

ALLEN & OTHERS V AMALGAMATED CONSTRUCTION CO. LIMITED

Barristers John Hendy QC and Michael Ford

Practice area(s) Employment and discrimination

Court ECJ

Judge(s) D.A.O. Edward, President of the Chamber, J.C. Moitinho de Almeida, C. Gulmann, J.-P. Puissochet (Rapporteur) and P. Jann, Judges,

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Judgment

JUDGMENT OF THE COURT (Fifth Chamber)

2 December 1999 (1)

(Safeguarding of employees' rights in the event of transfers of undertakings – Transfer within a group of companies)

In Case C-234/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Leeds Industrial Tribunal, United Kingdom, for a preliminary ruling in the proceedings pending before that court between

G.C. Allen and Others

and

Amalgamated Construction Co. Ltd

on the interpretation 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 (OJ 1977 L 61, p. 26),

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THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, J.C. Moitinho de Almeida, C. Gulmann, J.-P. Puissochet (Rapporteur) and P. Jann, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- **Mr Allen and other applicants, by J. Hendy QC and M. Ford, Barrister, instructed by L. Christian, Solicitor,**
- Amalgamated Construction Co. Ltd, by P. Duffy QC and G. Clarke, Barrister, instructed by W. Burton, Solicitor,
- the United Kingdom Government, by M. Ewing, of the Treasury Solicitor's Department, acting as Agent, assisted by K. Smith, Barrister,
- the French Government, by K. Rispal-Bellanger, Head of Subdirectorate at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and A. de Bourgoing, Chargé de Mission in the same directorate, acting as Agents,
- the Commission of the European Communities, by C. Docksey and P. Hillenkamp, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Allen and other applicants, of Amalgamated Construction Co. Ltd, of the United Kingdom Government and of the Commission at the hearing on 16 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 8 July 1999,

gives the following Judgment

1.

By decision of 5 May 1998, received at the Court on 3 July 1998, the Leeds Industrial Tribunal referred to the Court for a preliminary

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ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation 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 (OJ 1977 L 61, p. 26, hereinafter 'the Directive').

2.

The questions arose in proceedings brought by Mr Allen and 23 other mineworkers against Amalgamated Construction Co. Ltd (hereinafter 'ACC').

3.

ACC is a British company involved in the mining industry. For approximately 20 years it has driven tunnels and drifts for coal-mine owners to enable them to get at and extract minerals. For this purpose mine owners regularly issue invitations to tender for a defined package of work. Although there is no guarantee of renewal, the contracts concluded tend to be renewed indefinitely, so that ACC has never lost a contract in a competitive tendering process.

4.

ACC is a wholly-owned subsidiary of AMCO Corporation plc (hereinafter 'the AMCO Group'). The AMCO Group comprises some 12 companies, which include one other wholly-owned subsidiary, AM Mining Services Ltd (hereinafter 'AMS'). AMS was set up in 1993 to carry out work connected with pit closures, such as maintenance and shaft filling. For that purpose it recruited its own workforce under terms of employment which were different from those in force at ACC and far less favourable for employees. Although ACC and AMS are distinct legal entities, they have the same management and share administrative and support functions within the AMCO Group.

5.

AMS progressively diversified its activities, obtaining work which was incidental to the underground driveage work, such as the cleaning and maintenance of drifts. In particular, it took on such work at the Prince of Wales Collieries in Yorkshire. ACC already had a presence at that site where it carried out driveage work for the British national coal-mining company, British Coal, and, after the latter's privatisation and the sale of some of its assets, for RJB Mining (UK) Ltd (hereinafter 'RJB').

6.

In August 1994 and again in March 1995, ACC, whose contracts were coming to an end, submitted bids for further contracts for driveage work at the Prince of Wales Collieries. The terms of the bid in each case were that the work would be subcontracted to AMS whose labour costs were lower than those of ACC. ACC won those contracts. However, since the subcontracting of the work to AMS entailed a reduction in its own activities, ACC dismissed a number of its employees at the site, informing them that they could be taken on by AMS after a break of a weekend.

7.

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In 1994 and 1995, the workers dismissed by ACC received redundancy payments and were then engaged by AMS. However, since on each occasion ACC did not complete its driveage work until after AMS had commenced its own, it was difficult, during that transitional period, to ascertain for which of the two companies the workers concerned were working.

8.

As subcontractor for the driveage work, AMS was able to use all the plant and equipment which first British Coal and then RJB had previously made available to

ACC, such as washing and canteen facilities and the equipment required for disposal of excavated materials, transporting equipment and underground driveage.

9.

Subsequently, however, RJB expressed concern about the terms and conditions of employment being provided by its various contractors, including AMS, believing that they were the reason for lack of motivation of employees of those undertakings. At RJB's suggestion, ACC decided not to subcontract to AMS the new works contract which it had been awarded but to carry it out itself. To that end, it re-engaged its former employees, including Mr Allen and others, who had gone to work for AMS, where the subcontracts were coming to an end. They were engaged under terms of employment which were better than those which they had had at AMS but worse than those to which they were accustomed at ACC before 1994 or 1995.

10.

Mr Allen and his co-workers thought that they were entitled to the conditions of employment which ACC had provided before they left for AMS and brought an action before the Industrial Tribunal. In support of their claims they submitted that, under the Transfer of Undertakings (Protection of Employment) Regulations 1981, which transposed the Directive into national law, two transfers of undertakings had taken place, first between ACC and AMS and then between AMS and ACC. ACC denied that such a transfer had taken place.

11.

Taking the view that the case depended on the interpretation of the Directive, the Leeds Industrial Tribunal decided to suspend proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is the Acquired Rights Directive (77/187/EEC) capable of applying to two companies in the same corporate group which have common ownership, management, premises and work, or are such companies a single undertaking for the purpose of the Directive? In particular, can there be a transfer of an undertaking for the purposes of the

Directive when Company A transfers a substantial part of its labour force to Company B in the same corporate group?

2. If the answer to Question 1 is in the affirmative, what are the criteria for deciding whether there has been such a transfer? In particular, has there been a transfer of undertaking in the following circumstances:
 - (a) over a period of time the workers involved have been dismissed from Company A, purportedly for redundancy, and offered employment with associated Company B carrying out a geographically distinct undertaking or part of the undertaking of Company A, namely the driving of mine tunnels;
 - (b) no transfer of premises, management, infrastructure, materials or assets occurred between Company A and B and the majority of significant assets used by both companies in the work of driving main tunnels is supplied by a third party, the mine operator;
 - (c) company A remains the sole contractor with the third party client which engaged it to work on construction projects which were undertaken on a "rolling" basis;
 - (d) there was little or no contemporaneity between the movement of the workers from Company A to Company B and the beginning and/or end of the contracts under which the work was performed;
 - (e) company A and company B share the same management and premises;
 - (f) after being employed by Company B the employees carry out work for both Companies A and B as needed by the local management who are responsible for both companies;
 - (g) the work undertaken was continuous, there was no suspension of activities at any time or any change in the manner in which they were conducted?'

The first part of the first question

12.

By the first part of its first question, the referring court asks whether the Directive can apply to a transfer between two companies in the same corporate group which have the same ownership, the same management and the same premises and are engaged in the same work.

13.

Mr Allen and the other applicants, the French Government, the United Kingdom Government and the Commission propose that this question should be answered in the affirmative. They point out that Article 2 of the Directive defines a 'transferor' and a 'transferee' as, respectively, any natural or legal person who, by reason of a transfer, ceases to be, or becomes, the employer in respect of the undertaking, business or part of the business in question. Although belonging to the same group, the two subsidiaries are none the less distinct legal entities with separate obligations towards their respective employees.

14.

ACC, on the other hand, contends that the Directive cannot apply to a transfer between two companies which have the same ownership, management and supervisory staff and do not enjoy real autonomy from one another in determining their course of action on the market. Such companies are considered to be a single undertaking in competition law (Case C-73/95 P *Viho v Commission* [1996] ECR

I-5457). Similarly, the need to take account of economic reality leads perforce to the conclusion that two subsidiaries of this type constitute a single employer for the purposes of the Directive.

15.

According to Article 1(1), the Directive it is to 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(a) and (b) of the Directive define a 'transferor' and a 'transferee' as any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be, or respectively becomes, the employer in respect of the undertaking, business or part of the business.

16.

The Directive is therefore applicable where, following a legal transfer or merger, there is a change in the natural or legal person responsible for carrying on the business who by virtue of that fact incurs the obligations of an employer vis-à-vis employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred (Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, paragraph 12, and Case 324/86 *Tellerup v Daddy's Dance Hall* [1988] ECR 739, paragraph 9).

17.

It is thus clear that the Directive is intended to cover any legal change in the person of the employer if the other conditions it lays down are also met and that it can, therefore, apply to a transfer between two subsidiary companies in the same group, which are distinct legal persons each with specific employment relationships with their employees. The fact that the companies in question not only have the same ownership but also the same management and the

same premises and that they are engaged in the same works makes no difference in this regard.

18.

That conclusion is not affected by the judgment in *Viho v Commission*, cited above, in paragraphs 15 to 17 of which the Court held that Article 85(1) of the EC Treaty (now Article 81(1) EC) does not apply to relations between a parent company and its subsidiaries where those companies form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action on the market, but carry out the instructions issued to them by the parent company controlling them.

19.

That concept of undertaking is specific to competition law and reflects the fact that, without the concordance of economically independent wills, relations within an economic unit cannot constitute an anti-competitive agreement or concerted practice between undertakings within the meaning of Article 85(1) of the Treaty.

20.

Nothing justifies a parent company's and its subsidiaries' uniform conduct on the market having greater importance in the application of the Directive than the formal separation between those companies which have distinct legal personalities. That outcome, which would exclude transfers between companies in the same group from the scope of the Directive, would be precisely contrary to the Directive's aim, which is, according to the Court, to ensure, so far as possible, that the rights of employees are safeguarded in the event of a change of employer by

allowing them to remain in employment with the new employer on the terms and conditions agreed with the transferor (see, in particular, *Ny Mølle Kro*, cited above, paragraph 12, and *Daddy's Dance Hall*, cited above, paragraph 9).

21.

The answer to be given to the first part of the first question must therefore be that the Directive can apply to a transfer between two companies in the same corporate group which have the same ownership, management and premises and which are engaged in the same works.

The second part of the first question and the second question

22.

By the second part of its first question and its second question, the referring court is essentially seeking to ascertain the criteria for determining the existence of a transfer and whether those criteria are satisfied in the present case.

23.

The aim of the Directive is to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership. The decisive criterion for establishing the existence of a transfer within the meaning of the Directive is whether the entity in question retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed (Case 24/85 Spijkers [1986] ECR I119, paragraphs 11 and 12, and Case C-13/95 Süzen [1997] ECR I-1259, paragraph 10).

24.

First of all, in order for the Directive to be applicable, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract (Case C-48/94 Rygaard [1995] ECR I-2745, paragraph 20). The term 'entity' thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective (Süzen, cited above, paragraph 13).

25.

It is for the referring court to establish, in the light of the interpretative criteria set forth above, whether the driveage work carried out by ACC at the Prince of Wales Collieries was organised in the form of an economic entity before that undertaking subcontracted that work to AMS.

26.

Second, in order to determine whether the conditions for the transfer of an economic entity are met, it is necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not essential staff are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities are

suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (see, in particular, Spijkers, paragraph 13, and Süzen, paragraph 14).

27.

So, the mere fact that, in the instant case, the service provided by the undertaking holding the contracts for driveage work and then by the undertaking to which the work was then subcontracted is similar does not warrant the conclusion that an economic entity has been transferred between the first and the second undertaking. Such an entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organised, its

operating methods or indeed, where appropriate, the operational resources available to it (Süzen, cited above, paragraph 15, Joined Cases C-127/96, C-229/96 and C-74/97 Hernández Vidal and Others [1998] ECR I-8179, paragraph 30, and Joined Cases C-173/96 and C-247/96 Hidalgo and Others [1998] ECR I-8237, paragraph 30).

28.

As pointed out in paragraph 26 above, the national court, in assessing the facts characterising the transaction in question, must take into account, among other factors, the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the Directive will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business. Where, in particular, an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets (Süzen, paragraph 18, Hernández Vidal and Others, paragraph 31, and Hidalgo and Others, paragraph 31).

29.

The Court has thus held that, since in certain sectors in which the activity is based essentially on manpower, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, the new employer takes over a body of assets enabling him to carry on the activities or certain activities of the transferor undertaking in a stable way (Süzen, paragraph 21, Hernández Vidal and Others, paragraph 32, and Hidalgo and Others, paragraph 32).

30.

Although, as far as this case is concerned, the driving of underground tunnels cannot be considered to be an activity based essentially on manpower since it requires a significant amount of plant and equipment, it is clear from the order for reference that, in the mining sector, it is common for the essential assets required for driveage work to be provided by the mine owner himself. For instance, AMS, as subcontractor, was able to use the equipment which RJB previously made

available to ACC. The fact that ownership of the assets required to run the undertaking did not pass to the new owner does not preclude a transfer (see Ny Mølle Kro and Daddy's Dance Hall, cited above, and Case C-209/91 Watson Rask and Christensen [1992] ECR I-5755). In the

circumstances, the fact that there was no transfer of assets between ACC and AMS is not of decisive importance.

31.

Nor can the fact that ACC was always RJB's sole contractor and subcontracted the work to AMS preclude in itself the existence of a transfer within the meaning of the Directive. First, the transfer of customers between transferor and transferee is only one factor amongst others in the overall assessment to be made to ascertain whether a transfer has taken place (Spijkers, cited above, paragraph 13). Second, the Directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the business who incurs the obligations of an employer towards employees of the undertaking (see, inter alia, Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys [1996] ECR I-1253, paragraph 28).

32.

As regards the fact that the re-engagement of ACC's employees by AMS did not coincide with the beginning or end of the contracts, it must be observed that, as the Commission points out, a transfer of an undertaking is a complex legal and practical operation which may take some time to complete. Furthermore, according to the order for reference, the dismissal of ACC's employees and their engagement by AMS was clearly connected with ACC's decision to subcontract the work in question to AMS. Moreover, when ACC itself took on the driveage work again, it re-engaged the employees who had been with AMS. Accordingly, no particular importance can be attached to the lack of contemporaneity between the start of the work subcontracted to AMS and its re-engagement of ACC's employees.

33.

Moreover, even if a temporary suspension of the undertaking's activity does not of itself preclude the possibility that a transfer has taken place (see Ny Mølle Kro, cited above, paragraph 19), the fact that the work was performed continuously, with no interruption or change in the manner of performance, is none the less a normal feature of transfers of undertakings.

34.

The fact that ACC and AMS share the same management and the same premises and that there was no transfer of management staff between the two companies cannot preclude the existence of a transfer in so far as the transaction between the two subsidiaries actually involved an economic entity within the meaning of the case-law of the Court.

35.

The referring court also points out that the workers dismissed by ACC and taken on by AMS subsequently worked for both companies according to the needs of the local management running the two companies.

However, as the Advocate General observes at point 40 of his Opinion, the Court does not have sufficient information to address this point. In any event, if, as the order for reference suggests and Mr

Allen and the other applicants confirmed at the hearing, that situation reflected the initial period during which the driveage work carried out by ACC and AMS overlapped, it is not such as to affect the existence of a transfer for the reasons set out at paragraph 32 of this judgment.

36.

However, ACC submits that the facts of the case are in any event comparable to those of Rygaard, cited above, in which the Court held that there is no transfer where one undertaking merely makes available to another certain workers and material for carrying out certain works.

37.

It is true that in Rygaard the Court held that the situation in which an undertaking transfers to another undertaking one of its building works with a view to the completion of that work, confining itself to providing the latter undertaking with certain workers and equipment to carry out the work in progress, is outside the scope of the Directive. However, that situation differs from the present case in that complete works projects were subcontracted to AMS. Furthermore, at paragraph 21 of the judgment in Rygaard, cited above, the Court added that a transfer of building works with a view to the completion of that work could come within the terms of the Directive if it included the transfer of a body of assets enabling the activities or certain activities of the transferor undertaking to be carried on in a stable way. So, the fact that ACC only subcontracted to AMS the performance of certain driveage work would not be sufficient to preclude application of the Directive if it were established that in that transaction AMS had acquired from ACC a body of assets which would enable it to carry out driveage work on a permanent basis at the Prince of Wales Collieries.

38.

It is for the referring court to establish, in the light of all the interpretative criteria, whether in the case of which it is seised a transfer has taken place.

39.

The answer to the second part of the first question and the second question must therefore be that the Directive applies to a situation in which a company belonging to a group decides to subcontract to another company in the same group contracts for driveage work in mines in so far as the transaction involves the transfer of an economic entity between the two companies. The term 'economic entity' refers to an organised grouping of persons and assets

facilitating the exercise of an economic activity which pursues a specific objective.

Costs

40.

The costs incurred by the United Kingdom and French Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Leeds Industrial Tribunal by decision of 5 May 1998, hereby rules:

1. 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 can apply to a transfer between two companies in the same group which have the same ownership, management and premises and which are engaged in the same works.
2. Directive 77/187 applies to a situation in which a company belonging to a group decides to subcontract to another company in the same group contracts for driveage work in mines in so far as the transaction involves the transfer of an economic entity between the two companies. The term 'economic entity' refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.

Edward
Moitinho de Almeida
Gulmann
Puissochet
Jann

Delivered in open court in Luxembourg on 2 December 1999.

R. Grass

D.A.O. Edward

Registrar

President of the Fifth Chamber

