FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 39
GP1/22, P305/22 and P657/22

Lord President
Lord Pentland
Lord Doherty

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the cause

HUGH HALL CAMPBELL KC

Representative Party and Respondent

against

JAMES FINLAY (KENYA) LIMITED

Defenders and Reclaimers

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Representative Party and Respondent: Smith KC; C Smith; Black; Thompsons Solicitors Scotland
Defenders and Reclaimers: Lord Davidson of Glen Clova KC; McKenzie KC; Boffey; CMS Cameron McKenna Nabarro Olswang LLP

7 November 2023

Introduction

[1] The representative party represents a group of tea plantation workers who are, or were, employed in tea harvesting on plantations operated by the defenders in Kenya. They have brought proceedings against the defenders, whose registered office is in Scotland.

They seek damages for musculo-skeletal injuries, which they say were sustained as a result of the defenders' negligence.

[2] The defenders have a plea of "no jurisdiction". Although not expressly referred to in their pleadings, in submissions they relied on the provisions on prorogation of jurisdiction in rule 6 of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982. They contend that the group members and the defenders agreed, in terms of their contracts of employment, to prorogate exclusive jurisdiction to the Kenyan courts. The defenders advance an alternative argument that the court is *forum non conveniens*; that it is clearly and distinctly more appropriate for the claims to be determined in Kenya. Following a preliminary proof, the Lord Ordinary repelled the defenders' preliminary pleas-in-law of no jurisdiction and *forum non conveniens* and allowed the claims to proceed.

[3] At the proof, the defenders had argued that the terms of a Collective Bargaining Agreement, which was said to have been incorporated into the employment contracts, had also prorogated jurisdiction to the Kenyan courts. The Lord Ordinary was not satisfied that it had been proved that the group members were bound by the CBA. That finding is not the subject of this reclaiming motion (appeal). The reclaiming motion concerns the Lord Ordinary's determination that the court: (i) has jurisdiction, and (ii) is not *forum non conveniens*.

Clause 9 of the group members' contracts of employment

[4] A sample employment contract was produced. The Lord Ordinary accepted that the sample accurately reflected the terms of the group members' employment. Clause 9 reads:

> "**9. Industrial Sickness**

The terms of the relevant national legislation shall apply."

Statutory provisions

UK law: the Civil Jurisdiction and Judgments Act 1982

[5] The rules governing the jurisdiction of the Scottish courts are contained in the 1982 Act. The defenders' registered office is in Aberdeen. There is no dispute that they are domiciled in Scotland. The general rule in Scots law is set out in rule 1 of Schedule 8, *viz.*:

"…persons shall be sued in the courts for the place where they are domiciled."

Under this rule, the Scottish courts have jurisdiction to hear claims brought against the defenders. There are exceptions. These are also set out in Schedule 8 and include:

"6 Prorogation of jurisdiction

(1) If the parties have agreed that a court is to have jurisdiction to settle any disputes which have arisen … in connection with a particular legal relationship, that court shall have jurisdiction."

Kenyan law:

The Work Injury Benefits Act 2007

[6] The long title of the Kenyan Work Injury Benefits Act 2007 is "An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes". The Act renders employers liable to pay compensation to an employee who is injured in an accident occurring in the course of his employment. No fault on the part of the employer needs to be proved. An employer must have insurance for any liability which he incurs in terms of the Act.

[7] Section 16 is headed: "Substitution of compensation for other legal remedies". It provides:

> "No action shall lie by an employee … for the recovery of damages in respect of any occupational accident or disease resulting in the disablement … of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement ...".

Section 17 applies where the accident or disease was caused in circumstances in which someone other than the employer is liable to pay damages. In that event not only may the employee claim compensation under the WIBA, he, and his employer or the insurer, may "institute action for damages in a court against the third party".

[8] The WIBA prescribes that an employee must notify his employer of any accident within 24 hours. The employer must report the accident to the Director of Occupational Safety and Health Services within 7 days. The Director will make inquiries in order to determine any claim. This may include obtaining a medical report and requesting other information from the employee. An employee may ("shall") make a claim for compensation under the WIBA within 12 months of the accident (s 26(1)).

[9] In the case of temporary disablement, a periodic payment is to be made for the time during which the employee is unable to work. It is broadly equivalent to the employee's earnings, but there are minimum and maximum amounts of compensation (s 28(1)). These are determined by the Minister responsible for labour matters after consultation with the National Council for Occupational Safety and Health.

[10] A list of some injuries causing permanent disablement is contained in the First Schedule. In the first column of the Schedule categories of injury are specified. These commence with "A. DEATH". "B. INJURY (GENERAL)" covers the loss of a hand and foot or any injury resulting in the employee being permanently bed-ridden. In the second column the level of disability given for each of these situations is a minimum of 100%.

Categories C and D deal with a large number of injuries to, respectively, the upper and lower limbs, with the second column stating the minimum percentage disablement in a range from 1 to 100. Categories E and F cover injuries to sight and hearing. "G. GENERAL" reads as follows:

> "Except where otherwise expressly provided, the following conditions shall apply to all assessments in this Schedule - …
>
> (c) the Director shall prescribe the compensation criteria for Musculoskeletal disorders and occupational injuries not elsewhere covered".

The Second Schedule deals with certain occupational diseases, including various poisonings and infections, but also cramp of the hand or forearm due to repetitive movements caused by prolonged periods of typing or other movements of the fingers, hand or arm.

[11] The Director calculates the compensation payable for permanent disablement by multiplying 96 months of lost earnings by the applicable percentage in the second column of the First Schedule (s 30(1)), subject again to minimum and maximum amounts set by the Minister after consultation with the National Council. Section 30(3) provides that an employee shall be paid compensation for an injury which leads to permanent disablement, but which is not specified in the First Schedule. For those injuries, the percentage of disablement is to be assessed by a doctor. The percentage must "not lead to a result contrary to the guidelines of the First Schedule". If the injury or disablement has unusually serious consequences, the Director may increase the percentage (s 30(4)). An employee is entitled to compensation if he contracts any occupational disease which is specified in the Second Schedule or any other disease not so specified but which arose in the course of the employment (s 38(1)). The disease is compensated as if the resultant disablement had been caused by an accident (s 38(2)).

[12] If a claimant is aggrieved by the Director's determination, he or she can lodge an objection. The Director must issue a written decision, varying or upholding his determination and giving reasons for it. If the claimant remains dissatisfied, he or she may appeal to the Industrial Court (now the Employment and Labour Relations Court) within 30 days of the Director's reply (s 52(2)).

The Industrial Court Act 2011

[13] Section 12 of the Industrial Court Act 2011 states that the court (now the ELRC) has exclusive original and appellate jurisdiction to hear and determine employment and labour relations cases, including disputes "arising out of employment".

The evidence

General

[14] The defenders' managing director explained that the WIBA system was favourable to employees because the process was carried out by the defenders at no cost to the employee. He described the problems which might arise were the claims to be dealt with in Scotland, notably the court's lack of understanding of Kenyan culture. The defenders' human resources director described how the WIBA system had been introduced against a background of "ambulance chasing" lawyers. The system was now clear and transparent. Every injury at work was subject to compensation within that system. The defenders' health and safety officer set out how claims to the Director under the WIBA were processed. The system worked well, with no need for lawyers. He claimed, as the Lord Ordinary put it, to be aware of repetitive strain injuries being compensated under the WIBA.

[15] Dr Musa Nyandusi Lwegado is the Director. He referred to *Law Society of Kenya* v *Attorney General* [2019] eKLR (Supreme Court) and said that all WIBA claims had to be processed by his department. He was unaware of any alternative mode of claiming for an injury at work. The WIBA was a fair process and an improvement on the previous system. His approach to the WIBA was not to regard the injuries specified in categories A to F of the First Schedule, or the diseases listed in the Second Schedule, as exhaustive. Many injuries and diseases were not so specified or listed. He often invoked paragraph G(c) of the First Schedule for musculo-skeletal injury claims. Assessments for chronic and repetitive injuries were common in the Director's clinics, although to include a new degenerative type of disease in the Second Schedule would require a process of consultation and amendment. Dr Nyandusi explained that he had a discretion to accept claims late, even if that was not expressly provided for in the WIBA.

[16] Eric Njeru Theuri is an advocate and President of the Law Society of Kenya. He was called by the representative party and spoke to the absence of group proceedings and qualified one way cost shifting in Kenya. Contingency fees were illegal. It was unlikely that law firms would pursue the group members' claims in Kenya. Mr Theuri described awards under the WIBA as negligible when compared with a common law claim. The Director was inadequately funded and his department's medical expertise was limited. Mr Theuri "disagreed" with *Law Society of Kenya* v *Attorney General* in which the Supreme Court had said that the WIBA system worked well. There were lawyers who took claims under the WIBA, but these claims did not amount to easy access to justice.

Experts

[17] In relation to the experts on Kenyan law, the defenders would maintain (*infra*) that

the Lord Ordinary erred in his assessment of, and approach to, the evidence of Prof Githu Muigai and Wilfred Ngunjiri Nderitu. Prof Muigai is a professor of law at the University of Nairobi and a former Attorney General. He was instructed by the defenders. Mr Nderitu is a senior counsel and managing partner of Nderitu & Partners, Advocates, Nairobi. He was instructed by the representative party. The evidence of these witnesses regarding the WIBA's application requires to be set out in some detail.

Prof Muigai

[18] According to Prof Muigai, under Kenyan law, the group members' claims were subject to the exclusive jurisdiction of the Kenyan courts. The WIBA was one of four major statutes which covered labour law. The legislative and policy intent was to create a comprehensive and modern framework for the compensation of employees. This was a deliberate move towards an administrative process as a means of addressing problems which had stemmed from "ambulance chasing lawyers". The WIBA system was intended to provide an incentive to employers to prevent accidents in their workplaces.

[19] There was a need to respect, and to adhere to, the alternative mechanism which was provided by the WIBA in order to ensure access to justice (*Law Society of Kenya* v *Attorney General*). In interpreting statutes, the Kenyan courts had adopted the common law tradition, which was to ascertain the intention of the legislature (see report of 3 March 2023, para 82). In *Alcoholic Beverages Association of Kenya* v *Kenya Film Classification Board* [2022] KECA 1051 (KLR), it was said that the first consideration was the plain language of the statute, in the context of the legislation.

[20] In terms of sections 16 and 38 of the WIBA, where an occupational disease had been contracted in the course of employment, no claim for damages could be brought against an

employer except under the WIBA system. That had been reiterated by the Kenyan Supreme Court in *Law Society of Kenya* v *Attorney General*. The Director routinely handled claims relating to back injuries (eg *Samuel Otieno Musumba* v *Industrial & Commercial Development Corp* [2022] eKLR). Any dispute about the Director's determination required to be referred to the Employment and Labour Relations Court. The ELRC had exclusive jurisdiction in labour disputes.

[21] A common law claim against an employer could not be advanced in the ELRC without recourse to the WIBA. The group members ought to have applied for compensation under the WIBA before approaching any court. According to his report of 3 March 2023 (para 94), "[f]or completeness", Prof Muigai appeared to say that an employee would be entitled to seek damages, which were not available under the WIBA, once they had exhausted their WIBA remedies. The court retained the right to award general damages based on principles of English common law (*Linet Kadzo Kenga* v *Indiana Beach Apartment Hotel* [2015] eKLR). Any award made under the WIBA would be taken into consideration to avoid double counting. Prof Muigai was asked about this passage in examination in chief (transcription Day 3, p 41). He said that he was there describing the pre-2019 position, which had been reversed in *Law Society of Kenya* v *Attorney General*. It was not possible to make a common law claim to the ELRC without having recourse first to the WIBA system. Musculo-skeletal injuries were covered by the WIBA. Back injuries were not excluded.

[22] There were several legal instruments which were geared towards achieving access to justice for the poor in Kenya. The National Legal Aid Service provided financial assistance. This was supplemented by a number of faith, community and human rights based organisations which offered legal services, as did certain Non-Governmental Organisations

and the Kenya National Commission on Human Rights. A need to secure legal aid was unlikely to arise under the WIBA system. Legal representation in WIBA claims was the exception rather than the rule; the idea being that claimants should be able to represent themselves. Contingency fees were unlawful under Kenyan law. Group proceedings could be instituted under a representative/test suit scheme. Comity favoured the determination of disputes in the territory in which they occurred.

Wilfred Nderitu

[23] Mr Nderitu countered that, although the WIBA offered a supposedly speedy assessment of damages for injuries listed in its schedules, there were many injuries not so listed. These could not be the subject of a claim. It was a no-fault compensation system. A system that did not recognise fault and did not provide full compensation for the consequences of that fault was not a justice system.

[24] The interpretation of statutes in Kenya followed that in the United Kingdom using, for example, Craies (*Statute Law*) (transcription Day 5, p 31; report of 2 March 2023 para 4.5). The WIBA did not oust the jurisdiction of the ELRC. Section 12 of the Industrial Court Act 2011 conferred exclusive original jurisdiction on the ELRC. *Law Society of Kenya* v *Attorney General* did not detract from that. It was open to a claimant to present a common law claim for damages without first having recourse to the WIBA system, whether or not the injury or illness giving rise to the claim was specified in the schedules. Any claims for injuries, which were either not listed in the schedules, or had occurred more than a year ago, could not be brought into the WIBA system. In such cases, far from ousting the jurisdiction of the Kenyan courts, the WIBA obliged claimants to go to them.

[25] The group members were very poor. They were dependent upon the defenders for all aspects of their lives. It was highly unlikely that any lawyer would take on their cases *pro bono*. Even then, outlays would have to be met. A medical report would cost up to a month's wages. There was a risk of being found liable in costs. The social and economic disincentives to suing an employer were profound. There was no legal aid available for claims of this kind. Insufficient budget had been allocated for legal aid. The complexity of the claims, and the nature of the expert evidence which would be required, would be likely to overwhelm the National Legal Aid Service. The group members were unlikely to find an NGO willing to offer them legal representation. NGOs usually funded litigation only where it aligned with their mission statement. None of the legal aid NGOs had sufficient capacity, in terms of manpower and resources, to investigate and litigate the claims effectively.

[26] Conditional fee arrangements were unlawful in Kenya. Group proceedings were not available. The claims would have to be brought as a test case. The need for coordination and the application of resources by lawyers as well as other challenges, such as the illiteracy of many of the group members, rendered the system unsuited to mass litigation. Few lawyers in Kenya had the skills to handle complex cases. The Kenyan system suffered from backlogs. The group members might have to wait several years before their cases could be determined.

The Lord Ordinary's decision

[27] The Lord Ordinary observed (at para [100]) that the defenders did not lead any specific evidence on how the Kenyan courts approached the interpretation of either contracts or statutes. Mr Nderitu's evidence was essentially that the approach did not differ

from that which would be adopted by this court. As there was a disagreement between the experts on the effect of foreign law, the court should look at the relevant sources of law in order to resolve that conflict (Dicey, Morris & Collins on the *Conflict of Laws* (16th ed) para 3-016).

Jurisdiction

[28] The defenders had failed to establish that the claims of the group members involved injuries or conditions which were covered by the WIBA and which must therefore be dealt with under its regime. The court's jurisdiction had not been excluded by agreement. The defenders' plea of no jurisdiction required to be repelled.

[29] Clause 9 of the employment contracts provided that the terms of the "relevant national legislation" would apply to industrial sickness. This meant that it would be necessary to process a claim for a work-related injury or illness through the WIBA system, with subsequent recourse to the ELRC. The reference to "[s]ickness" was broad enough to cover bodily impairment. The WIBA was "relevant national legislation". Section 16 of the WIBA meant that there was no unlimited right of access to the court for injury claims. That had been settled by the Kenyan Supreme Court (*Law Society of Kenya* v *Attorney General*). The WIBA mandated the use of its alternative dispute resolution mechanism in relation to claims for injuries or diseases falling within its ambit, before the claimant could have recourse to the courts. Section 16 provided the sole mechanism in Kenya for addressing such claims.

[30] However, whether the claims of group members fell within the ambit of the WIBA was another matter. *Law Society of Kenya* v *Attorney General* had not addressed whether the WIBA regime applied to claims for injuries or illnesses that were not listed in the WIBA

Schedules. No evidence had been led that the Director had prescribed any criteria for musculo-skeletal injuries. Claims relating to back injuries may previously have been accepted by the Director, but it was quite a different matter to say that they must be processed under the WIBA. On that, the evidence was silent. The schedules were far from straightforward. Their relationship with the remainder of the compensation provisions in the WIBA had not been explored in any depth. There was no discussion about the significance or effect of section 30(3) on diseases not specified under the Second Schedule.

[31] An avenue of recourse to the court for the recovery of damages along common law principles remained open. Section 12 of the Industrial Court Act 2011 conferred both original and appellate jurisdiction on the ELRC in relation to claims brought by employees against their employers. Content could be given to the word "original" where a claimant had no right of recourse under the WIBA because his condition was not listed in the schedules. The courts retained the power to award general damages based on the principles of English common law, albeit that the award would require to take into account any WIBA compensation previously awarded (*Linet Kadzo Kenga* v *Indiana Beach Apartment Hotel*).

Forum non conveniens

[32] The defenders had discharged the initial onus on them to show that it was more appropriate to litigate the claims in Kenya. There were factors which clearly pointed to Kenya as the appropriate forum. The group members all lived in Kenya. They all sued on the basis of injury on tea estates in Kenya as a result of the defenders' breach of duty. The defenders retained a registered office in Scotland, but otherwise had no operations here. The officers who gave evidence for the defenders were all based, and lived, in Kenya. The circumstances giving rise to the claims would require to be investigated in Kenya. There

were practical and important issues about the extent to which routine orders, which the court might need to pronounce, such as for the recovery of documents and property, could be enforced in Kenya. These considerations led to the conclusion that Kenya would be the appropriate forum for disposal of claims.

[33] However, there was a real risk that the group members would not obtain substantial justice should they be required to litigate individual claims before the ELRC. There was evidence that: a tea harvester, who was looking to source his or her own medical report for litigation purposes, would have to spend a month's salary to do so; the tea harvesters' remuneration amounted to subsistence pay; many of the group members were illiterate; it was unlikely that any NGOs in Kenya would fund the litigation; the group members were unlikely to obtain legal aid; contingency fees were prohibited in Kenya; group members would be potentially liable for costs; there were no provisions for group proceedings and there were few lawyers in Kenya who would have the skills and resources to handle mass litigation of this kind. The issue was not that the Kenyan courts would be unable to come to a considered decision. The issue was one of accessibility.

The Representative Party's motion for an additional charge

[34] The representative party sought an additional charge under rule 5.2 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019. This was premature. Rule 5.2(3) directed the court or the Auditor to grant an application for an additional charge to reflect the responsibility of the solicitor in the conduct of "the proceedings". There was no definition of "proceedings". Elsewhere, the Rules drew a distinction between "the proceedings" and "part of the proceedings". The previous Rule of Court (Rule 42.14) used "cause", which meant the litigation in all its aspects (*Masterton* v *Thomas Smith & Sons*

(Kirkoswald) 1998 SLT 699). "The proceedings" referred to the whole of the proceedings. Rule 5.2 contemplated an application being made at the conclusion of the whole of the proceedings. That conclusion was not necessarily one which was consonant with the interests of justice, and reconsideration of the wording of the 2019 Rules may be justified.

Submissions

Defenders

Jurisdiction

[35] The central contention was that the Lord Ordinary erred in his construction of the WIBA and its application to the claims. He ought to have held that the WIBA established an exclusive process for work injury claims at first instance. It required to be followed by the group members as a matter of Kenyan law. Instead, he found that there was a class of workplace injury not covered by the WIBA. That led him, wrongly, to repel the defenders' pleas of no jurisdiction and *forum non conveniens*. The Lord Ordinary's construction failed to take into account: (i) the main purposes of the policy behind, and context in which, the legislation operated; (ii) the natural and ordinary meaning of the words of the WIBA; and (iii) the relevant Kenyan case law, including *Law Society of Kenya* v *Attorney General*. The Lord Ordinary's construction of the WIBA was based on an erroneous assessment of, and approach to, the expert evidence.

[36] The WIBA's *raison d'être* was to avoid the need for first instance litigation on workplace injuries. It established an administrative, non-adversarial, and no-fault compensation scheme; all underpinned by compulsory insurance. It replaced the previous regime by repealing (s 57) the Workman's Compensation Act. It addressed the backlog of

cases. It enhanced access to justice, encouraged expeditious disposal of disputes and lowered the cost of accessing justice (*Law Society of Kenya* v *Attorney General*). The WIBA was an exclusive process for work injury claims at first instance. This was a deliberate and considered policy shift away from claimants being required to bring claims to the first instance courts. This shift was one that the Kenyan legislature was entitled to make. The WIBA formed part of the modernisation of Kenyan workplace health and safety law. The Lord Ordinary left that policy intention and context out of account. He decided that the Kenyan legislature had left musculo-skeletal injury out of the legislation. That was an evidentially unsupported construction of the WIBA. The Lord Ordinary appeared to have been searching for a lacuna that did not exist.

[37] The Lord Ordinary's construction was inconsistent with the natural and ordinary meaning of the WIBA's provisions. Section 2 defined injury as a personal injury including a scheduled disease. That did not allow for any exceptions based on the type of injury. The meaning of paragraph G(c) of the First Schedule was that musculo-skeletal injuries were compensatable, albeit that the criteria for compensation may be yet to be published. Section 30(3) made express provision for injuries leading to permanent disablement that were not specified in the First Schedule. Section 38(1) made provision, not only for compensation for diseases in the Second Schedule, but also in relation to "any other disease". The Lord Ordinary required to look at the written materials and determine what the law had been proved to be (*Ted Jacob Engineering Group* v *Morrison* 2019 SC 487).

[38] The Lord Ordinary failed to have proper regard to the relevant Kenyan case law. That the WIBA was to provide the sole mechanism for addressing work injury claims had been settled by the Kenyan Supreme Court (*Law Society of Kenya* v *Attorney General*). No

Kenyan court since then had reached the same construction as the Lord Ordinary (see *Heritage Insurance Co* v *David Fikri Joshua* and the cases cited therein; *Austin Oduor Odira* v *Kenya Sweets*; *Magot Freight Services* v *Samson Mwakenda Mangale*; *Perfect Scan* v *Harrison Kahindi Said*; and *Daniel Mwangi Nkonge* v *Flamingo Horticulture*, all [2021] eKLR; *Alfred Kiprono Kirui* v *James Finlay (K)* [2020] eKLR). In particular, in *Samuel Otieno Musumba* v *Industrial & Commercial Development Corp* [2022] eKLR, which concerned a driver who developed back problems after driving for long periods, the claimant was compensated under the WIBA (see also the Practice Directions of the Kenyan Chief Justice and President of the Supreme Court dated, after the preliminary proof, 23 April 2023).

[39] The content of foreign law was a matter to be determined by the court, not experts. If there was conflicting expert evidence, the court required to examine the different views and to determine what the foreign law was. The appellate court was entitled to reach a different conclusion from the first instance judge on the expert evidence. The Lord Ordinary ought to have given no weight to the evidence of Mr Nderitu. It was idiosyncratic, unsupported by relevant case law, and characteristic of personal dogma. If cases were against his view (eg *Perfect Scan* v *Harrison Kahindi Said*, *Saidi Mohamed* v *Diamond Industries* [2018] eKLR or *Law Society of Kenya* v *Attorney General*), he just disagreed with them. Since his evidence was simply assertion, little weight should be attached to it (*Kennedy* v *Cordia (Services)* 2016 SC (UKSC) 59 at para [48]). He had not been instructed to deal with the WIBA and was not familiar with the case law. The defenders' expert, Prof Muigai, was someone with a deep understanding of Kenyan law, in particular the WIBA. In order to conclude that the injuries required to fall within those under heads A to F of the First Schedule or the diseases listed in the Second Schedule, the Lord Ordinary had to reject

Prof Muigai's evidence. The Lord Ordinary failed to consider his evidence to the effect that *Linet Kadzo Kenga* v *Indiana Beach Apartment Hotel* was no longer good law.

[40] If the Lord Ordinary was correct to hold that the WIBA did not encompass musculo-skeletal injuries, he was still wrong in holding that this court had jurisdiction. Section 12 of the Industrial Court Act 2011 had the effect that the ELRC had exclusive original and appellate jurisdiction for personal injury claims which were not governed by the WIBA. The Lord Ordinary failed to give effect to the word "exclusive". If the group members' claims were not covered by the WIBA, section 12 of the 2011 Act meant that the ELRC had exclusive jurisdiction over them. That excluded the jurisdiction of the Scottish courts.

Forum non conveniens

[41] At the heart of the representative party's case was the idea that substantial justice required the group members to be able to secure the services of lawyers to advance their claims in an adversarial process. The inherent difficulty with that proposition was that those were the very aspects of the system which the WIBA had been designed to supersede. Comity demanded that due regard be given to that policy decision. Far from securing justice, circumventing the WIBA process would be productive of injustice.

[42] There was no evidence which would allow the court to compare the likely outcome of claims pursued in Scotland with those pursued in Kenya. The representative party had resisted disclosing information regarding the likely deductions which would be made to an award of damages made by this court. These could be significant. There was no evidence that the group members would be better off if their claims proceeded in Scotland. In contrast, the WIBA system was available at no cost. The Director had given evidence that the claims could and would be considered by him under the WIBA. There was evidence of

the WIBA operating as a swift, readily accessible system of compensation. In circumstances in which the accepted evidence was that musculo-skeletal injury claims could be, and were, dealt with by the Director, the Lord Ordinary had no basis on which to conclude that justice required that the claims be litigated in Scotland. At the very least, the Lord Ordinary ought to have sisted the proceedings to allow the group members to pursue recovery via the WIBA. Comity demanded as much.

The cross appeal: motion for an additional charge

[43] The Lord Ordinary was correct to refuse the representative party's motion for an additional charge as premature. The appropriate time for such a motion was at the conclusion of the proceedings. The representative party had failed to demonstrate that the responsibility undertaken by the Scottish solicitors justified an additional charge at this stage.

The Representative Party

Jurisdiction

[44] The interpretation of foreign law was guided by expert evidence, but was ultimately an issue of fact for the court. The Lord Ordinary had concluded that the WIBA did not oust the jurisdiction of the Scottish courts because the group members' injuries could not be compensated under it. The court should exercise caution when reviewing findings of fact, including findings in relation to foreign law (*Ted Jacob Engineering Group* v *Morrison* at para [10] *et seq*; *Perry* v *Lopag Trust Reg* [2023] 1 WLR 3494at para 10). It should only interfere if the Lord Ordinary's findings were plainly wrong, or if the Lord Ordinary had made some other identifiable error (*Anderson* v *Imrie* 2018 SC 328 at para [38]; *Grier* v *Lord*

Advocate 2023 SC 116 at para [109]). There was a presumption that the Lord Ordinary had taken all relevant matters into account.

[45] The Lord Ordinary reached a justifiable interpretation of the WIBA. The WIBA could only compensate an employee for the particular injuries and diseases which were specifically listed in its schedules. That was a matter of interpretation, supported by the evidence of Dr Nyandusi. It was not competent or desirable that the Act should be construed as applying to other injuries and diseases. Prof Muigai's suggestion that musculo-skeletal conditions could be read into the Second Schedule, as being consistent with the occupational diseases listed there, was incomprehensible. The WIBA did not bar common law claims for damages. Section 16 of the Act only applied to claims within the scope of the WIBA. The Lord Ordinary could not be criticised for failing to make findings about sections 30(3) and 38(1). The defenders failed to lead evidence which established the significance of those provisions. Neither the court nor the Lord Ordinary was entitled to construe Kenyan law without the assistance of skilled witnesses (*Ted Jacob Engineering Group* v *Morrison* at para [11]).

[46] The defenders did not identify the proposition of law that the Lord Ordinary failed to take from the Kenyan authorities, or the difference which that failure would have made to his decision. No Kenyan authority addressed the extent of the Director's jurisdiction to process claims for injuries or diseases which were not specified in the schedules. *Samuel Otieno Musumba* v *Industrial & Commercial Development Corp* did not deal with this. It was a case about the enforcement of an award which had been made by the Director. *Linet Kadzo Kenga* v *Indiana Beach Apartment Hotel* had been cited by Prof Muigai to demonstrate that the Kenyan courts retained the power to award general damages.

[47] The Practice Directions of 24 April 2023 post-dated the preliminary proof. They were not foreshadowed in the grounds of appeal. They were *res noviter*. They ought not to be referred to on appeal (see *Grier* v *Lord Advocate* at para [146] *et seq*, following *Rankin* v *Jack* 2010 SC 642 at para [37]).

[48] The experts were in dispute about the effect of section 12 of the Industrial Court Act 2011. Mr Nderitu's position was that it gave the ELRC jurisdiction to hear claims for personal injuries, and that the WIBA did not exclude that. Prof Muigai's evidence on the section was incomprehensible. The Lord Ordinary was correct to prefer Mr Nderitu. The suggestion that section 12 ousted the jurisdiction of the Scottish courts to hear a claim against a Scottish domiciled company was novel and not vouched by authority. One nation could not legislate to oust the jurisdiction of another. The prorogation provision in rule 6 of Schedule 8 to the 1982 Act related to a court, not an administrative system.

Forum non conveniens

[49] It had been amply demonstrated that justice required the claims to be tried in Scotland. The Lord Ordinary accepted that there was a real risk that the group members would not secure substantial justice in Kenya. At best, claims for musculo-skeletal injuries may be dealt with under the WIBA on a discretionary basis. That was a far cry from a finding that the claims would be dealt with. If the WIBA applied, that would point towards the cases being dealt with in Kenya. The question of whether the court should sist the proceedings for that to happen was a matter for the exercise of the court's discretion. Were the court to sist, there would be no certainty that the claims would be dealt with. There was a real risk they would be further delayed. The claims had been brought in Scotland as of

right, against a Scottish domiciled company, and under a system in which legal advice, funding and justice were readily available.

The cross appeal: motion for an additional charge

[50] The Lord Ordinary erred in refusing the motion for an additional charge. His interpretation of the rules was too narrow. It gave rise to the potential for unreasonable, unfair and unjust consequences. It delayed recovery of expenses until the conclusion of the whole proceedings for no good reason. It meant that an uplift could only be applied to the whole expenses of the case, irrespective of whether only part of the proceedings had involved enhanced responsibility on the part of the solicitor.

[51] An additional charge was justified under heads (a) – (g). The issues raised at the preliminary proof were complex, difficult and novel. The solicitors had required to manage witnesses from abroad, to obtain statements and reports and to coordinate the factual and expert evidence. Exceptional time and effort were dedicated to the case, often at unsociable hours. The solicitors required to utilise their expertise in managing group proceedings. Observation of the Kenyan proceedings had been required. There were language difficulties. Translations had to be instructed.

[52] The documents, which included opinions of the experts, were important and critical. Research into the Kenyan constitution and case law was required. Factual and expert evidence had been received from multiple local agents. The solicitors required to arrange a work visa, flights and accommodation for junior counsel, who spent over a month in Kenya. The solicitors had to liaise and consult with witnesses and experts by video link and to arrange their attendance at proof. The claims were very important to the group members.

Decision

Prorogation

[53] Prorogation occurs when parties to a contract agree that a court, which does not have jurisdiction, should have jurisdiction (see Anton: *Private International Law* (3rd ed) para 8.83). That does not apply here where both the Scottish and the Kenyan courts have jurisdiction over the defenders.

[54] Parties may agree to prorogate the exclusive jurisdiction of a dispute to a particular court under rule 6 of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982. Such prorogation has to be to a court. The Director of Occupational Safety and Health Services is not a court.

[55] Clause 9 of the employment contract does not prorogate the dispute to any institution. It is, if anything, a choice of law clause whereby Kenyan legislation is to apply to "Industrial Sickness". This would include injuries in the workplace. However, it appears to be agreed that Kenyan law applies, in any event, to the claims. That is correct having regard to Article 4 of the Rome II Regulation (No 864/2007 of the European Parliament and Council). That being so, the clause does not add anything in the context of these claims.

[56] Since there is no prorogation of the exclusive jurisdiction of the Kenyan courts, the defenders' plea of no jurisdiction must be repelled.

Kenyan Law; the effect of the WIBA

[57] Central to the issue of *forum non conveniens* is the determination on whether the terms of the Work Injury Benefits Act 2007 apply to these claims. In deciding this issue, the court has not had regard to the Practice Directions of 24 April 2023. These were issued after the

preliminary proof had closed, albeit before the Lord Ordinary's Opinion was issued. In order to take cognisance of the Directions, the defenders would have had to have asked the Lord Ordinary to hear additional proof prior to his decision. Alternatively, they would have to invoke the *res noviter veniens ad notitiam* (newly discovered information) procedure set out in *Grier* v *Lord Advocate* 2023 SC 116 (LP (Carloway), delivering the Opinion of the Court, at para [146]). As neither procedure was adopted, the court will not take the Directions into account.

[58] The court agrees with much of the Lord Ordinary's opinion on the application of the WIBA. His approach to the interpretation of foreign law is entirely correct. The interpretation of the Kenyan legislation must be guided by expert evidence. There was evidence from both Prof Muigai and Mr Nderitu about how the Kenyan courts would interpret legislation. Their approach was said not to differ from the manner in which this court would approach a statute; that is to ascertain the intention of the legislature from the language used in the relevant provision, read in the context of the statute as a whole. Where there is disagreement between the experts, the court must look at the relevant sources of law, and construe any legislation, for itself (*Kolbin & Sons* v *Kinnear & Co* 1930 SC 724 (LJC (Alness) at 737-738 cited in *Ted Jacob Engineering Group* v *Morrison* 2019 SC 487, Lord Drummond Young, delivering the Opinion of the Court, at para [12] and in Dicey, Morris & Collins on the *Conflict of Laws* (16th ed) para 3-016 fn 83).

[59] The Lord Ordinary was right to find that clause 9 of the employment contracts meant that the relevant national legislation would apply, although, as already noted, that would be the case in any event. The legislation meant that a work related injury or illness would have to be processed through the WIBA system, with the possibility of an appeal to the

Employment and Labour Relations Court. In terms of section 16 of the WIBA, the use of the WIBA's alternative dispute resolution process was mandatory in cases to which it applied.

[60] The Lord Ordinary accepted (at para [119]) Prof Muigai's evidence that the WIBA represented a deliberate policy shift which was designed to take injury claims against employers out of the court, and into an administrative, process. The core element was a no-fault compensation scheme. *Law Society of Kenya* v *Attorney General* [2019] eKLR determined that section 16 prevented an employee from suing his employer for a work related injury "other than in the forum and manner provided for in WIBA" (Lord Ordinary at para [124]). Section 16 created "a statutory mechanism where any claim by an employee under the Act [emphasis removed] was subject, initially, to a process of dispute resolution" (*ibid*). If the group members' claims fell within the ambit of the WIBA, then the Lord Ordinary doubted (at para [130]) whether he could look beyond what had been decided in *Law Society of Kenya*. This reasoning is flawless.

[61] Where the court disagrees with the Lord Ordinary is in his conclusion that the group members' musculo-skeletal injuries do not fall within the ambit of the WIBA. His reasoning is based partly on the absence in the schedules of criteria for the assessment of such injuries, which criteria the Director was mandated to prescribe under the First Schedule (para G(c)); partly on an absence of evidence that the group members' claims must be processed under the WIBA; and partly on the terms of section 12 of the Industrial Court Act 2011. It is true that the Director has not published criteria for musculo-skeletal injuries, but he said that he used the relevant part of the First Schedule (ie para G(c)) to apply criteria in individual cases. It was not disputed that he did assess compensation for musculo-skeletal cases. The Lord Ordinary's conclusion that this must simply have been on a discretionary basis outwith

the WIBA scheme is in error. The reason that the Director processed them was because they fell within the ambit of the WIBA.

[62] Since there is disagreement between the experts on how the WIBA is to be applied, yet it is the evidence of both that the statute can be interpreted in the same way as it would be under Scots or English law, the court will construe the statute accordingly. Once it is accepted, in terms of its long title, that the WIBA was intended to replace first instance court proceedings with an alternative, administrative, dispute resolution system, "to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment", it becomes impossible to conclude that the legislature's intention was that a particular category of relatively common workplace injury was to be excluded from its ambit. In addition, first, section 17 is an express provision which enables an employee to institute, in addition to a claim under the WIBA, court action when a third party is also liable in damages. It is the only provision to do so. Secondly, the WIBA specifically states that compensation for an injury which is not listed in the First Schedule is to be assessed with the assistance of a medical opinion on the level of disablement (s 30(3)). Thirdly, the provision (First Sch para G(c)) whereby the Director is to set "the compensation criteria for Musculoskeletal disorders and occupational injuries not elsewhere covered" is another indicator that the WIBA is intended to cover all workplace injuries unless expressly excluded (ie, in broad terms, those which are self-inflicted). The fact that the Director has not yet published criteria for musculo-skeletal injuries does not detract from this.

[63] Section 16 of the WIBA could hardly be clearer. Its general meaning is specified in its heading; WIBA compensation is to be substituted for "other legal remedies". It states that no action for damages is available against an employer for any occupational accident or

disease. No liability for compensation arises except under the WIBA. Applying the natural and ordinary meaning to the language of the section, and construing it in the context of the WIBA as a whole, the law in Kenya is that the only way in which group members can obtain compensation for their musculo-skeletal injuries is by making a claim under the WIBA.

[64] If section 12 of the Industrial Courts Act 2011 conferred exclusive jurisdiction in Kenya on the ELRC for personal injury claims against their employers, that would not oust the jurisdiction of the Scottish Courts which is based, in terms of Scots law, on the defenders' domicile. Section 12 does not, however, confer original jurisdiction on the ELRC where the employee has a right to compensation under the WIBA. In terms of section 52(2) of the WIBA the only jurisdiction vested in the ELRC in respect of employee personal injury claims is appellate (*Saidi Mohamed* v *Diamond Industries* [2018] eKLR, Rika J at paras 21-23; *Perfect Scan* v *Harrison Kahindi Said* [2021] eKLR Byram Ongaya J at 6, para Fourth). In *Linet Kadzo Kenga* v *Indiana Beach Apartment Hotel* [2015] eKLR the ELRC (Judge O N Makau) held (at para 33) that the WIBA did not exclude its jurisdiction to award damages. This runs counter to the proper construction of the WIBA and section 12 of the 2011 Act. It is inconsistent with *Law Society of Kenya* v *Attorney General* and with both *Saidi Mohamed* and *Samuel Otieno Musumba* v *Industrial & Commercial Development Corp* [2022] eKLR (Justice Ocharo Kebira at paras 75, 85, 88-89). There is no reason to suppose that the recent decision in *Samuel Otieno Musumba* does not represent the correct law in Kenya. Prof Muigai thought that it did (Report of 10 March 2023 para 22). It is consistent with this court's construction of the relevant statutes. The evidence of Prof Muigai on this topic, which reflects this reasoning, is readily understandable and preferable to that of Mr Nderitu, who, in advance of the proof, had only been asked to address *forum non conveniens* (see his report of 2 March 2023,

para 1.2) and seemed unfamiliar with the WIBA, the cases on its application and the issue of jurisdiction.

Forum Non Conveniens

[65] Under reference to *Sim* v *Robinow* (1892) 19 R 665 (Lord Kinnear at 668), and the House of Lords in the English case of *The Spiladia* [1987] AC 460 (Lord Goff at 477), Anton: *Private International Law* distils (at para 8.409) the principle thus:

> "The plea … will be upheld only when there is another available forum which is clearly more appropriate to hear the case than Scotland and it would not be contrary to the interests of justice for the case to be tried in that forum. The appropriateness of the alternative forum is considered first (in terms of the convenience for the parties, the witnesses, the applicable law, … and other non-result-oriented practical factors …) before assessing whether it would be unjust to expect the litigation to take place in the clearly more appropriate forum (here the court can take account of whether the pursuer would be able to afford to bring his claim in that country and whether the courts in that country are sufficiently competent and fair to do justice in the case)."

The court agrees with this summary. It is also satisfied that the Lord Ordinary attempted to apply it. It is worth bearing in mind, when applying the principle, that it is uncommon to sustain the plea when the defenders are, as here, domiciled in Scotland. However, the place of the applicable law may turn out to be of some importance, although clearly not determinative (*Crédit Chimique* v *James Scott Engineering Group* 1982 SLT 131, Lord Jauncey at 136).

[66] The court agrees with the Lord Ordinary in his assessment that the defenders discharged the initial onus on them to show that it was more appropriate to litigate these claims in Kenya. The group members all live in Kenya and the alleged negligence and damage occurred there. The circumstances would require investigations in Kenya. These may relate to evidence which would have to be recovered by court order there. The Lord

Ordinary determined, however, that there was a real risk that the group members would not obtain substantial justice in the event that they were required to litigate at first instance before the ELRC having regard, *inter alia*, to the likely expense, a lack of access to lawyers and an absence of legal aid.

[67] The Lord Ordinary's reasoning is necessarily undermined by this court's finding that the WIBA applies to the claims. The group members will not be able to raise first instance proceedings against the defenders in the ELRC because it is incompetent to do so. The identified problems of first instance litigation in the ELRC will not arise. The group members have to make applications under the WIBA system, which is said to work well and is cost and lawyer free.

[68] This creates a jurisdictional dilemma. If this court were to deal with the claims, it would have to do so under Kenyan law as if it were applying the WIBA. In order to do that it might require to hear evidence about how the Director would apply the WIBA to the individual cases. Alternatively, the court might have to try and put itself in the position of the Director and attempt to apply the WIBA itself. That is something which it has no experience of doing; even if it does not appear to be a difficult task once the medical opinions on disablement and the claimants' wage rates were ascertained. At least in theory, the amounts which would be awarded by this court ought to be the same as those which would be made in Kenya under the WIBA. As the representative party accepted, if the WIBA applied, that would point towards the convenience of the claims proceeding in Kenya.

[69] Having regard to the court's construction of the WIBA, the appropriate manner of proceeding is to sist these proceedings pending resolution of the claims under the WIBA,

including any appeals to the ELRC, in Kenya. If the court's construction, or its understanding of the practical operation of the WIBA, turn out to be ill-founded, or if the WIBA claims were not determined in accordance with the scheme, or if there were to be excessive delay, the court may have to revisit the question of substantial justice and consider whether the sist should be recalled. However, the court cannot determine, as matters presently stand, that the WIBA, if it operates as its terms suggest, is not capable of providing substantial justice. The concept of such justice applies to both parties and envelops the general public interest. There is nothing amiss in a nation determining that its existing law of fault based reparation in the employment, or any other, context should be replaced by a no-fault compensation scheme. It can no doubt be argued that some claimants will obtain much less by way of damages than if it were possible to claim for pain and suffering and under the many other heads of loss which are available in Scotland. This is balanced by the certainty which a no-fault system brings and the availability of some compensation for everyone with a work based injury.

Conclusion

[70] The court will recall the interlocutor of the Lord Ordinary dated 11 July 2023 in so far as it repels the defenders' second plea-in-law (on *forum non conveniens*). It will allow the reclaiming motion and sist the group proceedings (GP1/22) pending resolution of the group members' claims in Kenya under the WIBA scheme. It will not determine the plea of *forum non conveniens* at present.

The Additional Charge

[71] In light of the court's decision, it may be that the interlocutors of 18 August 2023 ought to be recalled in so far as it awards the representative party the expenses of the preliminary proof. That is a matter which may require further applications and submissions. In relation to the competency of awarding an additional charge in respect of the preliminary proof, the court sees no difficulty in the making of such an order. Rule 5.2 of the Taxation of Judicial Expenses Rules permits the court to make an award in respect of "the proceedings". If it can do that, it can equally well restrict the award to cover only part of the proceedings. The greater power includes the lesser. If the matter of expenses requires to be revisited, the court will consider making such an order, including determining the relevant heads and the required specification of the percentage uplift, if any (Rule 5.2.(4)).