Case No: EA-2021-000269-BA (Previously UKEAT/0026/21/BA)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 July 2021

Before :

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

- -

Between :

CARILLION SERVICES LTD (IN COMPULSORY LIQUIDATION) AND OTHERS	**Appellants**
- and -	
MR C BENSON AND OTHERS	**Respondents**

- -
- -

Mr D Reade QC and Mr D Northall (instructed by DLA Piper UK LLP) for the **Appellants**
Mr S Brittenden and Ms R Snocken (instructed by Thompsons Solicitors, Weightmans LLP and OH Parsons LLP Solicitors) for the **Respondents/Claimants**

Ms L Pearce (JFH Law) for the **Respondents/Claimants**

Hearing date: 6 & 8 July 2021

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JUDGMENT

SUMMARY

REDUNDANCY AND TRADE UNION RIGHTS

The Carillion group was facing serious financial difficulties from no later than July 2017 and went into liquidation on 15 January 2018. The liquidation resulted in the claimants being dismissed on various dates after 15 January 2018. The claimants issued claims for protective awards under section 189 TULRCA in respect of the respondents' failure to comply with the requirements of section 188 TULRCA to consult with representatives about proposals to dismiss as redundant 20 or more employees at an establishment within a period of 90 days or less. The respondents contended that there were "special circumstances" within the meaning of section 188(7) TULRCA that meant that the respondents were only required to take all such steps towards compliance as were reasonably practicable in those circumstance. The tribunal rejected that contention. The respondents appealed.

Held, dismissing the appeal, that the tribunal had not erred in concluding that there were no special circumstances here, and was correct to follow Court of Appeal authority (**Clarks of Hove Ltd v Bakers' Union** [1978] 1 WLR 1207) that "special" in this context, meant something uncommon or out of the ordinary.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT):

1. The issue in this appeal is whether the Manchester Employment Tribunal ("the tribunal") erred in law in determining whether there were special circumstances rendering it not reasonably practicable for the employer not to comply with its consultation obligations pursuant to section 188(7) of the **Trade Unions and Labour Relations (Consolidation) Act 1992** ("TULRCA").

2. The issue arises out of the liquidation of the Carillion group of companies ("the Group") in January 2018. That liquidation is described as the largest and most complex insolvency of its kind in UK history.

Background

3. I shall refer to the parties as "the claimants" and "the respondents", as they were below. The claimants, of whom there are about 1,000, were employed by the respondents which are companies in the Group. Carillion plc was a publicly traded company listed on the FTSE 100. It had a turnover of £5.2 billion in 2016. The Group was described as a multi-national business services and construction services company with headquarters in Wolverhampton. Its activities included the provision of facilities management services to Government Ministries, various regional public sector authorities and corporate clients; work on infrastructure projects, including rail; and the delivery of major construction projects to public and private sector clients. According to the Group's HR records, it employed over 18,000 employees in the UK as at 15 January 2018.

4. It was common ground before the tribunal that the business was facing serious financial difficulties from no later than July 2017. The tribunal found that the financial position continued to

decline from July 2017 onwards and that the overall picture it found was one of a business "on a downward path from July 2017 until it went into liquidation on 15 January 2018."

5. The liquidation resulted in the claimants being dismissed on various dates after 15 January 2018. The claimants issued claims for protective awards under section 189 **TULRCA** in respect of the respondents' failure to comply with the requirements of section 188 **TULRCA** to consult with representatives about proposals to dismiss as redundant 20 or more employees at an establishment within a period of 90 days or less.

6. The respondents do not dispute that there was a failure to consult. They contend, however, that there were special circumstances within the meaning of section 188(7) **TULRCA** that meant that the respondents were only required to take all such steps towards compliance as were reasonably practicable in those circumstances.

7. As would be expected for such a large multiple claim, numerous preliminary hearings were conducted in order to manage the issues to be determined. Following the third preliminary hearing in these proceedings, the tribunal ordered that the following issue be determined:

> "6. This was a preliminary hearing to decide the issue set out at paragraph 2 of the Tribunal's order following the third preliminary hearing (p.154) in the following terms:
>
> > "…Did the circumstances giving rise to, and the order for, the compulsory liquidation of the Carillion group of companies on 15 January 2018 constitute special circumstances within the meaning of s.188(7) Trade Union and Labour Relations (Consolidation) Act 1992 rendering it not reasonably practicable for the relevant employer to comply with a relevant requirement of s.188 ("the primary special circumstances defence")?
> >
> > The circumstances on which the Respondents rely for the purpose of the primary special circumstances defence are those articulated at paragraph 33 of the Respondents' grounds of resistance and in reply to question 4 of a request for further information submitted by Thompsons solicitors on 20 May 2019."

8. The tribunal set out those special circumstances relied upon by the respondents as follows:

> "7. Paragraph 33 of the grounds of resistance reads as follows:
>
> > "The primary special circumstances applicable in this case are as follows:
> >
> > a. The Board was faced with sudden intervening events over the weekend of 13 and 14 January 2018, when a decision was taken by the Group's key stakeholders not to approve proposed short-term lending arrangements. This was not the outcome the Board had expected;
> >
> > b. Prior to these intervening events, the Board had in their view presented a compelling long term business plan which they considered was well received by its financial stakeholders. The Board was confident that short term lending facilities, representing a fraction of the turnover of the Group, would have been made available by the relevant stakeholders to enable the Group's continued solvent trading and the implementation of its business plan;
> >
> > c. As a direct and immediate consequence of the stakeholders' decision, the Board had no option but to apply to place various Group companies into compulsory liquidation. It was unprecedented for a business of this size and nature to be placed into liquidation, but it was not feasible for the relevant companies to be placed into administration;
> >
> > d. Given the fact of compulsory liquidation, it was inevitable and unavoidable that the Group's employees (with some limited exceptions) would ultimately be dismissed by reason of redundancy."
>
> 8. The Respondents gave further particulars of the primary special circumstances defence (amongst other matters) in a response on 20 May 2019 to a request for further and better particulars. The relevant parts begin at page 126.
>
> 9. Paragraph 11.2 of the further particulars states (p.129):
>
> > "the intervening events, which took place over 12, 13 and 14 January were essentially a decision from lenders that further financial support was now entirely contingent on Government guarantees; confirmation from Government that such support would not be forthcoming; and the subsequent majority decision of the banks on Sunday 14 January 2018 to withdraw financial support. Had the banks voted in favour of providing a short term bridging facility, the Compulsory Liquidation would not have happened. The sudden and unexpected turn of events was disastrous for the Group and clearly constituted a special circumstance.""

9. The preliminary hearing was conducted before Employment Judge Slater sitting with members on various dates between 13 November and 7 December 2020. In an extremely impressive and thorough written judgment in the matter, sent to the parties on 11 January 2021, the tribunal examined in great detail the factual circumstances leading up to the respondents' liquidation on 15

January 2018. The tribunal heard evidence from various individuals for the respondents. However, the tribunal noted, and expressed concern about, the fact that it had heard no evidence from any member of the Board. The tribunal's detailed findings of fact as to the picture of financial decline need not be repeated here, suffice it to say that none of the findings are challenged by the respondents.

10. The claimants had contended that the duty to consult was triggered by 6 or 31 December 2017 as there was a sufficiently clear intention to go into liquidation by those dates. The respondents denied that any duty to consult was triggered by those dates, but conceded that on 14 January 2018 the Board's proposals carried with them the inextricable consequence that employees would be dismissed as redundant and the duty to consult under section 188 **TULRCA** was therefore triggered at that date (see paragraph 323).

11. The tribunal rejected the claimant's claims as to the operative date being either 6 or 31 December 2017. It found that there had not been a sufficiently clear or settled intention to go into liquidation on either of those two dates. The tribunal concluded that, as conceded by the respondents, the duty to consult was in fact triggered on 14 January 2018.

12. The tribunal then proceeded to consider whether there were special circumstances as at 14 January 2018. The tribunal identified the issues to be determined as follows:

> "Whether there were "special circumstances" as at 14 January 2018
>
> 325. Two questions arise under section 188(7) TULCRA which are issues for this hearing: (1) were the circumstances on which the Respondents rely special; and (2) did those circumstances render it not reasonably practicable for the Respondents to comply with a relevant obligation under s.188 TULRCA? If we conclude that the circumstances were not special, then the second question does not need to be answered.
>
> 326. The parties agree that the leading case is the Court of Appeal decision in **Clarks of Hove Ltd v Bakers' Union** [1978] 1 WLR 1207. In accordance with that authority, we need to decide whether the event relied upon was something "out of the ordinary, something uncommon". **Clarks** also guides us that insolvency may or may not be a special circumstance; it depends on the causes of the insolvency whether the

> circumstances can be described as special or not. Sudden disaster, making it necessary to close the concern, will be something capable of being a special circumstance. If the insolvency is due to a gradual run-down of the company, the Employment Tribunal can come to the conclusion that the circumstances were not special.
>
> 327. For the reasons given in the section on the law, we do not consider we are limited to considering only the immediate and effective cause of the decision to apply for the compulsory winding up of the Company when applying the principles in **Clarks**.
>
> 328. The circumstances which the Respondents argue constitute special circumstances are set out in paragraph 33 of the grounds of resistance, which we set out at paragraph 7 of our reasons, and in reply to question 4 of a request for further information submitted by Thompsons solicitors on 20 May 2019. The Respondents rely in their response on what they describe as sudden intervening events over the weekend of 13 and 14 January 2018, when a decision was taken by the Group's key stakeholders not to approve proposed short-term lending arrangements.
>
> 329. Mr Reade put the relevant question for the Employment Tribunal in his oral submissions as being whether there were circumstances which were uncommon or out of the ordinary which led to the Board's proposal on 14 January 2018 for collective redundancies.
>
> 330. The Claimants contend that there was nothing "sudden" about Carillion's insolvency on 15 January 2018; they say the evidence shows that the Group's financial situation deteriorated steadily from 10 July 2017, when the July Trading Update was issued.
>
> 331. We have considered carefully the evidence relating to the period from 10 July 2017 until 15 January 2018 and have summarised what we consider to be the significant events in our findings of fact.
>
> 332. The overall picture is of a business on a downward path from July 2017 until it went into liquidation on 15 January 2018.
>
> 333. We pick out from the chronology, certain matters which are particularly demonstrative of the decline."

13. The subsequent 40 paragraphs of the judgment highlight some of the key evidential matters already considered in greater detail earlier in the judgment that supported its conclusion that the business was in financial decline. From paragraph 372 onwards the tribunal focuses on the weekend of 13 and 14 January 2018 and expresses its conclusions on the special circumstances issue. It is convenient to set out this part of the tribunal's judgment in full.

> "372. We then reach the weekend of 13/14 January 2018.

373. HMG informed the Company on the morning of 14 January 2018 that it would not be providing the support requested, although it would fund a compulsory liquidation with the Official Receiver taking control of the Company and appointment of Special Managers. HMG informed the Company that it would not fund administration. Later that day, the banks decided not to provide further support. The Board decided to petition for the winding up of the Company.

374. The burden of proof lies on the Respondents to make out the special circumstances defence. The Respondents rely on the events giving rise to the compulsory liquidation, rather than the compulsory liquidation per se. The Respondents rely on what they describe as sudden intervening events over the weekend of 13/14 January 2018, when a decision was taken by the Group's key stakeholders not to approve proposed short-term lending arrangements. They also rely on HMG's refusal to provide financial support for an administration process.

375. We have considered very carefully the events leading up to the liquidation of the Respondents. We do not consider that the events of the weekend of 13/14 January 2018 can reasonably be described as "sudden intervening events" or, using the words in **Clarks**, something "out of the ordinary, something uncommon."

376. As we have charted, the events of the weekend of 13/14 January 2018 followed a history of decline over, at least, the period from July 2017. The recognition by Mr Cochrane, when the announcement was made to employees on 15 January 2018 that Carillion had gone into liquidation, of the outstanding effort and sacrifice many employees had made over the previous five months to try and rescue the business, illustrates this (Paragraph 216).

377. We have seen evidence in the statement of Mr Cochrane to the Board on 10 January 2018 (paragraph 169) which might suggest that Mr Cochrane held the view that Carillion was simply too big and important, including in terms of its involvement in public sector contracts, for HMG to allow it to fail and that, insolvency was, therefore, likely to be averted by HMG stepping in with the support which the Company was requesting. However, we have seen no evidence that HMG ever gave the Company cause to believe that it was more likely than not that such support would be provided. Since we did not hear evidence from Mr Cochrane, we could not assess whether or not his expressed views reflected the reality of his belief at the time. Even if they did, we have no evidence that his views reflected the corporate belief of the Company. Even if the Company held such a corporate belief, we do not consider this would be sufficient to make the circumstances "special". In **Clarks**, the genuine hope of the directors that they would secure additional finance and be able to continue trading was not held to constitute special circumstances rendering it not reasonably practicable to comply with the collective consultation requirements.

378. We do not consider that **Hamish Armour** established any binding precedent that, where particular funding has been provided before, a refusal to provide more funding will always be a "special circumstance" providing a defence to the duty to consult under section 188, let alone it establishing any wider precedent that a refusal to provide funding will always be a "special circumstance". However, even if we were wrong on this, we conclude that the circumstances in this case are distinguishable from those in **Hamish Armour**. No previous support had been provided by HMG. At the very least, for this to

be a **Hamish Armour** type of situation, we conclude that the Board would have had to have a reasonable expectation that HMG would provide support and the banks would then provide further support and that this would avert insolvency. We conclude that the Respondents have not satisfied us, on the evidence, that this was the case. We do not consider that **Leancut Bacon** establishes any precedent which would bind us to conclude that there were special circumstances in the case we are concerned with. The factual situation in **Leancut Bacon** was different and, although the EAT upheld the Tribunal's decision in that case, it was done in such terms as suggests that the EAT might equally have upheld a different outcome.

379. We conclude that the refusal of support by HMG (including the refusal to fund administration) and the refusal of further support by the banks on 14 January 2018 was not something "out of the ordinary, something uncommon." There had been no prior history of HMG providing the Company with the type of support requested. We have had no evidence that HMG has routinely, or indeed, ever, provided support of the type sought to other businesses in the same sort of circumstances as Carillion. The banks were indicating, prior to the weekend of 13/14 January 2018, that any further support from them was conditional on support from HMG.

380. We are not clear whether it was being suggested by the Respondents that it has to be the cause of liquidation, as opposed to any other form of insolvency, which has to be something uncommon or out of the ordinary. If this submission was being made, we do not agree that this is in accordance with the principles in **Clarks** which we have to apply. However, if we are wrong on that, the Respondents would bear the burden of proof of proving those special circumstances. We have no evidence to support a conclusion that it was something uncommon or out of the ordinary that led to compulsory liquidation, as opposed to another form of insolvency, such as administration, which might not have involved the dismissal of the entire workforce. Although there is a dearth of evidence about the corporate mind of the Company in the critical period of the last weeks preceding the liquidation, it is clear that, by 31 December 2017, at the very latest, the Company knew that it did not have the funds for administration and there was, therefore, a risk that it would go into compulsory liquidation (see paragraph 135).

381. We conclude that the Respondents have failed to prove, on a balance of probabilities, that there were "special circumstances" in existence at the time the duty to consult was triggered (14 January 2018). The second question, as to whether the Respondents took such steps as were reasonable in the circumstances to take, does not, therefore, fall to be decided.

Summary of conclusions

382. For the reasons we have given, we have concluded that the duty to consult under section 188 TULRCA was triggered on 14 January 2018 and not on the earlier dates of 6 December or by 31 December 2017, as had been contended for by the Claimants. We have concluded that the Respondents have failed to establish that there were special circumstances at the time the duty was triggered, capable of rendering it not reasonably practicable to comply with the duty of collective consultation."

14. Accordingly, the special circumstances issue was decided against the Respondents.

The Legal Framework

15. Section 188 **TULRCA,** so far as relevant, provides:

"**188 Duty of employer to consult … representatives**

(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

(1A) The consultation shall begin in good time and in any event—

(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 45 days, and

(b) otherwise, at least 30 days,

before the first of the dismissals takes effect.

(2) The consultation shall include consultation about ways of—

(a) avoiding the dismissals,

(b) reducing the numbers of employees to be dismissed, and

(c) mitigating the consequences of the dismissals,

and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

(3) In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

(4) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives—

(a) the reasons for his proposals,

(b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant,

(c) the total number of employees of any such description employed by the employer at the establishment in question,

(d) the proposed method of selecting the employees who may be dismissed,

> (e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect
>
> (f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed.
>
> (g) the number of agency workers working temporarily for and under the supervision and direction of the employer,
>
> (h) the parts of the employer's undertaking in which those agency workers are working, and
>
> (i) the type of work those agency workers are carrying out.
>
> (5) That information shall be given to each of the appropriate representatives by being delivered to them, or sent by post to an address notified by them to the employer, or in the case of representatives of a trade union sent by post to the union at the address of its head or main office.
>
> (5A) The employer shall allow the appropriate representatives access to the affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.
>
> (6) …
>
> (7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances.
>
> Where the decision leading to the proposed dismissals is that of a person controlling the employer (directly or indirectly), a failure on the part of that person to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement."

16. The meaning of "special circumstances" in this context was considered by the Court of Appeal in the leading authority of **Clarks of Hove Limited v Bakers Union** [1978] 1 WLR 1207 ("**Clarks**"). In that case, the employers had been in financial difficulties for some time and, on 24 October 1976, it became apparent that the employer's last hopes of financial aid had failed. They dismissed 368 employees on the grounds of redundancy and ceased to trade on the same day. The employees' union made a complaint that there had been a failure to comply with the duty to consult under section 99 of

the **Employment Protection Act 1975** ("EPA") which was the predecessor to section 188 of **TULRCA.**

17. Section 99 **EPA** so far as relevant provided:

> "(1) An employer proposing to dismiss as redundant an employee of a description in respect of which an independent trade union is recognised by him shall consult representatives of that trade union about the dismissal in accordance with the following provisions of this section.
>
> (2) In this section and sections 100 and 101 below, "trade union representative" in relation to a trade union means an official or other person authorised to carry on collective bargaining with the employer in question by that trade union.
>
> (3) The consultation required by this section shall begin at the earliest opportunity, and shall in any event begin—
>
> (a) where the employer is proposing to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or less, at least 90 days before the first of those dismissals takes effect; or
>
> (b) where the employer is proposing to dismiss as redundant 10 or more employees at one establishment within a period of 30 days or less, at least 60 days before the first of those dismissals takes effect.
>
> …
>
> (5) For the purposes of the consultation required by this section the employer shall disclose in writing to trade union representatives—
>
> (a) the reasons for his proposals;
>
> (b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant;
>
> (c) the total number of employees of any such description employed by the employer at the establishment in question;
>
> (d) the proposed method of selecting the employees who may be dismissed; and
>
> (e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect.
>
> (7) In the course of the consultation required by this section the employer shall—
>
> (a) consider any representations made by the trade union representatives; and

> (b) reply to those representations and, if he rejects any of those representations, state his reasons.
>
> (8) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with any of the requirements of subsections (3), (5) or (7) above, the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances.
>
> …"

18. It can be seen that although the consultation requirements of section 99 **EPA** were somewhat different - there being, for example, no express requirement to consult about ways of avoiding dismissal, reducing the numbers to be dismissed, or mitigating the consequences of dismissal as provided for by section 188(2) **TULRCA** - there was still an obligation to consult "about the dismissal" and to provide information as to the proposal to dismiss. Furthermore, the essential components of the special circumstances defence contained in section 99(8) **EPA** are similar to those set out in section 188(7) **TULRCA**.

19. The industrial tribunal in **Clarks** had concluded that the insolvency, the factors which led to it and which occasioned the dismissals for redundancy, and the failure to consult the union were not special circumstances within the meaning of section 998 **EPA**.

20. The Court of Appeal in **Clarks** agreed, stating as follows in an oft-cited passage from the judgment of Geoffrey Lane LJ at 1215F to 1216B:

> "In so far as that means that the special circumstance must be relevant to the issue then that would apply equally here, but in these circumstances, the Employment Protection Act 1975, it seems to me that the way in which the phrase was interpreted by the industrial tribunal is correct. What they said, in effect, was this, that insolvency is, on its own, neither here nor there. It may be a special circumstance, it may not be a special circumstance. It will depend entirely on the cause of the insolvency whether the circumstances can be described as special or not. If, for example, sudden disaster strikes a company, making it necessary to close the concern, then plainly that would be a matter which was capable of being a special circumstance; and that is so whether the disaster is physical or financial. If the insolvency, however, were merely due to a gradual run-down of the company, as it was in this case, then those are facts on which the industrial tribunal

> can come to the conclusion that the circumstances were not special. In other words, to be special the event must be something out of the ordinary, something uncommon; and that is the meaning of the words "special" in the context of this Act.
>
> Accordingly, it seems to me that the industrial tribunal approached the matter in precisely the correct way. They distilled the problem which they had to decide down to its essence, and they asked themselves this question: do these circumstances, which undoubtedly caused the summary dismissal and the failure to consult the union as required by section 99, amount to special circumstances; and they went on, again correctly, as it seems to me, to point out that insolvency simpliciter is neutral, it is not on its own a special circumstance. Whether it is or not will depend upon the causes of the insolvency. They define "special" as being something out of the ordinary run of events, such as, for example, a general trading boycott - that is the passage which I have already read. Here, again, I think there were right.
>
> There was ample evidence upon which, on these correct bases, they could come to the conclusion which they did. But whether one would have reached the same conclusion oneself is another matter and is an irrelevant consideration."

21. It is clear from these passages that, in order to amount to special circumstances within the meaning of the relevant provisions, the event (s) relied upon must be something "out of the ordinary" or something "uncommon". The Court of Appeal gave as an example of something out of the ordinary "sudden disaster" befalling the company. On the other hand, a gradual financial decline leading to insolvency was something which is capable of being regarded as not amounting to special circumstances.

22. I was informed that there is no other Court of Appeal authority dealing with the meaning of special circumstances. In the Employment Appeal Tribunal, Her Honour Judge Eady QC (as she then was) presiding considered the issue more recently in **Keeping Kids Company (in compulsory liquidation) v Smith** [2018] IRLR 484 where, having set out the passage from **Clarks** cited above, the EAT said as follows:

> "30. And, thus, what will constitute special circumstances will depend upon the facts of the case; what might be special circumstances in one case might not be in another if the employer could, or should, have seen what was to come, see further GMB v Rankin [1992] IRLR 514 EAT . Moreover, whether the employer has shown special circumstances will be for the ET to assess on the evidence in the particular case, bearing in mind that the burden lies on the employer in this regard (see UK Coal Mining v NUM

at paragraphs 62 to 64 and E Ivor Hughes Educational Foundation v Morris [2015] IRLR 696 EAT at paragraph 28).”

23. I respectfully agree with those observations.

The Grounds of Appeal

24. Permission was granted on the sift by HHJ Auerbach to proceed with six grounds of appeal. These may be summarised as follows:

(a) Ground 1: The tribunal failed to identify the circumstances which prevailed at the point at which the duty to undertake collective consultation first arose on 14 January 2018 and failed to assess whether the circumstances were special, whether individually or collectively;

(b) Ground 2: The tribunal wrongly focused on the cause of insolvency to which the respondents were subject;

(c) Ground 3: The tribunal erred in interpreting the Court of Appeal's judgment in **Clarks** as requiring it to focus solely on the cause of insolvency where the special circumstances defence puts insolvency in issue;

(d) Ground 4: Applying the judgment in **Clarks**, the tribunal adopted a false dichotomy between a “sudden disaster" and a "gradual run-down of the company";

(e) Ground 5: The tribunal's errors described in grounds 2, 3 and 4 above were compounded by the conclusion at paragraph 380 of the written judgment which contained a fundamental misapprehension of the respondents' case;

(f) Ground 6: The tribunal erred in declining to consider whether the relevant circumstances rendered it not reasonably practicable for the respondents to comply with the requirement of the collective consultation duty.

Submissions

25. Mr Reade QC, who appeared with Mr Northall on behalf of the respondents, as they did below, submits that although each of the six grounds relied upon is distinct, there is a common issue throughout which is described in the following terms:

> "Where the employer relies upon its own insolvency as a context for a special circumstances defence pursuant to s.188(7) TULRCA, does the tribunal err by limiting its enquiry to the cause of the insolvency when identifying the relevant circumstances?"

26. Mr Reade submits that the Court of Appeal's decision in **Clarks** does not give the tribunal a mandate to focus solely on the cause of the insolvency when identifying the relevant circumstances which form part of the special circumstances defence. Alternatively, he submits that to the extent such a mandate can be drawn from **Clarks**, the Court of Appeal's comments were obiter and required further consideration in view of subsequent developments in the law.

27. Mr Reade contended that it was important to bear in mind the very different context in which the **Clarks** case was decided. In particular, he highlights the fact that in 1978, when **Clarks** was decided, insolvency inevitably resulted in the termination of the employer's business and consequently of the employees' contracts of employment. The "rescue culture" ushered in by the **Insolvency Act 1986**, under which there was an increased emphasis on the rescue of businesses in

financial distress as going concerns as opposed to the realisation of their assets for the benefit of creditors, is something that has to be borne in mind when seeking to understand the Court of Appeal's decision in **Clarks** as to the meaning of special circumstances.

28. Mr Reade also highlights the more limited consultation duties that existed under section 99 **EPA** and in particular the absence at that stage of any obligation to consult about ways of avoiding dismissal. He further highlights the fact that there was no prospect in 1978 of any employee's employment being continued with a new employer on the same terms and conditions as would be the case now if there were a relevant transfer within the meaning of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"). **TUPE** in its first incarnation did not become part of the law of the UK until 1981.

29. My attention was drawn in particular to regulation 8(7) of the current version of **TUPE** which provides that the preservation of employment upon a relevant transfer does not apply where:

> "… the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."

30. The thrust of Mr Reade's submission, as I understood it, was that given the entirely different context in terms of insolvency proceedings and employee rights pertaining at the time, the decision in **Clarks** should not be read so as to limit the tribunal's enquiry solely into the causes of insolvency. Such a limited enquiry may have been appropriate where insolvency in 1978 inevitably meant the dismissal of the employees concerned. However, now that an insolvency situation can result in the company going into administration, whereby part or all of the business may survive as a going concern, employment might continue with another employer pursuant to **TUPE** and/or there may be meaningful consultation about avoiding dismissal, any inquiry as to whether there are special

circumstances should go beyond the mere causes of insolvency and look at the context and consequences of that insolvency as well.

31. The tribunal in this case, submits Mr Reade, failed to conduct its enquiry on that basis and focused only on the causes of the insolvency. In so doing, he submits, the tribunal erred in law.

32. Mr Brittenden appeared with Ms Snocken for a group of claimants comprising (a) Unite the union and the individual claimants whose claims are supported by Unite (some of those being represented by Thompsons Solicitors LLP and others by OH Parsons LLP); and (b) individual claimants represented by Weightmans LLP (together referred to here as the "Unite and Weightmans claimants"). The Unite and Weightmans claimants' answer to the respondents' notice of appeal said *inter alia* as follows in response to ground 2 of the appeal:

> "… If and insofar as the Respondents invite the Employment Appeal Tribunal to hold compulsory liquidation is, in and of itself, a special circumstance, that contention is:
>
> (a) unsustainable in the light of the Court of Appeal's decision in **Clarks** …;
>
> (b) incompatible with Council Directive 98/59 EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies ("CRD"), which contains no exception for collective redundancies which an employer contemplates making by reason of compulsory liquidation (or any analogous proceeding instituted with a view to the liquidation of the employer's assets)."

33. Mr Reade did not expressly invite the EAT to hold compulsory liquidation is in and of itself a special circumstance. Notwithstanding that, Mr Brittenden did seek to rely on the effect of the Directive and went further in that it was submitted that the special circumstances defence *per se* is not compatible with the Directive and is in fact a "dead letter" in the context of compulsory liquidations. However, when pressed on this, particularly in view of the fact that this was not an issue that appears to have been raised below or one that was heralded in the skeleton argument, Mr

Brittenden did not pursue it and was content to proceed on the basis that the respondents' position is incompatible with EU law.

34. Mr Brittenden also submitted that the tribunal was correct to focus its inquiry on the causes of insolvency. Mr Reade's "rescue culture" points add nothing to the respondents' case because the insolvency in the present case (which resulted in compulsory liquidation) was a terminal event as far as continued employment was concerned, just as was the insolvency in **Clarks**. In any event, submits Mr Brittenden, the tribunal did make alternative findings (see paragraph 380), which considered the compulsory liquidation in the round. There is no appeal against those findings.

35. Ms Pearce is a Solicitor. She appears on behalf of the group of claimants represented by JFH Law. In admirably clear and concise written and oral submissions, Ms Pearce contended that, whilst the insolvency context might have changed, it did not necessitate any change to the guidance given by the Court of Appeal in **Clarks** as to what constitutes special circumstances. The tribunal did not limit its analysis as suggested by the respondents. In fact, it took account of all the points relied upon by the respondents and found that they had not discharged the burden of establishing that there were special circumstances. The tribunal analysed the events of the weekend of 13 and 14 January 2018 very closely (see paragraphs 195 to 215 of the judgment) and clearly would have had those in mind, she submits, when considering whether there was something out of the ordinary here.

Discussion

36. It is important to bear in mind that the Court of Appeal's binding guidance in **Clarks** was given in respect of a provision in section 99(8) **EPA** setting out the special circumstances defence that is almost identical to the current provision (in its material parts) contained in section 188(7) **TULRCA**. The Court of Appeal was clear that its judgment was concerned with the specific meaning

of the term “special circumstances” and considered that in order for an event to be special, "it must be something out of the ordinary, something uncommon, and that is the meaning of the words "special" in the context of this Act." There was no qualification that its guidance was confined to situations involving insolvency, albeit that was the context of the specific claim before it. Redundancy situations can arise out of a reorganisation or restructuring, or any number of other causes which do not necessarily denote any financial stress. The duty to consult is imposed on any of those situations where 20 or more redundancies within a period of 90 days or less are proposed. The obligation to begin that consultation in good time and in any event within the periods prescribed in section 188(1A) **TULRCA**, to consult on the matters set out in section 188(2), and to provide the information set out in section 188(4) will apply in all types of redundancy situation where the thresholds in section 188(1) are crossed.

37. In my judgment, the fact that the Court of Appeal's guidance, which was emphasised as being applicable "in the context of this Act", is not confined to insolvency situations militates against Mr Reade's argument that the evolving insolvency context should affect what is to be considered or the way that **Clarks** is to be applied. As Ms Pearce submitted, the change in the insolvency context does not necessitate any change to the approach to be taken in determining what is a special circumstance, the issue for the tribunal remaining simply whether the circumstances relied upon were uncommon or something out of the ordinary.

38. The answer to that question will of course depend on the facts of the individual case. As the Court of Appeal in **Clarks** itself indicated, insolvency may or may not be a special circumstance. On its own, the fact of insolvency tells one very little, as insolvency in any form is not an uncommon event. It was certainly not contended, as I understood the submission, that compulsory liquidation is in and of itself an uncommon occurrence amounting to a special circumstance. Whether or not a

particular insolvency is "special" would depend on the facts surrounding that insolvency. As it is a question of fact, the EAT would only interfere with the tribunal's conclusion where it was satisfied that there was some material misdirection of law or the conclusion could be said to be perverse. Perversity is not alleged here. That leaves an alleged misdirection.

39. The principal misdirection alleged is that the tribunal erred by limiting its inquiry to the causes of insolvency instead of considering the contextual and consequential matters relied upon by the respondents. In my judgment, there is no error of law on the part of the tribunal in this regard at all. The self-direction in respect of section 188(7) **TULRCA** is correct. The tribunal identifies that the burden of proof lies with the employer to show special circumstances (paragraph 267). It cited the authority of **Clarks** which all parties agreed was the leading authority (paragraph 268 and 269). It correctly rejected a submission that it should focus solely on the immediate causes of the insolvency, by which I understand the respondents to mean the events of the weekend of 13 and 14 January 2018, and instead considered events going back to July 2017 (paragraph 271). It correctly considered that the respondents needed to show that the events it relied upon were something out of the ordinary and that the examples given by the Court of Appeal of a "sudden disaster" and the "gradual run-down" were *capable* of leading the tribunal to conclude that the circumstances were or were not special (see paragraph 326). There is nothing in the judgment to suggest that the tribunal felt constrained to conclude that *any* gradual financial decline necessarily meant that there were no special circumstances.

40. The question is whether that self-direction is somehow rendered erroneous by reason of the changing insolvency context. In my judgment it is not. As I have already said, the guidance in **Clarks** was clearly of general effect and not confined to insolvency situations in any event. Thus the changing nature of the insolvency context would have little bearing on the interpretation of statutory wording intended to apply to all redundancy situations.

41. Mr Reade's suggestion was that as insolvency in 1978 could only have one outcome for employees, namely dismissal, it was inevitable that the focus then would be on the causes of that insolvency, but now that insolvency could have different outcomes, whether as a result of being put into administration or **TUPE** or otherwise, the inquiry as to whether the circumstances are special should move away from the causes of insolvency and instead focus on the context and consequences thereof. I am afraid I have difficulty in understanding that argument. The fact that an insolvency now can result in employment continuing provides all the more reason to consult; any analysis of whether the circumstances giving rise to a particular insolvency are special, and thereby providing a defence to the failure to comply with the obligation to consult, would still involve a consideration of the causes of that insolvency. It is difficult to see how the causes of an insolvency can be divorced from other matters in determining whether the situation is one that could be described as uncommon or out of the ordinary.

42. Mr Reade sought to disavow any suggestion that he was relying on the fact of compulsory liquidation itself as a special circumstance. However, it seemed to me that his submission, which relied in part on the inevitable consequences of a compulsory liquidation (i.e. the dismissal of the entire workforce) as compared to other types of insolvency, sailed perilously close to that forbidden shoreline. In any event, it is noteworthy that if the claimed "specialness" of the insolvency in this case is derived (at least in part) from the fact that compulsory liquidation results in the dismissal of the entire workforce, then the position would be directly comparable to the pre-1986 insolvency position whereby the dismissal of the workforce was similarly inevitable. When this observation was put to Mr Reade, he acknowledged that the end result might look the same as in 1978, but argued that that does not mean that one should not take into account the special circumstances as to why the Board was driven to opt for compulsory liquidation rather than some other alternative. That appeared

to me, if I understood Mr Reade's response correctly, to be an acknowledgement that ultimately a key consideration is why the respondents ended up in the position that they did. In other words, what was the cause of the insolvency? If that is right, then it cannot be said that the tribunal erred by looking at the causes of insolvency.

43. In any event it seems to me that Mr Reade's argument is based on an incorrect premise, which is that the tribunal did not consider the factors which the respondents contended gave rise to special circumstances. There were eight such factors in all, summarised by the tribunal at paragraph 223 of Mr Reade's closing submission below, and set out at paragraph 243 of the judgment:

> "223.1. The Government's refusal of financial assistance on 14 January 2018.
>
> 223.2. The Government's refusal to provide financial support for an administration process.
>
> 223.3. Carillion's lenders declined (by a 3-2 majority) to permit a further draw down from the £100M unsecured rotating facility.
>
> 223.4. The lack of any alternative to a process of compulsory liquidation.
>
> 223.5. The immediacy of the decision to seek compulsory liquidation (implemented within hours of the final decisions of the Government and lenders).
>
> 223.6. The speed with which the High Court heard and granted the Order for compulsory liquidation.
>
> 223.7. The liquidation was total, applying to the PLC in addition to the operating subsidiaries.
>
> 223.8. The effect of compulsory liquidation, entailing the inevitable dismissal of the entire workforce."

44. Mr Reade accepts that the first three of these were considered by the tribunal. These were factors related to the cause of the insolvency on which the tribunal had, he says, focused its attention. Mr Reade submits, however, that the remaining five matters were not considered for the purposes of determining whether there were special circumstances.

45. I do not agree. Taking each of the last five factors in turn, the position appears to me to be as follows:

(a) *Lack of any alternative to a process of compulsory liquidation* - The narrowing of options available to the Board was something that the tribunal very clearly had in mind. It noted that:

> "… the Company had concluded, prior to the Board meeting [on 14 January 2018], that the only feasible insolvency process would be compulsory liquidation, as opposed to any other form of insolvency process. …" (See paragraph 207).

It was noted elsewhere that there was no funding available to support an administration, which was not, therefore, an option (see paragraphs 211 to 212). In its summary of key points demonstrating financial decline (at paragraphs 333 to 373) the tribunal referred to its earlier findings of fact, including the fact that "the course was already set for insolvency" and to compulsory liquidation (see paragraphs 371 to 373). The tribunal's conclusions, especially those at paragraph 380, made express reference to compulsory liquidation, although it too was unclear as to the precise basis of the respondents' claim.

> "380. We are not clear whether it was being suggested by the Respondents that it has to be the cause of liquidation, as opposed to any other form of insolvency, which has to be something uncommon or out of the ordinary. If this submission was being made, we do not agree that this is in accordance with the principles in **Clarks** which we have to apply. However, if we are wrong on that, the Respondents would bear the burden of proof of proving those special circumstances. We have no evidence to support a conclusion that it was something uncommon or out of the ordinary that led to compulsory liquidation, as opposed to another form of insolvency, such as administration, which might not have involved the dismissal of the entire workforce. Although there is a dearth of evidence about the corporate mind of the Company in the critical period of the last weeks preceding the liquidation, it is clear that, by 31 December 2017, at the very latest, the Company knew that it did not have the funds for administration and there was, therefore, a risk that it would go into compulsory liquidation (see paragraph 135)."

Taking the judgment as a whole, it is quite clear that not only did the tribunal have clearly in mind the respondents' case that they had little alternative to compulsory liquidation, but it also concluded that, due to a lack of evidence, the respondents had failed to establish that this amounted to a special circumstance.

(b) *The immediacy of the decision to seek compulsory liquidation (implemented within hours of the final decisions of the Government)* - This point is difficult to follow. The tribunal examined the timeline very carefully paying particular attention to the events of the weekend of 13 and 14 January 2018. It was during that period that the Government's stance was made clear (as set out at paragraphs 196 to 197). The aftermath of that stance up to the point at which the Board resolved to petition for compulsory liquidation was described in great detail by the tribunal at paragraphs 198 to 208. In doing so, the tribunal noted the absence of any direct evidence from the respondents as to when and how certain decisions were taken. The tribunal also found that compulsory liquidation was being considered even before the Government had confirmed its position (see e.g. paragraph 211). In these circumstances the tribunal was fully entitled to state: "We do not consider the events of 13/14 January can reasonably be described as "sudden intervening events"". In other words, having regard to the timeline of events and the decisions made and the lack of direct evidence for those, the tribunal was simply not satisfied that there was anything "special" about the circumstances leading to the Board's decision. That is a finding of fact that is not challenged. The contention that the tribunal did not have the "immediacy" of the decision in mind when considering whether there were special circumstances is one without substance.

(c) *The speed with which the High Court heard and granted the order for compulsory liquidation* - The timing of the application and the making of the order is referred to by the tribunal at paragraphs 209 and 215. The respondents do not make clear how this assists their case on specialness. It does not appear, for example, to have been submitted that the High Court's response was unusually speedy in the context of such urgent applications, but even if that had been the case, the tribunal's finding that the events of that weekend in January 2018 could not be described as "sudden intervening events" would be unaffected. Once the decision to seek compulsory liquidation had been made, the speed with which that decision is implemented, for example by making an application to the court and obtaining the order, is unlikely to amount to a special circumstance. It is of no great surprise that a decision to seek compulsory liquidation is made in circumstances of great urgency, and the factors relied upon as rendering this particular application "special" remain wholly unclear.

(d) *The liquidation was total, applying to the plc in addition to the operating subsidiaries* - The judgment makes it plain that the tribunal was well aware of the scale of the liquidation: see for example paragraph 135, where the tribunal considers the respondents' request to the Government for assistance and which identifies the following as key risks:

> "135. Included under the heading "Consequences if restructuring fails" was the following:
>
> "…
>
> (A) Carillion will have insufficient liquidity to continue trading, will default on its obligations to its creditors and its directors will need to place the Company into an insolvency process. Given the interdependence between Group companies, the key Group operating companies will follow the Company into insolvency immediately or almost immediately;
>
> (B) it is uncertain whether an insolvency practitioner would accept appointment as an administrator of Carillion or any of its subsidiary companies due to the lack of funding that will be available. There is

> therefore a risk that the process would be compulsory liquidation, involving appointment of the Official Receiver as liquidator. All employees would be automatically dismissed and trading would terminate.""

These passages are the subject of an express cross-reference in the tribunal's analysis of special circumstances (see paragraph 360). It cannot properly be said, in my view, that the tribunal failed to have regard to these matters when reaching its decision.

(e) *The effect of compulsory liquidation entailing the inevitable dismissal of the entire workforce* - As is apparent from the preceding subparagraph, this was a matter taken into account, both in the findings of fact made by the tribunal and in its analysis of the special circumstances defence. Moreover, at paragraph 380 the tribunal states:

> "… We have no evidence to support a conclusion that it was something uncommon or out of the ordinary that led to compulsory liquidation, as opposed to another form of insolvency, such as administration, which might not have involved the dismissal of the entire workforce. …" (Emphasis added)

The suggestion that the tribunal failed to have regard to the relevant consideration is, once again, one without any real substance.

46. Before turning to the specific grounds of appeal, I deal very briefly with Mr Brittenden's EU law point. I do not consider there to be anything in this. The European Commission brought infringement proceedings against the UK (see **Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland** [1994] IRLR 412) in which it sought a declaration that the provisions of **EPA**, including section 99 (now contained in section 188 **TULRCA**), did not correctly transpose into UK law various provisions of the Directive. The failures alleged concern the designation of employee representatives, limiting the scope of the legislation to a narrower range of dismissals than foreseen by the Directive, the failure to require a consultation with a view to reaching

agreement and ineffective sanctions. No complaint was, it would appear, made about the special circumstances defence which was in existence at that time. I accept Mr Reade's submission that had that aspect been considered to amount to a failure to implement the Directive in full, then that too would probably have been the subject of complaint. Whilst I recognise that the Commission's failure to challenge the special circumstances defence on that occasion would not of itself preclude any subsequent challenge, it does provide a useful indicator of the merits of the incompatibility challenge. Accordingly, I do not consider that Mr Brittenden's arguments based on a failure to implement the Directive or as to non-compliance with it advance his case significantly or at all.

Ground 1 - The tribunal's failure to identify the circumstances prevailing as at 14 January 2018 and to assess whether those circumstances were special.

47. As the analysis above shows, there was no such failure. The tribunal was entitled, on a proper application of section 188(7) **TULRCA**, read in accordance with the guidance of the Court of Appeal in **Clarks**, to consider the causes of insolvency. In so doing, it did not fail to consider any of the specific factors relied upon by the respondents as amounting to special circumstances. Each of those was taken into account, and the tribunal's decision that the circumstances were not special is unassailable. The tribunal did not mischaracterise the respondents' position. The respondents' case was set out in full at paragraphs 6 to 8 and 243. The fact that the tribunal, at other points in the decision, did not repeat all those factors does not mean that it had not engaged with them or had not had them in mind in determining that the circumstances here were not special. The respondents' appeal on this ground is not based on a fair reading of the entire judgment.

Ground 2 - The tribunal erred in focusing solely on the causes of insolvency.

48. Mr Reade relies here upon the tribunal's statement at paragraph 374 that "the Respondents rely on the events giving rise to the compulsory liquidation, rather than the compulsory liquidation

per se". He contends that the first part of that sentence mischaracterises the respondents' case as the respondents were relying upon matters going beyond those that simply gave rise to the compulsory liquidation. However, as stated above under ground 1, the mere fact that the tribunal, in summarising the respondents' case, did not refer expressly to all of the eight factors upon which the respondents rely does not mean that they were not taken into account. Moreover, the remaining part of paragraph 374 goes on to refer to the respondents' reliance on:

> "… sudden intervening events over the weekend of 13/14 January 2018, when a decision was taken by the Group's key stakeholders not to approve proposed short-term lending arrangements. They also refer on HMG's refusal to provide financial support for an administration process."

49. Those references certainly indicate that the tribunal had in mind the broader nature of the respondents' case in that the lack of any alternative to compulsory liquidation and the speed with which decisions had to be taken were all matters described in the narrative of the events of that weekend. Furthermore, the totality of the liquidation and the consequent dismissal of the whole workforce were expressly referred to at paragraph 380. In these circumstances, I reject the submission that the tribunal erred in its approach to the respondents' case.

50. Finally, under this ground Mr Reade contends that the tribunal overlooked the fact that it was:

> "… literally impossible for the Respondents to comply with the first requirement at s.188(2) TULRCA that consultation shall be about "*ways of avoiding the dismissals*"." (See the Respondents' skeleton argument at paragraph 68)

51. This submission appears to conflate two matters: the first is whether there are special circumstances; and the second is whether those circumstances rendered it not reasonably practicable to comply with the requirements of section 188(1A), (2) or (4) **TULRCA**. It is clear from the decision in **Clarks** that there are three distinct stages in the analysis:

> "Where, as here, the employers have admittedly failed to give the requisite 90 days' notice the burden is clearly imposed upon them, by the statute, to show that there were special circumstances which made it not reasonably practicable for them to comply with the

> provisions of the Act, and also that they took steps towards compliance with the requirements, such steps as were reasonably practicable in the circumstances. There are, it is clear, these three stages: (1) were there special circumstances? If so, (2) did they render compliance with section 99 not reasonably practicable? And, if so, (3) did the employers take all such steps towards compliance with section 99 as were reasonably practicable in the circumstances?" (See page 1214H-1215A)

52. The mere fact that a circumstance has an effect on the ability to comply with an obligation under section 188(1A), (2) or (4) **TULRCA** does not render it special. Were that not so, then the defence would be available to any employer who could point to a factor that made it difficult or impossible to comply with the obligation to consult or an aspect thereof.

53. The requirement under section 188(2) stipulates that the consultation:

> "… shall include consultation about ways of -
> (a) avoiding the dismissals,
> (b) reducing the numbers of employees to be dismissed, and
> (c) mitigating the consequences of the dismissals."

54. Mr Reade appears to be suggesting that if consultation about one of those matters is rendered impossible, then the obligation to consult about any of them falls away and/or the situation is one that could be said to be special. If that is the contention, then it is one with which I do not agree. The matters identified at (a), (b) and (c) of section 188(2) are merely those that are to be included in any consultation and are not an exhaustive list. Even if dismissal cannot be avoided in a particular instance, there is still value in consulting about mitigating the consequences thereof.

55. Furthermore, as is made clear by section 188(4) the obligation to consult includes a requirement to provide information on a wide range of matters, including the reasons for the proposed redundancy, the method of carrying out the dismissals and the method of calculating the amount of any payment. All of these matters would be highly valuable to an employee facing the distressing prospect of being made redundant, even if the fact of dismissal itself could not be avoided.

Ground 3 - The tribunal erred in treating *Clarks* as requiring it to focus solely on the cause of insolvency when considering the special circumstances defence.

56. For reasons already set out above, I do not accept that the tribunal did limit its analysis in the manner suggested.

Ground 4 - the tribunal adopted a false dichotomy between a "sudden disaster" and a "gradual run-down of the company".

57. For reasons already set out above, I do not accept that the tribunal treated the Court of Appeal's judgment in **Clarks** as providing anything other than examples of situations in which a tribunal could conclude that there were, or were not (as the case may be) special circumstances.

Ground 5 - the tribunal's errors at grounds 2, 3, and 4 are compounded by its conclusions at paragraph 380.

58. This ground is based on the alleged misapprehension of the respondents' case. The tribunal was understandably unclear as to the precise basis of the respondents' case. However, the tribunal went on in paragraph 380 to make a finding in the alternative that there was no evidence to support a conclusion that it was something uncommon or out of the ordinary that led to compulsory liquidation. As discussed above, in coming to that conclusion the tribunal clearly did have in mind all of the factors specifically relied upon by the respondents as giving rise to special circumstances.

Ground 6 - the tribunal failed to consider whether the relevant circumstances rendered it not reasonably practicable for the respondents to comply with the requirement of the collective consultation duties.

59. In my judgment there is no error of law here either. The tribunal correctly set out the questions for consideration at paragraph 325:

> "Whether there were "special circumstances" as at 14 January 2018
>
> 325. Two questions arise under section 188(7) TULCRA which are issues for this hearing: (1) were the circumstances on which the Respondents rely special; and (2) did those circumstances render it not reasonably practicable for the Respondents to comply with a relevant obligation under s.188 TULRCA? If we conclude that the circumstances were not special, then the second question does not need to be answered."

60. The final sentence of that paragraph is correct. Given the sequential analysis adumbrated by the Court of Appeal in **Clarks**, the second question only falls to be considered if the burden of showing that there were special circumstances had been discharged. Here, it was not so discharged. Accordingly, it was not necessary for the tribunal to go on and determine specifically whether there were circumstances found not to be special which rendered it not reasonably practicable to comply with the consultation duty.

61. I do, however, accept Mr Reade's submission that that sequential analysis does not involve a consideration of the first question in a vacuum. The question under the first part of section 188(7) **TULRCA** is whether "…there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4) …" Although there are two separate questions here, the causal link between the special circumstances and the particular non-compliance relied upon means that there may be situations where the latter will inform whether the circumstances relied upon are indeed special. If, for example, a data storage company suffers a catastrophic data outage involving the loss of stored client data and the loss of all contact details of remote-working employees and employee representatives, the fact that the company is unable even to contact the representatives to comply with its section 188 obligations might inform the question of whether the outage amounted to a special circumstance. On the other hand, if the data outage only affected the client data and the company was still able to contact employees, it would be open to the

tribunal to conclude that the outage, if otherwise avoidable and the result of ongoing failures, did not amount to a special circumstance.

62. In the present case there was no dispute that the respondents did not comply with its section 188 obligations (see paragraph 19). I was not taken to any part of the respondents' case (other than that the dismissals were inevitable as a result of compulsory liquidation) which suggested that a particular aspect of the collective consultation duty with which they were unable to comply could in fact inform whether the circumstances were special. In any event, as already set out above, all of the factors relied upon by the respondents were considered by the tribunal in reaching its conclusion. In so far as it has been suggested that the tribunal approached its task by considering the special circumstances issue without regard to those factors, that suggestion is without merit. In these circumstances there is no error on the part of the tribunal. Having concluded that there were no special circumstances, it was not required in the circumstances of this case to proceed to consider the second question identified in paragraph 325.

Conclusion

63. For the reasons set out above, this appeal is dismissed.