

## White Paper Conference: Pensions Law

Do the automatic transfer provisions in Tupe apply to third party liabilities such as pension rights under a trust based occupational pension scheme?

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# Tupe and Pensions Technical bite

Tupe a complex topic.

This talk focusing on one aspect:

- Do the transfer provisions in Tupe 2006 cover pension trust benefits, given that they are third party obligations?

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# Tupe 2006

Tupe 2006 –

the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246, as amended)

- Enacted to reflect the Acquired Rights Directive 2001 (**ARD**): Directive 2001/23 EC
- Replaced earlier directives and statutory instruments

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# TuPE 2006

TuPE broadly operates very simply:

- If there is a relevant transfer (of a business or undertaking) or a service outsourcing
- Then most of the rights and obligations as between the current employer and employee transfer automatically to the new employer
- In effect a statutory novation (no consent of the parties needed)
- TuPE also contains other provisions – eg consultation obligations, information obligations

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# Tupe 2006

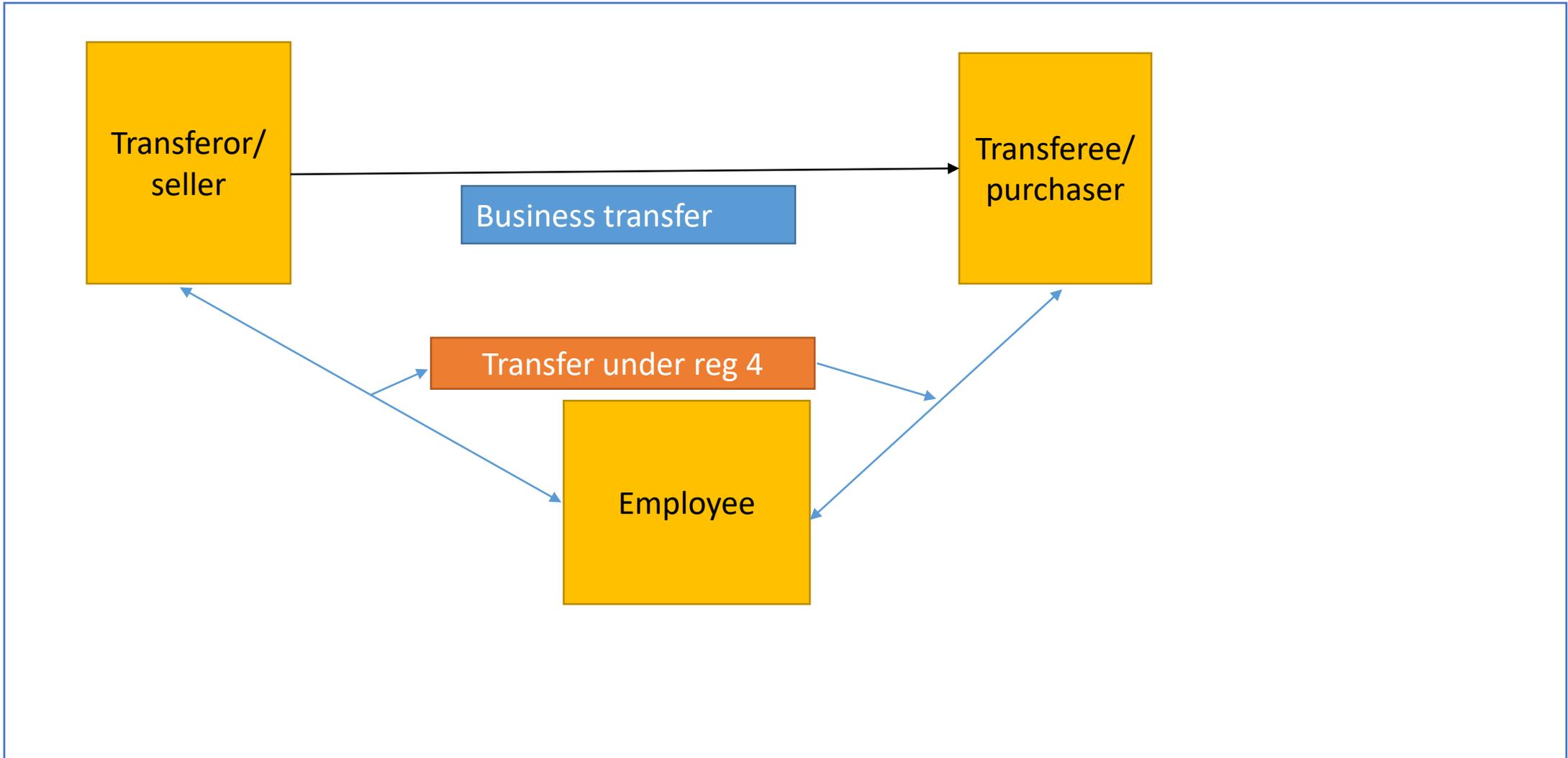
- Helpful to describe as a “*Worzel Gummidge*” effect
  - the body (the business) continues; and
  - the head changes (from the old employer to the new employer)



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# Transfer



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# TuPE reg 4

## 4.— Effect of relevant transfer on contracts of employment

(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which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.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.

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# Tupe reg 4 (cont)

4.— Effect of relevant transfer on contracts of employment

.....

(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.

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# Tupe regs 4A, 5 and 6

- 4A. Effect of relevant transfer on contracts of employment which incorporate provisions of collective agreements
- 5. Effect of relevant transfer on collective agreements
- 6. Effect of relevant transfer on trade union recognition
- 8. Insolvency

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# Tupe reg 10

## 10.— Pensions

(1) Regulations 4 and 5 shall not apply—

(a) to **so much of a contract of employment** or collective agreement **as relates to** an occupational pension scheme within the meaning of the Pension Schemes Act 1993; or

(b) to any rights, powers, duties or liabilities **under or in connection with any such contract** or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme.

(2) For the purposes of paragraphs (1) and (3), any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivors shall not be treated as being part of the scheme.

(3) An employee whose contract of employment is transferred in the circumstances described in regulation 4(1) shall not be entitled to bring a claim against the transferor for—

(a) breach of contract; or

(b) constructive unfair dismissal under section 95(1)(c) of the 1996 Act,

arising out of a loss or reduction in his rights under an occupational pension scheme in consequence of the transfer, save insofar as the alleged breach of contract or dismissal (as the case may be) occurred prior to the date on which these Regulations took effect.

# Tupe reg 10

Points on reg 10:

Reg 10(1):

- Only disapplies regs 4 and 5.
- Pension changes still within the other Tupe provisions (eg notification, consultation)
- Not a free standing transfer provision
- Refers back to the contract of employment
- Refers to an “occupational pension scheme” (**OPS**) within PSA 1993. So refers to s1 as amended from time to time. Definition in s1 was amended by the Brexit legislation wef end 2020 – now applies to an OPS established in another member state (did not before)

Reg 10(2)

- deals with “old age invalidity and survivors” exception – see *Beckmann (2002)*, *Martin (2003)* and *Procter & Gamble (2012)*

Reg 10(3)

- no breach of contract claims for changes as a result of Tupe (if transfer is after 6 April 2006)

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# Alongside Tupe

(1) Pensions Act 2004, ss 257 and 258:

From 2005, Where Tupe applies and transferor had an OPS, (limited) obligation on transferee to offer a relevant scheme going forward

- Can be DC contributions (matching up to 6%)
- No requirement for death in service benefits
- Transfer of Employment (Pension Protection) Regulations 2005 (SI 2005/649, as amended)
- Pollard *'Employment Law and Pensions'* (2016), ch 53.

(2) Pensions Act 2008: Auto-enrolment (AE) obligations will apply to employees once they start with the transferee

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# Transfer conditions under Tupe

For a right or obligation to transfer under Tupe reg 4 (ARD art 3), it must be

- In the contract of employment or part of “all the transferor’s rights, powers, duties and liabilities under or in connection with such contract”.
- And for a pension, must not be excluded under Tupe reg 10 (ARD art 3(4))

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# Transfer conditions under Tupe

So, from the wording of both Tupe and the ARD, it seems clear that there are three conditions for a pension benefit right or obligation to transfer:

- (1) Must be in the contract of employment or part of the “rights, powers, duties and liabilities” of the transferor; and
- (2) Must be “under or in connection” with a contract of employment; and
- (3) Must not be excluded under reg 10 – which excludes OPS benefits unless they “do not relate to benefits for old age, invalidity or survivors” – reg 10(2)

This talk focuses on the first condition above.

NB: “Rights or obligations” seem to have a wide meaning: Hildyard J in *P&G* at [68]. Not limited to legally enforceable rights, but can include a “discretionary entitlement”

# Transfer conditions (3)

Quick look at the 3 conditions in reverse order:

(3) Must be not be excluded under reg 10 – which excludes OPS benefits unless they “do not relate to benefits for old age, invalidity or survivors” – reg 10(2)

- Reg 10 (art 3(3) of ARD) has a general effect to exclude from the statutory transfer under reg 4 most rights under or connected with an OPS
  - OPS is as defined in PSA 1993 – see s1. So distinct from a personal pension.
- Rights not excluded by reg 10 are any rights which do not relate to “old age, invalidity or survivors”
- Tricky question as to when a right is excluded from reg 10 (and so potentially included in a transfer) – *Beckmann* [2002] ECR I-4893, *Martin* [2003] ECR I-12859, *Procter & Gamble* [2012] EWHC 1257 (Ch)
  - Condition 3 not discussed further in this talk – for further detail, see Pollard *‘Employment Law and Pensions’* (Bloomsbury Professional, 2016) at Pt 6.

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# Transfer conditions (2)

(2) Must be “under or in connection” with a contract of employment;

Although

- In practice, DB pension benefit obligations are not usually in the contract of employment,
- it seems relatively easy to find that pension obligations are under or in connection with such a contract of employment
- Eg wide meaning given by CA in *Bernadone* [2000] 3 All ER 544 (tort liability on employer covered by Tupe)

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# Transfer conditions (1)

(1) Must be in the contract of employment or part of the “rights powers duties and liabilities” of the transferor;

In practice in the UK, DB pension benefit obligations are usually not contained in the contract of employment.

- At least in the private sector
- Instead the contract may refer to a pension scheme but the rights and obligations usually arise under a separate trust (at least in the private sector).
  - DC / member contributions may well be different – see eg Pollard *Corporate Insolvency: Employment and Pension Rights* (7<sup>th</sup> ed) at 13.48-13.60 and ch 42)
  - Sometimes a death benefit lump sum obligation? (eg *Braganza*)

Sometimes there are complete pension promises in an employment contract, but this is unusual. Commonly the contract just refers to a booklet, and the booklet outlines the terms and refers to the relevant pension trust instrument.

# Transfer conditions (1)

In relation to benefits and the separate trust obligation, see Lord Millett in *Air Jamaica v Charlton* [1999] 1 WLR 1399 at 1408.

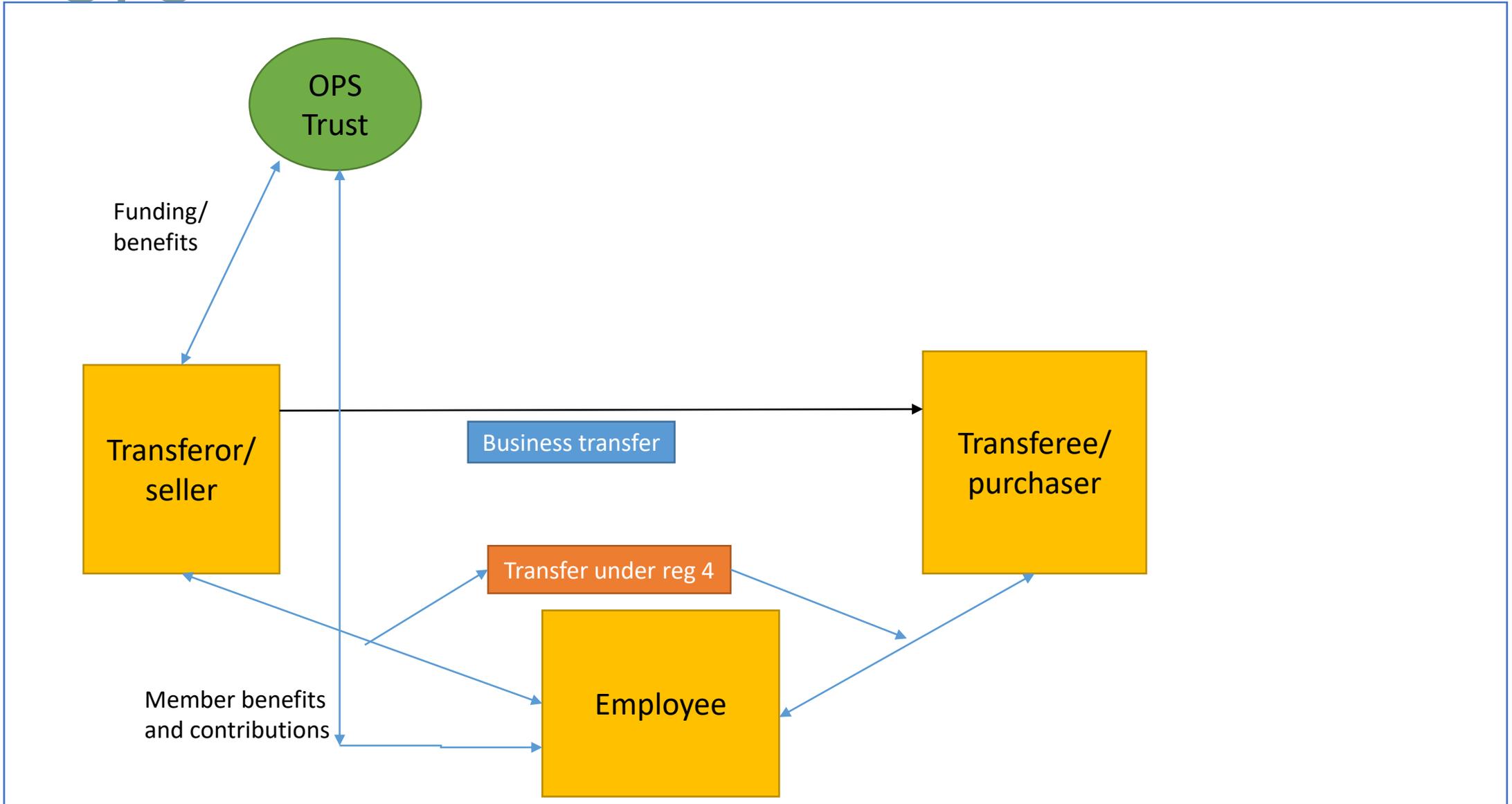
*“Even if these can be regarded as imposing contractual obligations on the company, the only obligation which was undertaken by the company, and one which it has fully performed, was to make contributions to the fund. The obligation to make pension payments was not a contractual obligation undertaken by the company, but a trust obligation imposed on the trustees. Their Lordships agree with the observation of Carey JA, who was dissenting in the Court of Appeal, that each employee becomes a member of the pension scheme by virtue of his employment, but that his entitlement to a pension arises under the trusts of the scheme.”*

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# OPS



# Transfer conditions (1)

The plain meaning of ARD art 3 and Tupe reg 4 is that only the transferor's obligations transfer:

ARD art 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.

ARD art 3(1) clearly only applies to transfer the “rights and obligations” of the transferor – not any rights or obligations owed by third parties to the employees or by the employees.

ARD art 2(1)(a) defines “transferor” as the person who ceases to be the employer by reason of the relevant transfer.

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# Transfer conditions (1)

Similarly the plain meaning of Tupe 2006, reg 4 is that only the transferor's obligations transfer:

Tupe reg 4(2)(a): Aside from the rights and obligations in the contract (reg 4(1)), the rights and obligations transferred under reg 4(2)(a) are:

- “all **the transferor's** rights, powers, duties and liabilities under or in connection with” [the transferring employees’ contracts of employment]:

(ii) the transferor is the old employer – Tupe 2006, reg 2(1)

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# Transfer conditions (1)

So reg 4 only transfers the obligations of the transferor/seller, not those of third parties, such as its pension trustees.

This conclusion is not inconsistent with *Beckmann* and *Martin*, as neither of those cases concerned pension benefits payable under a trust arrangement.

In some cases some pension benefits can transfer under TUPE - otherwise there would be no room to apply reg.10(2) - but the benefits capable of transferring must be those which are the obligation of the transferring employer to the transferring employee, such as where they arise by reason of a contract between employer and employee.

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# Transfer conditions (1)

In *Procter & Gamble*, this argument was available to the employer, but the point was apparently conceded,

Although Hildyard J (at [155]) raised as a possible ground of distinction between his case and the *Beckmann* and *Martin* cases:

*... whether it makes a substantive difference in terms of this issue that in the context of a private sector pension arrangement the obligation to pay benefits may be borne (as in this case) by trustees rather than directly by the transferor employer.*

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# Interpretation

Interpret enacting SI's in line with underlying EU directive – eg *Marleasing* [1990] ECR I-4135

Continue to follow this principle after Brexit – European Union (Withdrawal) Act 2018, s6(3)(a)

“Any question as to the ... meaning or effect of any retained EU law is to be decided, ... so far as they are relevant to it ... in accordance with any retained case law and any retained general principles of EU law.”

But query potential impact of **Retained EU Law (Revocation and Reform) Bill 2022** (if enacted in current form)

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## Retained EU Law (Revocation and Reform) Bill

[AS INTRODUCED]

A

# **B I L L**

TO

Revoke certain retained EU law; to make provision relating to the interpretation of retained EU law and to its relationship with other law; to make provision relating to powers to modify retained EU law; to enable the restatement, replacement or updating of certain retained EU law; to enable the updating of restatements and replacement provision; to abolish the business impact target; and for connected purposes.

*Presented by Mr Secretary Rees-Mogg  
supported by the Prime Minister, Nadhim Zahawi,  
Secretary Chris Heaton-Harris,  
Secretary Alister Jack, Secretary Robert Buckland  
and the Attorney General.*

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Ordered, by The House of Commons, to be  
Printed, 22nd September 2022.

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# Interpretation

## **Retained EU Law (Revocation and Reform) Bill 2022**

If enacted in current form:

- Ordered to be printed by House of Commons on 23 September 2022

S1: Sunset of EU Derived subordinate legislation by end of 2023

- Includes Tupe
- Can be extended to 23 June 2026 by a minister

S4: Abolition of supremacy of EU Law

S5 Abolition of general principles of EU Law

S13: Ministerial power to “restate” any secondary assimilated law

- Ends 23 June 2026

# Interpretation before Retained EU Law (Revocation and Reform) Bill 2022

*Lehman Brothers v CRC Credit Fund Ltd* [2012] UKSC 6, [2012] 1 BCLC 487 at [131]:

Interpret UK implementing legislation in the light of the meaning of the Directives and in accordance with the following principles:

- a) the court should not be constrained by conventional rules of construction;
- b) construction does not require that the UK statutory language be ambiguous;
- c) it is not an exercise in semantics or linguistics;
- d) departure from strict and literal application of the words which the legislative has elected to use is permitted;
- e) the implication of words necessary to comply with Community Law is permissible; and
- f) the precise form of words to be implied does not matter.

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# Interpretation

Similarly if interpreting directives:

*HP Bulmer Ltd and Another v J Bollinger SA* [1974] 1 Ch 401, 426C–E

Lord Denning MR explained the required approach (in the context of interpreting a Directive as distinct from the UK legislation implementing it):

‘... what are the English courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. To quote the words of the European court in the *Da Costa* case [1963] CMLR 224, 237, they must deduce “from the wording and the spirit of the Treaty the meaning of the community rules” ... They must divine the spirit of the Treaty and gain inspiration from it. If they find a gap, they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought about it...’

Cited by Hildyard J in *P&G* at [40]

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# Interpretation

Structure of Tupe:

If third party obligations also transferred then:

- Why are regs 5 and 6 needed – covering collective agreements and trade union recognition?
- Reg 10 not superfluous as can still apply to a pension promise of the employer (eg an unfunded public sector promise, with no trust).
  - Eg *Parlett v Guppys (Bridport) Ltd (No.2)* [1999] OPLR 309, CA

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# Caselaw

Not very much on third party liabilities. Most reported cases deal clearly with employer/employee rights and obligations.

- *French v Mitie* [2002] ICR 1395 transferee/purchaser required to set up substantially equivalent profit sharing scheme to that of transferor (paying cash or shares).

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# Caselaw

Some cases on third party rights:

***Chapman v CPS Computer Group plc*** [1987] IRLR 462,

The Court of Appeal held that a share option granted by the parent of the transferor employer did not transfer under TUPE:

see Glidewell LJ's agreement (at para [25]) with the argument of Counsel (at para [24]) that TUPE was only concerned with the contract of employment.

As regards the option contract with the parent company, Glidewell LJ said that:

*the Regulations have no effect; they are totally irrelevant.*



# Caselaw

Some cases on third party rights:

*Ponticelli UK Ltd v Gallagher* 12 Sept 2022 [2022] EAT 140

Share incentive plan case

Total subsidiary participated in share incentive plan – contributions by employer and employee. Used to buy shares in Total SA held in trust. Also matching shares provided

Employee transferred to a non-Total subsidiary under Tupe.

Lord Fairley in the EAT held;

- The plan was “in connection with’ the employment contract
- So purchaser/transferee under an obligation to provide “substantive equivalence” scheme – following *French v Mitie*
- *Chapman v CPS* distinguished

No consideration of nature of obligation on the transferor – just to provide contributions or



# Caselaw

## ***Frankling v BPS Public Sector Ltd*** [1999] ICR 347,

An NHS trust had outsourced its payroll department to BPS. Contracts with the NHS trust had incorporated “Whitley Council” terms. Cl.46 provided that, on redundancy, employees would be entitled to enhanced benefits under the NHS Pension Scheme. The terms of cl.46 were implemented by the NHS (Compensation for Premature Retirement) Regulations 1981. BPS made employees redundant, but did not provide the benefits described in cl.46. The employees’ claim for the benefits was rejected by the EAT, on the basis that BPS had no liability to provide the enhanced benefits:

Morison J held:

... the employer does not promise the employee that he will pay [the enhanced benefits]. There is a tripartite arrangement under which the employee is entitled under statute to receive [the benefits] from the scheme, which is under a correlative duty to pay them. The employers owe to the scheme an obligation to provide the necessary funds, which is an obligation enforceable under [the Premature Retirement Regulations]. There is, plainly, we think, scope for arguing that as between employer and employee the employer is under a contractual obligation to make the payments to the scheme to enable the eligible employee to receive payment of the benefits. But we are not persuaded that there is any scope for implying a term in the collective agreement to the effect that the employer is under an obligation, owed to the employee, to pay the benefits. Such a term is not necessary, because employees have statutory rights to them.

# Caselaw

## ***Beckmann and Martin***

Again the NHS scheme and Whitley council terms

No clear analysis of the issue, because the members' right to early retirement benefits in those cases involved UK public sector schemes and seemingly arose by reason of their employment contracts, and not purely from their membership of an occupational pension scheme.

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# Beckmann

## ***Beckmann***

### Two questions referred to ECJ

(1) Is the employee's entitlement to early payment of pension and retirement lump sum and/or to the annual allowance and lump sum compensation, a right to an old-age, invalidity or survivors' benefit within the meaning of Article 3(3) of Council Directive 77/187/EEC?

(2) If and to the extent that the answer to Question 1 is "no", is there an obligation of the transferor arising from the contract of employment, the employment relationship or the collective agreement within the meaning of Article 3(1) and/or 3(2) which transfers by reason of the transfer of the undertaking and renders the transferee liable to pay the benefits to the employee upon dismissal?

***Beckmann*** mainly known for insights into first question

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# Beckmann

## ***Beckmann***

On second question, Mrs Beckmann noted that health authority reimbursed the Secretary of State for pensions paid – see [34]

DWM (the transferee/purchaser) submitted that the obligations did not fall on them:

[35] DWM, on the other hand, contends that the fact that the rights to the benefits at issue in the main proceedings were provided for by statutory instruments and that the payments are made by the Secretary of State rules out the applicability of Article 3(1) and (2) of the Directive, which only cover the rights employees can invoke against their employer as such under a contract of employment or employment relationship or collective agreement. Under the system in the case in the main proceedings, the transferor employer, that is to say the NWRHA, had obligations towards the Secretary of State and not to the employees. Moreover, DWM itself had no obligation towards the Secretary of State.

# Beckmann

## ***Beckmann***

ECJ seems to go on to say that any rights of employees not expressly excepted (eg OPS rights under art 3(3) – now Tupe Reg 10) must transfer:

[37] Apart from the exceptions under Article 3(3) of the Directive relating to old-age, invalidity or survivors' benefits, no exception to those rules is provided for by the Directive and the existence of such a specific clause leads to the conclusion that Article 3(1) and (2) relates to all the rights of employees mentioned therein which are not covered by those exceptions (see Case 135/83 *Abels* [1985] EC 469, paragraph 37).

But this looks inconsistent with the later ECJ decision in *Kirtruna*

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# Abels

*Beckmann* refers to *Abels* here. *Abels* was concerned with a claim for wages and holiday pay (so clearly an obligation on the transferor). An issue was whether past claims also transferred: In *Abels*, the ECJ held that they did:

36 .... it is the transferee who is primarily liable for bearing the burdens resulting from employees ' rights existing at the time of the transfer.

37 That interpretation is confirmed by the fact that Article 3 (3) expressly excludes from the scope of paragraph (1), the provision at issue, ' employees ' rights to old-age, invalidity or survivors ' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States ' . The existence of such a specific clause, limiting the scope of the basic rule, leads to the conclusion that Article 3 (1) relates to all the rights of employees which are not covered by that exception, **whether those rights arose after or before the transfer of the undertaking.**

38 The reply to the second question must therefore be that Article 3 (1) of Directive no 77/187 must be interpreted as covering obligations **of the transferor** resulting from a contract of employment or an employment relationship and arising before the date of the transfer, subject only to the exceptions provided for in Article 3 (3).

Still refers to “obligations of the transferor”

# Caselaw

## ***Beckmann***

38 Accordingly, neither the fact that the rights and obligations arising from a contract of employment, an employment relationship or a collective agreement binding the transferor on the terms described in paragraph 37 of this judgment derive from statutory instruments or were implemented by such instruments, nor the practical arrangements adopted for such implementation can have the effect that such rights or obligations are not transferred to the transferee.

No mention here of needing to be an obligation of the transferor.  
Instead refers to “practical arrangements”

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# Caselaw

## ***Beckmann***

Finally the ECJ refers the issue back to the High Court:

39 In the case in the main proceedings, in order to decide whether the claimant can require the defendant, as transferee, to pay the benefits in question, it is for the referring court, if necessary, to determine whether these benefits arose from her contract of employment or her employment relationship with the transferor employer ...

So at this stage judgment dodges the point about being an obligation on the transferor.

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# Beckmann

40 The answer to the second question must therefore be that, on a proper construction of article 3 of the Directive, the obligations applicable in the event of the dismissal of an employee, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards that employee, are transferred to the transferee **subject to the conditions and limitations laid down by that article,** regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments and **regardless of the practical arrangements adopted for such implementation.**

But for a trust based OPS, the employer may well fund the scheme ultimately, but this is different from the NHS scheme with its direct “reimbursement” by the employer. So “practical arrangements” in a trust based scheme differ substantially from NHS.

References to the “conditions and limitations laid down by that article” include its reference to the obligations of the transferor?

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# Beckmann

The A-G had commented on the second question:

89 Further, it must be observed that the employment contract concluded between the claimant and the North West Regional Health Authority expressly declared the General Whitley Council conditions of service to be applicable to the contract. In that respect there are good reasons for taking the view that the entitlements under section 46, and (conversely) the obligations of the transferor, have a contractual basis, contrary to the decision of the Employment Appeal Tribunal in *Frankling v BPS Public Sector Ltd* [1999] ICR 347.

90 ..... On the basis of these observations on the first question, we must conclude that the entitlements under section 46 of the General Whitley Council conditions of service are obligations of the transferor under a contract of employment existing at the time of the transfer within the meaning of article 3(1) of Directive 77/187 or under a collective agreement within the meaning of article 3(2) of Directive 77/187.

93 I therefore propose that the second question referred for a preliminary ruling should be answered: there is an obligation of the transferor of an undertaking arising from the contract of employment, the employment relationship and the collective agreement within the meaning of article 3(1) and (2) of Directive 77/187, to pay benefits to an employee in the event of dismissal, which is transferred by reason of the transfer of the undertaking and renders the transferee liable to pay the benefits to the employee on dismissal.

But ECJ did not follow this approach

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# Martin v South Bank University

***Martin v South Bank University*** [2003] ECR I-12859, [2004] ICR 1234

Also a case on NHS pension rights and the Whitley Council

The ECJ cited and followed *Beckmann* and noted:

12 These various benefits are paid by the Secretary of State, in the case of the first two from the NHS Superannuation Scheme. However, they have to be reimbursed by the NHS administration.

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# Martin

Question 3 as referred to the ECJ:

3. If and to the extent that the answer to Question 2 is " no" , is there an obligation on the transferor arising from the contract of employment, the employment relationship or the collective agreement within the meaning of Article 3(1) and/or 3(2) which transfers by reason of the transfer of the undertaking and renders the transferee liable to pay the benefits to the employee upon dismissal?

On this question, ECJ just repeated *Beckmann*:

35. .... Article 3 of the directive is to be interpreted as meaning that obligations arising upon the grant of such early retirement, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards the employees concerned, are transferred to the transferee subject to the conditions and limitations laid down by that article, regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments and regardless of the practical arrangements adopted for such implementation.

# Martin

South Bank University (SBU) as transferee/purchaser had submitted (A-G opinion at [37]):

37. South Bank University, on the other hand, takes the view that, by referring to the statutory framework, Section 46 lays down both entitlements and obligations under the relevant pension system, but not those of the applicants' employer. Regulation 5 of TUPE covers the transfer of the employer's obligations arising under or in connection with the contract of employment. **As Section 46 imposed no obligations on the employer, no obligations were transferred to it.**

The A-G's assessment was that this was covered by Beckmann:

64. It was also held in the judgment in Beckman, in the light of the judgment in *Abels*, 9 that it is irrelevant whether rights and obligations which transfer to the transferee under Article 3(1) or (2) of the Directive derive from statutory instruments or what the practical arrangements for their implementation are. 10 It is thus irrelevant that the applicants' rights during their employment at Redwood College were governed by statute. 11 The obligations of the former employer derived from the employment relationship and the collective agreement and thus transferred to the transferee under Article 3(1) and (2) of Directive 77/187.



# Caselaw: P&G

***Procter & Gamble v Svenska*** [2012] EWHC 1257 (Ch) (Hildyard J)

Contractual issue between seller (P&G) and purchaser (Svenska). The “no transfer” analysis was not argued.

The analysis in *P&G* assumed that the employee’s non-old age rights under their original pension scheme transferred under TUPE. P&G initially argued that it did not owe any contractual obligation to provide pension benefits and so no obligation passed under Tupe. But this point was described as “bold” and conceded; in Hildyard J’s view, correctly so:

[61] One difficulty with this iteration of P&G’s case was and is that neither the Directive nor TUPE is confined in its operation to contractual liabilities; both extend to ‘rights and obligations’ (in the language of Article 3) and ‘rights, powers, duties and liabilities’ (in the language of reg. 4) ‘arising from a contract of employment or from an employment relationship existing on the day of transfer’ (Article 3) or ‘under or in connection with’ any contract of employment subject to the relevant transfer.

Mr Nugee QC conceded in opening, correctly in my view, that a pension scheme such as the P&G Fund plainly is an arrangement in connection with a contract of employment: it is well established that sums paid into a pension fund are in fact delayed remuneration (see per Lord Reid in *Parry v Cleaver* [1970] AC 1 (at 16C) and also *Mettoy Pension Trustees v Evans* [1990] 1 WLR 1587 per Warner J at 1610G).

This only looks at point (2) in the three conditions above – it does not deal with point (1): the wording of both Tupe and the ARD that the automatic transfer provisions relate only to obligations of the transferor.

A point that has been conceded is not a binding authority for a later case (eg *R (Kadhim) v Brent LBC* [2001] QB 955, CA)

# Caselaw: Bernadone

## ***Bernadone v Pall Mall Services Group***

[2000] 3 All ER 544, [2001] ICR 197.

Not a decision about pensions, but instead about employer liability insurance (ELI).

Principal issue was whether the liability of a transferor employer in tort to an injured transferring employee transfers under TUPE: CA held that it did. It was a liability under or in connection with contract of employment.

Seems sensible, save that may be issues for transferee getting (mandatory) insurance for this liability.

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# Caselaw

***Bernadone v Pall Mall Services Group*** [2000] 3 All ER 544, [2001] ICR 197

Did the transferor/seller's employer liability insurance also transfer under Tupe?

CA held yes.

Peter Gibson LJ at [48]:

*Mr Edelman would read into Directive 77/187 and the 1981 Regulations words limiting the relevant rights and obligations 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.*

# Kirtruna

## ***Kirtruna SL v Red Elite de Electrodomesticos SA***

EU:C:2008:574, [2008] ECR I-7907, [2009] 1 CMLR 14.

Third party rights case in the ECJ

Transfer of a business based on commercial premises held under a lease entered into by the transferor/seller with a third party. The lease was non-transferable.

Argued that the termination of that lease was likely to entail the termination of the contracts of employment transferred to the transferee/purchaser (under the Spanish legislation enacting the ARD)

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# Kirtruna

The ECJ held that the lease did not transfer under the ARD

Key aspect of judgment is at [43]-[44]:

*It is true that, as stated at [36] of this judgment, the objective of Directive 2001/23 is to protect employees in the event of a change of employer, and in particular to ensure the safeguarding of their rights. Their employment relationships could be under threat in circumstances such as those in the main proceedings. If there is no automatic transfer of the lease, there is a risk that the transferee of the undertaking may be obliged to quit the premises, to cease business and consequently to terminate the contracts of employment of the employees concerned.*

*However, the need to achieve that objective of protection of employees **cannot permit the unequivocal wording** of art.3(1) of Directive 2001/23 to be ignored and the rights of third parties who are not connected with the transfer of the undertaking to be adversely affected, by imposing on them an obligation to accept an automatic transfer of the lease which is not clearly provided for in that directive.*

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# Caselaw

Similarly the ECJ in *Bauer* in 2019 dealing with obligations under the Employment Insolvency Directive.

*Pensions-Sicherungs-Verein VVaG v Bauer* (C-168/18),

EU:C:2019:1128 A-G Hogan:

27. *The second condition (4) implies that the employer is in insolvency. Accordingly, Article 8 does not apply, in principle, to the situation of where it is only the occupational pension body which faces financial difficulties. (5) This is consistent with Article 1 of Directive 2008/94, which requires, for the directive to apply, that the claim is held by an employee against its employer or former employer. Indeed, it should be recalled that Directive 2008/94 is not intended to guarantee, in all circumstances, the rights of employees or former employees conferring on them immediate or prospective entitlement to old-age benefits, but, according to its recital 3, to protect them simply in the event of the insolvency of their employer. In the event of difficulties of the occupational pension body, it is only, as the Court has ruled, when the employer committed to guarantee the payment of the benefits set up in a pension plan and is itself in insolvency that Article 8 may apply.*

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# *Bernadone* not applicable to pensions?

So is *Bernadone*, as a CA decision, binding (up to the SC) in relation to the transfer of all employee connected third party liabilities, including private sector pensions (but subject to reg 10)?

However:

1. No authority was cited by the CA in *Bernadone* for this approach. Major extension of ARD/Tupe wording. *Chapman v CPS Computer* and *Frankling* not cited. *Chapman* is also a CA decision.
2. Gibson LJ referred to the need to “read into” ARD and Tupe “words limiting the relevant rights and obligations”. Arguably, there would need to be words read in to extend what seems to me to be the plain meaning.
3. *Bernadone* strictly only relates to ELI.
  - Special rights can apply to employees in relation to employer insurance on insolvency of the employer - the Third Party (Rights against Insurers) Acts (see *Bernadone* at [43]). The
  - Position on ELI was mitigated by specific provisions dealing with ELI by amendments made in Tupe 2006 – see reg 17 making transferor and transferee jointly and severally liable if transferor not required to have ELI.
  - Not allowing transferee to access existing ELI also seems to give a windfall to the insurer (transferor/seller has paid the relevant premiums) –see Gibson LJ at [49].
4. Extending *Bernadone* to all third party liabilities seems inconsistent with the later ECJ decision in *Kirtruna*

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# Conclusion

Obvious difficulties in construing reg 4

- EU Retained law: General “purposive” approach – so not literal.
- But must give some meaning to the words used.
- *Kirtruna* is clear ECJ authority (in relation to a lease) that some third party liabilities do not transfer
- *Bernadone* points the other way – in relation to employer liability insurance. But is pre *Kirtruna* and does not relate to pensions

Being definitive would need a court decision.

But arguments seem stronger to me that *Kirtruna* will be followed and that reg 4 of Tupe does not operate to transfer third party pension rights or obligations.

# Thank you

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## White Paper Conference: Pensions Law

Do the automatic transfer provisions in Tupe apply to third party liabilities such as pension rights under a trust based occupational pension scheme?

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