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TUPE

Govaerts and **McTear**
The Practical Implications

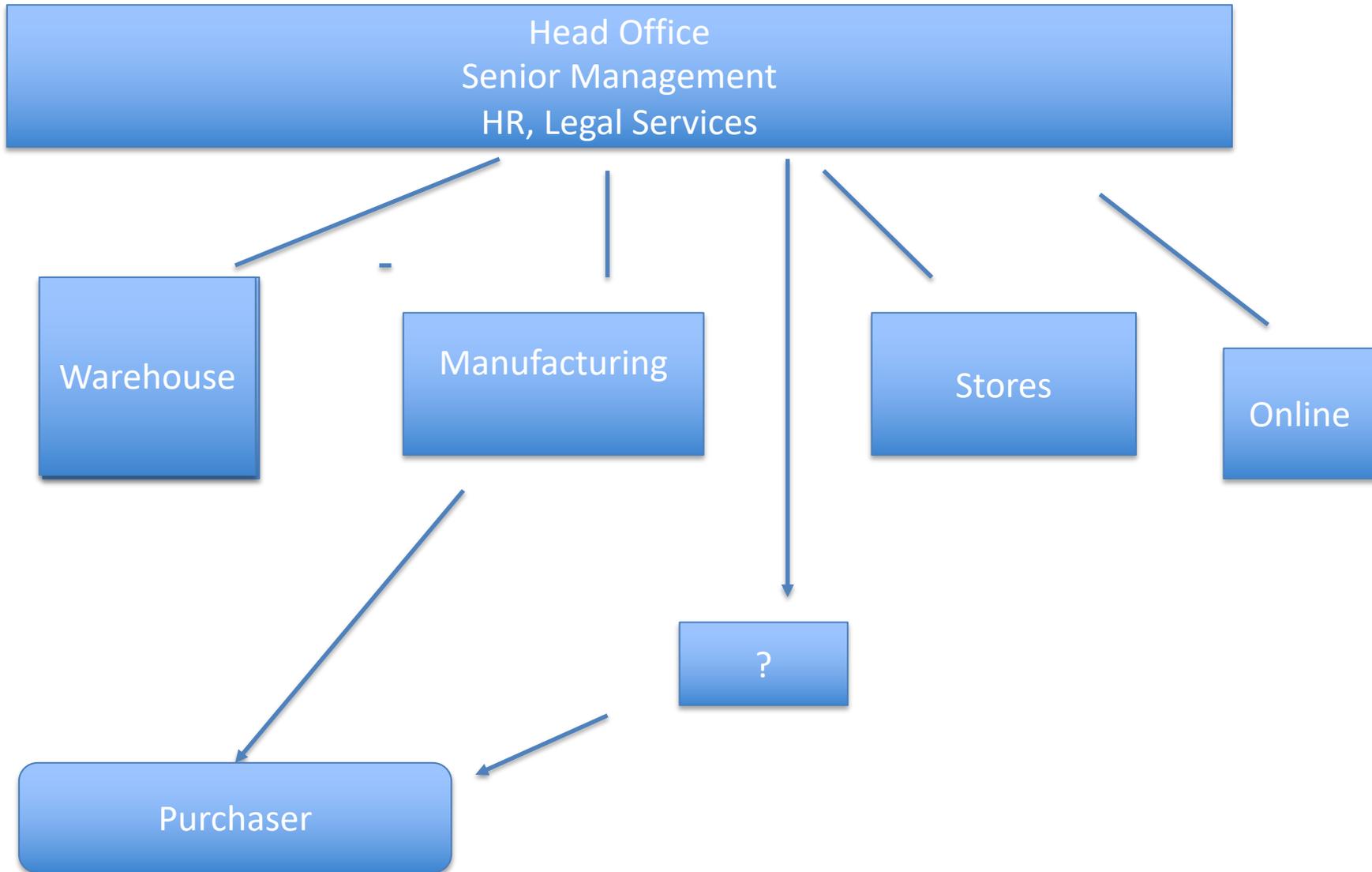
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- The Issue
 - A Tupe transfer of part of larger entity
 - It may be a larger business in administration
 - There are profitable elements and these are the subject of a transfer (or required to be treated as such)
 - EU model Reg 3(1)(a)
 - transfer of an economic entity which retains its identity
 - *Amatori and ors v Telecom Italia SpA and anor* [2014] IRLR 400
 - functionally autonomous part of an organised economic activity, identified as such by the transferor and the transferee at the time of its transfer

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- Reg 4
- person employed by the transferor and assigned to the **organised grouping of resources or employees** that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee
- *Botzen v Rotterdamsche Droogdok Maatschappij BV* [1986] 2 C.M.L.R. 50, ECJ
- *Duncan Web Offset (Maidstone) Ltd v Cooper* [1995] I.R.L.R. 633
- *Jones and Kingston v Darlows Estate Agency* (Unreported, 6 July 1998, CA)

- *Duncan Web Offset (Maidstone) Ltd v Cooper*
[1995] I.R.L.R. 633
 - how much time was spent on different parts of the business,
 - how much value was given to each part of the business by the employee,
 - what the contract of employment had to say about what the employee's duties were,
 - how the cost of employing the employee was allocated as between different parts of the business.

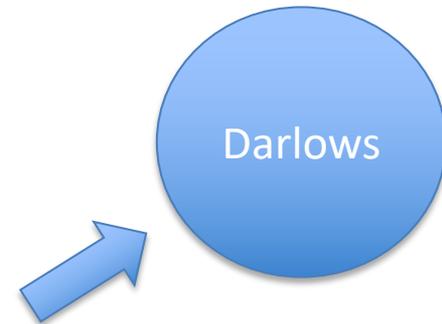
Jones and Kingston v Darlows Estate Agency
(Unreported, 6 July 1998, CA)

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Nationwide Estate Agency
Wales and the West of
England
Mr Jones (and PA)
Regional Operations
Director

West of England
11 Branches

Wales
20 Branches



Govaerts

- **ISS Facility Services NV v Govaerts and Atalian NV Case C-344/18 CJEU**
- **[2020] IRLR 639**
- 26th March 2020
- Fragmentation in the transfer of a service in an EU transfer
- No transfer not an answer
- Unreasonable to place all liability on one transferee, interests of the transferee also protected
- Splitting the role performed by the worker between the transferees in proportion to the tasks performed by the worker



In the light of all the foregoing, the answer to the question referred is that, where a transfer of undertaking involves a number of transferees, art 3(1) of Directive 2001/23 must be interpreted as meaning that the rights and obligations arising from a contract of employment are transferred to each of the transferees, in proportion to the tasks performed by the worker concerned, provided that the division of the contract of employment as a result of the transfer is possible and neither causes a worsening of working conditions nor adversely affects the safeguarding of the rights of workers guaranteed by that directive, which it is for the referring court to determine. If such a division were impossible to carry out or would adversely affect the rights of that worker, the transferee(s) would be regarded as being responsible for any consequent termination of the employment relationship, under art 4 of that directive, even if that termination were to be initiated by the worker.

ISS Facility cont

- No consideration of Botzen or the issue of assignment? (or perhaps it should be read as assuming assignment to the whole)
- So should Mr Jones have had 2 jobs? One retained the other transferred
- Or does Govearts only apply if the entire economic entity has been transferred to two or more transferees (para 27). Only then would there be no safeguarding of the contract of employment of the employee in the context of a transfer.
- But could it be said that the safeguarding is not ensured if the absent application the worker would be employed by an insolvent undertaking?

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- Para 34 appears to contemplate a division into part time contracts in proportion to task to the tasks performed by the worker
- Is this a division on the basis of time? Para 32 appears to contemplate it could be on the basis of value of the lots (part?)
- In *Govaerts* the facts conveniently meant worker's time allocated across lots
- But two part time contracts, what if competitors? What about obligations of fidelity, post termination restraints in the original contract. What if inconsistent for 2 P/T contracts.
- But what if no easy division of time. Having 2 overlapping contracts with 2 masters has significant legal problems seem *McTear* para 38 to 40
- Not possible, in general terms, for an employee to have two employers
- See *Wynn-Evans* and *Reade* ELA Bulletin July 2020,
- Division has to be possible, and possible within National Laws as CJEU noted Art 2(2) without prejudice to National laws on definition of a contract of employment or employment relationship (para 32)

- But what of the position of the worker?
- Transfer away of a significant part of their duties
- A substantial change in their working conditions to their material detriment (Reg 4(9))
- Does not matter if a valid contractual change, per *Lewis v Dow Silicones UK Ltd* (EAT 4th March 2021)
- But “are they a person whose contract is or would be transferred”
- But Govaerts appears to contemplate this protection should be engaged (para 36)
- Is it necessary to read Reg 4 purposively
- But there should be no objection to the transfer, see *Abellio London Ltd (Formerly Travel London Ltd) v Musse* and others UKEAT/0283/11 [2012] IRLR 360 so that can claim Unfair Dismissal against transferee.
- Does the worker also have claim constructive dismissal (Reg 4(11) to get their notice pay Reg 4(10) [nb the valid contractual change meant the constructive dismissal claim failed in *Dow Silicones*]

- **SPC**
- This is a different approach to that which has been taken in the UK on service provision change:
 - *Clear Springs v Ankers and others* [2009] UKEAT 0054-08-2402 (no transfer possible if complete fragmentation)
 - *Kimberley Group Housing Ltd v Mr D Hambley and Leena_Homes Ltd* [2008] IRLR 682
 - (transfer to the transferee who takes the majority of the work)

SPC may have limited impact in the posited transfer as the client will be different (Head Office staff are not directed to an external Client)

But SPC may be engaged

Will it be necessary to rethink the position or will there be a difference of approach between SPC and and EU in a splitting situation?

Enter McTear

- SPC 3(1)(b)
 - Activity base test
 - Not necessary to identify autonomy in *Telecom Italia* see *Arch Initiatives v Greater Manchester West Mental Health NHS Trust* EAT – [2016] IRLR 406
 - The identification of an organized grouping of employees that have as their principal purpose the carrying out the activities
 - But activities may be fragmented see *London Care Ltd v Henry and others* UKEAT/0219/17/DA, UKEAT/0220/17/DA 21st February 2018 (Supperstone J).

- ***McTear Contracts & Mitie Property Services UK Ltd v Bennett and others***
- ***UKEATs/0030/19/SS***
- Amey Services Ltd contract for replacement kitchens North Lanarkshire Council housing stock
- Re tender, contract split into 2 lots, North and South: McTear and Mitie.
- 2 teams, geographical analysis of work carried out by teams. Tribunal determined 1 team to each of the new contractors on the basis of where they predominately carried out their work.

- The Tribunal considered itself bound by *Kimberley Group Housing Ltd v v Mr D Hambley and Leena_Homes Ltd* [2008] IRLR 682
- *Govaerts* introduced at EAT level
- Seemed to be agreement that would apply to SPC
- No contrary argument
- There is force in the proposition that should be applied. A particular issue where transfer might be seen as both and EU and SPC transfer
- EAT acknowledge that *Govaerts* is retained EU Law under European Union Withdrawal Act 2018
- EAT express sympathy view that *Kimberly* and *Duncan Web* (Offset) must be read as subject to *Govaerts*

- Never really engaged in McTear
 - There were separate organised groups of worker around the specific activity of installation
 - Geographic analysis made more sense if one could say there was a pre existing degree of autonomy of the teams, per Italia, and the North and South division became an application of *Duncan Web*
 - One would not normally get to Govaerts situation in SPC
 - As
 - The focus is on the organised group around an activity
 - Still need to consider assignment in relation to that organized grouping on a *Duncan Web* basis
 - Goveart only really apply to a pure SPC if the organized group, whose principal purpose is the carrying out of the activities, would be split, because the activities will be carried on by more than one putative transferee for the same client.



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