

**Restructuring, Business
Sales and Employer
Insolvency: Managing the
changes and avoiding
adverse consequences**

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Guildhall
CHAMBERS

Agenda

1: Restructuring and Business Sale

2: Employer insolvency

3: Q&A



Restructuring and Business Sales

Debbie Grennan

What is a business restructure?

In simple terms:

The reorganising of the legal, ownership, operational or other structures of a business, usually with the aim of making it more profitable or better organised to meet its current and/or future business needs.

Why Restructure?

- Expansion
- Downsizing
- Diversifying
- Improve profitability / efficiency
- Improve corporate structure / governance
- Tax efficiency
- Financial pressures / debts
- Avoid insolvency



Types of Business Restructure

- **Corporate** – putting in place a more suitable or otherwise changing the corporate structure in some way (eg mergers, amalgamations, acquisitions, revising corporate group structures)
- **Financial / Capital** – reorganising the business`s financial structures (eg as between equity capital / debt capital)
- **Operational** – changes to operational structures to improve operational performance / profitability

A single restructuring exercise can involve one or a combination of these.

Underlying business decisions

- Keep the whole
- Keep part
- Acquire new
- Sell (shares / assets)
- Liquidate / dissolve (voluntary / involuntary)



Restructures - The Key Distinction

- Restructures which are wholly internal to a business
- Restructures which, in some way, involve third parties

Consultation requirements

Employers may be obliged to inform and consult with employees pursuant to:

- TUPE
- TULRA (collective redundancies)
- ICER (SI 2004:3426)



Purely Internal Restructures

- Potential scenarios of organisational restructuring are obvious
- Potential redundancy situation(s)
- Possible collective consultation requirements under TULR(C)A (s.188)
- Fair redundancy process requirements (ERA)
- Changes to terms and conditions of employment
- Impact on morale
- Impact on customer / market confidence
- Short term pain for long term gain

Restructures involving third parties

Potential scenarios are varied: egs -

- Corporate / governance restructures
- Acquisition or merger
- Sale of whole or part
- SPC (in or out)
- Voluntary arrangements / agreements with creditors
- Administration – pre packs, rescue deals, liquidation, etc

Sales of Shares v Sales of Assets

Share Sales

- The transaction is between the investor and the business owner, not with the company
- The owner is paid personally
- The investor effectively steps into the shoes of the original owner



Asset Sales

- The transaction is between the investor and the business
- Payment is made to the business, not to the business owner
- What does change is the business`s balance sheet, with the asset account being adjusted accordingly and the balancing transaction being the payment.
- Where 100% of the assets are sold, the business is still owned by the original owner but is simply a shell (holding the liabilities plus the payment received for the assets it previously held).



Share Sales

- Key issue – does TUPE apply?
- TUPE requires a change of employer
- A change in the legal control of a corporate employer (eg on a share sale) does not amount to a transfer because there is no change in the identity of the employer - the company remains the employer throughout (*Brookes and others v Borough Care Services and CLS Care Services Ltd [1998] ICR 1198; [1998] IRLR 636*).



Thus, a **simple** share sale should have no impact on the employer / employee relationship

But – the position is not always clear-cut.

- The question is always – whether, as a matter of fact, the business in which the employee is employed has been transferred from one employer to another.
- The mere fact that two companies are part of the same group, or that one is the parent / subsidiary of the other, does not of itself mean that one controls the business of the other for these purposes.

***Allen v Amalgamated Construction Ltd [2000] ICR
436***

The Print Factory (London) 1991 Ltd v Millam [2007] ICR 1331, CA

- The question is whether, as a matter of fact, the business in which the claimant is employed has been transferred from one employer to another.
- While formal legal structures are important, they cannot be conclusive in deciding the issue of whether, within that legal structure, control of the business has been transferred.

ET had held:

*The share sale agreement gave the superficial impression that no TUPE transfer had occurred. [However] **the buyer of the shares did far more than a simple shareholder would have done following a simple sale, or in our experience, a parent company of a subsidiary would have done in similar circumstances.** In particular, M's handling of a significant element of the management of F **set its actions apart from those of a mere shareholder.** It made key decisions in relation to F's workload, it attempted to bring about contractual changes and it ultimately made the decision to put F into administration. In all those circumstances, we are satisfied that..... there was a TUPE transfer.*

CA agreed:

*“... the employment tribunal identified a number of evidential indications, which in combination, established that **control of the business, in the sense of how its day to day activities were run, had passed from F to M...**” - per Buxton LJ*



Jackson Lloyd Ltd and Mears Group PLC v Smith & Others UKEAT/0127/13/LA.

- ML, a subsidiary of MG, purchased 100% of the shares of JL
- ET found - immediately thereafter there had been a TUPE transfer from JL to MG (and not to ML)
- While the sale of shares to ML had been a genuine transaction, **the share sale to ML had provided the trigger for a separate TUPE transfer to MG.**
- Control of JL's business, in terms of its day-to-day business activities, had passed to MG. While outwardly, the appearance was that JL was autonomous, separate and even in competition with MG, in reality it was not.

EAT –

- MG argued – had simply been attempting to revive an ailing business and not assuming control for TUPE purposes
- EAT disagreed on the facts and confirmed – the test to be applied in considering whether there was a TUPE transfer in a share sale case is **broad, multi-factorial and fact-sensitive**
- EAT confirmed that it is permissible to take account of what happened after the share transfer date in considering whether there was a transfer

The Jackson Lloyd decision reflects the fact that parent companies do not normally have the right to manage its subsidiaries` property, simply because it is the main or even the sole shareholder.

ICAP Management Services Ltd v Berry & another [2017] IRLR 811,

- Graham J pithily summarises the key question:

“Has the new party stepped into the shoes of the employer?” (para 83)

Guvera Ltd v Butler & others UKEAT/0265/16

- Lavender J upheld ET`s finding that there was a TUPE transfer when the acquiring company assumed day to day control of the business of the acquired company in a way that went **beyond the mere exercise of ordinary supervision or information gathering between a parent and a subsidiary.**

Note:

The date of any TUPE transfer does not necessarily coincide with the date of the share sale. The transfer can occur at a later date.

***Thomas and others v Glenside Manor
Healthcare Services Ltd and others
(1400177/2018)***

Asset Sales

- Tangible assets, such as land, plant, machinery, equipment, stock etc
- Intangible assets, such as intellectual property, patents, trademarks and goodwill
- Will often trigger TUPE, Reg 3(1)(a)
- TUPE does not apply if Reg 8(7) applies
- Over to Allan.....

Employer Insolvency

Allan Roberts

Please do not all leave!



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We are facing another financial crisis!

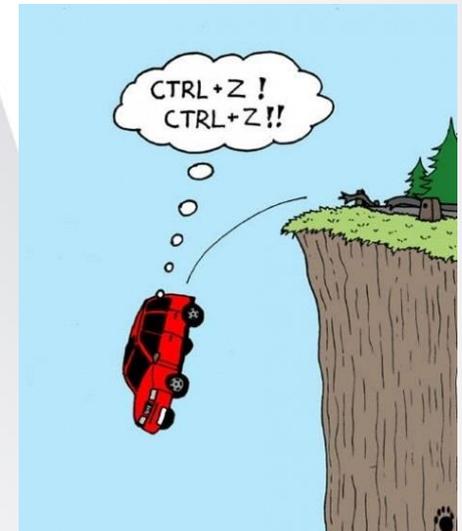
Maybe

A recession?

Quiet probably

Rising corporate insolvency?

Definitely!



What do we mean by insolvency?

Introduction

What does insolvency mean?

Sections 123 and 267 and Insolvency Act 1986:

- Unable to pay debt at or above bankruptcy level
- Company also unable to pay its debts if liabilities exceed assets, (taking into account is contingent and prospective liabilities)

Insolvency Procedures

Bankruptcy

IVA

Individuals

Companies

Liquidation/ Winding-up

Receivership

Administration

CVA



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Insolvency and Tupe

Tupe and Insolvency

Ordinarily if a transfer: **Regs 4 and 7** apply

Regulation 8(7) however, provides:

“Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner.”

Tupe and Insolvency

Lifted almost from Art 5(1) ARD

This consolidated CJEU case: [Abels v Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie](#)

Tupe and Insolvency

What does this mean in practice?

[D'Urso v Ercole Marelli Elettromeccanica Generale SpA:](#)

“In the light of all the considerations touched on by the Court in the judgment in Abels, the principal criterion to be considered is therefore the purpose of the procedure in question.”

Tupe and Insolvency

Along came [*Oakland v Wellswood \(Yorkshire\) Limited \(EAT\)*](#)

- Case involving a pre-pack sale
- Implemented through administrator
- EAT concluded it was a question of fact
- Reg 8(7) applies
- CoA: Upheld appeal but not on reg 8(7)

EAT in [OTG Ltd v Barke](#) held:

- Administration outside reg 8(7)
- Absolute not fact-based approach
- Administration = “*rescue culture*”

CoA upheld decision in allied appeal of [Key2Law \(Surry\) LLP v De'Antiquis](#)

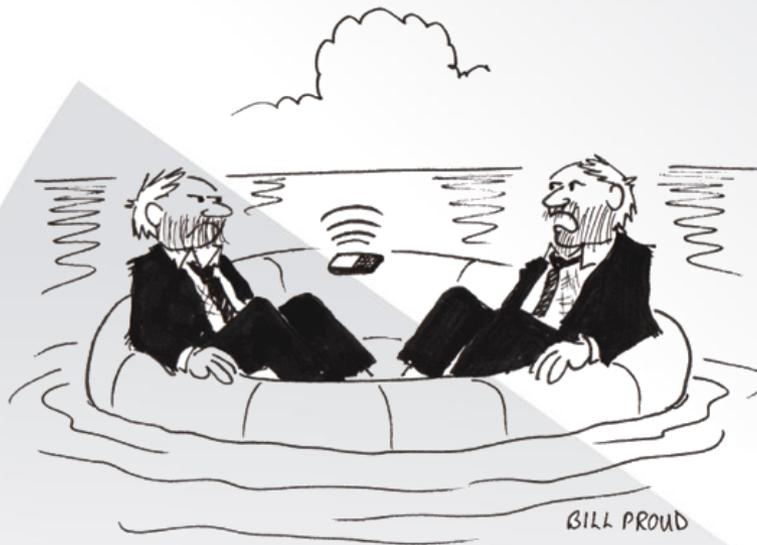
Tupe

Is [Key2Law](#) the final word?

Insolvency and Corporate Structuring

Corporate Structuring

A viable alternative?



"We should have got him to unlock his phone before we ate him"



Corporate Structuring

Points to note:

- Share sales excluded by Tupe ([Henry v London General Transport Services Limited](#))
- Companies are separate legal entity from their shareholders, directors or *associated companies* ([Salomon v Salomon & Co Ltd](#))
- Exclusion applies even when sale structured to avoid Tupe ([Brookes v Borough Care Services](#))

Piercing the Corporate Veil

Petrodel Resources Ltd v Prest

“...there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.”

Piercing the Corporate Veil

Four main components:

1. An existing legal obligation, liability or legal restriction;
2. A deliberate attempt to evade liability or frustrate enforcement;
3. The interposition of a company to do so; and
4. The absence of any remedy other than piercing the corporate veil.

Will therefore be rare!

Corporate Structuring

Tupe potentially has its own remedy:

- Where a group company takes steps beyond a mere shareholder, this may trigger a separate transfer ([Millam v Print Factor \(London\) 1991 Ltd](#));
- This however, is likely to be an exceptional case ([ICAP Management Services Ltd v Berry](#));

Tupe therefore largely respects corporate structuring.

EXCEPT...

Assignment

Possibly the pin to burst the balloon.

- An employee can be assigned to Company X even if employed by Company Y ([*Albron Catering BV v FNV Bondgenoten, John Roest: C-242/09*](#))
- EAT have confirmed [*Albron*](#) reflects UK law ([*Hyde Housing Association Ltd v Hyde*](#))
- Supported by Reg 2 which defines *employee* as: “*any individual who works for another person whether under a contract of service or apprenticeship or otherwise*”

Any questions?

