OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 22 January 1986

My Lords,

Article 1 (1) of Council Directive No 77/187/EEC (Official Journal 1977, L 61, p. 26) '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' provides that the Directive shall 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'. By virtue of Articles 2 (a) and 3 the rights and obligations of the transferor, who by reason of a transfer, ceases to be the employer, in respect of the undertaking, business or part of a business, are transferred to the transferee in so far as they arise from a contract of employment or from an employment relationship existing on the date of the transfer.

These provisions were given effect to by Article 1639 BB of the Civil Code of the Netherlands, which reads: 'On the transfer of an undertaking, the rights and obligations which the transferring employer has on the date of the transfer as a result of a contract of employment between him and the worker employed in the undertaking shall, by reason of such transfer, be transferred by operation of law to the transferee.'

Mr Spijkers brought proceedings against Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV ('Benedik CV' and 'Benedik BV') in the District Court at Maastricht, relying on this provision. The court found that he was an assistant manager employed by Gebroeders Colaris Abattoir BV ('Colaris') at their premises in Ubach over Worms. At those premises Colaris operated a slaughterhouse. On 27 December 1982 the entire slaughterhouse, with various rooms and offices, together with the land and specified goods, were sold to Benedik CV. 'Since that date, although in fact only since 7 February 1983, the business activity of Benedik CV has been to operate for joint account (for itself and Benedik BV) a slaughterhouse with all that that entails.' All of the employees of Colaris were taken over by Benedik CV except Mr Spijkers and another employee who was ill and unfit for work. The court also found that Colaris was declared insolvent by a court order of 3 March 1983 and that at the time of the sale the business activities of Colaris had entirely ceased 'and there was no longer any goodwill in the business'.

On these findings the court dismissed Mr Spijker's claim that the Benedik companies should pay his wages from 27 December 1982 and provide him with work or compensation; his appeal against that decision was dismissed by the Regional Court of Appeal and he brought the matter before the Hoge Raad.

The Hoge Raad proceeded on the basis (i) that the business activity which Benedik CV carried on in the buildings was of the same

kind as the activity previously carried on by Colaris, though there was an issue as to that between the parties; (ii) that the business assets taken over enabled Benedik CV to continue the activities of Colaris; and (iii) that the Regional Court of Appeal had accepted that Colaris' customers were not taken over, again a matter in issue.

The Hoge Raad decided that it was necessary to resolve three questions as to the interpretation of the Directive which it has referred to this Court.

These are:

'(1) Is there a transfer within the meaning of Article 1 (1) of Council Directive No 77/187/EEC where buildings and stock are taken over and the transferee is merely enabled to continue the business activities of the transferor and does in fact subsequently carry on business activities of the same kind in the buildings in question?

(2) Does the fact that at the time when the buildings and stock were sold the business activities of the vendor had entirely ceased and that in particular there was no longer any goodwill in the business prevent their being a "transfer" as defined in question 1?

(3) Does the fact that the circle of customers is not taken over prevent there being such a transfer?'

The questions posed proceed on the basis that Colaris was not already in liquidation at the time of the sale so that the Court's ruling in Case 135/83 *Abels* (judgment of 7 February 1985) does not apply.

It is clear that the overriding objective of the Directive is to protect workers in a business which is transferred. In my opinion, as the Netherlands Government, the United Kingdom Government and the Commission in its oral, though not its written submissions, contends, in deciding whether there has been a transfer within the meaning of Article 1 (1) of the Directive all the circumstances have to be looked at. Technical rules are to be avoided and the substance matters more than the form. The essential question is whether the transferee has obtained a business or an undertaking (or part thereof) which he can continue to operate.

That at the time of transfer the business is still active, that machinery is being used, customers supplied, workers employed and that all the physical assets and goodwill are sold, are strong indications that a transfer within the meaning of the Article has taken place. But these are not all necessary prerequisites of a transfer in every case. A realistic and robust view must be taken and all the facts be considered.

Thus the fact that at the date of transfer trading has ceased or has been substantially reduced does not prevent there being a transfer of a business if the wherewithal to carry on the business, such as plant, buildings and employees are available and are transferred. Nor is the fact that good will or existing contracts are not transferred conclusive against there being a transfer within the meaning of the Article. The transferee may well want to take over the activities of the business to supply his existing customers or to search out different types of customer such as wholesale rather than retail, foreign rather than domestic. Conversely, as the United Kingdom

submits, there may be a transfer in some cases where goodwill or existing contracts or lists of customers are sold without there being a transfer of physical assets.

That after the sale there is a gap before trading is resumed is a relevant fact but it is not conclusive against there being a transfer within the meaning of the Directive. A transferee may well want to spend time reorganising or renovating the premises or equipment. If the employees are kept on for that purpose and then trading is resumed, a national court is entitled to find that there has been a transfer. Similarly, the fact that the business is carried on in a different way is not conclusive against there being a transfer — new methods, new machinery, new types of customer, are relevant factors but they do not of themselves prevent there being in reality a transfer of a business or undertaking.

Though it is plain that a sale may take place simply of the physical assets or part of them with no intention in any real sense that the business should thereafter be carried on, care must be taken to ensure that such a sale is not a disguise to avoid obligations to the workers under the Directive.

These are all issues of fact to be found, and their effect assessed, by the national court.

Accordingly, in my view, the questions referred should be answered on the lines that:

(1) In deciding whether a transfer of an undertaking, business or part of a business to another employer within the meaning of Article 1 (1) of Council Directive 77/187/EEC has taken place, all the facts and circumstances must be considered.

(2) The essential question is whether the transferee is put in a position, as a result of a legal transfer, whereby he can carry on the undertaking or business or part thereof.

(3) The taking over of buildings and stock whereby the transferee is enabled to continue the business activities of the transferor, and does in fact subsequently carry on business activities of the same kind in the buildings in question, is capable of constituting a transfer within the meaning of the Article.

(4) That the vendor had entirely ceased business activities at the time of transfer, that there was no longer any goodwill in the business, that there was no transfer of a circle of customers, that there was a period of time before active trading was resumed and that modifications to the business were made by the transferee are all relevant factors to be taken into account but they do not of themselves prevent there being a transfer within the meaning of the Article.

Mr Spijkers' costs in the reference fall to be dealt with by the national court. No order should be made as to the costs of the Netherlands and the United Kingdom Governments or of the Commission.