

Appeal No. UKEAT/0124/15/MC

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 11 September 2015

**Before**

**HER HONOUR JUDGE EADY QC**

**(SITTING ALONE)**

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HYDE HOUSING ASSOCIATION LTD & OTHERS

APPELLANTS

MR D LAYTON

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellants

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## **SUMMARY**

### **TRANSFER OF UNDERTAKINGS - Acquired rights directive**

### **TRANSFER OF UNDERTAKINGS - Transfer**

In circumstances where the Claimant's employment with M transferred to employment with M and the other Respondents, the ET held that there had been a relevant transfer for the purposes of Regulation 3(1)(a) **TUPE**. The Respondents appealed.

The appeal raised the following questions: Can there be a relevant transfer for **TUPE** purposes where: (1) an employee moves from an employment contract with one employer to an employment contract with several employers, including the original employer (*the joint employment issue*)? and (2) the economic entity transfers to multiple transferees, including the original transferor (*the multiple transferee - or transferor as transferee - issue*)?

#### **Held:**

Allowing the appeal. Although Regulation 3(1)(a) **TUPE** did not preclude a relevant transfer to multiple transferees, where the transferor remained liable for the Claimant's employment the situation would not fall within the protection of **TUPE** or the **ARD**. That was so as a matter of construction; it was also consistent with the protective purpose of the **ARD**, which did not extend to those cases where the employee's legal position vis-à-vis the employer was unchanged. That being so, the appeal would be allowed and the ET's decision substituted by a finding that there had been no relevant transfer for **TUPE** purposes on 1 August 2013.

Given the novelty and potential importance of the point, permission was given to the Claimant to appeal to the Court of Appeal.

## **HER HONOUR JUDGE EADY QC**

### **Introduction**

1. I refer to the parties as the Claimant and the Respondents as below, save where helpful to distinguish between the Respondents, in which case I do so by name. This the Respondents' appeal against a Reserved Judgment of the Havant Employment Tribunal (Employment Judge Bridges sitting alone on 23 to 25 June and on 26 and 27 June 2014 in chambers; "the ET"). The Claimant was represented before the ET by his wife but now has the benefit of pro bono representation by Mr Reed of the Free Representation Unit. The Respondents were and remain represented by Mr Williams of counsel, joined on this appeal by Ms Stirling of counsel. By its Judgment, the ET ruled that, on 1 August 2013, there was a relevant transfer for the purposes of the **TUPE Regulations 2006**. It is against that ruling that the Respondents appeal.

2. The appeal was initially considered on the papers by HHJ Shanks to disclose no reasonable basis to proceed. At a hearing under Rule 3(10) of the **EAT Rules 1993** before HHJ Richardson, it was permitted to proceed on the following questions: (1) can there be a relevant transfer for **TUPE** purposes where an employee moves from an employment contract with one employer to an employment contract with several employers, including the original employer (*the joint employment issue*) and (2) where the economic entity transfers to multiple transferees, including the original transferor (*the multiple transferee- or transferor as transferee - issue*)?

### **The Background Facts**

3. As from 31 January 2005, the Claimant was employed by Martlet Homes Limited ("Martlet"), as a multi-skilled decorator. Martlet is a registered provider of social housing, primarily in the South East. Repairs on Martlet's managed and owned properties - some 5,000

homes - were carried out through an internal operating entity, Martlet Build. On 28 December 2007 the Claimant was told that Martlet would join the Hyde Group, becoming a subsidiary of Hyde Housing Association Limited (“HHA”) as from 1 January 2008, but that his employment would remain with Martlet. The Hyde Group is not a separate legal entity. At the relevant time it comprised the Respondents in this case; each Respondent being a separate legal entity.

4. With effect from 1 January 2008, pursuant to a stock management agreement between Martlet and HHA of that date, Martlet (while continuing to manage its own housing stock) took over the management of some 4,500 HHA homes located in Surrey, Sussex and Hampshire, under the trading name Hyde Martlet, an internal business unit. For its part, the Hyde Group became responsible for providing centralised HR and payroll services to Martlet, and from 1 August 2008 the Claimant’s payslip changed from to show HHA as his employer and his P60 for April 2009 showed HHA’s PAYE reference number rather than Martlet’s, this being the tax code for all employees employed by the companies comprising the Hyde Group. Notwithstanding those changes the ET was satisfied there had been no relevant transfer for **TUPE** purposes in 2008: HHA was acting as Martlet’s agent in paying the Claimant’s salary; the Claimant continued to be employed solely by Martlet up to 1 August 2013.

5. During 2008, the Hyde Group decided to commence a restructure of its services. This process was given the title “One Hyde, One Vision” (“OHOV”) and took place in three stages. Those who were unsuccessful in obtaining roles in the new structure would be made redundant. Those who were successful, if not already on Hyde contracts, would be appointed on new contracts, with HHA contractual terms and conditions, and with several separate entities constituting their employer on a joint and several basis (this being to provide flexibility for the Respondents and so as to ensure pension protection for some of the employees involved).

6. On 1 April 2009 Martlet converted to an industrial and providence society with exempt charitable status. That entity became the Claimant's employer from that date.

7. The third stage of OHOV related to the restructure of Property Services, the area in which the Claimant was employed. Proposals for that part of the review were made in January 2012. On 18 July 2013 the Hyde Group wrote to the Claimant confirming an offer to the position of "Repairs Specialist - Internal". A contract of employment was enclosed which stated that his employer was to be the Hyde Group, thus meaning that he would be jointly and severally employed by all members of the Hyde Group at any time.

8. OVOH3 came into effect as from 1 August 2013. Before there had been 228 roles in two departments; now there were 178 roles. Save for the Claimant, the employees concerned signed the new Hyde Group contract and were employed jointly and severally by the Respondents as the members of the Hyde Group. The Claimant did not sign. He objected to changes in terms and conditions under the new contract, specifically the loss of a bonus. Otherwise, however, the Claimant continued working in the same planned maintenance team (for Internal Works, Kitchen and Bathroom); he carried out similar services and activities as before, with the same line managers, wearing the same Hyde Martlet uniforms and badges and driving the same vans with the Hyde Martlet logos on.

9. As from 1 August 2013, Martlet remained a subsidiary of HHA, although no longer providing services under the stock management agreement. Moreover, whilst it still (trading as Hyde Martlet, through the operation division of Martlet Build) provided repair and maintenance services to HHA (as well as on its own housing stock), that was in a smaller geographical area than before and now only involved some 3,500 units (a reduction of around 1,000).

10. By letter of 21 August 2013, the Hyde Group gave the Claimant notice of the termination of his employment with effect from 16 October 2013. He was offered re-engagement on the terms and conditions set out in the new joint contract of employment. Accepting the offer of re-engagement, the Claimant maintained his dismissal (the termination of his former contract) was unfair and reserved his right to pursue a claim in this regard. On 14 October, he signed the new contract; it formally started on 17 October 2013.

11. The Claimant subsequently lodged his claim of unfair dismissal. As a preliminary issue, the ET considered the question whether there had been a relevant transfer for **TUPE** purposes: although the Claimant would be entitled to pursue a claim of unfair dismissal whether or not **TUPE** applied, the issue was seen as relevant to the test the ET would need to apply to determine the fairness or otherwise of the dismissal.

### **The ET's Conclusions and Reasoning**

12. As to whether there was a relevant transfer on 1 August 2013, the ET first asked if there was an economic entity within the meaning of Regulation 3(2) **TUPE**. It held there was: the Kitchen and Bathroom section of the planned maintenance team in which the Claimant was employed (see the reasoning at paragraphs 81 to 82 and the conclusion at paragraph 83).

13. The question then arose whether there could be a relevant transfer when this was: (1) to more than one entity, and (2) when Martlet, the transferor, remained one of those included as a transferee. Regulation 3(1)(a) required there to be a transfer "to another person". The ET did not agree that this had to be to a single entity. The case of **Celtec Ltd v Astley** (C-478/03) [2005] ICR 1409 ECJ) concerned the date of transfer not the question raised by this case. Here responsibility for carrying out the business of the unit transferred had changed from Martlet to

Martlet and the other members of the Hyde Group, the Respondents. This could constitute a relevant transfer. In reaching this conclusion, the ET noted that if Martlet dropped out of the Hyde Group, the Claimant's employment would remain with the remaining members because he was employed by each member of the group on a joint and several basis.

14. The ET was further satisfied that the economic entity of Kitchens and Bathrooms retained its identity after 1 August 2013 (see its reasoning at paragraphs 90 and 91).

15. The ET rejected the Claimant's alternative case that there had been a service provision change on 1 August 2013; he had not discharged the burden of proof upon him in that regard.

#### **The Relevant Legislative Provisions and Case Law**

16. This case is concerned with the **Transfer of Undertaking Protection of Employment Regulations 2006** (SI 2006/246, "TUPE"), by which the UK has sought to implement Council Directive 2001/23/EC, the **Acquired Rights Directive 2001** ("the **ARD 2001**"). It is common ground that in such circumstances national Courts and Tribunals should interpret domestic law, so far as possible, in the light of the wording and purpose of the relevant Directive in order to achieve the result pursued by that Directive (**Marleasing SA v La Comercial Internacional de Alimentación** C-106/89 [1990] ECR I-4135, ECJ).

17. The **ARD 2001** replaced the earlier Council Directive 77/187/EEC - the **ARD 1977**.

18. The origin of the **ARD 1977** is to be found in a proposal first made by the EC Commission on 21 June 1974. Acknowledging what it described as a "growing trend towards link-ups" in respect of amalgamations between undertakings, the Commission observed that the



need had arisen for the provision at community level of an adequate legal framework; specifically there was a need for a provision to address the “problems confronting employees in cases where a change has come about in the structure of their undertakings”.

19. The Commission’s explanatory memorandum on the provisions of the proposed Directive stated (in relation to Article 1):

**“Included in its scope as structural changes in undertakings are mergers and takeovers, for which the common criterion is a change of employer which could have repercussions on existing employment relationships. The proposed Directive defines the concept of mergers not by laying down a definition of its own but by reference to the laws, regulations and administrative provisions for the Member States and to Community law. ...**

**The definition of a takeover covers all kinds of legal disposals, i.e. not only transfers of property but also letting, leasing and the granting of usufruct. Furthermore, this definition is intended to include not only all those cases in which entire undertakings are transferred but also those in which individual establishments are transferred from one undertaking to another.”**

20. It further observed (in commenting on proposed Article 4) that:

**“The aim of this proposed Directive ... is the maintenance of the employment relationship ...”**

21. An early proposal (see the Commission’s amended proposal of July 1975) for the extension of the protection to include “concentrations between undertakings” where one undertaking gained control of another, albeit that the legal identity of the employer did not change (so, for example, a change in control by means of share ownership) did not make its way into the **ARD 1977**. Other aspects of the Commission’s proposals were, however, included, notably, the notion that the Directive should apply in cases where one person has relinquished an interest and another has acquired such an interest.

22. Before I turn to the language of the **ARD**, it is of some relevance that in June 2007 the Commission revisited the question whether the **ARD** should extend to cases where there was a change in control but no change in the legal personality of the employer, specifically arising

from a change in share ownership. It considered it was unnecessary to make such an extension as the employee's legal position, vis-à-vis the employer, was unchanged (see the European Commission report on Council Directive 2001/23/EC dated 18 June 2007).

23. Returning then to the **ARD**, the protective nature of the Directive was the subject of specific expression in the preamble to the **ARD 1977** and these (so far as material for the purposes of this appeal) are replicated in preamble to the **ARD 2001**, which expressly recognises the need to “provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded”.

24. Under the heading “Scope and definitions”, Article 1 of the **ARD 2001** provides:

“(a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.”

25. At Article 2, it is provided:

“1. For the purposes of this Directive:

(a) ‘transferor’ shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business;

(b) ‘transferee’ shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the undertaking or business;

...”

26. Under the heading “Safeguarding of employees’ rights”, Article 3(1) provides:

“1. The transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.”

27. Initially the UK implemented **ARD 1977** by means of the **Transfer of Undertakings Protection of Employment Regulations 1981**. These have since been replaced by **TUPE 2006**, which relevantly provide (under the heading “Interpretation”), at Regulation 2:

“(1) In these Regulations -

...

“relevant transfer” means a transfer or a service provision change to which these Regulations apply in accordance with regulation 3 and “transferor” and “transferee” shall be construed accordingly and in the case of a service provision change falling within regulation 3(1)(b), “the transferor” means the person who carried out the activities prior to the service provision change and “the transferee” means the person who carries out the activities as a result of the service provision change.”

28. Under the heading “A relevant transfer”, at Regulation 3(1)(a) it is provided:

“(1) These regulations apply to -

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity”

29. There is separate provision under Regulation 3(1)(b) for a transfer to be effected by means of a service provision change. That is a domestic addition which does not derive from EU law. That said, as the Respondent has submitted, it seems unlikely that Parliament intended the terms of “transferor” and “transferee” to have different meanings as between transfers for the purposes of Regulation 3(1)(a) and those for the purposes of Regulation 3(1)(b).

30. Under the heading “Effect of relevant transfer on contracts of employment”, by Regulation 4(1) and (2) it is then provided as follows:

“(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6) ... on the completion of a relevant transfer -

(a) all the transferor’s rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.”

31. I turn then to the case law. It is right to say that the language used in some of the European cases echoes the wording of the **ARD 1977** and **ARD 2001** and assumes that one employer has ceased to employ the employee - has relinquished the employment - and that a new employer now stands in its place, having acquired the interest. Thus, in **Landsorganisationen i Danmark v Ny Molle Kro** [1989] ICR 330, the ECJ said:

“12. It follows from the preamble and from those provisions that a purpose of the Directive is to ensure, so far as possible, that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor. The Directive is therefore applicable where, following a legal transfer or merger, there is a change in the legal or natural person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer vis-à-vis employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred. Employees of an undertaking whose employer changes without any change in ownership are in a situation comparable to that of employees of an undertaking which is sold, and require equivalent protection.”

32. Although strictly concerned with the date of a transfer, in **Celtec Ltd v Astley** the ECJ seemed to lay emphasis on the need for a moving of responsibility as employer from one entity to another for a transfer to arise:

“36. In those circumstances, the term “date of a transfer” in article 3(1) of Directive 77/187 must be understood as referring to the date on which responsibility as employer for carrying on the business of the unit in question moves from the transferor to the transferee.”

33. Further, in the context of a transfer between two subsidiary companies in the same group, it was emphasised that they were distinct legal personalities, each with specific employment relationships with their employees, thus meaning that there was a legal change in the person of the employer in such circumstances, see **Allen & Others v Amalgamated Construction Co Ltd** [2000] ICR 436 ECJ:

“16. The Directive is therefore applicable where, following a legal transfer or merger, there is a change in the natural or legal person responsible for carrying on the business who by virtue of that fact incurs the obligations of an employer vis-à-vis employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred: *Landsorganisationen i Danmark v Ny Molle Kro* (Case 287/86) [1989] ICR 330, 338, para. 12,

and *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S (Tellerup's Case)* (Case 324/86) [1988] ECR 739, 752, para. 9.

17. It is thus clear that the Directive is intended to cover any legal change in the person of the employer if the other conditions it lays down are also met and that it can, therefore, apply to a transfer between two subsidiary companies in the same group, which are distinct legal persons each with specific employment relationships with their employees. The fact that the companies in question not only have the same ownership but also the same management and the same premises and that they are engaged in the same works makes no difference in this regard.”

34. Cases before the domestic Courts have generally made the same assumption: a change in the identity of the employer is usually necessary in order for a transfer to arise. Thus it is that **TUPE** will not apply to a share sale because the identity of the employer remains the same (**Brookes & Others v Borough Care Services Ltd** [1998] ICR 1198). That said, it has been allowed that even absent a legal change of ownership, there may still be a **TUPE** transfer in certain circumstances where day to day control of the employer's business has been transferred as a matter of fact (**Print Factory (London) 1991 Ltd v Millam** [2007] ICR 1331 CA).

35. The Court of Justice has also held that it is possible for employees within a group structure to gain the protection of the **ARD** when the business for which they work is transferred out of a group company even if they were legally employed under a contract of employment not by the company running the business, to which they had been seconded, but by another company within that group, see **Albron Catering BV v FNV Bondgenoten** [2011] ICR 373 ECJ). In that case the Court of Justice opined that the protection of the **ARD** could extend not just to cases where there was a contract of employment but also to cases where it could be said there was an employment relationship even if not governed by direct contract (see paragraphs 23 to 26). In such cases it considered the transferor to be the party which by reason of the transfer had lost the capacity of employer (see paragraph 21).

## **Submissions**

### *The Respondent's Case*

36. The Respondent's case was founded upon four main propositions: (1) transfer to another person means to a separate legal person; (2) the transferee must, thus, be a separate person and could not be the transferor; (3) rights and liabilities could not transfer if the transferor remained responsible; and (4) there had to be a complete transfer from one entity to another, not to several entities. If, contrary to those submissions, the ET and the Claimant were right, the legislative language would need to be very different and the Court should consider making a reference to the Court of Justice. This was a point of some importance, particularly in the housing sector where such arrangements were not uncommon.

37. Turning to the provisions of **TUPE**, Regulation 3(1) required the transfer to "another person" who replaced the original employer in its entirety. "Another" should be read as a separate, different person or employer (as that concept was broadly understood in EU law, which might include a non-contractual employer). It envisaged a complete transfer of an undertaking or a complete cessation in providing the service by the previous provider: the transferor could not be the transferee.

38. In the joint employment situation in this case, the employee continued to work for his old employer; the pre-transfer employment relationship continued but with additional employers. Regulation 2(1) provided for a separate transferor and transferee. The use of the past tense - to the transferor having "carried out" the activities - was consistent with an interpretation that responsibility for the undertaking must pass completely to another person.

39. This approach was consistent with EU law. The Commission's original proposal for the **ARD** made clear that the protection was to be afforded in the context of a change of employer. It was to address the mischief where employment relationships were not continued, where the previously employing entity ceased to employ the employee and was replaced by another. That approach - stressing the need for a change in the identity of the employer - informed the drafting of the **ARD** in 1977 and 2001 and, thus, the domestic implementation of those Directives in the form of **TUPE**. The protection did not extend to all changes in control, such as a change in control arising from a change in share ownership; that was considered unnecessary because the employee's legal position vis-à-vis the employer was unchanged.

40. Whilst not directly on point, the language used in European and domestic case law supported the view that the protection of the **ARD** and **TUPE** only extended to those cases where the original employer had ceased to employ the employee. That was not this case: Martlet remained an employer; the employment relationship was preserved. Martlet remained responsible for rights and liabilities arising from the Claimant's terms and conditions under his contract. There had been no transfer to another; Martlet had neither ceased to be the employer nor lost capacity as such. No transfer could take place unless the existing employment relationship, the protection of which was sought, ceased. That did not happen here.

41. There was, further, no complete transfer of rights and liabilities. The employer's responsibility could not move to another entity if part of that responsibility remained in the transferor. The transferee - Hyde - did not inherit the rights and liabilities for **TUPE** purposes.

42. Furthermore, on the ET's findings, this was not a case such as **Print Factory v Millam**, where day to day control of the entity had transferred. On the contrary, the business continued

as before: Martlet provided stock management services as before with the same control. If Martlet were to leave Hyde at a later stage it might remain the Claimant's employer or the employment relationship between it and the Claimant might cease. In the latter case, there might then be an argument that the Claimant's employment then transferred to the remaining Hyde entities, but that situation had not arisen. Here there had been no termination of any existing employment relationship, only the creation of new employment relationships.

### *The Claimant's Case*

43. The question raised by the appeal was whether there could ever be a **TUPE** transfer where one of the employers is both transferor and transferee. The short answer to that question was: why not? The situation might be novel but there was no principled reason why it should not be the case.

44. Standing back, the facts showed the Claimant was entitled to the protection of the **ARD** and **TUPE**. He had started being employed by one organisation, Martlet. That entity later amalgamated with a larger organisation. As a result the Claimant was dismissed and then re-engaged on less favourable terms.

45. There was a need to read the **ARD** and **TUPE** purposively. The Court would not be assisted by an overly technical approach to the wording of the Commission's original proposals. Although Article 2 of the **ARD** did not anticipate an employer might be both transferor and transferee (it spoke in terms of the transferor ceasing to be the employer and the transferee becoming the employer), it had to be read in context, in particular of the wider remit of Article 1. In any event, the Claimant was relying on domestic law, which could give wider protection.



46. The Respondent's argument was absolute: there could never be a transfer where an employer was both transferor and transferee. That went against what the more pragmatic approach to be adopted under **TUPE**, which made this a fact-specific exercise for the ET.

47. Finally, when Regulation 3(1)(a) referred to "another person", the singular here should be read (as appropriate) as including the plural: unless the contrary intention appeared, words of the singular would include the plural. There was no reason in principle why the same person should not be on both ends of the transfer. This might be unusual but the facts of this case were. All that was required was that there had to be an element of change and there plainly was in this case. **TUPE** then left the question to the ET and the EAT should not interfere with the assessment the ET had carried out on the facts of the case.

### **Discussion and Conclusions**

48. I start with the language of **TUPE**, the protection under which is stated to apply where there is a transfer of an undertaking (or part) to "another person", Regulation 3(1)(a).

49. The Respondent contends that this cannot allow for a transfer to multiple transferees. I do not agree. The issue will inevitably be fact-specific, but I cannot see that there is any principled reason why the singular in this instance should not be read as including the plural; "to another person" might equally allow for a transfer "to other people". If the economic entity in which the Claimant was employed had transferred from Martlet to the other Respondents (grouped together under the umbrella of the Hyde Group), who thus became the employer on a joint and several basis, I am not persuaded that could not give rise to a relevant transfer for Regulation 3(1)(a) purposes. That reading of Regulation 3(1)(a) seems to me to be supported by the wording and purpose of the **ARD 2001** and the preceding **ARD 1977**, provided such a

transfer does not result in such fragmentation of the entity as to mean it loses its identity. It is an interpretation consistent with the protective nature of the **ARD**.

50. Here, however, one of the multiple transferees that my analysis would allow is the same legal entity as the original employer and transferor. More than that, that original transferor continues to be liable to its employees; that is the consequence of its several liability. The situation is unusual (although apparently not so unusual in this particular sector). The question is whether it falls outside the scope of **TUPE** protection.

51. The reference to “another person” in Regulation 3(1)(a) might suggest that a distinct legal entity is indeed required. The Claimant would say, however, that on a practical level that is this case. He is no longer employed by Martlet acting by itself but by Martlet joined together with others. Taking a “real world” view, he submits that this is “another person”.

52. Whilst I can see the point the Claimant makes, there is a difficulty in continuing with that approach when considering other aspects of the Regulations. Thus, Regulation 4 - looking at the effect of a relevant transfer on contracts of employment - assumes a difference in identity as between the transferor and the transferee. Moreover, in defining these terms for the purposes of a service provision change transfer, Regulation 2(1) talks in terms of the transferor as the entity that had carried out the activities before the change, as distinct from the person (the transferee) carrying out those activities as a result of the change. Whilst that part of the definition is specific to service provision transfers, it is unlikely that it was intended that there should be a different approach to these terms for the purpose of Regulation 3(1)(a) transfers.

53. I can see that one might need to avoid an overly-technical approach to the identification of “another person” for these purposes. There can be cases (**Print Factory v Millam**) where the factual reality is different to that which might appear from the legal labels that have been used. There may also be cases where caution needs to be adopted before assuming that the identification of the employer is that set out by the contract (**Albron Catering**; albeit the approach adopted in that case may give rise to difficulties for UK employment law). The facts with which I am concerned do not, however, give rise to the same issues.

54. The control of the business (or relevant part) remained, on the ET’s findings, in the hands of Martlet. That reality did not change. The Claimant’s employment relationship also remained with Martlet. The earlier changes to pay arrangements had not changed that and there is nothing in the ET’s findings to suggest this reality was subsequently altered other than by the contractual addition of the other Respondents as jointly and severally liable for his employment.

55. On its face, the language of **TUPE** thus suggests that the transferor and the transferee must be different. Does that provide effective implementation of the **ARD**?

56. I turn, therefore, to the language and purpose of the **ARD**. It is clear that the **ARD** was intended to protect employees and to safeguard their rights, but that is in circumstances where there is a change of employer (see the preamble), where one natural or legal person has ceased to be the employer (Article 2(1)(a)) and where there is a transferee, a natural or legal person which has become the employer (Article 2(1)(b)). That these are envisaged to be different entities is apparent from Article 3, which specifically allows Member States to provide for the transferor and transferee to have joint and several liability, a concept consistent with these otherwise being separate legal entities

57. Moreover, the policy decision has been taken not to extend the protection of the **ARD** to all cases where there is a change; thus it does not extend to cases where there is a change in control by means of a change in shared ownership. It does not do so because the employee's legal position vis-à-vis the employer is unchanged.

58. In my judgment, it is that principle which ultimately provides the answer in this case: Martlet retains liability for the Claimant's employment; that legal position remained unchanged. That Martlet's liability is now on a joint and several basis with the other Respondents does not change the position relevant to the Claimant. The identity of his employer has not changed in a way that is legally relevant for **TUPE** purposes, whether taking the word of the Regulations on their face or reading them in the light of a purposive construction derived from EU law.

59. For those reasons, I allow the appeal and substitute my decision for that of the ET such as to hold that there was no relevant transfer on 1 August 2013. Given the unusual nature of the point, the lack of previous authority and the potential wider importance of the question, I grant the Claimant permission to appeal.