2. Article 3 (1) of Directive No 77/187 must be interpreted as not covering the transferor's rights and obligations arising from a contract of employment or an employment relationship existing on the date of the transfer and entered into with employees who, although not employed in the transferred part of the undertaking, performed certain duties which involved the use of assets assigned to the part transferred or who, whilst being employed in an administrative department of the undertaking which has not itself been transferred, carried out certain duties for the benefit of the part transferred.

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 8 November 1984

Mr President,
Members of the Court,

This reference under Article 177 of the EEC Treaty raises three questions as to the interpretation of Council Directive 77/187 on the approximation of the laws of the Member States relating to the safequarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (Official Journal 1977 L 61, p. 26).

The plaintiffs in the main case are all former employees of Rotterdamsche Droogdok Maatschappij Heijplaat BV ('Old RDM') which was declared bankrupt on 6 April 1983. Shortly before then, on 30 March 1983, a new company which I shall refer to as 'New RDM' had been formed. This company is the defendant in the main case. On 7 April 1983 an agreement was concluded between the two companies whereby New RDM took over the marine, general mechanical engineering, heavy machinery and turbines departments of the bankrupt company together with the employees working in those departments. In this way 1 478 employees were transferred to the new company out of a total workforce of 3 184. In addition, New RDM took over 341 members of staff from departments of the old company which were not transferred. The General Section and the Staff Departments, the Ship Repair Department, the Offshore Department and its associated Staff Department (in which worked the remainder of the employees) were not transferred.

Mr Botzen and his seven co-plaintiffs all worked in divisions of Old RDM that were not transferred. They were in fact assigned prior to the liquidation to general departments of Old RDM such as personnel, porters service, general maintenance, despatch and the General Operations Office for Off-shore and Heavy Machinery. None of them was taken on by the new company and they were dismissed. They therefore brought proceedings before the Kantongerecht (Cantonal Court) at

Rotterdam to obtain a ruling that their dismissal was null and void.

Three questions have been referred:

'(1) Does the scope of Article 1 (1) of Directive 77/187/EEC also extend to a situation in which the transferor of an undertaking is declared bankrupt or is granted leave to suspend payment of debts?

(2) Does the scope of the Directive also extend to the rights conferred upon and the obligations imposed upon the transferor by contracts of employment which exist at the date of transfer and which are made with employees whose duties are not performed exclusively with the aid of assets which belong to the transferred part of the undertaking?

(3) Does the scope of the Directive also extend to the rights conferred upon and the obligations imposed upon the transferor by contracts of employment which exist at the time of transfer and which are made with employees who are employed in a staff department of the undertaking (for example, general management services, personnel matters, etc.), where that staff department carried out duties for the benefit of the transferred part of the undertaking but has not itself been transferred?'

The first of these questions is the same as that posed in Case 135/83 *H.B.M. Abels* v *Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* and Case 179/83 *Industriebond FNV and Federatie Nederlandse Vakbeweging* v *Netherlands*. For the reasons set out in my Opinion in *Abels* I consider that the answer to the first question is that Directive 77/187 does not apply in the event of a transferor being declared bankrupt or having obtained a final judicial order granting leave to suspend payments prior to the transfer.

On that basis the second and third questions do not arise in the present proceedings. I consider them in case the Court comes to the conclusion that the Directive does apply to such a transfer.

Article 1 (1) applies to 'the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger'.

I do not consider that it is necessary or desirable in this case to seek to define comprehensively what is meant by 'part of' a business. That is largely a question of fact, though it will usually involve the transfer of a department or factory or facet of the business. It may perhaps also involve the sale of a fraction of a single unit of business. Once it is decided as a fact that part of the business is transferred, then those workers who during their working hours are wholly engaged in that part are entitled to rely on the terms of the Directive. It will of course cover the full-time and part-time workers. A basic working test, it seems to me, is to ask whether, if that part of the business had been separately owned before the transfer, the worker would have been employed by the owners of that part or by the owners of the remaining part. The only exception I would admit to the requirement that an employee must be 'wholly' engaged in that part of the business would be where an employee was required to perform other duties to an extent which could fairly be described as *de minimis*. On the other hand, if a worker in fact is engaged in the

activities of the whole business or in several parts then he cannot be regarded for the purpose of the Directive as an employee 'of' the part of the business transferred.

Practical considerations, it seems to me, compel this result. An employee who works at several factories on e.g. maintenance or personnel work, or as a salesman for the whole range of products of the business, would otherwise be able to claim that he was transferred to the new owner of part only of the business. His job would then be very different in its scope and may be even in its place. That would seem contrary to the aim of the Directive which is to make a transfer of employment which is in all respects identical save as to the employer. Equally if two parts of the business were transferred respectively to different transferees, and another part were retained, the employee who worked in both or in a general department such as maintenance or accounts or sales, would, in theory, be able to claim that he had been transferred to each or at any rate to claim an option. That option does not seem to me to be conferred by the Directive.

There may be borderline cases, but it seems to me essential to reduce these to the minimum by having a clearly workable test. It is possible that in an exceptional case part of the business may be sold in which it cannot be said that there are any workers who are wholly engaged in that part. This, however, has to be accepted and seems likely to be an infrequent occurrence. Conversely, subject to reliance on Article 4 of the Directive, the part transferred must take with it all the employees who are wholly employed in it.

This seems to me to be a better approach than to adopt either of the criteria postulated in the two questions. I assume that by 'assets which belong to the transferred part of the undertaking' is meant 'assets used only in that part'. If the employee works on or with other assets, other than *de minimis*, it is likely that he will be engaged in the activities of the other parts of the business, and so he is not to be treated as employed wholly in or by the relevant part. A person who works in the staff department, which is not transferred as a separate unit, may or may not be regarded as employed wholly in the part transferred. If, for example, he is a wages clerk dealing with the wages of all the staff he is not to be treated for the purposes of the Directive as employed in the part transferred. If, on the other hand, he works exclusively on the wages of the staff of the part transferred, he is to be regarded for the purposes of the Directive, and is in a real sense, the wages clerk of the transferred part.

In my opinion, accordingly, the questions asked fall to be answered on the lines that:

(1) Council Directive 77/187 does not apply to the transfer of an undertaking, business or part of a business where the undertaking or the owner of the business or part of the business has been declared bankrupt or has been granted final leave to suspend payments ('surséance van betaling').

(2) and (3) If part of a business is transferred within the meaning of Article 1 (1) of Directive 77/187, only the rights and obligations, arising from a contract of employment or from an employment relationship which was existing on the date of transfer, or those employees who in fact work wholly in that part of the business (subject to the performance of other duties to the extent which can be regarded as *de minimis*) are transferred to the transferee of that part of the business pursuant to Article 3 of the Directive.

The costs of the parties to the proceedings before the national court fall to be dealt with by that court; no order should be made as to the costs of the Commission and the Member States which have intervened.