



EMPLOYMENT TRIBUNALS

Claimants:

1. GMB Trade Union North West & Irish Region
2. Mrs S Jones
3. Mrs L Wallbank
4. Mr J Williams
5. Mrs J King
6. Ms C Abel
7. Miss E Lloyd
8. Mrs J Williams

Respondents:

1. Tarvin Court Ltd
2. Tarvin Estates LLP
3. Conifer Care Homes Ltd

Heard at: Liverpool

On: 21, 22 & 23 January 2020

Before: Employment Judge Shotter (sitting alone)

Appearances

For the first claimant:	Mr S Susak, counsel
For Mrs S Jones:	Mr B Henry, counsel
For Ms King:	In person
For Ms Abel:	In person
For the first and second respondent:	Ms S Murphy, solicitor
For the third respondent:	Mr R Taylor, solicitor

RESERVED JUDGMENT

The JUDGMENT of the Tribunal is:

1. There was no transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 from the first and/or second respondent to the third respondent in or around 1 January, 28 February and 25 March 2018. All

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claims are dismissed against the third respondent who no longer has any interest in these proceedings.

2. All remaining claims in the case will be determined at a final hearing before an Employment Judge sitting alone at the Employment Tribunals **3rd Floor, Civil & Family Court Centre, 35 Vernon Street, Liverpool, L22BX**. **The parties will provide dates of availability and an agreed estimated length of hearing 14 days from receiving this judgment with reasons, to include liability and remedy in respect of all claims.**

REASONS

Preamble

3. This is an open preliminary hearing following a closed earlier preliminary hearing held on 21 June 2019 at which case management orders were made to assist the parties to prepare to deal with the issue of whether a TUPE transfer had taken place between the first and/or second and third respondent, and is so, the date of transfer.
4. The Tribunal has before it the skeleton argument prepared by Mr Henry dated 17 January 2020, skeleton arguments prepared on behalf of the first and second respondent by Ms Murphy and a third skeleton argument together with written closing submissions from Mr Taylor on behalf of the third respondent. The Tribunal has taken the skeleton arguments, written and oral submissions into account when arriving at its judgment.

Issues

5. It had been agreed by all the parties at the 11 December 2018 preliminary hearing when Mr Khan represented the first and second respondent, that there was no service provision change ("SPC") and that this was not an issue to be addressed by the Tribunal. Ms Murphy has changed the first and second respondent's position arguing now for the first time at this hearing that a SPC did take place. Despite the fact the other parties and Tribunal were not put on notice of this change in position, there was no objection to the issue as to whether there had been a SPC being considered by the Tribunal, and this point was dealt with in oral closing submissions.
6. The issues to be addressed were agreed between the parties as follows:

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6.1 Was there a TUPE transfer from the first/second respondent ("Tarvin") to the third respondent ("Conifers) in or around January or 28 February 2018? If not,

6.2 Was there a TUPE transfer from the first/second respondent ("Tarvin") to the third respondent ("Conifers) in or around 25 March 2018?

Evidence

7. Oral evidence has been heard from Ms King and Ms Able on their own behalf and they were found to be credible witnesses. On behalf of the first and second respondent Jayraji Bhadranwalia gave oral evidence, and on behalf of the third respondent, Dr Vijay Kumar Trehan, who were also found to given credible evidence.
8. Dr Trehan in oral evidence on cross-examination confirmed there had been a TUPE transfer on the 28 February 2018, and this was the view taken by Jayraji Bhadranwalia in his written statement. As a consequence, Ms Murphy amended the list of issues to include the possibility of a 28 February 2018 transfer and the Tribunal amended the list of issues accordingly.
9. The Tribunal was referred to an agreed bundle of documents, including a number produced during the hearing marked "C1" and "C2" and "R1" to "R5." Having considered the oral and written evidence and oral and written submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), it has made the following findings of the relevant facts.

Facts

10. Jayraji Bhadranwalia is a director of Tarvin Court Ltd referred to throughout these proceedings as "Tarvin". Tarvin employed a number of cooks, nurses, cleaners, managers and care workers to work in the nursing home business providing domiciliary and additional nursing care to residents/service users who live in Tarvin Court Nursing Home based in Chester, referred to within these proceedings as "Tarvin Court." The second respondent was during the relevant period the registered provider authorised by the Care Quality Commission ("CQC") to carry out the regulated activities in Tarvin Court.
11. The CQC describes how people in care homes "receive accommodation and nursing or personal care as a single package under one contractual agreement. CQC regulates both the premises and the care provided." Tarvin Court Nursing Home was regulated by the CQC in respect of the accommodation and care provided to the service users who were at all times residents within Tarvin

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Court. The fact that the service users were residents was an important consideration for the Tribunal when it came to assess whether a TUPE transfer had taken place or not.

12. During the relevant period Tarvin Court accommodated 14 service users, one service user paid privately and the fees of the remaining thirteen were covered either by the local authority or if nursing care was necessary, a mixture of funding from the health authority and local authority paid to the first respondent directly. The contractual agreement for the provision of accommodation, nursing and personal care was between the service user and Tarvin.
13. Shelia Jones was employed by Tarvin Court Limited as a staff nurse from 18 June 2006, Julie King as a care assistant from 3 June 2013 and Caroline Abel, a registered nurse and care manager from 22 September 2003. During Caroline Able's period of employment three transfers of staff had taken place under TUPE with no issue and terms and conditions of employment had remained unchanged. The last transfer was to the first respondent. Debra Mahon was the CQC registered manager during the relevant period and responsible for ensuring statutory compliance.
14. Conifer Care Homes Limited ("Conifers") owns and runs Oaklands, a care home situated on the same road next door to Tarvin Court. Dr Trehan was and remains a company director of Conifers. Oaklands is also regulated by the CQC and Conifers employs a CQC registered manager to ensure statutory compliance.

The sale and purchase

15. Jayraji Bhadranwalia was and remains based in London and he found it difficult to manage the business of running a care home for the elderly. Tarvin Court had a number of compliance issues, and Jayraji Bhadranwalia approached Dr Trehan about a possible purchase.
16. Jayraji Bhadranwalia and Dr Trehan negotiated the sale and purchase of Tarvin Court in or around September 2017. An email sent from Dr Trehan to Jayraji Bhadranwalia on 20 September 2017 set out the terms of an offer. Dr Trehan made reference to closing down Tarvin Court given it only had 14 clients and for the redundancy pay to be split between Tarvin and Conifer unless the clients increased to twenty when all redundancy pay would be paid by Conifer. The email concluded "If we agree then you will need to inform your staff the following day and I will need a minimum of two weeks to take over...I will need your help along with the help on my accountant so we are able to sort the takeover smoothly. Time is running out..." There was no thought at that stage to any temporary closure resulting in a TUPE transfer of employees.

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17. An agreement was reached referred to by Jayraji Bhadranwalia as a “gentleman’s agreement.” Solicitors drafted written agreements but these were never signed. £50,000 was paid by Dr Trehan for the deal which Mr Bhadranwalia confirmed was “started in good faith” until Dr Trehan called the deal off when Tarvin Court was still run by the first respondent. The “deal” included Dr Trehan running Tarvin Court Nursing Home on the basis that Jayraji Bhadranwalia no longer wanted the full responsibility for running the business.
18. In an email sent 13 October 2017 to the NHS South Cheshire and NHS Vale Royal Dr Trehan via the third respondent wrote “Just wanted to let you know of **our intention to take over as providers of Tarvin Court Nursing Home**...Debra Mahon to continue as Registered Manager at the same location under a new provider...and Conifers Care Homes Ltd to add Tarvin Court Nursing Home as a location to our registration. The date we have proposed to the CQC is 1 January 2018. However, **we are supporting the existing providers during the interim period**...” [the Tribunal’s emphasis]. This email is key as it reflected the true position between the parties before and after the 1 January 2018. Debra Mahon continued as registered manager of Tarvin Court which remained with Tarvin and was not added to the registration of Conifers. Dr Trehan helped to run Tarvin Court supporting Jayraji Bhadranwalia, who retained ultimate control over the business and his partner, Jayshree Patel, continued to be answerable to the CQC until closure.
19. On the 17 October 2017 staff met with Dr Trehan; they were informed Conifers was taking over the management of the business of Tarvin Court Ltd and would be purchasing Tarvin Court once an application to the CQC had been passed. Staff completed a HMRC new starter document in the anticipation of the transfer going ahead. It is not disputed by the parties that a TUPE transfer had not taken place in the period up to 1 January 2018.
20. The above are key facts, whilst was not taken in isolation, that pointed to a TUPE transfer not taking place. The events that transpired after confirmed the position on balance.

CQC application to cancel all regulated activities as provided dated 16 October 2017

21. Jayshree Patel, Jayraji Bhadranwalia’s business partner, submitted an application under section 19(1)(b) of the Health and Social Care Act 2008 to cancel the registration of Tarvin Estates LLP as a result of a sale or transfer to “another provider/potential new provider who is applying for registration to carry out regulated activities.” The new provider was to be Conifers Care Homes Ltd, but this never came to pass and during the relevant period Tarvin continued as the provider until Tarvin Court was closed down.

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22. Jayshree Patel completed a cancellation action plan confirming “service users, their representatives, staff and commissioners have been informed of our intention to cancel all regulated activity and also of Conifers Care Homes Ltd’s aim to add this location to their registration...**The planned new directors have visited the premises on several occasions to provide support to the registered manager and her team during this initial period and we also communicate with them closely. In the interim period Tarvin Court Nursing Home will continue to run as normal under the same registered manager**” [the Tribunal’s emphasis]. The evidence before the Tribunal was that this was indeed the case, and the home ran “as normal” with staff wearing the same uniform, letter-heading remained unchanged, the same lawyers continued to advise and so on, all under the registered manager, Debbie Mahon, until Tarvin Court was closed for good.
23. On 16 October 2017 Debbie Mahon in her capacity as registered manager, completed an application to continue registration as a manager under a new provider, Conifers Care Home Ltd, the existing provider being Tarvin Estates LLP and the location of the regulated activity Tarvin Court Nursing Home. In the supporting notes Debbie Mahon referred to the “excellent management support I have already received and expect to continue to receive” from Conifers, which aptly described in a contemporaneous communication Dr Trehan and Conifers input into the running of the business.
24. Both applications to the CQC were expected to take approximately 12-weeks to around 1 January 2018 when it was anticipated the sale and transfer would take place. In the meantime, steps were taken whereupon Conifers and Dr Trehan provided Tarvin Court with support, including, according to Dr Trehan at paragraph 9 of his witness statement, “full financial support for the running of the business.” Dr Trehan provided support at varying levels from 23 October 2017 until closure of the home on 28 March on the basis that Dr Trehan fully expected to acquire the business in due course providing CQC approval to the applications referred to above was given. In short, Conifers could not take over as the provider from Tarvin until CQC approval, and Conifers could not run Tarvin Court as its business until CQC authorised it as the new provider.
25. With the agreement of Jayshree Patel and Jayraji Bhadranwalia. Conifers received the local authority financial contributions payable in respect of service users, health authority payments for nursing care and private payment of resident fees. Conifers handled the expenses including wages, resident food bills and utilities and undertook some day-to-day management. In short, Dr Trehan was appointed to manage Tarvin Court through Conifers acting in the capacity of an agent; however, the ultimate decisions made when running the business remained the responsibility of Jayshree Patel and Jayraji Bhadranwalia, who agreed Dr Trehan took over as much responsibility for the

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business as he could within the limitations set by the CQC requirements. This stage of affairs remained unchanged until closure of Tarvin Court.

Meeting 9 November 2017

26. In a meeting held on 9 November 2017 chaired by Debra Mahon, the staff were up-dated. The meeting notes taken record that staff were informed their place of work would not change, there would be no change to terms and conditions and by January 2018 staff would be paid by Conifers. Tarvin was referred to as “the old providers.” Debra Mahon confirmed to staff she had spoken to Dr Trehan and he had assured her “staff will not lose their long service years as a result of the change of contract.” Jayshree Patel, Jayraji Bhadranwalia and Dr Trehan all had an expectation that the CQC authorisation would come through, the sale completed with staff continuing to work in Tarvin Court following a TUPE transfer to the third respondent. The fact the parties had this expectation is not synonymous with a TUPE transfer taking place.
27. Taking into account the factual matrix the Tribunal concluded that Jayshree Patel, Jayraji Bhadranwalia and Dr Trehan anticipated the CQC applications to have been completed and the sale of the business to proceed in the New Year and it was on this basis responsibility for Tarvin Court payroll changed and was taken over by Conifers.

Payroll changes 1 January 2018

28. Conifers took over the payroll responsibility of Tarvin from the 1 January 2018 and pay slips were issued in the name of Conifers to all employees working at Tarvin Court, who had been advised their last pay date on pay slips received from Tarvin Court Limited would be on 22 January 2018. In short, Conifers acted in the capacity of a payroll agent responsible for ensuring all payroll obligations were met, including lawful deductions, and there was no evidence before the Tribunal that the contract of employees employed by the first respondent had transferred to the third respondent under TUPE.
29. After the 1 January 2018 employees of the first respondent continued to report and raise issues with Debra Mahon whilst continuing to work at Tarvin Court. Employment advice was taken by Peninsula, who continued to be instructed to act on behalf of Tarvin. Dr Trehan and staff from Conifers continued to provide support, however the ultimate responsibility for the business and CQC lay with Jayshree Patel, Jayraji Bhadranwalia, and the first and second respondent.

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12 January 2018 Suspension of joint agreement for residential and nursing care home provision.

30. Following a telephone conversation with Dr Trehan, in a letter dated 12 January 2018 addressed to Dr Trehan at Confers Care Home Ltd, Tarvin Court Care Home, Cheshire West and Cheshire Council confirmed Dr Trehan had agreed “to a voluntary suspension of all new placements at Tarvin Court, with immediate effect...following an urgent safeguarding strategy meeting that was held this morning...Tarvin Court is now under the Disruption Policy and a disruption meeting will be arranged.” Dr Trehan was asked not to share this information with staff other than Debbie Mahon. The Tribunal accepted Jayraji Bhadranwalia’s evidence that he and Jayshree Patel had agreed the suspension with Dr Trehan, and that he should deal directly with the local authority further evidence that Jayshree Patel and Jayraji Bhadranwalia were ultimately responsible and had the final say.
31. As a result of the suspension Tarvin Court was unable to admit new patients until the commissioners were satisfied appropriate measure had been put in place, which Dr Trehan believed could take several months and result in a financial loss to the business, which concerned him as he was still looking to purchase it.
32. It is clear from contemporaneous correspondence the contracts and quality management team in Cheshire West and Cheshire Council understood Conifers Care Home Limited had taken on some of the responsibility for Tarvin Court. The contemporaneous documentation confirms Dr Trehan was on the face of it the decision maker and had agreed the suspension, albeit with the authority of Jayshree Patel and Jayraji Bhadranwalia.
33. Dr Trehan at paragraph 12 and 13 of his witness statement dealt with the 12 January 2018 voluntary suspension. Dr Trehan stressed the third respondent had no control over the business and was “simply providing financial support.” The evidence before the Tribunal does not fully support Dr Trehan’s position; he was able to agree a voluntary suspension of new placements fundamental to business profitability and according to the 20 September 2017 email, the purchase price was determinative on the number of clients’ which Dr Trehan had sought to increase from 14 to 20. On the balance of probabilities, the Tribunal found Dr Trehan was making fundamental business decisions during meetings, including telephone conversations with the council’s Contracts and Quality Management team. There is no suggestion Jayshree Patel or Jayraji Bhadranwalia were involved in the actual conversations with the council or health authority, however they did take part in the decision-making process as the final arbiters and so the Tribunal found. It suited Jayshree Patel and Jayraji Bhadranwalia to go along with Dr Trehan as their objective at the time was to ensure the business was sold to him and the purchase monies paid.

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CQC investigation

34. On the 6 and 7 February 2018 CQC carried out an inspection of Tarvin Court, both the premises and care provided were looked at and safeguarding issues found to exist. The inspection and outcome of the inspection was unconnected in any way to Dr Trehan or Conifers and the CQC was exclusively concerned with Tarvin Court Nursing Home, the registered provider, clients and the registered manager Debra Mahon.

Dr Trehan's decision not to purchase

35. On the 16 February 2018 Caroline Able met with Dr Trehan to discuss where "he was up to managing Tarvin Court." Dr Trehan made it clear that if Caroline Able agreed to go and work for him at Oaklands he would purchase Tarvin Court and close it down for refurbishment. The meeting was not minuted. The Tribunal accepted Caroline Able's recollection of what was said. It is notable that in Dr Trehan's email of 20 September 2017 referred to above, he confirmed that the purchase of Tarvin Court Nursing Home had been discussed with his architect, which suggests closure and refurbishment were inevitable had the sale and purchase gone ahead.
36. Caroline Able emailed Dr Trehan following the meeting setting out her concerns including "...I am not being given any other option other than to come and work at Oaklands or to leave Tarvin Court due to the fact that you will pull out of your purchase of Tarvin Court if I stay and if I don't stay Tarvin Court is going to be in a very difficult position due to talk of the closure you spoke to me about...I feel you have put a lot of pressure onto me regarding other staff members job's and redundancies and not being able to employ all the staff here at Tarvin Court..." It is clear that as at 16 February 2018 Caroline Able was of the understanding that she was still employed by the first respondent and the sale of the business was yet to take place, and understandably found the part played by Dr Trehan and Conifers confusing.
37. In a response sent on 17 February 2018 Caroline Able was informed by Dr Trehan that he intended to pull out of the sale due to Tarvin Court Nursing Home being placed in special measures.
38. Caroline Able was confused about who her employer was and sought information from the first respondent. In response to Caroline Able's request for clarification Jayshree Patel confirmed "Conifers Care have taken over Tarvin Court from 1 January 2018 **but technically Tarvin Court is still the owner,**" [the Tribunal's emphasis] a response which reflects the understanding of Jayraji Bhadranwalia and Dr Trehan who incorrectly believed a transfer had occurred on 28 February 2018.

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39. Jayshree Patel was party and signatory to a letter sent to Lee Calvert, the contract and quality manager at Cheshire West and Cheshire Council, drafted by N Grogan, an employee of the third respondent. The letter sent to Lee Calvert confirmed **“after consulting with Dr Trehan...we propose to close Tarvin Court temporarily and reopen after refurbishment as a care home specialising in specific needs”**. The plan was to recruit a new team of staff under Dr Trehan or any other new provider. A transfer of residents from Tarvin to Oaklands “next door” was proposed along with a transfer of all Tarvin Court staff, Debra Mahon the registered manager for Tarvin relocating to Oaklands “along with residents **who wish to transfer**” [the Tribunal’s emphasis]. The plan set out reflected Dr Trehan’s intentions going as far back as September 2017 and it is strong evidence that a transfer of the business had yet to take place.

Jayshree Patel’s email 27 February 2018

40. Jayshree Patel emailed Dr Trehan following a conversation about “what we would like to see happen”. It is clear from Jayshree Patel’s email of 27 February 2018 the first and second respondent’s agreement to forward the draft letter to Lee Calvert referred to above, was conditional on the following; **“that with effective from tomorrow you will be responsible for the safe transfer of all the residents. That you will take over the day to day responsibility of running the home including P/L until the home is closed** (as per our agreement dated 22/10/2017 when you took responsibility/charge of running of Tarvin Court). We feel that this is a fair compromise given the scenario we are in and the fact that having agreed with you **an agreement to allow you to run Tarvin Court since last October with a view to buying**. Once the dust has settled we can explore options with you about Tarvin Court going forward” [the Tribunal’s emphasis]. It is clear from this communication that Jayshree Patel and Jayraji Bhadranswalia were pushing for the sale and understood Dr Trehan and Conifers had not taken over day-to-day responsibility for running the business and there was no question that staff had transferred across to the third respondent under TUPE; which is unsurprising given the fact that the position had not changed since the “gentleman’s agreement” negotiated in or around September 2017 when a TUPE transfer had not occurred, and so the Tribunal found.

Staff meeting 28 February 2018

41. A staff meeting was called on 28 February 2018 when Dr Trehan addressed the staff. Jayshree Patel and Jayraji Bhadranswalia were due to attend but did not due to bad weather conditions, and they agreed Dr Trehan should continue with the meeting in their absence. The minute of the 28 February 2018 meeting records that Dr Trehan confirmed “the present provider proposes to close the home and Dr Trehan offered all the staff a position at Oaklands Nursing Home,

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a training programme would be put in place to address the safeguarding issues, the local authority will view resident's files to decide on placement they could all be housed at Oaklands if they so wished, along with current staff...they would retain their current terms and conditions and as much as possible be offered like-for-like posts". The reference to "present provider" was to the first and second respondent. Jayraji Bhadranwalia and Jayshree Patel as provider were the ultimate decision makers in relation to any home closure.

42. Dr Trehan confirmed that **"technically JP is still the provider but that all the documentation has been submitted to CQC and authorities are aware that he is about to buy the home and is currently managing the affairs in Tarvin Court."** When asked by staff who they were answerable to Dr Trehan responded "me, I am managing Tarvin Court...when the home closes the process would happen **immediately and JP would no longer be the provider as CQC would de-register her and the directors**" [the Tribunal's emphasis].
43. On the 28 February 2018 the local authority (who were meeting all or some of the care costs) instructed a social worker to assess the needs of residents, who were given a choice or being relocated to Oaklands or another care provider. Lee Calvert wrote to Jayshree Patel and the second respondent, who had previously provided him with training plans. Lee Calvert referred to them as "providers" and wrote "with regard to your offer to move residents over to Oaklands, this is something that we as commissioners will consider as part of the reviews undertaken and in liaison with the residents assist them with any move they wish make, or that is considered in the best interests for those without capacity to make this decision for themselves."
44. On the 9 March 2018 a meeting was held with Lee Calvert, residents and relatives who were informed by Dr Trehan Tarvin Court was closing. Residents and relatives were made aware that Conifers Care had vacant rooms in their nursing home, and it was explained Dr Trehan was purchasing the building, closing it for refurbishment and intended to re-open it three-months after the closure.
45. Residents and relatives subsequently went to view Oaklands before deciding whether to move next door or a different care home.

Redundancy

46. It is not disputed evidence that Dr Trehan and Caroline Able met on a date between 1 and 7 March 2018. Dr Trehan informed Caroline Able that he did not have a position for her in Oaklands and would make her redundant when Tarvin Court closed. He was questioned how he could make the decision when the first and second respondent were still the owners, to which he agreed stating he would claim the redundancy and notice pay back from Tarvin Court. It

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appears by this stage Jayraji Bhadranwalia and Jayshree Patel fully expected the sale to proceed content to leave the handling of staff matters to Dr Trehan.

13 March 2018 Dr Trehan's letter to staff

47. On the 13 March 2018 Dr Trehan confirmed the position as he understood it in a letter sent to staff, and in oral evidence on cross-examination at this hearing he stated that he stood by the contents of the letter and his belief that a TUPE transfer had occurred on 28 February 2018. The letter referred to the 28 February 2018 meeting "where I informed you of the planned closure of Tarvin Court Nursing Home...the closure...and transfer of the function...to Oaklands Nursing Home will take place within 4-weeks with the final closure date being dependent on the transfer of the current service users. Conifers...intends that the transfer is carried out in accordance with...TUPE...you can object to this transfer..."

Movement of residents

48. In the week commencing 19 March 2018, on the Monday/Tuesday Debra Mahon moved to Oaklands. 13 of the 14 residents transferred during the week, the last on 23 March 2018; the private paying resident transferred elsewhere. Residents who had a deprivation and liberty order in place (they were unable to make life decisions) were represented by a nominated advocate who had viewed Oaklands on their behalf. Ten employees, including Debra Mahon, the office manager, cook and various nurses and care assistants, agreed to work in Oaklands for the third respondent, thirteen employees did not move across.
49. Caroline Able was made redundant, the decision having been made by Dr Trehan, and her redundancy pay was met by the third respondent via its payroll facility, on the basis that Dr Trehan could not offer like-for-like work in Oaklands. On the evidence before it the Tribunal accepted on balance Jayraji Bhadranwalia did not make decisions relating to termination of employment with the first respondent and redundancies. It was Dr Trehan, empowered by Jayshree Patel and Jayraji Bhadranwalia to make such decision, in the expectation on the part of Jayshree Patel and Jayraji Bhadranwalia that he would be purchasing the business, including Tarvin Court premises, Dr Trehan having agreed to meet any redundancy payments as part of the "gentleman's agreement" referred to above.
50. Caroline Able raised a written grievance dated 21 March 2018 sent to Jayshree Patel and Jayraji Bhadranwalia "as you are my legal employer of Tarvin Court Ltd" alleging they had failed to inform and consult regarding redundancy. There was no response.

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Tarvin Court closure 23 March 2018

51. Tarvin Court closed on 23 March 2018 with most beds, all the furniture and medical/other equipment remained in situ except for some beds which according to Jayraji Bhadranwalia in oral evidence on cross-examination, were “borrowed” by Dr Trehan.
52. The sale of the property was not proceeded with by the third respondent and it continues to lay empty.
53. On the evidence before it the Tribunal was satisfied the residents were taken out of Tarvin Court directly because of the home’s closure. In short, clients (or the nominated advocate) individually decided whether not to utilise the services of Oaklands, the nursing home next door pending imminent close of Tarvin Court.
54. Prior to the closure staff wore a tunic and name badge with the Tarvin Court Nursing Home logo. The same logo was also on charts, records and correspondence. Ms King accepted on cross-examination “very little had changed on the shop floor” and the reporting structure remained the same although Dr Trehan came in to see the managers and had a “couple of meetings with residents.” Jayraji Bhadranwalia confirmed in oral evidence Debra Mahon reported to his partner Jayshree Patel “every day” right up to closure on 23 March, although the frequency reduced after Dr Trehan had taken over. All this changed when Tarvin Court was closed down with no foreseeable prospect of it being re-opened and/or sold to Dr Trehan/Conifers.
55. Tarvin Estates LLP deregistered with the local authority on 21 August 2018. Tarvin Court remains vacant to date and when all but one of the residents/service users and some staff moved to the Oaklands no assets were transferred, however, there was a high degree of similarity between the activities carried on before the closure of Tarvin Court and Oaklands filling its vacant beds.

Law

56. The provisions of **TUPE** are Regulation 3(1)(a), Regulation 3(2) and Regulation 3(6):

“(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;

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(2) In this regulation “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

...

(6) A relevant transfer -

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor.”

51. These provisions of **TUPE** were passed in order to implement the **Acquired Rights Directive**, Council Directive 2001/23/EC. It is well established that they are to be interpreted in accordance with jurisprudence developed under that Directive and its predecessor, Directive 77/187/EC.

52 The requirement under regulation 3(1)(a) that there should be a transfer of “an economic entity which retains its identity” may be traced back to Spijkers v Gebroeders Benedik Abattoir CV: ECJ 24/85 [1986] 2 CMLR 296 which lay down guidance for the Tribunal to consider (a) the type of undertaking or business concerned; (b) whether assets tangible or intangible, are transferred, (c) whether the employees were taken over, (d) whether customers were transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities are suspended.

53 The parties agreed the Tribunal should take a holistic approach when assessing the guidance set out in Spijkers not one single factor should be taken in isolation.

54 Further guidance was given by the EAT in Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 referred to the “Cheesman principles” by Mr Henry, which do not purport to be an exclusive list of factors. Paragraph 11 of the decision sets out:

(1) As to whether there is any relevant sense a transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is continued or resumed.

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- (2) In a labour-intensive sector, it is to be recognised that an entity can maintain its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour-intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity. The company in Carewatch referred to above was a labour-intensive business.
- (3) In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question but each is a single factor and none is to be considered in isolation - Vidal paragraph 29; Sanchez Hidalgo paragraph 29; Allen paragraph 26. However, whilst no authority so holds, it may, presumably, not be an error of law to consider "the decisive criterion" in (i) above in isolation; that, surely, is an aspect of its being "decisive", although, as one sees from the "inter alia" in (i) above, "the decisive criterion" is not itself said to depend on a single factor.
- (4) Amongst the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended.
- (5) In determining whether or not there has been a transfer, account has to be taken, inter alia, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on.
- (6) Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets.
- (7) Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer.
- (8) Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer.
- (9) More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-

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holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor.

- (10) The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not conclusive as there is no need for any such direct contractual relationship.
- (11) When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer.
- (12) The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one sub-contractor and the start by the successor.

55 Mr Henry referred the Tribunal to Colino Siguenza v Ayuntamiento de Valladolid (C-472/16) [ECJ AdvGen] it was held a gap of five months in an undertaking's activities does not necessarily preclude a transfer for the purposes of the Acquired Rights Directive (2001/23/EC) (ARD). The Claimant, Mr. Sigüenza, worked as a teacher at a music school in Spain. The school was run by the local authority until 1997 when it was outsourced to a contractor. Following poor financial performance, the contractor dismissed all its staff in April 2013 and subsequently ceased to operate. At the start of the next academic year in September 2013 the management of the school was given to a new contractor, who employed a different staff team. The CJEU considered that in this case there could be a transfer of an economic entity within the meaning of the ARD. The court took into account the fact that the premises and other assets of the business were owned by the local authority at all times, and that three months of the closure had been school holidays. However, the CJEU also held that the Claimant's dismissal appeared to be for an economic, technical or organisational (ETO) reason. The final decisions on both points were referred back to the Spanish courts.

56 Ms Murphy referred the Tribunal to the EAT judgment in Carewatch Care Services Ltd v Ms J Henry and Others: UKEAT/0220/17/DA the respondent had ended its contract to provide residential care services for Haringey Council and was replaced by four main providers. The EAT overturned an employment tribunal's decision that this amounted to an SPC. In the EAT's view, the tribunal had intended to find that the relevant activity carried out by S (UK) Ltd was the whole service provided for the Council, as opposed to the provision of care to individual service users, but it was 'most unsatisfactory' that there should be an issue as to what was decided on this important matter. The tribunal had also erred in its approach to the question of

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fragmentation and did not properly consider these factors when determining that the relevant activities were fundamentally the same post-transfer.

Submissions

57 The Tribunal is grateful to the parties for the comprehensive skeletons and closing submissions. The parties were unable to deal with Ms Murphy's argument that there was a SPC in any great depth, and Ms Murphy offered little to substantiate her claim, all the parties originally having agreed that this case did not involve a SPC.

58 In brief, the submissions of Mr Henry can be summarised as follows:

- (1) The bottom line is that the Directive and consequent regulations are to be interpreted in such a manner so as to preserve employment for the affected employees. Mr Henry's proposition was accepted by all of the parties.
- (2) The questions posed in Spijkers can be "boiled down" to an assessment of whether a business is "asset reliant" or "labour intensive." The provision of nursing care is labour intensive but it cannot be given without the use of certain assets, including "fundamentally" the provision of a home. Simply deciding the nature of the business is not a full answer to the question of the transfer; the Tribunal agrees and it has applied a multi-factorial approach to the decision-making process.
- (3) There are two possibilities in this case; a transfer on the 1 January 2018 when staff started to be paid by the third respondent, or on 23 March 2018 before the closure on 28 March 2018. The Tribunal took the view that there was a third possibility; Tarvin Court had closed down and its clients/service users contracted with a different provider who just happened to be the home next door thus minimising disruption to vulnerable elderly people.
- (4) With reference to Dr Trehan's admission that there was a transfer on 28 February 2018, it has not been said on what basis Dr Trehan accepted there was a transfer of staff on that date when the responsibility for staff wages took place on 1 January 2018 and the letter on page 250 of the bundle refers to a meeting on 28 February 2018 which envisaged the second transfer date. The letter in question is that dated 13 March 2018 sent to staff including Sheila Jones, referring to preserving employment rights.
- (5) Under the common law a contract of employment could cease, and that will be the situation when a business fails, the customers move, staff become free (to work elsewhere) and the TUPE regulations do not apply. The economic entity is a care home making a profit and loss, which has to retain

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its identity after the transfer. When a business fails and merges into another business the question depends on whether it retains its identity.

- (6) Regulation 3(b) provides for 2 or more transfers. The Tribunal was referred to the House of Lords decision in Celtec Ltd v Astley and ors [2005] ICR 1409, ECJ, the European Court ruled that the 'date of a transfer' in Article 3(1) of the Acquired Rights Directive is a particular point in time that cannot be postponed to another date at the will of the transferor or transferee. Both the choice of the word 'date' and the requirement for legal certainty indicated that the transfer must be identified at a particular point in the transfer process and not in relation to the length of time over which that process extends. The date in question, the Court continued, is that on which responsibility as employer for carrying on the business of the undertaking moves from the transferor to the transferee. Mr Henry submitted a transfer can happen in a business collapse leading to the final date for transfer.
- (7) On the 31 December 2017 the nursing care home business was still the same business as that on 2 January 2018, the entity having retained its identity.

59 In brief, Ms Murphy's submissions can be summarised as follows:

- (1) There was a SPC under regulation 3(b)(ii) from Tarvin to Conifers on the 28 February 2018. The client was the local authority, the activities the provision of care for residents at the care home.
- (2) There is no issue relating to fragmentation for the Tribunal to address, despite the matter having been raised at the outset of the hearing.
- (3) The relevant activity should be defined as adult homecare to individual service users in accordance with individual service delivery (known as care plans).
- (4) The document found at page 250 of the bundle is "very clear" and it is not possible for the third respondent to argue a transfer had not taken place. Page 250 is the letter sent to employees by Dr Trehan on 13 March 2018 referred to by the Tribunal in paragraph 47 above.

60 In brief, Mr Taylor's submissions can be summarised as follows:

- (1) Dr Trehan when he gave oral evidence that the TUPE transfer took place on 28 February 2018 reaffirms paragraphs 17, 18 and 19 in his witness statement, he was confused about the legal technicalities when he confirmed there had been a transfer. There was no TUPE transfer on a blanket basis but employees who could be taken on and offered

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employment at Conifers Care Home were taken on as a gesture of good will and not under a TUPE.

- (2) With reference to the third respondent taking over administration of the payroll of the business whilst handling monies coming into the business, this should not be considered a TUPE transfer under Cheesman v Brewer principles in that the staff themselves were not a stable economic entity as they were not sufficiently structured or autonomous. The “financial furnace” of the business was the placement of the service users inside the nursing home. The employees themselves were necessary in the process but their transfer alone does not lead to a financial reward on the part of the business.
- (3) The level of control over the business has been significantly brought into question during this hearing. It has been accepted that no physical assets of either business intermingled whilst the three respondents were attempting to save the business. All Tarvin’s assets were used to provide care, the staff remained branded as Tarvin and formal paper work such as minutes remained branded with the Tarvin Logo.
- (4) There has been competing evidence in relation to who ran the business on a day to day basis the respondent’s looking at each other in their respective evidence. It is clear that page 137 of the bundle supports the third Respondent’s position that they were there to simply support an administrative function of the business whilst Tarvin was run by its directors. It was submitted that the letter (email sent on 27 February 2018 referred to above at paragraph 40) supports the narrative of the third respondent.
- (5) The 3rd respondent does concede that in relation to aid advanced, it included the receipt of payments on behalf of the 1st/2nd respondent and handling of wages/running costs of the site. The 3rd respondent was not responsible for the day to day running of the business which was still retained by the 1st/2nd respondent. It is also stressed that the 1st/2nd respondent did not delegate authority to the 3rd respondent to make important decisions. All important decision taken on behalf of the business were taken by the 1st/2nd respondent. The European Union case of Landsorgainsationen I Danmark v Ny Molle Kro [1989] IRLR 37 held ownership of the business is less important than whether there has been a change in the legal person responsible for the running of the business. In this case whilst assistance was provided to the 1st/2nd respondent, they were responsible for the running of the business.
- (6) The above situation does not qualify as a Business transfer under regulation 3(1)(a) as there was no transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer. The 3rd

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respondent acknowledges managing the finances of the 1st/2nd Respondent but the 1st/2nd respondent retained full control of the business. They were responsible for the day-to-day running of the site and were the decision makers for the report to the Cheshire West safe guarding team in January 2018 which resulted in the site being placed on suspension. It is also highlighted that the decision to close the site was taken by the 1st/2nd Respondent. The 3rd Respondent was not a party to any of these decision-making processes.

- (7) The main asset of the business, specifically the building has until this day remained under the control of the 1st/2nd Respondent.

Conclusion: applying the facts to the law

60. The Tribunal is required to take a holistic approach and carry out a multi-factorial test having first identified the economic entity in question, before deciding whether that economic entity transferred.
61. Three possibilities have been put forward: There was a transfer from the 1st/2nd respondent on 1st January 2018 to the 3rd respondent on the assumption that the 3rd respondent took over responsibility based on the salary payments made. There was a transfer from the 1st/2nd respondent to the 3rd respondent on or around the 28th March 2019, with the 1st and 2nd respondent retaining control until the home closed. There was no transfer at all and Tarvin Court closed on the 25th or 28th March 2018 on the basis that there was an economic entity but post-transfer it did not retain its identity because Tarvin Court closed and a mixture of staff and clients moved to the 3rd Respondent, the main asset being the building retained by Tarvin. On the balance of probabilities, the Tribunal found the third scenario was applicable in the specific circumstances of this case, and the above situation did not create the transfer of an economic entity at any of the dates before or on the 23/28th March 2018. The entity in question, a nursing care home as set out below, did not retain its identity after its operation had been ended.
62. It is undisputed the nature of the business was a nursing care home, a hybrid labour and asset intensive business in that it was reliant upon the building Tarvin Court, a kitchen, equipment, furniture and nursing products/medication fundamental to the undertaking. Under the Cheeseman principles, even where assets are owned and required to run the undertaking, the fact that they do not pass does not preclude a transfer and therefore this is not a determinative point, but one to be taken into account when analyzing the factual matrix.
63. Once the assets had been set up and the residents in situ, the care of the home and residents was labour intensive. Residents required varying degrees

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of care depending on need assessed by the local authority and health authority. The first respondent can be differentiated from the company Sevacare, who was a provider of residential care service for a London borough, in Carewatch referred to above. The claimants in that case provided care to adults in their own home in accordance with a care plan, and there was an issue of fragmentation, which there is not in the case of Tarvin where all of the care was provided to residents in Tarvin Court.

64. The economic activity in Tarvin Court was asset reliant; in order to run the business of providing care to elderly clients, premises were necessary coupled with beds, furniture, medication, uniforms and so on consisting of the entire infrastructure necessary to provide a residential home to the elderly, including clients who no longer possessed mental capacity to make decisions and clients who required specialist nursing to such an extent that their fees included a contribution from the health authority. Ms Murphy succinctly defined the relevant activity which has been further clarified by the Tribunal to the following definition; the provision of adult residential care in accordance with an individual contract entered or on behalf of an individual service user and the second respondent provider, in accordance with an individual service delivery agreed between the provider, the service user, the local authority and on occasions, the health authority. For the avoidance of doubt, there was no contractual link between the service user and the third respondent until individuals had inspected Oaklands and moved from Tarvin Court immediately prior to its closure. The contractual position changed and the care provided was not continuous and interrupted by the closure of Tarvin Court.
65. It is undisputed the Tarvin Court residents contracted directly with the first respondent; there was no evidence one of the two local authorities who dealt with it were party to the client/service user contracts. The local authority and health authority involvement lay exclusively with meeting their statutory obligations, including providing financial support when the individual's savings held by a resident fell below £27,000, and a duty to set/review care plans. Contrary to Ms Murphy's submission on the existence of a service provision change, the Tribunal found the client was not the local authority, neither was it the health authority or any other organisation/business. The client was the individual service user who could choose whether to stay in Tarvin Court or move to different care home, such as Oaklands next door.
66. When Conifers took over the payroll on 1 January 2018 nothing changed in Tarvin Court. Jayshree Patel and Jayraji Bhadranwalia had lost interest in the business and were content for Dr Trehan to, over a gradual period, take control in the belief that he would be purchasing the business including the property once CQC had authorised the application to cancel all of the regulated activity provided by Tarvin at Tarvin Court. It was anticipated the

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application would take approximately 12-weeks; it was made on the 16 October and all parties took the view that by January the consents would have been given, and Debra Mahon as registered manager of Tarvin Court, would continue being responsible for Tarvin Court and the residents who lived in it under a new provider Conifers Care Home Ltd. It is a key fact in this case that the Tarvin Estates LLP, the registered provider with the CQC to provide regulated services to the residents of Tarvin Court, continued to be the registered provider until 21 August 2018, some 4-months after it closed.

67. Under statute a registered provider must have a registered manager. Debra Mahon was the registered manager of Tarvin Court until the home closed, and until that time she was responsible for ensuring compliance with CQC standards, as was the registered provider. The fact that staff ceased to be paid by Tarvin from January 2018 did not undermine the statutory and other legal obligations on Debra Mahon and Tarvin, and everything stayed the same with the exception of Dr Trehan's involvement at the behest of Jayshree Patel and Jayraji Bhadranwalia. The point is this; even if Dr Trehan's intention was to assist and at the time protect his investment, the ultimate responsibility for the business lay with Tarvin, the decision makers being Jayshree Patel and Jayraji Bhadranwalia.
68. On the evidence before it the Tribunal is satisfied that from November 2017 Dr Trehan on behalf of the third respondent became involved in the running of Tarvin Court with a view to purchasing the business and the property, and by the time it came to close Tarvin Court Jayraji Bhadranwalia and Jayshree Patel had left most, if not all, of the decision making with Dr Trehan in respect of staff. Dr Trehan intention was to keep Tarvin Court viable until the purchase by the third respondent was completed, and when it became clear to him Tarvin Court may not be profitable, he advised Jayraji Bhadranwalia to close the Home and the sale subsequently fell through. In the words of Jayraji Bhadranwalia, Dr Trehan "ran the whole show" and this was borne out largely in the evidence, with Jayraji Bhadranwalia and Jayshree Patel (as the authorised person) with the CQC, having the ultimate say.
69. During the relevant period in 2018 and immediately prior to the closure of the failing business, Jayraji Bhadranwalia and Jayshree Patel (to whom Debra Mahon reported to) retained ultimate control on behalf of the first and second respondent, over residents and employees. Evidence of this can be found in the 27 February 2018 email referred to above. "We are in agreement to forward your draft letter to Lee Calvert subject to you confirming the following: That with effect from tomorrow you will be responsible for the safe transfer of all resident's (subject to acceptance from the LO) & staff to Oaklands from Tarvin Nursing Home. That you will take over the day to day responsibility of the running of the home including the P/L until the home is closed (as per our agreement dated 22/10/2017 when you took responsibility/charge of running

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Tarvin Court.” Mr Taylor submitted the first and second respondent acknowledged that up until the 27th February 2018 they retained the business and no transfer was set to take place before that date. The email asked for an acknowledgment to show agreement to those terms, which was not given and the first and second Respondents were due to attend the employee meeting set to take place on the 28th February 2018 as they still retained control over the business. Jayshree Patel advised the attendees, including Lee Calvert and Debbie Mohan, that Dr Trehan was going to address the staff. Mr Taylor argued that all of this is evidence of the control the first and/or second respondent had over the business and no such transfer that would be subject to the Transfer of Undertakings Regulations 2006 ever happened, and the Tribunal agreed.

70. Jayshree Patel and the second respondent were ultimately answerable to the CQC for any statutory failings and this did not change until after Tarvin Court was closed. In accordance with the “gentlemen’s agreement” referred to above, it appeared the intention of all parties was for the third respondent to purchase the business followed by the closure of Tarvin Court pending refurbishment. However, four intervening events took place which changed the position; (i) the anticipated consent of the CQC to cancel all regulated activities in respect of the second respondent did not transpire, (ii) Cheshire West and Cheshire Council placed a suspension on all new placements following safeguarding issues, (iii) the CQC investigated, safeguarding issues were found to exist and Tarvin Court Care Home was placed in special measures, and (iv) Caroline Able refused to work in Oaklands Nursing Home for the third respondent. Dr Trehan pulled out of the sale on behalf of the third respondent and since its closure on 23 March 2018 Tarvin Court has been vacant and the second respondent deregistered with the local authority on 28 August 2018. In short, the economic entity Tarvin Court no longer exists, and its operation as a care home has not been continued by the third respondent in Oaklands. There was no temporary cessation of the activity carried out in Tarvin Court, which had become unprofitable and ceased to exist when the sale fell through.

71. The Tribunal acknowledges that a transfer can still occur despite a temporary cessation of activity in accordance with the principle set out Ny Mølle Kro cited above, where a change of employer can take place while the business in question was not functioning, but there was no evidence this was the case here. Had the anticipated sale to the third respondent gone ahead as envisaged by the parties, or Tarvin Court temporarily closed for refurbishment pending the third respondent starting up the business as a going concern later, the Tribunal may well have concluded there was a transfer of an undertaking within the meaning of the Directive. The Tribunal agreed with Mr Taylor that there was no entity identifiable as an economic entity transferred to the third respondent prior to or after the 23 March 2018.

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72. Prior to the closure of Tarvin Court Care Home on 23 March 2018 Jayraj Bhadranwalia and Jayshree Patel on behalf of the first and second respondent agreed to relinquish some of their control and responsibilities to Dr Trehan. On the evidence before it the Tribunal accepted Mr Taylor's submission that Dr Trehan and the third respondent provided financial support and financial management on some form of agency basis. The ultimate decisions over the use of the 1st and 2nd respondent's finances were retained by Jayraj Bhadranwalia and Jayshree Patel, and part of their decision-making process was to relinquish responsibility for parts of the business to Dr Trehan with the third respondent collecting payments, financially supporting the business and paying the expenses of the business.
73. Following closure of Tarvin Court Care Home Mr Taylor submitted that whilst the third respondent was involved in the rehousing of Tarvin Court's residents, a salient question perhaps would be, "do the residents themselves qualify as an "economic entity?" in response to which it was suggested the Tribunal should find they did not. The Tribunal accepted Mr Taylor's submission that the third respondent did not "take" the residents in the same manner as an asset would be taken but was involved in the rehousing of those residents. The rehousing was administered by Cheshire West and Cheshire Social Services at their discretion and the third respondent was not involved in their ultimate decision-making process or that of the service user as described by Caroline Able in her witness statement when she referred to residents and relatives being made aware of the fact Conifers Care had vacant rooms, presumably for viewing and approval before moving. Those residents who had mental capacity were not instructed but offered the option to move to Oaklands of their own free will, which all but one took up contracting directly with the third respondent as they had done with Tarvin. Mr Taylor suggested that the residents themselves cannot be considered an economic entity subject to transfer as neither party exercised control over them.
74. Turning to the issue concerning whether the employees offered positions by the third respondent were an economic entity subject to transfer, Mr Taylor submitted that employees themselves cannot be considered a "stable economic entity" as per the test set out in Cheesman cited above. In short, their services were required to administer care for the residents (which of itself brought revenue in for the business) rather than being the primary cause for payments to be received by the business.
75. Mr Taylor advanced the argument that the employees in question would not go on to provide the same business for the same clients, (residents) as they would provide care for new residents which those employees had never interacted with before. In effect as per Klarenberg v Ferrotron Technologies GmbH [2009] IRLR 301 it is advanced that "no functional link was maintained." In that case the ECJ ruled that for an entity to retain its identity after the transfer required the

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retention not of the specific organisation of the elements of production but of such a functional link of interdependence and complementarity between those elements as enabled the transferee to use them to pursue an identical or analogous economic activity, even if after the transfer they were integrated in a new and different organisational structure.

76. In order for TUPE to apply, it is sufficient that the transferred undertaking retain its identity immediately after the moment of transfer. In the instant case, there is no evidence either way whether the 10 employees out of a total of 23 who did transfer across to Oaklands carried out the same type work immediately following the transfer as they had done before, and the Tribunal is unable to reach any definitive conclusion save that it is a matter of logic that those employees who transfer from one nursing home to another would largely be involved in the analogous economic activity of caring for elderly residents, even if they are not the same residents as those who had previously resided in Tarvin Court.

Service provision change

77. Whether or not a SPC exists is a particularly thorny area on which the Tribunal has heard little by way of oral or written submissions on this point, the parties having been taken by surprise when Ms Murphy raised for the first time the possibility of a SPC when an agreement had been reached between the parties earlier at a preliminary hearing that there was none.

78. Regulation 3(1)(b) states that the TUPE Regulations apply to 'a service provision change' where the conditions set out in Reg 3(3) are satisfied.

Reg 3(1)(b) goes on to define three types of service provision change, as follows: where '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")' — Reg 3(1)(b)(i) i.e. 'contracting out' or 'outsourcing'

- where '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' — Reg 3(1)(b)(ii) i.e. involving a change of contractor,

- where 'activities cease to be carried out by a contractor or 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 by the client on his own behalf' — Reg 3(1)(b)(iii) i.e. 'contracting in' or 'insourcing'.

79. Each of the three SPC scenarios set out above involve 'activities' ceasing to be carried out by one person and subsequently being carried out by another. The

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transferor and transferee must carry out the same activities and reg 3(1)(b)(ii) requires the client to be the same before and after the putative transfer.

80. Mr Henry submitted an economic entity existed, but you do not service teams in the business moved between employers via outsourcing or insourcing as there is no third-party client in contrast to the situation in Carewatch, a case which does not take matters any further; the Tribunal agreed that Carewatch did not assist it.
81. Turning to Ms Murphy's submission that there was a SPC under regulation 3(b)(ii) from Tarvin to Conifers on the 28 February 2018, the client being the local authority, the activities ceasing to be carried out on behalf of the client by the first and second respondent and subsequently carried out by the third respondent was the provision of care for residents at the care home. There was no evidence before the Tribunal brought on behalf of the first and/or second respondent to the effect that it carried out the activities of a residential care home provider on behalf of the local authority and when the first and/or second respondent ceased to carry those activities out, there was a change of contractor to the third respondent. The first and/or second respondent did not contract directly with one of the two local authorities or for the avoidance of doubt, the health authority, involved in supporting the residential care of service users at Tarvin Court. The service users contracted directly with Tarvin, and providing they had mental capacity, could decide to leave the home and contract with another, which is precisely what happened just before Tarvin Court closed its doors for the very last time on 23 March 2018.
82. There was no SPC, and on the facts no transfer under Regulation 3(1)(a), Regulation 3(2) and Regulation 3(6), the cessation of operations at Tarvin Court continuing to date. The understanding of the parties was that whilst the terms of sale had been subject to a "gentleman's agreement" the third respondent had no rights in respect of Tarvin Court, other than those negotiated and agreed with Jayraji Bhadranwalia and Jayshree Patel in the expectation that the sale would go through whereupon Dr Trehan and the third respondent would take full control of the business, clients and staff. When Tarvin Court closed, no tangible assets were transferred to the third respondent; some of the beds were "on loan" to Dr Trehan, all the other assets lay unused. The third respondent did not continue or resume any part of the first and/or second respondent's business, and it would have been unable to do so directly as a result of CQC regulations evidenced by the fact that the second respondent deregulated with the local authority on 21 August 2018.
83. The Tribunal acknowledges that the circumstances in which the employees found themselves in was confusing, and the information provided by Jayraji Bhadranwalia, Jayshree Patel and Dr Trehan made it even more so. It was not unreasonable for employees to think that Dr Trehan's active involvement in the

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running of Tarvin Court, particularly when the wages were paid through the third respondent, was evidence of a transfer, given the affirmative communications made on behalf of all three respondents, whose directors appeared to be equally confused by the possible application of TUPE. For a TUPE transfer to take effect a transfer of an economic entity that retains its identity is a necessary condition; Dr Trehan's intention was to purchase the business and in the meantime, secure its viability by assisting Jayraji Bhadranwalia and Jayshree Patel by taking an active part even to the extent of paying salary and securing the payment of fees by residents, local authority and health authority. These are all relevant matters that could point to a transfer of an economic entity to the third respondent and taken into account by the Tribunal applying the multi-factorial test set out in Cheesman cited above.

84. Mr Henry in oral submissions validly made the point that the "sole" question for the Tribunal to decide was who had been standing in the employer's shoes from January 2018 and it must analyse what happened 1 January 2018 onwards. As set out above in its findings of facts, the Tribunal found Conifers was not in the shoes of the employer at any time leading to closure of Tarvin Court, the employer remained the first respondent throughout, with Jayraji Bhadranwalia and Jayshree Patel having the ultimate say on business decisions, including inviting Dr Trehan and the third respondent to become involved in the running of Tarvin Court.
85. In carrying out the balancing exercise the Tribunal took into account the fact that employees had worn the Tarvin Court uniform until closure, and following closure a number of staff agreed to work for the third respondent and according to Dr Trehan, their contracts were transferred under TUPE on the basis that he stood by his word. One key factor in the Tribunal's determination, although this was not a conclusive factor on its own, was pivotal part played the CQC who recognised that there was an intention on the part of the parties to transfer the first and/or second respondent business to the third respondent and the necessary statutory consents were not granted, for whatever reason. In short, without the CQC consents in place, the business of looking after elderly people in care homes cannot not take place, and the application made to the CQC on 16 October 2017 as set out above, was never finalised and the new provider for the second responded was not Conifers Care Homes Limited. Given the fact that Tarvin Estates LLP de-registered on 21 August 2018, the signs are that this is unlikely to happen in the future.
86. Turning full circle to the three possibilities suggested by the parties in this case, on the balance of probabilities the Tribunal found there was no transfer under TUPE and the business carried out by Tarvin at Tarvin Court came to an end on the 23rd March 2018. There was an economic entity but post-transfer it did not retain its identity because Tarvin Court closed and a mixture of staff and clients/service users voluntarily contracted to move to the third Respondent, the

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main asset being the house retained by Tarvin which was an essential requirement in order to run the nursing home business.

87. In conclusion, the claimants' employment did not transfer to the third respondent in or around January or on the 28 February 2018 or in or around 23/28 March 2018. All of the claims against the third respondent are dismissed. The claimants' have a potential claim against the first respondent and some case management orders have been agreed leading to the final hearing in respect of the remaining claims, which are attached in a separate order.

16.3.20_____

Employment Judge Shotter

Reserved judgment & reasons
sent to the parties on:

19 March 2020

For the Tribunal: