Neutral Citation Number: [2022] EAT 118

Case No: EA-2020-000367-DA

**IN THE EMPLOYMENT APPEAL TRIBUNAL**


Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 August 2022

**Before :**

**THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT**

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**Between :**

**MR P WILLIAMSON**

**Appellant**

**- and –**

**(1) THE BISHOP OF LONDON**
**(2) THE LONDON DIOCESAN FUND**
**(3) THE CHURCH COMMISSIONERS FOR ENGLAND**

**Respondents**

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**James Wynne** (instructed by Scott-Moncrieff & Associates Ltd, solicitors) for the **Appellant**
**Edward Kemp** and **Bláthnaid Breslin** (instructed by Winckworth Sherwood LLP, solicitors) for the **Respondents**

Hearing date: 13 July 2022

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# JUDGMENT

**This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.**

**The date and time for hand-down is deemed to be 11:00 on 1 August 2022**

## Summary

*Practice and procedure – Civil Procedure Order – section 42 Senior Courts Act 1981*

The claimant is subject to a Civil Procedure Order ("CPO"), which provides that he shall not initiate civil proceedings without the leave of the High Court. Notwithstanding that requirement, the claimant purported to bring a claim of unlawful age discrimination before the Employment Tribunal ("ET") without first obtaining the required leave. When the point was raised, the claimant made an application for retrospective permission. The Order made by the High Court ("the Pittaway Order"): 1. granted the claimant permission to pursue the existing proceedings; in the alternative, 2. granted him permission to issue proceedings in the ET. When the matter returned to the ET, however, it was ruled that paragraph 1. of the Pittaway Order could be of no effect as it was not possible to give retrospective permission under the terms of a CPO, and the proceedings in the ET were a nullity (the ET following the High Court decision in **HM Attorney General v Edwards** [2015] EWHC 1653 Admin). The ET further considered that paragraph 2 of the Pittaway Order was expressed in the alternative, and related to the same basis of claim. The claimant appealed.

Held: *dismissing the appeal*

The ET had correctly ruled that the proceedings before it were a nullity; section 42(1A) **Senior Courts Act 1981** imposed a substantive (not merely a procedural) barrier to the initiation of proceedings by the subject of a CPO. Although not strictly binding on the EAT, the decision in **AG v Edwards** was of persuasive authority and none of the exceptions identified in **Lock and anor v British Gas Trading Ltd (No. 2)** [2016] IRLR 316 EAT applied. In particular, contrary to the claimant's submissions, **AG v Edwards** had not been decided per incuriam, was not manifestly wrong, and no exceptional circumstances applied. In any event, the decision in **AG v Edwards** was consistent with the statutory language and the purpose of section 42(1A). As for the Pittaway Order (although strictly academic given the decision reached on the approach to section 42(1A)), the ET

had rightly construed the two paragraphs as being alternatives; that was apparent from the context of the application under consideration and from the language used.

**The Honourable Mrs Justice Eady DBE, President:**

## Introduction

1. This appeal raises a question as to the consequences of a claim being brought in the Employment Tribunal ("ET") by a claimant who is the subject of a Civil Proceedings Order ("CPO") who has not first obtained the required permission of the High Court.

2. In giving this judgment, I refer to the parties as the claimant and respondent, as below. This is the full hearing of the claimant's appeal against a judgment of the Watford Employment Tribunal (Employment Judge McNeill QC, sitting alone on 8 January 2020; "ET"), by which it was held that the claimant's claim, having been presented without first obtaining the leave of a High Court Judge, was a nullity. The claimant has appealed and, after a hearing under rule 3(10) **Employment Appeal Tribunal Rules 1993** (as amended) before Her Honour Judge Tucker on 11 November 2021, this matter was permitted to proceed to a full hearing. The claimant was represented before the ET by Mr Wynne, of counsel, as he is today. The respondents were also represented by counsel below, albeit not by Mr Kemp and Ms Breslin, who appear before me.

## The Relevant Background

3. On 16 July 1997, the claimant was made the subject of a CPO issued by a Divisional Court of the High Court (Rose LJ and Jowitt J) under section 42(1) of the **Senior Courts Act 1981** ("SCA"), by which it was ordered that the claimant was prohibited from:

> "1. instituting any civil proceedings in any Court and
>
> 2. continuing any civil proceedings instituted by him in any Court before the making of this Order and
>
> 3. making any application other than an application for leave as required by section 42 of the [SCA] in any civil proceedings instituted in any Court by any person unless [the claimant] obtains the leave of the High Court having

> satisfied the High Court that the proceedings or application are not an abuse of the process of the Court in question and that there are reasonable grounds for the proceedings or application"

4. It is common ground that the ET is a court for the purposes of the CPO.

5. The claimant seeks to pursue an age discrimination claim before the ET, relating to the termination of his tenure as Priest-in-Charge at the Parish of St George, Hanworth Park, when he reached the age of 70 on 18 November 2018. There are issues between the parties as to the claimant's employment status, and thus whether the ET would have jurisdiction to hear the case in any event, but, subject to the effect of the CPO on the proceedings, it is not otherwise suggested that the claim itself is vexatious or would amount to an abuse of the process of the ET.

6. The claimant presented his claim to the ET on 1 April 2019, without having obtained the permission of the High Court. After the respondents had raised the issue of the CPO, on 12 September 2019, the claimant made an application for leave to the High Court, attaching a draft Order by which he sought permission to either pursue the proceedings he had issued in the ET on 1 April 2019 or for permission to issue proceedings in the ET. The claimant's application was supported by a witness statement from his solicitor, who acknowledged that proceedings had been issued in the ET without the claimant having first obtained the leave of the High Court. Reference was made to the fact that the respondents had contended that the ET proceedings were a nullity, albeit the statement did not refer to the case of **HM Attorney General v Edwards** [2015] EWHC 1653 Admin on this point.

7. The claimant's application to the High Court was dealt with on paper, without notice to the respondents. Mr David Pittaway QC, sitting as a Deputy Judge of the High Court, made an Order on 24 September 2019 ("the Pittaway Order"), in the following terms:

> "1. The [claimant] do have permission to pursue the proceedings issued by him in the Watford Employment Tribunal on 1st April 2019 under Case Number 3313470/2019 against (1) The Bishop of London (2) The London Diocesan Fund and (3) The Church Commissioners for England (the "ET" Respondents) in respect of a claim for Age Discrimination contrary to the Equality Act 2010.
>
> In the alternative
>
> 2. The [claimant] do have permission to issue proceedings in the Watford Employment Tribunal as regards the termination of his tenure as the Priest-in-Charge of St. George Hanworth against the (1) The Bishop of London (2) The London Diocesan Fund and (3) The Church Commissioners for England."

8. In giving his reasons for making the Order, Mr Pittaway explained:

> "The Order was made against the Applicant in 1997 since that time he has not been involved in any litigation in a personal capacity. Having offered *[sic]* Mr. Macey-Dare's witness statement I am satisfied that the Employment Tribunal proceedings are not an abuse of process and these are reasonable grounds for the application following the resumption of the Applicant's office as a Clergyman in April 2019."

9. It was the respondents' contention before the ET that paragraph (1) of the Pittaway Order was to be treated as being of no effect: paragraphs (1) and (2) were alternatives (otherwise the Order did not make sense), either one or the other applied, they could not both apply. The respondents further submitted that the ET should be guided by the judgment in **AG v Edwards** and should find that the proceedings were a nullity and the only proper way to interpret the Order was by reference to paragraph (2), albeit that would give rise to limitation issues. In contrast, the claimant argued that paragraph (2) of the Pittaway Order was intended to refer to some further, unspecified future claim; paragraph (1) was effective regardless of paragraph (2) and was binding on the ET. As for the case of **AG v Edwards**, it was contended that had been wrongly decided but, in any event, to the extent that it stood in conflict to the Pittaway Order, the ET should prefer the latter as it had been made in the current proceedings.

## The ET's Decision and Reasoning

10. In determining the effect of the Pittaway Order, the ET preferred the arguments of the respondents to those of the claimant. Had the judge clearly intended to order that the current ET proceedings, presented without leave, could be continued, there would have been no need for paragraph (2). The claimant's application to the High Court had made clear that he sought a single Order: *either* an Order that the current proceedings were permitted to proceed before the ET, *or* an Order that, if leave was refused, the claimant should have permission to bring that same claim before the ET by way of a fresh claim. There was nothing in the application the claimant had made to the High Court to suggest that paragraph (2) could refer to some other, unspecified, future claim. The claimant's submission was effectively that he could both pursue the current proceedings and bring a fresh claim; that was contrary to the plain words of the Pittaway Order, which expressed the two permissions in the alternative.

11. In construing the Pittaway Order, the ET took into account the circumstances in which it had come about; it had been made on the papers, without notice to the respondents, and without the judge being referred to the key authority of **AG v Edwards**. The ET rejected the claimant's contention that **AG v Edwards** had been wrongly decided. The court in that case had been similarly concerned with the language of section 42 **SCA**, which was clear; in any event the judgment in **AG v Edwards** was binding on the ET. Interpreting the Pittaway Order in accordance with **AG v Edwards**, paragraph (1) was of no effect because the initial proceedings were a nullity, so there was nothing to which the retrospective granting of leave could attach; the alternative, paragraph (2) was the only Order that could be valid.

12. In the alternative, however, if the Pittaway Order and the decision in **AG v Edwards** constituted conflicting decisions of the High Court, the ET was clear that it would prefer the decision in **AG v Edwards** - a reasoned judgment reached after the court had heard argument from two interested parties - to the Pittaway Order, which had been determined, without notice, on paper and without the judge being referred to relevant authority.

13. For completeness, I add that, subsequent to the ET's decision, the claimant sought to pursue a claim relying on the permission granted by paragraph (2) of the Pittaway Order. That claim was, however, dismissed as being out of time; the ET considering it not just and equitable to extend time.

## The Law

14. The power to make a CPO is provided by section 42(1) **SCA**. A CPO can only be made upon the application of the Attorney General (section 42(1)) but can be for an indefinite period (section 42(2)). The conditions for such an Order are made clear at section 42(1) **SCA**: the High Court must be satisfied that the individual in question:

> "(1) … has habitually and persistently and without any reasonable ground-
>
> (a) instituted vexatious civil proceedings …;
>
> (b) made vexatious applications …, or
>
> (c) instituted vexatious prosecutions …"

15. By section 42(1A) it is provided that a "*civil proceedings order*" means an Order that:

> "(a) no civil proceedings shall without the leave of the High Court be instituted in any court by the person against whom the order is made;
>
> (b) any civil proceedings instituted by him in any court before the making of the order shall not be continued by him without the leave of the High Court; and

> (c) no application (other than one for leave under this section) shall be made by him, in any civil proceedings instituted in any court by any person, without the leave of the High Court;"

16. As those acting for the respondents observe, where such an Order has been made, leave of the High Court has always been required before proceedings are instituted (see section 1 **Vexatious Actions Act 1896** and section 51 of the **Supreme Court of Judicature (Consolidation) Act 1925**). By section 42(3) **SCA** it is provided that:

> "Leave for the institution or continuance of, or for the making of an application in, any civil proceedings by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the High Court is satisfied that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the proceedings or application."

17. The purpose of a CPO is clear, it is:

> "... to avoid the unnecessary use of court time and resources on unjustified litigation and to protect prospective defendants from the expense which that involves." (**Ewing v News International** [2010] EWCA Civ 942 per Patten LJ at paragraph 18)

18. The ability to apply to the High Court for permission to institute a claim ensures, however, that a CPO operates as a filter rather than a barrier. The judicial filter thus created by a CPO provides for the interests of the public to be protected against abusive claims and for the courts and tribunals not to be troubled with wholly unmeritorious proceedings (see **Her Majesty's Attorney General v Taheri** [2022] IRLR 395 EAT, which addressed the analogous provision at section 33 **Employment Tribunals Act 1996** ("ETA")).

19. The requirement to obtain permission of the High Court is intended to act as a deterrent, whereby the individual subject to a CPO has to make an application and pay a fee – itself "*part of the discipline imposed on vexatious litigants*" see **Chief Constable of Avon and Somerset v Gray** [2019] EWCA Civ 1675 per Irwin LJ at paragraph 33, making such litigants

"*at least think twice before making applications*" see **Senior-Milne v Secretary of State for Justice** [2012] EWHC 3062 Admin per Coulson J at paragraph 23.

20. More specifically, in **Her Majesty's Attorney General v Edwards** [2015] EWHC 1653 Admin, Wilkie J held that the reference in subsection 42(3) to leave for the continuance of any civil proceedings was limited to continuance of civil proceedings referred to in section 42(1A)(b), that is to say civil proceedings instituted *before* the making of the CPO; it did not refer to the continuance of civil proceedings commenced by the applicant without having first obtained leave of the High Court. In refusing Mr Edwards' application for retrospective leave to pursue an ET claim presented about a month earlier, Wilkie J held that an ET claim brought without the permission required under a CPO was a nullity and of no effect, such that it could not benefit from retrospective permission.

21. In reaching that decision, Wilkie J observed that:

> "12. On the face of it, section 42 provides a very strict set of provisions which would preclude anyone who had commenced proceedings covered by the order without first obtaining the leave of the High Court from making an application such as Mr Edwards has made for leave to continue the proceedings, even though leave had not been obtained before they were commenced, or to give retrospective leave for him to commence proceedings where those proceedings had been commenced without first obtaining leave of the High Court."

22. Wilkie J noted that this issue had been considered, albeit indirectly, by the House of Lords in **Seal v Chief Constable of South Wales Police** [2007] UKHL 31, a case concerned with section 139(2) **Mental Health Act 1983** ("MHA"), which provides:

> "No civil proceedings shall be brought against a person in any court in respect of any such act without the leave of the High Court."

The question that arose in **Seal** was described by Lord Bingham of Cornhill as follows:

> "2. ... What are the consequences if a claimant brings civil proceedings which require the grant of leave under the subsection, without obtaining such leave?

> The Chief Constable submits that the obtaining of leave in such circumstances is a jurisdictional condition, such as to render null any proceedings brought without it. Mr Seal challenges this interpretation of the subsection: he contends that the lack of leave, even when required, is an irregularity which can be rectified, not a fatal flaw which invalidates the proceedings."

23. Wilkie J further noted that part of the argument that found favour with the majority in **Seal** related to the legislative context. Referring to the words used at section 139(2) **MHA**, which had first been introduced in section 16(2) of the **Mental Treatment Act 1930**, Lord Bingham had observed that these:

> "18. ... were introduced with the obvious object of giving mental health professionals greater protection then they had enjoyed before. They were re-enacted with knowledge of the effect the courts had given to them."

24. In **Seal**, Lord Bingham (giving the lead speech with which the majority agreed) concluded that the Court of Appeal had been right in finding that the effect of the provision in question had been to render the proceedings in issue in that case a nullity, going on to also make clear his agreement with the opinion of Lord Brown of Eaton-under-Heywood (see Lord Bingham at paragraph 21). In this regard, and most relevantly for present purposes, Lord Brown had reasoned:

> "73. It seems to me quite evident from the legislative history of this provision that from 1930 onwards Parliament intended to make leave a precondition of any effective proceedings. Unlike the position prior to 1930, the prospective defendant was not to be required to take any action whatever with regard to a proposed claim unless and until it was sanctioned by a High Court judge. Absent such leave, albeit he might be notified of a claimant's proposal to proceed against him, he was not to be troubled by such proceedings. The very inflexibility of the provision was an integral part of the protection it afforded. If, however, the appellant's approach were to be adopted, inevitably (unless by chance the court took the point of its own motion) the defendant himself would be drawn into the litigation.
>
> 74. ... the requirement for leave here was to safeguard prospective defendants from being faced with proceedings (which might not be sufficiently meritorious to deserve leave) unless and until a High Court judge thought it appropriate that they be issued. And that is not a protection that can be secured save by a clear and inflexible rule such as section 139(2) (and its legislative predecessors) have always hitherto been understood to

> provide. Just such a rule applies in respect of those adjudged vexatious litigants under section 42 of the Supreme Court Act 1981 and Parliament clearly intended to achieve the same result under the Mental Health Act legislation. Whether or not such protection is necessary or desirable is, of course, open to question and has, indeed, been extensively debated over recent years. But your Lordships' task is not to decide whether it is desirable but whether presently the legislation confers it."

25. In **AG v Edwards**, Wilkie J further noted:

> "18. The issue whether the existence of such a clear and inflexible rule (as it had been decided by their Lordships section 139(2) amounted to) was compatible with the United Kingdom's obligations under the European Convention on Human Rights, and in particular Article 6(1), was the subject of challenge in the same case under the name Seal v United Kingdom [2012] 54 EHRR 6. The court in that case decided that the existence of the rule did not amount to a violation of Article 6(1)."

26. As for the application made by Mr Edwards, Wilkie J made clear that he considered that **Seal** was "*binding authority*" (paragraph 25) and, accordingly, that:

> "22. … that the Employment Tribunal proceedings commenced by Mr Edwards without leave of the High Court having first been obtained are a nullity, and therefore there is nothing to which any retrospective granting of leave could attach."

27. There is a dispute between the parties on this appeal as to whether, sitting in the EAT, I should follow the authority of **AG v Edwards**. Unlike the ET, the EAT is not bound by a decision of the High Court, as a court of co-ordinate jurisdiction (see **Portec (UK) Ltd v Mogensen** [1976] 3 All ER 565 EAT at p 568 D); that said, as Singh J (as he then was) observed in **Lock and anor v British Gas Trading Ltd (No. 2)** [2016] IRLR 316 EAT:

> "75. … they are of persuasive authority. It will accord them respect and will generally follow them. …"

28. In **Lock**, having thus described the general principle to be applied, Singh J set out the established exceptions to this rule, as follows:

> "(1) where the earlier decision was per incuriam, in other words where a relevant legislative provision or binding decision of the courts was not considered;
>
> (2) where there are two or more inconsistent decisions of this Appeal Tribunal;
>
> (3) where there are inconsistent decisions of this Appeal Tribunal and another court or tribunal on the same point, at least where they are of co-ordinate jurisdiction, for example the High Court;
>
> (4) where the earlier decision is manifestly wrong;
>
> (5) where there are other exceptional circumstances."

29. For the claimant, it is contended that sub-paragraphs (1), (4) and (5) are applicable in the present circumstances. I return to his arguments below but it is convenient to here set out the relevant legislative provisions and the case law he relies on.

30. First, the claimant contends that the decision in **AG v Edwards** was decided *per incuriam* (**Lock** (1)). He does not seek to suggest that this was because the decision was reached in ignorance of a previous decision "*which covers the case before it*", see **Young v Bristol Aeroplane Co Ltd** [1944] KB 718 per Lord Greene MR at p 729; rather, the claimant says that this was so because there was a failure to refer to the ET's jurisdictional basis in statute, and to the rules which govern its proceedings, and also because of the failure to have regard to the **Civil Procedure Rules**.

31. As the claimant points out, ETs are established by section 1 **ETA** ("ETA"). By section 2 it is provided that ETs:

> "… shall exercise the jurisdiction conferred on them by or by virtue of this Act or any other Act."

32. The claimant seeks to pursue a claim of direct discrimination because of age, contrary to sections 13, 49 and 53 **Equality Act 2010** ("EqA"); the ET has jurisdiction to determine such a claim under section 120 **EqA**.

33. Proceedings before the ET are (relevantly) governed by the rules laid down in schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("ET Rules"). The **ET Rules** are made pursuant to the power provided by section 7(1) **ETA**; by section 7(2) **ETA** it is provided:

> "Proceedings shall be instituted in accordance with employment tribunal regulations"

34. Rule 8 then sets out the requirement for a claim to be started before the ET:

> "A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction…".

35. Claims may be rejected for various reasons under rules 10 to 12, with provision for the ET to reconsider any such rejection under rule 13.

36. Upon the initial consideration of a claim, by rule 27, the ET may summarily dismiss a claim (or part of a claim), as follows:

> "(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the Tribunal shall send a notice to the parties— (a) setting out the Judge's view and the reasons for it; and (b) ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed.
>
> (2) If no such representations are received, the claim shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).
>
> (3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the claim (or part) to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. The respondent may, but need not, attend and participate in the hearing.
>
> (4) If any part of the claim is permitted to proceed the Judge shall make a case management order."

37. Claims may also be struck out under rule 37 **ET Rules**, either on the application of a party or on the ET's own initiative, on grounds that include:

> "(a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant … has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> …"

38. A claim may not be struck out, however, unless the claimant has been given a reasonable opportunity to make representations, either in writing or, if requested, at a hearing (rule 37(2)).

39. In interpreting or exercising any power given to it under the **ET Rules**, an ET is required to seek to give effect to the overriding objective, as provided by rule 2:

> "Overriding objective
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

40. The claimant also places reliance on the powers provided under the **Civil Procedure Rules** ("CPR") in relation to the making of a Civil Restraint Order ("CRO"), which he contends is analogous to a CPO. Relevantly, **CPR** 3.11 provides:

> "A practice direction may set out— (a) the circumstances in which the court has the power to make a civil restraint order against a party to proceedings; (b) the procedure where a party applies for a civil restraint order against

> another party; and (c) the consequences of the court making a civil restraint order."

41. The relevant Practice Direction is **CPD 3C**, which at paragraph 4.3 addresses the situation where a party who is subject to a CRO issues a claim, or makes an application, in a court identified in the Order without first obtaining the permission of a relevant judge. It provides that such a claim or application will be automatically struck out or dismissed (see paragraph 4.3 (1)). The automatic striking out or dismissal of such a claim or application is, however, subject to the relief from sanctions provisions of **CPR** 3.9, see **Couper v Irwin Mitchell LLP** [2017] EWHC 3231, [2018] WLR 23, at paragraphs 28-29.

42. The claimant further contends that I should not consider myself bound by **AG v Edwards** because that decision was manifestly wrong (**Lock** (4)) or because there are exceptional circumstances that warrant departing from that authority (**Lock** (5)).

43. In support of his contention that **AG v Edwards** was manifestly wrong, the claimant submits that the court had erroneously considered itself bound by the remarks of Lord Brown in **Seal**, which were (at most) *obiter*. First, that case was not concerned with section 42 **SCA** but with section 139(2) **MHA**. In this regard, the claimant draws attention to the observations as to the legislative context of section 139(2) made by Lord Bingham at paragraph 20 **Seal**:

> "... The European Court has accepted that the right of access to the court is not absolute, but may be subject to limitations: *Ashingdane v United Kingdom* (1985) 7 EHRR 528, para 57. The protection of those responsible for the care of mental patients from being harassed by litigation has been accepted as a legitimate objective: ibid, para 58; *M v United Kingdom* (1987) 52 DR 269, 270. What matters (*Ashingdane*, para 57) is that the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent as to impair the very essence of the right. But the threshold for obtaining leave under section 139(2) has been set at a very unexacting level: *Winch v Jones* [1986] QB 296. An applicant with an arguable case will be granted leave. Mr Seal's undoing lay not in his failure to obtain leave which he should have had but in his failure to proceed within the generous time limit allowed by the 1980 Act, which would not itself fall foul of article 6: *Stubbings v United Kingdom* (1996) 23 EHRR 213. ..."

44. Secondly, the claimant contends that Lord Brown's remarks at paragraph 74 **Seal** assumed an inflexibility in relation to section 42 **SCA** that was not borne out by the case-law. In this regard, the claimant places reliance on three reported decisions in which the courts had not treated as a nullity claims or applications brought without first seeking the permission required by a CPO:

(1) **Ewing v Security Services** [2003] EWHC 2051 QB, in which a claimant subject to a CPO was given retrospective permission to make an application to the Investigatory Powers Tribunal in which he alleged breaches by the Security Services of various of his rights under the **Human Rights Act 1998** when dealing with his application for subject data access under the **Data Protection Act 1998**. The argument in that case centred around the question whether the Investigatory Powers Tribunal was a "court" for the purposes of the CPO; it was held that it was. The question whether the High Court could give retrospective permission for the proceedings was not argued and, having considered whether there were reasonable grounds for bringing the proceedings, the judge gave permission for the claimant to continue his claim.

(2) **Foden v Smailes** [2005] EWHC 1965 Ch, in which an applicant who was subject to a CPO made applications to stay a possession Order and to rescind a bankruptcy Order without first seeking the permission of the High Court. Dealing with those applications, Pumfrey J had initially stayed the Order for possession, notwithstanding the absence of permission for the application (see paragraph 2), but subsequently stated that he was proceeding on the assumption that an application under section 42 **SCA** had been made, and duly refused it (see paragraph 13).

(3) **In the matter of St George, Hanworth** [2016] ECC Lon 1, involved an application initiated by the claimant in the present proceedings, supported by one of his

Churchwardens. The issue of the claimant's CPO was raised at a case management hearing and the proceedings were stayed to enable him to apply to the High Court (retrospectively) for the requisite leave (paragraph 8). That application was refused but the proceedings were permitted to proceed on the basis that the matter would be treated as brought by the Parochial Church Council rather than the claimant.

45. As for the exceptional circumstances, the claimant says that the consequence of the decision in **AG v Edwards** leads to a potential injustice. In support of this submission, he relies on the observations made in the dissenting opinions of Lord Woolf and Baroness Hale of Richmond in **Seal**, as follows:

Per Lord Woolf at paragraph 29:

> "What makes the appeal important is the principle that is involved. The principle arises because section 139 places a procedural restriction on access to the courts. The approach at common law to such restrictions was made abundantly clear by Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286 where he said:
>
> 'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is ... a 'fundamental rule' from which I would not for my part sanction any departure.'"

Per Baroness Hale at paragraph 41:

> "I approach the task of construing section 139(2), therefore, on the basis that Parliament, by enacting the procedural requirement to obtain leave, did not intend the result to be that a claimant might be deprived of access to the courts, unless there is express language or necessary implication to the contrary. If there is no express language, there will be no necessary implication unless the legislative purpose cannot be achieved in any other way. Procedural requirements are there to serve the ends of justice, not to defeat them. It does not serve the ends of justice for a claimant to be deprived of a meritorious claim because of a procedural failure which does no substantial injustice to the defendant."

46. The claimant contends that the injustice can be resolved by permitting that the ET should determine whether to strike out the claim or otherwise dismiss it, allowing for the possibility of staying the proceedings pending an application to the High Court and/or for relief from sanctions. That, the claimant submits, would allow for an approach akin to that taken in relation to CROs and in other legislative contexts:

(1) In the context of section 285(3) **Insolvency Act 1986**, which provides:

> "After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall – (a) have any remedy against the property or person of the bankrupt in respect of that debt, or (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose. …"

In **In re Saunders** [1997] Ch 60, where the court was concerned with various proceedings commenced against the bankrupt before the relevant plaintiff was aware of the bankruptcy, it was held that the case-law made clear that proceedings in insolvency begun without the stipulated leave should not be regarded as irretrievably null but rather as existing and capable of redemption by the retrospective giving of leave (see per Lindsay J at p 82B-83E). In his review of the case-law in **Saunders**, Lindsay J referred to the legislative purpose, as considered by Lord Coulsfield in **Carr v British International Helicopters Ltd** [1994] ICR 18 EAT (Sc) at p 30:

> "… the purposes of the insolvency legislation can quite well be served without requiring that a summons served, or an application made, without prior consent should be considered to be a nullity or incompetent. The purpose of the legislation is, in general terms, to prevent the liquidator's or administrator's task being made more difficult by a scramble among creditors to raise actions, obtain decrees or attach assets. We cannot, however, see that there is any reason why it should be necessary for the provision of such protection to treat any proceedings which may, for one reason or another, be commenced without consent as null and, therefore, incapable of proceeding further."

(2) In the context of section 33(2) **Charities Act 1993**, and subsequently section 115(2) **Charities Act 2011**, which provided:

> "... no charity proceedings relating to a charity are to be entertained or proceeded with in any court unless the taking of the proceedings is authorised by order of the [Charity] Commission."

In **Park v Cho** [2014] PTSR 769 charity proceedings had been pursued to judgment without first obtaining authorisation from the Charity Commission. The position of the parties was that this did not render the proceedings a nullity (**Rendall v Blair** (1890) LR 45 ChD 139); the question was whether the Charity Commission could authorise continuation of the proceedings such as to enable the court to determine all issues in relation to enforcement. The court held that it could: the Charity Commission's power to authorise the "taking" of proceedings envisaged:

> "not merely initiating or commencing proceedings from their inception, but also the taking of steps within any existing proceedings, even though such proceedings as a whole have not been authorised from their inception, and are not so authorised" (see paragraph 40).

See also **Choudhury and anor v Stepney Shahjalal Mosque & Cultural Centre Ltd and ors** [2015] EWHC 743 Ch, where the court stayed proceedings to enable an application for authorisation to be made to the Charity Commission (see paragraph 22). In **Choudhury**, in considering the purpose of the requirement to seek permission from the Charity Commission, the court referred to the judgment of Mummery LJ in **Muman v Nagasena** [2000] 1 WLR 299 CA, where he held (at p 305) that:

> "To allow the proceedings to continue without authorisation would be to offend the whole purpose of requiring authorisation for charity proceedings. That is to prevent charities from frittering away money subject to charitable trusts in pursuing litigation relating to internal disputes."

In **Muman**, as the proceedings had not been authorised by the Charity Commission, the court imposed a stay pending such authorisation and attempts at mediation.

## The Claimant's Appeal and Submissions in Support

47. The claimant pursues two grounds of appeal, by which he contends (in summary):

(1) The Pittaway Order was unambiguous and was binding on the ET: by paragraph (1), permission had been granted and the ET had no power to avoid that direction.

(2) **AG v Edwards** was not binding and should not be followed.

It is common ground that ground (2) should be considered first: if the claimant loses on this ground, his arguments under ground (1) are rendered academic.

48. For the claimant it is said that the starting point must be that the subject's right of access to courts and tribunals must not be whittled down (see the dissenting opinions of Lord Woolf and Baroness Hale of Richmond in **Seal** at paragraphs 29 and 41). The test for the grant of permission to bring proceedings when a CPO is in place is that provided by section 42(3) **SCA** (non-abusive and reasonable grounds); accepting that it is for the High Court to determine whether that test is met, if it is possible to apply this provision in a way that protects both the court in question (here the ET) and the respondent, but does not impose a greater hurdle than necessary for the claimant, that is the construction that must be adopted. That was the course adopted in relation to CROs under the **CPR** and **CPD 3C**.

49. Given that section 42 **SCA** (i) did not expressly provide for the removal of an existing jurisdiction, and (ii) was itself silent as to how a court or tribunal should deal with the matter, it must be for the rules of the court or tribunal in question as to how to deal with a claim brought absent permission as required by a CPO. There was a lacuna in the **ET Rules** in this regard but (i) the concept of a claim being treated as a nullity did not appear in the **ETA** or the **ET Rules**; (ii) provided a claim was presented in accordance with rule 8 **ET Rules**, proceedings had been instituted; (iii) the ET could then determine how to

justly deal with such a claim (for example, by striking it out under rule 37, which would permit the claimant the opportunity to make representations or seek a reconsideration; or by imposing a stay pending authorisation by the High Court) – in this regard, the ET had similar tools to those provided in respect of CROs under the **CPR** (which allowed for the application of the overriding objective in granting relief from sanctions, see **Couper v Irwin Mitchell**). Given that the claimant had presented a valid claim under the **EqA** and the **ET Rules**, it was a fiction (and contrary to the overriding objective) to treat his claim as a nullity.

50. Where a claim was presented without first obtaining the necessary permission of the High Court under a CPO, to treat the proceedings as a nullity could lead to a grave injustice, particularly in relation to claims before the ET where relevant time limits were relatively short. More generally, if, for example, the point regarding the need for permission under a CPO was only taken at the end of proceedings, a claim found to be meritorious at trial might then have to be re-run. Alternatively, if the claim had been dismissed and a costs award made against the claimant, treating the proceedings as a nullity would prejudice the respondent.

51. As for **AG v Edwards**, the EAT should not consider itself bound by that decision as it was decided *per incuriam* (**Lock** (1)), alternatively, was manifestly wrong (**Lock** (4)), or because there were exceptional circumstances warranting departure from that authority (**Lock** (5)).

52. The decision in **AG v Edwards** was *per incuriam* because the court had failed to give consideration to the statutory basis of the claim, to the ET's jurisdictional basis in statute and to the rules that govern its proceedings. The court in **AG v Edwards** had also failed to have regard to the analogous position under the **CPR** in relation to CROs.

53. Alternatively, the decision in **AG v Edwards** was manifestly wrong, as the court had erroneously considered itself bound by the *obiter* remarks of Lord Brown in **Seal**, when: (i) that was a case determined under section 139 **MHA**, which was a very different legislative context (see per Lord Bingham at paragraph 20 **Seal**); and (ii) Lord Brown's remarks assumed an inflexibility in relation to section 42 **SCA** that was not borne out by the case-law, see **Ewing v Security Services**; **Foden v Smailes**; and **St George, Hanworth**.

54. Furthermore, there were exceptional circumstances that warranted the EAT departing from the decision in **AG v Edwards** given the unjust consequences that might arise from treating the proceedings as a nullity (see the examples at paragraph 50 above, and see the passages cited from the opinions of Lord Woolf and Baroness Hale in **Seal**). The ability to deal justly with a claim brought without the permission required under a relevant CPO, without simply treating it as a nullity (with the consequent potential for injustice that that entailed), was demonstrated in other contexts, see **Saunders** (insolvency) and **Park v Cho** and **Choudhury** (charity proceedings). A similar approach should be adopted here.

55. As for the first ground of appeal, if the claimant succeeded on his submissions on ground (2), once **AG v Edwards** falls away, the Pittaway Order should be read as granting permission to pursue this claim; the only way for the respondents to contest that would be by way of application to set aside the Pittaway Order itself.

**The Respondents' Position**

56. For the respondents it is contended that the language of section 42 **SCA** was clear and the question of construction already determined by **AG v Edwards**. The EAT should follow that decision: (i) any departure by the EAT from a prior decision of the High Court must meet a high threshold (see **Lock**); (ii) the purpose of section 42 demonstrated that **AG v Edwards** was rightly decided.

57. The decision in **AG v Edwards** was not *per incuriam* due to a failure to follow a previous decision on the point (**Young v Bristol**) and if there were no valid proceedings (as Wilkie J found), the **ET Rules** could have no application such as to require consideration. As for the practice in the High Court in relation to a CRO, that could not be determinative of the entirely separate provision for a CPO under the **SCA**.

58. It could also not be said that the decision in **AG v Edwards** was manifestly in error. It was supported by the opinion of Lord Brown in **Seal**, seeing section 42 **SCA** as operating in the same way as section 139(2) **MHA**. Lord Bingham (giving the majority opinion) agreed with Lord Brown and Lord Carswell had agreed with Lord Bingham (and, therefore, also with Lord Brown). Lord Brown's opinion as to the proper construction of section 42 SCA thus sat towards the higher end of "*persuasiveness*" (see "**Precedent in English Law**" by Cross and Harris at p 77), being a considered opinion of a member of the House of Lords, which had received the support of the majority in the House of Lords. Wilkie J in **AG v Edwards** had understood that Lord Brown's opinion was not directly binding (see paragraph 13 **AG v Edwards**) but was entitled to give that opinion considerable weight.

59. In any event, **AG v Edwards** was plainly right and there were no exceptional circumstances warranting departure from that decision. By section 42(1A) parliament plainly intended to confer a substantial protection on putative defendants (as well as on courts and tribunals) against proceedings sought to be brought by vexatious litigants; the High Court's permission was not a mere procedural step. The object and purpose of s 42(1A) **SCA** was clear: (i) from the words used, which made clear that leave was a condition precedent to the institution of proceedings; (ii) from the fact that it was the "*institution*" of proceedings without permission that was prohibited - permission could not be granted to continue proceedings already instituted (save where the proceedings were

instituted before the making of the CPO, section 42(1A)(b) **SCA**); (iii) given that the purpose of a CPO (see **Ewing v News International** at paragraph 18) would be significantly undermined if a vexatious litigant was able to apply for retrospective permission; (iv) from references in various cases to vexatious litigants thus being "debarred" from commencing proceedings without permission, see **Ewing v News International** at paragraph 4; **Attorney-General v Ebert** [2000] EWHC 286 Admin per Laws LJ at paragraph 50.

60. As for the claimant's reliance on the practice in different jurisdictions:

(1) The purpose of section 285 **Insolvency Act 1986** would not be undermined by allowing retrospective permission to be granted. In any event, in allowing for retrospective permission in **Saunders**, Lindsay J relied on an established practice in insolvency proceedings; there was no such practice in the context of section 42 **SCA**.

(2) In relation to the **Charities Act**, the language used was different, and weaker, to that of section 42 **SCA**; it did not restrain the *institution* of charity proceedings without permission (a point confirmed by the decision in **Park v Cho**).

More generally, reference to the language used in other statutory contexts could not be determinative of the construction to be afforded to section 42 **SCA** (and see per Lord Bingham at paragraph 7 **Seal**).

61. To the extent that the claimant relied on other cases decided in relation to section 42 **SCA**, it was clear that no practice could be discerned that could properly be relied on to contradict the view expressed by Lord Brown in **Seal**. In the cases **Ewing v Security Services**, **Foden v Smailes**, and **St George, Hanworth**, the issue of nullity was not raised. Indeed, in an earlier case involving Mr Ewing (relating to his application for permission to bring proceedings

before the Information Tribunal; see **Re Ewing** [2002] EWHC 3169 QB) counsel for the respondent, who subsequently also acted in **Ewing v Security Services**, expressly disclaimed any reliance on the fact that Mr Ewing had failed to apply for permission before initiating his case (see paragraph 45). In **Foden v Smailes**, the court assumed an application had properly been made (see paragraph 13).

62. As for ground (1), the construction of the Pittaway Order depended on "*the natural and ordinary meaning of the words used in the light of the syntax, context and background ...*" (see **Feld v Secretary of State for Business, Innovation and Skills** [2014] EWHC 1383 Ch at paragraph 28). In the present case, the only proper construction of the Pittaway Order was that it granted the claimant two alternative forms of permission subject to (but without resolving) the nullity question that was before the ET.

**Discussion and Conclusions**

63. The question at the heart of this appeal can be posed in similar terms to that identified in **Seal**; that is, whether, as a matter of construction of the statutory provision in issue:

> "... in requiring a particular condition to be satisfied before proceedings are brought, Parliament intended to confer a substantial protection on the putative defendant, such as to invalidate proceedings brought without meeting the condition, or to impose a procedural requirement giving rights to the defendant if a claimant should fail to comply with the requirement; but not nullifying the proceedings ..." (**Seal** per Lord Bingham at paragraph 7)

64. The provision in issue in the current proceedings is section 42(1A) **SCA**. The ET considered that the question raised in this case had already been answered by the decision of the High Court in **AG v Edwards**, which the ET was bound to follow. In that case, Wilkie J had taken the view that **Seal** (albeit concerned with a different statutory provision, under the **MHA**) was binding authority and concluded that an ET claim, commenced

without first obtaining the leave of the High Court as required by an extant CPO, was a nullity.

65. Although, as a court of co-ordinate jurisdiction, the EAT is not bound by a decision of the High Court, it is common ground that I should treat **AG v Edwards** as persuasive authority, to be followed unless one of the exceptions identified in **Lock** applies.

66. In considering the exceptions relied on by the claimant in support of his contention that **AG v Edwards** should not be followed, I am clear that it cannot be said that that decision was *per incuriam*. It is not suggested that, in reaching its determination in **AG v Edwards**, the court proceeded in ignorance of a previous decision which covered the case before it (**Young v Bristol** *supra*). As for the failure to refer to the establishment of ETs under the **ETA**, or to the **ET Rules**, neither was necessary given the court's view that the proceedings were a nullity: a power to stay, strike out or dismiss proceedings would require that there were valid proceedings before the ET; the court had, however, concluded that there were not. Finally, to the extent that the claimant places reliance on the provisions of **CPD 3C**, that applies to CROs, not to a CPO under section 42 **SCA**; a failure to refer to a provision applicable to the High Court, not the ET, in respect of a different form of Order, cannot render the decision in **AG v Edwards** *per incuriam*.

67. Similarly, I am not persuaded that the decision in **AG v Edwards** can be said to have been manifestly wrong. In placing reliance upon the reasoning of Lord Brown in **Seal**, the court did not lose sight of the fact that that case was concerned with a different statutory provision; so much is plain from Wilkie J's reference to the consideration of this issue in **Seal** as being indirect. That is not to say, however, that Lord Brown's opinion was to be disregarded; the court in **AG v Edwards** rightly considered that the question it had to determine was akin to that in **Seal** (as identified at paragraph 62 above) and it could not

be said that Lord Brown's opinion was anything other than highly persuasive – it was, after all, the considered opinion of a member of the House of Lords, with whom the majority agreed. Notwithstanding the respect to be afforded to his opinion in **Seal**, the claimant says Lord Brown wrongly assumed an inflexibility in relation to section 42 **SCA** that was not demonstrated by the case-law. Although it is right to say that the three cases cited by the claimant did not proceed on the basis that proceedings commenced absent the permission required under a CPO must be a nullity, the reports would suggest that the point simply was not raised. Moreover, in each instance, the procedural history provides some explanation as to why that was the case:

67.1 **Ewing v Security Services**: as the respondents have pointed out, in earlier litigation involving Mr Ewing, counsel for the respondent (then the Secretary of State for the Home Department) had disclaimed any reliance upon the failure to seek permission before initiating an appeal before the Information Tribunal (**Re Ewing** [2002] EWHC 3169 QB, paragraph 45). The same counsel then appeared for the respondent in **Ewing v Security Services**, in an application raising similar considerations.

67.2 **Foden v Smailes**: in that case, Mrs Foden had originally appeared before the court seeking a stay of an Order for possession, which was granted for a brief period, the court being mindful "*of the difficulty which might confront a comparatively elderly woman confronted with an Order for Possession*" (paragraph 2). Considering that her applications were without merit, Pumfrey J then proceeded on the basis of an assumption "*that an application under Section 42 has been made*" (making the decision that such an application should be refused).

67.3 **St George, Hanworth**: in that case, the application for permission was also refused but the proceedings were permitted to proceed on the basis that the matter would be treated as brought by the Parochial Church Council rather than the claimant.

I am not persuaded that these cases can be taken to demonstrate that Lord Brown erred in expressing the view that section 42 **SCA** provides a "*clear and inflexible*" rule in relation to the requirement that vexatious litigants, subject to a CPO, must first obtain permission before they are able to bring proceedings.

68. As for the claimant's contention that there are exceptional circumstances that would warrant the EAT departing from the decision in **AG v Edwards**, I cannot see that this is made out. In saying this, I accept that a citizen's right of access to courts and tribunals is not to be excluded save by clear words (see per Viscount Simonds in **Pyx Granite**, cited by Lord Woolf at paragraph 29 **Seal**). That right is, however, not absolute and may be subject to limitations (see per Lord Bingham at paragraph 20 **Seal**; and the reference by Wilkie J in **AG v Edwards** (paragraph 18) to the confirmation given in this regard upon Mr Seal's subsequent application to the European Court of Human Rights, in **Seal v UK**). The importance of the principle of access to justice is, however, such that it is necessary to have careful regard to the particular wording and purpose of the statutory provision that would otherwise deny that access. To that end, as Lord Bingham observed at paragraph 7 **Seal**, a question of statutory construction such as that arising in this appeal, should not:

> "... ordinarily turn on a detailed consideration of the language used by Parliament in one provision as compared with that used in another."

69. In particular, I do not consider the claimant to be assisted by his reliance on case-law under the **Insolvency Act 1986**. In that context, the case of **Saunders** illustrates the obvious points of distinction.

69.1 First, those bringing the proceedings against the bankrupt might not know of the bankruptcy (as was the position in **Saunders** itself). An obvious injustice would arise if proceedings brought by a creditor in that position were subsequently to be ruled to be a nullity. That, of course, is very different to the case of an individual who is subject to a CPO (of which they will be aware) who then chooses to commence proceedings without obtaining the required consent of the High Court (something of which they will, again, have full knowledge).

69.2 Secondly, the purpose of the protection in the insolvency context is to prevent the task of the administrator being made more difficult "*by a scramble among creditors to raise actions, obtain degrees or attach assets*" (per Lord Coulsfield in **Carr v British International Helicopters** (cited by Lindsay J in **Saunders**)); that purpose could still be served without requiring that proceedings commenced without the necessary permission should be treated as a nullity (again, the point made in **Carr v British International Helicopters**). That is very different to the purpose of the protection provided by section 42 **SCA**. The subject of a CPO is necessarily someone who has been held to have "*habitually and persistently and without any reasonable ground... instituted vexatious civil proceedings... or made vexatious applications... or instituted vexatious prosecutions...*" (section 42(1)(a)-(b) **SCA**). The purpose of the requirement upon such a person to obtain the permission of the High Court before instituting proceedings is "*to avoid the unnecessary use of court time and resources on unjustified litigation and to protect prospective defendants from the expense which that involves.*" (per Patten LJ, paragraph 18 **Ewing v News International**). I return to this point below, but (in short) that purpose is manifestly not served if another court or tribunal (at the point when the existence of the CPO becomes apparent) then has to decide whether to stay, strike out, or dismiss proceedings that have been initiated without the required permission.

69.3 Finally, as Lindsay J's extensive consideration of the case-law in Saunders made clear, in that context, there was an established practice "*dating back to at least In re Warzer Ltd [1891] 1 Ch 305 ... that proceedings in insolvency begun without the stipulated leave should not be regarded as irretrievably null but rather as existing and capable of redemption by the late giving of leave*" (see p 81E). The cases drawn to my attention do not establish such a practice in the context of section 42 **SCA**.

70. As for the claimant's reliance on cases arising in the context of the **Charities Act**, the simple point is that the language of the provision in question – "*no charity proceedings ... are to be entertained or proceeded with in any court unless the taking of the proceedings is authorised*" – does not provide the same clear prohibition against the *institution* of proceedings as section 42(1A) **SCA**. Thus the court in **Park v Cho** considered that "*the taking of*" proceedings was not to be limited to the commencement of such proceedings, but could extend to the taking of steps within existing proceedings, even if they had not been pre-authorised by the Charity Commission. That construction does not offend against the purpose of section 115(2) **Charities Act 2011** (or the predecessor provision at section 33(2) **Charities Act 1993**) because the court can place a stay on the proceedings pending authorisation by the Charity Commission and thus ensure that charitable funds are not frittered away in the pursuit of litigation relating to internal disputes (see per Mummery LJ in **Muman**). That would not be so in relation to proceedings brought in breach of the requirement for High Court authorisation under a CPO: in determining whether to place a stay on the proceedings, or to strike out or dismiss them, the time and resources of the court or tribunal in question will be engaged, entirely contrary to the purpose of the CPO.

71. For all these reasons, I am satisfied that I should follow the decision in **AG v Edwards**.

72. For completeness, however, I should make clear that I also consider the decision in **AG v Edwards** to be correct. Even if I were to disregard the observations of Lord Brown in **Seal**, considering the language and purpose of section 42 **SCA**, in my judgement, the parliamentary intention is clear. Where an individual has been made the subject of a CPO, the process of obtaining the required leave from the High Court may impose a procedural step (of itself, a deterrent; **see CC Avon and Somerset v Gray** and **Senior-Milne v MoJ**, *supra*) but, in stating that "*no civil proceedings ... shall be instituted in any court*" without that leave, section 42(1A) goes further and imposes a jurisdictional barrier. That is, of course, entirely consistent with the context and purpose of a CPO. A CPO will only have been imposed where the litigant in question is properly to be described as "*vexatious*": at the risk of repetition, they have been found to have "*habitually and persistently and without any reasonable ground... instituted vexatious civil proceedings... or made vexatious applications... or instituted vexatious prosecutions...*" (section 42(1)(a)-(b) **SCA**). Parliament has provided that a CPO may be imposed in such circumstances, because there is a proven need to protect the interests of the public against vexatious claims brought by the individual in question, and to protect the wider interests of justice by ensuring that the time and resources of courts and tribunals are not taken up by wholly unmeritorious litigation brought by the subject of the CPO.

73. Of course, as the claimant points out, individual courts and tribunals will have their own powers to deal with abusive claims, but the imposition of a CPO recognises that there is an additional need to protect the resources of courts and tribunals against those who are properly to be described as vexatious: they are not to be troubled by such litigants unless leave has been given for the particular proceedings in question by the High Court. Thus, to point to the jurisdictional basis for the claimant's claim of age discrimination, and the ET's power to determine such a claim, does not address the prior barrier that the claimant must overcome in order to bring such a claim, as imposed by the CPO to which he is subject. A CPO attaches

to the would-be litigant, not to the individual proceedings that they might seek to bring. Unless and until he has obtained the permission of the High Court, the claimant is unable to institute proceedings in the ET. To say (as the claimant does) that the ET would have the power to stay such proceedings, or to strike out or dismiss the claim, fails to engage with the claimant's substantive inability to institute proceedings before the ET without the prior leave of the High Court. Section 42(1A) is clear: absent such leave "*no civil proceedings shall ... be instituted ...*". The ET was thus correct to treat the claimant's purported claim before it as null and void; whether or not the claim was otherwise validly started (meeting the requirements of rule 8 **ET Rules**), absent the leave of the High Court, the claimant could not institute such proceedings.

74. Recognising that the imposition of a CPO is (intentionally) a draconian step, I do not accept that this construction of section 42(1A) gives rise to an injustice that is disproportionate to the purpose of the restriction. As is often pointed out, the ability to apply to the High Court for permission to institute proceedings ensures that a CPO operates as a filter not a barrier (and see **AG v Taheri** at paragraph 15). The onus of making that application must lie on the subject of the CPO, given that they will be readily aware of the restriction that has been placed on their right of access to courts and tribunals, when putative defendants (and the courts and tribunals themselves) might not. The process they must thus adopt might act as a deterrent but it does not deny them their right of access to justice.

75. Accepting that this will place an additional burden upon the would-be litigant, who is subject to a CPO, in the ET, because of the shorter time limits that tend to apply, if they had taken reasonable steps to seek the permission of the High Court in good time before the expiration of the relevant limitation, that would be a relevant consideration in any application for an extension of time (the ET would be mindful of the litigant's inability to initiate proceedings before obtaining that leave). In cases where the subject of the CPO had pursued a claim before

the ET, without first seeking the required leave, and had obtained a judgment in their favour on the merits, given that they would have knowingly acted in breach of the CPO, it could not be complained that any subsequent ruling that the proceedings were null and void was unjust.

76. Whether viewed through the prism of the decision in **AG v Edwards**, or by having regard to the purpose and wording of section 42(1A) **SCA**, I consider the ET was correct in its judgment and duly dismiss ground (2) of the appeal.

77. Although my ruling on ground (2) disposes of the appeal, I would also have dismissed the appeal on ground (1). The Pittaway Order has to be seen in context of the application made by the claimant, which sought a single Order: *either* that the proceedings he had already initiated were permitted to proceed before the ET, *or* he should have permission to bring that same claim before the ET by way of fresh proceedings; there was nothing to suggest that the latter alternative referred to some other, unspecified, future claim. The language used also suggests that this was what the judge intended, hence the reference to paragraph 2 being "*In the alternative*".

78. For all the reasons provided, I therefore dismiss the appeal.

**Post-script**

79. In hearing this matter, I proceeded on the assumption that the claimant had obtained leave from the High Court to pursue his appeal to the Employment Appeal Tribunal. Certainly no point has been taken in this regard by the respondents. In preparing my reserved judgment, however, I have been unable to find any confirmation of such leave on the file. If such leave was not obtained prior to the institution of the appeal, the effect of my ruling must mean that these proceedings are also a nullity.