

Law Department

The Relationship Between  
the European Court of Justice  
and the British Courts  
over the Interpretation of  
Directive 77/187/EC

PAUL L. DAVIES

LAW No. 97/2

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**THE RELATIONSHIP BETWEEN THE EUROPEAN COURT OF JUSTICE  
AND THE BRITISH COURTS OVER THE INTERPRETATION OF  
DIRECTIVE 77/187/EC\***

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\* This working paper is part of a multi-national research programme undertaken at the European University Institute under the direction of Professor Silvana Sciarra. The project focuses on the dynamic relationship between national courts and the European Court of Justice in the field of Labour Law as a consequence of article 177 preliminary ruling procedures. Cases have been selected by the research group taking into account both the relevance of the subject matter and also the number of procedures started by national judges. A further criterion for such a selection is the impact of the court's decisions in legal systems different from the one where the case first originated. I am grateful to the other participants in the workshop session for comments on an earlier version of the paper.

## I. Introduction

The experience of the British courts with the interpretation of the Transfer of Undertakings (Protection of Employment) Regulations 1981,<sup>1</sup> which constitute the domestic legislation implementing Council Directive 77/187/EC, illustrates the thesis that the influence of the decisions of the European Court of Justice on a national judiciary in a particular area is not necessarily to be measured by the number of references made by that national judiciary to the European Court under the preliminary reference procedure contained in Article 177 of the European Community Treaty. In fact, at the time of writing, the ECJ has not delivered a single judgement on a UK reference in this area.

Of course, it is well known that the Commission brought infringement proceedings against the UK Government which successfully alleged that the implementation by the UK of Directive 77/187 was in various respects

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<sup>1</sup> SI 1981 No 1794. In order to avoid any confusion it should be made clear at once that 'Regulations' in this sense are a form of subordinate British legislation, not regulations in the sense of Article 189 of the EC Treaty. By virtue of the European Communities Act 1972 Parliament may proceed through the simplified procedure for enacting Regulations (rather than the more elaborate process for Acts of Parliament) where the aim of the legislation is to give effect to a European Community obligation of the United Kingdom. The procedure is simpler essentially because there is a single debate in each House of Parliament and the Regulations are either accepted as they stand or rejected in toto. In contrast, a Bill will normally be subject of a series of 'readings' in both Houses and be subject to line-by-line scrutiny, with full opportunity for amendments to be proposed, before it is adopted as an Act of Parliament.



defective.<sup>2</sup> However, it would be wholly misleading to assess the influence of the decisions of the ECJ on the British judiciary by analysing the scope of that infringement action. On the contrary, the central point of the infringement action, namely, the inappropriateness of confining the representatives of the workers who are to be consulted over proposed transfers to the recognised trade union, was not one which had unduly troubled the British courts. This was because, certainly prior to the decision in *Commission v UK*, litigants seemed to take the view that, whether the original domestic implementing legislation was an adequate reflection of Community law or not, the 1981 Regulations were clear in conferring representative status only on recognised trade unions. Consequently, there was no scope for British courts to interpret the domestic law differently so as to bring it in to line with Community law.<sup>3</sup> If the British law was wrong on this point, as it subsequently turned out to be, correction would be a matter for

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<sup>2</sup> Case C-383/92, *Commission v UK* [1994] ECR I-2435, noted by Davies, (1994) 23 ILJ 272 and Wedderburn (1994) 10 Int. Jo. Comp. L.L.I.R. 339.

<sup>3</sup> Of course, the British courts might have had to face the representatives question squarely if litigation had been brought on the directive against a state defendant under the direct effect doctrine, but in the one case where this was argued, in fact after the decision in *Commission v UK*, the judge, probably correctly, concluded that the provisions in the Directive about the selection of worker representatives were not sufficiently precise and unconditional to meet the criteria for direct effect: *Griffin v South-West Water Services Ltd* [1995] IRLR 15. The British courts might also have had to tackle this thorny issue if, during the period before the British law was amended, the scope of state liability under the *Francovich* doctrine had been more clearly delineated by the ECJ. On the potential liabilities of the UK in the wake of the decisions in Cases C-46 and 48/93, *Brasserie du Pêcheur* and *Factortame III* [1996] IRLR 267, see Hervey and Rostant, 'After *Francovich*: State Liability and British Employment Law' (1996) 25 *Industrial Law Journal* 259. The issue of state liability with regard to consultation of worker representatives is by no means dead, since the Commission takes the view that the 1995 Regulations (see n. 4 below) still do not adequately implement EC law.

the legislature.<sup>4</sup>

The point is, in short, that the impact of the decisions of the ECJ on the British judiciary has to be assessed in the light of an understanding of which issues with an EC dimension litigants thought it appropriate to raise before the domestic courts. In fact, the issues raised by litigants in the national courts related predominantly to the 'individual' side of the Directive: in what circumstances did the principle of compulsory transfer of the contract of employment operate and what, precisely, did that principle entail? The purpose of the following sections is, therefore, to explain why these issues were so crucial to British litigants and to demonstrate the responsiveness of the British courts to the decisions of the ECJ, even though the relevant decisions arose out of references from other Member States. It is not too much to say that the ECJ cases were decisive of the interpretation adopted by the British courts on many of issues raised in the domestic litigation.

## II. The Directive and the Prior National Law

Unlike the position in, say, France and Italy, where the principle of the compulsory transfer of contracts of employment upon the transfer of a business was a long-established part of the national labour law, dating even from the pre-war period, in the UK the pre-Directive law had always been

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<sup>4</sup> Legislative correction eventually emerged in the shape of the Collective Redundancies and Transfer of Undertakings (Protection of Employment)(Amendment) Regulations 1995 (No. 2587), which were designed to maximise the anti-union potential of the Court's judgements. See M Hall, 'Beyond Recognition? Employee Representation and EU Law' (1996) 25 ILJ 15.



based on the principle of freedom of contract and in particular the freedom to choose one's contracting party.<sup>5</sup> In consequence, upon a transfer of a business the transferee employer was free to offer employment to such members of the transferor's staff as it pleased and on such terms as it thought fit, and those employees of the transferor to whom offers of employment were made were equally free to accept them or not. No doubt, in practice this system did more to protect the economic interests of the transferee than of the transferor's employees.

On this settled landscape the Directive's principle of the compulsory transfer of contracts of employment and the associated principle that dismissals for reasons connected with the transfer were ineffective<sup>6</sup> landed like a bomb-shell. In some cases for the first time, deal-making lawyers in the commercial departments of the big firms of solicitors became aware of labour law as a major impediment to their traditional way of doing things, and they did not like the look of what they saw. Their response to the new law, and that of their clients, can be divided into three broad phases. Each phase generated much litigation and in each phase the response of the British judiciary has been crucially determined by the decisions of the ECJ.

In the first phase the attempt was made to rely upon a narrow interpretation of the 1981 Regulations so as to permit the transferor and

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<sup>5</sup> *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 (House of Lords), where the principle was applied to protect an employee from criminal prosecution by his new 'employer' into whose service he had been 'transferred' by the amalgamation of his original employer with another company, an amalgamation of which he was unaware and to which he had not consented.

<sup>6</sup> Subject to the 'economic, technical or organisational reason' (hereafter 'eto') defence.

transferee, acting together, to maintain the old situation of freedom of choice for the transferee, in spite of the new laws. When, under the influence of the ECJ, this attempt eventually failed, attention moved to confining as narrowly as possible the range of transactions which could be regarded as falling within the idea of the transfer of a business. This was a long drawn-out phase of litigation, which concentrated especially on the applicability of the new law to the contracting out of services. Vertical disintegration of organisational activities had become an article of faith within the public sector in the UK, where government was pursuing it vigorously in a number of ways, and it was also in vogue within the private sector of the economy.<sup>7</sup> The potential hindrance to this process which the new law posed ensured that this phase of litigation achieved a high political visibility. Initially, the proponents of the narrow view of the meaning of a transfer had some success, but as the ECJ widened its concept of a transfer and as the British courts followed suit, so this battle was lost as well.<sup>8</sup> So the current phase was entered in which attention concentrated upon the meaning of the 'economic, technical or organisational' defence to dismissals connected with transfers. Here the influence of the ECJ has been perhaps at its lowest, though some crucial aspects of the current stream of litigation have been influenced by the British courts' views of what the Directive requires, albeit views not necessarily guided by decisions of the ECJ.

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<sup>7</sup> P Davies and M Freedland, *Labour Legislation and Public Policy*, (Oxford, 1993) pp.615-635.

<sup>8</sup> And those still espousing a narrow view had to turn their attention to lobbying in Brussels in an attempt to secure a revision of the Directive's definition of a transfer. See S Hardy and R Painter, (1996) 25 I L J 160.



### III. Phase I: Maintaining the Status Quo

In this phase commercial lawyers sought to keep the old common law principle alive in practice even in the light of the new Regulations which apparently reversed it.<sup>9</sup> The argument fastened upon the wording of Regulation 5 of the domestic law which provided for the compulsory transfer of those employed by the transferor 'immediately before the transfer.' It was argued that those who were dismissed by the transferor before transfer would not be caught by this rule, even if the dismissal preceded the transfer by only a matter of hours. Moreover, even if the dismissal were wrongful, it was said, the dismissal would be effective to terminate the contract of employment, so that compulsory transfer to the transferee would not occur. Consequently, provided the transferor and transferee could agree on the matter, the transferee would be able to maintain its freedom of action if the transferor dismissed in advance of the transfer those of its employees whom the transferee did not want, either at all or on their current terms and conditions of employment.

The courts hesitated a little but then, up to the level of the Court of Appeal, accepted the main lines of this argument. The leading case became *Secretary of State v Spence*<sup>10</sup> in which the Court of Appeal seemed to say that employees dismissed at 11 am were not transferred in a transfer which

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<sup>9</sup> The story can be seen more fully from a series of notes in the Industrial Law Journal: H. Collins, (1986) 14 ILJ 244; P. Davies, (1988) 17 ILJ 249; and H. Collins again (1989) 18 ILJ 144.

<sup>10</sup> [1986] ICR 651 (CA).

occurred at 3 pm of the same day. Of course, the dismissed employees might have remedies against the transferor, but in the not infrequent case where the transferor was insolvent those remedies might not be worth very much. Moreover, some courts were prepared to hold that employees dismissed by the transferor at the behest of the transferee were dismissed for an 'eto' reason, so that their unfair dismissal claims against even the transferor would probably fail.<sup>11</sup> In short, the thrust of these decisions was to restore very largely the freedom of action of the transferee in relation to the workforce of the transferor, something which was often in the interests of the transferor as well, because it was likely that the transferee would then pay a higher price for the business transferred.

This line of authority was eventually rejected by the House of Lords in *Litster v Forth Dry Dock*<sup>12</sup> but from our point of view the crucial aspect of the case is the basis for the rejection. First, the court seem disposed to accept that, had this been a matter of interpretation of a purely domestic piece of legislation, the arguments of the transferor and transferee would have been very strong ones and the solution to the problem might well have been regarded by the court as one for the legislature. However, since the Regulations in question had been adopted in order to give effect to an EC Directive, a different approach to statutory interpretation was necessary.

'If the legislation can reasonably be construed so as to conform

<sup>11</sup> *Anderson v Dalkeith Engineering Ltd* [1985] ICR 66. Later the opposite rule was adopted: *Wheeler v Patel* [1987] ICR 631; *Gateway Hotels Ltd v Stewart* [1988] IRLR 287 (all decisions of the EAT).

<sup>12</sup> [1990] 1 A C 546 (HL). In this case the gap between dismissal and transfer was one hour!



with those [European Community] obligations - obligations which are to be ascertained not only from the wording of the relevant Directive but from the interpretation placed upon it by the European Court of Justice at Luxembourg - such a purposive construction will be applied even though, perhaps, it may involve some departure from the strict and literal application of the words which the legislature has elected to use.<sup>13</sup>

Although this may not seem a very radical proposition to those used to a more free-wheeling style of statutory drafting and, therefore, of judicial interpretation of statutes, this was in the UK context a significant departure from the previous orthodoxy. Of course, it was an approach which was not dependant on the particular context of the Transfers Directive but rather on the fact that the domestic legislation implemented EC law. *Litster* was in effect an application by the British courts of the interpretative rule laid down by the ECJ for national courts in such situations.<sup>14</sup> In fact, the House of Lords had first announced its acceptance of the doctrine a year earlier in a case involving the interpretation of the Equal Value Regulations which had been adopted in order to give effect in the UK to Article 119, Directive 75/117 and, in particular, the result of an infringement action brought against the UK.<sup>15</sup>

The task of the House in *Litster* was thus to establish what the

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<sup>13</sup> Per Lord Oliver at p 559.

<sup>14</sup> Case 14/83, *Von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891; Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1992] ECR I-4135.

<sup>15</sup> The case in which the House first enunciated this approach to statutory interpretation was *Pickstone v Freemans plc* [1989] A C 66. The infringement action in question was Case 61/81, *Commission v UK* [1982] ECR 2601.

Directive required, by looking both at the wording of the Directive and of its interpretation by the ECJ, and then, if at all possible, to bring the Transfers Regulations into line with what Community law required. The House examined closely Article 4 of the Directive and some five decisions of the ECJ, of which undoubtedly the most important was the then recently decided Case 101/87, *P Bork*.<sup>16</sup> In its judgment the European Court had said:

'...the only workers who may invoke Directive 77/187 are those who have current employment relationships or a contract of employment at the date of the transfer. The question whether or not a contract of employment or an employment relationship exists at that date, is to be answered under national law, subject, however, to the observance of the mandatory rules of the Directive concerning the protection of workers against dismissal by reason of the transfer. It follows that workers employed by the undertaking whose contract of employment or employment relationship has been terminated with effect on a date before that of the transfer, in breach of Art 4(1) of the Directive, must be considered as still employed by the undertaking on the date of the transfer with the consequence, in particular, that the obligations of an employer towards them are fully transferred from the transferor to the transferee, in accordance with Article 3(1) of the Directive.

It was clear that the lower courts' interpretation of 'immediately before' was inconsistent with this view of the ECJ. The House of Lords' solution was to achieve conformity with EC law by adding a number of words to the British

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<sup>16</sup> [1988] ECR 3071 At the time of the House of Lords' decision the decision of the ECJ had not been reported in the Official Reports of the ECJ, but it had found its way into British consciousness through an unofficial translation in the private British series of labour law cases, *Industrial Relations Law Reports*: see [1989] IRLR 41.



regulations. In future, those who would be covered by the Regulations were to be not only those employed by the transferor immediately before the transfer but also those 'who would have been so employed if [they] had not been unfairly dismissed in the circumstances described in regulation 8(1)' ie dismissal for a reason connected with the transfer.<sup>17</sup> Any less drastic surgery on the British regulations would mean that the purpose of the regulations would not be achieved. 'I do not find it conceivable that, in framing Regulations intending to give effect to the Directive, the Secretary of State [ie the British Government] could have envisaged that its purpose should be capable of being avoided by the transparent device to which resort was had in the instant case.'<sup>18</sup>

So the first phase in which it was attempted to preserve the philosophy of the common law came to an end. The failure of the attempt was secured by pointing to the contrary principle contained in Directive 77/187, as interpreted by the ECJ, and by the House of Lords' decision that the philosophy of the Community instrument should control the meaning of the implementing UK legislation, even where that policy meant a substantial

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<sup>17</sup> In fact, it seems on closer analysis that the House of Lords' view was not that the contracts of employment of those dismissed in advance of the transfer would go across to the transferee but rather that the *liabilities* of the transferor in relation to the prior unlawful termination would transfer. In other words, the prior dismissal would still be effective to terminate the contract (unless the dismissed employee were subsequently re-instated by an industrial tribunal, not a likely event). It is not clear whether Art 4 of the Directive requires that a dismissal for a reason connected with the transfer should be regarded as ineffective in law or whether, if so, the British Regulations can be construed so as to produce this result. The point is still important in relation to pre-transfer dismissal of workers who are then re-hired by the transferee on inferior terms and conditions of employment. See further n. 45 below.

<sup>18</sup> Per Lord Oliver at p 576.

addition to the words enacted by the British Parliament.

#### IV. Phase II: Narrowing the Scope of a Transfer

The arguments discussed in the previous section and ultimately rejected by the House of Lords appear in a comparative context rather idiosyncratic and particular to the British situation. Some, at least, of the issues to be discussed in this section, on the other hand, have troubled the courts in a number of Member States and even caused the European Commission to try its hand at re-drafting Directive 77/187. In particular, there has been the vexed question of how far contracting out of services, where very little in the way of tangible or intangible assets move from transferor to transferee, can be regarded as falling within the definition of the transfer of a business or a part of it.

##### (a) Transfers not in the nature of a commercial venture.

Before coming to that issue, however, one preliminary matter should be disposed of. When the UK Government transposed the Directive in 1981 it introduced into the British regulations one limitation for which there seemed to be no warrant in the Directive, namely, the restriction that the Regulations applied only to transfers of undertakings which were 'in the nature of a commercial venture'. This seemed to exclude many situations of contracting out of services from the public sector, where a great programme of government-inspired contracting out was under way, because many of these services had not been operated commercially within the public sector,



even if the intention was that, after contracting out, the contractor should indeed operate them commercially. Initially, the British courts in fact gave the 'not in the nature of a commercial venture' exclusion a broad interpretation,<sup>19</sup> but it became clear after the decision of the ECJ in Case C-29/91, *Dr Sophie Redmond Stichting v Bartol*,<sup>20</sup> if it had not been before, that this was not a restriction which was consistent with the Directive. However, the British government acted quickly, no doubt partly for fear of *Francovich* actions, to remove this restriction from the British legislation. This result was effected by s 33(2) of the Trade Union Reform and Employment Rights Act 1993.

Nevertheless, the British courts were left with the task of applying the exclusion to cases whose facts had arisen before the provisions of the 1993 Act were brought into force. In fact, following the *Sophie Redmond Stichting* decision, the British courts took the hint and narrowed the scope of this exclusion. See especially *U.K. Waste Control Ltd v Wren*<sup>21</sup>, where it was held that the fact that the transferor local authority had not operated a refuse service for the purpose of making a distributable profit did not mean that it had not operated the service which was 'in the nature of' of a commercial venture. The British court thus gave the 'commercial venture' exclusion a narrower meaning than the ECJ had thought it carried when it condemned the UK for not implementing the Directive adequately. The ECJ seems to have thought that all non-profit operations were excluded from the UK

<sup>19</sup> *Expro Services Ltd v Smith* [1991] ICR 577 (EAT).

<sup>20</sup> [1992] ECR I-3189. Cf the later and narrower exclusion from the scope of the Directive of the administrative functions of a public authority: Case C-298/94, *Henke v Gemeinde Schierke* [1996] IRLR 701.

<sup>21</sup> [1995] ICR 974 (EAT).

Regulations.<sup>22</sup> So, here, the British courts' loyal implementation of their duty to interpret domestic law so as to achieve uniformity with EC law to some degree undermined the basis for the ECJ's condemnation of the UK government. How far should the ECJ take into account a national judiciary's record of following EC law in a particular area when assessing complaints by the Commission that the Member State's legislation is defective?

### (b) Contracting out of services and the definition of a transfer

Once the British legislation had been amended so as to remove the restriction relating to undertakings not in the nature of commercial ventures, the British courts faced the full weight of the question which has troubled courts in so many other countries<sup>23</sup>: in what circumstances is the contracting out of services within the scope of the transfer of part of a business? On this question the legislature did not intervene and the British courts were left to find their own way. In that search the decisions of the ECJ have been decisive. The original inclination of the British courts was to take a rather narrow view of the range of contracting out situations which could be regarded as transfers, but, as the ECJ has adopted a ever-wider view of the matter, so the decisions of the British courts have followed suit.

Although we pointed out above that the principle of compulsory transfer of contracts of employment was a new one for domestic law, nevertheless the concept of the transfer of a business was known to British labour law before 1977 in one obscure area of the subject, namely, in the

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<sup>22</sup> See paras. 42 to 47 of the Court's judgement, cited at n. 2 above.

<sup>23</sup> On the difficulties which the decisions of the ECJ have caused for French and German courts see Davies (1996) 25 ILJ 247.



context of the rules relating to continuity of employment. If an employee, upon a transfer of a business, did in fact accept an offer of employment made by the transferee, these rules provided that continuity of employment was preserved.<sup>24</sup> If the employee were later dismissed, continuity of employment, which might be relevant for a variety of statutory entitlements, would be calculated on the basis of the combined service with transferor and transferee. But what counted as a transfer of a business?

As far as contracting out was concerned, the tendency in the case-law interpreting the continuity provisions was to draw a distinction between two types of contracting out. On the one hand, there was putting the contractor in possession of a business opportunity, involving the chance of profit and the risk of loss and, usually, the possibility of dealing with a number of customers; on the other hand, there was contracting out of the performance of a function which the contractor performed solely for the party contracting out and usually for a fixed fee. The former was regarded as the transfer of a business; the latter was not.<sup>25</sup>

It was this approach, which naturally tended to exclude the contracting out of mere services from the scope of the Regulations, which the British courts applied in their early decisions on the meaning of a transfer. Thus, in *Stirling v Dietsmann Management Systems Ltd*<sup>26</sup> the Scottish EAT

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<sup>24</sup> See now s 218(2) of the Employment Rights Act 1996.

<sup>25</sup> *Port Talbot Engineering Ltd v Passmore* [1975] ICR 234: a steel company contracted out its plant maintenance to a local engineering company and from time to time the identity of the engineering company holding the contract changed. The employees had worked for a number of such companies, but the court held that the transfer of the contract from one company to another was not the transfer of a business and so continuity of employment was not preserved.

<sup>26</sup> [1991] IRLR 368 (EAT). The court also held that what was transferred in this case

evaluated in the following way the decision by Shell UK to end a contract with SMML for the manning and operation of a support ship and to contract with the respondents for this purpose instead. Under the contract the respondents were remunerated by a fixed fee and were reimbursed their costs, and the Court said: 'In our opinion, as was pointed out on behalf of the respondents under reference to *Port Talbot Engineering Co Ltd v Passmore*..., there is a distinction between running an undertaking or business, and taking over a contract for services.' The contract in this case fell within the latter category and so fell outside the scope of the Regulations. However, as the ECJ gave an ever broader interpretation to the test it had laid down in Case 24/85, *Spijkers*,<sup>27</sup> (ie did the part transferred constitute an economic entity which preserved its identity?), so the British courts, too, adopted a wider view of the matter.

The crucial decisions of the ECJ were Case C-209/91, *Rask and Christensen v ISS Kantinenservice A/S*<sup>28</sup> and Case C-392/92, *Schmidt*.<sup>29</sup> The decision in *Rask*, ironically, had a bigger effect initially on the decisions of the ordinary courts than on the specialist labour courts (notably the Employment Appeal Tribunal). In the High Court there were two immediate decisions which applied *Rask* to transfers of contracts to provide services,

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was not a commercial venture. The two arguments, whether what was transferred was a commercial venture and whether it was a business, are obviously interrelated, though not identical. See also *Curling v Securicor* [1992] IRLR 549 (following *Passmore*, transfer of a contract for managing a detention centre from one company to another held not to be the transfer of an undertaking).

<sup>27</sup> [1986] ECR 296.

<sup>28</sup> [1992] ECR I-5755.

<sup>29</sup> [1994] ECR I-1311.



even though no transfer of assets was involved. Arguably, this took the principle in *Rask* further than was needed to decide that particular case. In *Kenny v South Manchester College*<sup>30</sup> the High Court was concerned with a situation in which the Home Office had put out to tender the provision of education at a young offender's institution. The contract was won by the defendant, a higher education corporation, which was part of the public sector but a separate legal entity. The plaintiff employees were employed by Cheshire County Council, which had previously provided the education at the prison but by way of administrative arrangement rather than a competitively won contract. The employees sought a declaration that, when the provision of the education was taken over by the College, they would automatically become employees of the College on their existing terms and conditions. Given the then existing 'commercial venture' restriction in UK law, the matter was argued entirely on the basis of the Directive, which was directly applicable against the defendant as an emanation of the state. The court granted the declarations sought, even though the education was provided on the prison premises, using Home Office equipment and very largely according to specifications laid down by the Home Office. In the eyes of the judge, 'the education department [at the prison] will retain its identity and its operation will continue' after the transfer of responsibility for providing the education, and so the Directive applied.

In *Porter v Queen's Medical Centre*<sup>31</sup> the situation was that a Health Authority, which was responsible for the provision of paediatric services at a

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<sup>30</sup> [1993] IRLR 265.

<sup>31</sup> [1993] IRLR 486.

particular hospital, contracted with the defendants for the provision of those services in the future, the defendants being a NHS trust ie again an independent legal entity within the public sector. Two consultant doctors previously employed in the provision of the services sought declarations that they had been automatically transferred to the employment of the trust and on the same terms and conditions. The judge, following *Kenny*, held that there had been a transfer within the Directive, even though the buildings and equipment used to provide the services were and remained those of the Health Authority ie the hospital and its equipment. The judge rejected two arguments against there having been a transfer. These were that the Health Authority remained responsible for the paediatric services. This was true only in the sense that the Authority remained responsible for seeing that the services were provided; the responsibility for actually providing the services was in fact transferred to the defendants. The second argument was that the transferee intended to operate the services in a somewhat different way. The judge held, however, that, since medical science is in a constant state of change, it could not be argued that there was no transfer where it was the case that new means of achieving the undertaking's objective were being adopted whilst that objective remained the same.<sup>32</sup>

After *Schmidt*, however, the employment courts have fallen into line, especially after the decision of the Court of Appeal, upon appeal from the Employment Appeal Tribunal, in *Dines v Initial Health Care Services*.<sup>33</sup> This

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<sup>32</sup> The changes involved did, however, enable the judge to say that the defendant's refusal to take on the consultants was for an 'economic, technical or organisational' reason. See further below.

<sup>33</sup> [1995] ICR 11. For the subsequent wholehearted adoption of this approach by the EAT see *Kelman v Care Contract Services Ltd* [1995] ICR 260; *BSG Property Services*



was a case of a 'second generation' contract. A hospital had contracted out its cleaning requirements to the Initial Health Care, but when the time came for the contract to be put out to tender again, it was won by Pall Mall Services. The latter took over the employees of Initial who had been employed on the cleaning contract but on less favourable terms and conditions of employment. The essence of the question before the Court of Appeal was whether the second contractor had to honour the first contractor's terms and conditions of employment. A positive answer was given, even though there was no transfer of assets from one contractor to the other and even though the transfer was a two-stage process, ie the termination of the first contract by the hospital and its re-grant to Pall Mall.<sup>34</sup>

As a result of these decisions it can be said that, in both the ordinary courts and the employment courts, the test for the transfer of a business had become essentially a labour law test rather than a commercial law test. It is perhaps not going too far to say that there will be held to be a transfer if, after

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*v Tuck* [1996] IRLR 134; *Securicor Guarding Ltd v Fraser Security Services Ltd* [1996] IRLR 552; and *Council of the Isles of Scilly v Brintel Helicopters Ltd* [1995] ICR 249. The last case involved yet a third factual situation to which the Directive has been applied by the British courts: the ending of contracting out and bringing back 'in house' the performance of services previously provided by an outside contractor. For an account of the initial reaction of the EAT and the impact of *Schmidt* see John McMullen, (1993) 23 ILJ 230; and also his later article 'Atypical Transfers, Atypical Workers and Atypical Employment Structures - A Case for Greater Transparency in Transfer of Employment Issues' (1996) 25 ILJ 286.

<sup>34</sup> Such a two-stage process is not an obstacle to the finding of a transfer, as the ECJ has held (see Case 324/86, *Daddy's Dance Hall* [1988] ECR 739) and as the Court of Appeal acknowledged. See also *Betts v Brintel Helicopters Ltd* [1996] IRLR 45, where a transfer was found on the termination and grant to another company of a contract for the supply of helicopter transport services, even though no employees of the old contractor were taken on by the new one and the new contractor operated from a different airport with its own helicopters.

the transaction in question, the transferee has a need for employees to do broadly the same type of work as was being done by the 'transferor' before the transaction between the two employers. Factors such as the transfer or not of tangible or intangible assets seem now to be not even subordinate factors in assessing whether there has been a transfer but almost irrelevant matters. This analysis has been applied to the initial contracting out of the services, to the subsequent transfer of the contract from one service-provider to another and to the bringing of the provision of the services back in-house.

### V. Phase III: Living with the Transfers Regulations

In this phase the commercial parties involved in transfers and their legal advisers have come to accept that the Regulations introduced a new principle of compulsory transfer into British law and that the Regulations apply to a wide variety of commercial transactions. It is now<sup>35</sup> a question of learning to live with and operate within the new set of rules.

If it is now clear that the Transfer Regulations cannot easily be avoided and that the employees are likely to transfer to the transferee on their current terms and conditions of employment, what steps might a transferee contemplate in order to protect its interests?<sup>36</sup> As we have seen

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<sup>35</sup> I do not suggest that the three phases discussed in this paper proceeded in entirely separate chronological phases; indeed, some of the issues discussed in this section appeared at an early stage. What is clear is that these issues achieved greater significance after the decisions in *Litster* and *Dines*.

<sup>36</sup> See John McMullen, (1992) 21 ILJ 15.



above,<sup>37</sup> requiring the transferor to dismiss the unwanted employees before the date of the transfer is unlikely to solve all the transferee's problems, because *Litster* will still operate to transfer the liabilities of the transferor arising out of the dismissals to the transferee. Moreover, the majority view of the courts is that dismissals by a transferor in order to prepare the business for the transfer do not fall within the *eto* category. Consequently, in most cases the transferee will have to concentrate on the question of what action it proposes to take once the workers arrive in its employ. Somewhat oddly, the current stance of the law seems to be that it is easier for the transferee to dismiss unwanted workers received from the transferor than to keep them on but to integrate the new arrivals into its existing structures of terms and conditions of employment.

If the transferee, having taken over the whole of the transferor's workforce, regards itself as over-staffed and seeks to reduce the number of its employees, the dismissals are likely to be regarded by the British courts as *eto* dismissals on grounds of 'redundancy' and thus capable of being lawful (or 'fair') dismissals, provided the correct procedures are followed in implementing the redundancy dismissals.<sup>38</sup> However, the transferee will then incur a liability, not only to give notice of termination or pay in lieu, but also to make redundancy payments. In the case of a transferee who has been awarded only a short contract for the supply of services, the cost of these payments could be large in comparison with the amount of the profit the

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<sup>37</sup> See text attached to notes 11 to 13 above.

<sup>38</sup> These procedures require, *inter alia*, the setting of appropriate criteria for selecting those to be made redundant and consultation with the representatives of the workers and with individual workers.

contractor stands to make from the service contract. However, these costs could be re-allocated as between the transferor and transferee by agreement. For example, if, at the time when it was thought in the UK that the Regulations did not apply to contracting out, the transferee would not have taken over the transferor's workers, then presumably the transferor would have dismissed on grounds of redundancy most of the employees not taken over on by the transferee and would thus have incurred the dismissal costs. The application of the Regulations in this situation does not create the dismissal costs, but rather transfers them from transferor to transferee, who now becomes the dismissing employer. However, there would seem to be no legal impediment to the re-allocation of those costs back to the transferor by contract between transferor and transferee. Provided the transferor is solvent, the ultimate result as between transferor and transferee is largely the same. If this analysis is correct, the application of the Directive to a situation of over-staffing creates no greater a problem than when the Directive does not apply, at where the situation is one involving the initial contracting out of services.<sup>39</sup>

On the other hand, the transferee may perceive its problem to be, not that it has taken on too many employees as a result of the transfer, but that it has taken on employees on inappropriate terms and conditions of employment. These conditions may be thought to be inappropriate because

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<sup>39</sup> This analysis is attractive in relation to the initial contracting out of services. It is less plausible in relation to 'second generation' transfers ie from one contractor to another. Here, the client does not incur any termination costs, whether the Directive applies or not, because it is not the transferor, and so it has not incentive to take the termination costs off the shoulder of the winning contractor. However, the same is true of the losing contractor, so the winning contractor must count on bearing the termination costs itself, if the Directive applies. Would this be a basis for not applying the Directive to second-generation contracting out?



they are simply different from (though on the whole as favourable as) those of the transferee's existing employees ie there is a problem of integration of the new employees. Or the terms may be thought to be inappropriate because they are also more favourable, taken as a whole, than the those of the transferee's existing workers ie the transferee may see the problem as one of cost as well as of integration.<sup>40</sup>

It would seem that the transferee could deal with the problem by negotiation with the employees or their representatives.<sup>41</sup> However, the Court of Appeal has created a major obstacle to transferees wishing to re-negotiate the terms and conditions of the transferred workers by reducing their freedom to threaten dismissal of those transferred employees who are not willing to embark upon the re-negotiation process. The Court of Appeal in *Bermiman v Delabole Slate*<sup>42</sup> held that a dismissal of a worker for refusing

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<sup>40</sup> A particular problem is the still unsolved issue of how far and in what ways the Directive applies to the opportunity to earn future pension entitlements under an occupational pension scheme. See Case E-2/95, *Eidesund v Stavanger Catering A/S* [1996] IRLR 684 and *Adams v Lancashire County Council* [1996] ICR 935 (both in favour of the exclusion of the right to earn future pension benefits) but cf *Sita (GB) Ltd v Burton*, *The Times*, 5 December 1996. If the Directive leaves such rights outside the scope of its provisions, then the transferee has an in-built advantage over the transferor without being in breach of the Directive. This seems to be an anti-competitive, as well as an anti-social, result.

<sup>41</sup> The non-legally binding nature of British collective agreements means that re-negotiation even below the level set by the previously applicable collective agreement in principle gives rise to no legal difficulties: see Wedderburn, 'Inderogability, Collective Agreements and Community Law' (1992) 21 ILJ 245. It is usually assumed, though the point has not been fully tested before either the national courts or the ECJ, that the provisions of the Directive relating to collective agreements do not alter this situation in the case of transfers, since the Directive aims at only 'partial harmonisation' ie at putting the transferee in the same position as the transferor was in: Case 105/84, *Mikkelsen* [1985] ECR 2639.

<sup>42</sup> [1985] ICR 546.

to accept a change in terms was not a dismissal for an *eto* reason 'entailing changes in the workforce' (as the Directive stipulates). The employer still had a need for the job to be done, but simply wished to have it done on different terms of employment. Consequently, the dismissal of the employee for failing to agree to the change of terms was automatically unfair and the employer had to pay compensation to the worker.

It would seem that the employer can bring itself within the *eto* category only if it needs to reduce the numbers of its employees or change their functions, whilst the numbers remain constant.<sup>43</sup> This is in fact a tougher rule than applies outside the transfer context in relation to dismissals for refusing to accept unilateral variations of terms. Outside the transfers area such dismissals will be fair provided the employer has a good business reason for wishing to impose the changes and provided it has consulted effectively with the employees affected over the need for the changes.<sup>44</sup> Within the transfer area, on the other hand, an employer, provided it follows appropriate procedures, will be able to carry out fair dismissals in order to reduce its staffing levels or to change the duties of the employees, but not in order to amend the rewards which the employees receive for their work. The reason for the different and stricter attitude on the part of the courts in the case of re-negotiations by transferees is, as formulated by the courts, that the *eto* reason is a derogation from the basic principle embodied in the Directive and the Regulations that employees should have the status quo protected

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<sup>43</sup> The 'functions' application of the *eto* category was accepted by the EAT in *Crawford v Swinton Insurance Brokers Ltd* [1990] ICR 85 and by the High Court in *Porter* (above).

<sup>44</sup> *Hollister v National Farmers' Union* [1979] ICR 542 (CA).



when there is a transfer. As a derogation, the *eto* reason should be construed narrowly.

Equally rigorous reasoning has been applied even to the case where the transferee has succeeded in obtaining the agreement of the transferred workers to a change to their detriment in their terms and conditions of employment. As a result of the decision in *Wilson v St Helens Borough Council*,<sup>45</sup> the employees will not be bound by their agreement and will be able to insist upon reversion to their old terms and conditions, whenever the transferee's reason for initiating the change is a reason connected with the transfer. In taking this approach, which the court characterised as 'surprising . . . to English legal tradition', the EAT was explicitly following what it took to be the path indicated by the ECJ in *Daddy's Dance Hall*.<sup>46</sup> Though the determination of the reason for the variation in the terms and conditions of employment is a question of fact, it is clear that the EAT saw no place for an

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<sup>45</sup> [1996] ICR 711 (EAT). It should be noted that the consent of the employees to the change was secured in this case by means of their dismissal by the transferor before the transfer and their acceptance of an offer of worse terms and conditions from the transferee. It is therefore possible to argue that the dismissal by the transferor, although unfair, was effective to terminate the contract of employment, so that what passed to the transferee was the liability for the unfair dismissal and not the contractual relationship. See n. 17 above. On this analysis, which was adopted by another division of the EAT in *Meade v British Nuclear Fuels* [1996] IRLR 541, the question of whether the transferee and the employees could agree to an effective variation of the transferred contract simply did not arise. In *Wilson* this point may have been missed because, on the facts, the employees has left it too late to bring unfair dismissal proceedings against the transferee. Both *Meade* and *Wilson* are being appealed to the Court of Appeal. If *Meade* is upheld, this will make it easier for transferor and transferee, by agreement, to effect a variation of contract (provided the transferee is prepared to accept the unfair dismissal liability), but that would not alleviate the position of the transferee which seeks to make changes only after the transfer.

<sup>46</sup> Case 324/86, [1988] ECR 739, paras. 14 to 17 of the Court's judgement. See also Case E-3/95, *Torgeir Langeland v Norsk Fabrikom A/S*, decision of 25 September 1996.

eto defence where a variation of terms was concerned. Reasons which might justify a dismissal did not permit the employer to require that its employees stick by an agreed variation which was motivated by the transfer. Once again, dismissal of employees by the transferee is legally easier than their retention on altered terms and conditions of employment. Despite the bizarre consequences in industrial relations terms of this set of rules, the EAT was persuaded that 'the public policy of Directive 77/187 and, therefore, of the implementing Regulations, precludes even a consensual variation in the terms of the contract if the transfer of the undertaking is the reason for the variation'.

A final example of the British courts taking a broad view of the policy underlying the Directive and the UK Regulations is to be found in relation to the question of whether an employee complaining of a transfer-related dismissal needs to have two-years' service with the employer in question. That is the normal rule in British unfair dismissal law<sup>47</sup> and the Directive permits Member States to impose their normal qualifying periods on the dismissal protection provided as a result of the Directive. In *Mulligan v Securicor Cleaning Ltd*<sup>48</sup> the Employment Appeal Tribunal held, however, that it was unclear whether the Government had chosen to exercise this option in the implementing Regulations and the resulting ambiguity must be construed in favour of the employee. However, the Government rapidly made it clear in subsequent legislation that it had intended to exercise this

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<sup>47</sup> Though the service requirement is in the course of being challenged on the grounds that it is indirectly discriminatory: see *R v Secretary of State ex parte Seymour-Smith* [1995] ICR 889 (CA).

<sup>48</sup> [1995] ICR 867.



option.<sup>49</sup>

## VI. Conclusion

The relationship between British domestic law and the law of the European Community in the area of transfers of businesses is a large topic. This paper has concentrated on those aspects of the matter which illustrate the relationship between the British courts and Community law in general and the decisions of the ECJ in particular. A few general points may be made by way of conclusion.

First, there is an evident contrast between the attitude of the British courts and that of the British government and legislature towards Directive 77/187. The Directive was adopted, unanimously under the provisions of Article 100 of the EC Treaty, on 14 February 1977, when a Labour government was in power in the UK. However, it was not fully transposed into domestic law until 1 May 1982, i.e. more than three years after the deadline set by Art. 8 of the Directive. By this time a Conservative government was in power in the UK. Part of the delay was caused by difficulties in accommodating the new principle of compulsory transfer of contracts of employment with the practice of 'hiving down', a mechanism then in vogue for dealing with insolvent companies.<sup>50</sup> Although, for tax

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<sup>49</sup> In the Regulations mentioned in n 4 above.

<sup>50</sup> See Davies and Freedland, 'The Effects of Receiverships upon Contracts of Employment' (1980) 9 ILJ 95 and 'Acquired Rights, Creditors' Rights, Freedom of Contract and Industrial Democracy' (1989) 9 *Yearbook of European Law* 21.

reasons, hiving down is no longer popular in the UK, this episode was an early indication of the difficulties which were to emerge in a number of Member States in reconciling the principles of the Directive with those of their domestic insolvency laws and with which the Commission is still grappling in its proposed revision of the Directive.<sup>51</sup> More to the point, by the time these difficulties had been brought near to resolution, there had been a change of government and the new government was much less committed to the principles underlying the Directive. As the responsible governmental minister, when introducing the Regulations to the British legislature, famously declared, the government was bringing its proposals forward with 'remarkable lack of enthusiasm'<sup>52</sup> and only in face of the threat of infringement proceedings by the Commission. Consequently, the government took the narrowest approach to the Regulations which it thought was consistent with the Directive, a view which the ECJ subsequently held to be too narrow in a number of respects.<sup>53</sup>

The contrast with the attitude of the British courts to the Directive is very marked. After some initial hesitations and confusions, the British courts have given the Directive and the Regulations a very full application and, more to the point, have done so by way of express reference to the guidance issued by the European Court of Justice. The British tradition of lengthy judgements, with copious citation and analysis of previous decisions, reveals this process in operation.<sup>54</sup> All the decisions of the Employment Appeal

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<sup>51</sup> See Davies, Written Evidence to the House of Lords' Select Committee on the European Communities, *Transfer of Undertakings: Acquired Rights*, 5<sup>th</sup> Report, Session 1995-96, HL 38, 11 July 1995.

<sup>52</sup> HC Deb., 6<sup>th</sup> ser., vol. 691, col. 680 (Mr David Waddington).

<sup>53</sup> See n. 2 above.

<sup>54</sup> This is by way of contrast with, say, the French courts, which, at least at the



Tribunal, the first level of appeal in employment cases, which have been reported in recent years contain both a full citation and consideration of the relevant decisions of the ECJ and an acceptance that that guidance must, wherever possible, be given full effect in domestic law. Indeed, those decisions sometimes display not just an acceptance of the supremacy of EC law but a positive enthusiasm for its principles and a more whole-hearted application of them in the domestic context than the ECJ's guidance perhaps requires. Why should this be so?

In part the answer lies in the attitudes of the British courts towards the supremacy of EC law in general, and not just in the area of social law or the law of the transfer of businesses. The British courts have adopted the supremacy doctrine with relative ease, both in relation to directly effective Community law<sup>55</sup> and in relation to the construction of domestic legislation so as to produce conformity with non-directly effective Community law.<sup>56</sup> The reasons for this cannot be explored in full here but it is suggested that the absence of written constitution and of a Bill of Rights, and of a Constitutional Court to protect them, may have been conducive to the acceptance of the supremacy doctrine. As Mancini has observed,<sup>57</sup> it is domestic constitutional courts which have had the greatest difficulties with

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higher levels, have equally loyally sought to follow the guidance of the ECJ, but usually without express reference to the latter's decisions.

<sup>55</sup> See the *Factortame* litigation in the British courts ([1990] 2 A.C. 85 and [1991] 1 A.C. 603) and *R v Secretary of State for Employment ex parte Equal Opportunities Commission* [1994] ICR 317.

<sup>56</sup> See the tortuous construction of the domestic law adopted by the House of Lords in *Webb v Emo Air Cargo (UK) Ltd (No.2)* [1995] ICR 1021.

<sup>57</sup> G Mancini, 'Labour Law and Community Law' (1985) 20 *Irish Jurist* 1,14. See also Davies, 'The European Court of Justice, National Courts and the Member States' in Davies, Lyon-Caen, Sciarra and Simitis (eds), *European Community Labour Law* (Oxford, 1996) pp. 124-125.

complete and unqualified acceptance of the supremacy doctrine. Is even the most lowly EC rule to trump the fundamental values of the domestic legal order? The absence of an explicit text embodying such values in the UK, it is suggested, has made it easier for the UK courts to finesse apparently fundamental conflicts of domestic and EC legal orders.<sup>58</sup>

However, in searching for explanations of the attitudes of the British courts towards the new law on transfers one must also look more narrowly at the particular area of law involved. It is suggested that the British courts had the somewhat unexpected advantage over their French and German colleagues, that the prior British law was based on the opposite principle to that which underlay the Directive. Once the House of Lords in *Litster*<sup>59</sup> had made it clear to the lower courts that, in relation to transfers, the common law principle of freedom of contract had been replaced by one based on employee protection, as the supremacy doctrine required,<sup>60</sup> the British courts could apply the new principle without being trammelled by the prior national law. Unlike the French and German courts, whose pre-existing

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<sup>58</sup> Cf. Wedderburn, 'Labour Law in the European Community: A British Perspective' [1995-96] *Särtryck ur Juridisk Tidskrift* (No.2) at p. 375: 'Once British judges were plunged into the oceans of Community law, they had no alternative constitutional beacon to signal to them from domestic shores.' This is not to suggest, however, that such fundamental problems could not emerge in the future. For example, it would seem that the majority view of the UK judges is still that the supremacy of EC law stems from the intention of Parliament that this should be the case. Were Parliament explicitly and unambiguously to legislate in breach of EC law, it is far from clear how the UK courts would react. See Craig and de Burca, *EC Law* (Oxford, 1995) pp. 267-280.

<sup>59</sup> See n.12 above.

<sup>60</sup> Although this was an important change within British labour law, it cannot be maintained that the overthrowing of freedom of contract in yet another area of domestic law raised any constitutional issues. As an overarching explanation of British private law freedom of contract was dead by the time of the First World War, if not before.



domestic laws had produced elaborated theories of what constituted a transfer and for whom the developing case-law of the European Court caused constant problems of potential conflict with the national law,<sup>61</sup> the British courts could be content to follow along in the wake of the ECJ as the parameters of this new principle were revealed to them by the European supreme court.

Thus, whereas the apparent adoption by the ECJ in the case of *Schmidt*<sup>62</sup> of the view that there could be a transfer of an undertaking which retained its economic identity, even though no tangible or intangible assets were transferred, produced a violent reaction on the part of a considerable number of domestic commentators in France and Germany, in the UK the decision was welcomed because it removed uncertainty.<sup>63</sup> Precisely because the underlying philosophy of the Directive was alien to the previous common law, once the British courts had decided in fact to embrace the new principle, a sort of *tabula rasa* was created on which the British courts felt quite at ease in doing their Community duty. It is unlikely that the British courts, if left to their own devices, would have ended up quite in the position to which the ECJ has led them. On the other hand, there was no domestic intellectual and judicial capital invested in a different view of the scope of the new principle, which the ECJ could be seen as up-setting. So the British courts did not feel their *amour propre* to be invaded by the lead given to them by the ECJ; on the contrary, the European Court led them, admittedly a long way, but also to a situation in which certainty of law was established.

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<sup>61</sup> See n.23 above.

<sup>62</sup> See n. 29 above.

<sup>63</sup> See McMullen, 'Contracting Out and Market Testing - the Uncertainty Ends?' (1994) 23 ILJ 230.

The British courts deduced from what the ECJ had said that contracting out, both first and second generation, and the ending contracting out were all covered by the Regulations, and those involved had better get used to proceeding on that basis.

On the other hand, this willing acceptance by the British courts of their Community duty puts a heavy burden on the ECJ to give effective guidance to the national courts. In the case of the definition of a transfer, the question is whether the ECJ will be able to construct a coherent and consistent theory of what constitutes a transfer in relation to the contracting out of services. Its broad approach in *Schmidt* produced pressure on the Commission to amend the Directive's wording, but it now appears that reform of this element of the Directive is no longer on the Commission's agenda, and so the issue is thrown back into the lap of the Court. A series of references, mainly from Germany and Spain, will test the Court's adherence to its broad view. Already the Advocate General has given his Opinion to the effect that a 'second generation' transfer (ie the transfer of a contract to perform services from one contractor to another) should not fall within the scope of the Directive,<sup>64</sup> though the EFTA Court has taken a different view.<sup>65</sup> Other cases references to the ECJ raise the same issue and also that of whether bringing services back 'in house' is covered by the Directive.<sup>66</sup> It remains to be seen whether the British courts will be able to continue confidently to

<sup>64</sup> Case C-13/95, *Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice*, Opinion of Advocate General La Pergola, delivered on 15 October, 1996.

<sup>65</sup> Case E-2/95, *Eidesund v Stavanger Catering A/S* [1996] IRLR 684.

<sup>66</sup> Cases C-204/96, *E.F.Liebelt GmbH & Co.KG v Siedel*; C-229/96 *Santner v Hoechst AG*; C-247/96, *Ziemann v Ziemann Sicherheit GmbH*; C-173/96, *Sánchez Hidalgo v Asociación de Servicios Aser Sociedad Cooperativa Minerva*; C-127/96, *Hernández Vidal S.A. v Gómez Pérez*.



summarise the effect of EC law on domestic law as follows:

Directive 77/187/EC and the Regulations of 1981 may apply in the context of competitive tendering procedures whereby a contract for the provision of services, such as cleaning, is granted or where, having been granted, it terminates and is regranted to a different contractor. The provisions may apply even though there is no transfer by the contract of management structure, stock, supplies or equipment between contractors. . . The theme running through all the recent cases is the necessity of viewing the situation from an employment perspective, not from a perspective conditioned by principles of property, company or insolvency law. . . If, despite the changes resulting from the alleged transfer, jobs are still there to be done, though for a different employer, the Directive and the Regulations may apply.<sup>67</sup>

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<sup>67</sup> *Kelman v Care Services Ltd* [1995] ICR 260, 264-5 (EAT).







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