Neutral Citation Number: [2026] EWCA Civ 1161

Case No: CA-2025-002878

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM KING'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
His Honour Judge Bird
[2025] EWHC 1000 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 September 2026

Before:

LORD JUSTICE BEAN
Vice President of the Court of Appeal (Civil Division)
LORD JUSTICE COULSON
and
SIR LAUNCELOT HENDERSON

- -

Between:

ABC	**Appellant**
- and -	
(1) Huntercombe (no.12) Limited **(2) Active Young People Limited** **(3) Dr Veerraju Banisetti** **(4) Dr Mark Tattersall**	**Respondents**

- -
- -

Niazi Fetto KC, Peter Edwards & John Platts-Mills (instructed by **R James Hutcheon**) for the **Appellant**
Alexander Macpherson (instructed by **DAC Beachcroft**) for the **Second Respondent**
Jasmine Chan (instructed by **Medical Defence Union**) for the **Third Respondent**
Victoria Heyworth (instructed by **Medical Protection Limited**) for the **Fourth Respondent**

Hearing Date: 22 July 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8 September 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON:

Introduction

1. This appeal raises a potentially important point about the effect of Regulation 4(2)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (the "TUPE 2006 Regulations"). The issue is whether an employer's vicarious liability to a third party for the alleged torts of an employee passes to that employee's new employer on transfer.

2. In these proceedings, ABC claims damages arising out of her placement at Huntercombe Hospital in Maidenhead. Huntercombe Hospital was a privately run psychiatric facility. It was owned and operated by the first defendant ("Huntercombe"). In around March 2021, there was a transfer of undertaking for the purposes of the TUPE 2006 Regulations from Huntercombe to the second defendant, Active Young People Limited ("AYPL"). The third and fourth defendants (whom I shall refer to as D3 and D4) were at various times ABC's consultant psychiatrist and responsible clinician and the employees of Huntercombe and, following the transfer, AYPL.

3. ABC's claim alleges that, during her four month period at the hospital in 2018/2019, she was mentally and verbally abused by a large number of individual members of staff. She says that she was restrained on over 200 occasions. All the relevant events occurred before the transfer to AYPL. We are told that there are more than 50 similar claims brought by other claimants against the same parties which are to be considered at a case management conference in the autumn. This judgment has been produced with that timetable in mind, in the hope that it may assist with the case management of those claims.

4. Initially, ABC sued Huntercombe alone. It was then discovered that Huntercombe is in liquidation. Moreover, although Huntercombe has public liability insurance, ABC's representatives have been informed that there is a deductible of £250,000 per claim, which it is thought would wipe out most or all of ABC's claim for damages. In order to get round that unhappy concatenation of events, ABC has joined in the other three defendants. It is her case that AYPL is vicariously liable for the acts and omissions of D3 and D4, because that liability was transferred to AYPL by Huntercombe in March 2021. That case was rejected by HHJ Bird (sitting as a High Court Judge) ("the judge") in a judgment dated 24 April 2025 ([2025] EWHC 1000 (KB)). ABC seeks to appeal that decision with leave granted by Singh LJ on 20 January 2026.

The Legal Framework

5. It is common ground that the TUPE 2006 Regulations are materially identical to an earlier set of Regulations dating from 1981. Both the old and new TUPE Regulations derive from a European Council Directive, the Acquired Rights Directive of 14 February 1977, and its replacement, the Acquired Rights Directive of 12 March 2001. There is also no material difference between the two Directives, although I shall call the latter "the Directive" for the purposes of this judgment.

6. The preamble to the Directive noted that it is adopted on the basis that:

> "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".

7. Article 3.1 of the Directive provides:

> "The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of transfer shall, by reason of such transfer, be transferred to the transferee.
>
> Member states may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer."

When the TUPE Regulations were enacted in the UK, Parliament chose not to make the transferor and the transferee jointly and severally liable. Accordingly, in the UK, if a liability is passed to the transferee, the transferor's liability is extinguished. If it is not passed, the transferee has no relevant liability.

8. Turning to the TUPE 2006 Regulations, it is common ground that the transfer from Huntercombe to AYPL is "a relevant transfer" for the purposes of Regulation 3.

9. Regulation 4 of the TUPE 2006 Regulation lies at the heart of this appeal. It provides as follows:

> "Effect of relevant transfer on contracts of employment
>
> 4.—
> (1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.
> (2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—
> (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
> (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.
> (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.
> …
> (6) Paragraph (2) shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.
> (7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee."

This last sub-paragraph reiterates the point that the transfer of a contract of employment cannot happen without the consent of the relevant employee.

10. Whilst it is not necessary to set them all out, it is important to note that Regulations 5 and 6 are concerned, respectively, with the effect of a relevant transfer on collective agreements and the effect of a relevant transfer on trade union recognition. Regulation 7 is concerned with the dismissal of an employee because of a relevant transfer. Regulation 10 is concerned with pensions.

11. Regulation 11 sets out detailed requirements for the provision by the transferor of what is called "employee liability information". Regulation 11 is in the following terms:

> "**11.** - (1) The transferor shall notify to the transferee the employee liability information of any person employed by him who is assigned to the organised grouping of resources or employees that is the subject of a relevant transfer —
>
> (a)in writing; or
>
> (b)by making it available to him in a readily accessible form.
>
> (2) In this regulation and in regulation 12 "employee liability information" means—
>
> (a)the identity and age of the employee;
>
> (b)those particulars of employment that an employer is obliged to give to an employee pursuant to section 1 of the 1996 Act;
>
> (c)information of any—
>
> (i)disciplinary procedure taken against an employee;
>
> (ii)grievance procedure taken by an employee,
>
> within the previous two years, in circumstances where a Code of Practice issued under Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 which relates exclusively or primarily to the resolution of disputes applies;

> (d)information of any court or tribunal case, claim or action—
>
> (i)brought by an employee against the transferor, within the previous two years;
>
> (ii)that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee's employment with the transferor; and
>
> (e)information of any collective agreement which will have effect after the transfer, in its application in relation to the employee, pursuant to regulation 5(a).
>
> (3) Employee liability information shall contain information as at a specified date not more than fourteen days before the date on which the information is notified to the transferee.
>
> (4) The duty to provide employee liability information in paragraph (1) shall include a duty to provide employee liability information of any person who would have been employed by the transferor and assigned to the organised grouping of resources or employees that is the subject of a relevant transfer immediately before the transfer 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.
>
> (5) Following notification of the employee liability information in accordance with this regulation, the transferor shall notify the transferee in writing of any change in the employee liability information.
>
> (6) A notification under this regulation shall be given not less than 28 days before the relevant transfer or, if special circumstances make this not reasonably practicable, as soon as reasonably practicable thereafter.
>
> (7) A notification under this regulation may be given—
>
> (a)in more than one instalment;
>
> (b)indirectly, through a third party."

In addition, Regulation 12 sets out detailed remedies for a transferor's failure to notify the transferee of employee liability information.

The Judgment Below

12. The judge was tasked with deciding a number of preliminary issues as follows:

> "a. Is the effect of regulation 4(2) of the 2006 Regulations to transfer to the second Defendant any alleged vicarious liability of the First Defendant to the Claimant:
> i. for the alleged torts of any employee employed by the First Defendant immediately prior to the transfer date. [Preliminary Issue 1].
> ii. for the alleged breaches by any such employee of the Claimant's human rights? [Preliminary Issue 2].

b. If the answer to either issues 1 or 2 is "yes", is the effect of regulation 4(2) also to transfer to the Second Defendant any right that the First Defendant may have to indemnity by its public liability insurers in respect of the Claimant's claim for damages and costs and/or in respect of Defence Costs, arising from any such alleged vicarious liability? [Preliminary Issue 3]."

13. It was and is common ground that Preliminary Issues 1 and 2 fall to be answered in the same way (in other words, there is no distinction between the alleged torts and any breach of ABC's human rights). The judge answered the first two Preliminary Issues in the negative. If he was wrong about that, he answered Preliminary Issue 3 in the affirmative. The appeal is based on the proposition that the judge's answers to Preliminary Issues 1 and 2 were wrong.

14. Before the judge, and again on appeal, Huntercombe, D3 and D4 have adopted a neutral stance on Preliminary issues 1 and 2. Thus the dispute lies between ABC, who submits that AYPL was fixed with the necessary liability because it was transferred, and AYPL, who say it was not.

15. Having set out at [5]-[8] of his judgment the relevant legal framework, the judge then turned to address the issues. Most of the rest of his judgment is concerned with a review of the authorities (see [14]-[50]). This was despite the fact that there was only one case directly concerned with the transfer of vicarious liability to a third party, namely *Doane v Wimbledon FC* [2007] 12 WL UK 2 ("*Doane"*). Moreover, the judge noted that that was a county court decision which he was not bound to follow and, for the reasons he gave, he did not do so.

16. The reported cases did, however, deal with the interplay between the Directive and the Regulations more generally. The judge's analysis and conclusions, although short, relied upon them as follows:

> "52. In my judgment the decided cases show:
>
> a. The connection between the liability of a transferor and the contract must be direct, in the sense of being a liability the transferor has to an employee if the liability is to transfer; and
>
> b. if the transferor has a vested (or contingent) right against a third party which arises purely as a result of such a liability, that right will also transfer.
>
> 53. In the present case, if the transferor has any real "liability" at all, it is not owed to its employee. It follows that the connection is too remote. The relevant "direct" liability here is the liability of the employee to the third party. The only liability that attaches to the transferor ("*a blameless employer*") is the secondary (or indirect) no-fault liability "…. *for a wrong committed by his employee*".
>
> 54. The cases describe those liabilities that are sufficiently closely connected to the contract as "fundamental" parts of the employer/employee relationship (see *Wilson v Clyde Coal* and the example *Baker v British*

> *Gas*). This can be compared to descriptions of vicarious liability as a doctrine without any "*coherent or agreed jurisprudential underpinning*"."

17. In consequence, the judge found that the connection between the transferor's liability and the contract of employment had to be direct, in the sense of being a liability that the transferor had *to an employee*. The vicarious liability of the employer to a third party did not fall within that category and was therefore outside the scope of the transfer. He therefore answered Preliminary Issues 1 and 2 in the negative. At [57] he said that if he had been wrong about them, he would have found, under Preliminary Issue 3, that the transferor's right to claim on an insurance policy in respect of such matters would also transfer. In this way, the judge's answer to Preliminary Issues 1 and 2 became critical.

The Parties' Submissions

18. It is unnecessary to set out the submissions of the parties at any great length, although I pay tribute to the clear and unfussy way in which both Mr Fetto KC and Mr Macpherson set out their arguments. Where particular issues were raised on either side, I have endeavoured to deal with them in the course of my analysis of the proper construction of Regulation 4(2)(a). For present purposes, therefore, a general summary of the respective submissions will suffice.

19. On behalf of ABC, Mr Fetto said that the court had to start with the ordinary and natural meaning of the critical phrase in Regulation 4(2)(a), namely "liability…in connection with" the contract of employment. He said that an employer was vicariously liable for acts and omissions on the part of the employee that occurred during the course of their employment. The harm had to flow from an act and omission which was closely connected to the course of their employment. Vicarious liability was therefore a liability which arose "in connection with" the contract of employment. He stressed the width and breadth of the expression "in connection with".

20. Furthermore, he said that there was clear authority that an employer's direct liability to his employee for (for example) failing to provide a safe system of work was plainly a liability that passed on transfer. If that liability passed, it made no sense for the employer's vicarious liability for an employee's acts and omissions not similarly to pass on transfer.

21. Although he focussed on Regulation 4(2)(a), he was at pains to submit that his construction of the Regulation was not inconsistent with the Directive, and he advanced various arguments in support of the proposition. Indeed, he maintained that his construction was more consistent with the Directive than that argued by Mr Macpherson.

22. On behalf of AYPL, Mr Macpherson said that the starting point was the Directive. He said that the law was plain: in construing any domestic legislation that derived from an EU Directive, the words were secondary and the court had a wide latitude to ensure that any construction was in accordance with the aim and purpose of the Directive.

23. He said that the purpose of the Directive, as emphasised in the subsequent authorities, was the safeguarding of the rights of employees on transfer. He submitted that the

focus was on the obligations owed by the transferor to the employee which could be enforced by the employee. There was nothing in the Directive, and nothing in the Regulations, which suggested that their purpose was concerned with the enforcement of the rights of third parties against the employer. That was not what the Directive and the Regulations were all about. Accordingly, he said that, however the words were precisely construed, they could not encompass the passing from Huntercombe to AYPL of Huntercombe's vicarious liability to ABC for the acts and omissions of D3 and D4.

24. I should note that both Mr Fetto and Mr Macpherson spent some time drawing analogies with other hypothetical situations, a process designed to demonstrate that the other side's construction would have anomalous or complex consequences and that their own was more straightforward. Speaking for myself, I did not find those parts of the submissions particularly helpful, and I only refer to one or two of these points in the remaining parts of this judgment. That is primarily because the TUPE 2006 Regulations, and the Directive from which they stem, are expressly designed to modify and disturb what the conventional legal position would otherwise have required. That was an understandable, indeed laudable intent, but it means that there will always be potential anomalies, and an inevitable degree of complexity, when considering their effect. As Mr Fetto properly accepted during his oral submissions, complexities were "unavoidable". It is impossible for one size to fit all. In my view, that is the case whichever party succeeds on their construction of Regulation 4(2)(a).

The Correct Starting Point and Its Importance

25. Any UK legislation derived from an EU Directive must be construed by reference to that Directive. Thus, the TUPE 2006 Regulations must be interpreted, so far as possible, in the light of the wording and purpose of the Directive, in order to achieve an outcome that is consistent with the objective pursued by the Directive (see *Schulte Deutsche Bausparkasse Badenia AG* [Case C-0350/03) [2003] All ER (EC) 420, at [71]). Plainly, that cannot be done until the purpose and objective of the Directive have first been ascertained.

26. In the authorities to which we were referred, when the TUPE Regulations were being construed, the courts went first to the Directive to identify its purpose, then turned to the Regulations. So in *Swift (Trading as AS Swift Move) v Robertson* [2014] UK SC 50 ("*Swift*"), Lord Kerr looked first at the Directive to ascertain its purpose ([23] – [29]) and then turned to a purposive construction of the Regulations ([30] – [33]). Similarly, in *Martin v Lancashire County Council & Bernadone v Pall Mall Services Group Limited & Ors* [2001] ICR 197 ("*Bernadone*"), Peter Gibson LJ started with the Directive at [34], and went to the Regulations thereafter at [35].

27. Starting with the Directive, not the Regulations, and ascertaining the purpose of the Directive, is therefore the appropriate first step in the analysis. It also has potentially significant consequences. As Sir Andrew Morritt C set out in *Vodafone 2 v Revenue and Customs Commissioners* [2010] Ch 77, at [37] – [38], the obligation on the English courts to construe domestic legislation consistently with Community law obligations was both broad and far reaching. In particular, he said:

(a) It was not constrained by conventional rules of construction;

(b) It did not require ambiguity in the legalistic language;

(c) It was not an exercise in semantics or linguistics;

(d) It permitted departure from the strict and literal applications of the words which the legislature had elected to use;

(e) It permitted the implication of words necessary to comply with Community law obligations;

(f) The precise form of the words to be implied does not matter.

28. In addition, the Chancellor noted that the only constraints on the broad and far-reaching nature of that interpretative obligation were that the meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed". Those principles were expressly endorsed by the Supreme Court in *Swift.*

29. Accordingly, contrary to Mr Fetto's submissions, which relied principally on what he called the ordinary and natural meaning of Regulation 4(2)(a), and only latterly referred to the Directive, I start my analysis with an ascertainment of the purpose and objective of the Directive.

The Purpose/Objective of the Directive

30. I have set out the relevant parts of the Directive at paragraphs 6 and 7 above. The key element of the preamble is its definition of its objective: "the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded." Thus the primary purpose of the Directive is to ensure that the rights of employees are safeguarded in the event of a change of employer.

31. That is how the Directive has been treated in the authorities. In *British Fuels Limited v Baxandale* and *Wilson v St. Helens Borough Council* [1999] 2 A.C.52 ("*Wilson")* at 83H-84A Lord Slynn said:

> "In my opinion, the overriding emphasis in the Court of Justice's judgments is that the existing rights of employees are to be safeguarded if there is a transfer. That means no more and no less than that the employee can look to the transferee to perform these obligations which the employee could have enforced against the transferor."

32. More recently, in ("*Bernadone*") at [34] Peter Gibson LJ said:

> "On the first issue, I start with Directive 77/187. It is clear that its purpose is to safeguard the rights of employees on a change of employer by a transfer of an undertaking. The economic entity carrying on the undertaking after the transfer will be the transferee, and in general the employees are most likely to be protected if the rights and obligations to be transferred are more rather than less comprehensive. But such rights and obligations

> must of course fall within the limiting words "arising from a contract of employment or from an employment relationship""

Accordingly, I consider that the purpose and objective of the Directive, to safeguard the rights of employees on transfer, is well-settled.

33. In answer to a question from the court, Mr Fetto properly conceded that an employee – in this case, D3 and D4 – had no relevant *right* against the transferor in respect of the transferor's vicarious liability to a third party claimant (in this case, ABC). Instead he relied on the words "protection of employees" which can also be found in the Preamble to the Directive, acknowledging that the protection arose "in practice, if not in law". I address those submissions below. But since there can be no doubt that the primary ("particular") purpose of the Directive expressly concerns employees' rights, it seems to me an important starting point in this case to note that no relevant *right* is asserted on which ABC can or does rely in support of the argument that the liability was transferred to AYPL.

34. By reference to *ISS Facility Services NV v Govaerts and another* [2020] I.C.R 115 at [26], Mr Macpherson was at pains to point out that the Directive had a secondary purpose, namely the striking of a fair balance between the employee's rights and those of the transferee. I accept that that is a part of the purpose of the Directive, although the more important point perhaps is that this need for the protection of the transferee was expressly reflected in the TUPE 2006 Regulations themselves, in particular those regulations concerned with the provision of information about employee claims to the transferee before transfer, and sanctions for the transferor if they failed to comply.

35. Having identified the primary purpose of the Directive, I turn to the Regulations in order to construe them in the way identified in *Swift* and *Vodafone 2*.

<u>The Proper Construction of the TUPE 2006 Regulations</u>

36. The key words in Regulation 4(2)(a) are:

> "All the transferor's…liabilities under or in connection with any such contract (of employment of any person employed by the transferor) shall be transferred…"

37. The first point to note is that these words are potentially very wide. They refer to "all the transferor's liabilities", not just some. "Liabilities" is not expressly qualified in any way. Furthermore, it is all liabilities "under or in connection with" the contract of employment. It is trite law that the expression "in connection with" can convey the widest possible type of connection: in *Ashville Investments Ltd v Elmer Contractors Ltd,* [1989] 1 QB 488, Balcombe LJ said they were words "of the widest import". It is easy to see why Mr Fetto relied on them so heavily.

38. However, the potential width of the phrase also explains why, in *Coventry Waste Limited v Russell* [1999] 1 WLR 2093 at 2103, Lord Hope said that, when confronted with this expression, the court should look closely at the surrounding words and the context of the legislative scheme in order to work out the degree of connection intended. He said:

> "The majority in the Court of Appeal held that it was a sufficient answer to the appellant's argument to construe the words "in connection with" as meaning "having to do with". This explanation of the meaning of the phrase was given by McFarlane J in *Re Nanaimo Community Hotel Limited* [1944] 4 D.L.R. 638. It was adopted by Somervell L.J. in *Johnson v. Johnson* [1952] P. 47, 50-51. It may be that in some contexts the substitution of the words "having to do with" will solve the entire problem which is created by the use of the words "in connection with." But I am not, with respect, satisfied that it does so in this case, and Mr. Holgate did not rely on this solution to the difficulty. As he said, the phrase is a protean one which tends to draw its meaning from the words which surround it. In this case it is the surrounding words, when taken together with the words used in the 1991 Amending Order and its wider context, which provide the best guide to a sensible solution of the problem which has been created by the ambiguity."

39. Having cited that passage in her judgment concerned with the same phrase, Arden LJ (as she then was) in *Barclays Bank PLC v HMRC* [2007] EWCA Civ 442 at [19] said that the others parts of the definition of "relevant benefits" (the particular subject of the link in that case), and the surrounding provisions of the legislative scheme will inform the court "as to the extent of the link required by any particular provision".

40. There was agreement between counsel in the present case that there had to be some limits on the type and nature of the connection referred to in Regulation 4(2)(a): as Mr Fetto put it during his oral submissions, "not every connection suffices". But he argued that there was plainly sufficient connection between the vicarious liability and the contract of employment, primarily because, for the transferor to be vicariously liable for the acts and omissions of the employee, those acts and omissions would have to have a close connection to that contract of employment. As Lord Nicholls put it in *Majrowski v Guy's and St Thomas's NHS Trust* at [25], vicarious liability arises "only if the new wrong is committed by the employee in the course of his employment". By contrast, Mr Macpherson said that, by reference to the purpose of the Directive, and the content of the Regulations as a whole, there was no connection at all between the transferor's vicarious liability owed to ABC (a third party), and the safeguarding of the rights of D3 and D4 on transfer.

41. I propose to set out my analysis of the construction of Regulation 4(2)(a) first, and then go on to see whether that conclusion is contradicted by any of the other authorities to which we were referred, acknowledging that none of those authorities, with the exception of *Doane*, dealt expressly with the issue of vicarious liability.

42. I have concluded that Huntercombe's vicarious liability to the third party, ABC, did not pass on transfer to AYPL, and remained with Huntercombe. I therefore agree with the result identified by the judge. There are a number of reasons for that conclusion.

43. First, I consider that, given the purpose and objective of the Directive, Regulation 4(2)(a) does not extend to liabilities owed by the transferor to third parties. The primary purpose of the Directive is to safeguard the rights of employees: it is, after all, the Acquired *Rights* Directive (my emphasis). It is designed to ensure that an employee can enforce those rights against the transferee as if they were the transferor: see paragraph 31 above. As I have said, in the present case, it is accepted that vicarious

liability gives rise to no right that an employee could enforce against the transferor or transferee.

44. In my view, that concession is rightly made. An employee has no *right* to his employer being vicariously liable for his acts and omissions. The vicarious liability of an employer to a third party (who suffers loss and damage as a result of the acts and omissions of the employee) is a secondary liability, parasitic always on the direct liability of the employee to the third party. Vicarious liability is simply a legal construct: a convenient way in which a claimant can seek to recover damages against an employer who is likely to be better funded and perhaps more willing to settle than a negligent employee.

45. Secondly, whilst I acknowledge that the *protection* of employees is also referred to in the Directive, and that that might be regarded as being potentially wider than the *rights* of employees, I do not see that it can make any difference in substance to the outcome of this issue. As a matter of law, as Mr Fetto acknowledged, the employer's vicarious liability provides the employee with no legal protection. On these facts, ABC can make a claim based on vicarious liability against Huntercombe. The relevant employees (in this case D3 and D4) are not *protected* against or by the making of such claim. Huntercombe's liability is a secondary liability, parasitic upon their primary liability to ABC for their alleged negligence. A defendant who is primarily liable for a claim for damages is not protected merely because another defendant may have a secondary liability for the same default.

46. Contrary to Mr Fetto's submissions, I consider that vicarious liability gives no protection in practice either. An employee is not entitled to expect his employer to bear the brunt of any claim brought by a claimant arising out of his or her acts and omissions. On the contrary, pursuant to *Lister v Romford Ice and Cold Storage Co. Limited* [1957] A.C. 555, the employer is entitled to recover from the employee a full indemnity for any damages which the employer is obliged to pay out to a claimant as a result of his vicarious liability for the negligence of that employee. That principle, although not free from controversy, was recently restated without qualification by the Supreme Court in *Lifestyle Equities CV v Ahmed* (SC) [2025] A.C. 1 at [36]. Moreover, even if the employer's entitlement to a *Lister* indemnity was open to question, it is hard to see what answer an employee would have to a contribution claim for 100% from his or her employer under the Civil Liability (Contribution) Act 1978. The employer would say that the employee, if sued by ABC, would be liable for the same damage, because it is damage wholly caused by the employee.

47. Mr Fetto sought to stress that, in the real world, an employee will shelter behind a claim against the employer, and may not even be sued at all. But that all depends on happenstance: who the claimant decides to sue, what financial resources the employer has, what independent financial resources the employee may have, and the attitude taken by the respective insurance companies.

48. Mr Fetto also argued that, on my analysis, AYPL (the transferee) would have the contractual right to the *Lister* indemnity, but the liability to which that indemnity related would remain with Huntercombe. He said that that was absurd, and that the liability and the indemnity should pass together. I am not sure his basic premise is right. The employee is liable to indemnify his employer at the time of the negligent acts: that would be, on this hypothesis, Huntercombe. It is difficult to see how D3 and

D4's liability to indemnify Huntercombe passed to AYPL with their contracts of employment, since AYPL would not be vicariously liable for events that occurred before the transfer of the undertaking. But even if it was, for the reasons I set out in greater detail below, it cannot mean that a liability to a third party, unheralded in the Directive or the Regulations, must automatically pass too. In any event, even if the indemnity passed but the liability did not, it makes no difference, because of Huntercombe's entitlement to a 100% contribution from the employees.

49. These strands of the analysis only support the proposition that the vicarious liability of an employer is a legal construct which may sometimes assist a third party claimant, but has no substantive effect upon the position of the employee in question. That employee is in ultimately the same position, whether he or she is sued by a claimant directly, or obliged to indemnify their employer for all sums paid out to the third party.

50. In some ways, Mr Fetto's submissions as to protection echoed what Judge Robinson said in *Doane*, that it was plainly a very real benefit to the employee to know that his new employer (the transferee) would be taking care of all matters pertaining to the defence of a claim arising out of alleged negligence in connection with his employment. *Doane* was plainly a strong case on the facts, persuasively argued by counsel. But the central flaw in Judge Robinson's reasoning is that he nowhere grapples with the underlying issue, namely that a negligent employee had no *right* in respect of the transferor's vicarious liability for his acts and omissions, and therefore no such right could be transferred. Also, for the reasons that I have explained, the alleged "benefit" of an employee looking to the protection of the employer is not sound in law: on the contrary, it is the employer who is entitled to an indemnity from the employee.

51. The third reason why I have concluded that vicarious liability is not transferred is that, in accordance with the principles noted at paragraphs 37 - 40 above, the protean phrase "in connection with" has to be read in the light of the purpose of the Directive. If – as is agreed – not every connection suffices, then what is the driver for the relevant connection in this case? In my view, it has to be the purpose of the Directive. So, because the employer's vicarious liability to a third party does not give rise to a right on the part of the employee under the contract of employment and forms no part of the employer's protection of the employee under that contract, the transferor's vicarious liability to a third party does not arise in connection with his or her contract of employment, and so does not pass under Regulation 4(2)(a).

52. Fourthly, Regulation 4(2)(a) must also be read in the context of the Regulations as a whole. As set out in Regulation 11 (paragraph 11 above), those Regulations expressly identify what liabilities are passed on. They are in essence the liability that the transferor has for claims made against it by its employees. Regulation 11 sets out detailed provisions in which information about those claims is passed from the transferor to the transferee. There are even sanctions if that information is not provided, as set out in Regulation 12. In this way, Parliament intended that the transferee would know in advance about those claims for which they would be assuming liability, so they could act accordingly. Such information might affect the price paid by the transferee or, if there are significant claims, whether the transfer happens at all.

53. By contrast, there is nothing in the Regulations which addresses claims which had been or may be made against the transferor by third parties. If Parliament had intended that a transferee would be liable for third party claims for vicarious liability, the same or similar provisions to Regulations 11 and 12 would have been necessary in order to protect the transferee. Otherwise the transferee has no idea what it is taking on. The absence of such provisions is not, in my judgment, an omission, but the end result of deliberate policy. The Directive makes no mention of claims by third parties, and neither do the Regulations. Thus they fall outside the scheme of both.

54. This is not just idle speculation. If there are over 50 claims of this type for which, on ABC's analysis, AYPL are now liable, they might be worth millions of pounds. Yet AYPL had no entitlement under the Regulations to know anything about them at all (not even their existence) when they agreed to the transfer. There could be no policy justification for such a blatantly unfair arrangement, particularly when it is compared to the meticulous detail which the transferor has to provide about claims brought against it by its own employees.

55. In addition, other parts of the Regulations confirm that what really matters are the employee's rights against the transferor being safely transferred to the transferee. That explains Regulations 5 and 6, concerned with collective bargaining and trade union recognition. It also explains Regulations 7 and 10 concerned respectively with dismissal and pensions. The entire focus of the Regulations is on the employee's enforceable rights.

56. This is perhaps a convenient moment to deal with Mr Fetto's subsidiary argument that, since one of the justifications for the doctrine of vicarious liability is that it can act as a deterrent to an employer and to maintain or improve standards of good practice, transfer of such a liability under Regulation 4(2)(a) should not be lightly dismissed. That is, of course, correct as far as it goes. But given that, on this hypothesis, the employer will have changed (from Huntercombe to AYPL) the point has no real force. The old employer no longer has any relevant interest in ongoing working practices, and a new employer is bound to have different practices anyway.

57. Fifthly, just standing back from the detail and looking at the position in the round, it is counter-intuitive to conclude that a third party can bring claims against the transferee, about events which happened before the transfer, and about which the transferee would know nothing and about which it would have no right to know anything. That is particularly so where such a claim could only be made by a third party relying on the off chance that there had actually been a transfer. As Mr Macpherson correctly pointed out, ABC's entire case turned on the fact that, because of a transfer that was wholly unrelated to ABC, that transfer has given her the chance to pursue AYPL in circumstances where, had the transfer not happened, there could be no claim against them. Moreover, I consider that a third party's ability to make a claim against a transferee with no relevant involvement in, or responsibility for, the actual events that gave rise to the claim, would need some clear permissive wording somewhere in the Directive or the Regulations, because it would otherwise be so at odds with ordinary legal principle. There is none, and no policy grounds which could begin to justify such an arbitrary outcome.

58. For the avoidance of doubt, therefore, I conclude that the meaning ascribed to Regulation 4 by Mr Fetto, that the transferor's vicarious liability owed to a third party

is transferred to the transferee, is inconsistent with the purpose of the Directive. Insofar as it makes the transferee liable for something it had no way of knowing about and no entitlement to know anything about under the Directive and the TUPE 2006 Regulations, I consider that it is contrary to both.

59. I make clear that I do not criticise ABC or her advisors for seeking to make her claim in this way: after all, on her case, ABC has suffered loss and damage for which, through no fault of her own, she may not be able to recover damages. But I conclude that Mr Macpherson was right to say that, in all the circumstances that I have outlined, this must be regarded as an opportunistic claim.

The Other Authorities

60. All that remains now is for me to check whether any of the authorities to which I have not yet referred point to a different conclusion.

61. The first, and perhaps most important, point to note about the other authorities is that, although the TUPE Regulations have existed in this form for over forty years, save for *Doane*, it is has never been suggested that they can be used by a third party claimant to extend liability to the transferee for his or her claim. That omission is significant. If such a claim was sustainable, one would have expected to see high authority in support of that principle, either from the CJEU, or from the domestic courts. There are no such cases.

62. The only other authority concerned with vicarious liability is *Baker v British Gas Services (Commercial) Limited* [2017] EWHC 2302 (QB); [2018] P.I.Q.R. P3, a decision of Amanda Yip QC (as she then was). This was a case where the employer's vicarious liability for the wrongdoing of its employees, which caused injury to another employee, was transferred to the transferee. Details of that claim would have been part of the information required to be provided to the transferee by the transferor, before the transfer, under Regulation 11.

63. In this way, the result in *Baker* is entirely consistent with my interpretation of Regulation 4(2)(a), when read in the light of the purpose of the Directive. This was a liability that the transferor had to the employee who was injured; the employee had a right to make the claim against the transferor, which right was protected/safeguarded by being transferred as a right to claim against the transferee. It was a liability and a right arising in connection with his contract of employment, and so was a liability that was transferred to the transferee.

64. *Bernadone* can be seen as a relatively straightforward pair of cases where claims by an employee injured at work based on the employer's own negligence (a failure to provide a safe system of work etc) were held to be claims which were transferred to the transferee. Again that is consistent with my reading of the Regulations: liabilities were owed directly to the employees by the employer, and therefore arose in connection with the contract of employment. The provision of relevant information to the transferee about those liabilities would again be covered by Regulation 11.

65. Despite Mr Fetto's submissions to the contrary, I do not accept that the employer's obligation to the employee to provide a safe system of work was akin to – and could be categorised together with - the vicarious liability owed to a third party. Those may

be the two most obvious ways in which an employer finds itself paying out damages, but they are entirely different in nature. One is a liability owed to the employee, and is therefore transferred under the TUPE 2006 Regulations; the other is a liability to a third party, which, for the reasons that I have given, is not transferred.

66. Moreover, the fact that in *Bernadone*, it was found that the employee had a related claim against the employer under the Occupier's Liability Act, which was also transferred, is not a point in ABC's favour: it is the inevitable consequence of the employee's claims in *Bernadone* arising in connection with the contract of employment. Peter Gibson LJ explained at [35] why "in connection with" was much wider than claims *under* the contract and was not therefore limited to purely contractual rights and liabilities. That analysis was the same as that of Balcombe LJ in *Ashville v Elmer* where he found that the claims for rectification and misrepresentation did not arise *under* the building contract, but plainly arose "in connection with" it.

67. Neither is there anything in the fact that in *Bernadone* it was found that the claim against the insurers was also transferred: if the claim was transferred, then so too were the means of enforcing it. The insurers were third parties to the contract of employment, but their involvement was triggered by the employee's right to claim against the employer; unlike ABC, they were not third parties bringing a claim against the employer.

68. At one point during the hearing of this appeal, a point arose as to what Peter Gibson LJ said at [37]-[39] in *Bernadone* about fundamental obligations in a contract, and the precise meaning of "in connection with". The judge referred to this at [54]. In my view, it is unnecessary for the purposes of this judgment to go into that debate. In the present case, Huntercombe had no obligation at all – whether fundamental or otherwise – to D3 and D4 to be vicariously liable for their acts or omissions, and they had no right or protection in that regard. So, any attempt to distinguish between ordinary and fundamental obligations of a contract of employment is unnecessary in this case, and if I may be permitted to say so, I consider that such distinctions potentially obscure rather than illuminate.

69. An older case, *Alamo Group (Europe) Ltd v Tucker* (EAT) [2003] ICR concerned whether Regulation 5(2) of TUPE 1981, which was drafted in materially the same terms as Regulation 4(2), had the effect of transferring to the transferee the duties and liabilities imposed on the employer under Regulations 10 and 11. In that case the transferor had failed to consult with its employees, as required by Regulations 10 and 11. The Court held that the language of Regulation 5 was very wide: while there must be a contract of employment that established the relationship, the specific transferred obligation need not arise from the contract. The Regulations have a twofold purpose: first, to protect employees on a transfer; and secondly, the recognition that this is generally best achieved by a transfer of rights. Accordingly, as the rights provided for by Regulations 10 and 11 were connected with the contract of employment, they were deemed to have transferred to the transferee.

70. *Alamo* therefore again confirms my analysis that Regulation 4 is concerned primarily with the rights of the employee. That was also the view of the court in a case from the same year concerned with old age pensions, *Beckmann v Dynamco Whicheloe Macfarlane Ltd* (ECJ) [2003] ICR 50.

71. It is not, I think, necessary to refer to any of the other authorities in the bundles, which were even further away from the facts of the present case. In my view, all the authorities point the same way.

Conclusions

72. For the reasons that I have given, I consider that the judge's answer to Preliminary Issues 1 and 2 was correct. ABC cannot use provisions that were designed to safeguard the rights of employees to make a claim which would not otherwise be open to her, in circumstances where there are no relevant rights at all.

73. The judge chose to achieve that goal by construing the words as referring to "a direct liability in the sense of being a liability the transferor has to an employee". I consider that the word "direct" may be imprecise and could lead to argument, although it might be said to flow from Lord Slynn's "no more and no less" comment in *Wilson*. In my view, it is better simply to say that the liabilities referred to in Regulation 4(2)(a) do not extend to the transferor's vicarious liability to third parties for the acts and omissions of employees prior to transfer.

74. If my Lords agree, I would therefore dismiss this appeal.

SIR LAUNCELOT HENDERSON

75. I agree.

LORD JUSTICE BEAN (VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION)

76. I also agree.