Appeal No. UKEAT/0321/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 9 January 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

OTTIMO PROPERTY SERVICES LIMITED — APPELLANT

(1) MR G DUNCAN
(2) WARWICK ESTATE PROPERTIES LIMITED — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANTHONY KORN (of Counsel) Instructed by: Judicium Consulting Limited 3700 Parkway Solent Business Park Whiteley PO15 7AL
For the First Respondent	MR RICHARD OWEN-THOMAS (of Counsel) Instructed by: Lyons Davidsons Solicitors Victoria House 51 Victoria Street Bristol BS1 6AD
For the Second Respondent	MISS KATHERINE REECE (Representative) Peninsula Business Services Ltd Legal Services 2 Cheetham Hill Road Manchester Greater Manchester M4 4FB

SUMMARY

TRANSFER OF UNDERTAKINGS - Service Provision Change

Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")

Regulation 3(1)(b) - service provision change ("SPC") - "the client"

The appeal raised a novel point: whether "a" or "the" client, for the purpose of a SPC transfer under Regulation 3(1)(b) was to be understood solely in the singular or whether it could allow for there to be (providing they remain identical) more than one client.

Although the identification of "the client" for the purposes of Regulation 3(1)(b) **TUPE** has been the subject of earlier consideration in the case-law (see **Hunter v McCarrick** [2013] ICR 235 (in the EAT, [2012] ICR 533) and **SNR Denton UK LLP v Kirwan** [2012] IRLR 966), none of the earlier cases had to address, on their particular facts, the question whether - allowing no changes in the end users ("clients") before and after the SPC - the singular should not include the plural for these purposes.

Without adopting a "purposive approach", but applying section 6 of the **Interpretation Act 1978**, the relevant question was whether a contrary intention should be discerned, such that the words expressed in the singular under Regulation 3(1)(b) **TUPE** are, contrary to the normal rule, not to be read as including the plural?

Without considering the approach laid down by the **Interpretation Act**, the ET assumed that it must interpret "client" as requiring one single legal entity; the existence of a number of legal entities as clients - even if remaining identical before and after the change in service provision - meant that there could be no SPC transfer.

Held (allowing the appeal):

The ET had erred in adopting such a strict view in this context. There was no reason in principle why "the client" must be a single legal entity for these purposes; why, for example, might the SPC not involve a contract for the provision of particular services drawn up between a contractor and a group of persons who are collectively defined as "the client" under that contract? Allowing that that might be so, the regulation did not evidence an intention that the singular should not encompass the plural for these purposes. The identity of the client or clients must remain the same before and after the SPC but might involve more than one legal entity, subject to the caveat that it would still need to be possible to discern the intention of the client for the purposes of Regulation 3(3)(a)(ii) **TUPE**. Intention for Regulation 3(3)(a)(ii) purposes would be easier to discern where those entities had evinced common intention by entering into a contract together and would, no doubt, be harder to demonstrate where there was no such umbrella contract. The absence of one single contract would, however, not necessarily be fatal to the finding of some link - some commonality - between the clients in question, so as to allow the identification of intention for those purposes.

The ET in this case did not consider this question. It took the view that there was no SPC because there was no single client. It erred in so doing. It does not require a purposive construction to allow that the use of the singular "client" under Regulation 3(1)(b) includes the plural, "clients". That is not to say that the client or clients do not have to retain their identity before and after the SPC - they do. It is also a requirement that they are sufficiently linked so as to permit the ascertainment of a common intention for Regulation 3(3)(a)(ii) purposes. Otherwise, however, the existence of more than one legal entity and possibly even more than one contract will not necessarily be fatal.

The appropriate course would be to remit this matter back to the same ET (to the extent that it is practicable) to reconsider the question whether there was an SPC.

Upon Ottimo applying for costs (recovery of fees) under Regulation 34A(2A) **EAT Rules 1993** (as amended). Noting the guidance laid down by Langstaff P in **Look Ahead Housing and Care Ltd v Chetty and Eduah** UKEAT/0037/14/MC, it was relevant to have regard to those aspects of the original appeal that had not been successful (five of the original six grounds) and to the steps taken (or not taken) by Ottimo to avoid the need to pursue all aspects of this appeal (Warwick having suggested that it might have been in agreement with the matter being remitted to the ET). In these circumstances, the just award would be for Warwick to pay £1,000 towards Ottimo's costs incurred by way of fees in this case.

HER HONOUR JUDGE EADY QC

Introduction

1. In this Judgment I refer to the parties by name. The appeal is that of Ottimo Property Services Ltd ("Ottimo"), the First Respondent before the Employment Tribunal ("the ET"). The appeal is against the Judgment of the East London ET (Employment Judge Oliver sitting with members on 24-25 October 2013 and, in chambers, on 29 November 2013), sent to the parties on 2 December 2013 and holding that there was no relevant transfer under **TUPE** from Ottimo to the Second Respondent, Warwick Estate Properties Ltd ("Warwick").

2. Mr Duncan, the Claimant below, was represented before the ET and on this appeal by Mr Richard Owen-Thomas of Counsel. Ottimo was similarly represented below and before me by the same Counsel, Mr Korn. The ET records that Warwick appeared before it in person; before me it had the benefit of representation by Miss Reece of Peninsula Business Services Ltd.

3. The ET having determined, relevantly, that there was no transfer from Ottimo to Warwick for **TUPE** purposes, liability for Mr Duncan's unfair dismissal and other claims lay with Ottimo. Ottimo appeals against that Judgment, specifically against the determination that there was no service provision change ("SPC") transfer for the purposes of Regulation 3(1)(b) **TUPE**. Mr Duncan supports Ottimo's appeal. It is resisted by Warwick.

The Background Facts

4. On 1 May 2007 Mr Duncan was employed as a Site Maintenance Manager by a company called Chainbow Ltd ("Chainbow"); he was based at Britannia Village ("BV"), an estate which comprises different blocks of residential housing; each block ("BV1", "BV2" and so on) with a

separate residents' management company; each such company constituting a separate legal entity. There is also a separate general management company which dealt with the common parts of the estate (pathways, parking areas etc), "BVG". As at 2007, Chainbow had contracts to provide property management services at BVs 1-10, BV12 and for BVG. Each was a separate contract with the separate management company. BV11 had entered into a property management contract with a different entity.

5. In the period 2009-2011, property management contracts for BVs 4, 8 and 10 moved from Chainbow to another company, leaving Chainbow with contracts to provide property management services with BVs 1, 2, 3, 5, 6, 7, 9 and 12, and with BVG.

6. On 1 February 2012, a company called Trinity Estates ("Trinity") acquired the residential property department of Chainbow and sub-contracted the on-site property maintenance work to Ottimo. The Mr Duncan's employment was treated as having transferred from Chainbow to Ottimo, all concerned agreeing at the time that this was by operation of **TUPE**.

7. In early 2012, the management contracts for BVs 2 and 9 and for BV12 moved to other companies. Ottimo was left providing property maintenance services to BVs 1, 3, 5, 6, 7, 10 and BVG. For Mr Duncan, however, things continued as before: he still worked out of an office on the BV estate, with enough work to keep him occupied.

8. In the period May to August 2012, Warwick acquired the property management contracts for BVS 1, 3, 5, 6 and 7. On 17 May 2012, Warwick employed a Mr D'Alessandri as a Property Manager to work at BV in anticipation of potential contracts from the BVs as well as the BVG contract. Mr D'Alessandri took up his duties as from 25 June 2012. Warwick did not

think it was obliged to consider Mr Duncan for this position, having been advised that **TUPE** did not apply in these circumstances. Warwick otherwise engaged contractors or subcontractors to carry out on-site maintenance work; it did not use an on-site employee to carry out that work.

9. On 19 July 2012, Mr Duncan was dismissed. Having been told he should have transferred to Warwick, he received his P45 from Ottimo. He was never actually employed by Warwick.

The ET Proceedings and Reasons

10. The ET considered first whether there had been a transfer of an undertaking or business (or part) between Ottimo and Warwick for the purposes of Regulation 3(1)(a) **TUPE**. It found it was unclear what Mr Duncan, and Ottimo were putting forward as the applicable economic entity; it could not simply be property management or maintenance at BV, Chainbow had never held all the contracts for that work and, immediately before the putative transfer, held only seven out of a possible 13 contracts. In any event, there was no transfer of an economic activity which retained its identity; there was no transfer of assets or employees and no deliberate refusal to take on staff so as to avoid **TUPE**. Some factors might suggest a transfer but, overall, these did not indicate the transfer of an economic activity. The ET also expressed concern that any such entity had effectively fragmented over time in any event. There had been a group of property management contracts held by Chainbow but most had moved elsewhere over time.

11. The ET then looked at the possibility of a transfer under Regulation 3(1)(b)(ii): whether there was a SPC in which activities ceased to be carried out by one contractor on a client's behalf and were instead carried out by a subsequent contractor on that client's behalf. Here the

two contractors were Chainbow and Warwick. The client was each of the BVs 1, 3, 5, 6 and BVG, which were separate legal entitites which had entered into separate contracts albeit that:

> **"… There may well have been a service provision change in relation to each individual contract with each BV and BVG …" (paragraph 60)**

In the circumstances the ET concluded:

> **"61. However, this must be a series of individual service provision changes. It is not permissible for a number of contracts with different clients to be added together to make one overall service provision change. Recent cases have made it clear that [this] section of TUPE is to be given a literal interpretation. The relevant wording … clearly refers to "a client" and "the client" throughout, which means [that] a single client is being referred to - not a group of two or more clients."**

12. In the alternative, the ET considered whether, immediately before any SPC, there had been an organised grouping of employees which had as its principal purpose the carrying out of the activities concerned on behalf of the client. It answered that question in the negative. Allowing that each individual property management contract that moved to Warwick may have constituted an individual service provision change, it did not find that there was any organised grouping of employees which had as its principal purpose the carrying out of the activities for that single client: i.e. BV 1, 3, 5, 6, 7 or BVG. Mr Duncan's principal purpose was not the carrying out of maintenance work for any one of those clients. On a literal interpretation of Regulation 3(1)(b)(ii) he could not rely on a group of clients, so there could be no SPC.

13. The ET also held that Mr Duncan had not been assigned to a group of resources or employees which had transferred to Warwick because, again, there was no transfer of an economic entity and no SPC; he had not been assigned to any one of the contracts.

The Appeal

14. The Notice of Appeal initially set out six potential grounds of appeal. The first five sought to take issue with the ET's conclusion under Regulation 3(1)(a) of **TUPE** that there was

no transfer of an undertaking or business or part thereof. The sixth ground contended that the ET misdirected itself in relation to the true meaning of "client" in respect of Regulation 3(1)(b) **TUPE** and in its application of **Hunter v McCarrick** (see below) and in failing to consider whether there was a transfer from Ottimo to Warwick pursuant to Regulation 3(1)(b)(ii).

15. Initially, considering the matter on the papers, HHJ Peter Clark took the view that it disclosed no reasonable basis of appeal. At the subsequent hearing under Rule 3(10) of the **EAT Rules 1993**, HHJ Richardson was persuaded that the appeal was arguable on the Regulation 3(1)(b)(ii) SPC point. His summary reasons for allowing the appeal to proceed on this basis are instructive, and I set them out in full:

> **"I had no difficulty rejecting the appeal as regards section 3(1)(a), but I thought the appeal as regards the "silver plated" section 3(1)(b)(ii) was arguable.**
>
> **In this case activities under six contracts transferred from one contractor to another at about the same time (there appear to be no findings as to precisely how this came to happen). The clients were not the same but they were closely linked - management companies for different aspects of the same large estate. The EJ was prepared to accept that there may have been a service provision change in respect of each contract (see paragraph 60), but not that they could be aggregated.**
>
> **I think this is at least arguable. It does not require a purposive construction of a statute to find that the singular includes the plural - this is the starting point. I think there are probably quite a lot of circumstances where multiple service users (tenants in commercial premises and so forth) group together to commission activities - and it may be a matter of chance whether they do so under one contract made through an agent (in which case, who is the client for the purposes of TUPE?) or through different contracts made at the same time. If there is an identifiable set of "activities", procured and transferred at the same time by service users who are in practice linked, is it a bar to the operation of section 3(1)(b) that there is more than one service user?"**

The Legal Principles

16. The relevant provisions of the **TUPE** Regulations are as follows:

> **"3. A relevant transfer**
>
> **(1)These Regulations apply to-**
>
> **…**
>
> **(b) a service provision change, that is a situation in which -**
>
> **(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");**

> **(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or**
>
> **(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf.**
>
> **…**
>
> **(3) The conditions referred to in paragraph (1)(b) are that -**
>
> **(a) immediately before the service provision change -**
>
> **(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;**
>
> **(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and**
>
> **(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use."**

17. As the EAT (HHJ Burke presiding) recognised in **Metropolitan Resources Limited v Churchill Dulwich Ltd (In Liquidation) and others** [2009] ICR 1380, at paragraph 26:

> **"26. … the introduction in the 2006 Regulations of the concept of a transfer of undertaking by service provision change was intended to remove or at least alleviate the uncertainties and difficulties created, in a variety of familiar commercial settings, by the need under the 1981 Regulations to establish a transfer of a stable economic identity which retained its identity in the hands of the alleged transferee, particularly in the case of labour-intensive operation, by including within the definition of a transfer of undertaking situations falling within regulation 3(1)(b) in which the conditions set out in regulation 3(3) were satisfied. The three situations falling within regulation 3(1)(b) can shortly be described as outsourcing (regulation 3(1)(b)(i)), in-sourcing (regulation 3(1)(b)(iii)), and change in the provision of activities or services carried out on behalf of a client between one contractor and another (regulation 3(1)(b)(ii)). All these situations are well known to employment lawyers to have caused problems under the 1981 Regulations. The introduction of regulation 3(1)(b) enables a transfer to be established in any of those three situations if the activities previously carried out by client or contractor have ceased to be so carried out and, instead, are carried out by a contractor or a new contractor or by the client."**

18. Recognising that background the EAT did not, however, accept that imported a requirement that Regulation 3(1)(b) should be given a purposive construction as a result. As HHJ Burke QC continued:

> **"27. "Service provision change" is a wholly new statutory concept. It is not defined in terms of economic entity or of other concepts which have developed under the 1981 Regulations or by Community decisions upon the Acquired Rights Directive prior to April 2006 when the new Regulations took effect. The circumstances in which service provision change is established are, in my judgment, comprehensively and clearly set out in regulation 3(1)(b) itself and regulation 3(3); if there was, immediately before the change relied upon, an organised**

grouping of employees which had as its principal purpose the carrying out of the activities in question, the client intends that those activities will be carried out by the alleged transferee, other than in connection with a single specific event or a task of short term duration, and the activities do not consist totally or mainly of the supply of goods for the client's use, and if those activities cease to be carried out by the alleged transferor and are carried out instead by the alleged transferee, a relevant transfer exists. In contrast to the words used to define transfer in the 1981 Regulations the new provisions appear to be straightforward; and their application to an individual case is, in my judgment, essentially one of fact.

28. In this context there is, as I see it, no need for an employment tribunal to adopt a purposive construction as suggested by Mr Cooper, as opposed to a straightforward and common sense application of the relevant statutory words to the individual circumstances before them; but equally and for the same reasons there is no need for a judicially prescribed multi-factorial approach, as advanced by Mr Bourne, such as that which has necessarily arisen in order to enable the tribunal to adjudge whether there was a stable economic entity which retained its identity after what was said to be a transfer falling within what is now regulation 3(1)(a).

29. In a case in which regulation 3(1)(b) is relied upon, the employment tribunal should ask itself simply whether, on the facts, one of the three situations set out in regulation 3(1)(b) existed and whether the conditions set out in regulation 3(3) are satisfied.

30. The statutory words require the employment tribunal to concentrate upon the relevant activities; and tribunals will inevitably be faced, as in this case, with arguments that the activities carried on by the alleged transferee are not identical to the activities carried on by the alleged transferor because there are detailed differences between what the former does and what the latter did or in the manner in which the former performs and the latter performed the relevant tasks. However, it cannot, in my judgment, have been the intention of the introduction of the new concept of service provision change that that concept should not apply because of some minor difference or differences between the nature of the tasks carried on after what is said to have been a service provision change as compared with before it or in the way in which they are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor. A common sense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided, as was adopted by the tribunal in the present case. The tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the tribunal on the evidence in the individual case before it."

19. HHJ Burke QC's observations as to there being no need for a purposive to Regulation 3(1)(b) **TUPE** were subsequently approved by the Court of Appeal in **Hunter v McCarrick** [2013] ICR 235 (see per Elias LJ at paragraphs 22 to 23):

"22. I do not dispute that there may be issues where a purposive interpretation is appropriate with respect to service transfer provisions and where the courts should approach matters as they would similar issues relating to transfers of undertakings. For example, it may be necessary not to be too pedantic with respect to the question whether the activities carried on before and after the transfer are sufficiently similar to amount to the same service; or to take a broad approach to the question whether an employee is employed in the service transferred: see *Kimberley Group Housing Ltd v Hambley* [2008] ICR 1030. But I agree with Judge Burke QC that there is no room for a purposive construction with respect to the scope of regulation 3(1)(b) itself. So far as that is concerned, there is in my view no conflict between a straightforward construction and a purposive one: the natural construction gives effect to the draftsman's purpose. There are no underlying EU provisions against which the statute has to be measured. The concept of a change of service provision is not complex and there is no reason to think that the language does not accurately define the range of situations which the draftsman intended to fall within the scope of this purely domestic protection.

23. I agree with the comment of Underhill J (President) giving judgment for the Employment Appeal Tribunal in *Eddie Stobart Ltd v Moreman* [2012] ICR 919, para 19, when he said, with respect to identifying whether there is a relevant transfer:

> **"No doubt the broad purpose of TUPE is to protect the interests of employees by ensuring that in the specified circumstances they 'go with the work' (though the assumption that in every case that will benefit, or be welcome to, the employees transferred is not universally true). But it remains necessary to define the circumstances in which a relevant transfer will occur, and there is no rule that the natural meaning of the language of the Regulations must be stretched in order to achieve transfer in as many situations as possible." "**

20. In **Hunter v McCarrick**, the commercial property management services in question were originally provided in-house by, and for the benefit of, the Waterbridge Group of companies. There was an initial SPC to WCP Management Ltd, which then provided the services in question for the Waterbridge Group as its client. When the mortgagee, Aviva, appointed receivers to assume control of the properties in question, there was a further SPC from WCP Management Ltd to Mr Hunter, who then ensured that the services were provided for the benefit of Aviva and/or the receivers. Mr McCarrick actually carried out the management services and had transferred first from the employment of Waterbridge to that of WCP Management Ltd and then from that company directly into the employment of Mr Hunter. When he was subsequently dismissed, he claimed that he had sufficient continuity of service to bring an unfair dismissal claim because his employment had been the subject of relevant transfers for Regulation 3(1)(b) **TUPE** purposes. The ET agreed, but the EAT allowed Mr Hunter's appeal: the client for the property management services had changed, and the reference to "the client" in Regulation 3(1)(b)(ii) must refer back to a specific client (see [2012] ICR 533 per Slade J). Specifically (see paragraphs 27 and 28), it ruled:

> **"27. In our judgment "the client" in regulation 3(1)(b)(ii) refers back to a specific client. The specific client referred to earlier in the provision is the client on whose behalf the transferor contractor carried out activities. The use of the definite article "the" must refer back to "a client". Regulation 3(1)(b)(i) applies to contracting out activities which were carried out by the client himself, "a client", and are to be carried out on "the client's" behalf by another person. Similar wording, "a client", and "the client", is used in regulation 3(1)(b)(iii) dealing with contracting in. There is no warrant for giving the words "a client" and "the client" different meanings in the different sub-paragraphs of regulation 3(1)(b). As in regulation 3(1)(b)(i) and (iii) "the client" in regulation 3(1)(b)(ii) is the same client as "a client".**
>
> **28. Conditions set out in regulation 3(3)(a) must be satisfied for there to be a service provision change within the meaning of regulation 3(1)(b). Regulation 3(3)(a)(i) refers to the person on whose behalf activities are carried out before the transfer as "the client". In context "the client" in regulation 3(3)(a)(i) is "a client" in regulation 3(1)(b)(i), (ii) and (iii). Regulation 3(3)(ii) requires a consideration of the intention of "the client" with regard to the activities following the service provision change. The relevant intentions are those "immediately before**

> **the service provision change". There is no warrant for giving a different meaning to "the client" in regulation 3(3)(a)(i) and in (ii). If "the client" were to include the plural, whose intention would be relevant for the purposes of regulation 3(3)(a)(ii)? Regulation 3(1)(b) which Judge Burke held was introduced to provide certainty would be rendered uncertain by such an interpretation."**

21. The Court of Appeal agreed with the EAT, holding (paragraph 37) that:

> **"… The language of regulation 3(1)(b) is only consistent with the situation where there is the same client throughout; and regulation 3(3), which focuses on the intention of the client, is premised on that same assumption."**

22. The approach to the identification of the client, for Regulation 3(1)(b) purposes, was also an issue for the EAT in the case of **SNR Denton UK LLP v Kirwan** [2012] IRLR 966. In that case the Claimant had been employed by a Facilities Management Company, Jarvis Accommodation Services ("JAS"), as its "Director of Legal". In the last four years of her employment she had focussed on disposing of JAS's contracts, the company being in financial difficulties. In the last year that had taken 90% of her working time. When the company went into administration SNR Denton UK LLP ("Denton") was employed as solicitor for the administrator. The Claimant was made redundant, but Denton continued the work of disposing of the JAS contracts. The ET concluded that that had been a SPC for the purposes of Regulation 3(1)(b) **TUPE**. The EAT (Langstaff P) disagreed: whilst the ET had reached a permissible conclusion in respect of the activities in question - the relevant focus being on the nature of the activities rather than the purpose for which they were performed - it had erred in its approach to the question of "the client". For Regulation 3(1)(b) purposes, the activities must be carried out for *the same* client. On the facts of that case, the ET had erred in concluding that because the administrator could, and did act, as agent for JAS, it meant that the solicitors retained by the administrator were themselves acting on behalf of JAS. They might have been, but that could not be assumed, and that is what the ET had done in that case.

23. The issue raised in the present case is, however, different from that being considered on the facts of those earlier cases. Accepting that "the client" must be the same, what if that client is comprised of more than one legal entity? Alternatively, as here, what if there are a number of clients for whom the service is provided and who continue to be the same clients when there is a change in the identity of the service provider? Can "the client", for Regulation 3(1)(b) purposes, only be understood in the singular?

24. In answering that question the approach I am to adopt must be that laid down in domestic law. There is no EU law backdrop to Regulation 3(1)(b).

25. Thus applying domestic law, I note that section 6 of the **Interpretation Act 1978** provides:

> **"Gender and number**
>
> **In any Act, unless the contrary intention appears, -**
>
> …
>
> **(c) words in the singular include the plural and words in the plural include the singular."**

So the question may be asked: does Regulation 3(1)(b) **TUPE** demonstrate an intention that "a client", or "the client", should be understood in the singular and not the plural?

Submissions

Ottimo

26. Mr Korn, representing Ottimo, tells me that this question is an important one for his client. It is often engaged in maintenance contracts by managing agents or management companies in multiple property scenarios.

27. In this case, Mr Korn sought to suggest that the individual management companies (whilst they might have been separate legal entities) in fact operated collectively through BVG. That said, he had to accept that the ET's finding of fact was that each BV - separately from whatever involvement it had in BVG - entered into an individual contract for the activities in question. Moreover, he allowed that the activities could, at least in theory, have varied on the instruction of each BV as a separate legal entity. He observed, however, that the ET in this case had concluded (see paragraph 60) that the activities under each of the contracts by Chainbow was subsequently carried out by Warwick.

28. In interpreting Regulation 3(1)(b) **TUPE**, Mr Korn reminds me that the introduction of the SPC as a species of relevant transfer was to seek to reduce uncertainty, in practice by establishing a position in the UK whereby service provision changes will - subject to certain specified exceptions - be comprehensively covered by the legislation; the intention being to enable businesses and employees to be clearer as to where they stood (see the final consultation document, published in March 2005, by the Employment Relations Department of the DTI).

29. As for the case-law on Regulation 3(1)(b), Mr Korn submitted that the leading authority - **Hunter v McCarrick** - did not rule out a purposive construction but favoured a natural construction, giving effect to the draftsman's purpose, rather than a literal interpretation. In the alternative, I should have regard to the injunction laid down by section 6 of the **Interpretation Act 1978** that words in the singular include the plural. Thus, the word "client" may include "clients" if the circumstances so permit.

30. In deciding whether or not they do, Mr Korn further submitted it was helpful to have regard to the statement of principle by Lord Hoffmann at paragraph 24 of his speech in **Moyna**

v Secretary of State for Work and Pensions [2003] 4 All ER 162, cited at page 442 of *Bennion on Statutory Interpretation*, sixth edition. Specifically:

> **"The meaning of an English word is not a question of law because it does not in itself have any legal significance. It is the meaning to be ascribed to the intention of the notional legislator in using that word which is a statement of law. …"**

31. In this case there was no reason why "the client" should be regarded as each separate legal entity; they were closely linked. It was simply a matter of chance whether they chose to group together under an umbrella contract or to enter into separate contracts with the service provider. Provided the activities were the same, the legal outcome should not vary depending on the mechanism used. As HHJ Richardson had allowed, if a holding company and various subsidiary companies enter into a contract for a particular service, they would together be taken to constitute the client. Why, Mr Korn asked rhetorically, should the situation be different if they do so under a number of separate contracts, as here?

32. The case-law on "client" did not address the question of more than one client. In **Taurus Group Ltd v Crofts and Securitas** UKEAT/0024/12/CEA - in which it was argued that "the client" could include successor clients - the EAT declined to allow that possibility, holding that it was constrained by the earlier Judgment of this court in **Hunter**. That meant it had read "client" in the singular. Allowing that "client" could be read in the plural, however, would not have given rise to any other outcome in **Taurus**; there would still need to be the same clients and the carrying out of the same activities for those clients. It was the client identity that would still lead to the same outcome in **Taurus** or in **Hunter** or in **Kirwan**, not the number of clients that continued to retain the same identity. Moreover the Court of Appeal in **Hunter** had allowed that it might be possible that purposive interpretation should be given to Regulation 3(1)(b): see, for instance, the suggestion it might be wrong to be too pedantic with

respect to the question whether the activities carried on before and after the transfer were sufficiently similar to amount to the same service.

33. As to the suggestion that Ottimo's proposed construction might itself give rise to uncertainty, that might be so, but certainty could be provided by the other requirements of Regulation 3(1)(b) and those of Regulation 3(3). If it was wrong to construe the word "client" purposively, the court must, in the alternative, approach the term as required by section 6 of the **Interpretation Act**, allowing "client" to be read in the plural not simply the singular.

34. In so submitting, Mr Korn accepted it was necessary to look at the case in the context of the ET's findings of fact; he was not seeking to challenge those findings. That said, he took issue with Warwick's characterisation of the use of separate legal entities as being intentional; there had been no finding of fact on that point. It was right that the individual BV contracts had different start and end dates, and that might be a relevant question, although more obviously so in relation to assignment under Regulation 4. In this case the ET had found that the changes did not affect on Mr Duncan's workload (see paragraphs 16 and 18). The ET had not expressly recorded whether the individual BV contracts were the same or different. There were five specimen BV contracts in the ET bundle, which had been identical terms. That was perhaps reflected in the ET's finding as to the Schedule of Activities listed in "this contract" (see paragraph 17), which suggested the use of one pro forma contract.

35. There may be cases where the activities are different in relation to each individual contract or sufficiently different for there to be no SPC, but, in the present case, the ET had concluded that:

> **"… There may well have been a service provision change in relation to each individual contract with each BV and BVG …" (paragraph 60)**

If the BVs had contracted on different terms, then that might have been relevant to the question of whether the activities remained the same or not, and that would be a relevant question as to whether there was a SPC (see, for example, **Enterprise Management Services Ltd v Connect-Up Ltd and Others** UKEAT/0462/10/CEA); that was not this case.

36. On the question of fragmentation (to the extent this was raised as an alternative ground in Warwick's Answer), the ET's conclusion on this question at paragraph 59 was solely in the context of Regulation 3(1)(a) **TUPE**; it was not identified as an issue for Regulation 3(1)(b) purposes and should not be permitted as a new point on appeal. It could not simply be assumed that the ET would reach the same conclusion as that set out at paragraph 59. In any event the issue of fragmentation, as identified in cases such as **Clearsprings Management Ltd v Ankers and Others** UKEAT/0054/08/LA, related to the activities or service. Here the Claimant remained 100% employed at BV. As for the other conclusions of the ET, on organised grouping of employees and on assignment (see paragraphs 63 and 64), the reasoning was also dependent on the ET's approach to "client" being in the singular. The points stood or fell together.

37. On disposal, if the court was with Ottimo on the question of construction, the EAT could reach a final conclusion as to whether there had been an SPC based on the ET's findings of fact. The determination of other questions under Regulation 13 (**Polkey**; any award of compensation) could be remitted to the ET for consideration at the Remedies Hearing.

Mr Duncan

38. Mr Owen-Thomas, for Mr Duncan, adopted the submissions of Ottimo.

Warwick

39. By way of overview Miss Reece submitted that the ET had not misdirected itself in relation to the true meaning of "client" in respect of Regulation 3(1)(b) of **TUPE**. It had correctly applied the case of **Hunter v McCarrick**. It had considered whether there was a transfer from Ottimo to Warwick pursuant to Regulation 3(1)(b)(ii) and had found there was not; a decision it was entitled to reach.

40. Turning then to the facts, Miss Reece observed that there were 12 BVS, not only the six that Warwick took responsibility for. The BVG contract, dealing with the common parts of the estate, gave rise to a separate type of work for Mr Duncan. The contracts that each BV had with Chainbow and that BVG had with Chainbow were separate and covered a range of activities. Mr Duncan was only employed to the on-site maintenance. Each entity had reserved the right to give notice and to start and finish the contracts when they wished and (see the finding at paragraph 18) as a matter of fact, the contracts moved over to Trinity at different times.

41. Putting her case at its highest, Miss Reece submitted it was not possible to aggregate the contracts to create an SPC for Regulation 3(1)(b) purposes if the service users were intentionally separate legal entities. "Client" had to be read in the singular (see **Hunter**). There was no reason to read "client" in the plural; doing so would give rise to difficulties in knowing whose intention was relevant for the purposes of Regulation 3(3)(a)(ii) **TUPE**.

42. In the alternative, even if it were permissible to read "client" in the plural in general terms, it would not be so in this case. There would have to be common intent, but here the only link between the service users (the BVs) was geographical. The BVs had individually set up

legal entities so that they could operate independently and they had chosen to enter into separate legal contracts for the purpose of the property maintenance contracts. There was simply no evidential basis for assuming that the individual BVs were acting collectively. Even if this court was with the Appellant on the question of the construction, the matter would need to be remitted to the ET to determine this question as a matter of fact.

Discussion and Conclusions

43. I think it is right to say that the point raised by this appeal is novel. Although the identification of "the client" for the purposes of Regulation 3(1)(b) **TUPE** has been the subject of earlier consideration in the case-law, none of those cases had to expressly address, on the facts, the question whether - allowing no changes in the end users before and after the SPC - the client had to be understood solely in the singular or whether the regulation could allow for there to be - providing they remained identical - more than one client.

44. In approaching this question, I do not find it helpful to adopt a "purposive approach" (as Mr Korn urged). The underlying rationale for the introduction of this "silver plating" (to adopt HHJ Richardson's apposite phrase) was to provide greater certainty. That may or may not be provided by allowing that "the client" can be read as "the clients"; that will depend on the facts. And I note Slade J's concern in **Hunter** (in the EAT), that Regulation 3(1)(b) might be rendered less certain if "the client" was read in the plural. **Hunter** was, however, dealing with the situation where the identity of the client changed. If Regulation 3(1)(b) allowed for the client or clients to change identity before and after the SPC, questions would arise both as to certainty and as to defining the relevant intent for Regulation 3(3)(a)(ii) purposes. Does that mean that the general approach laid down by section 6 of the **Interpretation Act** should not

apply here? Should I discern a contrary intention from Regulation 3(1)(b), such that the words in the singular are - contrary to the normal role - not to read as including the plural?

45. Miss Reece says "the client" has to be a single legal entity. The approach to construction laid down by the **Interpretation Act** should not apply here because it would lead to uncertainty and would make it impossible to ascertain the client's intention. In support of Miss Reece' case in this respect I further note that Regulation 3(1)(b)(i) uses the word "client" to refer to "a person", again in the singular. There is, however, no other definition of "client" in **TUPE**; it can encompass an individual person, a limited company, a partnership or an unincorporated association. Given that this is so, for my part I see no reason why, in principle, a SPC might not involve, for example, a contract for the provision of particular services drawn up between a contractor and a group of persons who are collectively defined as "the client" under that contract. If the case in question then fell to be considered under Regulation 3(1)(b)(i), that would require "a person" to also be read as encompassing the plural, "people", but I do not see why a contrary intention should be read into the provision so as to rule that out.

46. Furthermore, in such a case the group of persons defined as "the client" would have demonstrated common intent in entering into the contract as, collectively, one party to its terms. I would thus not see the fact that the client was comprised of more than one entity as fatal to ascertaining future intention for the purposes of Regulation 3(3)(b). In such a case, that intention might be discernible from the terms of the contract itself or it might require a broader-ranging factual enquiry. Provided those involved in "the client" retain their identity, however, I do not consider that to give rise to any fatal objection.

47. I take the view, therefore, that "the client" for the purposes of Regulation 3(1)(b) can include "clients". Such clients would have to retain their identity before and after the SPC, but, the fact that the service is provided to more than one legal entity does not, in my judgement, necessarily mean there cannot be a SPC transfer.

48. Does it matter that there was, here, no umbrella contract but separate contracts with each of the BVs and with BVG? I can see Mr Korn's point that the focus of the definition of a SPC under Regulation 3(1)(b) **TUPE** is on the "activities". I can also see that the legal mechanism under which those activities are carried out will not always be determinative of the question whether there is an SPC or not. That said, the legal mechanism may be determinative in certain instances because of what it means for the identification of the client (see, for example, **SNR Denton UK LLP v Kirwan**). In my judgment, allowing that "the client" may comprise more than one legal entity - and so, might more properly be described as "the clients" - there must be some link, some commonality, between them, to permit the identification of intention for Regulation 3(3)(a)(ii) purposes. That will be all the harder to demonstrate where there is no umbrella contract defining "the client", as my example envisaged. That does not mean that there must be a single contract between the legal entities comprising the client, or clients, and the contractor. There must, however, be an ability to ascertain a common intent.

49. In this case there were separate contracts between the contractor and the individual BVs and BVG. It may be right, as Mr Korn tells me, that each contract was identical in its terms but I am not sure that answers the question whether there was a commonality of intention, as would be required for Regulation 3(3)(a)(ii) purposes. The ET simply did not answer that question, having taken the view that there was no SPC because there was no single client.

50. In my judgment the ET erred in taking such a strict view. It does not require a purposive construction to allow that the use of the singular client under Regulation 3(1)(b) includes the plural "clients". That is not to say that the client or clients do not have to retain their identity before and after the service provision change. They do. It is also a requirement that they are sufficiently linked to as to permit the ascertainment of a common intention for Regulation 3(3)(a)(ii) purposes. Otherwise, however, the existence of more than one legal entity - and possibly even more than one contract - will not necessarily be fatal.

51. I therefore allow the appeal on this point and consider that the appropriate course is to remit this matter back to the same ET (to the extent that is practicable) to reconsider the question whether there was a SPC in this case.

52. Given the novelty of the point, I indicated that I would be minded to grant permission to appeal if sought. In the event, no application was made, Miss Reece reserving her position.

53. At the end of the hearing, Mr Korn (for Ottimo) applied for costs to the extent that his client had incurred fees when lodging the appeal and for the hearing (see Rule 34A(2A) of the **Employment Appeal Tribunal Rules 1993**, as amended). He relied on the approach I had suggested might be followed in the case of **Horizon Security Services Ltd v Ndeze and Anor** [2014] IRLR 854. Since then, the EAT President has also given some guidance in relation to the operation of Rule 34A(2A) in the case of **Look Ahead Housing and Care Ltd v Chetty and Eduah** UKEAT/0037/14/MC, suggesting that it might be relevant to consider whether the fees could have been avoided, perhaps by an application to the ET for reconsideration of its Judgment or an approach to the other party/parties to see what might be agreed, thus avoiding some of the costs involved in pursuing an appeal to a Full Hearing.

54. It is not suggested that this is a case which would have been appropriate for an application for reconsideration. It involved a point of law, and to that extent would at some stage have needed to go before the EAT. That said, Miss Reece has indicated that her clients' position has been that the matter would need to be remitted to the ET and, had an approach been made prior to the hearing to seek to agree some way forward, that might have been something that could have been resolved positively. Of course it is difficult to test that proposition at this stage: such an approach was not made, and Warwick was not put to the test. Ms Reece also observed that the initial Notice of Appeal lodged had contained five grounds relating to Regulation 3(1)(a), which were not permitted to proceed.

55. It seems to me that Ms Reece's submissions have some merit. A large part of the original Notice of Appeal was not permitted to proceed, and the way in which the appeal was put at the Full Hearing was not wholly successful. That said, the construction point was resisted, not simply on the facts of this case - which might require remission back to the ET to resolve - but also as a point of law (Warwick urging a strict interpretation of Regulation 3(1)(b)).

56. Balancing those factors in mind, and seeking to achieve a fair outcome on this application, I award Ottimo, £1,000 towards the fees it has incurred. That removes some element which would have been covered by the original lodgement fee in respect of those grounds which were never permitted to proceed and also some element to allow that it is possible that, had Ottimo approached Warwick with a compromise position in terms of the outcome of this appeal, it might have been possible there was another way forward.