1"). He refused the strike out applications. In respect of the deposit order applications, he made the following decisions:

> "2. Subject to the parties agreeing or, in default of such agreement, the Tribunal determining, which of the Leigh Day Claimants drove for the Respondent at any time in the period 1 July 2014 to 24 May 2016 inclusive (the "Deposit Claimants"), the Deposit Claimants' applications dated 7 November 2022 for deposit orders are granted in respect of the arguments raised in paragraphs 11 and 11(i), 15 and 16, and 30 to 33 of the Amended Grounds of Response dated 6 October 2022.
> 3. The total amounts of the deposits to be paid in respect of the Deposit Claimants shall be limited as follows:
>
> a. In respect of the arguments raised in paragraphs 11 and 11(i) of the Amended Grounds of Response dated 6 October 2022, to the sum of £75,000;
>
> b. In respect of the arguments raised in paragraphs 15 and 16 of the Amended Grounds of Response dated 6 October 2022, to the sum of £25,000;
>
> c. In respect of the arguments raised in paragraphs 30 to 33 of the Amended Grounds of Response dated 6 October 2022, to the sum of £25,000.
>
> 4. The Leigh Day Claimants and the Respondent shall co-operate with a view to agreeing the identities of the Deposit Claimants. They shall update the Tribunal within 21 days of the date that this Order is sent to them as to whether they have been able to reach agreement in that regard, providing the names of the Claimants who it is agreed are Deposit Claimants and, if relevant, the names of the Claimants whose status is in dispute The Tribunal will determine the status of any disputed Deposit Claimants at the next case management preliminary hearing. Any statements or evidence intended to be relied upon by them in that regard shall be served on the other and filed with the Tribunal at least 14 days prior to that hearing."

16. These orders were, therefore, provisional. The order in para 2 was "subject to" a future agreement or determination of the identities of Deposit Claimants. The order in para 3 imposed a cap or limit, rather than awarding an amount. The order in para 4 provided for further proceedings and a further determination in respect of Deposit Claimants in the absence of agreement.

17. A further hearing took place on 19 July 2023. EJ Tynan again reserved his decisions, which were in two parts. They were both sent to the parties on 15 August 2023. In the first part ("Decision

2") he declined to vary, set aside or suspend Decision 1. He gave Reasons for this in paras 1-18 of Decision 2, to which I will return. Second, he proceeded to make the deposit orders under appeal ("Decision 3"). Decisions 1 and 2 fed into Decision 3, and are also appealed. Decision 3 explained its Reasons by reference to those earlier decisions by saying "The Tribunal adopts and repeats the reasons contained within [Decision 1] and in its further reasons contained within [Decision 2]".

18. Before making the deposit orders, Decision 3 recorded that EJ Tynan:-

> "…considers that the Respondent's allegations or arguments raised in paragraphs 11 and 11(i), 15 and 16, and 30 to 33 of its Amended Grounds of Response dated 6 October 2022 have little reasonable prospect of success."

Decision 3 went on to note that EJ Tynan had "had regard to any information available as to the Respondent's ability to comply with the order in determining the amount of the deposits". The deposit orders themselves were as I have set out in para 1 above. The names of the 327 claimants in respect of whom the deposit orders were made were listed at the end of Decision 3.

THE LAW

Rule 39

19. The deposit orders were made under rule 39 of the Employment Tribunals Rules of Procedure (2013, Schedule 1 of SI 2013/1237) which says:

> "**39.— Deposit orders**
> (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

> (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
>
> otherwise the deposit shall be refunded.
>
> (6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

20. The effect of Rule 39 is that the making of a deposit order does not prevent a party from pursuing the "specific allegation or argument" in question, even though the tribunal considers that it has "little reasonable prospect of success." However, a deposit "not exceeding £1,000" must be paid as a condition of doing so (Rule 39(1)). If that payment is not made, the relevant allegations or arguments are struck out (Rule 39(4)), whether they come from a claimant or a respondent.

21. Initially, the payment is paid as a deposit, and it does not go to any opposing party. If the allegation or argument in question is, in due course, successful, in a way not anticipated by the tribunal (which made the deposit order on the basis that it had "little reasonable prospect of success"), the deposit is refunded (Rule 39(5)). If, however, it is decided against the paying party "for substantially the reasons given in the deposit order", there are, under Rule 39(5), two consequences.

22. An automatic consequence under Rule 39(5)(b) is that "the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders)". The £1,000 cap applies to that consequence, since the deposit itself is subject to a limit of £1,000.

23. However, an additional consequence, under Rule 39(5)(a), is that "the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown". Rule 76(1) provides:

> "A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success; (…)".

24. The effect of the Rule 39(5)(a) consequence is, therefore, that the party which pays the deposit, and continues with the allegation or argument which was the subject of a deposit order, is put on risk of having to pay a wider costs order in that respect, although that is ultimately a matter for the tribunal

to consider and decide under Rule 76. The existence of the deposit order increases that risk beyond what it might have been had the costs risk been limited to the operation of Rule 76 alone (as illustrated by the decision in *Keighley v Age UK Leeds* UKEAT/0229/19/AT (2020, EAT) at paras 54-55).

The application and operation of Rule 39

25. In this case, the strike out applications were refused but the deposit orders were granted. (The current claimants have not appealed or cross-appealed the failure of their strike out applications.) Because different tests applied to the two applications, that was a permissible outcome: see *Hemdan v Ishmail* [2017] ICR 486 at para 12 per Simler J, President of the EAT. Mr Jonathan Swift QC (as he then was) described the strike out remedy as "the red card" and the deposit order remedy as "the yellow card": *HM Prison Service v Dolby* EAT/0368/02 ILB (2003, EAT) at para 14.

26. In *Wright v Nipponkoa Insurance (Europe) Ltd* UKEAT/0113/14/JOJ (2014, EAT) Judge Eady QC said, at para 34:

> "When determining whether to make a deposit order an Employment Tribunal is given a broad discretion. It is not restricted to considering purely legal questions. It is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case. Given that it is an exercise of judicial discretion, an appeal against such an order will need to demonstrate that the order made was one which no reasonable Employment Judge could make or that it failed to take into account relevant matters or took into account irrelevant matters."

27. She noted that the £1,000 maximum leaves open the possibility of a total sum greater than £1,000, because an award may be made under Rule 39(1) in respect of "any specific allegation or argument", and there may be more than one of those (*Wright v Nipponkoa Insurance* at para 77). She therefore suggested that, in addition to the check based on affordability, there should be a final check based on proportionality (which is not a check required by the words of Rule 39 itself). See *Wright v Nipponkoa Insurance* at para 78:-

> "It is right that (…) the Employment Tribunal Rules 2013 may well result in separate awards being made in relation to different allegations and that this might give rise to a total level of award of some significantly higher value than the individual orders. When making such deposit orders Employment Tribunals should indeed stand back and look at the total sum awarded and consider the question of proportionality before finalising the orders made."

28. However, she was not thereby writing additional words into Rule 39, or giving anything more than guidance. Standing back and looking at the total sum awarded is a matter of good sense and good judgment, consistent with the making of a deposit order being the exercise of a discretion. This is clear from the remainder of the passage in which Judge Eady both accepted the Employment Judge's reference to what was "appropriate" rather than what was "proportionate", and emphasised, also, the importance of the Employment Judge's discretion. She said (at para 78 of *Wright v Nipponkoa Insurance*):-

> "In this case, however, I am satisfied that the Employment Judge did. He expressly had regard to what he described as "appropriate". In this case, it is clear that this was a reference to what was proportionate. The Employment Judge expressly had regard to the totality of the award made as comprised of each deposit order, allowing for the maximum that could be awarded under the Rules. He did not make the maximum awards that he could have done but made orders which gave rise to a total sum that seemed to be proportionate – "appropriate" – when taking into account the number of allegations to which the orders related and the Claimant's means. That was a proportionate view on the totality of the award and a conclusion that was entirely open to the Employment Judge as an exercise of his discretion."

29. In *Hemdan v Ishmail* [2017] ICR 486, Simler J (President of the EAT) also considered the question of proportionality, but linked it particularly to the question of affordability, because of the potential obstacle that a deposit order might present to access to justice. She said (at para 15):

> "…the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all the circumstances of the particular case."

After referring to the statutory requirement that means should be considered when fixing the quantum of any deposit order (at para 16, [2017] ICR 486 at 492A, referring to Rule 39(2) "when deciding the amount of the deposit"), Simler J then said (at paras 16-17, [2017] ICR 486 at 492B-H):

> "16. (…) Deposit orders are necessarily made before the claim has been considered on its merits and in most cases at a relatively early stage in proceedings. Such orders have the potential to restrict rights of access to a fair trial. Although a case is assessed as having little prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights

> of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued (…)
> 17. An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise. The proportionality exercise must be carried out in relation to a single deposit order or, where such is imposed, a series of deposit orders. If a deposit order is set at a level at which the paying party cannot afford to pay it, the order will operate to impair access to justice."

30. What, then, is the legitimate aim pursued by deposit orders? *Hemdan* provides a clear and important articulation of this in para 10 (*Hemdan v Ishmail* [2017] ICR 486 at 490):

> "A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit."

31. The initial purpose of a deposit order is, therefore, not punitive, or even preventive, but persuasive. It does not stop a party proceeding with an allegation or argument which appears (at least at the outset) to have "little reasonable prospect of success". It must not be fixed at a level which would have that punitive or prohibitive effect. But it is intended to have a deterrent or chilling effect (what Simler J describes as "a warning, rather like a sword of Damocles"). Even if the sums are small (in comparison with the means of the litigant, for some of whom they may appear very small indeed), the fact of a deposit order provides food for thought, in the form of the tribunal's evaluation of the allegation or argument as having "little reasonable prospect of success". It encourages a pause for thought, because of the enhanced costs risk. The hope is that (as is often the case), a litigant may, with the benefit of that evaluation and encouragement, and on second thoughts, not pursue the

allegation or argument in question. The chilling effect (as I have described it) must not restrict access to justice (that would go too far), but it is desirable and legitimate that it should create a serious opportunity and motive for cool reflection and reconsideration. This may benefit the party which might otherwise proceed too far in the heat of an unjustified confidence, just as much as it benefits the tribunal system and the other parties who otherwise have to spend time and money addressing weak points. Of course, if the party continues regardless, and pays the deposit ordered, and is eventually found to have been wrong in that respect, the more serious consequences of an enhanced costs exposure under Rule 39(5) may follow, and at that point the effect may be said to be punitive. The sword of Damocles, initially suspended above the litigant to concentrate the mind, then falls upon him. But only time will tell whether that should or will happen, and that time has not been reached in the present case.

32. It would defeat the object of simplifying cases by encouraging weak points to be dropped, thereby shortening (or, in some instances, ending) those cases, and saving future drain on everyone's resources (winners and losers), if the deposit order process became too elaborate and long drawn out. As Simler J said in *Hemdan v Ishmail* [2017] ICR 486 at 491, para 13:

> "The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strikeout application, because it defeats the object of the exercise. Where, for example as in this case, the preliminary hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective."

33. A deposit order in respect of allegations or arguments which ultimately prove to be stronger than expected has no effect; because the deposit is then returned and there will be no adverse costs order. It is therefore fair to proceed in the summary fashion suggested by Simler J, because the consequences of what may later turn out to be an error of judgment are so limited. This is not only a reason for avoiding a mini-trial of the facts, however. It is also a reason for avoiding excessive technicality or pedantry, and encouraging a broad brush assessment by the independent Employment

Tribunal judge in accordance with the *prima facie* merits of the case which can be carried out in a period of time proportionate to the exercise in question.

THE APPEAL

34. Separate appeals have been lodged in respect of Decision 1, Decision 2 and Decision 3. If each were to be considered separately, there would be unnecessary repetition and overlap. The appeal has therefore helpfully proceeded on the basis of a consolidation of the various points in Addison Lee's skeleton argument. In oral submissions, Addison Lee did not appear to abandon any point from its skeleton argument, although the points were re-grouped under fewer headings.

35. A total of 11 points were argued by Addison Lee, as follows:

i) The employment tribunal ("ET") erred in taking into account the findings of fact made in the Lange decision. To do so was contrary to the rule in *Hollington v Hewthorn* because the parties were different.
ii) The reasons given by the ET for declining to strike out the allegations and arguments in question were inconsistent with proceeding to make deposit orders in respect of them.
iii) The ET had no jurisdiction to make an inchoate deposit order which fails to identify beneficiaries and the amounts payable in respect of each relevant allegation in respect of each beneficiary.
iv) The claimants' failure, at the hearing in March 2023 (before Decision 1), to provide a list of relevant claimants should have resulted in the dismissal of their application.
v) The ET erred in taking into account its own private researches into Addison Lee's finances.
vi) The ET erred in taking account of anecdotal evidence of brief fees in another case not canvassed with the parties.
vii) The ET erred on proportionality, penal approach and "big picture".
viii) The ET ought not to have made deposit orders where some claimants (undisclosed in number and identity) had their costs covered by damages-based agreements.
ix) The ET refused in Decision 2 and failed in Decision 3 to take account of limitation-related issues.
x) Decision 2 made a procedural error when requiring Addison Lee to show grounds for reconsideration of Decision 1 and/or denying the existence of such grounds.
xi) Decision 2 made a substantive error when deciding that limitation points were not relevant to the deposit order decision.

36. I will consider each of these in turn.

(i) The employment tribunal ("ET") erred in taking into account the findings of fact made in the Lange decision. To do so was contrary to the rule in *Hollington v Hewthorn* because the parties were different.

37. Decision 1 considered the rule in *Hollington v Hewthorn* and later cases (paras 5-13). It noted (para 17) that Addison Lee "put forward no information or evidence whatsoever" in respect of the period covered by the deposit orders, which was the same as the period covered by the Lange decisions, to distinguish the current claims from the Lange claims in that period. All the changes which Addison Lee rely upon took place after the period of time considered in the Lange decision.

38. Decision 1 recognised that the Lange claims were not *de facto* lead or sample cases (para 21).

39. When deciding not to strike out the allegations and arguments which underpinned the deposit orders, Decision 1 decided that the strike out threshold was not met and there was also no abuse of process (para 24). It also recognised the possibility of a future tribunal reaching a different outcome from the Pearl tribunal (para 32) but noted that there had, in fact, been "few factual disputes between the parties" in the Lange cases, as the Pearl decision itself observed (quoted in para 32).

40. Decision 1 recognised that Addison Lee had the right to have the claims heard and determined by a new tribunal, but said Addison Lee "has not explained why there is at least some prospect, even if it is not a significant prospect, of the Tribunal next year reaching different findings and conclusions to those reached by the Pearl Tribunal" (para 36).

41. Decision 1 said that "if the deposits are paid and the claims go forward… the Tribunal will have a free hand…" (para 38).

42. Addison Lee argues that it was impermissible for the ET to have regard to Addison Lee's defeat in the Lange litigation because of the rule in *Hollington v Hewthorn.* In oral and written submissions, I was taken to a number of cases and to a passage in *Phipson on Evidence* citing other cases.

43. *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 CA decided that evidence of a criminal conviction (for careless driving) was inadmissible in a subsequent civil action (for negligent driving

on the same occasion). The plaintiff did not suggest that the conviction was conclusive evidence but he did suggest that it was relevant, probative and admissible. Giving the judgment of the Court of Appeal, Lord Goddard LCJ said (at [1943] KB 587, 595-596):

> "In truth, the conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. Moreover, the issue in the criminal proceedings is not identical with that raised in the claim for damages…"

44. The decision was based in part (although other reasons were also given) on the fact that a criminal conviction contains no narrative and no reasoning. In that, it is quite unlike the decisions of the ET in the *Lange* cases, and, indeed, the decisions of the EAT and of the Court of Appeal which rejected Addison Lee's appeals, because those decisions make, not only the fact of Addison Lee's defeat clear, but also the precise basis of it, factual and legal, which the Leigh Day claimants contended were in every respect indistinguishable from the case being run against them by Addison Lee in respect of the period covered by the deposit orders.

45. Lord Goddard LCJ also said (at [1943] KB 587, 596):-

> "A judgment obtained by A against B ought not to be evidence against C, for, in the words of the Chief Justice in the Duchess of Kingston's Case (1776) 2 Sm. L.C., 13th ed., 644,
>
> > "it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore (....) the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers."
>
> This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case."

46. The judgment in *Hollington v Hewthorn* has been criticised. In *Hunter v Chief Constable of the West Midlands* [1982] AC 529 HL at 543, Lord Diplock noted that its effect, in cases of the type

that *Hollington* itself dealt with, had ceased to be relevant because of the Civil Evidence Act 1968. But he also said:

> "Despite the eminence of those who constituted the members of the Court of Appeal that decided it (Lord Greene M.R., Goddard and du Parcq L.JJ.) that case is generally considered to have been wrongly decided…"

47. Other judges have defended and applied the decision even in relation to criminal convictions (see Morritt V-C in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1, [2003] EWCA Civ 321, at paras 18-19, citing examples).

48. Notwithstanding doubts about *Hollington v Hewthorn*, it is has been accepted that the same rule applies at least to some extent to prior civil judgments and not only prior criminal convictions (at common law; sections 11 – 13 of the Civil Evidence Act 1968 having effected a radical relaxation of the rule in respect of criminal convictions).

49. In *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1, [2003] EWCA Civ 321, Morritt V-C reviewed the authorities (at paras 20-26) and at para 27 held that the findings of a High Court judge in earlier civil proceedings between a director and the company were neither conclusive nor even admissible in subsequent disqualification proceedings brought against the director by the Secretary of State. He expressly rejected the distinction which had been drawn in argument between a civil judgment and a criminal conviction. However, in reaching his conclusion, he considered and cited with approval two previous decisions about somewhat different situations: *Symphony Group plc v Hodgson* [1994] QB 179 CA and *Hawaz v The Thomas Cook Group Ltd* (27th October 2000) Keene J.

50. *Symphony Group plc v Hodgson* [1994] QB 179 CA concerned orders for costs against non parties and decided that the unsuccessful defendant (Mr Hodgson) could not rely on the findings made against him when seeking costs against a non-party to the proceedings in which they had been made (his new employers). The judgment of Balcombe LJ (with whom Staughton and Waite LJJ agreed) made it clear, however, that although the Court of Appeal was applying the rule in *Hollington v*

Hewthorn in that respect, there were some circumstances in which it would not be applied. He said (at 193E-G):

> "(6) The procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action. Thus, subject to any relevant statutory exceptions, judicial findings are inadmissible as evidence of the facts upon which they were based in proceedings between one of the parties to the original proceedings and a stranger: see *Hollington v. F. Hewthorn & Co. Ltd.* [1943] K.B. 587; Cross on Evidence, 7th ed. (1990), pp. 100-101. Yet in the summary procedure for the determination of the liability of a solicitor to pay the costs of an action to which he was not a party, the judge's findings of fact may be admissible: see *Brendon v. Spiro* [1938] 1 KB 176, 192, cited with approval by this court in *Bahai v. Rashidian* [1985] 1 WLR 1337, 1343D, 1345H. This departure from basic principles can only be justified if the connection of the non-party with the original proceedings was so close that he will not suffer any injustice by allowing this exception to the general rule."

51. Similarly, the judgment of Staughton LJ (with whom Waite LJ agreed) said (at 196G-H):-

> "Nevertheless there are cases, as Balcombe LJ has shown, where a person may be ordered to pay costs on the basis of evidence given and facts found at a trial to which he was not a party. Before such an order is made, it must be just and fair that the stranger should be bound by that evidence and those findings. In my judgment that is not the case here."

52. In the present case, of course, Addison Lee was a party to the proceedings brought by the Lange claimants.

53. In *Hawaz v The Thomas Cook Group Ltd* [2000] 10 WLUK 763 (quoted in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1 para 23), Keene J decided an appeal against three rulings by a county court judge. The context was that Ferris J had decided in separate civil proceedings against Mr Hawaz (to which Thomas Cook were not parties) that he had forged the signature of Sheikh Ahmed (the claimant in those proceedings) on land transfers. In subsequent civil proceedings brought by Mr Hawaz against The Thomas Cook Group Ltd, in which the defence was that he had committed a different fraud involving travellers cheques, the county court judge made three rulings. He ruled (1) the finding by Ferris J of forgery and fraud by Mr Hawaz against Skeikh Ahmed was not admissible in evidence on the issues in the Thomas Cook action; (2) The topic of Mr Hawaz's activities in respect of the Sheikh Ahmed properties could not be the subject of evidence or cross-examination irrespective of Ferris J's findings; and (3) Thomas Cook could not put any of these

matters to Mr Hawaz by way of cross-examination as to credit. It is an important feature of the *Thomas Cook* case that, although Mr Hawaz was a party to the prior civil proceedings, per Keene J, he "played no part in those proceedings. He gave no evidence and was not represented".

54. Keene J upheld the county court judge on issue (1) but reversed him on issues (2) and (3). On issue (1), he said:

> "…the principles adumbrated in *Hollington v Hewthorn* remain applicable in cases where none of the statutory or common law exceptions operate. Those principles prevent the findings made in earlier civil cases from being used subsequently as evidence of the facts found. They do not in themselves operate as a bar to the findings being put by way of cross-examination as to credit, subject to the control of the court, but that is a different topic with which it will be necessary to deal later in this judgment. But in so far as it was sought to adduce the findings of Ferris J. in order to establish that the Respondent had committed fraud and forgery in fact against Sheikh Ahmed and had therefore been involved in a fraudulent claim on the travellers cheques in this action the learned judge was correct to rule that those findings were inadmissible in law."

On issue (3), he ruled as follows:

> "…the finding of Ferris J. as to the Respondent's fraudulent conduct could be highly relevant to the Respondent's credibility. It relates to his honesty or dishonesty, just as a conviction for fraud would have been relevant to his credibility: see *Thomas v. The Commissioner of Metropolitan Police* [1997] QB 813. It may seem highly unrealistic to suggest that the Respondent if asked about it would admit to forgery and fraud over the property transfers, but it is nonetheless something which the court should have allowed to be put, albeit briefly. To that limited extent I accept the Appellant's argument. Some limited questions about why he took no part in the High Court trial and why he did not appeal the decision should also be permitted. However, the County Court judge was fully entitled to adopt the view that he was not going to allow the circumstances of the alleged fraud on Sheikh Ahmed to be explored, even on the issue of credit, in any depth. If the Respondent denies any fraud over the property transfers because, for example, he says he had Sheikh Ahmed's authority to sign the transfers, the topic could not then be explored in any depth without involving a re-run of the High Court action, though this time with the Respondent participating and Sheikh Ahmed probably not. The judge was right to wish to avoid that outcome. Therefore it is only to the limited extent indicated that the allegedly fraudulent transfers should be put by way of cross-examination as to credit. The County Court is entitled to use its normal powers under the CPR to prevent any substantial time being taken on an aspect which goes only to credit."

Consequently, even that decision did not exclude the decision of Ferris J entirely, since it was admitted for the purposes of cross-examination and testing Mr Hawaz's credibility.

55. In *R. (on the application of PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin) [2011] PTSR 269, Hickinbottom J found that a local authority had acted unlawfully when adopting a decision of the First Tier Tribunal about the age of the claimant, because the local authority had to make the decision for itself and had not been party to those proceedings. In doing so, he referred to the rule in *Hollington v Hewthorn*. However, he construed that rule as permitting the local authority (while making its own determination) to examine the basis upon which the earlier determination had been made, rather than excluding it altogether. He said (at para 83):-

> "The finding of the FTT is not, in itself, of any evidential weight or value to the council, who must exercise their own judgment in assessing the claimant's age for the purposes of their section 20 duty. Nevertheless, in any reassessment of age they now make, the previous proceedings before the tribunal will be materially relevant (…) The council will have, not just the finding of the tribunal, but the judge's reasoning and the process by which he came to the conclusion that the claimant was over 18 years old, which might assist their own assessment of the claimant's age - although, of course, in considering even that the council will have to bear in mind the differences between the evidence available to the judge and that available to them to which I have referred. In my view, that is what, in a planning context, Mann LJ was getting at in *North Wiltshire District Council v Secretary of State for the Environment* 65 P & CR 137. For that reason, I do not find any inconsistency between the evidential principle of *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 and the public law principle illustrated by the North Wiltshire case: the subsequent public decision-maker must respect, not the finding made by an earlier decision-maker per se, but the earlier decision-making process."

56. Finally, I have been referred to the unanimous judgment of the Court of Appeal given by Christopher Clarke LJ in *Rogers v Hoyle* [2015] QB 265, [2014] EWCA Civ 257. In that case, the Court of Appeal upheld Leggatt J who had refused to exclude a Department of Transport accident investigation report from subsequent proceedings for negligence against the pilot. In particular, they dismissed an appeal against the judge's ruling that the whole report was admissible as evidence in the proceedings because it was the report of an expert whose opinions might properly be admitted in evidence.

57. Leggatt J recognised that *Hollington v Hewthorn* "has always been a controversial case" (para 84) and went so far as to say that some of its reasoning "is absurd" (para 92). He nevertheless accepted

that the rule must be taken to represent the law "unless and until it is reconsidered by the Supreme Court" and "except in so far as it has been reversed by statute" (para 92). He said (at para 104)

> "…the true justification for the rule in *Hollington v F Hewthorn & Co Ltd*, as I see it, is not that the opinion of an earlier court is irrelevant but lies in the requirements for a fair trial. The responsibility of a judge to make his or her own independent assessment of the evidence entails that weight ought not to be attached to conclusions reached by another judge - all the more so where the party to whose interests the conclusions are adverse was not a party to the earlier proceedings. That, I think, was the principle which the Court of Appeal was expounding in the Hollington case."

58. His reasoning was, therefore, based on the requirements of a trial, not of a preliminary, non-binding and inconclusive merits assessment such as that required by a deposit order application. Leggatt J supported (at para 107 of *Rogers v Hoyle* [2015] QB 265, 290) the minority opinion of Buckley LJ in *Stupple v Royal Insurance Co Ltd* [1971] 1 QB 50 that a conviction admissible in civil proceedings under section 11 of the Civil Evidence Act 1968 was not "a weighty piece of evidence in itself" (as Lord Denning MR thought) but gave rise to a presumption "which, like any other presumption, will give way to evidence establishing the contrary on the balance of probability without itself affording any evidential weight to be taken into account in determining whether that onus has been discharged".

59. In the Court of Appeal, the rule in *Hollington v Hewthorn* was also considered, and criticism of it, and some of the limits to be placed upon it, were again rehearsed (paras 34-37). Like Leggatt J, however, Christopher Clarke LJ re-stated the rule as applying to a trial, because of the obligation on a trial judge to make an independent decision by reference to the evidence called before him, rather than relying on another judge who had heard proceedings between different parties. He said (at para 39):

> "As the judge [i.e. Leggatt J] rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ("the trial judge"), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial

> judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard."

Again, therefore, this is a decision based squarely on the requirements of a fair trial, and the need for the trial judge (who has the task of deciding an issue definitively) to do so for himself, rather than being invited or tempted to follow a prior decision which does not satisfy the requirements of *res judicata* or issue estoppel.

60. These authorities do not persuade me that the rule in *Hollington v Hewthorn* should be extended to the summary consideration by an employment tribunal under Rule 39 of whether a specific allegation or argument "has little reasonable prospect of success". If anything, they point away from that proposition. The tribunal in this situation is not making a binding decision about the allegation or argument in question. It is not conducting a trial, or anything like a trial. It is simply forming a view, well before the final hearing and determination, about whether (in the words of Rule 39) it "considers" that any specific allegation or argument in a claim or response "has little reasonable prospect of success". This must necessarily be matter of impression, since the tribunal is not (as Simler J said in *Hemdan*) to conduct a mini-trial, let alone a trial.

61. It would be extraordinary if any rule of practice or law from other jurisdictions and contexts were allowed to exclude from that preliminary and non-binding consideration an available and on the face of it reliable indicator which is (in this case) that, in proceedings in which the same points were taken, and in which no distinction of fact appears from the pleadings or submissions made by Addison Lee, all the allegations and arguments under scrutiny failed. This is particularly so when Addison Lee was a party to and vigorously contested the earlier proceedings, although the current claimants were not. Addison Lee was not able to show to the employment tribunal any difference of fact between the position of the current claimants and the position of the Lange claimants. The period of time covered by both the Lange decisions and the deposit order determinations was the same (and so, therefore,

were all the contractual and general arrangements between Addison Lee and its drivers, there being no reliance on any exceptions attributable to any specific current claimant).

62. There is no injustice in introducing the previous proceedings in this situation, not as evidence of truth, but as indicators of a future outcome, because the party which has to make a deposit order can proceed to the full hearing by paying the deposit, and the deposit will be set at a level which is within the means of the paying party so that they may do that. They are not prejudiced by the deposit order unless and until the subsequent hearing has taken place and they are only prejudiced at that point if they are the losers on these issues at the final hearing.

63. The connection between the previous proceedings and the current proceedings was so close, by reason of their similarity and Addison Lee's full participation, that Addison Lee suffered no injustice by not having the previous proceedings excluded. Moreover, it was just and fair that the outcome of proceedings on identical facts and law should be admitted into the Rule 39 consideration, all the more so because Addison Lee were parties to both, and could not have argued their corner with stronger representation, greater resources, or to a higher level than they did in those earlier proceedings.

64. The previous findings were not determinative (as Decision 1 recognised at para 38), but the employment tribunal was entitled to consider them relevant and to take them into account when assessing prospects of success. They were worthy of respect. They did not have to be ignored. They did not prove anything, but they were suggestive. This was so whether the Lange decision made findings of primary fact or drew inferences from the facts. This was the decision of an independent and expert employment tribunal and, while findings of fact were not a matter for the Employment Appeal Tribunal or the Court of Appeal, both the findings and the inferences of the employment tribunal were in no way weakened by the decisions of both those appellate courts to uphold them.

65. The rule in *Hollington v Hewthorn* does not apply to a non-binding assessment of merits under Rule 39. The fact that the same case had been fought on the same facts and in respect of the same period albeit with different parties was admissible and relevant to the non-binding assessment (similar

to an early neutral evaluation) required by Rule 39. Whilst a different outcome before a different tribunal on identical facts might, to the extent that it was purely a question of fact or inferred fact, be possible, it was not particularly likely. That was the reasoning of Decision 1, and it was permissible.

(ii) The reasons given by the ET for declining to strike out the allegations and arguments in question were inconsistent with proceeding to make deposit orders in respect of them.

66. Decision 1 gave reasons in principle for making deposit orders (which were ultimately made in Decision 3) in respect of claimants driving for Addison Lee "in the period 1 July 2014 to 24 May 2016 inclusive" (para 2). That period was chosen because it coincided with the period when the successful Lange claimants had also been driving for Addison Lee (para 48). EJ Tynan pointed out that it was likely that the same arrangements for Addison Lee drivers had been in place for some time before the beginning of that period and for some time afterwards, but noted "there is no further information available to me in that regard" (para 15). This meant that the same arguments which had led to the deposit orders might (depending on the extended period during which the same arrangements were actually in place) be applied to a longer period as well, before 1 July 2014 and after 24 May 2016.

67. Decision 1 decided that the threshold test for striking out Addison Lee's allegations and arguments was not met, although the test for making deposit orders in respect of them was met. There is nothing wrong with that in principle, since the tests are different. Addison Lee argues, however, that the following passage of Decision 1, which the employment tribunal decided went against striking out, ought by parity of reasoning have precluded deposit orders too. The passage (in para 24 of Decision 1) said as follows:

> "I have also been informed in the matter by a practical consideration highlighted by Mr Jeans and Ms Belgrove [on behalf of Addison Lee], namely that if, as Ms Tether contends, I were to strike out the relevant parts of the AGoR that relate to the period from June 2014 to March 2020 (or even the shorter period from June 2014 to August / September 2017, when the Respondent says that practices began to be overhauled "on the ground"), that would leave the Tribunal next year in the unenviable position of having to make findings of fact and reach conclusions in respect of the periods immediately prior to June 2014 and immediately after March 2020 (alternatively, immediately after August / September 2017), potentially hamstrung by my decision in respect of the period

> in between or, at the very least, labouring under a potential weight of expectation on the part of the Leigh Day Claimants that it should make findings that enable it to arrive at effectively the same outcome in respect of those two contiguous periods. In my view, any strike out would weigh heavily on the final hearing yet might not achieve any, or any material, saving in time or costs, since the Tribunal would still have to hear evidence, make findings and come to a judgment about the same business model and working arrangements in place both immediately before and after the period covered by the strike out. Certainty would give way to greater uncertainty, including potential confusion in the minds of the parties and even the advocates as to what evidence and arguments might properly be advanced by them, including whether the period of time covered by any strike out would be entirely 'off limits'. There would be significant potential for satellite disputes to develop, with a corresponding increase in costs. And, most significantly, there is the very real risk that the administration of justice could be brought into disrepute if the Respondent were to prevail next year in circumstances where part of their AGoR had been struck out by me in respect of a specified period in time that involved the same business model, working arrangements and driver contracts. It seems to me that the potential for the administration of justice to be brought into disrepute increases if there are different outcomes in the course of the same proceedings in respect of the same business model and working arrangements, not least where one decision, namely mine, is arrived at on a summary basis, but the other is reached after the Tribunal has heard detailed evidence which has been tested in the normal way. For the reasons below, these same considerations do not apply in relation to the applications for deposit orders."

68. The "reasons below" are in para 38 of Decision 1 (although it mistakenly cross references to para 25 instead of para 24):

> "In paragraph 25 of these Reasons, I refer to the practical consequences of potentially striking out aspects of the AGoR [Amended Grounds of Resistance]. The same considerations do not apply should I make deposit orders since if the deposits are paid and the claims go forward on the strength of the AGoR as they currently stand, the Tribunal will have a free hand to consider the evidence and the parties' submissions, make findings and come to a judgment; only then will it be required to consider whether, in accordance with Rule 39(5) of the Employment Tribunals Rules of Procedure, it has decided any specific allegation or argument against the Respondent for substantially the reasons identified in these Reasons. The effect of any deposit orders I make will not be to fetter or embarrass the Tribunal that hears any sample cases next year. On the contrary, that Tribunal will be best placed to determine why, if it is the case, any specific allegation or argument has failed and, accordingly, whether costs consequences should follow. The principal impact of the deposit orders will be to encourage the Respondent to actively consider whether time and resource (both the parties' and the Tribunal's) should be devoted to litigating issues that have previously been litigated and determined in favour of other Claimants, rather than to impinge on the exercise by the Tribunal of its judicial function."

69. Addison Lee says that this reasoning is flawed because it might have declined to pay the deposit orders, in which case the claims would have been struck out and the same consequences

envisaged in para 24 of Decision 1 would then have followed. It argues that, if these were unacceptable consequences of a strike out order, they were equally unacceptable consequences of a deposit order.

70. I am not persuaded by this.

71. It was up to Addison Lee whether it dropped the arguments assessed as having "little reasonable prospect of success" or not. It was able to (and did) pay the deposits ordered, and so the deposit orders left that decision entirely up to Addison Lee. What Addison Lee decided could not bring justice into disrepute, because no decision by a litigant is a decision by the justice system.

72. Addison Lee never suggested it could not pay the deposit orders. The reality was, therefore, that it would either reject the employment tribunal's assessment and pay the deposits (which is what it swiftly did, after Decision 3), thereby avoiding the consequences now suggested, or it would accept the tribunal's assessment and abandon those aspects of its case. However, if Addison Lee accepted that the challenged arguments were too weak to be pursued because of the deposit order costs threat, it is fanciful to suggest it would not apply the same logic to any longer period in which the same considerations applied, unless there was some material difference in the case other than the dates in question. If there was no difference of fact, the risk of being held to have acted unreasonably in pursuing the points outside the deposit order time frame would be just as great. There was no reason to expect that Addison Lee would drop the arguments only for the period covered by the deposit orders rather than in respect of the whole period in which they were equally weak. Nor did they ever suggest they might do that. Nor did they in fact do that. The employment tribunal was not required to refrain from making deposit orders in respect of arguments with little reasonable prospect of success on the basis of the vanishingly unlikely situation now envisaged by this ground of appeal.

73. There was therefore nothing wrong with the employment tribunal's reasoning in this respect. The decision to leave the consequences of the tribunal assessment up to Addison Lee, while concentrating its mind on the weaknesses in its case by making the deposit orders, was fair, just, reasonable, consistent, and in accordance with the interests of justice.

(iii) The ET had no jurisdiction to make an inchoate deposit order which fails to identify beneficiaries and the amounts payable in respect of each relevant allegation in respect of each beneficiary.

74. One consequence of a deposit order may be that "the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders)" (rule 39(5)(b)). This will only happen when the allegations or arguments in question are finally decided. However, rule 39(1) requires the deposit order made at the outset not to exceed £1,000 and indicates that it will be in respect of a "specific allegation or argument". That does suggest that the amount in respect of each allegation or argument, and in respect of each claimant, should be fixed when the deposit order is made. That also makes the operation of 39(5) more straightforward in due course.

75. Addison Lee argues that when, as in this case, there is more than one party on the other side, the deposit order needs to identify at the outset the claimants who are to be beneficiaries and how much is payable in respect of each relevant argument in relation to each claimant. It says that Decision 1 was made without jurisdiction, because it was "an inchoate Order, omitting the beneficiaries or the amounts applicable to each relevant argument raised in respect of each beneficiary" (Addison Lee skeleton argument para 55). It also says that the failure to drill down to the amounts awarded in respect of each individual claimant encouraged looseness of thinking generally.

76. This misunderstands the nature of Decision 1 and its relationship with Decisions 2 and 3. Decision 1 considered whether the conditions for making deposit orders were met (examining the challenged arguments to see whether they had little reasonable prospect of success), and whether in the exercise of the employment tribunal's discretion (the word in rule 39(1) being "may") such orders would in principle be made. It answered both questions in the affirmative, giving reasons. It also considered proportionality and placed a cap on the amounts to be paid, irrespective of the number of claimants winning deposit orders, in respect of the various arguments in question (the word in para 3 of the Order in Decision 1 being "limited as follows"). If there had not been enough claimants (entitled in respect of each argument to a maximum deposit order of £1,000 each, under rule 39(1)), the cap

might not have been reached. That is why it was a cap, stated to be "limited as follows", rather than an absolute and final sum. Decision 1 made it clear that the deposit orders themselves would be "Subject to the parties agreeing or, in default of such agreement, the Tribunal determining" which of the current claimants drove for Addison Lee at the relevant times (para 1 of the Order in Decision 1). Decision 1 was therefore an order made as part of a staged decision making process. Decision 2 maintained Decision 1, so far as reasoning and outcome was concerned, but took it no further. It was not until Decision 3 that the decision to make deposit orders was completed, and a deadline (21 days) for payment was set.

77. The employment tribunal decided to proceed in this way as part of its case management powers and it was entitled to do so. By doing so, it allowed the arguments to proceed in an orderly fashion. It is not uncommon for decisions of principle to precede agreement (or, in the absence of agreement, a ruling) on what precise order or orders should be made as a result.

78. The final order was in Decision 3. This said:

> "(1) The Employment Judge considers that the Respondent's allegations or arguments raised in paragraphs 11 and 11(i), 15 and 16, and 30 to 33 of its Amended Grounds of Response dated 6 October 2022 have little reasonable prospect of success.
> (2) The Respondent is ORDERED to pay the following deposits in respect of the Deposit Claimants identified below not later than 21 days from the date these Orders are sent as a condition of being permitted to continue to advance those allegations or arguments:
>
> a. In respect of the arguments raised in paragraphs 11 and 11(i) of the Amended Grounds of Response dated 6 October 2022, the sum of £75,000;
> b. In respect of the arguments raised in paragraphs 15 and 16 of the Amended Grounds of Response dated 6 October 2022, the sum of £25,000;
> c. In respect of the arguments raised in paragraphs 30 to 33 of the Amended Grounds of Response dated 6 October 2022, the sum of £25,000.
>
> The Judge has had regard to any information available as to the Respondent's ability to comply with the orders in determining the amount of the deposits.
> REASONS
> (1) The Tribunal adopts and repeats the reasons contained within the orders sent to the parties on 17 May 2023 following the hearing on 30 and 31 March 2023 and in its further reasons contained within the orders following the hearing on 19 July 2023.
> (2) Subject to the parties agreeing or, in default of agreement, the Tribunal determining that any further Leigh Day Claimants are Deposit Claimants, the

> names of the Deposit Claimants are set out in the pages that immediately follow."

79. There was then a schedule of 7 pages containing the full names and case numbers of 327 individual claimants, who were (accordingly) the claimants in respect of which the deposit orders were made. There was liberty (in para (2) of the Reasons) for names to be added by agreement or subsequent decision. By agreement, another two names were added on 7 September 2023, bringing the number from 327 to 329.

80. No distinction was drawn in the pleadings, or in the arguments before the employment tribunal, between any of the 327 claimants (subject to limitation points which form a separate ground of appeal). No distinction was, therefore, drawn between them in the orders made in Decision 3.

81. This was not an inchoate order. It did name the beneficiaries. Although Decision 1 made decisions in principle, it was only Decisions 2 and 3 (issued at the same time) which made the final deposit orders and Decision 3 listed each of the 327 beneficiaries by name, to which two others were later added by agreement, making a final total of 329 names. The amounts payable in respect of each relevant allegation were stated separately. There is no basis for suggesting that the total amounts (reached by way of cap in the way explained in the Decisions) were to be divided other than equally between the 329. Therefore, the amounts payable to each of them were sufficiently clear from Decisions 2 and 3, i.e. one three hundred and twenty-ninth part of the total specified in respect of each allegation. This was less than £1,000 in each case, because no allegation attracted a deposit order of as much as £327,000 in total.

82. Both sides agreed that this was the natural meaning of the order. For the avoidance of doubt, this meant that if (as it seems has happened) any of the 329 named claimants was taken out of the proceedings before the end, for whatever reason, the deposit order in respect of that claimant was not reallocated between those who remained. There is nothing in the Decisions to suggest otherwise.

83. The deposit orders were therefore made within the rule 39 jurisdiction and were not wrong in principle. They were clearly divided between specific allegations and attributed to named claimants.

(iv) The claimants' failure, at the hearings in March 2023 (before Decision 1), to provide a list of relevant claimants should have resulted in the dismissal of their application.

84. Addison Lee argues that the claimants ought to have provided a list of the Leigh Day claimants who provided services in the period to March 2020 (or any other period in respect of which they might seek an order) at the hearing on 30-31 March 2023 which preceded Decision 1 on 17 May 2023. It says that the employment tribunal ought to have treated the failure to do this as fatal to the application and ought to have dismissed it on those grounds immediately. Addison Lee argues that identifying the claimants who were to benefit from the deposit orders was a basic jurisdictional requirement of deposit orders.

85. There was no doubt on whose behalf the applications to strike out and for deposit orders were being made. They were identified on the facts of Decision 1 which stated that the applications were made by "The Leigh Day Claimants" and that these were the claimants who appeared (on instructions from Leigh Day) by "Ms M Tether, Counsel". In other words, the applications were made on behalf of those claimants who had instructed Leigh Day. As the arguments before, and the decisions of, the employment tribunal progressed, through Decisions 1, 2 and 3, it became clear that not all of them worked as Addison Lee drivers in the period upon which, by Decision 1, any deposit orders would be focussed. This meant (as para 2 of the Orders at the beginning of Decision 1 made clear), the total body of Leigh Day claimants who would benefit had to be narrowed down to those who drove for Addison Lee in that period. Those drivers were duly discussed and agreed between the parties, before Decisions 2 and 3 (both dated 19 July 2023) and were listed in the schedule of 327 names and case numbers annexed to Decision 3 accordingly.

86. Proceeding in this way was a case management decision well within the powers and discretion of the employment tribunal.

(v) The ET erred in taking into account its own private researches into Addison Lee's finances.

87. Addison Lee objects to para 51 of Decision 1, which came as a surprise to it. Para 51 said:

> "I have looked at the Respondent's publicly available records at Companies House. The available filed accounts are in respect of Atlas Topco Limited, albeit which trades primarily as Addison Lee. Group gross profit in the year ending 31 August 2021 was some £43 million, though in particular as a result of administrative expenses it had an operating loss of nearly £9 million. I have not explored the accounts further in that regard."

88. Addison Lee objects that it did not know the employment tribunal would do its own research in this way and it was contrary to fairness and natural justice that it did so without giving Addison Lee an opportunity to make submissions. It does not challenge the accuracy of the figures, however, or indicate why it would have wanted to make submissions on its own filed accounts, or what it would have said about them.

89. Para 51 falls within a section of Decision 1 headed "The amounts of the deposits" (paras 49-53). In para 49, the tribunal said that its starting point would be to make deposit orders of £1,000 per Deposit Claimant (defined as those claimants represented by Leigh Day who drove for Addison Lee in the relevant period, that is, the period targeted by the deposit orders). However, the tribunal decided to place an upper limit on the total amount of the deposit orders, in recognition of the references to the need for proportionality in the cases of *Wright* and *Hemdan* which I have already considered (para 49 of Decision 1).

90. In this context, para 50 of Decision 1 agreed with Addison Lee "that it would be disproportionate to make deposits totalling £400,000 as the claimants suggest". It referred to the likely costs of arguing the points identified in the deposit orders as having little reasonable prospect of success, which Decision 1 estimated (in para 50) "in the region of £192,000 inclusive of VAT". Decision 1 then said (at para 50):

> "In my view it would be disproportionate to make deposit orders equal to or indeed which exceed the Deposit Claimants' potential legal costs in relation to the issues that I consider to have little reasonable prospect of success. Whilst I do not think such an amount would make it difficult for the Respondent to access justice or that it would be effecting strike out through the back door, I still consider that the deposit orders should be proportionate to the costs likely to be incurred potentially unnecessarily. I do not know the likely value of the Deposit Claimants' claims should they succeed and accordingly am not in a position to assess what level of deposits might be proportionate to the sums at stake."

91. This made it clear that Decision 1 was already considering the requirements of Rule 39(2), which says "The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit". Indeed, that point was made explicit in the deposit orders finally made in Decision 3, which said (at the end of the section stating those orders) "The Judge has had regard to any information available as to the Respondent's ability to comply with the orders in determining the amount of the deposits".

92. The reference to company accounts in para 51 then follows. It was, therefore, a sense check, to make sure that Addison Lee could afford even the maximum sums being envisaged by Decision 1 (which totalled, even if the cap was reached in every case, no more than £125,000).

93. However, it was no part of Addison Lee's submissions at any stage that it would not be able to afford even the £400,000 total being sought by the claimants. Its objections were on the grounds of proportionality, not affordability. That point was expressly confirmed to me by Mr Jeans KC in argument. Addison Lee duly paid the £125,000 total as soon as it was ordered, without difficulty.

94. Had there been any doubt about Addison Lee's ability to pay, then the tribunal would have been bound to hear submissions and receive any relevant evidence in the usual way. But there was no doubt about its ability to pay the sums being discussed (let alone the much lower sums at which the deposit orders were capped), and so that was not an issue.

95. A glance at the company accounts by way of sense check was unnecessary, but it did no harm and was of no consequence in this case.

(vi) The ET erred in taking account of anecdotal evidence of brief fees in another case not canvassed with the parties.

96. Addison Lee also objects to one sentence in a passage within the tribunal's consideration of the likely costs of arguing the challenged points, in para 50 of Decision 1. This passage immediately precedes the passage beginning "In my view it would be disproportionate to make deposit orders equal to or indeed which exceed the Deposit Claimants' potential legal costs in relation to the issues that I consider to have little reasonable prospect of success", which I have just quoted.

97. The passage says (with the sentenced objected to underlined by me):

> "I have regard to the fact that the Pearl Tribunal hearing lasted five days and that a similar amount of time might need to be allocated to determine the arguments that are to be the subject of deposit orders. I work to the assumption that the Leigh Day Claimants will be represented by Leading Counsel, assisted by Junior Counsel. I have recently determined a costs application in which Leading Counsel's Brief fee was £90,000 plus VAT for a five day case, albeit where there was a single Claimant and the issues were not as wide ranging or complex as those that arise in these proceedings. Although I was a solicitor in practice until 2021, it is nevertheless difficult for me to arrive at a fully informed and reliable view as to Junior Counsel's likely fee or Leigh Day's likely additional costs should the relevant arguments go to trial. However, assuming for these purposes that the former's fees might be £20,000 plus VAT and the latter's costs perhaps £50,000 plus VAT, even allowing for the fact that much of the relevant evidence may be readily available in the Lange Claimants' files, that would indicate total potential costs in the region of £192,000 inclusive of VAT."

98. Addison Lee objects that the employment judge's prior experience of a £90,000 brief fee in a 5-day case "had not been shared with the parties for comment and submission" (Addison Lee skeleton argument para 62). It argues that this was a breach of natural justice, and fairness required that the parties should have had an opportunity to comment.

99. At this point, the employment judge was considering proportionality, which is not an explicit component of Rule 39. The *Hemdan* authority deals with proportionality in relation to affordability, which is not the same as the proportion any deposit order total might bear to the costs of the disputed arguments on both sides. It is only *Wright* which suggests a broader "look at the total sum awarded" which considers "the question of proportionality before finalising the orders" in any sense that might go beyond affordability. Even then it is not said that this has to be based on the legal costs involved. Decision 1 chose to use likely legal costs as a measure of proportionality, and that was legitimate. However, it was by no means a first order issue.

100. Having decided to bear likely costs in mind, the employment tribunal was (as Addison Lee's own skeleton recognises, at para 62) "entitled to use his or her general experience in assessing likely fees". Decision 1 makes it clear that the judge's experience was not limited to the recent example mentioned, but also followed a career "as a solicitor in practice until 2021".

101. The objection is, therefore, that the employment judge was too explicit in articulating the basis of his estimate from his own experience, by referring to a specific recent example. Had he not done so, the objection would not have been possible. I do not think this is a criticism of any substance.

102. In any event, it is not suggested that the estimate in Decision 1 was wrong. Although there was a further hearing after Decision 1 and before Decisions 2 and 3, Addison Lee did not comment on this passage or submit evidence or make submissions to the effect that costs were likely to be lower than the tribunal's estimate. Nor was this suggested to me.

103. These decisions were made after a total of three days of hearing, not including the time in chambers required for them to be formulated and written up in the absence of the parties. I have already mentioned the need to keep what should be a summary procedure within bounds. The suggestion that the decision in this case was flawed because of this aspect and that this provides a ground of appeal is rejected.

(vii) The ET erred on proportionality, penal approach and "big picture".

104. Addison Lee relies on the cases of *Hemdan* and *Wright* (discussed in paras 26 to 33 above) for a requirement that any deposit orders should be proportionate and not penal.

105. Addison Lee emphasises the £1,000 cap on the deposit order for each allegation or argument imposed by rule 39(1).

106. Addison Lee objects to the deposit orders in this case being awarded to each of the 327 (later, 329) claimants, thereby increasing the total sums (after application of the total limits imposed in Decision 3) to £75,000 in respect of one set of arguments (which, divided by the original 327 claimants, is £229 each), £25,000 in respect of another set of arguments (which, divided by 327 claimants, is £76 each) and £25,000, again, in respect of the final set of arguments (£76 per claimant).

107. It argues that it is not the number of claimants but the number of allegations or arguments which should swell the size of the deposit orders awarded. It says that there will be necessarily sample or test cases among the claimants, although no order to that effect has been made. It says that granting the deposit orders to every one of the claimants affected, rather than a smaller number based on an

estimate of the numbers of those who might be selected as test cases (which was not an exercise that had been carried out before Decisions 1, 2 or 3) results in a total sum which is penal and disproportionate.

108. Addison Lee suggests that, in order to be proportionate, the orders should have been a total of £1,000 per contention, resulting in orders not exceeding £3,000 in total. As a matter of mathematics, this would have given each of the original 327 claimants the benefit of a deposit order (which might be forfeited to them in due course) of just £3 per contention in due course. This is an extraordinarily low sum. It is derisory in fact. The alternative, that the whole £1,000 might be allocated to a single claimant, would exclude the other 326 claimants, not only from the benefit of any sum by way of forfeit in due course, but also the wider cost advantages of rule 39(5)(b) (the presumption of unreasonable conduct by the paying party).

109. I do not see how an order which is well within Addison Lee's means (as it concedes) can be said to be penal, any more than any deposit order payment is penal. I also consider that the nature of a deposit order, which is refundable if the assessment of the argument as having little prospect of success proves to be wrong, means that it cannot sensibly be regarded as penal unless (which is not the case) it is a sum which Addison Lee has difficulty in paying in the first place. As I have explained in para 31 above, the purpose of a deposit order is not penal but persuasive. Making the party which wishes to pursue arguments which have been evaluated as lacking any reasonable prospect of success pay a sum of money in respect of them is designed to concentrate the mind and force reflection. The sum is limited to £1,000 by rule 39(1) in each case, but that does not mean that it is meant to be negligible. £1,000 is not a negligible sum even in cases where there is only one beneficiary. It is enough to make the person who has been made subject to a deposit order stop and think, and that is the point. It ensures that the reasoning behind the deposit order is not simply ignored, but that there is an appreciation that the view expressed by the tribunal has some force, and a real effect, a practical consequence. The decision to make a deposit order is therefore not merely the expression of an opinion on a piece of paper, or delivered orally by the employment tribunal. It forces action on any

party which contemplates ignoring what has been said about the weakness of its argument as a condition of carrying on with it. There is nothing wrong with it being a sum which makes that party sit up and take notice. On the contrary, that is a good thing, provided it is within the £1,000 cap for each case, and consistent with ability to pay, as required by rule 39(1) and (2); and, in general terms, proportionate.

110. The reason that the order totals exceeded £1,000 per argument in this case is that that weak points which Addison Lee has decided to persist with affected 327 other parties. Addison Lee may consider that some of them need not be considered because they may not be involved in any test or sample cases, but I disagree. Everyone is affected by a test or sample case, even if they are not one of those selected for the purpose. The weak arguments hang over them. They may to a greater or lesser extent be involved in meeting them. Their cases are made more complex by their inclusion. They are as entitled to a deposit order if the weak points are directed against them as they would be if they had no other parties standing with them. That being the case, the sums awarded in respect of each of the 327 claimants must not exceed £1,000 and, in this instance, amount to £229, £76 and £76 as their share of the totals ordered in Decision 3 (and even less when the number was increased to 329 relevant claimants). Those are very substantial reductions. It is not arguable that further reductions were required.

111. Mr Jeans KC on behalf of Addison Lee concedes that there was jurisdiction to make deposit orders in respect of each argument and in respect of each claimant, but he argues that it was disproportionate to do so. Proportionality is however a matter for the employment tribunal, which has a broad discretion, and I see no basis for saying that it erred in that respect.

112. I should add that Addison Lee also, in both written and oral submissions, cited a comment by Michael Ford QC in *Sami v Avellan* [2022] EAT 22 at para 26 (quoted in para 29 of Decision 2) as authority for the suggestion that deposit orders can be reduced below even what is affordable, and even below the rule 39 £1,000 cap per argument and per claimant, because it is the costs warning implicit in the deposit order which is the normal deterrent, not the scale of the payment. This is more

of an extrapolation of what Mr Ford QC said in that passage than a faithful reflection of it. He said in para 26 of *Sami* that "the practical effect of a deposit order on the right of access to justice – probably due more to the costs warning if the case is pursued than to the deposit itself – means that there must be a proper case for making such an order", citing *Hemdan.* He did not say that, once the overall sum has been tested for affordability and proportionality, it should be driven down further to no more than £1,000 per argument regardless of the number of claimants. Nor did he say that the deposit order can be driven down, below what is required by affordability and proportionality, to what might be a negligible sum because the sum is immaterial and it is only the costs warning that matters. That would not be correct.

(viii) The ET ought not to have made deposit orders where some claimants (undisclosed in number and identity) had their costs covered by damages-based agreements.

113. It was accepted at the employment tribunal hearing before Decision 1 that a number of the Leigh Day claimants had their costs covered by damages based agreements. Addison Lee does not know, and it is not entitled to know, the terms of those agreements.

114. Addison Lee speculates that any such damages based agreements may have been incorrectly drafted, with the result that they would be unenforceable and the current claimants will not have to pay any costs. There does not appear to be any basis for this suggestion. Firms such as Leigh Day which enter into damages based agreements for the benefit of parties who may be unable or unwilling to proceed on a purely fee-based or hourly-retainer regardless of whether they win or lose are likely to want their agreement to be lawful and effective, and one would ordinarily expect them to have the professional competence to ensure that. Damages based agreements in employment matters are lawful and enforceable provided they comply with section 58AA of the Courts and Legal Services Act 1990 and the Damages-Based Agreements Regulations 2013.

115. Leaving aside the speculative nature of the submission, however, it was dealt with by the employment tribunal in Decision 1, paras 41-42.

> "(41) I deal briefly with a second potentially novel point raised by Mr Jeans and Ms Belgrove, namely that it would be inappropriate to make deposit orders in

> favour of any Claimants who are pursuing claims where they are represented under a damages based agreement, as is the case in relation to an unspecified number of the Leigh Day Claimants. They submit that to the extent the deposit order regime is an adjunct of the Tribunals' costs jurisdiction, the relevant Claimants would not have incurred costs and so would not recover them. If I were to accede to their submissions, it seems to me that it would follow that it would equally be said to be inappropriate to make deposit orders in favour of those who are representing themselves or who are represented on a pro bono basis and therefore incur no legal costs. Mr Jeans' and Ms Belgrove's submission overlooks the dual purpose of a deposit order. The risk of a costs order, which Similar P referred to as the sword of Damocles hanging over the paying party, may well be the consideration that weighs most heavily in the paying party's mind, but the requirement to pay a sum of money may of itself properly act as a deterrent to continuing with an allegation or argument that has little reasonable prospect of success. If Rule 39(1) was intended to be limited to parties who have paid representatives, I would have expected this to have been stated explicitly in the Rules.
>
> (42) In any event, Ms Tether has drawn the Tribunal's attention to Rule 44 CPR and to the Employment Appeals Tribunal's decision in *Swissport Ltd v Exley* and others UKEAT/7/16, 8/16 that a damages-based agreement will not affect the making of an order for costs which would otherwise be made in favour of that party. The Respondent may have been unable at this stage in the proceedings to examine any funding arrangements, with a view to considering their validity, but in my view these are matters for a later date once liability has been determined and the parties know which allegations and arguments have prevailed. Even should the Claimants succeed on all the allegations and arguments that are to be the subject of deposit orders, all this means is that the threshold test in Rule 76(1)(a) will have been met. The Tribunal would still have to go on to consider whether to make a costs order and, if so, in what amount, having regard to all relevant applicable legal principles."

116. The point made in para 41 seems to me to be a fair one. It is not a requirement of rule 39 that the beneficiary should be paying a legal representative. For each claimant, the benefit in respect of each weak argument is a maximum of £1,000 (and for those not incurring legal costs, that will be the total of any possible benefit). This is a benefit to which a claimant may be entitled for the trouble, anxiety and complication of weak claims being persisted with even if they are incurring no legal costs.

117. But the deposit does not have to be about a benefit to the successful claimant anyway. It is a measure directed against the paying party. The deposit, if forfeit, has to go to someone. The rules could have directed that it go to the tribunal system, or to charity. There was no reason why the rule should have done that, and it does not do that. It directs that it should go to the claimant against whom the failed argument was made. It does so as a matter separate to the overall risk of an adverse costs order established by rule 39(5)(a). I agree with the employment tribunal that the costs arrangements

entered into by the beneficiaries of the deposit orders were not relevant and did not entitle Addison Lee to conduct an enquiry into them, or to require disclosure of them, as an additional pre-condition to the award of a deposit order in favour of any particular claimant. Moreover, such an enquiry would not only have been irrelevant and beside the point; it would also have further complicated a process which is to be kept as simple as possible.

(ix) The ET refused in Decision 2 and failed in Decision 3 to take account of limitation-related issues.

118. Para 44 of Decision 1 decided to limit the deposit orders to periods of time which exactly coincided with the period of time in question in the Lange proceedings.

119. Addison Lee then argued that deposit orders should not be made in respect of claimants whose claims were vulnerable to limitation arguments in respect of those periods (paras 6-7 of Decision 2).

120. This argument was rejected (paras 8-11 of Decision 2). Decision 2 said (at para 10):

> "The power to make a deposit order is a discretionary one. Whilst that discretion must be exercised judicially, there is no requirement within Rule 39 or by reason of any decision of the appellate courts that has been drawn to my attention, that the Tribunal must necessarily consider and weigh in the overall balance the merits of other allegations and arguments outside the ambit of the application for a deposit order. Indeed, it begs the question why an arguable issue should rescue one with little or no prospect of success?"

121. Addison Lee challenges that reasoning but it seems to me to be sound. The arguments which attracted the deposit orders were arguments being advanced by Addison Lee itself. They were being advanced indiscriminately against all 327 claimants named in Decision 3. Addison Lee might have dropped or refrained from those arguments in respect of those claimants it considered could be effectively dealt with by taking a limitation point, but it has not done so. The issue under rule 39 is not whether the paying party will win the case as a whole. It is whether a specific allegation or argument is considered to have little reasonable prospect of success. The rule 39 remedy for such an argument having little reasonable prospect of success is that it should not be pursued, or, if it is pursued, that it is pursued only upon payment of the deposit. The remedy is not that the weak argument is rendered irrelevant by another, better argument (said in this case to be limitation). Such

points can be argued on their merits in due course. The tribunal observed that there had been no request by Addison Lee for any time limit or jurisdiction issues to be determined as a preliminary issue (Decision 1 para 7).

122. The tribunal was entitled, in the exercise of its case management powers, to decline to enter into a consideration of limitation issues when exercising its discretion on whether to make a deposit order in circumstances where the requirements of rule 39 had been met, namely, arguments were being advanced which had little reasonable prospect of success. Limitation did not form part of those arguments. It did not have to be considered as an adjunct to them.

123. It is impractical and undesirable that deposit order hearings should become mini-trials, considering, potentially, all the issues in the round, and their impact upon each other, and not merely the "specific allegation or argument" in question.

(x) Decision 2 made a procedural error when requiring Addison Lee to show grounds for reconsideration of Decision 1 and/or denying the existence of such grounds.

124. After considering and rejecting the limitation point on its merits in Decision 2 paras 9-11, the employment tribunal said (in para 12 of Decision 2):-

> "I do not consider it necessary in the interests of justice to re-visit the Deposit Reasons or to vary, suspend or set aside the March Orders or otherwise vary, suspend or not perfect the deposit orders intended to be made pursuant to the March Orders, whether in respect of some or all of the Deposit Claimants, because the Respondent now believes, following analysis of its pay data, that it has greater prospects of successfully resisting various claims, or significant elements of them, on jurisdictional grounds. In my view that does not involve a material change of circumstances since the March Orders were made that warrants the Respondent now being able to pursue the arguments identified in paragraphs 11 and 11(i), 15 and 16, and 30 to 33 of its Amended Grounds of Response dated 6 October 2022 freed from the risk of the potential consequences that arise from a deposit order. In my view, the only material change of circumstances since the March Orders were made is that the duration of the final hearing has been extended by five days to accommodate the evidence of up to 11 test claimants, potentially further increasing the time, costs and resources that will be allocated to determination of arguments that I have concluded have little reasonable prospect of success. It is not suggested by Ms Belgrove that the Respondent's prospects on those specific arguments are altered in any way because of its prospects, or any re-appraisal of its prospects, in respect of jurisdiction."

125. Addison Lee argues that there was, in fact, a change of circumstances because it was only after Decision 1 and the identification of the claimants who were within scope of the time period to which Decision 1 was limited that it was able to argue (as it then did) that many of them were at risk of limitation arguments, whatever the merits of the arguments identified in the deposit orders. It complains that it has been precluded from succeeding on limitation points because of a mistaken approach to whether there had been a material change of circumstances since Decision 1, prior to which no limitation arguments had been advanced.

126. I think that this is to mis-read the reasoning of Decision 2. Decision 2 did, in fact, consider the limitation point on its merits. This was done in paras 8-11 (which I have considered under appeal point (ix) above). It arguably continued to do so in para 12, because the final sentence is a merits point, not a procedural point.

127. The procedural objection that there had not been a material change of circumstances was not the primary basis for upholding the deposit orders notwithstanding the limitation arguments. The primary basis was that the limitation arguments were a different part of the case and should not distract from the question in issue, which was "a specific allegation or argument in a claim or response has little reasonable prospect of success" rather than whether the person advancing such an argument had better arguments elsewhere which were not the subject of challenge (and which had yet to be decided).

128. Ground (x) cannot therefore alter the outcome of the appeal.

129. It is not a particularly strong ground in any event. The employment tribunal said (in para 14 of Decision 2) "I see no reason why the arguments now advanced by [Addison Lee] could not equally have been made in March this year." It said (in para 15) that Addison Lee was in a position before Decision 1 to identify the cut-off date for each claimant resulting from the operation of section 23(4A) of the Employment Rights Act and to identify the dates when new terms for drivers were introduced, such as potentially to trigger a three-month time limit for bringing pay in lieu of holiday claims under Regulation 14 of the Working Time Regulations 1998.

(xi) Decision 2 made a substantive error when deciding that limitation points were not relevant to the deposit order decision.

130. This is the same point as (ix) and fails for the same reasons.

Conclusion

131. The appeals are dismissed.