Neutral Citation Number: **[2025] EWHC 1000 (KB)**

Case No: KB-2021-MAN-000215

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

The Civil Justice Centre
Manchester

Date: 24 April 2025

Before:

HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THIS COURT

- -

Between:

ABC	**Claimant**
- and -	
(1) Huntercombe (No.12) Limited **(2) Active Young People Limited** **(3) Dr. Veerraju Banisetti** **(4) Dr. Mark Tattersall**	**Defendants**

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- -

Niazi Fetto KC, Peter Edwards and John Platts-Mills (instructed by **R James Hutcheon Solicitors**) for the Claimant
Catherine Foster (instructed by **Kennedys Law**) for the First Defendant
Alexander Macpherson (instructed by **DAC Beachcroft**) for the Second Defendant
Jasmine Chan (instructed by the **Medical Defence Union**) for the Third Defendant
Victoria Heyworth (instructed by the **Medical Protection Society**) for the Fourth Defendant

Hearing dates: 10, 11 March 2025

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This is an Approved Judgment

This judgment was handed down remotely at 10.30am on 24 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

His Honour Judge Bird :

Introduction

1. In this action, the Claimant seeks damages for wrongs suffered by her whilst an in-patient at a hospital in Maidenhead owned and operated by the first Defendant. She avers that the first Defendant is responsible for the wrongs of the third and fourth Defendants, their employees. The first Defendant's business was sold to the second Defendant on or about 5 March 2021. It is accepted that the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE" or "the 2006 Regulations") applies to the transfer.

2. This is the trial of the following preliminary issues:

    a. Is the effect of regulation 4(2) of the 2006 Regulations to transfer to the second Defendant any alleged vicarious liability of the First Defendant to the Claimant:

        i. for the alleged torts of any employee employed by the First Defendant immediately prior to the transfer date. [Preliminary Issue 1].
        ii. for the alleged breaches by any such employee of the Claimant's human rights? [Preliminary Issue 2].

    b. If the answer to either issues 1 or 2 is "yes", is the effect of regulation 4(2) also to transfer to the Second Defendant any right that the First Defendant may have to indemnity by its public liability insurers in respect of the Claimant's claim for damages and costs and/or in respect of Defence Costs, arising from any such alleged vicarious liability? [Preliminary Issue 3].

The Hearing

3. I had the benefit of long and detailed written submission from the Claimant and the second Defendant, and I heard oral submissions from Mr Fetto KC, who appeared with Mr Edwards and Mr Platt Mills for the Claimant and from Mr Macpherson for the second Defendant. The first, third and fourth Defendants adopted a neutral stance. They were represented by Miss Foster, Miss Chan and Miss Heyworth.

4. I heard oral argument over the course of 2 days and read the detailed skeleton arguments with (in the Claimant's case) detailed appendices. In reaching my conclusion I have borne all the arguments in mind. It is neither necessary nor helpful to recite and deal with each argument. I will set out only those which I feel are particularly germane to my conclusion.

The European and Domestic legislative framework

5. The 2006 Regulations are materially identical to the Transfer of Undertakings (Protection of Employment) Regulations 1981. Each is derived from a European Council Directive. The Acquired Rights Directive of 14 February 1977 and the Acquired Rights Directive of 12 March 2001 (the "Directive").

6. The preamble to each Directive notes that it is adopted on the basis that:

> "*it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded*."

7. Art.3 (within Chapter II entitled "safeguarding Employees' rights") of the Directive provides at 3.1:

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

8. Regulation 4 of the 2006 Regulations provides as follows:

> *Effect of relevant transfer on contracts of employment*
>
> *4.—*
> *(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the*

person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

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

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

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

…

(6) Paragraph (2) shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

The Court's Task

9. To resolve the preliminary issues, I am required to interpret the 2006 Regulations. Guidance on that exercise is set out in *Swift Trading v Robertson* [2014] UKSC 50 at paragraphs 20 to

22. Domestic Courts are under an obligation to interpret domestic legislation, so far as possible, in the light of the wording and purpose of the Directive which it seeks to implement. The obligation:

(a) is not constrained by conventional rules of construction
(b) it does not require ambiguity in the legislative language
(c) it is not an exercise in semantics or linguistics
(d) it permits departure from the strict and literal application of the words which the legislature has elected to use
(e) it permits the implication of words necessary to comply with Community law obligations
(f) the precise form of the words to be implied does not matter and
(g) The only constraints on the broad and far-reaching nature of the interpretative obligation are that the meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed"

The Issues

10. The first and second preliminary issues effectively pose the question: what "liabilities…. in connection with" the contracts of the third and fourth defendant have transferred to the second Defendant (see Reg.4(2)(a))? Mr Fetto KC does not argue that the relevant liability arises "under" the transferred contract but does submit that the relevant liability is transferred.

11. The words "in connection with" are capable of capturing a wide spectrum of liabilities. Mr Fetto KC rightly accepts that not all liabilities which arise by virtue of the existence of the relevant contracts arise "in connection with" them. Thus, he rightly accepts that something more than a mere "but for type connection" (see para.32(b) of *Sean Pong Tyres v Moore* [2024] 1 EAT 1, a decision of Judge Stout in the EAT to which I return below) between the liability and the relevant contract is required.

12. The question posed at paragraph 10 above can therefore be expressed in this way: is the connection between the relevant liability and the relevant contract sufficient to bring the liability within Reg.4(2)(a) so that it is transferred from the first Defendant (the transferor) to the second Defendant (the transferee)?

13. Before turning to the relevant authorities, it is helpful to consider 3 matters:

a. first, what is the precise nature of the relevant liability which Mr Fetto KC contends has been transferred? It is the transferor's liability to the claimant. The liability arises either as a vicarious (or secondary) liability in respect of the actions or omissions of the transferor's employees (in the case of tort claims) or as a liability imputed to the transferor as a result of breaches of the Claimant's Human Rights (a primary liability arising under sects. 6 and 7 of the Human Rights Act) and (in either case) it is owed to the claimant who was not an employee of the transferor.

b. Secondly, what is the purpose of the Directive? It is the safeguarding of employee rights after a transfer of employment.

c. Thirdly, what is the nature of vicarious liability?

i. In a passage quoted in *Doane* (see below) from *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, Lord Nicholls said:

> "*Vicarious liability is a common law principle of strict, no-fault liability. Under this principle a blameless employer is liable for a wrong committed by his employee while the latter is about his employer's business. The time-honoured phrase is "while acting in the course of his employment". It is thus a form of secondary liability. The primary liability is that of the employee who committed the wrong*…."

ii. Charlesworth and Percy on Negligence (15th edition chapter 7) describes the basis of vicarious liability (describing it as a "doctrine") as without any "coherent or agreed jurisprudential underpinning" (para.7-08 adopting the words of Tipping J in the New Zealand case of *S v Attorney General* [2003] 3 NZLR 450 (CA)) but with policy justifications based on "*a combination of loss-spreading, deterring behaviour likely to cause harm and, broadly, the justice of the case at hand*."

The Authorities

14. The reported domestic cases deal with the transfer of both rights and liabilities.

15. Those dealing with the transfer of liabilities ("under or in connection with" transferred contracts of employment) deal exclusively with pre-transfer tortious liabilities owed by transferor employers to their employees. In other words, they deal with the following outline scenario: an employee (A) suffers an injury at work. Before A issues proceedings seeking damages in respect of the injury, A's employer completes a relevant transfer to B, and A's employment is transferred to B and A's employer's liability is transferred to B.

16. In one such case (*Baker v British Gas* [2017] EWHC 2302 (QB)) Amanda Yip QC (as she then was) described the employer's duty (and consequent liability) to take all reasonable steps to avoid risk of injury to employees as a "***fundamental principle of the common law***". The fundamental nature of the obligation was emphasised by Lord Wright in in *The Wilson & Clyde Coal Co Ltd v English* [1938] AC 57 where he referred to "***those fundamental obligations of a contract of employment*** [including the provision of a proper system of working] .. . ***for the performance of which employers are absolutely responsible***" (see the references in *Martin* cited below).

17. There are no authorities decided at the level of the High Court or above where the court has found that the vicarious (secondary) liability or imputed direct liability of the type that arises on the facts of this case has transferred under TUPE. Thus, the authorities cited deal (almost exclusively) with the transmission of the transferor's duties to its own employees to keep them safe at work (a fundamental duty).

18. The joined appeals of *Martin v Lancashire County Council* and *Bernadone v Pall Mall Services Group Ltd and others* [2001] ICR 197 deal with the transfer of both employer rights and liabilities.

Martin and Bernadone

19. These decisions identify examples of the type of liabilities that arise "in connection with" (as opposed to "under") a transferred contract and deal with the transfer of employer rights

against a third party.

20. I will deal first with the transfer of liabilities.

21. The contract of the (employee) victim of the wrongdoing (of the employer) was subject to a TUPE transfer. Peter Gibson LJ (giving the lead judgment) started his analysis with a consideration of the relevant Directive. He noted that its purpose (as discussed above) was to safeguard the rights of employees on a change of employer by a transfer of undertaking (see paragraph 13 and paragraph 42). He referred (at paragraph 19) to the speech of Lord Slynn in *Wilson v St Helens BC, British Fuels Ltd v Baxendale* [1998] IRLR 706 at 490, [1998] ICR 1141 at 1159–60:

> *'In my opinion, the overriding emphasis in the European Court's judgments is that the existing rights of employees are to be safeguarded if there is a transfer. That means no more and no less than that the employee can look to the transferee to perform those obligations which the employee could have enforced against the transferor. ... The object and purpose of the Directive is to ensure in all Member States that on a transfer an employee has against the transferee the rights and remedies which he would have had against the original employer.'*

22. He went on (at paragraphs 34 and 36 to 38) to say:

> "*…. The economic entity carrying on the undertaking after the transfer will be the transferee, and in general the employees are more likely to be protected if the rights and obligations to be transferred are more rather than less comprehensive. But such rights and obligations must of course fall within the limiting words "arising from a contract of employment or from an employment relationship". It would seem to me to be surprising if the rights and obligations were to be limited to contractual claims and to exclude claims in tort. Why should there be such a dividing line (in accordance with the distinction in English law between tort and contract) in a Community Directive? It is the more surprising when the language used in the Directive is broad ("arising from") and when it is not only a contract of employment but also an employment relationship (which is plainly something different) from which the rights and obligations must arise…*

> 36 *It is to my mind significant that by common consent all contractual rights and liabilities are transferred. They are not limited to those which are still contingent. Thus, fully accrued rights and liabilities are transferred. That demonstrates the far-reaching effect of the 1981 Regulations. But if such contractual rights and liabilities are transferred it is hard to understand why tortious rights and liabilities are not transferred. There will be many circumstances which enable an action to be brought either in contract or in tort or both….*
>
> 37 *Does such a tortious liability arise from the contract of employment (in the words of Directive 77/187) or under or in connection with that contract (in the words of regulation 5 (2)(a))? I would not say that it arose under the contract, but I have no difficulty in saying that it arose from or in connection with the contract. In this context the observations of Lord Wright in Wilson & Clyde Coal Co Ltd v English [1938] AC 57 are helpful. He referred, at p 78, to "those fundamental obligations of a contract of employment . . . for the performance of which employers are absolutely. responsible". "The employer's obligation" was said, at p 81, to include the provision of a proper system of working. The duty of care arises out of the relationship of employer and employee, and in my judgment any liability for its breach arises from and is in connection with the contract of employment. (emphasis added)*
>
> 38 *In the present cases, although Mr Martin and Mrs Bernadone sued in negligence, they could have sued in contract for breach of an implied term to provide a safe system or place of work. I would hold, in agreement with Blofeld J, that the liability in negligence was transferred to the transferee under the 1981 Regulations. The language of Reg5(2) is wide enough, without any express reference to tortious rights and liabilities for the reasons already given, and, so construed, accords with the Directive and its purpose."*

23. It is clear from these passages that there was no material difference between the employer's duty of care and the employer's contractual obligation to provide a safe working environment to its employees. It was also clear that the nature of that obligation (however it arose) was "fundamental" to the contract of employment. A right that was so fundamental to the relationship of employer and employee (and so fundamental to the protection of the employee) was sufficiently connected to the employment relationship to allow the Court of

Appeal to conclude that it arose "***in connection with***" the contract.

24. The same decision deals with the status of statutory liabilities. Mrs Bernadone's claim against Pall Mall included a claim under section 2 of the Occupiers Liability Act 1957. By that section, occupiers owe a duty of care to visitors (including but not limited to employees) to keep them reasonably safe from harm. The Court of Appeal found, on the basis of Mrs Bernadone's pleaded case, that she had visited the place she suffered harm in the course of her employment so that any liability under the 1957 Act "***had sufficient connection with her contract of employment for that liability to be transferred***" (see headnote and paragraph 39).

25. I now turn to deal with the transfer of employer's rights.

26. The question of whether the transferor employer's right to an indemnity under its own employee liability insurance transfers to the transferee, is dealt with at paragraphs 41 to 49 of the judgment.

27. Peter Gibson LJ again considered the purposes of the Directive (discussed above: to safeguard the employee's rights on a change of employer by a transfer of an undertaking and to the obligation on the court to construe the 1981 Regulations purposively) at paragraph 42. He went on:

> *"The Regulations therefore must if possible be construed in such a way as to ensure that on the transfer the employee is not deprived of rights against his employer, which he would otherwise have, had he continued to be employed by the transferor and arising out of or in connection with his contract of employment with the transferor."*

28. At paragraph 45, he said this:

> *"The transferor prior to the transfer has a vested or contingent right to recover from his insurers under the employers' liability policy in respect of the liability to the employee. On the basis of the conclusion reached on the [transfer of liability in tort] , that obligation arising from or being in connection with the contract of employment is transferred by the 1981 Regulations to the transferee. <u>It follows that the transferor's vested or contingent right to recover from his insurers is a vested or contingent right to recover from them in respect of a liability to his employee arising</u>*

> *from or in connection with the employee's contract of employment." (emphasis added)*

29. Dealing with the construction of the 2006 Regulations, at paragraph 48 Peter Gibson LJ noted that Mr Edelman QC (counsel for Pall Mall and the third party insurer) submitted that the right against the transferee's insurers was not a right "*arising from or in connection with the employee's contract of employment*". It is important to note that for the purpose of insurance, the Court of Appeal was considering whether rights (as opposed to liabilities) transferred.

30. Peter Gibson LJ said this at paragraph 48:

> *"Mr Edelman QC would read into Directive 77/187 and the 1981 Regulations words limiting the relevant rights and obligations [arising out of or in connection with the transferred employee's contract of employment with the transferor] so as to exclude rights and obligations under contracts with third parties. The transferor employer's right is to recover from the insurers an indemnity in respect of the transferor's liability arising from or in connection with the contract of employment. That is the very liability which the transferor was required to insure under the 1969 Act. True it is that that right is under the contract of insurance with third parties, the insurers. But the important point is that* ***the right*** *arises from and is in connection with the contract of employment, because the liability insured under the contract is such a liability." (emphasis added).*

31. It follows that the Court of Appeal looked at the nature of the risk (liability) insured against. In essence, that liability transferred because it arose "in connection with" the employee's contract of employment. That was enough for the rights under the contract of insurance to transfer. It is perhaps unsurprising that rights that attach to a liability that is transferred also transfer. If those rights did not transfer, the employee might be disadvantaged.

Doane

32. The single case in which it was held that vicarious (secondary) liability of a transferor is transferred because it arises "in connection with" the transferred contract is *Doane v Wimbledon FC* a county court decision of His Honour Judge Robinson, a very experienced Judge whose careful judgments command great respect. The case is reported at [2007] 12

WLUK 2.

33. The Claimant was a professional footballer injured in what he alleged was a negligent tackle committed by a Wimbledon FC player, Darren Holloway. Mr Holloway's (the wrongdoer's) employment transferred to MK Dons under TUPE. The Claimant issued a claim against 6 Defendants including MK Dons. They sought summary judgment against the Claimant on the ground that they had no liability. The question for the Judge (determined as one of a number of preliminary issues) was: did Wimbledon FC's vicarious liability for Mr Holloway transfer to MK Dons?

34. Both the Claimant and Mr Holloway (see paragraph 44 of the judgment) argued that liability passed to MK Dons either under what is now Reg.4(2)(a) of the 2006 Regulations or under paragraph (b). It is accepted by both sides before me that the learned Judge had misread Reg.4(2)(b). No reliance is therefore placed on paragraphs 50 and 51 of the judgment.

35. The Judge's approach to Reg 4(2)(a) was to begin by analysing its constituent words (see paragraph 47). He concluded that "*nothing could be clearer than the operative words of Reg* [4(2)(a)]". A liability "*arising vicariously out of or by virtue of a contract of employment is classically a liability "in connection with" such contract*…" (paragraph 49). At paragraph 52, having completed the textual analysis, he said "*Tempting as it is to leave matters there, Mr Lewis [counsel for MK Dons] has made cogent submissions to the effect that this is not the meaning of the Regulation, and those submissions demand detailed consideration*".

36. The Judge went on to consider *Bernadone*. He found that there was nothing in that decision to support the proposition that the transferor's vicarious liability owed to a third party would not transfer. At paragraph 55 he quoted part of paragraph 37 of the judgment of Peter Gibson LJ (see paragraph 22 above):

> "*Does such a tortious liability arise from the contract of employment (in the words of Directive 77/187) or under or in connection with that contract (in the words of regulation 5(2)(a)? I would not say that it arose under the contract, but I have no difficulty in saying that it arose from or in connection with the contract*."

37. However, the Judge left out the important words in that paragraph underlined at paragraph 22 above. The omitted words are an important part of Peter Gibson LJ's reasoning because they

explain the fundamental nature of the duty at issue in the *Bernadone* case and so deal with its very close connection to the relevant contract (which, as I have explained above contains the same obligations). In my judgment that omission is important.

38. At paragraph 57 he said:

> "*A Claimant such as Mr Doane, seeking to establish that an employer of the primary tortfeasor is vicariously liable for the tort of his employee, must establish that the act or omission in question arose in the course of the employee's employment with the employer. Thus, if called upon to do so, Mr Doane must prove that Mr Holloway was in a contractual relationship with Wimbledon at the material time. Unless he can do so he has no prospect of recovery against Wimbledon. Thus Wimbledon's potential liability to pay damages to Mr Doane is plainly "connected with" its contract with Mr Holloway*."

39. At paragraph 64 the Judge explains that his conclusion results in a "*very real benefit*" to the negligent employee of having his new employer

> *"taking care of all the matters pertaining to the defence of any claim arising out of negligence related to his employment. Those matters may well include his employer arranging legal representation, undertaking the defence of any claim and indemnifying him against any liability, which would be the position if the employee's right to be indemnified transfers to the new employer. Those matters represent benefits of such importance to the employee that it seems to me inconceivable that Parliament intended to exclude transfer of the relevant liability to a new employer. Had that been the intention of Parliament, and given that the purpose of the legislation is the protection of the employee, I would have expected to see clear exclusionary words in TUPE"*

40. Mr Macpherson points out in such circumstances, that an employee has no strict "right of indemnity". In fact, the employer has a right of indemnity against the employee (see *Lister v Romford Ice* [1957] AC 555). It seems to me that the Judge's conclusion was that the liability was connected to the contract because without the contract it would not arise. In other words, he held that a simple "but for" connection was sufficient. He then held that the construction was consistent with the aims of the Directive because it resulted in some advantage to the

(employee) wrongdoer.

41. In my view, and with respect to the very experienced Judge, the decision (which is not binding on me) should not be followed. I reach that view for the following reasons:

    a. The Judge placed too heavy an emphasis on the words of the regulation. In doing so he treated the question of construction as mainly "*an exercise in semantics or linguistics*". This is an impermissible approach.

    b. The Judge's 2-step approach (to ask if the contended for construction is consistent with the words of the regulation and then ask if that construction leads to some "benefit") is impermissible. Whilst the Judge considered if his interpretation resulted in a benefit to the employee he did not consider if it safeguarded any relevant rights. The benefits the Judge referred to are not, in my view, strictly "**rights**".

    c. The Judge was wrong to conclude that *Bernadone* did not run contrary to the approach he took. In my view it does. The rights in that case could be said to have arisen "in connection with" the transferred contract because they were identical to fundamental rights under the contract between the employer and employee. The apparently transferred obligation in *Doane* is of an entirely different character: it is not owed by the employer to the employee but by the employee to a third party. Even if the vicarious liability for the acts of an employee can be said to be a liability owed by the employer to the injured party, it is not "fundamental" to the employment relationship. The primary obligor is the employee.

Sean Pong Tyres

42. I note that the approach set out in *Doane* received some limited support from the Employment Appeal Tribunal in *Sean Pong Tyres v Moore* [2024] EAT 1. As Mr Macpherson explains, the Judge in that case "*did not dissent from or criticise*" the decision, but distinguished it.

43. Mr Moore was an employee of Sean Pong Tyres ("SPT"). He resigned and brought claims against SPT including a claim in respect of direct age and race discrimination perpetrated by a fellow employee (Mr Owusu). After Mr Moore resigned, SPT transferred its business to a third party. At the start of the final hearing, SPT applied to amend its response to the claim to

add the transferee. The application was refused, and the Tribunal went on to find against SPT who appealed to the EAT. SPT were represented by counsel, Mr Moore was not represented and advanced no argument at the appeal hearing. The absence of any argument on behalf of Mr Moore means the points before the EAT were not fully argued. As the Judge herself recognised at paragraph 19 of the decision, the conclusions reached should be approached with caution. The transferred employer was (as in *Doane*) the wrongdoer. The EAT found that liability did not transfer.

44. At paragraph 32 the Judge notes that the *Doane* decision is "*highly persuasive in respect of the position for the vicarious liability of a transferor employer in tort for the negligent act of an employee whose employment has transferred*." In *Doane* the transferor employer was Wimbledon, and it was found the lability had been transferred. The Judge went on to identify 9 reasons why the analysis in *Doane* did not apply to the facts of the case before her (and so why the decision could be distinguished).

45. The third reason was this (see paragraph 32(c)):

> *"'Connected with' is a term that can have a narrower or wider meaning depending on the context, and it seems to me that, in this context, the connection between the liability and the contract needs to be direct. In all the cases, save for the part of Bernadone that was concerned with the insurance indemnity, the connection between the liability and the contract has been direct: the right or liability has arisen under or in connection with the transferring employee's contract with his employer, in the sense of being a right or liability owed by one party to that contract against the other, albeit sometimes in tort rather than contract. The insurance indemnity in Bernadone was different, as it was a right and liability under a third-party contract, but it is apparent from the Court of Appeal's judgment that strong policy arguments pushed the Court towards the conclusion that the insurance indemnity transferred…"*

46. Mr Fetto KC was concerned to point out that the decision in respect of the transfer of insurance in *Bernadone* was not purely based on policy considerations. I agree. The Court of Appeal plainly construed the regulation and found that the relevant rights under the policy of insurance were rights "in connection with" the transferred contract. Paragraph 48 of the decisions (cited above) plainly deal with construction.

47. For the reasons given at paragraph 31 above, it seems to me even when dealing with rights under the insurance contract in *Bernadone*, the connection between the liability (the risk insured against), and the contract was direct.

48. The need for a direct connection identified at paragraph 32(c) of *SPT* does not seem to be consistent with an endorsement of the reasoning in *Doane* where (see paragraph 40 above) a "but for", much looser, connection was held to be sufficient. I agree with the analysis set out in *SPT*.

Other cases

49. My attention was drawn to the Employment Tribunal decision of *Sohail v WFS and others*. That case, like *SPT* concerned the potential transfer of vicarious liability for conduct contravening the Equality Act 2010 under TUPE when the wrongdoer but not the victim of the wrongdoing had transferred. The Tribunal dealt with *Bernadone* at paragraphs 27 to 30. There is brief mention of *Doane* at paragraph 31, but only to dismiss the possibility of reliance on the decision because no transcript was available.

50. Employment Judge Franey accepted that a "*literal and mechanical wording of reg.4 appears to support the argument pursued by WFS, a purposive reading of reg.4 leads to the contrary conclusion*".

Resolution

51. I remind myself that the present exercise is one of interpretation. The starting point is therefore *Swift*. For the purposes of *Swift*, I am satisfied that the purpose of the Directive and so of the 2006 Regulations is the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.

52. In my judgment the decided cases show:

    a. The connection between the liability of a transferor and the contract must be direct, in the sense of being a liability the transferor has to an employee if the liability is to

transfer; and

b. if the transferor has a vested (or contingent) right against a third party which arises purely as a result of such a liability, that right will also transfer.

53. In the present case, if the transferor has any real "liability" at all, it is not owed to its employee. It follows that the connection is too remote. The relevant "direct" liability here is the liability of the employee to the third party. The only liability that attaches to the transferor ("*a blameless employer*") is the secondary (or indirect) no-fault liability "…. *for a wrong committed by his employee*".

54. The cases describe those liabilities that are sufficiently closely connected to the contract as "fundamental" parts of the employer/employee relationship (see *Wilson v Clyde Coal* and the example *Baker v British Gas*). This can be compared to descriptions of vicarious liability as a doctrine without any "*coherent or agreed jurisprudential underpinning*".

55. The parties approached preliminary issues 1 and 2 on the basis that they would have a common answer. This approach might be explained by the Claimant's pleaded case that individual employees were themselves "public authorities" for the purposes of the Human Rights Act 1999. I have not been invited to consider the merits of that position at this hearing.

56. In my judgment, for the reasons I have given, the answer to preliminary issues 1 and 2 is no.

57. The answer to preliminary issue 2 does not strictly arise. But if my answer to preliminary issues 1 and 2 is wrong, I would have found that the transferor's right to claim on an insurance policy in respect of such matters would also transfer. In my view it does not matter that public liability insurance is not mandatory.