Trinity Term
[2011] UKSC 26
On appeal from: [2010] EWCA 24

JUDGMENT

Parkwood Leisure Limited (Respondent) *v* Alemo-Herron and others (Appellants)

before

Lord Hope, Deputy President
Lord Walker
Lord Brown
Lord Kerr
Lord Dyson

JUDGMENT GIVEN ON

15 June 2011

Heard on 13 and 14 April 2011

Appellant	*Respondent*
Thomas Linden QC Laura Prince (Instructed by Unison)	Adrian Lynch QC Richard Hignett (Instructed by Freeth Cartwright LLP)

LORD HOPE

1. The appellants are former employees of the London Borough of Lewisham ("the council"). They worked in the council's leisure department until 2002. Their part of the council's undertaking was then contracted out to a private sector employer named CCL Ltd and they were transferred into its employment. In May 2004 CCL's undertaking was taken over by another private sector employer named Parkwood Leisure Ltd ("Parkwood"), which is the respondent to this appeal. As a result of that transfer the appellants became employees of Parkwood. The Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794) ("TUPE") applied to each of these transfers.

2. TUPE safeguards the rights of employees when the business in which they worked changes hands between employers. It preserves their contractual rights so that they are enforceable against the transferee after the transfer. Regulations 5(1) and 5(2) of TUPE provided that their contracts of employment were to have effect after the transfer as if originally made between the persons so employed and the transferee. TUPE was replaced by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) which came into force on 5 April 2006. But the transfers with which this case is concerned took place before that date. So the position that applies to them is governed by the 1981 Regulations, which I shall continue to refer to as TUPE.

3. The council subscribed to the National Joint Council for Local Government Services ("the NJC"). The NJC comprises within its membership representatives of local authority employers and trades unions. As the appellants were employees of a local authority, their contracts of employment with the council included a term which entitled them to the benefit of the terms and conditions set by the NJC. They were in a standard form which, under the heading "Terms and Conditions of Employment", contained the following express term:

> "During your employment with the council your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the National Joint Council for Local Government Services, set out in the scheme of conditions of service (commonly known as the Green Book) supplemented by agreements reached locally through the council's negotiating committees."

Among the terms and conditions collectively agreed by the NJC were rates of pay for employees of local authorities.

4. At the date of the appellants' transfer to CCL there were in place collectively agreed terms setting out the pay rates for the period from 1 April 2002 to 31 March 2004. Those terms were honoured by CCL throughout the period of the appellants' employment with that company. In March 2004 NJC negotiations began for the period from 1 April 2004 to 31 March 2007. There were twelve representations of the local government associations on the NJC and various unions, including UNISON of which the appellants were members. But Parkwood does not recognise UNISON and, as it is a private sector employer, it cannot belong to the NJC or be represented on it. So it was not a party to these negotiations. The negotiations concluded on 4 June 2004, after the date of Parkwood's takeover of CCL. On 14 July 2004 the NJC issued a circular summarising the three year settlement. It included pay increases for the periods from 1 April 2004 and 1 April 2005.

5. Parkwood initially refused to award the appellants pay increases in accordance with the collective agreement for the periods from 1 April 2004 and 1 April 2005. The appellants brought claims against it for unauthorised deductions from their wages contrary to section 13 of the Employment Rights Act 1996. These claims were settled without admission of liability and the increases for these years were paid. But Parkwood declined to award the appellants increased rates of pay in accordance with the collective agreements with effect from 1 April 2006 and 1 April 2007. So the appellants brought further claims against Parkwood for unauthorised deductions in the London (South) Employment Tribunal ("the ET"). The ET dismissed their claims, for reasons that were given in a judgment sent to the parties on 16 July 2008. On 12 January 2009 the Employment Appeal Tribunal ("the EAT"), allowed the appellants' appeal against that decision and remitted the claims to the ET for a hearing as to remedy: [2009] ICR 703. Parkwood was given permission to appeal. On 29 January 2010 the Court of Appeal (Ward, Smith and Rimer LJJ) allowed the appeal, set aside the order of the EAT and restored the decision of the ET to dismiss the appellants' claims: [2010] EWCA Civ 24, [2010] ICR 793.

The issues

6. The issue which lies at the heart of this appeal is whether the effect of regulations 5(1) and 5(2) of TUPE is that the appellants are entitled to the benefit of increases in pay negotiated by the NJC after they were transferred into the employment of Parkwood.

7. It is common ground that, had this issue been solely one of domestic law, the question would have been open only to one answer. In *BET Catering Services Ltd v Ball* (unreported) 28 November 1996, Lindsay J, delivering the judgment of the appeal tribunal in Mrs Ball's favour, said that he could see no conceptual difficulty in a private sector employer binding itself to public sector pay rates. In *Whent v T Cartledge Ltd* [1997] IRLR 153, in a judgment delivered by Judge Hicks QC, the appeal tribunal said that, once it was accepted that regulation 5 of TUPE applied and that there had been no relevant subsequent variation in the contract of employment, the issue became simply one of the true meaning of the clause that provided that the employees' pay would be in accordance with the agreement made by the NJC as amended from time to time, and that there was no apparent reason why the transfer should cause any change in the meaning of these words: para 9. The employment tribunal's view that it could not be right that an employer is bound ad infinitum by the terms of a succession of collective agreements negotiated by bodies other than themselves was rejected. In para 16 Judge Hicks said:

> "…there is simply no reason why parties should not, if they choose, agree that matters such as remuneration be fixed by processes in which they do not themselves participate."

8. In *Glendale Grounds Management v Bradley*, (unreported) 19 February 1998, and *Glendale Managed Services v Graham* [2003] EWCA Civ 773, [2003] IRLR 465 issues were raised as to whether a different result followed because of particular words used in the employee's contract. In *Bradley* it was held that the particular terms of the contract required the approval of the employer for the time being to any new negotiated terms, whereas Glendale had given none. In *Graham* the clause provided that the rate of remuneration would "normally" be in accordance with the NJC. The Court of Appeal held that it was an implied term of that contract that the employer must inform the employee if and when there was to be a departure from the normal situation. *BET Catering Services Ltd v Ball* and *Whent v T Cartledge Ltd* were not referred to. But I agree with Rimer LJ's observation in the Court of Appeal in this case that the decision in *Graham* was impliedly consistent with the approach that was reflected in those cases: [2010] ICR 793, para 21.

9. The view that was taken in those decisions about the effect of conditions of the kind that the appellants rely on in this case was, in my opinion, entirely consistent with the common law principle of freedom of contract. There can be no objection in principle to parties including a term in their contract that the employee's pay is to be determined from time to time by a third party such as the NJC of which the employer is not a member or on which it is not represented. It all depends on what the parties have agreed to, as revealed by the words they have used in their contract. The fact that the employer has no part to play in the

negotiations by which the rates of pay are determined makes no difference. Unless the contract itself provides otherwise, the employee is entitled to be paid according to the rates of pay as determined by the third party. This is simply what the parties have agreed to in their contract. The same is true of the transferee in the event of the transfer of an undertaking regulated by TUPE. Domestic law tells us that the term in the contract is enforceable against the transferee in just the same way as it was against the original employer. As Rimer LJ said in the Court of Appeal, decisions such as *Whent* amount to no more than a conventional application of ordinary principles of contract law to the statutory consequences apparently created by regulation 5 of TUPE: [2010] ICR 793, para 46.

10. But the issue is not solely one of domestic law. Regulation 5 of TUPE must be read together with 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 (OJ 1977 L61, p 26) ("the Directive"), to which it gave effect. The question that has brought the appeal before this court is whether the approach that has hitherto been taken as to the effect of TUPE can still stand, in the light of the decision of the European Court of Justice in *Werhof v Freeway Traffic Systems GmbH & Co KG* (Case C-499/04) [2006] ECR I-2397 ("*Werhof*"). The ECJ was concerned in that case with the meaning and effect of article 3(1) of the Directive. The Court of Appeal held that the decision of the ECJ in *Werhof* was to be understood as meaning that the transferee was not committed by article 3(1) to any collective agreement made after the expiry of an agreement that was in force at the date of the transfer, and that there was nothing in the language of regulation 5 of TUPE to indicate that it was intended to enlarge employees' rights beyond those provided for by article 3(1). Its conclusion was that, in the light of *Werhof*, the domestic decisions in cases such as *Whent* were wrong and should not be followed.

11. The appellants contend for what has been described as a dynamic interpretation of the effect of their contract on transferees. That is to say, that their contracts should be given effect according to their terms, binding the transferee to give effect to collective agreements negotiated by the NJC from time to time in the same way as if they had still been employed by the council. The respondents submit that the effect of *Werhof* is that static rights only are protected, with the result that the transferee is not bound by any collective agreements that were not already binding on the original employer on the date of the transfer. The questions that must be examined, therefore, are these: (i) what is the effect of the judgment of the Court of Justice in *Werhof* as to the interpretation of article 3(1) of the Directive? (ii) to what extent, if at all, is there room for giving a different meaning to regulation 5 of TUPE in domestic law from that indicated by *Werhof* as to the meaning of article 3(1)?

The legislation

12. As Rimer LJ observed in para 9 of his judgment, the law in the United Kingdom prior to the bringing into force of legislation to comply with the Directive was that, if an employer transferred his business to another, the employees' contracts of employment were terminated. It was a matter entirely for the transferee to decide whether it should continue to employ the employees of the transferor in the business which it had acquired and, if so, on what terms. That position was reversed by the implementation of the Directive in 1981 by TUPE. The position now is that the rights of employees when the business in which they worked changes hands between employers are safeguarded. The extent to which their contractual rights are protected so that they are enforceable against the transferee after the transfer has not hitherto been in question.

13. The 1977 Directive was amended by Council Directive 98/50/EC (OJ 1998 L201, p 88). Article 3 of the amended version reproduced in substance the provisions of article 3 of the 1977 Directive, as the ECJ noted in *Werhof*, para 4. Council Directive 2001/23/EC of 12 March 2001 (OJ 2001 L82, p 16) has replaced the 1977 Directive, but the tenor of the wording used in the article 3 of the 1998 Directive has been retained: *Werhof*, in the opinion of Advocate General Ruiz-Jarabo Colomer, para 9. As both the Advocate General and the Court of Justice directed their attention to the wording of the 1977 Directive in *Werhof*, and as that was the Directive that TUPE was intended to implement, I shall do the same for the purposes of this judgment.

14. The preamble to the Directive included the following recitals :

> "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;
>
> Whereas differences still remain in the Member States as regards the extent of the protection of employees in this respect and these difference should be reduced;
>
> Whereas these differences can have a direct effect on the functioning of the common market;
>
> Whereas it is therefore necessary to promote the approximation of laws in this field …."

No mention was made in the recitals of any need to protect employers in the event of a change in employer as against the rights that were to be safeguarded for the protection of the employees.

15. In article 1(1) of the Directive it was declared that the Directive was 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 3 of the Directive included these provisions:

> "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 the 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.
>
> 2. Following the transfer within the meaning of article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.
>
> Member States may limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year."

16. As the aim of the Directive was the approximation of the laws of the Member States, not their harmonisation, article 7 of the Directive provided:

> "This Directive shall not affect the right of member states to apply or introduce laws, regulations or administrative provisions which are more favourable to employees."

In that connection it should be noted that the Directive did not apply to sea-going vessels: article 1(3). Nor, according to consistent decisions of the Court of Justice, did it apply to transfers of undertakings in the context of insolvency proceedings unless the undertaking had continued to trade or was expected to continue to trade:

see *Transport and General Workers' Union v Swissport (UK) Ltd (in administration) and another* [2007] ICR 1593, paras 56-58.

17. TUPE was made under the authority of section 2 of the European Communities Act 1972, subsection (2) of which, as amended by section 27(1) of the Legislative and Regulatory Reform Act 2006, provides inter alia that at any time after the passing of that Act any designated Minister or department may by order, rules, regulations or scheme make provision for the purpose of implementing any EU obligation of the United Kingdom or enabling any such obligation to be implemented. Paragraphs (1) and (2) of Regulation 5 of TUPE, as amended by section 33(4)(a) and (b) of the Trade Union Reform and Employment Rights Act 1993, provided:

> "(1) 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.
>
> (2) Without prejudice to paragraph (1) above, but subject to paragraph (4A) below, on the completion of a relevant transfer –
>
> (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
>
> (b) anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee."

A "relevant transfer" is a transfer to which TUPE applies, that is to say a transfer from one person to another of an undertaking situated immediately before the transfer in the United Kingdom: regulation 3, read with regulation 2(1). Regulation 5(4A), which was inserted by section 33(4)(c) of the 1993 Act, provided that paragraphs (1) and (2) were not to operate to transfer the employee's contract of employment and the rights, powers, duties and liabilities under or in connection with it if he informs the transferor or the transferee that he objects to becoming employed by the transferee.

18. Regulation 6 of TUPE was in these terms:

> "Where at the time of a relevant transfer there exists a collective agreement made by or on behalf of the transferor with a trade union recognised by the transferor in respect of any employee whose contract of employment is preserved by regulation 5(1) above, then –
>
> (a) without prejudice to section 18 of the 1974 Act or article 63 of the 1976 Order (collective agreements presumed to be unenforceable in specified circumstances) that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if made by or on behalf of the transferee with that trade union, and accordingly anything done under or in connection with it, in its application as aforesaid, by or in relation to the transferor before the transfer, shall, after the transfer, be deemed to have been done by or in relation to the transferee; and
>
> (b) any order made in respect of that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if the transferee were a party to the agreement."

Section 18 of the 1974 Act is now to be found in section 179 of the Trade Union and Labour Relations (Consolidation) Act 1992.

The interpretative obligation in domestic law

19. I shall deal with this question first so that the decision of the Court of Justice in *Werhof* [2006] ECR I-2397, which is the most troublesome aspect of this case, can be examined in the right context. The appellants submit that, even if the ruling in *Werhof* is inconsistent with the interpretation of regulation 5 of TUPE for which they contend, it does not warrant any reading down of regulation 5 given that article 7 of the Directive expressly authorises more generous protection for employees. The respondents, on the other hand, say that regulation 5 of TUPE was introduced to implement, and to do no more than implement, article 3 of the Directive and that, in that situation, the courts of the United Kingdom are obliged to construe the domestic legislation consistently with the Directive and rulings of the Court of Justice as to the meaning and scope of the Directive.

20. As to the latter point, it is well established that it is the duty of the court to construe domestic legislation which has been enacted to give effect to the United Kingdom's obligations under the EU Treaty so as to conform to those obligations,

so far as it is possible to do so. In *Pickstone v Freemans plc* [1989] AC 66 it was held that words were to be implied into a regulation which was designed to give effect to Council Directive 75/117/EEC dealing with equal pay for women doing work of equal value. This was because, if the House had not been able to make that implication, the United Kingdom would have been in breach of its treaty obligations to give effect to Directives. In *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546, where the employees had been dismissed a short time before the transfer became operative, the issue was as to the meaning of the words "immediately before the transfer" in regulation 5(3) of TUPE. Lord Keith of Kinkel said at p 554:

> "it is the duty of the court to give to regulation 5 a construction which accords with the decisions of the European Court upon the corresponding provisions of the Directive to which the regulation was intended by Parliament to give effect. The precedent established by *Pickstone v Freemans plc* indicates that this is to be done by implying the words necessary to achieve that result."

Lord Oliver of Aylmerton said at p 559:

> "If the legislation can reasonably be construed so as to conform with those obligations – obligations which are to be ascertained not only from the wording of the relevant Directive but from the interpretation placed upon it by the European Court of Justice at Luxembourg – such a purposive construction will be applied even though, perhaps, it may involve some departure from the strict and literal application of the words which the legislature has elected to use."

21. This approach is consistent with what the Court of Justice itself said in *von Colson and Kamann v Land Nordrhein-Westfalen* (Case 14/83) [1984] ECR 1891 with regard to Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment (OJ 1976 L39, p 40). In para 26 the court said that:

> "the member states' obligation arising from a Directive to achieve the result envisaged by the Directive and their duty under article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of member states including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically

> introduced in order to implement Directive 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in the third paragraph of article 189."

22. All of this is, of course, now very well known and it is common ground between the parties. Mr Linden QC for the appellants submitted, however, that there was no decision of the Court of Justice which prohibits the domestic court from doing other than applying its domestic law approach to interpretation in a case where there was no reason to be concerned that the domestic provisions fell short of what Community law requires. In *R (Hurst) v London Northern District Coroner* [2007] UKHL 13, [2007] 2 AC 189, para 52 Lord Brown of Eaton-under-Heywood said that the interpretative effect that Community law required was strictly confined to those case where, on their particular facts, the application of the domestic legislation in its ordinary meaning would produce a result incompatible with the relevant European Community legislation.

> "In cases where no European Community rights would be infringed, the domestic legislation is to be construed and applied in the ordinary way."

23. Mr Linden referred to two decisions of the Court of Justice that he said supported this approach to the construction of domestic legislation by national courts. They showed, he said, that it was open to national courts to adopt an interpretation of domestic legislation that had been designed to give effect to the result sought to be achieved by a Directive that was more favourable than that indicated by the Directive itself.

24. In *Katsikas v Konstantinidis* (Joined Cases C-132/91, C-138/91 and C-139/91) [1992] ECR I-6577 the court was asked to consider a provision in article 613a(1) of the German Domestic Code which had been held by the German Labour Court to have the effect of preventing a transfer of the employment relationship where one of the employees had objected to the transfer of his employment by the business in which he was employed. Provisions to the same effect are now to be found in regulations 5(4A) and 5(4B) of TUPE. The question was whether the words "laws, regulations or administrative provisions" in article 7 of the Directive, which enable Member States to introduce laws which were more favourable to employees than the Directive, covered more favourable interpretations of measures of that kind given by national courts. The court said in paras 39 and 40 that it had been consistently held that the scope of national laws, regulations and administrative provisions had to be assessed having regard to the interpretation given to them by the national courts and that the expression used in

article 7 must be understood as referring to those measures as they are interpreted by the courts of that state.

25. In *Criminal Proceedings against Lindqvist* (Case C-101/01) [2004] QB 1014 questions had been referred to the Court of Justice as to whether Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data was compatible with the general principles of freedom of expression and whether national rules might be introduced that were more restrictive than the Community provisions. As to the first point, the court said in para 85 that it was at the stage of the application at national level of the legislation implementing the Directive in individual cases that a balance must be found between the rights and interests involved. The courts of the member states had to make sure, however, that they did not rely on an interpretation which would be in conflict with the fundamental principles protected by the Community legal order: para 87. In paras 97-98 it said:

> "97 It is true that Directive 95/46 allows the member states a margin for manoeuvre in certain areas and authorises them to maintain or introduce particular rules for specific situations, as a large number of its provisions demonstrate. However, such possibilities must be made use of in the manner provided for by Directive 95/46 and in accordance with its objective of maintaining a balance between the free movement of personal data and the protection of private life.
>
> 98 On the other hand, nothing prevents a member state from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included within the scope thereof, provided that no other provision of Community law precludes it."

26. The question that these decisions give rise to are (1) whether regulations 5(1) and 5(2) of TUPE were designed to be more generous than article 3(1) of the Directive as interpreted by the Court of Justice in *Werhof* [2006] ECR I-2397, according to the respondents' reading of that decision; and (2) if not, whether it is open to the national court to construe regulation 5 of TUPE more generously because to do so is not precluded by article 3(1).

Was regulation 5 of TUPE designed to be more generous?

27. There is no doubt that in some respects TUPE was more generous to employees than the Directive. As already noted (see para 16, above), the Directive

did not apply to sea-going vessels. In *Castle View Services Ltd v Howes* 2000 SLT 696, however, the First Division of the Court of Session held that the crews of such vessels were not excluded from the benefit of the regulations: see also *NUMAST v P&O Scottish Ferries Ltd* [2005] ICR 1270. In *Transport and General Workers' Union v Swissport (UK) Ltd (in administration)* [2007] 1CR 1593 it was held that TUPE applied to transfers of undertakings in insolvency cases, whereas the Directive did not. TUPE did not adopt the one year maximum on the period for observing collective agreements after a transfer in regulation 6, as member states were authorised to do by the second paragraph of article 3(2). And regulations 5(4A) and 5(4B) introduced by section 33 of the Trade Union Reform and Employment Rights Act 1993, which enable employees to object to being transferred, are also more generous: *Katsikas v Konstantinidis v Stauereibetreib Paetz* [1992] ECR I-6577.

28. It is not possible, however, to detect anything in regulations 5(1) and 5(2) of TUPE that is so obviously more generous than what is to be found in article 3(1) of the Directive. Regulation 5(1) does say something that article 3(1) does not say in so many words. This is that a relevant transfer shall not operate so as to terminate the contract of employment, which shall have effect after the transfer as if originally made between the employee and the transferee. Article 3(1) leaves this to implication, concentrating as it does on the fundamental point that the transferor's rights and obligations arising from the contract shall, by reason of the transfer, be transferred to the transferee. This is the point that is picked up, admittedly in more elaborate language, in regulation 5(2)(a) and (b). The words "rights and obligations" are expanded to "rights, powers, duties and liabilities". But the expanded phrase does not encompass anything more than was caught by the words used in article 3(1). So there is in substance no difference. Regulation 5(2)(b) goes on to refer to things done in relation to the transferor before the transfer, which are deemed to have been done by or in relation to the transferee. But here too we find an expanded description of what is already captured by the words "rights and obligations" in article 3(1).

29. Mr Linden sought to find support for his argument as to the intention of Parliament from the fact that regulations 4(1) and (2) of the 2006 Regulations which came into force on 6 April 2006 were in almost the same terms as regulations 5(1) and (2) of TUPE. He submitted that, by re-enacting the equivalent provisions of TUPE, Parliament must be taken to have endorsed the interpretation that had been given to those provisions in *BET Catering Services Ltd v Ball* and *Whent v T Cartledge Ltd* (see para 7, above). I do not think that it is open to us to make that assumption. No reference to these authorities was made in the Public Consultation Document issued by the Employment Relations Directorate of the Department of Trade and Industry in March 2005 and none of the questions that were asked were addressed to this point. Furthermore, by the time the 2006 Regulations were laid before Parliament on 7 February 2006 the Advocate

General's opinion in *Werhof* [2006] ECR I-2397 was in the public domain. It was delivered on 15 November 2005, so anyone who was keeping an eye on what was being said about the effect of article 3(1) of the Directive would have been aware of the raising of the issue as to its limits by that time. The judgment in *Werhof* was promulgated on 9 March 2006, and the 2006 Regulations came into force on 6 April 2006. This timetable indicates that it would not be safe to infer that Parliament's intention was to do anything more than simply to give continuing effect to the Directive.

30. I think therefore that Rimer LJ summarised the situation correctly when he said that it seemed to him that the language of regulations 5(1) and (2) of TUPE sat harmoniously with that of article 3(1) and gave effect to it: [2010] ICR 793, para 56. In my opinion Parliament must be taken to have intended to do no more, when it was enacting regulations 5(1) and (2), than implement article 3(1) of the Directive. The same must be said of its intention when it was enacting the 2006 Regulations.

Is it open to the national court to interpret regulation 5 more generously?

31. I address this question on the assumption, whose soundness I will examine later, that the effect of the decision of the Court of Justice in *Werhof* [2006] ECR I-2397 is that the transfer of dynamic contractual rights was inconsistent with article 3(1) of the Directive.

32. It seems to me that Mr Linden's argument that it is open to the domestic courts to give regulations 5(1) and 5(2) of TUPE their ordinary meaning derives some support from what the Court of Justice said in the cases of *Katsikas v Konstantinidis* [1992] ECR I-6577 and *Criminal Proceedings against Lindqvist* [2004] QB 1014: see paras 24 and 25, above. Lord Keith's statement in *Litster v Forth Dry Dock & Engineering Co Ltd (In Receivership)* [1990] 1 AC 546, 554 that it is the duty of the court to give to regulation 5 a construction which accords with the decisions of the European Court upon the corresponding provisions of the Directive to which the regulation was intended by Parliament to give effect must be read subject to this qualification. It is open to the national court, as the Court of Justice said in para 98 of *Lindqvist*, to extend the scope of the national legislation implementing the provisions of the Directive to areas not included within its scope, provided that no other provisions of Community law preclude it. In the present context this means that it would be open to the national court to give regulations 5(1) and 5(2) their ordinary and natural meaning so long as there was nothing in *Werhof* that indicates that it is not open to it to do so.

33. Mr Lynch QC for Parkwood submits however that this is exactly what, in the light of the ruling in *Werhof*, the national court cannot do.

Werhof

34. Mr Linden submits that there are two main reasons why *Werhof v Freeway Traffic Systems GmbH & Co KG* [2006] ECR I-2397 is not to be read as having the effect of overruling the case law of the EAT as indicated by *Whent* [1997] IRLR 153. The first depends on the facts in *Werhof*. He submits that it was concerned with a different question from that which arises in this case, as it did not concern a term in the employment contract which incorporated terms and conditions as agreed from time to time by a collective bargaining body such as the NJC. The second is that in any event *Werhof* merely decided that the Directive did not require the transferred employees to be entitled to the benefit of subsequent collective agreements. It did not prohibit national law from being more generous to the employees, in accordance with our own domestic case law as to the effect of regulation 5 of TUPE.

35. Mr Werhof's terms of employment with his original employer were governed by a framework collective agreement and wages agreement in force at the material time for workers in the North Rhine-Westphalia metal and electrical industry negotiated between the trade union for the metal industry, of which he was not a member, and the metal and electrical Industry for North Rhine-Westphalia, of which the undertaking was a member: Advocate General, para 17; ECJ, paras 7 and 8. The Advocate General acknowledged that, under German employment law, a contract of employment may refer to other instruments such as collective agreements which have not necessarily been concluded by the contracting parties: para 30. These clauses act statically or dynamically, depending on whether they refer to a specific agreement which is in force or to the agreement applicable at any time to the undertaking or economic sector in which the business is conducted: para 32. Mr Werhof's agreement was of the dynamic kind. This was what gave rise to the problem with which his case was concerned.

36. As the Advocate General explained in para 33, the problem arose as to the legal effects of an agreement of that kind when the undertaking has been transferred, where the transferor was a member of the employer's federation with whom the union negotiated but the transferee was not and the collective agreement was replaced by another one after the transfer. The referring court, the Landesarbeitsgericht at Düsseldorf, was in doubt as to whether the right to participate in amendments made to agreements following the transfer was one of the rights that passed to the transferee under article 3(1) of the Directive. This was because, as the Advocate General explained in para 35,

> "in Germany, the Bundesarbeitsgericht (Federal Labour Court) has interpreted paragraph 613a of the BGB stating that, under the second sentence, the collectively agreed rules become a constituent part of the contract of employment with the content that they possess at the time when the business is transferred and subsequent amendments are not relevant, because a right to benefit from the advantages of further dynamic development in negotiation cannot be inferred, since the protection granted to the rights of workers is static; the Bundesarbeitsgericht, combining the first sentence of the provision with paragraphs 3 and 4 of the TVG [Law on Collective Agreements: Advocate General, para 10], also considers that subjection of workers to subsequent collective agreements cannot do without the subjection of the employer; otherwise, if the company were transferred, the position of the employees would depend on the concluding of an arrangement for parity of treatment."

The point that the Advocate General was making in the concluding part of this paragraph was that the system of collective bargaining that was in issue in that case was enforceable by statute, which required the employer to be a member of the employer's federation that was a party to the collective agreement. The only way the collective agreement could be rendered enforceable, if the statute did not apply to it, would be by entering into a contract which gave parity of treatment to the employee. Mr Werhof's contract of employment was not of that kind.

37. The first sentence of paragraph 613a(1) of the BGB provides that, where a business is transferred to another owner, the rights and obligations arising from the employment relationship "existing on the date of the transfer" shall pass to the owner. The second sentence provides that, where the rights and obligations are governed by the provisions of a collective or works agreement, they shall be incorporated into the employment relationship with the new owner and the employee. This was the provision that the Federal Labour Court had interpreted as having the effect that such agreements had the content that they possessed at the time when the business was transferred and that subsequent amendments were not relevant. The question that the case raised was whether this interpretation was precluded by article 3(1) of the Directive.

38. The Advocate General drew attention to the distinction between articles 3(1) and 3(2) of the Directive in paras 38- 43. Article 3(1) refers to clauses applying to individuals and article 3(2) to those stipulated in a collective agreement. Where the document concluded by the worker and the employer refers to a collective agreement on a matter such as wages it is governed by article 3(1) because it is included in an individual contract. But the collective provision to which the parties refer is governed by article 3(2). He drew attention too to the fact that the right to freedom of association under article 11 of the European

Convention on Human Rights includes the right not to join or to withdraw from an association: *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38; *Gustafsson v Sweden* (1996) 22 EHRR 409, para 45. In para 49 he observed that if the new owner wished to participate in agreements with the unions he would have to join the negotiating employer's federation which would curtail his freedom of association.

39. In paras 51-52 the Advocate General said that the right of a person acquiring an undertaking must prevail over any other of lesser importance, such as the right of the employee to the financial advantages arising from the development of the collective agreements signed by the transferor, otherwise the consequences would be similar to contracts imposing obligations on third parties in breach of the general principle pacta tertiis nec nocent. In para 53 he concluded that a dynamic interpretation of the clause in Mr Werhof's contract was inappropriate. He suggested that the Court of Justice should rule that it was not contrary to article 3(1) of the Directive if a transferee, who was not a member of an employer's federation which negotiates such agreements, did not apply collective agreements which had replaced the one which was in force at the time of change of ownership.

40. The Court of Justice was more guarded in its approach to the question whether the principle that contracts cannot impose obligations on third parties would be infringed. In paras 24 and 25 it noted that the Community legislature has sought to ensure that, on the transfer of an undertaking, employees enjoyed special protection designed to prevent the erosion which could result from the application of that principle. According to the case law of the court, the Directive was intended to safeguard the rights of employees by allowing them to continue to work for the new employer on the same conditions as those agreed with the transferor. The rights and obligations arising from a collective agreement to which the contract of employment refers were automatically transferred to the new owner even if the new owner was not a party to any collective agreement.

41. That having been said, however, the court found two reasons for holding that Mr Werhof could not maintain that his clause referring to collective agreements must necessarily be dynamic, so that by the application of article 3(1) of the Directive it referred to collective agreements concluded after the date of the transfer. The first was that account had to be taken of article 3(2), which contained limitations to the principle that the collective agreement to which the contract of employment referred was applicable. It showed that the object of the Directive was merely to safeguard the rights and obligations of employees in force on the date of the transfer, and was not intended to protect hypothetical advantages flowing from future changes to collective agreements: paras 28-29. The second was that, although the interests of the employees must be protected, those of the transferee could not be disregarded. If the dynamic interpretation were to be applied it would mean that the transferee's fundamental right not to join an association could be

affected, whereas that right would be fully safeguarded if the static interpretation were to be adopted: paras 31-35.

42. The Court concluded its judgment with a ruling in these terms, at para 37:

> ". . . Article 3(1) of the Directive must be interpreted as *not precluding*, in a situation where the contract of employment refers to a collective agreement binding the transferor, that the transferee, who is not a party to such an agreement, is not bound by collective agreements subsequent to the one which was in force at the time of the transfer of the business." [emphasis added]

Is a dynamic interpretation precluded by article 3(1)?

43. The Advocate General's summary of the facts indicates that the system under national law which applied in *Werhof* was different from that which formed the context for the appellants' contracts of employment with the council. Among other things, the German employment law with reference to which Mr Werhof's employment contract was framed assumes that the employer is a member of the employer's federation which is a party to the collective agreement and, in consequence, is bound by statute to comply with it: Advocate General, para 12; see also *Employment Law In Europe* 2nd ed (2009), paras 11.197-11.200. There is no such statutory obligation in our domestic law, nor is membership of the negotiating body a prerequisite for the enforceability of any agreement that has been reached collectively. It all depends upon what the parties have provided for in their individual contracts. There is therefore something to be said for Mr Linden's submission that the decision in *Werhof* is distinguishable on its facts, especially as to the point that the Court of Justice made in paras 31-35 of its judgment about the transferee's fundamental right not to be required to join an employer's federation.

44. The more important point of distinction for present purposes, however, is the second point on which Mr Linden relies: see para 34, above. The question which the Court of Justice addressed by its ruling in *Werhof* is not the same as that which requires to be answered in this case. It was sufficient to resolve the issue that had been raised by the referring court for it to say that the ruling of the Federal Labour Court summarised by the Advocate General in para 35 of his opinion was not precluded by article 3(1) of the Directive. In our case the question has to be looked at the other way round. This is because, as the Court of Justice recognised in *Criminal Proceedings against Lindqvist* [2004] QB 1014, para 98, there is nothing to prevent a member state from extending the scope of the national legislation implementing the provisions of the Directive to areas not included within it, so long as no other provisions of Community law preclude this. It would,

of course, not be open to the national court to adopt that approach if the effect of the Directive was that it was precluded by it. That is why the way in which the Court of Justice framed its ruling in *Werhof* does not answer directly the question that needs to be resolved in this case.

45. The absence of a direct answer to it would not have given rise to difficulty if it had been possible to infer from the judgment how the question would have been answered. Mr Lynch invited us to draw that inference, as his case is that the principle enunciated in the judgment is that the transfer of dynamic contractual rights is inconsistent with the Directive so regulation 5 of TUPE must be confined to static contractual rights. But it is not obvious, if it is open to the national courts to interpret legislation that was intended to give effect to the Directive more generously in favour of employees than the Directive itself envisaged, why this should be so.

46. The first of the two reasons for the court's decision, that the object of the Directive was merely to safeguard the rights and obligations of employees in force on the date of the transfer, would not seem to preclude a more generous interpretation if the national court thought that this was appropriate to give effect to the ordinary meaning of TUPE. There are various reasons for thinking that, when TUPE was originally being framed, it was thought that employment contracts such as those which the appellants entered into which provided for a dynamic approach to be taken to collective agreements were permitted by the Directive. The aim of the Directive was to promote approximation of laws among the member states, not their harmonisation. None of the recitals in the preamble refer to a need to balance protection for employers against the protection given to employees in the event of a change of employer. And it was stated in article 7 of the Directive that it was not to affect the right of member states to introduce laws which are more favourable to employees. It hardly needs to be said that the question whether *Werhof* precludes the dynamic approach, if this is indeed what the employment contract interpreted according to the principles of domestic law provides for, is of fundamental importance to the many employees who work in sectors where their terms and conditions of employment are commonly determined through collective bargaining.

47. The second reason for the court's decision was its finding that, when interpreting the Directive, account had to be taken of the principle of the coherence of the Community legal order which required secondary Community legislation to be interpreted in accordance with the general principles of Community law among which was that the right not to join an association or a union was protected in the Community legal order: paras 32-33. As I have already mentioned, this point was directly relevant in Mr Werhof's case because of the way German employment law deals with collective agreements. Our domestic law is entirely different. There is no equivalent statutory framework. The matter depends entirely on the domestic

law of contract, under which parties are at liberty to agree to abide by agreements arrived at by a process in which they do not, and are not required to, participate. Parkwood has not sought to argue that regulation 5 of TUPE is objectionable because it breached its article 11 Convention right of freedom not to join an association. There is no question of its being forced to become a member of one of the participants in the NJC. The appellants' contracts do not require this, and in any event it would not be eligible to do so.

48. In these circumstances, as I consider the answer to the question not to be acte clair, I would refer the issue as to whether article 3(1) of the Directive precludes national courts from giving a dynamic interpretation to regulation 5 of TUPE in the circumstances of this case to the Court of Justice of the European Union for a preliminary ruling under article 267 TFEU (ex article 234 EC). I would invite the parties to make submissions in writing within 28 days on the questions to be referred to the Court of Justice.