Neutral Citation Number: [2023] EAT 116

Case No: EA-2021-001040-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building,
Fetter Lane, London EC4A 1NL

Date: 29 August 2023

Before :

THE HONOURABLE MR JUSTICE KERR

- -

Between :

JAGRUTI RAJPUT

Appellant
(Claimant below)

- and –

(1) COMMERZBANK AG
(2) SOCIÉTÉ GÉNÉRALE (LONDON BRANCH)

Respondents
(Respondents below)

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- -

Ms Sarah Clarke (instructed by Direct Access) appeared for the **Appellant**
Mr Gavin Mansfield KC and **Mr Mubarak Waseem** appeared (instructed by GQ|Littler) for the **First Respondent** and (instructed by Allen & Overy LLP) for the **Second Respondent**

Hearing date: 23 May 2023

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JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is 29 August 2023 at 10.30am. The version released for publication may be treated as authentic.

SUMMARY

Transfer of Undertakings
The Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE)

In deciding the date of the transfer from the first to the second Respondent, by a series of transactions, of the first respondent's Equity Markets and Commodities (**EMC**) business, the tribunal had correctly decided that the date of transfer was not necessarily the date of the last transaction in the series. Nor had the tribunal materially erred in asking itself the question when the "essential nature" of the EMC business was first carried on by the second respondent.

However, the tribunal had misdirected itself by excluding from its consideration a substantial part of the first respondent's EMC business, accounting for about two fifths of the purchase price, on the basis that it was geographically located outside the United Kingdom, in Germany.

The respondents and the tribunal having accepted that the relevant economic entity, the EMC business, was "situated immediately before the transfer in the United Kingdom" (TUPE regulation 3(1)(a)), there was no basis for excluding from consideration a part of the transferred economic entity which was predominantly located outside the UK; while including in its consideration parts of the business that were predominantly located inside the UK or co-located inside and outside the UK.

The issue as to the date of transfer would be remitted for further consideration by a different employment judge in the light of the judgment on appeal.

The Honourable Mr Justice Kerr:

Introduction

1. This appeal is against a finding ghat the date of a "TUPE transfer" (i.e. of an undertaking, under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE** or **the TUPE Regulations**) was 1 October 2019. The appellant (**claimant**) says the tribunal should have found that it was later, on 10 May 2020. The respondents (below and to the appeal) jointly say the finding was correct and unassailable. The decision was that of Employment Judge Graeme Hodgson sitting alone at London Central Employment Tribunal, dated and sent to the parties on 22 October 2021 after a hearing in September 2021.

2. His Honour Judge Auerbach held a hearing in November 2022 under rule 3(10) of the Employment Tribunal Rules 1993, after a decision on the papers that there were no reasonable grounds for bringing the appeal. The judge allowed five of the six grounds of appeal to proceed. Rightly, he did not allow the third ground, in which the claimant asserted a general rule that the date of completion of a sale is normally the date of transfer. There is no such rule.

3. The permitted grounds of appeal can be summarised in the following propositions (not in the same order as the grounds). First, the judge should have held that the TUPE transfer occurred on the date of the last in the series of transactions by which it was effected. Second, he wrongly asked himself on what date the "essential nature" of the activity was first carried on by the transferee, (or misapplied that test). Third, he wrongly focussed only on the predominantly United Kingdom based part of the transferred business, disregarding part of the business predominantly located in Germany.

The Facts

4. The facts found were based largely on matters of record and common ground, contemporary

documents including extracts from a business purchase agreement (**the BPA**) and a witness statement from Mr Neil Aiken, Commerzbank's head of lending in London. There was little if any cross-examination. The tribunal did not have to rule on disputed issues of fact. The question was what date it should conclude, from the undisputed facts, was the date of the TUPE transfer.

5. The claimant began work for the first respondent (**Commerzbank**) in 2012 as a senior compliance officer in the Equity Markets and Commodities (**EMC**) division, based in London. In 2016, she took maternity leave, returning to work in September 2016. On 1 September 2017, she presented claim no. 2207126/2017 against Commerzbank (**the first claim**), for discrimination of various kinds. At around the same time, Commerzbank was in discussions with the second respondent (**SocGen**) about the sale to SocGen of Commerzbank's EMC business.

6. While those discussions were taking place, the first claim was heard in March 2018. In its judgment dated 23 March 2018, the tribunal found that the first claim partially succeeded. The claimant had been off work on sick leave; she returned to work after the judgment, in April 2018. Commerzbank appealed. With the appeal pending, agreement on terms between Commerzbank and SocGen was then reached and announced in a press release dated 3 July 2018. The appeal later partially succeeded and led to remission back of some issues to a fresh tribunal.

7. In the present claim (brought later, in 2020) the claimant asserts – and the respondents deny – that Commerzbank victimised and discriminated further against her in various ways from February 2018 up to the end of March 2020, when she was, or claims to have been, dismissed by Commerzbank. The details of those allegations are not relevant to the TUPE transfer date and need not be recited here. The gist of the present claim is that Commerzbank sought to ostracise the claimant and secure her departure from the business and that it then unfairly dismissed her on 31 March 2020.

8. In parallel with that ongoing dispute, the sale to SocGen of the EMC business proceeded. The

BPA was signed on 8 November 2018. The BPA is lengthy; the tribunal saw, and I have seen, only extracts including materially the following. Recital (E) stated (with "EVF" denoting "Exotics, Vanilla and Funds"):

> **"the acquisition by the Relevant Purchasers of the Seller's 'Equity Markets and Commodities Business' which comprises the Flow Trading Business, including the market making services, the EVF Business, the Asset Management Business as well as related sales activities and risk management, and the IT systems, each as defined herein and as described in more detail in Schedule (E) (*Description of the Crystal Business*). The Seller's 'Equity Markets and Commodities Business' as described in Schedule (E) (*Description of the Crystal Business*) shall be referred to herein as "Crystal Business")."**

9. Recital (G) recorded that the "Relevant Purchasers" (i.e. SocGen or its nominees) would "operate the Sold Business as a going concern". Further recitals from (H) to (K) recorded the following:

> **"(H) In order to allow the Relevant Purchasers to so continue the Sold Business, the transfer of those elements of the Crystal Business which are subject of the Transaction shall be effected through the transfer (legally or synthetically as set out in more detail herein) of (i) the Portfolio Assets and Liabilitiesand (ii) the Static Assets and Liabilities[,] both as further defined and described in Clause 4.3 (*Sold Business*) and updated using the methodology set out in detail in this Agreement, and (iii) the Relevant Employees.**
>
> **(I) The transfer of the Sold Business shall be implemented by way of a combined asset and share deal by which the Seller carves out and transfers to the Relevant Purchasers or, upon instruction by SG [*i.e. SocGen*], to the Issuance Vehicles, as the case may be, the relevant (i) Portfolio Assets and Liabilities and/or (ii) Static Assets and Liabilities as soon as, or in due course after, the Relevant Purchasers and the Seller have achieved the relevant Operational Readiness and the relevant Conditions Precedent have been fulfilled in accordance with this Agreement. The actual transfer shall occur in several batches (each a 'Batch' and together 'Batches') which may have to be broken down in smaller sub-batches (each such part of a Batch a 'Sub-Batch' and together the 'Sub-Batches'). The transfer, synthetically or legally, in full of the last Sub-Batch of all Batches is referred to herein as 'Closing'. The transfer processes, composition and transfer principles of the Batches are described in this Agreement and in Schedule 9 (*Batching Attachment*).**
>
> **(J) After the Closing, additional steps may be required, in particular the final legal transfer of positions previously only transferred synthetically, see also Schedule 12.1 (*General transfer principles*).**
>
> **(K) Each Batch shall contain the Portfolio Assets and Liabilities and/or Static Assets and Liabilities (including Transferring Employees) only pertaining to the relevant Batch or Sub-Batch."**

10. The BPA then set out long and detailed terms, not placed before the tribunal or this appeal tribunal, to give effect to the above. Schedule 9, as referred to in recital (I), covered in detail the four "Batches" and various "Sub-Batches". The Schedule "sets out the provisions governing the processes to be followed by the Parties for the transfer of the Sold Business in four Batches, each potentially consisting of several Sub-Batches". The four Batches were "Batch Zero, Asset Management Batch,

EVF Batch and Flow Trading Batch".

11. Those four Batches, Schedule 9 went on to state, "shall comprise the entire Sold Business, i.e. each part of the Sold Business has to be assigned to a Batch" (paragraph 1). The timescale for completing the transfer of the four Batches was not fixed but it was envisaged that the transfer of the last Batch and its Sub-Batches would be completed or virtually completed during 2020, apart from some minor details that could take longer. As an example, paragraph 2.3.1 of Schedule 9, relating to the "Flow Trading Batch", stated that:

> **"… [b]ased on the Seller's timing assumptions, there are not expected to be any residual notes relating to the Flow Business left after 31 December 2021 except for any remaining Old Perpetuals".**

12. I should now explain in more plain words the nature of what was being transferred under the BPA. What was transferred was the EMC business of Commerzbank. That is the economic entity that retained its identity, whose business was carried on by the transferee, SocGen, from the transfer date. The EMC business of Commerzbank comprised, as we have seen from recital (E), "the Flow Trading Business, including the market making services, the EVF Business, the Asset Management Business as well as related sales activities and risk management, and the IT systems …".

13. As the tribunal explained (reasons, paragraph 25) "[a]ll parties accept that the [EMC] business constituted one organise[d] grouping of resources". The respondents identified about 365 employees (not including the claimant) who would transfer, based in London, Germany, France, Switzerland, Luxembourg and Hong Kong. SocGen would acquire responsibility for servicing about 1,800 clients of Commerzbank (paragraph 27). Of the 365 employees identified, 262 ultimately transferred (paragraph 36). The claimant "accepted that she was assigned to the EMC business" (paragraph 38).

14. Mr Aiken's evidence, adopted by the tribunal, described each of the three elements of the EMC business: Asset Management (or **AM**), Exotics, Vanilla and Funds (**EVF**) and Flow Trading / Market Making (**Flow**). The claimant did compliance work for all three parts of the EMC business,

but mostly for AM or EVF, since Flow had only five London based employees (paragraph 31).

15. These three components of the EMC business corresponded to the second, third and fourth Batches. I will say more about each in a moment. But before doing so I should explain the first Batch, called Batch Zero. It was described thus in Schedule 9 to the BPA:

> **"Prior to the three large Batches (Asset Management Batch, EVF Batch and Flow Trading Batch) and as soon as legally possible, a certain number of IT resources as outlined in Schedule 15.4 (Batch Zero - Certain HR and data matters) shall start assisting the Relevant Purchasers in their preparations for the migration by either making resources available as Transferring Employees or on a contractor basis (such contracts being entered into with external contractors or with the Seller), as the case may be ('Batch Zero')".**

16. Mr Aiken explained that Batch Zero:

> **"referred to a group of Commerzbank employees who transferred early in order to build infrastructure at SocGen (particularly IT infrastructure) and to prepare for the sold EMC business to arrive in areas where SocGen did not have the relevant support or infrastructure in place. This related mainly to Flow, which was a new type of business for SocGen. I understand that the employees within Batch Zero were all employees based in Germany."**

17. I come back to the three substantive components of the EMC business. The first was Asset Management, divided into three Sub-Batches. To state the obvious, AM is managing clients' assets. AM is explained as follows in the tribunal's decision and Mr Aiken's evidence. It was split mainly across Luxembourg, London and Frankfurt. The amount of AM business was about the half the amount of EVF business and about half the amount of Flow business. The sale price for the AM business was about one fifth of the total price, which ran into hundreds of millions of pounds.

18. The next component of the EMC business was EVF, divided into six Sub-Batches. One can guess from the language used that "exotics" may mean investing client funds in unusual and interesting non-mainstream markets; "vanilla" is likely to mean something like the opposite; and "funds" must mean just investing client money in funds of some kind. The EVF business was based mainly in London and Hong Kong. It was about twice the size of AM, about the same size as Flow and accounted for about two fifths of the purchase price.

19. The last part of the transferred EMC business was Flow, divided into four Sub-Batches. It included "market making" (the phrase used in the BPA), i.e. it included in particular "public distribution" or the selling of privately held shares to public shareholders. As the tribunal explained (paragraph 33), SocGen wished to acquire this part of the business in order to increase its market share, particularly in Germany. The claimant called this "the jewel in the crown", though there was some issue as to the precise nature of the jewel.

20. What is clear is that the Flow business was part of the transferring EMC business; it was about the same size as the EVF business and about double the size of the AM business. The Flow business accounted for about two fifths of the purchase price, i.e. about the same as the price attributed to the EVF business and about double that of the AM business. The Flow business was based mainly in Germany. It had only a small presence in London, with five employees there.

21. Such is the nature of the EMC business which was transferred to SocGen. The transfer of that business was, as already explained, effected in "batches". As the tribunal explained (reasons, paragraph 41):

> **"As that process proceeded, the business, including clients, were transferred and specific employees, as identified, became actively managed by SG. That process occurred over three businesses and in relation to numerous parts of each business. Those three principal areas of business were spread over several countries. It follows that the deal was complex and multinational."**

22. When was each batch transfer effected? Mr Aiken produced a table giving his account which was not called into question by anyone. I will not set it out here but it shows the Sub-Batch transfer dates in more detail. Batch Zero was, according to Mr Aiken's table, transferred from 18 February to 31 March 2019.

23. The six EVF Sub-Batches were transferred from 10 March to 22 October 2019, with individual EVF contracts transferring at differing times and "finalised as of 9 April 2020". The three AM Sub-Batches were transferred from 25 May to 16 November 2019. The four Flow Sub-Batches

(after a preliminary IT transfer on 11 February 2019, more properly attributed to Batch Zero), were transferred in 11 separate tranches on 11 separate dates, from 27 October 2019 to 10 May 2020.

24. As Mr Aiken said, that meant 95 per cent of each of the AM and EVF Batches had transferred to SocGen by the end of September 2019; while Flow was "more complicated". While many employees "globally" transferred from as early as February 2019, "much of the business and the contracts did not transfer across until later, with a significant proportion having transferred to SocGen by March 2020 and the remainder transferring at the end of May 2020" (Mr Aiken's paragraph 20).

25. It may be recalled that Commerzbank dismissed or purported to dismiss the claimant on 31 March 2020. At the time, neither Commerzbank nor the claimant proceeded on the basis that her employment contract had transferred to SocGen or that Commerzbank's EMC business had by then been transferred to SocGen. Those assertions came later, flushed out in 2021 during the case management process after the claimant brought her present claim in June 2020.

26. After it became common ground that a transfer of the EMC business had taken place and that the claimant was assigned to the part of the business transferred, the respondents pleaded (by amendment) that the transfer date was 1 October 2019, five months before the claimant's supposed dismissal by Commerzbank. It could follow that (as I suggested at the hearing and the respondents did not contradict me) Commerzbank's dismissal of the claimant might with hindsight be considered a nullity because Commerzbank was not the claimant's employer at the time when she was dismissed.

27. Furthermore the respondents, both represented by Mr Mansfield, contend that the present claim, brought in June 2020, is in large part out of time because it relies on acts that took place more than three months before the claim was brought; and because, the respondents contend, the claimant cannot (for various reasons I need not go into here) rely on post-transfer or post-termination discrimination.

28. After the claimant brought this claim in June 2020, Commerzbank produced a presentation document marked "Frankfurt / October 2020". It consisted of slides setting out the history of the transfer process. It confirmed that the transaction was "structured in the form of an asset deal, i.e. transfer of individual assets, liabilities, contracts, employees, infrastructure etc". It included a detailed timeline chart and recorded that "[c]artel clearance" was received on 11 February 2019 and "[m]igration largely completed by end March 2020". It was consistent with Mr Aiken's account.

29. As the dispute developed, it became clear that the transfer of Commerzbank's EMC business to SocGen was relevant to the claim. In amended particulars of claim dated 20 May 2021, the claimant pleaded the transfer, saying (paragraph 97(c), first sentence) she understood the sale took place by "a series of 3 transactions, in which 3 payments were made in respect of the following parts of the business: … AM … EVF … and Flow". She then quoted from the BPA and the Batches system in Schedule 9. She went on to plead (paragraph 97(d)):

> **"Given that the Respondents have stated that the sale was effected by way of three transactions, it is averred that the date on which responsibility for the conduct of the EMC business transferred from R1 to R2 was at the end of those transactions. The Claimant does not have knowledge as to when the sale completed, such information not having been disclosed. However the transfer of the 3rd batch (Flow) appears to have completed on or around 10/05/20. It is averred therefore that this is the likely transfer date."**

30. In reamended grounds of resistance, Commerzbank pleaded (paragraph 58A) that the transfer took place on 1 October 2019. It confirmed that the transfer was of the three parts of the EMC business (AM, EVF and Flow), each in Batches and Sub-Batches. It added that Flow had a limited presence in the UK and was based mainly in Germany and that "[t]he first two sentences of Paragraph 97(c) are admitted".

31. The gist of Commerzbank's case in support of 1 October 2019 as the transfer date was that by that date 95 per cent of the EVF and AM business had transferred to SocGen and nearly 87 per cent of the 97 London based employees who were to transfer to SocGen had done so (paragraph 58A(8)

and (9)). Implicit in that case was the proposition that the Flow part of the business should be disregarded because it was mainly based outside the United Kingdom.

32. SocGen's reamended grounds of resistance were to similar effect. It confirmed (paragraph C3) that the EMC business which transferred comprised three areas: EVF, AM and Flow. It repeated the point that "Flow had a limited presence in the UK and was mostly based in Germany." SocGen did not dispute Commerzbank's acquiescence in the claimant's proposition that the transfer was effected in a series of three transactions, one for each of the three components of the EMC business.

33. The judge decided to deal with the transfer date as a "stand alone" preliminary issue. He held a hearing for that purpose in late September and early October 2021 and gave his reserved judgment, as indicated above, on 22 October 2021, deciding that the transfer date was 1 October 2019, essentially accepting the respondents' submission that nearly the whole of the EVF and AM business had transferred by that date and that the Flow part of the business should not be the focus of the enquiry because it was not (apart from five employees) part of the London operation.

34. For completeness, I should add finally that in May 2022, there was a rehearing of certain issues in the claimant's first claim, which had been remitted back from this appeal tribunal following Commerzbank's partially successful appeal. I do not have – and for present purposes do not need - the details of that exercise. I am told that the claimant was again successful, at least to some extent, that Commerzbank has once again appealed and that its current second appeal in the first claim is awaiting determination in this appeal tribunal.

The Tribunal's Decision

35. After the usual introductory remarks, the judge set out the law, starting with TUPE (as amended in 2014) regulations 3(1)(a), 3(6)(a), 4(1) and 4(3). I will set out those provisions and some others. First, regulation 3 provides, materially:

"3.— A relevant transfer

(1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity; …

(2) In this regulation "*economic entity*" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

…..

(4) Subject to paragraph (1), these Regulations apply to—

(a) public and private undertakings engaged in economic activities whether or not they are operating for gain;

(b) a transfer or service provision change howsoever effected notwithstanding—

(i) that the transfer of an undertaking, business or part of an undertaking or business is governed or effected by the law of a country or territory outside the United Kingdom or that the service provision change is governed or effected by the law of a country or territory outside Great Britain;

(ii) that the employment of persons employed in the undertaking, business or part transferred or, in the case of a service provision change, persons employed in the organised grouping of employees, is governed by any such law;

(c) a transfer of an undertaking, business or part of an undertaking or business (which may also be a service provision change) where persons employed in the undertaking, business or part transferred ordinarily work outside the United Kingdom.

…

(6) A relevant transfer—

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor."

36. Regulation 4(1) and (3) of TUPE then provide as follows:

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

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

….

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

37. The judge referred to several cases. I need not refer to all of them here. He referred to the ruling of the Court of Justice in *Celtec Ltd v. Astley* [2005] ICR 1409, at the end of the judgment of the court:

> **"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."**

38. The governing directive subsequently became EU Council Directive 2001/23/EC, like its predecessor commonly known as the Acquired Rights Directive. It is not suggested that its provisions are materially different so as to affect the continuing authority of the ruling of the court in *Celtec*.

39. The judge referred to two cases I will mention, among others. He cited the observation of Slade J in *Housing Maintenance Solutions Ltd. v. McAteer* [2015 ICR 87, at [40], in the course of her review of relevant authorities:

> **"… when the CJEU in Celtec stated that the term "date of transfer" must be understood as the date on which responsibility as employer for carrying on the business of the unit in question moves from the transferor to the transferee they were not referring to the date or dates when the transferee entered into contracts of employment with the employees. It was when by operation of Article 3 the business was transferred with the effect that the contracts of employment of former employees of the transferor engaged in the business were transferred to the transferee by operation of law."**

40. He also mentioned certain observations of HHJ Burke QC in *Metropolitan Ltd v. Churchill Dulwich Ltd (in Liquidation)* [2009] ICR 1380, at [30], [38] and [39] (an early service provision change case), some of which I reproduce here:

> **"30 … A commonsense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided, as was adopted by the Tribunal in the present case. The Tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the Tribunal on the evidence in the individual case before it.**
>
> **….**
>
> **38. … Celtec requires the Tribunal to find one date on which any type of TUPE transfer occurred on the facts before them but does not require that all the steps which constitute such a transfer must take place on the same day. …**
>
> **39. The Tribunal, in a case in which the date of the alleged transfer is in issue, must, in my judgment,**

> **determine the date at which the essential nature of the activity carried on by the alleged transferor ceases to be carried on by him and is instead carried on by the transferee. The ascertainment of that date must be a question of fact. … ."**

41. The judge also referred to the commentary in *Harvey on Industrial Relations and Employment Law* at F [103]-[105] (relied on by the claimant below) discussing when an employee's employment transfers in a case where a transfer is effected by a series of transactions:

> **"It is reasonable to conclude that the contract of such an employee becomes transferred at the moment that it would otherwise terminate by virtue of the disposal of the undertaking, but there is a theoretical difficulty if the employee's contract is apparently terminated by one of the first transactions in a series (which at that date may not be perceived to be a series). In such a case, it is submitted that the correct analysis is that the contract may be regarded as terminated at the time of the relevant event, but on completion of the transfer of the undertaking (at the end of the series of transactions) the contract must retrospectively be deemed not to have been terminated, by virtue of the first part of reg 4(1) of TUPE 2006. Regulation 4(2) of TUPE 2006 provides that the transferee does not assume responsibility until completion of a relevant transfer (which would be at the end of the series of transactions). Therefore, it is suggested, it must follow that the contract is retrospectively to be regarded as having continued in existence between the employee and the transferor during the intervening period. … ."**

42. The judge then dealt with the facts (at paragraph 20 onwards), much as I have done above. After setting out some of the salient events, he went on to consider the scope of his enquiry. At paragraph 42 he commented that the EMC business "operates across countries". He then stated two points expressed in double negatives:

> **"TUPE is concerned with 'a business or part of an undertaking or business situated immediately before the transfer in the United Kingdom.' No party has sought to suggest that there was no economic entity which retained its identity situated entirely in the United Kingdom. There is no allegation that the claimant was not assigned to the organised grouping of resources or employees that was subject to the relevant transfer… ."**

43. He then stated at paragraph 43:

> **"Reg. 3 is concerned only with a business or undertaking which was an economic entity, situated immediately before the transfer in the United Kingdom. With that in mind, it is clear that I must focus on the London operation. AM and EVF formed the vast majority of the London business."**

44. The judge then reverted to his account of the facts and completed that account based on the documents and Mr Aiken's evidence, in a manner similar to my account above. He then summarised the parties' submissions and from paragraphs 55 to 71 stated his reasoning and conclusion, which I summarise and quote as follows.

45. First, he was guided by the requirement in *Celtec* that he must focus on the transfer of the business, not of employees. Focussing on the parties' views and intentions may lead the tribunal into error, he said. To ascertain the date of the transfer, the tribunal would consider as a correct way of approaching the exercise ordained by the Court in *Celtec*, on what date the "essential nature" of the activity carried on by the transferor started to be carried on instead by the transferee.

46. He regarded the notion of a "transaction" forming part of a "series" of transactions as "very wide". He rejected the submission founded on the passage in *Harvey* that a transfer necessarily occurs at the end of a series of transactions, i.e. on the date of the last one in the series. It was a question of fact in each case. The operative date could be at the start, in the middle, or at the end of the series.

47. The judge rejected the claimant's submission that he should decide the transfer date was 10 May 2020 because that was the date on which the transfer of the Flow business was completed and that part of the business was the "jewel in the crown" most attractive to SocGen. The judge noted that the more attractive and less attractive parts of the EMC business were alike transferred; it was irrelevant how attractive or unattractive to SocGen they were.

48. He rejected submissions from the claimant based on what was communicated to groups of employees and when and how specific employees or groups were treated. That would be the wrong focus. Rather, he said at paragraph 65, "it is identification of the transfer of the business or economic entity which determines when the employee is transferred, not vice versa." The transfer of employees was a gradual process over time. It was no more logical to say the business transferred when the first employee transferred than when the last one did.

49. At the end of the judgment, at paragraphs 68 to 71, the judge accepted the case advanced by the respondents, in the following terms:

> **"68. The respondents' argument is straightforward. The respondents focus on what constituted the vast**

> **majority of the business within the UK. That business consisted of EDF [*EVF*] and AM. It is acknowledged that it is extremely difficult to identify the exact date of transfer. Mr Aiken says 95% of the AM and E[*V*]F batches were transferred to SG by the end of September 2019. Out of a total of 97 employees identified as being formally taken on by SG leading, 84 had transferred leading up to 1 October 2019. Flow was predominantly based in Germany and only five people in London were directly involved.**
>
> **69. I am concerned with transfer of the business situated in the UK. The best evidence I have is 95% of that business had transferred to SG on 1 October 2019. Both respondents accept that that is when the responsibility for the business was assumed by SG and passed from Commerzbank.**
>
> **70. As I have noted, the evidence is sparse. Undoubtedly, there is a vast amount of detail which could have been advanced which may have assisted. However, I am required to form a decision on the best available evidence. I do not consider this to be one those cases where the facts are so poor that no decision can be made. Both respondents agree the date. That agreement appears to be based on rational grounds, supported by evidence that transfer of approximately 95% of the business assets was complete.**
>
> **71. To find the transfer occurred on the date the claimant alleges, I would have to take the view that despite the almost complete transfer of assets in London by 1 October 2019, nevertheless, the essential nature of the activity carried on by the transferee remained with the transferee and not the transferor. Further, I would need to find that the essential nature of the activity remained with the transferee until the very end of the transactions in May 2020. That submission is unsustainable. The reality is the essential nature of the activity had transferred. The second respondent had taken over responsibility. It is hard to be certain about the date. However, I do not need to be certain; I have to decide the matter on the balance of probability, based on the best available evidence. The best evidence I have points to the date of transfer as being 1 October 2019, and that is the date I find to be the date of transfer."**

The Issues, Reasoning and Conclusions

50. It remains common ground in this appeal, as it was below, that there was a TUPE transfer; that the part of the business transferred was the EMC business; that the claimant was assigned to the part of the business that was transferred; and that the date of transfer matters because it affects or may affect the viability or otherwise of the present claim for the reasons I have already explained. The difference between the parties is whether the date of transfer found by the judge is defensible or not.

51. The respondents submit, through Mr Mansfield, that it was not common ground below, nor in this appeal, that the transfer was effected by a series of transactions; and that the tribunal did not so find. That is untenable. The respondents' pleading below conceded the point, as I have noted. Mr Mansfield does not say otherwise. He says only that the pleading is mistaken. He accepts that he did not say that to the judge below. Still less did he seek to amend his pleaded case. The judge therefore proceeded on the basis that it was agreed that the transfer was effected by a series of transactions.

52. That is reflected in the decision, which does not include any alternative analysis. The judge was right to accept the common position, first, because it was the common position and, second, because it is obviously the right analysis. The transfer of the three parts of the EMC business was, at the very least, three transactions. Each Batch and Sub-Batch was, arguably, a transaction. There was clearly a series. I do not understand why the respondents now seek to contend otherwise. They cannot go behind their pleaded case below. Even now on appeal, they do not seek to amend it.

Should the judge have held that the TUPE transfer occurred on the date of the last transaction in the series?

53. The claimant submitted that where there is a series of transactions, the transfer is not effected until "full and final" responsibility for carrying on the transferred business or part of a business lies with the transferee. Generally, that will not be until the last transaction in the series takes place. Until then, responsibility is, as the judge said in this case (at paragraph 45) "shared by Commerzbank, and then taken on by [SocGen]". This line of argument covers the first two grounds of the appeal.

54. The sequence of events and the retrospective presentation in October 2020 shows that "full and final" responsibility for running the transferred business did not vest in SocGen until completion of the series of transactions transferring the Flow part of the EMC business, Ms Clarke submitted. Normally, logic dictates that full transfer of responsibility for running the business in question will not occur until the end of the series of transactions effecting the transfer. Until then, some responsibility will nearly always be retained by the transferor, she argued.

55. The commentary in *Harvey* at F [103]-[105] reflects the same logic and should be adopted, said Ms Clarke. So does the reasoning of the appeal tribunal in *Longden v. Ferrari Ltd* [1994] ICR 443, (per Mummery J(P) at 448D-449A), supporting a purposive construction of the predecessor regulations. Here, Ms Clarke pointed out, for a transaction to have "effected" a transfer, at least it should have commenced before the transfer date. Here, nothing of substance in the Flow part of the

business had been transferred by 1 October 2019. Only preparatory steps had been taken.

56. The respondents submitted through Mr Mansfield that there is no warrant in authority for adding the gloss "full and final" to the responsibility for running the business that is the touchstone of a transfer. The transfer occurs by operation of law, on a single date when responsibility ceases to be exercised by the transferor and starts to be exercised by the transferee. That date is ascertained by what actually happened, rather than what the contract documents state. It may be before completion takes place according to the contract terms. Deciding upon the date is an issue of fact.

57. The analysis is no different where the transfer is by a series of transactions. The change in responsibility for running the transferred business or part thereof may, depending on the facts and not on what the contract says, occur at the start of, or in the middle of, or at the end of the series. It was for the judge to weigh the evidence and determine, as he did, the date on which the change of responsibility occurred, applying the *Celtec* test unvarnished by any "full and final" gloss. His decision that the date was 1 October 2019 is unassailable, said Mr Mansfield.

58. On this part of the appeal, I prefer the submissions of the respondents. Transfers of businesses and parts of them come in all shapes and sizes. Some are closely regulated by contracts defining each step with precision and setting rigid deadlines that are performed to the letter. Others happen in a less formal way, with a handover of functions over time, more loosely linked to a contract of a "framework" kind. The present case more nearly fits the latter description than the former.

59. The contract for transfer, the BPA, prescribed numerous transactions effecting the transfer of the EMC business to SocGen, but despite its length and detail it included much flexibility, in particular about timing. Regulatory approval had to be obtained; neither party knew when it would be. IT functions had to be in place, pursuant to the "Batch Zero" provisions. The timing of that was uncertain when the BPA was signed.

60. Then the Batch and Sub-Batch transfers had to take place. These included novation of numerous individual client investment contracts. No one knew exactly how long that would take. The approximate timescale was – a tribute to the efficiency of the operations – met, apart from some delays attributed to the Covid pandemic, as explained in the retrospective presentation document of October 2020. All in all, it is clear that no one could have said with authority what the single transfer date would be, at the time the BPA was signed. It was a "wait and see" date.

61. I agree with the respondents that there is no presumption or rule that a transfer effected by a series of transactions occurs at the end of the series. Completion may be artificially delayed. The last transaction in the series may be a minor detail, putting the last piece of the jigsaw in place long after the transferee has started running the business to the exclusion of the transferor. An example arises in this very case, where "residual notes" relating to the Flow business might be expected to remain in being up to as late as 31 December 2021, and "Old Perpetuals" even after that date.

62. By similar reasoning, the gloss "full and final" should not be added to the concept of responsibility for running the business. A transferor might retain minor responsibilities for mopping up work long after responsibility has shifted to the transferee in substance. Nothing in the reasoning of the then President in *Longden v. Ferrari Ltd* is authority to the contrary. Ingenious devices to defeat employees' TUPE rights may lie in seeking to delay transfer or in seeking to accelerate it. No rule or presumption about the date of a transfer assists in discouraging that.

Was the judge wrong to ask himself when the "essential nature" of the activity was first carried on by the transferee; if not, did he misapply the test?

63. This issue covers the fifth and sixth grounds of the appeal. The phrase "essential nature of the activity" was used by the judge in his exposition of the law at paragraph 14 of his reasons, quoting from HHJ Burke QC's judgment in *Metropolitan Resources Ltd v. Churchill Dulwich Ltd* [2009] ICR 1380 at [39]. The judge clearly adopted the phrase, repeating it twice in his concluding paragraph

71, which I have quoted above.

64. The claimant criticises that reasoning. Ms Clarke submits that the judge's focus on the "essential nature" of the activity transferred is not in tune with the test articulated in the ECJ's *Celtec* ruling which simply refers to the date on which "responsibility as an employer for carrying on the business of the unit transferred moves from the transferor to the transferee". Further, she submits, HHJ Burke QC's judgment was given not in a standard transfer case but in a service provision case. The two are fundamentally different, she says: the first relates to sale of a business or part thereof; the second, to a change in the identity of the organisation that carries out the activity.

65. Ms Clarke submits that, generally speaking, in the former case, transfer of responsibility takes place on completion or at the end of the series of transactions (a proposition I have already rejected). Further, she said, the judge failed to identify the activity whose "essential nature" was transferred. He must have omitted from the "activity" transferred the Flow part of the business, since transfer of that did not start in earnest until after 1 October 2019. It was impermissible to leave out of account the Flow business when applying the "essential nature" test, if it was right to apply it at all.

66. For the respondents, Mr Mansfield submitted that HHJ Burke QC intended his remarks to apply to both kinds of TUPE transfer; and that this reflected the intention of parliament, when enacting the purely domestic law service provision variety of TUPE transfer, that the same *Celtec* formulation of the test should apply to both kinds of cases. The adoption of the "essential nature" test by the judge in this case was therefore appropriate and correct; and he applied it correctly in determining the factual issue of the transfer date, which was for him to determine.

67. I find difficulties with the claimant's submissions. First, I do not accept the proposition that in a "series of transactions" case the transfer normally occurs on the date of the last transaction in the series. I have already explained my reasoning in that regard. Second, the identity of the person

carrying on the business changes in both kinds of case, not just in the case of a standard transfer. It is not clear why the absence of a direct commercial transaction between the parties in a service provision change case is a fundamental difference between the two kinds of transfers.

68. I do not need to investigate in this appeal whether or how the analysis differs in a service provision case, not necessarily involving any commercial transaction between transferor and transferee. In *Housing Maintenance Solutions Ltd v. McAteer* (cited above), Slade J at [33] recorded that Elias LJ in *Hunter v. McCarrick* [2013] ICR 235, at [11], had pointed out that many service provision changes also constituted standard transfers; the two are not mutually exclusive.

69. It also seems to me unnecessary to engage fully with the respondents' submissions on this issue. The phrase "essential nature of the activity" is not particularly helpful, but nor does it do violence to the authoritative *Celtec* formulation of the test. It is tautological and does no more than lend emphasis to the need for a transfer of the activity in question. The "essential nature" of the activity is the essence of the activity; which is the activity itself, nothing more.

70. HHJ Burke QC in in *Metropolitan Resources Ltd* did not need to decide whether the judicial approach to a service provision change and to a standard transfer case should always be exactly the same. No more do I in this appeal. The provisions in TUPE are not the same for the two kinds of case. The present case is a standard transfer case governed by the *Celtec* test, unvarnished by any gloss such as the "essential nature of the activity" or, for that matter, "full and final" responsibility. Such glosses are an unnecessary distraction and best avoided. But if the judge's decision in this case is otherwise defensible, it is not vitiated by his invocation of the "essential nature of the activity".

Did the judge wrongly disregard the non-UK based elements of the transferred entity's business?

71. His Honour Judge Auerbach, after a rule 3(10) hearing, allowed this issue to proceed to a full hearing, with the following comment:

> **"It is arguable that, once it was agreed or found that the single economic entity which, though it consisted of sub-operations in both the UK and abroad was, for TUPE purposes, to be treated as situated in the UK, it was an error for the tribunal then to focus only on the operations that were actually in the real world situated in the UK."**

72. That is the major point in this appeal. The claimant's real complaint is that the judge wrongly disregarded the Flow part of the business even though everyone agreed that it formed part of the "organised grouping of resources" comprising the EMC business, the part of Commerzbank's business that was transferred to SocGen. Ms Clarke submitted in her skeleton argument that it was "an error of law to arbitrarily exclude part of the single entity from consideration when determining when the transfer took place on the basis of where the employees were geographically located".

73. Ms Clarke complained that since it was an agreed fact that the undertaking concerned was situated in the UK, the geographical location of employees "does not change the question as to whether the undertaking is situated in the UK"; and there is nothing in the TUPE Regulations and no authority supporting the proposition that "for the purpose of identifying the date of a TUPE transfer, anything which occurs outside the UK is to be completely disregarded".

74. Regulation 3(4)(c) showed, she submitted, that "once the hurdle of showing that there was an economic entity which was situated in the UK has been overcome, geography plays no further relevance [*sic*] in the determination as to when the transfer took place". The position was as stated in the January 2014 Department for Business Innovation & Skills guide to the 2006 TUPE Regulations, called *Employment Rights on the Transfer of an Undertaking*, which states at page 13 under the sub-heading "[t]he effect of the Regulations where employees work outside the UK or GB":

> **"The Regulations apply to the transfer of an undertaking situated in the UK immediately before the transfer, and, in the case of a service provision change, where there is an organised grouping of employees situated in Great Britain immediately before the change.**
>
> **However, the Regulations may still apply notwithstanding that persons employed in the undertaking ordinarily work outside the United Kingdom. For example, if there is a transfer of a UK exporting business, the fact that the sales force spends the majority of its working week outside the UK will not prevent the Regulations applying to the transfer, so long as the undertaking itself (comprising, amongst other things, premises, assets, fixtures & fittings, goodwill as well as employees) is situated in the UK."**

75. Ms Clarke said that on the tribunal's findings, based on Mr Aiken's evidence, the Flow part of the EMC business accounted for some two fifths of the purchase price and twice that of AM; and that the EVF and AM parts of the EMC business also operated outside the UK, across various other countries. The same logic should be applied to all parts of the transferred EMC business. The focus should have been on the EMC business as a whole and that would inexorably have led to the conclusion that the TUPE transfer date was in May 2020.

76. Finally, Ms Clarke submitted that on the tribunal's approach, the TUPE mechanism would be unworkable for transfers where events occur across several countries. For example, if the transfer of responsibility for running a business in this country depended upon the transferee coming into possession of a building and assets outside the UK, a tribunal would have to ignore that part of the series of transactions effecting the transfer, which would defy common sense. A transfer of a UK based business can occur on the happening of an event outside the UK.

77. For the respondents, Mr Mansfield referred to regulation 3(1) and submitted, as put in his skeleton argument, that the Regulations "apply to employees in the United Kingdom and to the transfer of their employment. The Judge was entitled to have particular regard to the undertaking or part of the undertaking located in the United Kingdom. The laws of other jurisdictions would apply to those parts of the business located in other jurisdictions".

78. Further the judge, said Mr Mansfield, did not overlook the non-UK part of the EMC business; he stated the relative sizes and number of employees in each part of it; and noted that the AM and EVF parts were carried on outside as well as inside the UK. He evaluated and properly dismissed the claimant's arguments about the Flow part of the business. The argument that the transfer was not complete until the Flow business was transferred merely restated the proposition, rightly rejected, that the transfer was complete only when the last transaction in the series had taken place.

79. That, not the geographical issue, had been the focus of the claimant's arguments below, Mr Mansfield submitted. The claimant's case below was founded not on the geographical location of the Flow business but on the submission that until it had passed, "full and final" responsibility had not passed. The judge properly directed himself as to the legal principles. He made a factual evaluation and dismissed the claimant's arguments on their merits and not because they involved looking at parts of the business outside the UK. His finding was open to him on the evidence.

80. I come to my reasoning and conclusions on this issue. First, there is no doubt that the part of the business transferred included the Flow business. The BPA so provided. Mr Aiken confirmed the same point in his witness statement. And it was an agreed position before the tribunal. Hence, the tribunal recognised that "the deal was complex and multinational" (reasons, paragraph 41) and that the EMC business "operates across countries" (paragraph 42).

81. Next, it was common ground that the claimant was assigned to the part of the business transferred, i.e. she was assigned to the EMC business. She provided services to all three areas of the EMC business, though mostly to the employees in London working in the AM and EVF part of that business, who formed the majority of the London based employees. The Flow business had only five employees working out of London, but the claimant was employed to provide her services to them as well as to the other London based employees.

82. Next, I observe that there is no reason why an "organised grouping of resources" (in the words of regulation 3(2)) such as the EMC business cannot be physically located in several countries at once. That was the case here. The Batch Zero employees were all based in Germany. The EVF employees were, according to Mr Aiken, mainly based in London and Hong Kong. The AM employees were, he explained, split mainly across Luxembourg, London and Frankfurt. The Flow employees were mainly based in Germany.

83. Next, it was common ground that the economic entity that retained its identity, i.e. the EMC business, was "situated immediately before the transfer in the United Kingdom" (regulation 3(1)(a)). Had the respondents not accepted that proposition, they would have contended that the TUPE Regulations did not apply in this case at all. Rightly, they did not so contend. A business or part of a business can be "situated" in the UK without its entire operation being located in the UK, as all parties, and the tribunal, accepted in this case.

84. Thus, there was no attempt by the respondents to sever, in a juridical or jurisdictional sense, the Flow part of the business from the organised grouping of resources comprising the part of the business transferred. They did not want the tribunal to focus on it but that was not just because it was located overseas; it was because the transfer of its Batches and Sub-Batches came late in the process and they were arguing for an early transfer date, correctly resisting the proposition that the transfer date must necessarily await completion of all the transactions in the series.

85. Next, regulation 3(4)(b) and (c) make clear that the involvement of foreign law and legal systems does not prevent the Regulations applying to a transfer, provided it is of a business or part thereof situated in the UK immediately before the transfer. It does not matter if the transfer is governed by the law of a foreign state (regulation 3(4)(b)(i)); nor that the employment of persons employed in the undertaking is governed by the law of a foreign state (3(4)(b)(ii)); nor that persons employed in the undertaking ordinarily work outside the UK (3(4)(c)).

86. That brings me to the reasoning of the judge. At paragraph 42, he said, expressing himself in an awkward double negative, that "[n]o party has sought to suggest that there was no economic entity which retained its identity situated entirely in the United Kingdom". That was wrong, if the word "entirely" was meant to denote the geographical location of the EMC business. None of the parties suggested that the EMC business was geographically situated entirely in the United Kingdom. Everyone, including the tribunal, agreed that it was geographically located across several countries.

87. At paragraph 43, the judge then reasoned that because regulation 3 is concerned with a business or part thereof situated immediately before the transfer in the UK, "it is clear that I must focus on the London operation". I think that was, with respect, a *non sequitur* and a misdirection of law. There is nothing in the TUPE Regulations that required the tribunal to confine its consideration to the part of the organised grouping of resources based in this country.

88. Nor is there any suggestion in the corresponding European directive (Council Directive 2001/23/EC, to which I referred the parties at the hearing), that a national court should confine its consideration to the part of a business in the country of that court; see article 1(2) which provides:

> **"This Directive shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty."**

89. The London based part of the EMC business was only part of the economic entity that was transferred. It was a part of a part of the business of Commerzbank. It was not on its own the part of Commerzbank's business that was transferred. The misdirection was repeated at paragraph 69, where the judge said he was "concerned with the transfer of the business situated in the UK". That was only part of what he should have been concerned with.

90. The claimant's submission that the transfer occurred in May 2020 was rejected as "unsustainable" (paragraph 71) only because the judge refused to look at the transfer of Flow business as part of what was transferred; but it was part of what was transferred. The *Celtec* ruling requires that the transfer date is "the date on which responsibility as employer for carrying on the business of *the unit transferred* moves from the transferor to the transferee" (my italics). The unit transferred here was the EMC business, not just the London based or mainly London based part of it.

91. The respondents' submission that the judge correctly applied the law, properly evaluated the facts, properly considered the non-UK elements of the EMC business and reached a conclusion open to him on the law and the facts, therefore cannot be accepted. The judge erred in law by excluding

from his consideration the Flow part of the EMC business. The fourth ground of appeal succeeds. It is not a variant of the unsuccessful contention that the transfer was only complete once the last in the series of transactions took place. It is directed not to the timing of the transactions but to the scope of what was transferred.

Conclusion

92. For those reasons, I dismiss the appeal in so far as founded on the first and second issues discussed above, but I allow it in respect of the third issue. The judge overlooked the non-UK component of the economic entity transferred. If he had not done so, he may have decided that the transfer occurred later than 1 October 2019. Indeed, it is likely he would have done so, since he recognised (paragraph 35) that:

> **"As regards the public distribution business, which was mainly concerned with the German market, the part of the transaction which dealt with that, occurred late in the process and ran into 2020, the process of acquisition may not have been fully completed until after the claimant had been dismissed."**

93. The question is then whether this appeal tribunal should decide the point on the facts found by the tribunal below, or remit the matter back. I think it is appropriate to remit the matter back. Although 1 October 2019 may well be too early a transfer date, it is not clear what later date may best fit on a detailed consideration of the evidence, applying the correct principles. I do not think it should be for this appeal tribunal to decide that issue itself. To do so, I would have to undertake a detailed analysis of voluminous relevant documents, not all of which are before the appeal tribunal.

94. I think that (following the example of Slade J in *Housing Maintenance Solutions Ltd v. McAteer*) the reconsideration should be undertaken by a different judge. I would not expect much, if any, further evidence to be permitted or given at the hearing of the remitted issue of the transfer date. The focus should be on eliciting from the evidence already filed the date which, on analysis, best fits with that evidence, taking into account the non-UK components of the EMC business that was transferred to SocGen. It is for the tribunal to issue appropriate directions in respect of that hearing.

