HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 29

on appeal from [2002] EWCA Civ 1035

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

North Wales Training and Enterprise Council Limited (t/a Celtec) (Appellants) *v.* Astley and others (Respondents) (formerly Celtec Limited (Appellants) *v.* Astley and others (Respondents))

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Carswell
Lord Mance

Counsel

Appellants:
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Jeremy Lewis
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Respondents:
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LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead, Lord Rodger of Earlsferry and Lord Mance. I am greatly indebted to them for their summary of the facts, materials and decisions relevant to this appeal, which I need not attempt to repeat. I shall for convenience refer throughout to Celtec, since nothing turns on the transfer from Newtec to it.

2. If an employer transferred his business undertaking to another party, the position at common law of an employee who worked for the first employer before the transfer and for the new employer after it was in principle clear. His previous contract of employment was not varied, because the second contract was made between different parties. But the first contract was the subject of an express or implied novation, involving the termination of the first contract and its replacement by a new contract. This was a readily intelligible and rational analysis. But it could work disadvantageously to the employee in any situation where his rights depended on showing that his employment had been continuous for a given period, since a novation necessarily involved a discontinuity. It was this disadvantage which the legislation now under consideration was intended to obviate. The benign intent of the legislation is not in question. But its effect is, inevitably, to introduce a fictional element into this tripartite relationship, since (where the legislative conditions are satisfied) the employee is treated as having been employed by the new employer all along and ex hypothesi such is not the case. The European Court of Justice [2005] IRLR 647

acknowledges this in para 43 of its judgment on the reference in this case, when it rules that

> "… the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between the parties to the transfer process in that respect."

In legal parlance, a matter is only deemed to be the case when it is not, or may not, in fact be so, or would not or might not be thought to be so if not deemed to be so. The complexity of this case, I think, derives from the fiction which underlies it.

3. Certain very important questions, which were the subject of discussion and argument below, have effectively ceased to be controversial. The employment tribunal began, in a logical way, by seeking to define the undertaking whose transfer was in issue. Its answer (in para 11 of its reasons) was clear:

> "the management of the government-funded post-16 vocational training and enterprise activities in England and Wales together with the information systems and database, some staff and some premises. That we think is a recognisable and definable economic entity."

It went on (para 12) to observe that the undertaking in question was a "labour intensive" undertaking, and therefore the movement of staff from the Department to Celtec was an important defining part of the undertaking and transfer. The Employment Appeal Tribunal [2001] IRLR 788 did not understand Celtec to attack this description (para 46 of its judgment) and thought the tribunal's description could not be faulted. The Court of Appeal [2002] ICR 1289, para 7 took the same view.

4. The employment tribunal then asked (para 13) whether the individual respondents were assigned to the undertaking at the time of the transfer commencing. In its view they clearly were. The Court of Appeal considered (para 30) that the tribunal had been fully entitled to conclude that the management skills of such of the Department's

employees as were happy to continue in work under the supervision of Celtec formed part of the undertaking which was being transferred.

5. It was of course necessary for the employment tribunal to decide whether the undertaking it had defined had been transferred. It concluded (paras 11-12) that it had. In the EAT (paras 3 and 43) Celtec accepted that there had been a transfer of an undertaking. In the Court of Appeal (para 7(ii)) it was effectively agreed that the undertaking had been transferred.

6. What was and remains the divisive question is when the transfer occurred. The employment tribunal (para 20) assumed that September 1990 when Celtec commenced business was the date on which the transfer commenced, but thought transfer was a long process "starting some time in 1990 as affects these applicants and ending on a national basis some time in 1996". In the EAT the majority view (para 99) was that the tribunal, rightly directing itself, would have concluded that the transfer was probably completed in about September 1990 and certainly long before 1993. The Court of Appeal (para 32) accepted the tribunal's test and its conclusion. In the statement of facts and issues agreed in the House (para 12) it was accepted that Celtec became operational in September 1990. In summarising the essential facts agreed between the parties in its reference to the ECJ the House recorded in para (13) that the respondent employees were "full-time employees whose work was dedicated to the undertaking and they were therefore assigned to the undertaking prior to the transfer", and the summary continued in para (14):

> "On the day in September 1990 when NEWTEC commenced operations there was no difference between the work they did and the work they had done as civil servants the day before. They worked from the same desks, in the same building. The programmes which the Government had guaranteed to provide for prospective, and current, trainees had to be continued. The careers of young people depended on these and there could be no interruption of activities. The Government had a responsibility to the trainees which could not be interrupted. A seamless transition was important even if the economic structure was to change with time."

In its written case on this appeal Celtec affirms that Celtec "commenced operations in September 1990 when it took over the premises, information systems and databases of the DoE area offices".

7. As the opinions of my noble and learned friends make clear, the arguments of the parties were advanced below on a basis somewhat different from that which they now put forward. Celtec said that the transfer was in September 1990; but the respondent employees were not (in effect) part of what was then transferred; so they cannot gain the benefit of the legislation. The respondent employees contended that the transfer took place over a period, and each of the respondent employees was part of what was transferred from time to time, so that they could claim the benefit of the legislation. The ECJ accepted neither of these approaches, ruling (if I understand the judgment correctly) that transfer must take place on a single date on which responsibility as employer for carrying on the business transferred moves from the transferor to the transferee and that this date cannot be postponed to another date at the will of either. It seems to me to follow inexorably that the transfer took place in September 1990 and the later dates of transfer agreed with the individual respondent employees are to be disregarded.

8. In agreement with my noble and learned friend Lord Hope I conceive it to be the duty of this House to give effect to the law as declared in Luxembourg. But I agree, of course, that if it would unfairly prejudice Celtec to do so without giving it an opportunity to adduce further evidence or argument that course would have to be followed, however reluctantly after the lapse of so many years. In this instance, I agree with my noble and learned friend that such a course need not be followed, for two main reasons:

(1) Celtec have long accepted September 1990 as the date of effective transfer. This is a matter partly of fact, partly of law. But the factual element is very prominent. The facts cannot be changed because an unforeseen legal argument makes them damaging to Celtec's case.

(2) It is plain from the findings made below that Celtec set up in business in September 1990 and the employees seconded from the Department were the core of the business: without them there could have been no effective transfer. It is scarcely an exaggeration to say that they were the business.

I readily accept that the respondent employees did not think that they became employees of Celtec in September 1990, and it was not intended that they should become employees then. There are other potential difficulties and problems in concluding that they did. But these spring from the fiction to which I alluded at the outset, and from the Government's decision to structure the transfer in this unusual way.

9. For the reasons given by Lord Hope, and these brief reasons of my own, I would dismiss this appeal and invite written submissions on costs within 21 days.

LORD HOPE OF CRAIGHEAD

My Lords,

10. This case arises out of a dispute between the appellant, North Wales Training and Enterprise Ltd, trading as Celtec ("Celtec"), and a group of its employees about the length of their continuous employment with the company for the purpose of establishing redundancy entitlements and other accrued rights. The dispute relates to the interpretation and application of article 3(1) of Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses ("the Acquired Rights Directive"), which has now been consolidated with subsequent amendments and repealed by Council Directive 2001/23/EC.

11. The respondents, John Astley, Julie Owens and Deborah Lynn Hawkes, were all employed by the Department of Employment ("the DoE") as civil servants before they took up direct employment with a predecessor of Celtec following the transfer of part of the DoE's undertaking to the predecessor as part of a privatisation initiative. They contend that their periods of continuous employment with Celtec and its predecessor should include their periods of service with the civil service prior to the date when they entered into the direct employment of the predecessor. Celtec contend that the respondents' periods of service with the civil service should be excluded from the computation. The respondents raised proceedings for determination of this issue in the employment tribunal as representatives of the group of employees to which they belong. The issue affects a large number of other civil

servants who transferred from the civil service to other employers in the private sector during the early 1990s in similar circumstances.

Background

12. Until 1989 the DoE managed the training of young people and unemployed adults in England and Wales through about 60 local area offices. These area offices were all staffed by civil servants. In December 1988 the government published a White Paper entitled "Employment For the 1990s" (Cm 540) which set out an agenda for action for the next decade. Among the changes which it envisaged was the transfer of part of the DoE's vocational training responsibilities to bodies to be known as training and enterprise councils ("TECs"). The TECs were to plan and deliver training and to promote and support the development of small businesses and self-employment within their area under contracts with the government. They were to take over all the training work that had previously been carried on in the area offices. These proposals were put into effect, and 82 TECs were set up. By November 1991 all the TECs in England and Wales had become operational.

13. It was understood from the outset between the TECs and the DoE, on whom the TECs were dependent for the funding of their operations, that the TECs were to be entitled to recruit their own staff. Most of them did so from the date they became operational. But they were new organisations, and the work to be undertaken required an understanding of the government policy that the contracts were designed to deliver. So the DoE, with the agreement of the TECs, issued an invitation to staff in its area offices to volunteer for secondment to the newly created TECs. They were invited to do so initially for a period of three years. Those who wished to volunteer were told that during the secondment period they would continue to be civil servants employed by the DoE. As such, they would retain their normal pay and terms and conditions of employment as embodied in the department's personnel handbook. They were also told that they could, if they wished, accept additional payments and benefits offered to them by the TEC, but that the right to any such payments or benefits would cease at the end of their secondment. They would not form part of their terms and conditions of employment as civil servants.

14. The TECs welcomed the contribution made by the seconded staff. But they made it clear that, as private companies, they wanted to

employ all their own staff on terms and conditions determined by them. In 1991 discussions took place with the TECs, seconded staff and the relevant trade unions about future staffing arrangements. All seconded staff were informed that they would be free to choose any offer of employment that a TEC might make or, if they preferred, to return to the DoE or the wider civil service for redeployment. In December 1991 the Secretary of State announced that secondments would be phased out by the end of each TEC's fifth year of operation. The DoE agreed with the TECs that it would reimburse them should a court or tribunal decide, in the case of a dismissal of a former civil servant, that his or her period of employment with the TEC must be deemed to have been continuous with that in the civil service for the purpose of calculating that person's rights on redundancy.

15. The area offices of the DoE in Wrexham and Bangor were taken over by the North East Wales TEC ("Newtec"). It had a board of directors drawn from local businessmen. It became operational in September 1990. On 1 April 1997 Newtec and the TEC for North West Wales, called Targed, were merged by the creation of a new body called Celtec. 43 civil servants were initially seconded to Newtec. When the secondments ended 18 of them resigned from the civil service and took up employment with Newtec. 10 chose to remain as civil servants, and they were redeployed. 13 resigned from the civil service, and 2 left the civil service for other reasons. Of the 40 civil servants seconded to Targed, 10 resigned to take up employment with the TEC, 9 retired and the rest left for other reasons.

16. Mr Astley, Ms Hawkes and Ms Owens entered the civil service on 31 August 1973, 4 November 1985 and 21 April 1986 respectively. As civil servants they were responsible for vocational training in North Wales. Their work was entirely devoted to that service prior to its transfer to Newtec. They were all seconded to Newtec when it commenced operations on 17 September 1990. There was no difference between the work they did before and after the date of their secondment. They worked from the same desks in the same building. This arrangement ensured that there was a seamless transition from the old system to the new in the provision of the programmes which the government had undertaken to provide for the trainees. Towards the end of the period of their secondment they resigned from civil service to become direct employees of the TEC. Ms Hawkes and Ms Owens resigned from the civil service on 30 June 1993. Mr Astley resigned on 31 August 1993. Ms Hawkes' and Ms Owens' contract of employment with the TEC commenced on 1 July 1993. Mr Astley's contract commenced on 1 September 1993. There was no gap in time between

their resignations from the civil service and their employment by Newtec.

17. In 1998 Ms Hawkes was dismissed by Celtec on the ground of redundancy. The DoE took the view that there was no continuity of service between the periods of her employment with the civil service and the TEC, as she had chosen freely to resign from the civil service to take up employment with an employer in the private sector. Mr Astley and Ms Owens feared that they too were at risk of being dismissed for redundancy. All three sought a determination by the employment tribunal as to the length of the period of continuous employment on which they were able to rely. Their argument was that it should include their periods of employment with the civil service as well as those with Newtec and Celtec.

The legislation

18. The respondents all rely on the provisions of the Acquired Rights Directive and section 218 of the Employment Rights Act 1996. Mr Astley also relies on regulation 5 of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794) ("TUPE"), as amended by section 33 of the Trade Union Reform and Employment Rights Act 1993 with effect from 30 August 1993. As from that date, which was the day before Mr Astley resigned from the civil service, the definition of the expression "undertaking" in regulation 2(1) of TUPE which had previously been restricted to commercial organisations was amended to include any trade or business. It is common ground however that Celtec fails to be treated as an emanation of the state for present purposes and that Mr Astley's primary claim is under the Directive.

19. The preamble to the Directive stated that it was adopted because it was "necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded." Article 1(1) provided:

> "This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger."

Article 2 provided:

> "For the purposes of this Directive—
>
> (a) 'transferor' means any natural or legal person who, by reason of a transfer within the meaning of article 1(1), ceases to be the employer in respect of the undertaking, business or part of the business;
>
> (b) 'transferee' means any natural or legal person who, by reason of a transfer within the meaning of article 1(1), becomes the employer in respect of the undertaking, business or part of the business."

20. Article 3(1) of the Directive was in these terms:

> "The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of article 1(1) shall, by reason of such transfer, be transferred to the transferee.
>
> Member States may provide that, after the date of transfer within the meaning of article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship."

21. The Directive was transposed into domestic law by TUPE. Regulation 5(1) of TUPE, as amended by section 33 of the 1993 Act, provides:

> "Except where objection is made under paragraph 4A below, a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee."

22. Part XIV of the Employment Rights Act 1996 contains the interpretation provisions for the purposes of the statutory employment rights conferred by the Act. Chapter 1 of that Part deals with the concept of continuous employment, which is entirely a creature of statute. Section 210(1) states that references in any provision of the Act to a period of continuous employment are to a period computed in accordance with that chapter. Section 218 deals with how that period is to be computed in the event of a change of employer. Subsections (1) and (2) of that section are in these terms:

> "(1) Subject to the provisions of this section, this Chapter relates only to employment by the one employer.
>
> (2) If a trade or business, or an undertaking (whether or not established by or under an Act), is transferred from one person to another –
>
> (a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and
>
> (b) the transfer does not break the continuity of the period of employment."

The proceedings

23. On 22 December 1999 an employment tribunal sitting at Abergele determined that all three respondents had continuous employment from the start of their employment with the civil service under section 218 of the Employment Rights Act 1996 and the Directive, and that Mr Astley also had continuity of employment by virtue of article 5(1) of TUPE. It found that there had been a TUPE transfer commencing in September 1990 when NEWTEC started business. It also found that the transfer took place over a number of years until 1996 when the last of the secondments to TECs from the civil service came to an end. In para 20 of its determination the tribunal said:

> "Our analysis is that each time a seconded employee became directly employed by the TEC there was another transaction and immediately before that transaction ('any transaction') that employee was employed by the transferor, ie by the civil service and therefore that

> employee's rights passed over to the transferee which was the TEC. We see no reason in principle why such a very long period should not be found to be a period of the transfer when that was plain from the outset."

24. On 5 October 2001 the Employment Appeal Tribunal, by a majority, allowed an appeal by Celtec against the employment tribunal's determination: [2001] IRLR 788. It had been accepted for the purposes of that appeal that the tribunal's conclusion that there was a transfer of an undertaking was not open to challenge. The appeal was directed to the question when the transfer took place. It was held that the test for determining the time at which a transfer is completed was when the new employer was in actual occupation and control of the old business. On that basis the tribunal ought to have concluded that the transfer was probably completed in about September 1990 and certainly long before 1993. It followed that the respondents remained employed by the civil service after the transfer, and their continuity of employment was not preserved when they accepted employment with Newtec.

25. On 19 July 2002 the Court of Appeal (Schiemann and Laws LJJ, Jackson J) allowed an appeal by the respondents against the determination of the Employment Appeal Tribunal: [2002] EWCA Civ 1035; [2002] ICR 1289. Delivering the opinion of the court, Schiemann LJ said that the employment tribunal was entitled to hold that the management skills of the seconded employees formed part of the undertaking that was being transferred: para 30. Addressing then the question whether the wording of the Directive implied that the transfer of the undertaking must take place at a moment in time, he said that the Directive was sufficiently wide in its terms to embrace a transfer of a business which took place over a period: para 31. In para 32 he said:

> "Once one accepts that a business can be transferred over a period of time, the establishment of the period of time during which the transfer takes place is a task for the tribunal of fact. We see no legal error in what was done by the employment tribunal."

26. Celtec appealed against that decision to your Lordships' House. The parties were agreed that the respondents remained employees of the civil service during the period of their secondments. They were also agreed that the issue in the appeal was whether the employment tribunal erred in law in finding that the relevant transfer took place over a long

period of time. They submitted that a reference should be made to the European Court of Justice under article 234 EC for a preliminary ruling on this point. On 10 November 2003 the House referred the following questions to the European Court of Justice:

> "1. Are the words 'the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer in article 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses to be interpreted as meaning that there is a particular point of time at which the transfer of the undertaking or part thereof is deemed to have been completed and the transfer of rights and obligations pursuant to article 3(1) is effected?
>
> 2. If the answer to question 1 is 'yes', how is that particular point of time to be identified?
>
> 3. If the answer to question 1 is 'no', how are the words 'on the date of a transfer' in article 3(1) to be interpreted?"

27. Celtec's contention before the Court of Justice was that the relevant words in article 3(1) of the Directive should be interpreted as meaning that there was a particular point of time at which a transfer of an undertaking or part thereof was deemed to have been complete and the rights and obligations of the transferor arising from a contract of employment existing on the date of the transfer were transferred to the transferee. They submitted that any later movement of employees from the transferor to the transferee was not within the scope of the Directive. The respondents' contention was that, while it was necessary to identify a date on or by which a transfer of an undertaking had been completed, this did not preclude the national court from finding that the transfer took place in stages, or over a period of time, or was effected by a series of transactions. They submitted that employees who remained employed in the undertaking during the process of transfer, or who were employed at the time of the stages or transactions by which the transfer was effected and who did not resign from the transferor's employment voluntarily or otherwise object to the transfer, are entitled to the protection of the Directive.

28. On 26 May 2005 the Court of Justice made the following rulings (Case C-478/03) [2005] IRLR 647:

> "1. Article 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses must be interpreted as meaning that the date of a transfer within the meaning of that provision is the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee. That date is a particular point in time which cannot be postponed to another date at the will of the transferor or transferee.
>
> 2. For the purposes of applying that provision, contracts of employment or employment relationships existing on the date of the transfer within the meaning stated in para 1 of the operative part between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between the parties in that respect."

The issues before the House

29. One might have expected the rulings by the European Court of Justice as to whether the transfer took place over period of time to have resolved the issue between the parties. The case has been argued hitherto on the assumption that the respondents remained civil servants during their secondment to Newtec. A statement to this effect appears in para 7 of the Statement of Facts and Issues. Celtec submit that in the light of the ECJ's ruling as to the date of the transfer the appeal should be allowed and that it be determined that the respondents' periods of continuous service began when, after resigning from the civil service, they took up direct employment with Newtec.

30. The respondents submit however that the only issue that has to be determined is whether, in the light of the ECJ's judgment, their continuity of employment was broken in 1993 when they resigned from the civil service and accepted an offer of employment with Newtec. They contend that, assuming now that the date of the transfer was in September 1990 and not over a period as they had previously submitted, their accrued rights were protected by the Directive. This is because their contracts of employment are deemed to have been handed over to Newtec at the date of the transfer. This, they say, is the inevitable consequence of article 3 of the Directive as interpreted by the ECJ.

31. Mr Bowers QC for Celtec pointed out that the argument which the respondents were now seeking to advance is a new argument. The premise on which the case had been sent for a preliminary ruling was that the only question between the parties was whether there had to be a single date for the transfer. It had been assumed that the answer to that question would determine the case. He submitted that the respondents ought not to be permitted to raise this new point at this stage. In any event, the effect of the ECJ's ruling was that the employment tribunal had been proceeding on a false premise when it assumed that the transfer could take place over a long period. As a result the basis on which the respondents chose to remain with the transferor after the date of the transfer was not before the tribunal for its determination. So it had not been asked to consider whether it was by their own decision that the respondents agreed to be seconded to Newtec while remaining as employees of the DoE. If this question was to be considered now it would have to be remitted to the tribunal for its determination.

32. There are then two preliminary questions which your Lordships must consider before applying the rulings by the ECJ to the facts of this case. These are whether the respondents should be permitted to argue that the effect of the ruling by the ECJ is that the continuity of their employment was not broken in 1993 despite the fact that the transfer of the undertaking to Newtec must now be held to have taken place on a single date in September 1990 and, if so, whether that issue can be determined by the House on the information that is available or must be remitted to the tribunal for its determination.

The ECJ's judgment

33. There is no doubt that the ECJ's ruling went further than was strictly necessary for a determination of the question whether the transfer of the undertaking took place on a single date or over a period. It went out its way to make it plain, in its answer in para 1 to the questions on which a preliminary ruling had been sought, that that date was a particular point of time which could not be postponed to another date at the will of the transferor or transferee. And it went further still when it ruled in para 2, drawing on its previous case law, that contracts of employment existing on the date of the transfer between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over on that date from the transferor to the transferee regardless of what has been agreed between the parties in that respect.

34. I take this to be a clear indication that, notwithstanding the court's ruling that the transfer took place on a particular point of time and not over a period, it was open to the national court to hold that the respondents' continuity of employment was not broken when they accepted employment with Newtec in 1993. This feature of the decision makes it necessary to examine the court's reasoning more closely.

35. The reasoning on which the first sentence of the ruling in paragraph 1 was based appears in paras 26 to 36 of the ECJ's judgment. In para 26 the court referred to what it has repeatedly held to be the purpose of the Directive in, for example, *d'Urso v Ercole Marelli Elettromeccanica Generale SpA* (Case C-362/89) [1992] ECR I-4105, para 9. It is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the new employer on the same conditions as those agreed with the transferor. Its purpose is to ensure, as far as possible, that the contract of employment continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer. Accordingly article 3(1) of the Directive covers the transferor's rights and obligations arising from a contract of employment existing on the date of the transfer and entered into with employees who, in order to carry out their duties, were assigned to the undertaking transferred: para 28. In para 29 the court said that the protection of article 3(1) covers workers assigned to the unit affected by the transfer whose contract of employment or employment relationship is in force on the "date of a transfer", and not those who have ceased to be employed by the transferor on that date or those who were engaged by the transferee after that date.

36. In para 30 the court added this observation, the effect of which was to emphasise the close link that exists between establishing the date of the transfer and the protection of workers whose contracts of employment were in force at that date:

> "Both the choice of the word 'date' and reasons of legal certainty indicate that, in the mind of the Community legislature, the workers entitled to benefit from the protection established by article 3(1) of Directive 77/187 must be identified at a particular point in the transfer process and not in relation to the length of time over which that process extends."

The court concluded this part of its discussion in para 36 with these words:

> "In those circumstances, the term 'date of a transfer' in article 3(1) of Directive 77/187 must be understood as referring to the date on which responsibility as employer for carrying on the business of the unit in question moves from the transferor to the transferee."

37. The court then turned its attention to the issue which it saw as lying at the heart of the reference. This was the subject of the second sentence of its ruling in paragraph 1 and of its ruling in paragraph 2. It introduced this part of the discussion with these observations in paras 37 and 38:

> "37 As the court has already held, implementation of the rights conferred on employees by article 3(1) of Directive 77/187 may not be made subject to the consent of either the transferor or the transferee nor to the consent of the employees' representatives or the employees themselves, with the sole reservation, as regards the workers themselves, that, following a decision freely taken by them, they are at liberty, after the transfer, not to continue the employment relationship with the new employer (see Case 105/84 *Danmols Inventar* [1985] ECR 2639, para 16 and *d'Urso*, cited above, paragraph 11).
>
> 38 It follows that, with that sole reservation, contracts of employment or employment relationships existing on the date of the transfer referred to in article 3(1) of Directive 77/187 between the transferor and workers assigned to the undertaking transferred are automatically transferred from the transferor to the transferee by the mere fact of the transfer of the undertaking (see *d'Urso*, cited above, para 20, and Case C-305/94 *Rotsart de Hertaing* [1997] IRLR 127, para 18)."

38. In para 40 the court referred, in support of that interpretation, to the second subparagraph of article 3(1) which gives Member States the option of providing that, after the date of the transfer, the transferor is to be liable, alongside the transferee, for the obligations arising from a contract of employment or employment relationship. It said that this

rule implies that in any event those obligations are transferred to the transferee on the date of the transfer. In para 42 it added that to allow the transferor or transferee the possibility of choosing the date from which the contract of employment or employment relationship is transferred would amount to allowing employers to derogate, at least temporarily, from the provisions of the Directive. As those provisions are mandatory, it is not possible to derogate from them in a manner unfavourable to employees.

39. The court concluded this part of the discussion with these observations in para 43:

> "For the same reasons as those stated in paragraphs 40 to 42 of this judgment, it must be held that, for the purposes of article 3(1) of Directive 77/187, contracts of employment or employment relationships existing on the date of the transfer referred to by that provision between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between the parties to the transfer process in that respect."

40. The court's judgment shows that the respondents' original position, that the continuity of employment which they sought was preserved because the transfer took place over a period of time, was based on a misunderstanding of the effect of article 3(1) of the Directive. But it also shows that there were two aspects to that misunderstanding. The first relates to the date of the transfer. The second relates to the question whether that date can be postponed at the will of the transferor or the transferee. The respondents' argument had assumed that it was not possible for their contracts of employment to be transferred to the transferee during the period of their secondment. The court's ruling that contracts of employment existing on the date of the transfer between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over from the transferor to the transferee on the date of the transfer casts an entirely different light on this argument.

Should leave be given to argue this point?

41. The question then is whether the respondents should be permitted to argue that the effect of the ruling by the ECJ is that the continuity of their employment was not broken when they resigned from the civil service and accepted an offer of employment by Newtec, notwithstanding the fact that this took place after the date of the transfer. In effect, the question is whether your Lordships should decline to give effect to the ECJ's judgment because the ruling which it has given has raised a point that was not previously argued. I would hold that the answer to this question is to be found by applying the principles described in *Amministrazione delle Finanze dello Stato v Simmenthal SpA (No 2)* (Case 106/77) [1978] 3 CMLR 263. It is necessary also to have regard to article 10 EC, which provides that Member States shall take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty and abstain from any measure which could jeopardise the attainment of those obligations.

42. In the *Simmenthal* case the court said that direct applicability of a provision of Community law means that rules of Community law must be fully and uniformly applied in all the Member States as from the date of their entry into force and for so long as they continue in force: para 14. Referring to the structure of article 177 of the EC Treaty (now article 234 EC) which provides for the making of a reference to the court for a preliminary ruling, it said that the effectiveness of that provision would be impaired if the national court were prevented from forthwith applying Community law in its entirety in accordance with the decision or the case law of the court and that it followed that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals: paras 19 and 20.

43. In the light of that guidance I would reject Celtec's contention that it is not open to the respondents to argue at this stage that, for the purposes of article 3(1) of the Directive, their contracts of employment must be deemed to have been handed over to Newtec on the date of the transfer. In my opinion it is the duty of the national court to give them that opportunity, in view of the ECJ's ruling that contracts of employment existing on the date of the transfer between the transferor and workers assigned to the undertaking transferred are deemed to be handed over from the transferor to the transferee on the date of the transfer.

Should the House determine the issue?

44. There remains however the question whether Celtec's argument that the respondents' contracts of employment were not transferred to Newtec on the date of the transfer because they freely decided to remain in the civil service can be determined by the House on the information that is available. This question is best divided into two parts. It is first necessary to identify the precise extent of the sole reservation from the general rule that contracts of employment are automatically transferred from the transferor to the transferee on the date of the transfer. It is then necessary to decide whether the question whether the reservation applies to this case can be answered on the existing material or must be remitted to the employment tribunal for its determination.

(a) the extent of the reservation

45. The ECJ dealt with the consent issue in para 37 of its judgment: see para 28 above. The basic proposition which is set out in that paragraph is that implementation of the rights conferred on employees by article 3(1) of the Directive may not be made subject to the consent of either the transferor or the transferee nor to the consent of the employees' representatives or the employees themselves. From this it follows that the fact that it was agreed between the DoE and the TECs that the staff who understood the government policy that the contracts were designed to deliver would be provided to the TECs on secondment initially for a period of three year is irrelevant to the question whether the respondents' employment contracts are to be deemed to have been handed over to Newtec on the date of the transfer. So too is the fact that it was agreed between the DoE and those who volunteered for secondment that they would continue to be employed by the civil service during the period of their secondment. But the basic proposition is subject to the sole reservation as regards the workers themselves referred to in para 37, that they are at liberty after the transfer, following a decision freely taken by them, not to continue the employment relationship with the transferee. Are the respondents' cases caught by that reservation?

46. Celtec's argument is that the reservation applies to the respondents' cases because they freely decided to remain civil servants after the date of the transfer by volunteering for secondment to Newtec. It is not in doubt that they volunteered for secondment on the terms that were offered to them. They were to continue to be civil servants

employed by the DoE, and they were to retain their normal pay and terms and conditions of employment during the period of their secondment. But is this the kind of arrangement that the ECJ had in mind when expressing what it described as "the sole reservation" in para 37? Mr Millar QC for the respondents submitted that it applied only to cases where the workers objected to taking up employment with the transferee in circumstances where taking up that employment was an option that was available.

47. To answer this question it is necessary to examine the two cases to which reference is made at the end of para 37 of the ECJ's judgment. These are *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar, in liquidation* (Case 105/84) [1985] ECR 2639, sometimes referred to as the *Mikkelsen* case after the name of the person whose action against the defendant company led to the making of the reference, and *d'Urso v Ercole Marelli Elettromeccanica Generale SpA* (Case C-362/89) [1991] ECR I-4105.

48. In the *Mikkelsen* case Mr Mikkelsen was employed by the transferor Danmols Inventar A/S as works foreman. The undertaking of that company was transferred to Danmols Inventar og Møbelfabrik A/S. He continued to carry out his duties as works foreman in the new company. He did the same work and he received the same pay in that capacity as before the transfer: para 4. But, unlike his previous situation where he doing his work under a contract of employment, he was a shareholder in the new company. He held 33% of its shares, was chairman of the Board of Directors and held 50% of its voting rights. One of the questions in the case was whether the expression "employee" in article 3(1) of the Directive must be interpreted as applying to persons who were employed by the transferor at the date of the transfer but who did not continue to work as employees of the transferee. The court answered this question in the negative. In para 16 it said that the protection which the Directive was intended to guarantee is redundant where the person concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer, adding:

> "That is the case where the employee in question terminates the employment contract or employment relationship of his own free will with effect from the date of the transfer, or where that contract or relationship is terminated with effect from the date of the transfer by virtue of an agreement voluntarily concluded between the

> worker and the transferor or the transferee of the undertaking. In that situation article 3(1) of the Directive does not apply."

49. In the *d'Urso* case Mr d'Urso was one of a group of 518 employees of a company called EMG which was made subject to a special administration procedure in 1981 but was authorised to continue trading. In 1985 its entire undertaking was transferred to a new company called Nuova EMG. Pursuant to the contract of transfer, and in accordance with agreements reached with the trade unions, 940 of the employees of the transferor were transferred into the service of the transferee. But Mr d'Urso and the other employees in his group remained in the service of the transferor. One of the questions in the case was whether article 3(1) of the Directive was to be interpreted as meaning that all the contracts and relationships of employment existing at the date of the transfer are automatically transferred to the transferee by the mere fact of the transfer. In para 10 the court said that it followed from its case law that article 3(1) covered the rights and obligations of the transferor arising from a contract of employment or an employment relationship existing on the date of the transfer and entered into with employees who, in order to carry out their duties, are assigned to the part of the undertaking or business transferred: *Arie Botzen and others v Rotterdamsche Droogdok Maatschappij BV* (Case 186/83) [1985] ECR 519, para 16. In para 11 it referred to its decision in *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* (Case 324/86) [1988] ECR 739, para 14, that the rules of the Directive had to be considered mandatory. It was not possible to derogate from them in a manner unfavourable to employees. The court then added these words:

> "The implementation of the rights conferred on employees by the Directive may not therefore be made subject to the consent of either the transferor or the transferee nor the consent of the employees' representatives or the employees themselves, with the sole reservation, as regards the workers themselves, that, following a decision freely taken by them, they are at liberty, after the transfer, not to continue the employment relationship with the new employer (judgment in Case 105/84 *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar, in liquidation* [1985] ECR 2639, para 16)."

In para 12 the court said that it followed that, in the event of the transfer of an undertaking, the contract of employment or employment relationship between the staff employed by the undertaking transferred may not be maintained with the transferor. It is automatically continued with the transferee.

50. In the *Daddy's Dance Hall* case Mr Tellerup was employed as a restaurant manager by the transferor, Irma Catering A/S. When its lease was terminated Irma Catering dismissed all its staff including Mr Tellerup, whose statutory period of notice expired on 30 April 1983. But it continued to run the business with the same staff until 25 February 1983, with effect from which date a new lease was concluded between the landlord and Daddy's Dance Hall A/S. Daddy's Dance Hall immediately re-employed the employees of the former lessee including Mr Tellerup to do the same jobs as before. The new management contract which was concluded with Mr Tellerup provided that his remuneration, which had previously been in the form of commission, would take the form of a fixed salary. At his request a trial period of three months was agreed on, during which either side could give 14 days' notice. This was a shorter period of notice than that to which Mr Tellerup was entitled if his employment with the transferor was taken into account. He was dismissed on 26 April 1983 with 14 days' notice. One of the questions was whether an employee may waive rights conferred on him by the Directive if the disadvantages resulting from his waiver are offset by such benefits that, taking the matter as a whole, he is not placed in a worse position. The court gave a qualified answer to this question. In para 14 it said that the purpose of the Directive is to ensure that the rights of employees affected by the transfer of an undertaking are safeguarded, adding that:

> "Since this protection is a matter of public policy, and therefore independent of the will of the parties to the contract of employment, the rules of the Directive, in particular those concerning the protection of workers against dismissal by reason of the transfer, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees.

In para 15 the court said that it followed that employees are not entitled to waive the rights conferred on them by the Directive, and that those rights cannot be restricted even with their consent. But in para 16 the court said that the Directive could be relied on only to ensure that the

employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State. In para 17 it said:

> "Consequently, in so far as national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking, in particular as regards their protection against dismissal, such an alternative is not precluded merely because the undertaking has been transferred in the meantime and the agreement has therefore been made with the new employer."

51. Mr Millar referred to two other cases to illustrate the application of these principles. These were *Berg v Besselsen* (Joined Cases 144 and 145/87) [1988] ECR 2559 and *Katsikas v Konstantinidis* (Joined Cases C-132/91, 138/91 and 139/91) [1992] ECR I – 6577.

52. In the *Berg* case Mr Berg had been employed by a Mr Besselsen who operated a bar-discothèque. The operation of the establishment was taken over by a third party under a lease-purchase agreement entered into between Mr Besselsen and a commercial partnership. The agreement provided that the object sold should not become the property of the purchaser by the mere transfer. Mr Berg continued to work in the establishment following its transfer to the purchaser. The lease-purchase agreement was later terminated on the ground of the purchaser's non-performance and restored to Mr Berg's former employer. Mr Berg then applied for an order against Mr Besselsen for payment of his arrears of salary for the period while the establishment was managed by the purchaser. The court said that an analysis of article 3(1) showed that the transfer of an undertaking entails the automatic transfer from the transferor to the transferee of the employer's obligations arising from a contract of employment or an employment relationship, subject to the right of the Member State to provide for joint liability of the transferor and the transferee following the transfer. It followed that, unless the Member States availed themselves of that possibility, the transferor was released from his obligations as an employer by reason of the transfer. That consequence was not conditional on the consent of the employees: para 11. The court then said, at para 12, referring to its judgment in *Daddy's Dance Hall*, that the Directive was intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to work

for the transferee under the same conditions as those agreed with the transferor:

> "Its purpose is not, however, to ensure that the contract of employment or the employment relationship with the transferor is continued where the undertaking's employees do not wish to remain in the transferee's employ."

53. In the *Katsikas* case Mr Katsikas objected to continuing to work for the transferee after the date of the transfer. One of the questions in his case was whether he was entitled to do so. The court, referring to its judgment in *Daddy's Dance Hall*, said that, while the Directive allowed the employee to remain in the employ of his new employer on the same conditions as were agreed with the transferor, it could not be interpreted as obliging the employee to continue his employment relationship with the transferee: para 31. The court then went on to say this in para 32:

> "Such an obligation would jeopardize the fundamental rights of the employee, who must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen."

54. From this jurisprudence I would draw these conclusions as to the extent of the reservation. The starting point is to be found in the general rule that the contracts of employment of workers assigned to the undertaking transferred are automatically transferred from the transferor to the transferee on the date of the transfer. Then there is the fact that it is not possible for this rule to be derogated from in a manner unfavourable to the employees. The rights conferred on them by the Directive may not be made subject to the consent either of the transferor or the transferee nor the consent of the employees' representatives or the employees themselves: *Daddy's Dance Hall*, para 14; *d'Urso*, para 11. The gulf between what the parties themselves may have contemplated and what the rule requires may be quite large, as it is in this case. My noble and learned friend Lord Rodger of Earlsferry says that this puts in place a fictional version of events in place of what actually happened. But, as I read paras 37 and 38 of the court's judgment, it is the rule that must prevail. So I cannot agree with him that, to accommodate the arrangements that the parties thought they were entering into, the date of transfer must be taken to be 1 July 1993. The transfer took place in September 1990 when responsibility as employer for carrying on the business of the unit transferred moved to the TECs from the DoE.

55. On the other hand it is a fundamental right of the employee to be free to choose his employer. So he cannot be obliged to work for an employer whom he has not freely chosen: *Katsikas*, para 32. From this it follows that it is open to an employee whose contract of employment would otherwise be transferred automatically from the transferor to the transferee on the date of the transfer of his own free will to withdraw from this arrangement by declining to enter the employment of the transferee: *Mikkelsen*, para 16; *Berg*, para 12; *Katsikas*, para 32. That, then, is the extent of the sole reservation referred to in para 37. It does not, as my noble and learned friend Lord Mance suggests, work the other way round. It does not enable effect to be given to an employee's wish to continue to be employed by the transferor while continuing to be employed in the unit to which he has been assigned after its transfer to the transferee. But the application of the rule that he can withdraw from the arrangement depends on two things: first, that the employee is in a position to choose whether or not to enter the employment of the transferee after the date of the transfer; and second, that he in fact exercises that choice by deciding of his own free will *not* to do so.

(b) the facts

56. The crucial question then is whether, in the light of that jurisprudence, the reservation to which the ECJ referred in para 37 applies in this case. Were the respondents in a position on or after the date of the transfer to choose whether or not to enter the employment of Newtec? And did they in fact exercise that choice by deciding of their own free will not to do so?

57. Celtec's position before the ECJ, as noted by Advocate General Poiares Maduro in para 45 of his opinion, was that the respondents implicitly refused to allow their contracts of employment to be transferred to Newtec. This was because they entered into a voluntary agreement with the DoE that they were to be seconded to the TECs whilst remaining DoE employees. This, Celtec argued, must be taken as a refusal by them to transfer their contracts of employment to the TECs. In para 46 the Advocate General said:

> "Such an analysis cannot be accepted, since Celtec acknowledged at the hearing that the Department of Employment employees had not been offered a contract of employment with the TECs in September 1990. In any event, to accept that employees can tacitly refuse to

transfer their contracts of employment would run counter to the spirit of Directive 77/187, which instead provides for the automatic transfer of contracts of employment as the consequence of the transfer."

58. I have not been able to find anything in the material before your Lordships that is inconsistent with the opinion on this issue which was formed by the Advocate General. The arrangements for the setting up of the TECs are described in a note by Andrew Tabor of the Operations Directorate in the Department for Education and Employment, which was formed on the merger of the DoE and the Department of Education in 1996. He makes it clear in para 8 of this note that the arrangement which led to the invitation to staff in the DoE's area offices to volunteer for secondment was arrived at by agreement between the Department and the TECs. There is no suggestion that it was envisaged that the staff were to be presented with the option of taking up employment direct with the TECs at that stage. Nor is there any mention in the letters which were issued to the staff, of which the letter written to Mr Astley on 3 September 1990 is an example, of any such option. The only choice that he was offered was whether or not to apply for secondment.

59. The letters did not address the problem about continuity of employment that would arise in the event of the staff being involved in a TUPE transfer of the unit to which they were assigned to Newtec. But the effect of what the letters did say ought not to be underestimated. Mr Astley was told that he would continue to be a civil servant during the secondment period, and he appears to have acted on this assurance. It was not suggested at any time during the hearing before your Lordships that giving effect to the judgment of the ECJ in the way I have indicated would deprive the staff of the benefit of any pension rights accrued between September 1990 and the summer of 1993. That is not surprising, in view of the assurances they were given that they would retain their normal pay and conditions during that period. It should be noted too that the judgment of the ECJ does not affect those civil servants who decided in September 1990 to be deployed elsewhere rather than volunteer for secondment to a TEC. They had no need of the continuity of employment that the judgment gives to employees who are involved in a TUPE transfer. It is to employees in that position, and to them only, that the concept of the deemed transfer applies.

60. Of course it can be said that the respondents were in a position on the date of the transfer to choose not to work for Newtec. They could have made their position plain by declining to accept secondment. The

effect of the DoE's invitation was that they were free to decline secondment if they wished. They could also have withdrawn from their agreement to accept secondment by refusing to work for Newtec as soon as the management of the area offices in which they were employed were transferred to it by the Department. But it is equally plain that this was not what they chose to do. They continued to work in the area offices after the date of the transfer. The arrangement which the DoE had entered into with the TECs that their services were made available to them not as direct employees but under secondment did not affect the respondents' right to continuity of employment under the Directive, as their contracts were transferred to Newtec automatically on the date of the transfer.

61. It seems to me to be plain in these circumstances that the sole reservation to the general rule to which the ECJ referred in para 37 of its judgment does not apply in this case. The respondents were in a position on or after the date of the transfer to choose of their own free will not to work for Newtec. But they did not make that choice. The fact is that they continued to do the same work in the area offices after the transfer of the undertaking to Newtec, albeit in the belief that they remained in the employment of the DoE. This leads inevitably to the conclusion that their contracts of employment were transferred automatically to Newtec with continuity of employment on the date of the transfer.

Conclusion

62. I would hold that it is not necessary for the case to be remitted to the employment tribunal for a further determination. I would affirm the decision of the employment tribunal, although on different grounds, that the respondents had continuous employment with Celtec from the start of their employment with the civil service by virtue of the Acquired Rights Directive. I would dismiss the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

63. The respondents in these appeals worked at one time as civil servants in the Department of Employment ("the Department") in Wrexham. (No point is taken about the precise nature of the employment of civil servants and therefore I shall for convenience refer to the respondents as having had contracts of employment with the Department.) The respondents were subsequently employed by the North East Wales Training and Enterprise Council ("Newtec") whose successor is the appellant. The respondents each received from Newtec a Statement of Terms and Conditions of Employment as required by section 1 of the Employment Rights Act 1996. Each statement gave a date in 1993 (1 July or, in the case of John Astley, 1 September) as the date of commencement of the respondent's continuous employment with Newtec. The respondents challenged that date and, in 1998, under section 11 of the 1996 Act they required a reference to be made to the employment tribunal to determine the appropriate date of commencement of their continuous employment. In their statements of complaint they all contended that they had become employees of Newtec on 31 August 1993 but that their employment with Newtec should be regarded as continuous with their employment with the Department. Therefore the appropriate date of commencement of continuous employment was the date on which each of them had first been employed as a civil servant.

64. In advancing this contention the respondents argued that, when they became employees of Newtec in 1993, there had been a transfer of the undertaking in which they worked from the Department to Newtec in terms of the Transfer of Undertakings (Protection of Employment) Regulations 1981 ("the TUPE Regulations"). As a result, by virtue of regulation 5(1), their contracts with the Department had effect after the transfer as if they had originally been made between the respondents and Newtec. For its part the appellant contended inter alia that, if there had been a transfer of part of the undertaking of the Department to Newtec, that transfer had taken place at the time, or over the period, when Newtec became established and operational in September 1990. The respondents became employees some three years after that time or period and accordingly could not have continuity of employment under the TUPE Regulations or the antecedent Council Directive.

65. The TUPE Regulations were made to give effect in United Kingdom law to Council Directive 77/187 EEC, commonly known as the Acquired Rights Directive ("the Directive"). Notoriously, regulation 2(1) of the TUPE Regulations was originally drafted so as to exclude from the definition of an "undertaking" any undertaking or part of an undertaking which was not in the nature of a commercial venture. In May 1992, however, in *Sophie Redmond Stichting v Bartolo* (Case C-29/91) [1992] ECR I-3189, the European Court of Justice held, at para 18, that "the fact that in this case the origin of the operation lies in the grant of subsidies to foundations or associations whose services are allegedly provided without remuneration does not exclude that operation from the scope of the Directive." The definition of "undertaking" in regulation 2 of the TUPE Regulations required to be amended to take account of that decision and this was done by section 33(2) of the Trade Union Reform and Employment Rights Act 1993 which came into force on 30 August 1993 and removed the exclusion. According to the relevant documentation, the respondent John Astley became an employee of Newtec on 1 September 1993 and therefore he can properly frame his case in terms of the TUPE Regulations – although, in my view, it ultimately falls to be determined by reference to the Directive.

66. According to the documentation in their cases, the respondents Deborah Hawkes and Julie Owens became employees of Newtec on 1 July 1993. So, by reason of the exclusion of non-commercial undertakings in regulation 2(1) at the time, they cannot rely on the TUPE Regulations. But the Directive was, of course, binding on the government and on any emanation of the state. So any failure to transpose the Directive correctly would make no difference to the position of the Department: the Directive bound it. Equally, it would make no difference to the position of Newtec if it was an emanation of the state in terms of decisions such as *Foster v British Gas plc* [1991] 2 AC 306. Although at one stage the appellant argued that Newtec had not been an emanation of the state, it now accepts that it was. It follows that at all relevant times the Department and Newtec were bound by the Directive in so far as the events in question involved, in terms of article 1(1), "the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger". In particular, they were bound by article 3, which provides inter alia:

> "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 within the meaning of article 1(1) shall, by reason of such transfer, be transferred to the transferee.

> Member States may provide that, after the date of transfer within the meaning of article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.
>
> …
>
> 3 [Paragraph 1] … shall not cover 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 appellant now also accepts that article 3 had direct effect and so Deborah Hawkes and Julie Owens can rely on it, so far as it may have been applicable to the events in question. In practice, the issues under the TUPE Regulations and the Directive are, for the most part, the same and so I shall concentrate on the Directive.

67. The events in the present case have to be seen against a somewhat wider backdrop. In 1988, as their White Paper (Employment For the 1990s (Cm 540)) explained, the then government decided that training could be better delivered and the development of small businesses and self-employment could be better promoted and supported if these activities were carried on by locally based training and enterprise councils ("TECs"), which would be companies with directors, including top-level employers, who were familiar with local conditions. Under contracts with the Department, the TECs would, for instance, run the Training Agency offices which the Department had previously run, but they would have an extended remit. Newtec was set up to carry out these functions in the area which included Wrexham. It started work in September 1990.

68. From the outset the policy appears to have been that, eventually, all the services would be delivered by employees of the TECs. At that stage it would be up to the individual TECs to decide how many employees they required and who they should be. To begin with, however, while the TECs recruited some staff, the people with the relevant experience in providing the core services were those who had been doing so in the Training Agency area offices as civil servants in the Department. So, if a break in the provision of the training and enterprise programme was to be avoided, these civil servants had to continue to do this work when the TECs took over.

69. The terms and conditions on which government civil servants are employed have been formulated in negotiations with the relevant trade unions over many years. Those which applied to Department civil servants in September 1990 were to be found in the current version of its personnel handbook. Prominent among the available benefits was, of course, an entitlement to a civil service pension. The employment tribunal made no detailed findings in fact about exactly what happened when Newtec was due to take over the Department's activities in North East Wales in 1990. But Mr Millar QC, who appeared for the respondents, did not dispute that civil servants in the Department (and their trade union representatives) would have been understandably apprehensive that, if they stopped being civil servants and became employees of the TECs, they would lose the benefit of their civil service terms and conditions. Another cause for possible concern would have been that they might face a less certain future with the untried TECs, whose financial position was not secured for the longer term and whose ethos might turn out to be rather different from that of the Department.

70. In fact, however, in 1990 no immediate change in the status of the Department civil servants was in contemplation, partly at least because the government had not yet worked out a scheme which would be acceptable to the TECs. Instead, the civil servants were to remain civil servants, entitled to all their existing terms and conditions, but they were be seconded to the TECs for an initial period of three years. After that, there might be a further period of secondment. For North East Wales this was spelled out, for instance, in the letter to Mr Astley of 3 September 1990 from the Head of Personnel for Wales in the Training Agency:

> "During the secondment period you will continue to be a civil servant employed by the Department of Employment and as such will retain your normal pay and terms & conditions of employment as embodied in the Department's Personnel Handbook. A summary outlining the main terms & conditions is enclosed with this letter. You may, if you wish, accept additional payments and benefits which may be offered by the TEC, but [indistinct word] will be for you to discuss and agree with the TEC. The Department of Employment accepts no liability for any agreement entered into between you and the TEC on such matters. The right to any such payments or benefits will cease at the end of your secondment and will not form part of your terms & conditions of employment as a civil servant.

> These arrangements will apply for the duration of the secondment period.
>
> If you are willing to accept secondment on the basis set out, please sign the Declaration form enclosed with this letter and return it to me within seven days."

At some point Mr Astley and the other respondents must have signed and returned the necessary declaration forms.

71. What the Department and the TECs therefore envisaged was that initially the civil servants would not be offered employment by the various TECs but would be seconded to them. There the "secondees" would remain employed as civil servants but would do what was required for the TECs to carry on their enterprise and training activities. And – so far as anyone could see - that was indeed exactly what happened. The Department continued to regard the secondees working in the TECs as Department civil servants, drawing their salaries from the Department and enjoying all the benefits, including the pension, to which civil servants of their grades were entitled. More particularly, the respondents were not offered employment by Newtec, but when they started work with the company in September 1990, as the employment tribunal found, at para 13 of its decision, "there was no difference between tasks they performed with Newtec and the tasks they had with the Department of Employment the day before." They were working in an office that was now run by Newtec, but they were doing so as civil servants of the Department on secondment. They continued to work in this way until the summer of 1993.

72. In the meantime the government had gone on developing its policy on the future of the TECs and, in particular, on the status of those working in the TECs. On 16 December 1991 the Secretary of State announced the arrangements which were to enable all TECs to become employers of their own staff by the end of their fifth year of operation. A Question and Answer briefing of the same date shows that there had been meetings with various interested parties, including the trade unions. The unions had "refused to accept the principle that secondments should end." Although the decision that TECs should employ their staff had been announced, correspondence available to the employment tribunal shows that a lot more work still needed to be done behind the scenes because the TECs were apprehensive about the costs which they would incur if it were held that, when the secondments ended and the civil servants became their employees, the TUPE Regulations applied so as to make for continuity of employment. There

were also concerns about any liability for pensions. Eventually, however, a package was worked out and the necessary funding arrangements were put in place with effect from 1 January 1993.

73. Newtec then moved to implement the policy of ending the use of secondees and of employing only its own staff. In May 1993 the Managing Director wrote to the respondents offering them employment and enclosing a summary of the general terms and conditions of employment negotiated with the union. Civil servants, such as the respondents, were not obliged to take up the offer of employment: they could, if they wished, ask for a post elsewhere in the Department, but they could not continue to work for Newtec as seconded civil servants. Both the respondents Deborah Hawkes and Julie Owens agreed to take up the offer of direct employment with Newtec from 1 July. Miss Hawkes intimated her wish to resign from the civil service with effect from 1 July in a letter dated 2 July. Miss Owens wrote on 1 July protesting at the way that she had "been resigned", and adding that "Whilst I am happy with my offer of employment and generally satisfied with the terms and conditions I would have preferred to remain on long term secondment from the Department. I realise that this is not on offer." John Astley and four others indicated that they intended to return to the Employment Service, but Mr Astley must later have changed his mind since the documents show that he became an employee of Newtec on 1 September 1993. The respondents then worked as employees of Newtec until 1998 when Miss Hawkes was dismissed on the grounds of redundancy. All three respondents then referred the question of the length of their period of continuous employment to the tribunal.

74. In each case the respondent's statement of complaint to the tribunal in 1998 was in similar terms and began: "On 31 August 1993 I became employed full time by Newtec and remained so until it was merged in April 1997 to form CELTEC." Why the date of 31 August, rather than 1 July or 1 September 1993, was chosen is not clear – perhaps in the hope of avoiding any question about the applicability of the TUPE Regulations which had been amended with effect from the previous day. For present purposes what matters, however, is that, when applying to the tribunal, all three respondents proceeded on the basis that they had been employed by the Department until the summer of 1993 and that it was only when they then resigned from the Department and accepted the offer of direct employment with Newtec that they became employees of Newtec. This is hardly surprising since, as the narrative of events shows, that was precisely how the whole matter was seen by the Department, by the TECs, by the trade unions and, of

course, by the respondents themselves. It would have come as a considerable shock to the respondents, for example, if they had suddenly been told in the summer of 1993 that ever since September 1990 they had not, in fact, been civil servants and so their service during that period had not counted towards their civil service pension.

75. At the hearing on the disposal of the appeal in light of the answers returned by the Court of Justice to the questions referred by the House, it was common ground that the ruling of the Court of Justice meant that the relevant part of the Department's undertaking was transferred to Newtec in September 1990. For the appellant, Mr Bowers QC submitted that the appeal should accordingly be allowed, since the respondents' case had all along been perilled on the proposition that, in terms of article 3(1) of the Directive, the transfer to Newtec of the relevant part of the Department's undertaking, and hence of its obligations from its employment relationship with the respondents, occurred in 1993. If, as the Court of Justice judgment now confirmed, the transfer of the relevant part of the undertaking occurred in 1990, then there was no transfer of the respondents' rights under their contracts of employment with the Department when, three years later, they became direct employees of Newtec. By contrast, counsel for the respondents now argued that, since the Directive was to be interpreted as meaning that the relevant part of the Department's undertaking transferred in September 1990, by virtue of article 3(1) the Department's obligations under its employment relationship with the respondents must also have transferred to Newtec at that time. So the Directive still operated to maintain the respondents' continuity of employment – even though not in a way that their legal representatives had envisaged at any previous stage in the proceedings from the lodging of their applications with the employment tribunal until now.

76. Counsel for the appellant submitted that it was too late for the respondents to perform this somersault and the House should not entertain the argument. If, however, the House were prepared to do so, the matter should be remitted to the employment tribunal so that the appellant could have an opportunity, if so advised, of leading further evidence about what happened in 1990. In the light of that further evidence, the appellant would hope to persuade the tribunal that, even though normally the effect of transferring the relevant part of the undertaking would have been to transfer the employer's obligations from the Department to Newtec, this case should be regarded as exceptional since the respondents had so clearly decided that they wished to remain civil servants in the Department, rather than to transfer to the employment of Newtec. Their deliberate choice should be

respected. Counsel was not unaware of the potential difficulty posed for any such contention by the fact that, in paras 37 and 38 of its judgment [2005] IRLR 647, 658, under reference to its previous case law, the Court of Justice envisages as "the sole reservation" to the transfer of the employment obligations from the transferor to the transferee the situation where "following a decision freely taken by [the workers themselves] they are at liberty, after the transfer, not to continue the employment relationship with the new employer".

77. At the end of the hearing, I was satisfied that, since this is a test case, it would not be appropriate to refuse to consider the respondents' new argument – even though it was a complete volte face. On the other hand, it seemed to me that, precisely because the entire proceedings had been conducted on a completely different basis, justice to the appellant required that the matter should be remitted to the employment tribunal. This would at least give the appellant an opportunity to advance its fallback argument on the basis of a more detailed examination of the events in 1990 than had been required in a hearing where the focus had been on the position in 1993. The resulting further delay in the proceedings would be unfortunate but any resulting decision in the test case would be that much more securely based. Essentially, my position was the same as Lord Mance's. So, but for what I now go on to say, I would have taken much the same approach as he is to adopt in paras 114 and 115 of his speech.

78. More fundamentally worrying for me throughout the hearing, however, was the idea, implicit in both parties' submissions, that, unless a new exception could be recognised – which would assuredly require a further reference to the European Court of Justice – in this case article 3(1) of the Directive had the effect of obliterating what had actually happened and of putting in its place an entirely fictitious version of events. In that alternative world the Department's civil servants were never seconded to Newtec in September 1990, never worked as secondees, never resigned from the civil service and never accepted an offer of employment from Newtec in 1993. The special terms in that supposed offer of employment, which were designed to provide additional protection in respect of redundancy and certain other employment rights, would never have been needed and could never have had any effect. For, it must now be held, by 1993 the civil servants were civil servants no more: since September 1990 they had all along been working as employees of Newtec – blissfully unaware that they were not earning any enhancement to their civil service pension since, by virtue of article 3(3), the Department's pension obligations had not transferred to Newtec. Similarly, the complex negotiations between the

government and the TECs in 1991 and 1992 had been in vain since, unbeknown to anyone, the Department's obligations under its employment relationship with the relevant civil servants had already passed to those TECs, like Newtec, which had commenced operations.

79. If the Directive really had to be interpreted as having this effect, this legal fiction would play as spectacular a role in the law of the European Community as fictions ever played in the law of ancient Rome. More to the point perhaps, the fiction would produce apparently absurd and impractical results and difficulties. What, for instance, would be the status of any pension "rights" which had apparently, but not actually, accrued between September 1990 and the summer of 1993?

80. Happily, closer inspection of the decision of the Court of Justice which is supposed to have spawned this troublesome fiction reveals a rather different picture.

81. The second recital in the preamble to the Directive ("Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded") reminds us that the only purpose of the Directive is to provide protection to employees in the event of a change in their employer. In para 26 of its decision in the present case, the Court of Justice emphasises this point when it refers to its earlier case law and says [2005] IRLR 647, 657:

> "Directive 77/187 is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the new employer on the same conditions as those agreed with the transferor. The purpose of the Directive is to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer…."

82. If one stops and asks whether in September 1990 the respondents were in need of the protection of a Directive which has this purpose, the answer is surely that they were not, because there was no change in their employer and it was never intended that there should be: they remained,

and were intended by all concerned to remain, employees of the Department with exactly the same rights as before, the only difference being that they had been seconded to work for Newtec for three years. Employees need the protection of the Directive when there is a change of employer and they are at risk of finding that they have no job or that their conditions of employment have been changed for the worse. Neither eventuality arose in September 1990.

83. The Court of Justice draws attention to the fact that the Directive applies to transfers "to another employer" in paras 31 and 32 of its opinion, [2005] IRLR 647, 657:

> "31 As is apparent from the actual wording of article 3(1) of Directive 77/187, the term transfer in the expression 'date of a transfer' in that provision is to be understood 'within the meaning of article 1(1) [of that Directive]'.
>
> 32 It is apparent from the latter provision that Directive 77/187 applies to transfers of an undertaking, business or part of a business 'to another employer'. In the words of the second recital in the preamble to the Directive, the Directive is intended to protect employees 'in the event of a change of employer'. In article 2 of the Directive, the terms 'transferor' and 'transferee' are defined by reference to, respectively, ceasing to be or becoming 'the employer in respect of the undertaking, business or part of the business'."

This in turn leads on to the court's identification of the decisive criterion for establishing whether there is a transfer for the purposes of article 3(1). The court says, at paras 34 - 36, [2005] IRLR 647, 657-658 (emphases added):

> "34 To establish whether there is a transfer within the meaning of Directive 77/187, it is necessary to assess whether the unit in question retains its identity, which follows in particular from the fact that its operation is actually continued or resumed *by the new employer*, with the same or similar economic activities (see case 24/85 *Spijkers* [1986] ECR 1119, paragraphs 11, 12 and 15, and case C-48/94 *Rygaard* [1996] ECR I-2745, paragraphs 15 and 16).

> 35 It follows that the decisive criterion for establishing whether there is a transfer for the purposes of article 1(1) of Directive 77/187 is whether *a new employer* continues or resumes the operation of the unit in question, retaining its identity.
>
> 36 In those circumstances, the term 'date of a transfer' in article 3(1) of Directive 77/187 must be understood as referring to the date on which responsibility *as employer* for carrying on the business of the unit in question moves from the transferor to the transferee."

This conclusion is reflected in para 1 of the operative part of the judgment, [2005] IRLR 647, 658:

> "Article 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses must be interpreted as meaning that the date of a transfer within the meaning of that provision is the date on which responsibility *as employer* for carrying on the business of the unit transferred moves from the transferor to the transferee. That date is a particular point in time which cannot be postponed to another date at the will of the transferor or transferee."

Again, I have emphasised the words "as employer" which are an essential part of the court's conclusion.

84. The decisive criterion identified by the Court of Justice in para 35 of its judgment has to be applied to the facts as found by the employment tribunal. In considering the facts it must be borne in mind that the tribunal specifically found, at para 22 of the extended reasons, that there had been no attempt whatsoever for purposes of the TUPE Regulations "to engineer any particular outcome or to evade liabilities in the way the transfer has been structured. The rationale is justified in business and political terms."

85. The tribunal considered, at para 11, that the undertaking which was transferred from the Department to the TECs was the management of the government-funded post-16 vocational training and enterprise

activities in England and Wales, together with the information systems and database, some staff and some premises. The tribunal thought that this was a recognisable and definable economic entity. In the hearing before the House, neither side sought to challenge that description of the relevant unit or undertaking, which has, of course, to be applied to the situation in North East Wales.

86. In para 13 the tribunal went on to consider whether the respondents were assigned to the part of the undertaking which was run by Newtec. In its view, the respondents clearly were assigned to the undertaking "at the time of the transfer commencing" – by which the tribunal meant September 1990. The tribunal was certainly entitled to reach the view that, when Newtec began operations in September 1990 using the civil servants who had been doing the job the day before, those civil servants were included in the part of the undertaking for the management of which Newtec was then responsible.

87. That does not mean, however, that, for the purposes of article 3(1) of the Directive, there had been a transfer of the relevant part of the undertaking to Newtec in September 1990. As the Court of Justice underlined in para 32 of its judgment, the reference back in article 3(1) to article 1(1) shows that the Directive applies to transfers of an undertaking, business or part of a business "to another employer". And in this case, even although Newtec had taken over the running of the activities of enterprise and training, there is nothing in the tribunal's findings to show that it had done so "as employer". On the contrary, the picture which emerges is of a situation where, from September 1990, the essential work of the unit was being carried on by staff who were not employed by Newtec. As I have noted, Newtec did indeed employ some staff, but there is nothing in the case to suggest that they were concerned with the essentials of the operation. From all that appears in the employment tribunal's extended reasons, the essential work continued to be done by the civil servants who had the necessary experience and who remained employees of the Department, but on secondment to Newtec for three years. Newtec no more employed them or intended to employ them than it would have employed or intended to employ the employees of some company with which it might have contracted for the supply of the same necessary expertise. In accordance with the understanding of all concerned - the Department, Newtec and the civil servants - the civil servants did not have, and were not meant to have, a new employer. So, even though Newtec had taken over the offices, including presumably the desks and chairs on which the civil servants sat and the equipment which they operated, in terms of article 3(1) of the Directive, they had not done so "as employer" and so there was no transfer of the

undertaking to them for the purposes of the Directive in September 1990. Which is exactly what one would expect since at that stage there was no threat to the position of the civil servants who continued to be employed by the Department and to enjoy all their rights as civil servants. There was no event or threat arising out of a change of employer for which they needed the protection of the Directive and so no reason why it should apply to them. I would add that this analysis appears to me to be consistent with the approach of the Court of Justice in *Foreningen af Arbejdsledere I Danmark v A/S Danmols Inventar* (Case 105/84); [1985] ECR 2639, as explained by Lord Mance in paras 108 and 109 of his speech.

88. Therefore, contrary to the common position adopted by counsel at the hearing, I would hold that there was no transfer for the purposes of article 3(1) in September 1990 because, to adopt the terminology in para 35 of the judgment of the Court of Justice, the operation of the unit was not being continued by "a new employer". This in turn means that the Directive does not stand history on its head and, to a great extent at least, the case can be considered on its real facts.

89. In reality, then, on the facts found by the employment tribunal, the first moment when the respondents could be said to have faced the risk of suffering the kind of disadvantage for which the Directive affords protection came in 1993. As part of the culmination of the government's original policy, Newtec decided to put an end to the use of secondees and, from 1 July onwards, to have the work done by its own employees. Those working at the heart of Newtec's operations could no longer do so as seconded civil servants but had to choose either to seek employment elsewhere in the Department or to become employees of Newtec. From that date, not only was Newtec continuing to run the unit or undertaking which had formed part of the Department's undertaking before September 1990 but, as envisaged in the overall scheme for the privatisation of the delivery of the enterprise and training activities, it was now doing so "as employer". In my view, therefore, 1 July 1993 is the date on which, in terms of the test in para 1 of the operative part of the judgment of the Court of Justice, responsibility "as employer" for carrying on the business of the unit transferred moved from the transferor (the Department) to the transferee (Newtec). On that date there was accordingly a transfer, within the meaning of article 3(1), of the relevant part of the Department's undertaking to Newtec. It follows that the Department's obligations under its contracts of employment with the respondents transferred to Newtec on that date. At the risk of introducing a little artificiality, I include the Department's obligations to Mr Astley, since, even though he had contemplated moving to another

part of the Department, he changed his mind and there is nothing in the facts found by the tribunal to suggest that he was not employed by the Department in the unit immediately before Newtec took over responsibility as employer on 1 July. So the Department's employment obligations to Mr Astley passed to Newtec on that date, some two months before he purported to become its employee.

90. Had there been any question of the House deciding the appeal on the basis which I have outlined, it would have been necessary to put the case out for a further hearing in order to allow counsel for both parties to make submissions on the point. Since, however, three of your Lordships are minded in any event to dismiss the appeal on the basis of the arguments at the hearing, a fresh hearing is, strictly speaking, unnecessary. In these circumstances, I can express the conclusion which I have reached on the basis of the reasoning which I have just set out. I would hold that, by virtue of the operation of article 3(1) of the Directive, the respondents' employment with Newtec should be regarded as continuous with their employment with the Department. So in each case the appropriate date of commencement of continuous employment is the date on which the respondent was first employed as a civil servant. In my respectful view the Court of Appeal reached the right conclusion even though, not having had the benefit of the judgment of the Court of Justice, it did so for different reasons. In agreement with the majority of your Lordships but on quite a different basis, I would accordingly dismiss the appeal.

LORD CARSWELL

My Lords,

91. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead.

92. For the reasons which they have given I agree that the date of transfer has to be taken to be September 1990 and that the respondents' contracts of employment must be deemed to have been handed over to Newtec on the date of the transfer. I appreciate that this may be regarded as the product of what both my noble and learned friends Lord Bingham and Lord Rodger of Earlsferry have referred to as a fiction. It

is in many ways unsatisfactory: it fails to represent the commercial reality of the arrangement and very probably is the opposite of what the respondents themselves thought to be the case at the time. I am also conscious of the force of the arguments put forward by Lord Rodger and his concern about the obliteration of reality in relation to such matters as the respondents' pension rights. I nevertheless am compelled by the reasons given by Lord Bingham and Lord Hope to agree that the consequence of the decision of the ECJ must be that the date of transfer is to be regarded as September 1990.

93. I would dismiss the appeal.

LORD MANCE

My Lords,

94. This appeal concerns the respondents' claim, under Directive 77/187/EEC, that their employment with the appellant North Wales Training and Enterprise Council Ltd, trading as Celtec Ltd. ("Celtec") and its predecessor, the North East Wales Training and Enterprise Council ("Newtec") in training and enterprise activities in the 1990s is to be regarded as continuous with their prior employment in the same activities as civil servants with the Department of Employment. Celtec and Newtec can for present purposes be treated as one. For simplicity I shall use "Celtec" to embrace both. The problem which the claim has to meet is that the Department transferred responsibility for such activities ("the undertaking") to Celtec in September 1990, whereas the respondents remained, on the face of it, civil servants employed by the Department and on secondment to Celtec until summer 1993 when they elected to forego civil servant status and to become employees of Celtec. So, the appellant asserts, there was no change of employer "by reason of" the transfer of the undertaking within the language of articles 2 and 3 of the Directive, and any change occurred separately and voluntarily some years later. Other (indeed a majority) of the civil servants ostensibly seconded by the Department to Newtec from September 1990 never elected to become employees of Newtec, but retired or resigned or returned to other posts in the Department from 1992 onwards.

95. The respondents' claim succeeded in the employment tribunal, failed before the Employment Appeal Tribunal, but succeeded in the

Court of Appeal. Their claim was pursued through all these instances, brought to this House and referred to the European Court of Justice on the mutual assumption that its outcome depended upon whether the date of the transfer of an undertaking within the meaning of articles 1(1) and 3(1) of the Directive is a single point in time or can take place "progressively or in distinct stages". Celtec have always contended for the former analysis and the respondents for the latter. The respondents have accepted, at every instance and in their written observations to the European Court, that they "were seconded [by the Department of the Environment to Celtec] rather than directly employed in the period September 1990 to 1993". The European Court having held on 26 May 2005 in favour of the appellant that transfer of an undertaking takes place at "a particular point in time", the respondents now submit that they should have leave to advance a new argument. This is that they were neither seconded by the Department of Environment nor therefore civil servants in the period September 1990 to 1993, but were on the contrary employed by Celtec from September 1990 onwards.

96. The basis for this argument is that the European Court, having in paragraph 36 of its judgment determined that the 'date of a transfer' in article 3(1) of Directive 77/187 must be understood as referring to the date on which responsibility as employer for carrying on the business of the unit in question moves from the transferor to the transferee", went on in paragraphs 37 and 38 to state that, where there is a transfer of an undertaking, "contracts of employment or employment relationships existing on the date of the transfer ….. between the transferor and the workers assigned to the undertaking transferred are automatically transferred from the transferor to the transferee by the mere fact of the transfer of the undertaking (see *d'Urso* (Case C-362/89); [1991] ECR I-4105], paragraph 20 and case *Rotsart de Hertaing* (C-305/94) [1997] ECR I-5927, paragraph 18)" – "with the sole reservation, as regards the workers themselves, that, following a decision freely taken by them, they are at liberty, after the transfer, not to continue the employment relationship with the new employer (see case 105/84 *Danmol Inventar* [1985] ECR 2639, paragraph 16, and *d'Urso*, cited above, paragraph 11)".

97. Relying on this passage, the respondents wish to submit that, whatever they thought or said from September 1990 until the European Court's judgment on 26 May 2005, there was in September 1990 an automatic transfer of their employment relationship. This occurred because, they say, they were not offered any employment relationship with Celtec and because, on their reading of the European Court's words, such an offer must be regarded as an essential pre-requisite to or

element of any "decision freely taken …. not to continue the employment relationship with the new employer". The appellant resists the grant of leave to advance any such submission as well as challenging its basis and substance.

98. I make some preliminary observations. First, the European Court was not purporting to make new law, but based itself, as appears from its own paragraphs 37-38, on its previous decisions. The respondents thus concede "with hindsight" that they should have argued at previous instances in this case that there was continuity of employment throughout, even if transfer of the undertaking occurred at a single point in time in 1990. That they should have done is highlighted by the course of the submissions in the Court of Appeal when Mr Bowers QC for the appellant explained that on the appellant's case there had been no automatic transfer of the employment relationship in September 1990, because the respondents had freely opted to remain civil servants with the Department by volunteering for secondment (cf the judgment of Schiemann LJ at paragraph 20). This elicited no contrary argument (late though any would have been even at that stage) from the respondents.

99. Second, the circumstances in which the respondents came to be seconded to, rather than employed by, Celtec have not been investigated or adjudicated upon at any previous instance in this case. Third, if the respondents became (unwittingly) employees of Celtec in September 1990 (so that their continuity of employment continued in 1993, which is when they *thought* that they were choosing to become Celtec's employees), the larger number of other Department of Employment employees who thought in 1990 that they were choosing to remain civil servants and volunteering to be seconded to Celtec or another training and enterprise council ("TEC") must in law have ceased to be civil servants in September 1990; and their continuity of employment was broken in 1993, when, on this analysis, they chose to revert to being civil servants independently on any view of the transfer of any undertaking. A decision favourable to the respondents in this case might thus, in another case, prove unfavourable to a body of employees who thought that they had at all times maintained their employment status (in this case as civil servants) with their former employers. Fourth, I do not consider that the analysis adopted by my noble and learned friend, Lord Rodger of Earlsferry, is open, not only because it was not argued before the House, but also because, if the respondents freely chose to remain civil servants and to volunteer for secondment in September 1990, that seems to me the end of the matter, and to preclude any possibility of a later transfer of their employment relationship in connection with the

transfer of the relevant TEC which on the European Court's analysis took place, once and for all, in September 1990.

100. There is substantial Employment Appeal Tribunal and Court of Appeal authority to the effect that, even in the Employment Appeal Tribunal, new points may only in exceptional circumstances be raised (cf the cases cited in *Leicestershire County Council v Unison* [2005] IRLR 920, paragraph 37). Quite apart from that, there is the authority of your Lordships' House in *North Staffordshire Railway Co v Edge* [1920] AC 254 that leave to advance a new point should be refused in this House, if there are any further matters of fact by reference to which there is "reasonable ground for supposing" that one party "might have been able to strengthen his case" (per Lord Birkenhead LC at p 263) or which "would affect the argument" (per Lord Dunedin at p 266) or which "could possibly and properly influence the judgment to be formed" (per Lord Buckmaster at p 270).

101. The present cases were however selected by the employment tribunal as lead cases and have been pursued not simply in the interests of these particular respondents, but to enable other former Department of Employment employees, who were on the face of it seconded to training enterprises from September 1990 to dates in or after 1992, to know their position. If leave is not given to raise the new point, other employees will have to bring fresh proceedings, and the three respondents to this appeal will also potentially suffer from allowing their names to be used. In these circumstances, if the new point raises no new factual matters for investigation (as the respondents submit), then I consider that the respondents should have leave to raise it. Even if the new point raises new factual matters, I think that the House can and should, exceptionally, be prepared to contemplate both allowing it to be raised, on appropriate terms as to costs, and if appropriate remitting the matter to the employment tribunal to investigate and make findings regarding the relevant facts. I would not accept Mr Bowers' submission that the facts must by now be so obscure that even this would be unfair to the appellant.

102. Does the new point raise new factual matters? The respondents submit not. They point to paragraphs 45-46 in the opinion of Advocate General Poiares Maduro, addressing Celtec's submission that there was a single specific date of transfer in September 1990 (a submission that the Advocate General actually rejected, but the European Court accepted). The Advocate General said:

> "45 In this case, Celtec's interpretation results in the date of transfer being set at September 1990. It follows that the applicant employees could have claimed protection of the rights arising from their contracts of employment at that time. However, according to Celtec, the Department of Employment employees implicitly refused to allow their contracts of employment to be transferred. Their decision to agree to be seconded to the TECs whilst remaining Department of Employment employees must be taken as a refusal to transfer their contracts of employment to the TECs.
>
> 46 Such an analysis cannot be accepted, since Celtec acknowledged at the hearing that the Department of Employment employees had not been offered a contract of employment with the TECs in September 1990. In any event, to accept that employees can tacitly refuse to transfer their contracts of employment would run counter to the spirit of Directive 77/187, which instead provides for the automatic transfer of contracts of employment as the consequence of the transfer of an undertaking.
>
> 47 Accordingly, were Celtec's interpretation of the date of transfer for the purposes of article 3(1) of Directive 77/187 to be accepted, the necessary conclusion would be that the Department of Employment employees' contracts of employment would be transferred to the TECs with effect from September 1990. More generally, that interpretation would require the automatic transfer of the contracts of employment on a single date, unless the employees had made clear their refusal."

103. The European Court did not expressly endorse these paragraphs, but instead identified the general principles which I have quoted in paragraph 96 above. The Advocate General focused on the question whether the respondents could be said to have "refused to allow their contracts of employment to be transferred", while the European Court spoke of "a decision freely taken" by employees "not to continue the employment relationship with the new employer". Mr Millar QC submits that neither test could be met when or if the respondents were not positively offered the opportunity of employment by Celtec in September 1990. Mr Bowers QC submits that the circumstances in which the respondents volunteered for secondment to Celtec call for evidential investigation, and that no conclusions can on present material safely be reached as to the voluntariness of the respondents' apparent choice to continue to be employed by the Department of Employment and to be seconded to Celtec.

104. I would accept Mr Bowers' submission. As a preliminary point, I note that - whatever may have been said at the (doubtless very) short hearing before the European Court of Justice on a point which was not in issue before that court – it is not even certain that the respondents could not have been employed by Celtec if they had wanted. The unchallenged evidence of Mr Tabor (which was before the employment tribunal and is quoted in paragraph 25 of the Employment Appeal Tribunal's decision) was that:

> "8 As private companies TECs were entitled to recruit their own staff and most, if not all, did so the day they became operational. The Department of Employment wished to assist TECs to become operationally effective as quickly as possible. As TECs were new organisations, and the work to be undertaken required an understanding of the government policy that contracts were designed to deliver, the Department, with the agreement of TECs, issued an invitation to staff in its area offices and elsewhere seeking volunteers for secondment to TECs. This invitation was initially for a three year period. …"

105. Second, I note that there were considerable potential advantages for employees in keeping civil service status – particularly in retaining their membership of the Principal Civil Service Pension Scheme (Mr Tabor's statement, paragraph 9), which they could not retain if they became employees of Newtec (cf. article 3(3) of the Directive). The documentation before the House shows that civil service trade unions supported secondment and resisted the decision eventually taken to phase it out. Mr Bowers informed the House that, although no evidence had been called on this aspect because it was not then material, the appellant's case would be that the original arrangements for secondment were the outcome of a long period of discussion, with trade unions representing the interests of the Department's employees resisting any suggestion that such employees should lose their civil service status.

106. Third, Mr Bowers pointed out that there had been no investigation of the basis on which the respondents were engaged as civil servants. Civil servants are traditionally engaged on a mobile basis, "to serve wherever the Crown directs", in the language of the Industrial Tribunal in the early decision of *Moloney v Hampshire Training & Enterprise Council Ltd* (Case No 9172/96) paragraph 40. On this basis, the Department had the right to deploy the respondents in any other appropriate situation, and it is clear that, if the respondents had not

volunteered for secondment to a TEC in September 1990, the Department would have arranged to deploy them elsewhere. Further, those respondents who wished to maintain their civil service status when the arrangements for secondment were gradually ended in and after 1992 were also offered alternative situations by the Department.

107. Fourth, neither the Advocate General nor the European Court can have had the potential implications of the third point in mind, since it was not raised by the questions put to them, was not in issue and was not even mentioned, at least until brief reference must have been made to it during the oral submissions before the court. On the respondents' submission, the European Court must nonetheless be taken to have laid it down as an absolute and inflexible rule of European law that an employee of the transferor of an undertaking can never retain his or her employment status with the transferor or elect to be seconded to the transferee unless he or she has been offered and refused an employment relationship with the relevant transferee – even if the transferor would otherwise have had and exercised the right to deploy the employee in another situation. But the concern of the Directive is to protect employees and to preserve continuity of employment on the same terms. It is not to give employees rights which they would not otherwise have, in particular a right to work in a particular situation, if he or she did not previously have this. These general propositions are supported by the reasoning in the previous European Court authorities to which I refer in paragraphs 108-113 below, and I do not find in the reasoning of the present European Court decision anything which suggests a different purpose. If an employer is entitled to and would otherwise deploy an employee in another post which would preserve continuity of employment, I can no see no reason why the Directive should prevent the employer from inviting the employee and the employee from agreeing, as an alternative, to stay in the same post and work on a seconded basis with the transferee of the undertaking. The civil servant employee had no previous right or obligation to work in that undertaking. His secondment, if he accepts the invitation, is freely undertaken, in circumstances where he would otherwise be employed elsewhere in accordance with his employer's contractual entitlement.

108. Fifth, since the precise scope and application of the exception to the principle of automatic transfer of employment relationships on the transfer of an undertaking was never in issue or argued before the European Court, I do not consider that the European Court's formulation of its "sole reservation" can or should be read as providing any axiomatic or definitive answer to it. Nothing in the underlying authorities, the effect of which the European Court said that it was

simply restating, supports so rigid or formulaic an interpretation. Indeed, in *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* (Case 105/84) [1985] ECR 2639, there was no suggestion that the question whether Mr Mickelson ceased to have continuity as an employee depended on whether or not he was offered employment with the transferee company. Advocate General Slynn said that there would be no transfer of employment:

> "if an employee of one employer whose business is transferred genuinely and willingly agrees with that employer or the transferee of the business, that he will not be engaged under a contract of employment, or in an employment relationship with the transferee" (pp 2641-2)

or, put another way, that the question was whether he had "genuinely agree[d] to accept a status with the transferee which is not that of an employee" under an agreement which was "genuine and not tainted by duress" (p.2642). These formulations would both embrace secondment by a transferor to a transferee. The European Court spoke of a case "where the employee in question terminates the employment contract or employment relationship of his own free will with effect from the date of the transfer, or where that contract or relationship is terminated with effect from the date of the transfer by virtue of an agreement voluntarily concluded between the worker and the transferor or the transferee of the undertaking" (paragraph 16).

109. If it is open to an employee who is not offered a contract of employment with the transferee to conclude a voluntary agreement for some different relationship with the transferor or transferee, no reason is apparent why it should be impossible for an employee, who is not offered such a contract and whose employment relationship with the transferor allows the transferor to deploy him or her otherwise than in the undertaking transferred, to conclude a voluntary agreement with the transferor that he will be seconded to the transferee. Civil servants were given the choice in September 1990 whether or not to be deployed elsewhere in the Department rather than to volunteer for secondment to a TEC. A civil servant who, without any offer of a contract of employment from a TEC, chose deployment elsewhere in the Department would not have his or her contract of employment transferred to the TEC. The European Court's citation in paragraph 37 of the *Danmols Inventar* case shows that its reservation there regarding "a decision freely taken … not to continue the employment" covers those continuing to work in or be assigned to an undertaking, but in a

different capacity to that of *employee* of the transferee. It is common ground that, were a contract of employment with a TEC to have been offered and refused by a civil servant, the reservation would cover the civil servant's continuing employment by the Department on secondment to the TEC. In these cases, European law pursues its aims of protecting freedom of contract and the interests of employees at the same time. Yet it is said that there is no freely taken decision within the European Court's reservation, in the situation where a civil servant volunteers to be seconded to a TEC, when the Department had the right and would otherwise have transferred the civil servant elsewhere within the Department, unless the civil servant has also formally been offered a new contract with the TEC which he or she almost certainly did not want and would have refused so as to retain civil service status. The enforced transfer of a contract of employment in this situation is inconsistent with both employee protection and ordinary contractual freedom.

110. Mr Bowers further submits, correctly in my view, that none of the other previous European Court decisions touches on a situation comparable with the present. In *d'Urso v Ercole Marelli Elettromeccanica Generale SpA* (Case C-362/81); [1991] ECR I-4105, the 518 employees who were ostensibly not transferred to the transferee (but whose employment relationship the European Court held was in law nevertheless automatically transferred) had been laid off (p I-4108), their employment relationship had been "suspended" and a third party, the Cassa Integrazione Guadagni Straordinaria (CIGS), had assumed "responsibility for their pay" instead of the transferor. Quite clearly there was nothing welcome or voluntary about any of that, as far as those employees were concerned. (One might add that their employment relationship with the transferor would also appear, effectively, to have been determined.)

111. In *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* (Case 324/86) [1988] ECR 739 the European Court explained the rationale of the Directive as follows, at para 14:

> "14 ….. the purpose of Directive 77/187/EEC is to ensure that the rights resulting from a contract of employment or employment relationship of employees *affected* by the *transfer* of an undertaking are safeguarded. Since this protection is a matter of public policy, and therefore independent of the will of the parties to the contract of employment, the rules of the Directive, in particular those

> concerning the protection of workers against dismissal by reason of the transfer, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees."

The Directive aims therefore to protect against dismissal by reason of the transfer of an undertaking. In the present case, the offer made to employees had the same purpose and effect of safeguarding the civil servants' rights arising from their employment relationship with the Department, and of protecting against dismissal by reason of the transfer. Employees were to be deployed elsewhere in the Department (as Celtec maintains was the Department's right) or, if they wished, they could choose to continue to work in training and be seconded to Celtec. On neither basis was there any question of cessation of their continuous employment or of dismissal. The European Court also held that, although "employees are not entitled to waive the rights conferred on them by the Directive" (paragraph 15), nevertheless "the Directive can be relied on only to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned" (paragraph 16). So, the court concluded, "the Directive does not preclude an agreement with the new employer to alter the employment relationship, in so far as such an alteration is permitted by the applicable national law in situations other than the transfer of an undertaking". Nothing in the Directive was therefore aimed at removing or varying any right which the Department had under the terms of the relevant employment relationships to deploy civil servants in different situations outside the training and enterprise activities transferred to the TECs. That being so, it is again difficult to see why employees should not instead volunteer for secondment to a transferee of the undertaking constituted by such activities, without thereby forfeiting their civil service status - contrary almost certainly to what would have been their will at the time.

112. In *Berg v. Besselsen* (Joined Cases 144 and 145/87) [1988] ECR 2559, the European Court spoke in paragraph 12 of the Directive as:

> "intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the transferee under the same conditions as those agreed with the transferor. Its purpose is not, however, to ensure that the contract of employment or the employment relationship with the transferor is

> continued where the undertaking's employees do not wish to remain in the transferee's employ."

In paragraph 13 it spoke also of the rules as "intended to safeguard, in the interests of the employees, the existing employment relationships which are part of the economic entity transferred". Neither of these statements was addressing a situation where the transferor was both entitled and willing to offer continuing employment elsewhere in its organisation, and would have done so but for the employee's voluntary offer to continue to serve on secondment in the same area as the undertaking transferred.

113. *Katsikas v. Kostantinidis* (Joined Cases C-132/91, C-138/91 and C-139/91); [1992] ECR I-6577 concerned employees who had objected to becoming employees of the transferee, an attitude which the transferor (who then dismissed them) argued was not open to them in the light of the Directive. Not surprisingly, the European Court held that the Directive did not have the purpose or effect of compulsorily transferring an employee's employment contract or relationship against his or her will, but that, in such a case, it was for the law of the relevant Member State to determine whether the contract or relationship was to be regarded as terminated by the transferor or transferee or to be maintained with the transferor. The case may explain references evidently made before the European Court in the present case to situations of "refusal" to be employed by a transferee, but its facts were far removed from the present.

114. In summary, I consider that the respondents should have leave to argue their new point, but that it raises potentially both factual matters which it would require further investigation to resolve and legal issues which would merit further argument, at least before there could be any question of dismissing this appeal. The situation is not, of course, at all a happy one in a case which is already old. But the problem about its resolution now arises from the respondents' own admitted failure to argue the case at any previous stage on the new basis which they now belatedly seek leave to raise. One option open to the House would be to refer the matter yet again to the European Court for determination of the question of law whether - on the hypothesis that the facts are as the Department, in answer to the respondents' new point, maintain – the employment relationship of civil servants who volunteered for secondment in September 1990 was, contrary to their evident intention and belief, transferred willy-nilly to the relevant TEC to which they thought they were being seconded. But even that would not necessarily

resolve the case, in view of the first point made in paragraph 104 above; and anyway it is in my opinion preferable that the law should be reviewed and decided on a solid basis of findings regarding the actual facts.

115. In my opinion, therefore, the appeal should be allowed and the Court of Appeal's decision set aside and the case should be remitted to the employment tribunal for the facts to be investigated and for appropriate findings to be made, on the basis of which the legal position should then be further considered. The parties should have 21 days in which to make submissions as to the appropriate costs order.