IN THE SUPREME COURT OF NEW ZEALAND SC 103/2013

[2014] NZSC Trans 17

BETWEEN **LSG SKY CHEFS NEW ZEALAND LIMITED**

Appellant

AND **PACIFIC FLIGHT CATERING LIMITED**

First Respondent

AND **PRI FLIGHT CATERING LIMITED**

Second Respondent

Hearing:	19 August 2014
Coram:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	P G Skelton QC, A Borchardt and G M Pollak for the Appellant R B Stewart QC and J K Goodall for the Respondents

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CIVIL APPEAL

MR SKELTON QC:

May it please Your Honours. I appear for the appellant LSG Sky Chefs New Zealand Limited. My learned friends Ms Borchardt and Mr Pollak.

ELIAS CJ:

Thank you Mr Skelton.

MR STEWART QC:

Yes, may it please Your Honours. I appear with Mr Goodall for the respondents.

ELIAS CJ:

Thank you Mr Stewart. Mr Skelton?

MR SKELTON QC:

Yes Your Honours. I have taken the liberty to prepare a short two page –

ELIAS CJ:

Yes, there is a preliminary matter but we hope that the parties are not pressing that at this stage. It is a matter that might perhaps resound in costs if the material proves to be irrelevant but it's not really something that should take our time at the outset I think.

MR SKELTON QC:

Yes I understand that's the position Your Honour.

ELIAS CJ:

Thank you.

MR SKELTON QC:

I have prepared an outline, a two page summary of the submissions which will hopefully guide me through the process and with your leave of the Court I'd like to produce that to the Bench.

ELIAS CJ:

Thank you.

MR SKELTON QC:

Your Honours, I'd like to begin by taking you to the source of Pacific's contractual liability for the pre-leave entitlements and those, of course, are the relevant employment contracts. Your Honours there are two contracts. If we have, if we can turn to the case on appeal, volume 3, page 277. That's a copy of the collective

employment agreement between Pacific Flight Catering and the Union. Clause 1(a) is the coverage clause over the page at 278 and Your Honours will note that it's a contract between Pacific Flight Catering and the Union. It covers the catering assistants, catering supervisors, cooks, the Auckland Establishment who become members of the Union. So the collective –

WILLIAM YOUNG J:
Sorry, I'm lost, 1(a)?

MR SKELTON QC:
Yes, clause 1, subsection (a), page 278. The coverage clause there. So that contract covers employees who are members of the Union and the Union is the Service and Food Workers Union. If you're not a member of the Union then you're on an individual employment contract. There are two relevant clauses in the collective agreement. The first –

ELIAS CJ:
Were any on individual contracts, subject to this?

MR SKELTON QC:
Most of them were subject to the collective employment contract but there were some non-Union employees who were subject to individual employment, standard form individual employment agreement.

GLAZEBROOK J:
And are they similar in terms?

MR SKELTON QC:
I'm going to take Your Honours to the two key sections and there are some minor differences, but I don't think they will be relevant for the purposes of this case. Dealing just with the collective contract, if we first of all go to clause 10 on dealing with annual holidays, that's on page 283, and you'll see clause 10 subclause (a), "Annual leave shall be granted in accordance with the provisions of the current legislation." And then when it comes to subclause (c), it says, "Upon completion of six years continuous full-time service with the same employer each worker shall for the seventh and subsequent years be entitled to an extra one week's annual

holidays. The extra week's holiday may be taken in conjunction with or separately from the statutory annual holidays."

So, Your Honours, you see there that after six years of service with Pacific the employees were entitled to an enhanced entitlement of an extra week's holiday over and above what they would have as the minimum entitlements under the Act.

If we then turn to sick pay, which is dealt with in clause 12 of the collective, that's over the page, 12(a), "After six months current continuous service with the same employer," and then you'll see there Your Honours that they're entitled to eight days sick leave. There's two points to make in relation to 12(a). You have to be employed for six months minimum before you are entitled to sick leave. That's the same as under the Holidays Act 2003. There's a minimum requirement of six months before you become entitled to holiday entitlements or sick leave entitlements. It's important in the context of this case, Your Honours, because if there's a cessation of employment, a restructuring, sale of the business, employment ends from the old employer, you move onto the new employer, in the absence of Part 6A the clock starts ticking from day 1 again before you're entitlements start to accrue.

The second point in relation to sick pay is under 12(b), "Sick pay shall accumulate up to 280 hours, 35 days, can be carried forward." And, Your Honours, when I take you to the Holidays Act you'll see the minimum entitlement under the Act is to accumulate up to 20 days. So again this contract provides enhanced entitlements over and above the minimum.

Now, Your Honours, if we turn over to page 290 you will see there the individual employment agreement. They are in standard form. This one was between Pacific and Mr Manakofua and the annual holiday provisions at clause 9(a) is on page 292 of the case on appeal, "Annual leave shall be granted in accordance with the provisions of the Holidays Act." Sick leave, again just subject to the current legislation only. So for people on the individual employment agreements, they didn't get enhanced extra leave, compared to the unionised employees.

Now in terms of how this ties in with the Holidays Act, I'll briefly take Your Honours to the –

ARNOLD J:

Just before you leave these at 287 there's a redundancy clause and the amount of redundancy you're entitled to is based on the length of service.

MR SKELTON QC:
Correct.

ARNOLD J:
So it's the same as the sickness entitlement and at some point I'd like you to tell us whether your arguments would apply equally to redundancy if the new employer were to declare the transferring employees redundant after six or eight months.

MR SKELTON QC:
Well the answer to that is, no they wouldn't, Your Honour, because there is an express provision in the statute, in Part 6A, which says that the old employer isn't liable to pay for the redundancies.

ARNOLD J:
That's right.

MR SKELTON QC:
Now there isn't, in that clause 69I, there isn't an equivalent provision that says the old employer is not liable for accrued leave entitlements at point of transfer and that's one of the key points which I will be coming back to, as to why we say in relation to accrued leave entitlements it's quite different from redundancy. Parliament expressly said redundancy, you the old employer are not liable, you the new are, leave entitlements they didn't have that clause in 69I. Now why the difference? Well, Your Honours, the answer is because with redundancy the purpose of the legislation was to say you don't get an entitlement from the old employer to say pay me out my redundancy based on my years of service with Pacific and at the same time still have a job, the same job on the same terms and conditions, with the new employer. So you can't pick up the money and have the job at the same time.

ARNOLD J:
No I wasn't thinking about that situation. I mean you come to it when you want to but the new employer may well decide, the new employer is entitled to, decide that some of the transferring employees it wants to make redundant. That's right, isn't it?

MR SKELTON QC:

Well the new employer may, in the future, make that decision.

ARNOLD J:

That's right. And the entitlement of the transferring employee will reflect his or her length of service under this collective agreement.

MR SKELTON QC:

That is correct also.

ARNOLD J:

Right and so in principle it's very similar to the sickness situation or the holiday situation where length of service increases your entitlement.

MR SKELTON QC:

Length of service increases entitlement, I agree with that, but I don't accept that it is similar for the following reasons. With accrued leave entitlements the new employer has no choice. Those are accrued entitlements of the employee. So the new employer must recognise and pay out those leave entitlements. With redundancy Your Honour is, of course, correct, there is a possibility in the future that the new employer might make some or all of the employees redundant, but that is the choice of the new employer. The new employer doesn't have any choice when it comes to paying out the accrued leave entitlements. They are statutory entitlements the employer has.

Now the whole purpose of this Part 6A is employee protection, vulnerable employees, and so it is, of course, understandable how Parliament may well have said we're not going to allow double dipping. We're not going to allow you, the employees, to claim redundancy from the old employer while you have a job on the same terms and conditions from the new. You are right that if you are made redundant in the future the new employer will have to pay redundancy. But that creates an incentive for the new employer not to make these vulnerable workers redundant. It enhances employee protection. So those are, I can elaborate on that later, but those are the differences.

ARNOLD J:

Thank you.

MR SKELTON QC:

Your Honours, if I can just very briefly take you to the Holidays Act provisions that I just wanted to refer you to and they're in the appellant's bundle of authorities, tab 2. The starting point is section 6, in particular, yes, section 6 on page 46 of the appellant's bundle of authorities. You will see there under subsection (1) that the entitlements under the Act are minimum entitlements and under subsection (2) the Act doesn't prevent employer from providing an employee with enhanced or additional entitlements as a basis agreed with the employee and that's what we saw in that collective. And under subsection (3), "However an employment agreement that excludes, restricts or reduces the employees entitlements under the Act is of no effect." So you can't by your contract if you like contract out of the minimum requirements under the Act.

If we then look at sub annual leave on section 16 of the Holidays Act on page 48. We'll see at subsection (1) that after the end of each completed 12 months of continuous service an employee is entitled to not less than four weeks' paid annual leave, annual holidays. So that's the minimum entitlement but again Your Honours, it only arises after completion of 12 months' continuous employment.

So when you just think about what happens where there was a change of employer. It might be a sale and purchase of a business or in this case a change of employer arising from a subsequent contracting. In the absence of Part 6A employment ceases with the old and you have to wait your 12 months before your entitlement would accrue with the new –

GLAZEBROOK J:

Well you're saying that you accrued an entitlement paid out when you cease employment with the previous employer which has been expressly stopped under Part 6A.

MR SKELTON QC:

That's right.

GLAZEBROOK J:

So you don't lose out at all, you just get money in lieu of holiday.

MR SKELTON QC:

But under the Act the entitlement is not simply to money, the entitlement is to a period of holidays on pay. So –

GLAZEBROOK J:

Yes but if you finished your employment you get money in lieu.

MR SKELTON QC:

Yes you do.

GLAZEBROOK J:

So you don't miss out, you miss out on the holidays but you don't miss out on the money.

MR SKELTON QC:

No but you miss out on the holidays Your Honour and that's the key issue because the purpose of Part 6A continuity of employment was to ensure that these employers go across, not simply that they have some money but they actually get to take a holiday on pay and there's continuity of employment, there's no break in that continuity of employment. So it's to protect not only the money which they would have got paid out on cessation of employment with the old but they can actually say come Christmas time they've actually got some holidays that they can take. So it's holidays on pay. So that's section 16.

Section 27 of the Act then talks about when payments for annual holidays must be taken, and the relevant section I wish to refer the Court to is section 27(2). So under subsection (1) it says, "An employer must pay an employee for annual holidays before the holiday is taken unless," and if you go down to (b), "the employee's employment has come to an end." And then under subsection (2), "If subsection 1(b) applies the employer must pay the annual holiday pay and the pay that relates to the employers final period of employment.

So again absent Part 6A of the Employment Relationship Act which we will come to that's the provision that says you've got to pay it out in your final pay for annual holidays.

If we look at alternative holidays, that's section 56. Alternative holidays are where you have to work on what is a public holiday or a statutory holiday and the provision that I wish to draw Your Honours' attention to is section 60(2)(b). If the employee has not taken annual holidays before date on which employment ends then under (b) subsection (2) it must be paid out in the pay that relates to the final period of employment.

Now unlike annual holidays, with alternative leave you can exchange them for cash. That's dealt with in 61, subsections – section 61 of the Act. "If the employer agrees to the employee's request then the employer must pay the employee the amount agreed." So for those alternative holidays you can, if you like, cash them in. With annual holidays you can only cash in up to one week, you can't cash in all of your annual holidays. Then just to round it off, dealing –

GLAZEBROOK J:
What section is the cash in, is that –

MR SKELTON QC:
Section 61 of the –

GLAZEBROOK J:
It's the one week, which section is that?

MR SKELTON QC:
Your Honours for annual holidays?

GLAZEBROOK J:
Yes.

MR SKELTON QC:
That's 28A. It was introduced at the date that Parliament increased the entitlements from three weeks to four weeks. So they said the three weeks is sacrosanct you can't cash those in but the extra week, the fourth week you could cash those in under the provisions in 28A.

Then the final leave that we're dealing with here is entitlements to sick leave and if we look at section 63, entitlements to sick leave and bereavement leave and you'll

see at 63(1) “An employee is entitled to sick leave, bereavement in accordance with the subpart after the employee has completed six months current continuous service.”

And 65(2), “An employee is entitled to five days’ sick leave for each 12 month period specified in the section.” We've seen in the collective agreement it was increased to eight days by contract and then 66(2), “For the purposes of subsection (1) an employee may carry over up to 15 days’ sick leave to a maximum of 20 days’ current entitlement,” and again we saw in the collective contract that that was enhanced to 35 days.

Section 67, “An employee is not entitled to be paid for any sick leave that has not been taken before the date on which his or her employment ends.” So unlike annual holidays or alternative holidays, with sick leave you don't get them paid out. They are there if you were sick you get to use them, if you haven't used all of your sick leave you don't get a payment for them.

Now Your Honours I want to then take you to the key provisions in the Employment Relations Act 2000 Part 6A and they are to be found under tab 1 of the appellant’s bundle of authorities. And the starting point Your Honour is section 69A. It's on page eight of the appellant’s bundle of authorities. We see there the heading, Part 6A, “Continuity of employment if employees’ work affected by restructuring.” So that's the – and then the subpart 6A, it's divided into three subparts and this appeal is dealing with subpart 1 although my friends do try to draw some support from subpart 2 which is dealing with disclosure of information.

Subpart 3 deals with employees who aren't the vulnerable employees but we're not concerned with that aspect of it.

ELIAS CJ:
Because I haven't looked at subpart 3, what – but we do of course have to look at the scheme of legislation. So what happens in relation to them, just briefly?

MR SKELTON QC:
For employees, just employees who are not covered –

ELIAS CJ:

Yes.

MR SKELTON QC:

– this first part. Subpart 3 requires clauses to be added into all employment contracts now that make provision for a procedure to deal with what is to happen where there is a change of employment. The main difference Your Honour is that there is no automatic right to elect to go across. So, you know, in a sale and purchase of a business that happens all of the time what will happen is employment contracts have to provide that you will put a process in your contract that says what are you going to do in that situation. The vendor sells the business, the purchaser buys the business, there's then a negotiation over what should happen to the employees. Often the situation is that the employees transfer across, they might be the key asset of the business that's being sold.

ELIAS CJ:

All right, sorry, I didn't want you to take too long over it, so it's not required that the employee be given the right to elect but what's the consequence in the way that we're interested in if they do elect in terms of holidays?

MR SKELTON QC:

Well what usually happens in that situation is the purchaser takes on the employees, leave balances are usually transferred across to the purchaser of the business and the vendor accounts to the purchaser for the accrued leaves up until the date of transfer.

ELIAS CJ:

And where's that provided for in the – just point me to the section? You say usually it happens but is that a matter of dealing?

MR SKELTON QC:

That's a matter of – yes Your Honour. It's a matter of dealing –

ELIAS CJ:

It's a matter of contract?

MR SKELTON QC:

Mmm.

ELIAS CJ:

Is there anything in Part 3, subpart 3 which gives any direction on that?

MR SKELTON QC:

No there isn't Your Honour so it's possible on the sale of the business that having sold the business the employees are redundant because there's no, the vendor has no business to operate so they could be paid out their redundancy, paid out their leave entitlements and they go off to the market and try and find a job, that could happen. Or the purchaser might say, "No we want these employees so we will offer new employment," but a new contract with employment starts. How do you deal with leave entitlements is a matter purely for the negotiation between vendor and purchaser. There's nothing in Part 3 that sets out what must happen.

ELIAS CJ:

Or is it a matter for negotiation between the employee and the new employer?

MR SKELTON QC:

Well that is also the case because you cannot assign an employee across to a new purchaser.

ELIAS CJ:

No and if that happens presumably the payout provisions of the Holidays Act apply?

MR SKELTON QC:

Yes, unless there's agreement otherwise –

ELIAS CJ:

Yes.

MR SKELTON QC:

– employment would cease with the old employer and all those leave entitlements would be paid out but in that situation they would start with a clean slate with zero balances with the new employer. Now often that's very inconvenient for the employees and very inconvenient for the purchaser of the business. That's why they will often agree to transfer the balances across and then it comes, well who pays for

the accrued leave entitlements up to date of transfer and what happens is there is an adjustment on settlement of the sale of the business.

ELIAS CJ:
But that's the usual course.

MR SKELTON QC:
That's the usual course.

ELIAS CJ:
All right, but there's nothing in subpart 3 that let's the first employer off the hook in terms of –

MR SKELTON QC:
No.

ELIAS CJ:
– accrued entitlements?

MR SKELTON QC:
No the old employer would have to pay out all of those leave entitlements to the employees –

ELIAS CJ:
Yes.

MR SKELTON QC:
– on cessation and they certainly would not get a windfall, they would certainly not be relieved of any, of their obligations to pay accrued holiday pay or alternative leave.

The one difference Your Honour is of course with sick leave because as I've taken Your Honour to the section it's a use it or lose it. So with sick leave if you haven't had to take your sick leave there's no payout in relation to sick leave. So that's the difference but for holidays, alternative holidays they would be paid out unless the parties agreed otherwise amongst themselves.

But it's different when it comes to vulnerable employees. Now why is that? Well section 69A is the key objects provision for that subpart and that's at page 8 and the object of this subpart is to provide protection to specified categories of employees. So it's recognised that these specified categories of employees there's a need for protection and that's done by giving the employees a right to elect a transfer on the same terms and conditions of employment.

So when it comes to construing how this subpart works I believe it is central and it's certainly a key aspect of the appellant's case that employee protection is the purpose that needs to be focused on. Now if we then look at how it works, 69 – if we turn the page. So we go to the definition page on page 9, there's a definition of "restructuring" and the one we are concentrating on is subparagraph 3 there, "subsequent contracting", that's what this case is about. But you will see, just in passing, restructuring also includes selling or transferring an employees business to another person which happens all the time. So this paragraph covers subsequent contracting as well as sales. What is subsequent contracting? That's dealt with on the bottom of page 9. It has the meaning set out in section 69C and if we turn the page to section 69C.

GLAZEBROOK J:

There seems to me to be some significance in the selling or transferring because while the entitlements of the employees are protected by this subpart. If it is a case of selling or transferring then presumably the two parties can make whatever arrangements they want in reflect of payment in the same way that they would under Part 3, because they could decide that they will pay out the approved entitlements, they could decide they won't, they could adjust the purchase price to take into account the Part 6A prices and wouldn't the market just operate in those circumstances?

MR SKELTON QC:

And up until this case was decided Your Honour it's exactly what people did.

GLAZEBROOK J:

Well what's wrong with that?

MR SKELTON QC:

That's what should happen, Your Honours, that's exactly what should happen.

GLAZEBROOK J:

But you're saying there's some right of reimbursement even if they don't make those arrangements in the contract.

MR SKELTON QC:

Yes I am Your Honour because here we have –

GLAZEBROOK J:

Well why would you have an added right if you've already decided in the contract that this is the price and it's taken on these terms including the Part 6A terms?

MR SKELTON QC:

Because if you have a – the situation that's arisen in this case where you have –

GLAZEBROOK J:

Well I'm not interested in a situation that's arisen in this case, I'm saying why would you override a bargain made by the parties by a so-called common law right of reimbursement?

MR SKELTON QC:

Well if the parties had reached –

GLAZEBROOK J:

If it wasn't dealt with in the contract isn't that just their bad luck?

MR SKELTON QC:

Well if the parties in their contract had dealt with the matter than –

GLAZEBROOK J:

So if they've forgotten about it there's a common law right of reimbursement that overrides the contractual provision –

MR SKELTON QC:

But if they haven't dealt with it in their contracts, if they don't deal with it or they can't reach agreement as happened here, they couldn't reach agreement. LSG is saying, "Well you've got to account for the pre-contractual obligations," and they go, "No we don't, there's nothing in the Act that says we have to."

GLAZEBROOK J:

But what's there in Parliamentary intention that says that – that the Parliamentary intention is just to protect the vulnerable employees, so does Parliament care who pays as long as someone does?

MR SKELTON QC:

Well the intention is employee protection.

GLAZEBROOK J:

Sorry, not just pays actually because it indicates the holidays and to have the sick leave or paid sick leave but let's just say pay because it's easier to –

MR SKELTON QC:

The first point is you're correct that the focus is in protecting the employee. So it's making sure the employees get their holidays on pay, that's the – and continuity of employment. But in the situation we're dealing with there's no contract at all between Pacific and Singapore.

GLAZEBROOK J:

I understand that.

MR SKELTON QC:

But in the sale and purchase situation Your Honour is talking about, I accept that if the parties reach an agreement as to how to deal with accrued pre-transfer leave entitlements that should govern, absolutely. But the question is what if the parties can't reach agreement or you have a vendor saying, "We're not going to account for our accrued leave entitlements," then the common law –

WILLIAM YOUNG J:

But won't that just depend on the contract? What's implicit, what's either explicit or implicit in the contract?

ELIAS CJ:

With whom?

WILLIAM YOUNG J:

No, where there's a transfer of a business.

ELIAS CJ:

Sorry, I thought you were talking about this situation.

MR SKELTON QC:

Well in this situation there isn't any contract between the parties at all but in the transfer of business – I accept that the terms of the contract will govern and you couldn't say, or you could rely on a common law remedy if the parties have expressly provided in their contract for what should happen with accrued leave entitlements.

GLAZEBROOK J:

So you're suggesting if they've forgotten about it the common law rule would give them reimbursement?

MR SKELTON QC:

Well I would suggest that if the purchaser –

GLAZEBROOK J:

It's an odd question.

MR SKELTON QC:

– is paying what are the vendors accrued leave entitlements –

GLAZEBROOK J:

Well no they're not, they're their approved leave entitlements because that's what they've been deemed to be under Part 6A. The employer is paying what it's obliged to pay under Part 6A of them.

ELIAS CJ:

It's obliged to recognise.

GLAZEBROOK J:

Yes. So it's not someone else's liability it's their liability, whether it's also someone else's liability obviously you want to address this on but it's their liability they're paying, and I'm using that as a shorthand for recognising the –

ELIAS CJ:

The argument is that it's a compulsion of law.

MR SKELTON QC:

It's a payment under compulsion of law which has the effect of discharging the debt that the old employer had and common law will come in to fill the gap, is what I'm saying Your Honour, in that situation to give a restitutionary remedy to avoid unjust enrichment. But I want to expand on that a little bit after I've gone through the statutory provisions unless Your Honours.

So we're not dealing with sale and purchase of a business in this case, we're dealing with subsequent contracting. Subsequent contracting is defined in 69C. The relevant bit is 69C(4) because it says, "In this subpart unless the context otherwise requires subsequent contracting means a situation where," and Your Honours might just want to add in here where it says, "A person, person A."

GLAZEBROOK J:

Sorry where are you now?

MR SKELTON QC:

69C(4), that's on page 10. It's defining what subsequent contracting means and it says, "A person, person A, has an agreement with another person, person B." Now if Your Honours might want to note, person A in this situation would be Singapore Airlines. So person A, Singapore Airlines, has an agreement with another person, person B, that's Pacific, under which person B performs work, as an independent contractor for person A.

Then the work or some of the work is actually performed by employees of person B, that's Pacific's employees. The agreement or part of the agreement under which person B performs the work expires or terminates. That occurred February 2011 when Pacific lost the Singapore Airlines catering contract.

McGRATH J:

But was it expiry or termination?

MR SKELTON QC:

It was Singapore Airlines put the contract out to tender again –

McGRATH J:
Was that when the earlier contract had expired? It may not matter.

MR SKELTON QC:
I'm not 100% sure Your Honour but they were certainly entitled, well they certainly –

McGRATH J:
It's probably not important.

MR SKELTON QC:
– they put it out for tender and the incumbent Pacific lost the tender –

McGRATH J:
Yes.

MR SKELTON QC:
– and LSG acquired it. Then under D person A Singapore enters into an agreement with another person, person C. Now person C in this definition is LSG under which person C is to perform the work, an independent contractor. And you will see under section 69D(1)(c), "In relation to subsequent contracting new employer means person C." So the new employer is LSG in this instance. So that's how that works.

69F application of this subpart. This subpart applies to an employee if schedule 1A applies to the employee and Your Honours if we go to the last page of the tab, page 36 of the appellant's bundle of documents, there's schedule 1A which lists the employees covered by that subpart, the relevant clause is E. So, "Employees who provide the following services in the specified sectors, cleaning services, food catering services in relation to airport facilities." So that brings in operation of Part 6A to the facts of this case.

McGRATH J:
It says, "Or for the aviation sector."

MR SKELTON QC:
Or for the aviation sector.

McGRATH J:

Which I presume is what we're dealing with here?

MR SKELTON QC:

Yes Your Honour, yes. So it's common ground that –

McGRATH J:

That's all right, that's enough.

MR SKELTON QC:

E covers that, but it's cleaning services, caretaking services, laundry, food catering, it's almost a replica of the membership rule for the Service and Food Workers Union Your Honour. This is where the genesis, if you like, of the vulnerable employees categories come from.

Now 69I is the right of election. "An employee to whom this subpart applies may," and then before a particular date, "elect a transfer to the new employer." And then under 69I(2), "If the employee elects to transfer," then under little (a), "becomes an employee of the new employer on and from the specified date," and under (b), "Is employed on the same terms and conditions by the new employer, including terms and conditions relating to whether the employee is employed full-time or part-time," and under (c), "Is not entitled to any redundancy entitlements under those terms and conditions of employment from his or her previous employer because of the transfer."

Your Honour Justice Arnold, this is the point where the appellant submits that after (c) where it says, "Not entitled to any redundancy entitlements," if Parliament had intended that they weren't entitled to recover accrued leave entitlements from the old employer you would have expected a (d), "Is not entitled to any accrued leave entitlements under the terms and conditions from his or her previous employer," you would have expected that to be included.

ARNOLD J:

But there is a provision, isn't there, which says the employer, the old employer can't pay out holidays. Where was –

MR SKELTON QC:

Yes that's in 69J which is the next section I'm going to take you to but the point I'm making here is here's Parliament saying you've got a right to elect, if you elect you become an employee of the new employer on your same terms, you are not entitled to take redundancy entitlements from your old, but it doesn't say you're not entitled to accrued leave entitlements from your old –

GLAZEBROOK J:

But isn't the point that the only accrued leave entitlements or the only payment they are entitled to on the termination of an employment is the payment of accrued holiday pay and that is explicitly dealt with in the statute. So you're not entitled to a payout for sick leave and obviously as you are no longer employed if you get sick that's your problem and not the employer's problem because you don't, there's no leave to pay once you've terminated employment and you're not entitled to a payment. So the statute deals with the only payment you're entitled to in respect of accrued holiday pay and that's a payment in lieu and it explicitly says that you're not entitled to that. Isn't that exactly the same as the redundancy requirement that you've just pointed us to.

MR SKELTON QC:

Your Honour, that's partially right in relation to annual holidays but there are two entitlements not just one on termination of employment, it's payout annual holidays and then there's the obligation to pay out alternative holidays. Your Honour is correct in relation to sick leave as we've seen that if you don't use those you don't get a payout on cessation.

ARNOLD J:

Well this – I mean your statement of claim seeks payments for sick leave.

MR SKELTON QC:

It does.

ARNOLD J:

Right, now can you explain to me on what basis that claim is made? I mean if the employee is not entitled to a payout for untaken sick leave on what basis do you say that the old employer is obliged to pay?

MR SKELTON QC:

Well firstly Your Honour, under Part 6A employees are entitled to transfer their unused sick leave across to their employer.

ARNOLD J:

Yes, right.

MR SKELTON QC:

So that's unlike other employees who would lose it.

ARNOLD J:

Yes.

MR SKELTON QC:

So they do carry it across and they can use it with the new employer. If they use it with the new employer that will of course create a cost to the new employer.

ARNOLD J:

Right.

MR SKELTON QC:

And that cost, we are saying, can be recovered from the old employer because it was in the nature of a contingent liability at date of transfer. It was not like annual holidays or alternative holidays which were accrued actual liabilities at date of transfer but once as Justice Woolford in the High Court said, once the employee takes those holidays with the new employer it crystallises and may become liabilities that are being discharged from the old employer.

ARNOLD J:

Well if the sick leave is a contingent liability why isn't the service-related entitlement to redundancy exactly the same position, it's a contingent liability of the old employer.

GLAZEBROOK J:

And isn't it a contingent liability only so long as there is employment? Once employment finishes the contingent liability disappears. If you were doing your accounts you'd take any contingent liability out of the accounts, don't you?

MR SKELTON QC:

You mean the old employer on the sale of the business would take it out of the account?

GLAZEBROOK J:

Yes, would take it out of his accounts.

MR SKELTON QC:

That's likely, I accept that Your Honour.

GLAZEBROOK J:

Well it would be not in accordance with proper policy if you had a debt that is no longer likely to be paid, liable to be paid in your accounts. Sorry I added a question to Justice Arnold's question.

ELIAS CJ:

What happened here in terms of Pacific's accounts do we know, is that before us?

MR SKELTON QC:

No there wasn't any evidence in the Court on that Your Honour.

ELIAS CJ:

No.

GLAZEBROOK J:

Well they may have had to put it back in when they had this, these proceedings.

ELIAS CJ:

They may never have taken it out.

McGRATH J:

Mr Skelton, I'm just coming back to the point, it may be, I hope I'm not interrupting Justice Arnold, but you say that costs can be recovered as a contingent liability but you then appeared to be suggesting that you'd wait until the liability had accrued before it would be met. Now is this so, I mean I would like to know on your argument at which time we should be focusing on the time of transfer when it's a contingent liability but you then appeared to be suggesting that you'd wait until the liability had

accrued before it would be met. Now is this so, I mean I would like to know in your argument at which time we should be focusing on the time of transfer when it's a contingent liability but the subsequent time when it becomes accrued.

MR SKELTON QC:

The cause of action relied upon by the appellant, money paid to the use of the defendant under compulsion of law. You can only, it only crystallises on the payment of that debt, right. So it's only when LSG, the new employer, actually pays out the annual holidays, the alternative holidays or we say the sick leave entitlements, under that cause of action it has a right to recover, and so – but how you value the entitlement, and I will get onto this because my learned friends raise this, they say this is going to be problematic because there might be pay rises that take place after transfer and this would be unfair. The claim LSGs making is to the value of the leave entitlements at the date of transfer. So it's not saying, and it would be wrong and against principle to say if LSG subsequently gives people pay rises that it could somehow recover that additional cost from the old employer. If they transferred across let's say $15 per hour it's only the leave valued at the $15 per hour at the date of transfer that LSG is seeking to recover. Even if it pays it out to the employers at $18 an hour because it's increased their pay rate it doesn't have a right and is not seeking to recover $18 an hour for each hour of leave that's taken.

ELIAS CJ:

It's very complex though, isn't it, because you can't recover until payment is made so you're going to have a sort of a rolling wall?

MR SKELTON QC:

It's not as complicated as my friends suggest because it's a first in, first out basis.

ELIAS CJ:

No I understand the method of calculation may not be complicated but it's the fact that when is it going to be due.

WILLIAM YOUNG J:

Unless you can actuarially access it but it is getting quite complex.

MR SKELTON QC:

Well the very simple way to deal with these matters to avoid, my friends had these problems and concerns with timing and complexity is to do what most employers do is a week or two after the transfer you calculate what was the value of the accrued leave entitlements that passed across and you send them a cheque and then it's done. But here, in a situation where they're refusing to do that, yes, under the common law remedy we can't claim the full amount from them on day 1, we can only claim the amounts after it had been paid. But it's a, if it's a problem for my friends, all they have to do is send out a cheque for the value of the accrued leave entitlements.

McGRATH J:
Well that's the practical answer and we can come back to the sort of legal framework we have to operate in. Do you say that this is the answer which is implicit in the statute somehow? You've got to bring it back to that don't you?

MR SKELTON QC:
I'm saying there's a gap in the legislation Your Honour. I'm saying what happens is that legislation says you the new employer must recognise you the old employer not to pay out but they don't deal with, as they should've, what is to happen between the old employer and the new employer, who accounts for what. There's a gap.

GLAZEBROOK J:
Isn't that the suggestion, that they just leave it to the market, and that if there's going to be an issue that it's dealt with in the tender price, or it's dealt with in the agreement for sale and purchase of property. Parliament's concerned with the employee and it leaves the employers to sort themselves out.

MR SKELTON QC:
Well of course in a subsequent contracting situation like this there's no negotiation at all when –

GLAZEBROOK J:
Well no but you take it into account in your – if you can't come to an agreement, you take it into account in the tender price.

WILLIAM YOUNG J:
It gives the incumbent a bit of a start.

McGRATH J:
It does, indeed, and that's the point Mr Skelton.

MR SKELTON QC:
That's part of the problem with the result in the Court of Appeal because the Court of Appeal rightly acknowledged that it creates some practical problems, their interpretation of this legislation.

GLAZEBROOK J:
But isn't it for Parliament to say well actually the market doesn't work in the subsequent contracting, it does in the normal situation of contracting, it doesn't in the subsequent contracting.

MR SKELTON QC:
Well that is the answer the Court of Appeal said, oh well it's up to Parliament to sort out of the problem, but I say there is a lacuna in this legislation –

ELIAS CJ:
Well the Court of Appeal says that too.

MR SKELTON QC:
And the Court of Appeal acknowledged that and that the common law can come in and fill that gap unless, of course, there's something in the scheme of the Act that Your Honours say, well Parliament could not have intended this common law right to still exist and the high water mark of my friend's response is section 69J, must not pay, that's the only bit. There's nothing in the statute that says we're taking away your common law right of recovery but they rely on section 69J, that's what they rely on.

McGRATH J:
You're not saying, Mr Skelton though, you're not saying, you're putting it all on a gap, you're not saying that it is implicit in the statute that the value will be on a contingent liability basis as at the date of transfer, you're not saying that?

MR SKELTON QC:
No, I was saying, Your Honour, that the common law remedy that avoids unjust enrichment, the money paid to the use of the defendant under compulsion. We'll

deal with the issue that my friends have raised because you would say what is the benefit that the defendant has received by the new employer paying the accrued leave entitlements.

McGRATH J:
You're not saying some development is required of the common law –

MR SKELTON QC:
No.

McGRATH J:
– to counter for the fact that the statute intrudes here?

MR SKELTON QC:
No I'm saying that there was a lacuna, which the Court of Appeal accepted, but instead of saying well it's just up to Parliament to fix –

McGRATH J:
Yes.

MR SKELTON QC:
– that the common law can fill the gap. I'm not saying it's perfect –

McGRATH J:
I think you've answered the question.

MR SKELTON QC:
– you know, and maybe there is a, it's desirable to have a comprehensive statutory scheme that deals with these issues, but in the absence of that the common law will come to the assistance of the new employer to prevent unjust enrichment. That's the argument.

WILLIAM YOUNG J:
Where are the amendments? Were they enacted before the –

MR SKELTON QC:

No they weren't because when Mr Banks resigned, John – the Prime Minister announced that he didn't have the numbers to pass the legislation and it has now – the Bill has lapsed under section 20 Constitution Act 1986 when Parliament rose so, you know, it might possibly pass if National gets elected again in the future. It was strongly opposed by the other parties so –

WILLIAM YOUNG J:
This component of it?

MR SKELTON QC:
Part of this – not just this component. Part 6A amendments were strongly opposed because the Bill says they're going to do away with the protection for vulnerable employees if you happen to be an employer of 19 or less employees –

WILLIAM YOUNG J:
Oh I see.

MR SKELTON QC:
– so Labour, et cetera, was not supportive of the amendments to Part 6A. But, as we stand now, the first point is Justice Woolford, I believe, got it correct to say you can't call an aid a Bill that may or may not ever be passed to say what the intent of Parliament was when it enacted the scheme back in 2006. Secondly, the Bill isn't retrospective, so this wouldn't provide any remedies for LSG or the other hundreds of parties that are involved in cleaning catering businesses where there have been these contracts, so that's that. And then thirdly, well if there is a statutory amendment in the future that maybe an improvement but in the absence of that the common law does provide a remedy. Those are the key submissions there.

GLAZEBROOK J:
I was just going back to Justice Arnold's question as to why the contingent debt doesn't rely on redundancy, doesn't apply to redundancy?

MR SKELTON QC:
Well I think the answer, Your Honour, is that with redundancy it's the new employers' choice as to whether or not they make –

GLAZEBROOK J:

Okay, we'll go back to that.

MR SKELTON QC:

– someone redundant, you know, and of course it –

ELIAS CJ:

It's also the employers – employees' choice whether to accept the transfer.

MR SKELTON QC:

Yes, that is correct. But it is a choice that for vulnerable employees, who are faced with the other option of being made redundant, and most of them are on minimum wages or thereabouts –

ELIAS CJ:

No, no, I'm not arguing – I'm just indicating that there are options for everybody at that point. Well there aren't options for the successful tenderer perhaps, that's your argument, but there are options for the employee and – yes.

ARNOLD J:

My problem is I don't understand what there is in the Act that allows you to distinguish, in the way that you have, between a contingent liability for sick leave and a contingent liability in relation to redundancy. Now I understand your point that on the redundancy it is the new employer making the decision that after the transfer the employer has too many workers and has to let some go. But the new employers financial obligation is determined by the collective and the collective gives greater rights to people who have served for a long time. Ours is it's exactly the same as the sickness situation. Nobody makes a decision to get sick, the employee get sick. So I just don't understand what it is in the Act that allows you to say well this doesn't apply in the case of redundancy but it does apply to sick leave.

MR SKELTON QC:

Sick leave is more problematic in terms of the arguments for the appellant because it is a contingent liability. Annual holidays, alternative holidays, are crystallised actual liabilities and they are in a different category. I do accept, when it come to sick leave, it is more of a stretch for the appellant to succeed on that basis.

ARNOLD J:

All right. Thank you.

GLAZEBROOK J:

But would the other part of your argument be that this isn't anything to do with the statute anyway, it's a common law, and if it's a common law remedy if you choose to make someone redundant then you don't come within the compulsion on the basis of law. So you're not compelled to make somebody redundant. You are compelled to pay more than you would do if this statute wasn't there.

MR SKELTON QC:

That's correct, Your Honour, absolutely.

ARNOLD J:

I don't see how that can be right because you are forced to take the employee on his or her existing terms and conditions. That is a compulsion of law and that reflects long service which gives you an increased entitlement.

MR SKELTON QC:

You are correct in the sense that you are obliged to recognise their previous service when you take them on board, and that will impact on the financial consequences that Your Honour has identified. But unlike annual leave and alternative leave where the new employer has no choice, they must recognise them –

ARNOLD J:

Yes.

MR SKELTON QC:

– they must pay them out their rights, when it comes – and sick leave is in that category as well, when it comes to redundancy they do have a choice, they don't have to make people redundant, and there's no compulsion, certainly no compulsion to do so.

ARNOLD J:

Yes.

WILLIAM YOUNG J:

The holiday pay represents, what is it, 7.4 or 7.5% of annual salary, something of that order. I think I've got that figure from Mr Stewart's submissions.

MR SKELTON QC:

Yes, there wasn't really any real evidence on that in the Court but that's Mr Stewart's calculation.

GLAZEBROOK J:

It used to be 6% so presumably at four weeks it's gone up.

MR SKELTON QC:

Well it's 8% is the normal holiday component.

WILLIAM YOUNG J:

And what component, I mean if one looks at, you know, as a rule of thumb what might an employer allow for accumulated sick leave?

MR SKELTON QC:

Well in this instance there was a cap at 35 days. The amount of sick leave was about 35% of the total amount of leave entitlements.

GLAZEBROOK J:

It would be a contingent liability that you would value depending upon whether someone got sick so you wouldn't count the 35 days you would count, you would look at your normal sickness levels and assume that it would be, say, 20% of that taken up, if you were valuing it.

WILLIAM YOUNG J:

Yes, you've got a handle on how much sick leave is actually taken.

MR SKELTON QC:

You can value accurately annual holidays and alternative holidays because they're crystallised, you know what they are. Sick leave you have the contingency, will I become sick and secondly they may well resign, leave, be dismissed, whatever, before they take their sick leave.

WILLIAM YOUNG J:

I understand that but I mean, what would you say, for every 30 days of sick leave do you expect to be held to account for say 15 or 10 or –

ELIAS CJ:

Or vary across occupations but vulnerable employees might be a higher percentage, one would think.

MR SKELTON QC:

In some industries people think sick leave is an entitlement they can take as a right but I don't know, Your Honour, I can' really assist you on that aspect.

So then if we have a look at section 69J which is on page 18 of the appellant's bundle of documents, of the authorities, "The employment of an employee who elects to transfer to a new employer is to be treated as continuous including for the purpose of service-related entitlements whether legislative or otherwise." So it's not just for service-related entitlements. It's for all purposes. Under (2), without limiting subsection (1) and then it talks about the Holidays Act entitlements, "The period of employment of an employee with the employer that ends with the transfer must be treated as a period of employment with the new employer for the purpose of determining the employee's entitlements to annual holidays, sick leave, and bereavement leave. The employer must not pay the employee for annual holidays not taken before the date of transfer." Now the point there, Your Honour, is that it says the employer must not pay, this is the old employer, must not pay the employee for annual holidays. It doesn't say, as I would have expected it to say, had Parliament intended to remove the common law right, it would have said, nor reimburse the new employer. It would have read, "The employer must not pay the employee nor reimburse the new employer for annual holidays."

GLAZEBROOK J:

Just coming back to the point I keep making. Wouldn't they assume that that would be dealt with under the contract between the two employers, being people who can make their own decisions in contracts, unlike vulnerable employees?

MR SKELTON QC:

In a subsequent –

GLAZEBROOK J:

Does Parliament care who paid for it, as long as the vulnerable employees were paid?

WILLIAM YOUNG J:

Well your hypothesis might be, I think you float as, what would happen if a new employee fell over straight away after the transfer. Do the vulnerable employees have a right to go back to their first employer? Now that's not addressed in the statute.

MR SKELTON QC:

No and –

ELIAS CJ:

And isn't it important that it's annual holidays not taken before the date of transfer. All of these are timing issues and it's to insure the ability to take holidays because this is not a market driven piece of legislation. It is a piece of legislation with humanitarian motives, to allow people to take holidays. But it says nothing about once they take their holidays who may be liable for the portion that had accrued during previous employer's employment.

MR SKELTON QC:

It's focusing very specifically on the date of the transfer of the business across and you, the new, must recognise you, the old, must not pay out. It only deals with annual holidays, which is significant in my view. It doesn't say you must not pay out alternative holidays. It doesn't talk about the sick leave provision.

GLAZEBROOK J:

Well in terms of the alternative holidays I would have thought that if you did get paid out for alternative holidays you couldn't expect to get paid again.

MR SKELTON QC:

No you can't double dip, I agree with that.

GLAZEBROOK J:

Because – so what is the significance of not saying about that they mustn't pay the alternative holidays? Is it just you can pay the alternative holidays but in that case if you do then your employer doesn't have to pay you too.

MR SKELTON QC:

Yes but if –

GLAZEBROOK J:

Or give you the holidays because your only entitlement to alternative holidays, well you are entitled to be paid out for alternative holidays, put it that way, so in fact it's actually totally consistent. So if you'd been paid out for alternative holidays you don't get the leave and then your employer doesn't have to pay you for that. So it's totally consistent with the scheme of the Act to say that the old employer can pay you out isn't it, because the old employer can do that anyway?

MR SKELTON QC:

Although –

GLAZEBROOK J:

I mean the scheme of the whole Holidays Act.

MR SKELTON QC:

If you look at subparagraph (3), the new employer must recognise entitlement sick leave, annual holidays, alternative holidays –

GLAZEBROOK J:

Yes, yes, any alternative holidays not taken or exchanged for payments –

MR SKELTON QC:

Yes.

GLAZEBROOK J:

– so as soon as you've exchanged them for payment, if you've been paid out for them you've exchanged them for payment, so there's no longer any liability to…

MR SKELTON QC:

So if you do that before the date of transfer, you cash up your alternative holidays, no problem. LSG doesn't have to pay them. There's no recoupment right –

GLAZEBROOK J:

But there's nothing significant for not including a prohibition on paying those because if they are paid the new employer doesn't pick them up. If they're not paid the new employer does pick them up.

MR SKELTON QC:

If they're not paid out the new employer has to pick them up then the whole issue is who should be ultimately liable as between –

GLAZEBROOK J:

No, I understand, I understand what your issue is, I just don't know that it helps you to say that there's not a similar – maybe just explain to me why it helps you, that there's not a similar provision saying you can't pay it out?

MR SKELTON QC:

The respondent's case, as I understand it Your Honours, is that the high water mark is that under that subparagraph (2), must not pay out, is that prohibition that says that the debt has been discharged, they don't have to pay it out, there's no right of recoupment. Well that only deals with an issue relating to annual holidays. That argument can't possibly work for them when it comes to alternative holidays, because it's not addressed, or sick leave.

ELIAS CJ:

And in any event why on earth would this provision apply if the respondent's argument is correct because what employer, being let off the hook by transfer on the respondent's argument, would pay out on holidays not taken.

GLAZEBROOK J:

They might because they might have dealt with it in the contract between themselves and the other –

ELIAS CJ:

Well there's no contract in this case.

GLAZEBROOK J:

No, not at this situation, but they could well do so.

ELIAS CJ:

But you're not going to get an unjust enrichment in that sort of situation. That's the point. So if we're dealing simply with the common law claim, it's not going to arise in that other case.

MR SKELTON QC:

No.

GLAZEBROOK J:

I just couldn't – I can understand that argument, I just wasn't sure why it was founded in the Act. That was my – because if you're just looking at the common law I can totally understand the argument. What I can't understand is how it's founded in the Act, that's all.

ELIAS CJ:

But the Act, this provision is not dealing with liabilities as between old employer and new employer. It's dealing with preserving –

MR SKELTON QC:

No, that is correct. This is about getting the leave across. It's to overcome the problems that I took Your Honours to under the Holidays Act that says in the absence of that provision you must pay it all out and so the leave wouldn't have transferred across, and we want to transfer the leave across because we want the vulnerable employees not only to get the payment, the money, but to have the holiday on pay. So you've got to read (2) and (3), they're interdependent. You must recognise, you must not pay out. The point I was making in the example that His Honour Justice Young mentioned about what happens if the new employer goes into liquidation or doesn't pay out a month later, the example that I posit in the submissions. Interpreting the statute in the way that I am contending for enhances employee protection because in that situation the employees would still retain their right to recover from the old employer and, you know, there are situations that –

GLAZEBROOK J:

That couldn't apply to sick leave, could it?

MR SKELTON QC:

Not sick leave, no, I agree with Your Honour on that because sick leave is contingent –

WILLIAM YOUNG J:

Unless they have been sick and haven't been paid.

GLAZEBROOK J:

Well that's different because that would be an actual liability.

MR SKELTON QC:

That's right. But you can see, if you interpret it in the way that the respondent's are contending for, there's real opportunities for abuse here. You know, if you have a million dollars of accrued leave entitlements on your books for annual holidays, alternative holidays, sick leave, you want to save yourself some cash, you set up a subsidiary company, you transfer your contract across, you wind it up the next month, you know, the employees, the vulnerable employees have no recourse. Having the right to go against the new employer first and foremost is what you would expect, LSG pays it out, not a problem for the employees. But if they don't pay it out, or can't, or they go into liquidation, or they're wound up, the right to be able to go back to the old employee, employer, when you recover it, enhances employer protection. And the way you can achieve that is by saying that (3) and (2) are inter-dependent if you – the employer must recognise, but if the employer doesn't, in fact, recognise, and doesn't pay out, then the obligation not to pay out doesn't arise. Those two are connected and linked, they have to be looked at together.

ELIAS CJ:

Well if it's a funny term too, recognise if the leave becomes liable for.

MR SKELTON QC:

Yes, and the word "recognise" also Your Honour. It's not, you know, talking about the liability being transferred to the new employer, or assigned, it's the new employer must recognise it. It's not transferring it away from the old – the old doesn't have any existing contractual obligation.

McGRATH J:

Well certainly not the language of extinguishment I suppose.

MR SKELTON QC:

No Your Honour. And just the final couple of points under the scheme, 69M, "New employer becomes party to collective agreement that binds employee." I raise that Your Honour because the Court of Appeal appears to have perhaps misunderstood the submissions that were being made on behalf of LSG. It was never suggested in the High Court, or in the Court of Appeal, that these employees somehow remained employees of the old employer. It is quite clear that from the date of transfer if they elect to go across they have a new employment relationship with the new employer, LSG in this instance. The argument for the appellant was that this did not discharge or remove accrued contractual obligations it had already agreed. And the simple example that I give here, Your Honours, is the final month's pay. If the old employer doesn't pay these employees their final month's pay, there's no suggestion that those employees could not have issued proceedings to recover arrear of wages due to them from the old employer because they're somehow deemed under this legislation to have always been employed forevermore by the new employer. They have a right under section 131 Employment Relations Act to bring arrears of wages claim and to recover.

Now Your Honours I'd like to move on to section 3, if I may, of the outline of my submissions dealing with the common law remedies.

ELIAS CJ:
Sorry, I'm just thinking about 69M. it also doesn't knock out the first employer as a party?

MR SKELTON QC:
No.

ELIAS CJ:
Is there any other provision that does that?

GLAZEBROOK J:
Well sensibly you wouldn't be a party to the employment relationship any longer though.

ELIAS CJ:
Well the terms of this Act are from the time of the transfer so I'm not sure.

MR SKELTON QC:

Well see the collective employment agreement will cover a whole range of different employees. Some of them have transferred across. The remaining employees are still covered by it –

ELIAS CJ:

No, no, I understand that, but I'm thinking in relation even to a transferred employee, it's not clear from this provision that the original employee/er is taken out.

MR SKELTON QC:

No, not from that provision, but it does follow from the wording in the collective employment contract –

ELIAS CJ:

Ah, right, that's what I was asking.

MR SKELTON QC:

The coverage clause only covers you if you are a member of the Union employed by the old employer. So I'm not contending that these employers who transferred across, it's not our case that they remained employees of the old employer. That wasn't, I don't believe, the intention.

ELIAS CJ:

No but did the old employer – how does the old employer not – how does it get discharged from the collective agreement?

MR SKELTON QC:

Your Honour, I don't believe it gets discharged for accrued obligations that have arisen up to point of transfer. I do –

ELIAS CJ:

Well that's the only point I'm raising.

MR SKELTON QC:

Yes, and that's the only point we need.

ELIAS CJ:

Yes.

MR SKELTON QC:
Future obligations are discharged because they're no longer working for the –

McGRATH J:
Your point is that the statute fixes a time at which the obligations of the old employer end.

MR SKELTON QC:
Yes.

McGRATH J:
And that's all it does.

MR SKELTON QC:
That's all it does.

McGRATH J:
It doesn't extinguish them –

MR SKELTON QC:
No.

McGRATH J:
– or anything else, it just, they end because they're picked up by the new employer from that point, with certain elaborations.

MR SKELTON QC:
Yes that's –

GLAZEBROOK J:
The problem is that it's not, and it may not be a problem, for myself I have difficulty with the argument on sick leave because it's –

MR SKELTON QC:
I acknowledge sick leave is a harder argument.

GLAZEBROOK J:

Just looking at the holiday issue, the only obligation that actually arises for the employer, the old employer, is to pay it out on termination of employment for holidays not taken to that point and that's the, that's a time where you can pay it out because you don't have to give a holiday, well you can't anyway because the employment's terminated. Now under the collective agreement, the only time you have an entitlement to a holiday is when you actually take a holiday but by that stage you're no longer an employee of the previous employer and so while the amount of that depends on service, and that's accrued from the previous employer, you're not really taking over an actual liability of the previous employer because the only liability of the previous employer is to pay it out on termination, subject to your argument about if the other employer falls over or –

ELIAS CJ:

And when the holiday is taken, not just –

GLAZEBROOK J:

Exactly, that was my point really.

ELIAS CJ:

Yes.

GLAZEBROOK J:

So by that stage there's no suggestion that the old employer will be part of the collective contract at the time that's taken and, of course, you have to accept that because that is the case, and that is the time when the liability arises, but it's actually a different liability, even though the quantum is calculated and it's not a liability that the old employer has, because the only liability the old employer can have is to pay out the accrued holiday pay, because the liability to give a holiday, a paid holiday, is no longer something the old employer can fulfil.

MR SKELTON QC:

No, but I'm focusing very much on not the giving of the holiday but the obligation to pay out, as you put it, the value of the holiday, which would normally have crystallised on date of cessation of employment. Under this statute the entitlements

are transferred across and must be recognised by the new and when they are paid out they've effectively discharged the debt that the old employer had.

Now Your Honours I'm just conscious of time. If I could perhaps briefly move on to the common law principles. I just start in my outline just briefly talking about some of the general principles of unjust enrichment at the expense of the plaintiff. The enrichment in this case, Your Honour, is the discharge of the defendant's debt, and the unjust factor that is being relied upon is non-voluntary payment under compulsion of law. So very much a Professor Birks sort of analysis of unjust enrichment.

WILLIAM YOUNG J:
Is the undue enrichment represented by the actual payment or by the assumption of responsibility for payment?

MR SKELTON QC:
No, the –

WILLIAM YOUNG J:
I know the claim money paid to the use of another suggests that you're looking for a payment but is that – is it as simple as that?

MR SKELTON QC:
No, it's the discharge of your debt that is the enrichment to you. The monies are paid to the third party employees. So –

ELIAS CJ:
That's the cause of action you're relying on.

MR SKELTON QC:
Yes.

WILLIAM YOUNG J:
That's the discharge of the debt but there's a sort of a timing issue which arises because the argument against you is that by the time, and we've touched on it, by the time the money came to be paid your client was no longer liable.

MR SKELTON QC:

Well my client LSG was liable because the statute says he must recognise the leave entitlements.

WILLIAM YOUNG J:
I'm sorry, I put it round the wrong way. Pacific was no longer liable.

MR SKELTON QC:
And that's where the appellant says, yes they were, because they had a contractual liability under the collective –

WILLIAM YOUNG J:
I understand that, but is it possible to sidestep the issue by saying that in substance the undue enrichment was your client being required to assume contractual responsibility at the point of handover? So it doesn't fit within the four corners of the claim for money paid to the use of another by compulsory law, but it conflates the incurring of the liability with the payment of the money.

ELIAS CJ:
Unjust enrichment is a principle used to underpin a number of different causes of action but unless we were going to be extremely radical it's not a cause of action in itself, is that –

MR SKELTON QC:
No, in the UK it's moving very much in that direction, to become a standalone cause of action in its own right, but it wasn't pleaded that way in this case. Your Honour, the traditional approach is to say that unjust enrichment is the unifying principle that explains a number of separate, different causes of action, one of which of course is –

ELIAS CJ:
In equity and law?

MR SKELTON QC:
In equity and in law and the genesis of it largely was quasi-contract. Money had and received, which is of course when the money is paid to the defendant for the defendant's use, and the other flip side of that was the common count of money paid to the use of the defendant, where the defendant didn't get the cash, but the enrichment was the discharge of the debt that they had when the money was paid to

the third party. So that was the divide and I did put in the bundle of the authorities the historical analysis of it. Taking up my friend - Justice Young's argument about, is there another way of looking at the enrichment, I think there is Your Honour, and it's more to say the enrichment here, that the defendant received, was the benefit of the services of these employees while they were employed by the old employer. While they were employed by the old employer they provided services and benefits to the employee and they accrued leave entitlements as part of that. Now if the old employer doesn't have to ultimately bear the cost of paying those entitlements that accrued under their watch, they are enriched to that extent. The traditional analysis, and the analysis that I primarily rely on though is that it's the discharge of the defendant's debt. The unjust factor is the payment by compulsion. You can't voluntarily pay off someone else's debt, it doesn't act as the discharge of a debt.

Now Your Honours I'll very quickly, if I can, take you to the relevant passages in Goff –

ELIAS CJ:
All the authorities are so very old, aren't they?

MR SKELTON QC:
They are.

ELIAS CJ:
And it's curious that I tried to do a search for articles on this topic and drew a bit of a blank. A 1944 article.

MR SKELTON QC:
Well the Court of Appeal decision in *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 by Lord Wright, brings a, that's the key authority that I'll be taking you to, because he really found that on the principle of unjust enrichment rather than the old theories of implied contracts and quasi-contract that some of the older cases deal with, but if we can look at tab 22 of the bundle of authorities, which is –

ELIAS CJ:

Did you do a parallel exercise looking at money had and received and how it's treated today because there have been, of course, a lot more authorities on that topic.

MR SKELTON QC:

See the big difference with money had and received is that there is never any dispute when you've received money that you are benefited.

ELIAS CJ:

Yes.

MR SKELTON QC:

Incontrovertibly, you've got the money.

ELIAS CJ:

Yes the principles are exactly the same.

MR SKELTON QC:

They are.

ELIAS CJ:

So I just wondered if we mightn't find more helpful up to date discussion in the case law around money had and received.

MR SKELTON QC:

The cases in this theory are all about compulsory discharge of another party's debt and, you know, *Brook's Wharf* I believe is still the leading authority on it and it's similar in many ways to this case because you had a customs statute –

ELIAS CJ:

No, I'm not bothered about that, I was just really thinking about the intellectual ferment that has taken place in this area of law, leaving this little bit seemingly untouched, and I wondered whether we might be assisted by looking at money had and received because it is, really, acting on the same principle. But that's all right, you take us to *Brook's Wharf*.

MR SKELTON QC:

If we could just look at tab 22, Your Honours, which is Goff & Jones text on the law of restitution, page 262 of the bundle. Chapter 13, it's the right to contribution or recoupment. Recoupment is what we are dealing with rather than contribution. "It is an established, if anomalous, principle of English law that a person who makes a voluntary payment, intending to reimburse another's debt, will only discharge that debt if he acts with that other's authority or if that other subsequently ratified the payment. Consequently, if he pays the creditor without authority and if his payment is not subsequently ratified, he has in general no direct redress against the debtor, for the debt has not been discharged by the payment."

And then the next paragraph down, "There is, however, an important if limited exception to these general principles. It is this: if a payment has been made under *compulsion of law*, then the payer will have a right to contribution or recoupment from the person who has the benefit of the payment." And that's the category look at.

If we turn over the page to 263 where the authors under 13.003, the second paragraph down, they look at that second group of cases. "The second group of cases concern a situation where the claimant is compelled by law to pay money which the defendant was primarily liable to pay." It refers to *Exall v Partridge* (1799) 8 TR 308, "the claimant's goods, which were on land leased to the defendants, seized by the landlord in distress of rent. The claimant, having paid the rent to obtain the release of the goods, obtained recoupment from the defendants for he had satisfied the defendants' liability to the landlord." And importantly in this case, "It is therefore enough that the claimant is compelled *by law* to pay a debt owed by the defendant to a third party; it does not matter that there is no common liability to be sued."

Your Honour, I'm conscious of the time but I might just stop at that point because here's Goff & Jones saying, you know, you don't need a common liability to be sued, it is enough that your payment under compulsion has discharged the debt and I'll elaborate on that a bit later.

McGRATH J:
You've set out these passages in your written submissions Mr Skelton?

MR SKELTON QC:
Yes I have.

McGRATH J:
So we've read them, yes.

ELIAS CJ:
We'll take the morning adjournment now thank you.

COURT ADJOURNS: 11.30 AM
COURT RESUMES: 11.47 AM

MR SKELTON QC:
Yes, Your Honours, before the adjournment I was referring you to the various passages from Goff & Jones but I have cited those in the submissions and just given the time I'll leave Your Honours to review those. Likewise with the case law, section 4 of my outline, I'll just deal with the one key authority which is the *Brook's Wharf* decision. I do set out there *Exall*, *Johnson v Royal Mail Steam Packet Company* (1867) 3 LR 38 (Comm Pleas), two older decisions.

ELIAS CJ:
Sorry, where are you referring to?

MR SKELTON QC:
My outline Your Honour. Your Honour mentioned the, some of these decisions are of some antiquity. Those two decisions, they're only short decisions, but they are worth, I submit, a review because *Exall* and *Johnson* are situations where the plaintiff in that case wasn't liable to the third party to pay the debt but still managed to recover. There was no common liability that was required in those situations.

WILLIAM YOUNG J:
The problem that you're facing is the other way around, as to whether the defendant in this case is liable.

MR SKELTON QC:
Yes, exactly.

WILLIAM YOUNG J:
Whether there's a debt that's been discharged.

MR SKELTON QC:

Exactly correct but, Your Honour, the Court of Appeal, there's a suggestion in the judgment that there has to be a common liability before you can recover and Your Honour is correct, the defendant has to be liable, and you have to be discharging the defendants' debt, but there doesn't need to be a common liability. The *Johnson* case is a good example because *Johnson* was a mortgagee. They take possession of a ship. The crew had put a statutory lien for wages that were due and the plaintiff had to pay those wages to release the ship. They were able to recover the cost from the actual employer because they had been discharging the employer's obligation to pay the wages. No suggestion whatsoever, of course, that the mortgagee had any contractual obligations whatsoever to the crew. There was no common liability but they were still able to recover because under compulsion through the distraint, the Admiralty procedure, they had to pay off the debt.

Now let's move ahead a couple of hundred years or so to *Brook's Wharf* and that's in the appellant's bundle of authorities, tab 9. If we turn to page 535 of the judgment, which is the appellant's bundle, page 104, and the facts are stated very succinctly. "The defendants were a firm of furriers who had imported from Russia a consignment of squirrel skins in August, 1934. Out of the consignment ten packages were stored by the defendants in the bonded warehouse of the plaintiffs. Whilst in the warehouse they were stolen… The plaintiffs as bonded warehousemen were compelled by law at the demand of the Customs to pay the duties on those packages out of their own money." Now the issue was whether the warehouse could recover the amount they had to pay out from the importer of the furs.

Now if we – the decision of the Court of Appeal is given by Lord Wright and if we turn to page 542 of the judgment, page 111 of the bundle, His Honour looked at the Customs and Excise Act 1996, scheme of the Act. "The Customs Act has, however, also imposed upon the bonded warehousemen a liability for the duties so due in certain events. Thus in section 82 it is provided that a warehouseman failing to produce to an officer of Customs on request goods deposited which have not been duly cleared and delivered… shall be liable to a penalty." Now if we turn over to 543, the top of the page 543, "The obligations so imposed on the plaintiffs as warehousemen are ancillary to and by way of security for the due payment to the Customs and do not supersede the liability of the importers, though, if the

warehousemen pay the duty, the importers cannot be made by the Customs to pay it over to them a second time."

Now then the basis of the claim is set out at the bottom of page 543, the last paragraph there, "Under these circumstances the plaintiffs claim that they are entitled to recover from the defendants the amount which they have paid to the Customs in respect of duties due on the defendants' goods. They make their claim as for money paid to the defendants' use on the principle stated in Leake on Contracts." And the passage referred to there by Chief Judge Cockburn in *Moule v Garrett* (1872) LR 7 Ex 101 (Exch Ch). So they are basing their claim on what was the alternative ground relied upon by Chief Judge Cockburn in *Moule v Garrett*, the passage from Leake that he cited.

We turn over the page to paragraph 544 and His Honour says, "The principle has been applied in a great variety of circumstances. Its application does not depend on privity of contract." So no need to prove any contractual relationship. And then half way down, "The class of cases was discussed by Vaughan Williams L J in *Bonner v Tottenham and Edmonton Permanent Investment Building Society*." It was distinguished, "The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff. The case is analogous to that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a right of indemnity."

GLAZEBROOK J:
What happens with the primary liability because let's assume here that there is a dual liability, or a common liability, to pay to the employee so that the liability for holiday pay still arises. The primary liability is going to be on the new employer, isn't it, because the liability of the old employer can really, even on your argument, only arise if the new employer doesn't pay.

MR SKELTON QC:
There is a risk of –

GLAZEBROOK J:

So the primary liability has to be the new employer under the terms of the Act.

MR SKELTON QC:

There is a risk here of confusing the words what is primary liability and secondary liability and how they're used in the cases. I accept that under the scheme of the Act the employees will look to the new employer first and foremost to pay the holidays. The issue of what we're looking at here is who should be ultimately liable as between the old and the new for that cost.

WILLIAM YOUNG J:

If you looked over the page Lord Wright does actually put it in pretty general terms. He says, "It is true that in the present case there was a contract of bailment… but there is no suggestion that the obligation in question had ever been contemplated as between them or that they had ever thought about it. The Court cannot say what they would have agreed if they had considered the matter when the goods were warehoused."

ELIAS CJ:

I can't find it sorry?

WILLIAM YOUNG J:

Page 545. "The court cannot say what they would have agreed if they had considered the matter when the goods were warehoused. All the Court can say is what they ought as just and reasonable men to have decided as between themselves. The defendants would be unjustly benefited at the cost of the plaintiffs if the latter, who had received no extra consideration and made no express bargain, should be left out of pocket by having to discharge what was the defendants' debt."

MR SKELTON QC:

That's the key passage, Your Honour, from the judgment and the principal and I submit that that sets out the rationale behind this. It's to avoid unjust enrichment. It's not a question of implying contracts or what – it's looking at, as between the two, who ought to bear the ultimate cost, and in this instance the Court said the defendant would be unjustly benefited at the cost of the plaintiff if the latter, if he didn't have to pay. Now why was that in the facts of this case? Well, because the importer was the party that had brought in the furs and should primarily have been the party that paid

the duty. The machinery provisions in the Customs Act provided dual liability on both but as between the two, it was obviously just and reasonable that the importer pay. Applying that to the facts of the present case, we have to bear in mind that these accrued leave entitlements accrued while these employees were providing their services to the old employer and so it was the old employer who got the benefit of those services and therefore, I submit, that as between the old and the new, the ultimate liability should be on the old employer for those accrued leave entitlements up until the point of transfer on that same principle. The basis is to prevent unjust enrichment.

GLAZEBROOK J:
So does your argument depend on there being a continuing debt?

MR SKELTON QC:
Yes.

GLAZEBROOK J:
So – all right. So you say, well it's hard to see a continuing debt for sick pay though, isn't it? Well, can see a benefit –

MR SKELTON QC:
Yes.

GLAZEBROOK J:
– but it's hard to see a continuing debt or at least I'm finding that hard.

MR SKELTON QC:
Well the difference between being able to quantify that debt and, which you clearly can with holidays and alternative –

GLAZEBROOK J:
But as soon as the employment is finished the debt goes.

MR SKELTON QC:
Well –

GLAZEBROOK J:

The sick pay.

MR SKELTON QC:
That's correct but it's looking at it, at the point transfer there was a contingent liability at that stage.

GLAZEBROOK J:
At which – it went away as soon as the transfer happened.

MR SKELTON QC:
Mmm.

GLAZEBROOK J:
Or as soon as the termination of employment, put it that way.

MR SKELTON QC:
Yes. I think Your Honour is correct on that. There's one final passage out of *Brook's Wharf* though that I do draw Your Honours' attention to. Just after the passage Your Honour referred to on page 545, if we look at the bottom of 545, the last paragraph. "I agree with the learned Judge in holding that this principle applies to the present case. As I have explained, the duties were due from the importer. There is nothing in the machinery of the Customs Act which had removed this liability from him when the warehousemen paid the duties, as they were compelled to do under s 85. The payment relieved the importer of his obligation. The plaintiffs were no doubt liable to pay the Customs, but, as between themselves and the defendants, the primary liability rested on the defendants."

So another situation of a gap in the legislation. The Customs Act that's set out here provided for the Customs to recover, either from the warehousemen or from the importer, but it didn't in the machinery provisions say if the warehouse pays there is a machinery provision that enables them to recover from the importer. There was a lacuna, there was a gap. The common law came in and said, well to avoid unjust enrichment you can recover under that monies paid under compulsion of law. And I say it's a similar situation here. Obligation on the new employer to pay. The old employer must not pay. That's that timing issue on the transfer but as between the two there's a gap. There's nothing, and this is what the case turns on, Your Honour,

we're saying that there's nothing in the scheme that says that the common law ability to recover is removed. That's the essence of what the case turns on.

Now, I move on then in my outline I'm up to section 5, Part 6A does not remove the common law right of reimbursement and the submission is that the absence of statutory right in 6A for the new employer to seek reimbursement doesn't indicate Parliament intended to abolish LSG's common law remedy. Now in the High Court Justice Woolford relied on the presumption that Parliament is presumed not to intend to abrogate common law rights in the absence of clear words or necessary intendment. So that was the starting point and I submit that that's correct. It's for my friends to actually be able to point to something in the statute that says it was either express or by necessary intendment that what otherwise would have been a common law right of recoupment in this situation no longer exists. I just, in that outline referred Your Honours to the paragraph in the High Court judgment there Justice Woolford cites the various cases that he refers to.

Then moving quickly on to part 6 of my outline. Part 6A, I submit, does not remove Pacific's contractual obligations. I submit that the Court of Appeal erred at paragraph 26 of the judgment when it held that Pacific was no longer contractually liable for pre-transfer leave entitlements. Your Honours will have read the judgment but is it of assistance if we perhaps just turn to paragraph 26. It's in the case on appeal, volume 1, tab 10. It talks about the combined effect of these provisions and the provisions are the provisions referred to in paragraph 25 above, "Is that, from the time of transfer, the transferring employee becomes an employee of the new employer, and ceases to be an employee of the old employer." Correct, I have no issue with that, that's obvious. It's the next paragraph, "In those circumstances there is no contractual basis for a claim by the transferring employee against the old employer for pre-transfer leave entitlements. Rather, the transferring employee can now make a claim against the new employer, which has become a party to the collective agreement, and in respect of which the transferring employee is treated as having been continuously employed both before and after the date of transfer."

Now I wish to then to the statutory provisions that the Court of Appeal relied upon to reach that conclusion and to submit that the obligations weren't – the contractual obligations weren't extinguished by those statutory provisions. The first – well two of the three provisions can be dealt with together. Section 69I(2)(a) and 69M(2) and Your Honours may recall that 69I(2)(a), it's page 17 of the authority bundle, "An

employee who elects to transfer becomes an employee of the new employer on and from the specified date." And 69M(2) is the section we looked at about becoming a party to the collective.

Now as I note in my outline, Your Honours, the Court of Appeal misunderstood LSG's case. LSG never contended before the High Court or the Court of Appeal that the employees remained employees of Pacific. Change of employer does not extinguish old employees existing contractual obligations. It's a point that Your Honour made about it future obligations going forward are removed but not existing obligations.

Now the next issue relied upon was section 69J(1). This is the continuous employment provision. About employees who elect to transfer to a new employer to be treated as continuous, employment is to be treated as continuous. Now it's submitted that the legal fiction of continuous employment is enacted to protect employees' entitlements but the fiction does not apply to the relationship between LSG and Pacific.

The final case that I want to refer Your Honours to in relation to this matter is the Privy Council decision in *Commissioner of Inland Revenue v New Zealand Forest Research Institute Ltd* [2000] 3 NZLR 1 (PC), because it turned on the interpretation of a continuous employment provision, and that is at tab 17, page 196 of the bundle of authorities. Now if we turn to the judgment of Lord Hoffmann, page 2, His Honour very briefly sets out the facts in his opening paragraph, "The issue in this appeal can be shortly stated. The taxpayer company agreed to acquire the asset and undertaking of a business. As part of the consideration for the acquisition of the business, it agreed to take over certain liabilities, including certain of the vendor's contractual obligation to its employees. These included their vested or contingent entitlement to paid leave, attributable to their service with the vendor. The question is whether the subsequent payment of these sums was deductible for the purposes of calculating the company's profits assessable to income tax."

Now at the bottom of the page, on page 2, is set out the relevant statutory provisions, section 41, and Your Honours will see there, "Employment of transferring employees deemed to be continuous." And there's the relevant statutory provision, "Every employee of a Government department who is transferred to a Crown Research Institute pursuant to section 39 of this Act shall, on the date of the transfer, become an employee of the Crown Research Institute, but, for the purposes of every

enactment, law, determination, contract, and agreement relating to the employment of each such employee, the contract of employment of that employee shall be deemed to have been unbroken and that employee's period of service with that department, and every other period of service of that employee that is recognised by that department as continuous service, shall be deemed to have been a period of service with the Crown Research institute."

So it's in similar terms, it's your continuous employment, your service is transferred across. Now at the bottom on page 3, line 35, paragraph 6 of the judgment, His Honour notes, "Leaving aside for the moment the provisions of s 41, the position was that the Institute, pursuant to the transfer agreement and as part of the consideration for the purchase of the assets, accepted a liability under its employment agreements with former Crown employees not merely to remunerate them for services to the institute but also to discharge obligations, either vested or contingent upon some future event, which were attributable to their previous service with the Crown. It seems to Their Lordships plain that, viewed in this light, the payments were capital expenditure, being part of what was paid for the acquisition of the assets. There can be no doubt that the discharge of the vendor's liability to a third party, whether vested or contingent, can be part of the purchase price. It does not matter that the payment is not made at once but pursuant to an agreement whereby the purchaser agrees to be substituted as debtor to the third party."

So leaving that aside and then we turn to paragraph 8 where His Honour then considers the affect of section 41 and the Court of Appeal – well he considers the Court of Appeal's findings so the Court of Appeal's finding at paragraph 8. "Is this finding affected by s 41? The Court of Appeal thought that it was. Richardson P said that the effect of the section was that the employees must be deemed always to have been employed by the Institute. Therefore, in discharged the creed staff liabilities, the Institute was not making payments which had become due in respect of service to the Crown. The payments were due in respect of deemed service to the Institute itself. They were accordingly of a revenue nature."

And that's the same basis, if you like, that the Court of Appeal is arguing in this case. They're saying, well, there's no contractual liability back on Pacific because they've always been deemed to have been employees of LSG under the section 69J. Now what did the Privy Council say about the Court of Appeal's judgment? Well at paragraph 9, "Their Lordships think that this construction gives s 41 too wide a

meaning. The section says that for the purposes of every enactment, law, determination, contract and agreement 'relating to the employment' of each employee, the contract is deemed to have been unbroken and his 'period of service' with the Crown shall be deemed to have been a 'period of service' with the Institute. This means that the right of the employees as against the Institute, and in particular those rights affected by their length of continuous service, are to be determined as if they had always been employed by the Institute." But then the important passage, Your Honours, is that, "It does not however mean that this assumption is to be applied to the relationship between the Institute and the Crown. Indeed, the provisions of the transfer agreement for the assumption of accrued staff liabilities and the adjustment of the purchase price to take them into account would have made little sense if the employees had never been Crown employees in the first place." So the deeming provision in that case didn't reflect the relationship between the Institute and the Crown, rather just between the employees.

Now, Your Honours, I've checked and I believe there's something like 43 separate statutes which have similar continuous employment provisions in them involving transfers of employees from Crown departments to State owned enterprises. I can make that information available to the Court if it would be useful, but these are common provisions. But the important point that in this case the fallacy the Court of Appeal made, I submit, is to say that the deeming provision meant that these employees were never employed by Pacific, which as a matter of fact, of course, was wrong, and that's the basis upon which the Court of Appeal said that the accrued contractual obligations ceased to exist and it's contrary to the reasoning in the Privy Council decision that I've referred Your Honours to.

WILLIAM YOUNG J:
Can I just ask you something that's slightly related to that? Was there any evidence as to how these liabilities were treated in the accounts of the two companies? Were they accrued – expenses on an accruals basis or were they really just allowed for on a cash basis?

MR SKELTON QC:
No, there wasn't any evidence on how that was done.

WILLIAM YOUNG J:
For neither side?

MR SKELTON QC:

No.

ARNOLD J:

Sorry, can I take you back to paragraph 26 of the Court of Appeal's judgment, page 81. Now you say there was a contractual basis for a claim by the transferring employee against the old employer for pre-transfer leave entitlements?

MR SKELTON QC:

Yes Your Honours. I'm saying the collective employment contract, those individual contracts that I took you to right at the outset, is the source of that contractual liability and that –

ARNOLD J:

So if the new employer didn't complete its – didn't fulfil its obligations to the employee, the employee, to the extent that those obligations involved a hangover from a previous period, could sue the old employer?

MR SKELTON QC:

Yes, Your Honour, and on that interpretation that will enhance employee protection for these vulnerable employees.

GLAZEBROOK J:

How does that work under the contract itself though, leaving aside the statute, because all of these obligations arise under the new employer so to – if you want to take a holiday you get paid for your holiday, because that's the way the Act works, and it's the Act that's brought in under the collective employment agreement. I can understand the argument that says, well despite you then said you don't have to pay the accrued holiday pay when the payment had ended, if the new employer doesn't, maybe you can say, well I can go back to that obligation of the old employer, because that's just paying me out.

MR SKELTON QC:

Mmm.

GLAZEBROOK J:

That's not paying for my holiday, it's just paying me out. But it is a different obligation. Because I can't see – say, for instance, somebody takes a holiday and the new employer says I'm not going to pay, I can't see what cause of action you have against the old employer to pay for your holiday.

MR SKELTON QC:

It arises because you've got to think about these entitlements are really the employees' money we're talking about here. These are leave entitlements that have accrued while they've been working for Pacific, the old employer. It's their money that Pacific is holding for them. Would have had to pay it out on termination. Under the Act they've transferred across and Pacific haven't accounted or paid out that money for them. Now, first and foremost the employees don't care, as long as LSG pays it out. So they look, first and foremost, to their new employer, LSG, pay me my leave. They get paid. If LSG doesn't pay them, can't, goes broke, something along those lines, I'm saying you can interpret this statute that says, well, the underlying contractual obligations –

GLAZEBROOK J:

So you're back to the statute and I'm fine if you're talking about the statute. I understand that argument. But they're not being paid for their holidays though, are they, under the collective agreement? They're being paid their contractual entitlement to their accrued holiday pay –

MR SKELTON QC:

To be paid out.

GLAZEBROOK J:

– to be paid out as they would have done absent the statutory prohibition on payment, is that –

MR SKELTON QC:

Yes, Your Honour, and that's all I need to achieve is to show that there is a debt for that payment of money.

GLAZEBROOK J:

All right, I understand that.

MR SKELTON QC:

You're correct, they may not get their actual holidays if LSG goes broke or whatever, but all I need to show is that there is still an existing debt that Pacific had for that amount that LSG, when it pays the holiday payout, is discharging. And then the cause of action will –

GLAZEBROOK J:

It's that second step I'm not totally convinced on yet.

MR SKELTON QC:

I'll continue and hopefully get there before the break.

GLAZEBROOK J:

I can understand the first part of the argument.

MR SKELTON QC:

Now I'm at 6.4 of my outline. Section 69J(2)(a)(iii), the new employer's obligation to recognise entitlements, I submit, doesn't extinguish the old employer's liability. Recognition creates a new statutory obligation enforceable by the employees against the new employer, it doesn't transfer or resign the liability from the old to the new employer and as the Chief Justice mentioned in discussion, it's really a timing issue, those two provisions. It's not extinguishment of the underlying obligation. And under 69(2)(a)(ii), the old employer must not pay, this was, as I mentioned, referred to in the Courts below, is the high water mark argument for the defendants. A number of points I wish to make here. There is no prohibition in 69J(2)(a)(ii) against the old employer reimbursing the new employer for payments it has made for pre-transferring annual leave. It's a point that I've already touched on where I said there's no wording in that clause that says, must not pay the employees or reimburse the new employer. You would have expected that wording in there if the intent had been to give a windfall for the old employer in those circumstances.

It's the compulsory discharge of the debt by LSG's payment, it's all that's required to give rise to a right to reimbursement. No need to establish that the debt remained directly enforceable by the employers against Pacific. So I put the argument on two bases. I say all we have to do to succeed is show that a debt was discharged, whether or not that debt was enforceable by the employees directly against Pacific, or remained enforceable, but if I'm wrong on that my primary submission is that these

employees still have a right to sue Pacific and to recover payment. I don't believe I have to go that far. All I have to show to, the last element in the cause of action, is that I've discharged your debt.

GLAZEBROOK J:

Can I just take you back, you said it doesn't matter whether it's enforceable or remains enforceable, but it has to be a debt and if it's not enforceable, or remains enforceable against Pacific, I can't see that it's a debt.

MR SKELTON QC:

Well there may –

GLAZEBROOK J:

I understand your second argument which is, yes, it would be enforceable but…

MR SKELTON QC:

Yes, well my primary argument, it is enforceable, that's where we're resting our case. But I give you the example of a situation where there is a debt but perhaps it's unenforceable because it was a contract entered into with a minor. So under the Minors' Contracts Act 1969 you can't sue the minor. There's still a debt there but it's not enforceable against the minor as such. The payment still discharges the debt. So the cause of action, the enrichment is the discharge of the debt, and I submit that there's nothing in the case law that says that the debt actually has to be, you know, legally enforceable in that sense.

GLAZEBROOK J:

But where's the unjust enrichment because it's really a gift then isn't it and this it a voluntary payment?

MR SKELTON QC:

It's not a voluntary payment because the payment is made under the statute –

GLAZEBROOK J:

I you have compulsion under law you say so if you're compelled to make a payment to a minor under law, all right, I understand the argument.

MR SKELTON QC:

Well the argument is that if I guarantee a minor's debt, the creditor can still enforce and sue the guarantee even though the creditor couldn't enforce the claim directly against the minor because the Minors' Contracts Act would say you can't enforce it against the minor, but you can still pursue it against the parent who has guaranteed that debt. That's a subrogation argument. So, as I say it's not my primary position but I'm saying that there's still the debt there. If you do interpret the words "must not pay" as meaning that somehow or other it's no longer enforceable against the old employer and that would be an interpretation that would leave these vulnerable employees in a difficult, vulnerable situation but even if you do get that far that doesn't mean that the appellant can't recover because the fact of the payment by LSG has still discharged a debt albeit that the employees mightn't have been able to enforce that directly. That's the submission in relation to that point.

ELIAS CJ:
Well that has to be a subrogation argument, doesn't it?

WILLIAM YOUNG J:
Doesn't the argument really come down to the proposition although you can articulate in this way but we're party a compulsorily assumes the liability of party B the law will imply a promise by party B to reimburse party A?

MR SKELTON QC:
Yes.

WILLIAM YOUNG J:
And at that point the focus is on the transfer of liability rather than just what happens at the time when payments fall to be made and whatever that you'd have to do it on an accrual basis, a calculation of what the value was to in this case LSG – Pacific from being relived of its contingent liabilities.

MR SKELTON QC:
That's the benefit that they got and to put it into the structure around the causes of action you say well when party A compulsorily discharged the debt of party B the benefit that party B got was debt paid, that's the benefit that the remedy then restores, the restitutionary remedy it attaches to. Now it was a voluntary payment no right to recover but because this is a payment under compulsion, under the statute there is a right to recover.

Now Your Honours, if I could turn to my written submissions, paragraphs 93 and 94. Your Honours will recall I suggested three examples as to how it may, the scheme may be interpreted in a way that will enhance employee protection. At paragraph 86, example 1, was Pacific does not pay the final month's wages. So they just, they don't pay the final month's wages. Can it realistically be argued that these employees don't have any right to sue Pacific and recover their final month's pay? I submit, well no clearly not. They would be able to recover that final month's pay because under the collective employment contract the wages became due and owing up to the date of transfer. The fact that they now, Pacific – LSG employees it doesn't stop them in any way from exercising their rights under the collective contract to sue for their wages. So why is it different with leave entitlements.

Now the second example that I postulate is that the employees transfer across. Shortly thereafter, say a month later, employment is terminated. Now of course it could be terminated because the employees resign, they leave or they might be dismissed or the company may go into liquidation.

Now assuming the employee demands payment of their accrued annual leave and alternative holidays in full from LSG but LSG declines or is unable to pay as required under section 27(2) of the Holidays Act could the employee sue Pacific to recover annual leave, alternative holidays? And I submit they could. They wouldn't recover sick pay, I acknowledge that, because that event, that contingency hadn't arisen, they weren't sick other than any sick pay that they might have actually already taken.

McGRATH J:
What if an agreement had been reached between the two companies and a financial settlement made?

MR SKELTON QC:
But Your Honour, these are not sale and purchase of a business these are competitors, they are not reaching agreement amongst anybody.

GLAZEBROOK J:
Well there may be under a 6A because it applies to transfers and contractual transfers as well.

MR SKELTON QC:

If there was an agreement between the parties as to what should happen in this situation the agreement will govern.

GLAZEBROOK J:

But that doesn't help the employees who –

McGRATH J:

Yes, how can it govern the employees?

MR SKELTON QC:

It would have to be a tri – it would have to be a tripartite agreement of everybody but, no, I mean –

ELIAS CJ:

There could be a bilateral agreement between the two employers which would simply mean that if Pacific paid it's not, there's not unjust if – yes, if it's transferred there's not unjust enrichment if they've agreed to that wash-up among themselves and that's all you need really to contend for. It's not affecting the liability of either in respect of obligations to the employees and I don't see in the absence of any statutory provision that that could happen.

GLAZEBROOK J:

Although it would be a bit on the nose if you had an adjustment in the purchase price and then still were liable to the employees. It doesn't seem likely that Parliament would have –

MR SKELTON QC:

No but as a matter of contract law, yes, the employees who weren't paid out by the new employer could go back and recover.

GLAZEBROOK J:

No, but you've had an adjustment in purchase price that said because you're taking on these obligations just under an ordinary contractual situation you have this so that leave aside 6A.

MR SKELTON QC:

Yes.

GLAZEBROOK J:
You could have an agreement that says, well, although whether that would be contrary to the Holidays Act might not be the case but –

ELIAS CJ:
Well it couldn't be imposed on employees, could it.

MR SKELTON QC:
It's not binding on the employee so you are correct. I mean there might well be on the sale and purchase of the business the parties agree we'll transfer the leave across, new employer you will pay out the leave and then for whatever reason that doesn't happen the point Your Honour made was, well couldn't the employers still go back to the old employer and recover their leave? As a matter of contract law, absolutely. And then the old employer would have to try to recover the costs from the new but you see what's happening here is the risk of insolvency is not being sheeted home to the vulnerable employees it's a matter between the old and the new employer.

But I come back again, I hate to dwell on it, but this was a case where we're dealing with two competitors who are fighting one another, there's definitely no agreement, commercial agreement between LSG and Pacific that governs these situations, they were never reaching agreement amongst themselves, this is a subsequent contracting situation. So it's not analogous to the sale and purchase situation that we are discussing here.

So at 93 of my submissions I set out what I submit is the preferable way of interpreting section 69J(2)(a)(ii), and 93A, I'm saying that you have to read those two provisions, subparagraph (2), subparagraph (3) as being interrelated. So subject to the new employer complying with its statutory obligations under 69J(2)(a)(iii)(B) of the Act then Pacific does not have to pay but if LSG goes broke, doesn't pay the employees should retain their contractual rights to recover from the old employer.

The other way of looking at it, Your Honour, which is to say that, you know, this is all about continuous employment obligations, section 69J(1) is a provision that deems employment to be continuous. Now when that continuous employment comes to an

end through, you know, resignation, dismissal, liquidation, redundancy, whatever, then the prohibition doesn't apply. That section 69J(2) is an avoidance of doubt clause. It says, you know, for the avoidance of doubt.

We go back Your Honours, it talks about –

ELIAS CJ:
Sorry, which provision again?

MR SKELTON QC:
69J, it's in appellant's bundle of authorities, page 18. The main provision in 69J(1), "The employment of the employee who elects to transfer is to be treated as continuous including for the purposes of service-related entitlements." And then there's, "To avoid doubt," and then we set out the provisions that we've been dealing with under 69J(2)(a)(ii)(iii). But my point here is that this is governing a situation of continuous employment. So in a situation where that new employment relationship comes to an end there's no longer continuous employment, resignation, dismissal, liquidation of LSG then the prohibition against Pacific paying out is no longer operable.

The other way of interpreting the section is to say the prohibition is against Pacific paying out the money at its initiative. Now does it stop the employees from requesting that they pay out the lead balances. Now why employers would ever want to do that is debatable because it's preferable from their perspective that the leave is transferred across, that they not only get their money but they get the holiday on pay and they look to the new employer to pay. But is there a situation where you interpret 69J(2) that says, well you can't pay out unless the employees request it.

ELIAS CJ:
Well it's a bit hard to read it like that.

GLAZEBROOK J:
I think it –

ELIAS CJ:
It's a prohibition.

GLAZEBROOK J:

– the idea of the –

McGRATH J:

It's the policy, that's not the policy of the statute.

GLAZEBROOK J:

Because you're not allowed to under the Holidays Act require payment out so.

MR SKELTON QC:

That's right Your Honour because under 27(2) of the Holidays Act they would have been obliged, they must pay it out on termination of employment in the final pay. So this section is all aimed about saying, no you don't have to do that, not to pay it out.

ARNOLD J:

Not don't have to, you must not, it says.

GLAZEBROOK J:

So you can't even if the employee wants you to if the employee has chosen to transfer.

MR SKELTON QC:

Yes there's certainly, in terms of policy arguments, some substance in that in relation particularly to annual holidays because the whole policy of the Holidays Act is to ensure that employees take holidays on pay. Alternative holidays are a bit different because they can just cash them up.

GLAZEBROOK J:

But there is no prohibition on them paying out the alternative holiday.

MR SKELTON QC:

I turn then to the question which we've touched upon a little bit on redundancy entitlements and the differences at section 6.6 of my outline and I note there that the statute does expressly extinguish the old employer's liability to redundancy, so there's that express extinguishment in 69I(2)(c) but there is no equivalent wording in relation to accrued leave entitlements which you would have expected if the old

employer was no longer to be sort of ultimately liable for those costs. And I've touched on already –

ARNOLD J:

Well I'm not sure if you're right. I mean, what it says is you're not entitled to any redundancy because of the transfer but, well we've gone over this ground but the logic of your argument, it does seem to me, is that all service-related entitlements which can be reflected in an additional financial monetary sum to the employer, employee, sorry, are liable to be met by the old employer to the extent that they're referable to that old employment. That's the fundamental position you're adopting and that does apply to redundancy which occurs subsequently, sickness, probably maternity leave, I'm not sure but I think maternity leave has got a basis in length of service as well.

MR SKELTON QC:

Yes and parental leave is dealt with also in 69J but it's (b), it deals with – so you're correct that for the continuity of employment, so if it's a seamless transition across to protect these employees they don't have to start the clock ticking again from the date there are employed by the new employer.

ARNOLD J:

That's right, so the logic of your argument is that all those sort of accrued interests that the employee has with the old employer are chargeable to the old employer if the new employer subsequently has to pay them out.

WILLIAM YOUNG J:

Well one example is service pay.

ARNOLD J:

Yes, service pay is an example.

MR SKELTON QC:

Except the difference is that with –

GLAZEBROOK J:

Christmas lunch.

MR SKELTON QC:

Well service pay, you know, after five years of service you get an additional 20 cents in the dollar on your pay rate or something along those lines, but those are not liabilities that have accrued due and owing for the old employer at the date of transfer. You see that's –

ARNOLD J:

Well no, so are you really abandoning the pursuit of the sickness leave, illness leave?

MR SKELTON QC:

The sick pay is in the category that Your Honour has talked about, that it hasn't, it's not a liability that has crystallised at the date of transfer, it's a contingent liability going forward which is in the same, if you like, category of being there is a potential of redundancy down the track or there is a potential that the employee may want to take parental leave in two or three years' time.

ARNOLD J:

Yes.

MR SKELTON QC:

But it's not a liability that Pacific had crystallised at the date of transfer whereas annual leave and alternative holidays are fixed liabilities at that stage. They are, can be seen appropriately as money that was due and owing to the employee at that time.

ARNOLD J:

It seems to me though that you have to take a position and either it is, well all I'm talking about is things that have accrued and were effectively vested at the date of transfer or else I'm talking about those things plus things that are contingent that might arise in the future but the amount the employee gets or the type of benefit the employee gets is going to be affected by his or her terms of service with the old employer and in relation to those as Justice Young has said, you're looking at some sort of assessment, actuarially or otherwise, to try and put a value on those figures. Now what are you saying, are you saying that the broader one applies or are you focusing just on those that are, let's use the term "vested" that are certain at the date of transfer?

MR SKELTON QC:

Certain obligations that have, that accrue on the date of transfer. The unpaid out holiday pay, the alternative leave that was due and owing, it's not contingent on anything it was due and owing –

ARNOLD J:

Right.

MR SKELTON QC:

– at date of transfer, that went across. Sick leave that was a, as you say, a contingent liability that only arose if and when in the future the employees became sick. Now can LSG recover sick leave costs? The argument why they can is to say, well, the statute does provide for continuous employment so it does transfer across those liabilities which would not be the case of course on just a sale and purchase of a business, they would be lost.

ARNOLD J:

Yes.

MR SKELTON QC:

There's a bit of a trade-off here because the statute has said the old employer is not liable for redundancy, that's 69I(2)(c). The old employer is not entitled, "The employer is not entitled to pay any redundancy entitlements under the terms and conditions of the employment." So the old employee gets a windfall from that, they don't have to pay out redundancy.

ARNOLD J:

Well I must say I don't think that's what s 69I(2)(c) means. If your theory is right it should apply in the case of redundancy as everything else. (1)(c) [*sic*] just says there's no entitlement to redundancy because of the transfer. But if your – if the new purchaser say after three or four months of running the business says, "Well I'm going to have to make a whole bunch of people redundant and some of them are transferring people," and if those transferring people are entitled to more in the way of redundancy because of their prior service with the old employer then the new employer is having to pay more to reflect the old employer's – the benefit the older

employers got from these people's service. Well, why doesn't the same principle apply?

MR SKELTON QC:

Well, the new employer would have to pay more because it has to, under the statute has to recognise prior service.

ARNOLD J:

That's right.

MR SKELTON QC:

It's not suggesting and I can't suggest that the new employer can recover that additional cost from the old employer. Why is that? Because section 69I(c) expressly stops the new employer from recovering costs it says that if the employer elects to transfer across not entitled to redundancy entitlements. Now, my point is that there isn't an equivalent provision that says that the employees who elect to transfer across are not entitled to accrued leave entitlements from their old employer. Or sick leave, which includes sick leave.

GLAZEBROOK J:

Well because they're just never entitled to sick leave anyway. As soon as their employment is terminated that's it.

MR SKELTON QC:

Except that their entitlement, the employees' entitlement has been preserved –

GLAZEBROOK J:

But that – but it – well that's fine but it's irrelevant isn't it?

MR SKELTON QC:

– by the statute.

GLAZEBROOK J:

I mean your argument would have to be that the new employer, the old employer, that there's a benefit to the new employer because if it had continued to be the employer, which it isn't, it might've had to pay out sick leave.

MR SKELTON QC:

Mmm. Yes.

GLAZEBROOK J:

Well that's a long way away from the case law isn't it? Because what benefit is it to the old employer that somebody else pays sick leave? Which if it had been a employer still it would've had to pay. But then if it had been an employer still it would've had the benefit of those employees' services during that period. So effectively I can see that getting a benefit –

MR SKELTON QC:

My argument does have to be, as Your Honour notes –

GLAZEBROOK J:

– from not having to pay out sick pay but equally it's getting a detriment from never having had the employees' services in the period that the sick leave arises.

MR SKELTON QC:

That's why I think I've acknowledged the argument around sick leave is a lot more difficult because it isn't a debt that has crystallised and is actually genuine and owing at the date of transfer, it's a contingent liability that's transferred across. But you're –

GLAZEBROOK J:

So if I can – so I mean I can understand your argument on the accrued leave. You say if it wasn't for this provision then the old employer would've had to pay out this sick leave so it gets a benefit from the statute in the sense that it doesn't have to pay that out and therefore when it is paid out or alternatively possibly just on transfer, on the transfer of the liability on – if you're looking at Justice Young's postulation, then it has a right of reimbursement. Because otherwise it has, by virtue of the statute, got a benefit for nothing.

MR SKELTON QC:

Mmm.

GLAZEBROOK J:

That – but sick leave I can't put in the same category.

MR SKELTON QC:

Sick leave is more difficult to justify. Because it's not a crystallised obligation. The way Justice Woolford put it when he dealt with the matter was to say, "Well it was nevertheless a contingent liability. It wasn't the same as annual leave or alternative leave. It wasn't an actual liability that had crystallised, it was a contingent one, and then he said, well, when the liability, when the employee was sick and it did crystallise into an actual liability, as Your Honour put it, it would have been a liability of the old employer had the employers not transferred across. It was the –

GLAZEBROOK J:

But is that – does that come within the cases though? Because it's assumed there is an actual liability. Because there's no – the – I doubt the employee could go along and say, "Well, I got sick so, I know I'm not your employee any more but you should pay me out."

MR SKELTON QC:

The cases I've looked at have involved crystallised actual debts that have been discharged by payment by the plaintiff.

GLAZEBROOK J:

Or possibly contingent ones where the contingency being nothing to do with the relationship comes up, so if it's contingent on some third party doing something it's going to be at that stage still a debt of the original debtor, original – yes. Though they mention contingent debts, but there are all sorts of contingencies that have nothing to do with the – that would mean that when the contingency has crystallised, that it will be crystallised debt of the original debtor. But here it's difficult with sick pay to put it into that category, isn't it?

MR SKELTON QC:

Yes, I see the scheme of the Act as creating a bit of a trade-off here. It's saying, "In relation to redundancies we're going to, under 69I, we're going to relieve the old employer for having to pay redundancy costs, the costs are on the new employer, but in relation to, say, sick leave, which would normally have, use it or lose would have vanished, we are going to, under the statute, transfer sick leave entitlements across, so that the new employer has to recognise not only the annual and alternative but also sick leave entitlements." And I would say as part of that trade-off, it's, if the new

has to pay out the sick leave that was referable to the period of employment prior to transfer, the right of recovery. It has to be on –

GLAZEBROOK J:

You'd have to find that in the statute though, wouldn't you, rather than the common law? Because you relied on the common law. Where's the trade-off for that in the statute?

MR SKELTON QC:

Well, on the common law basis, the appellant has to show that they have discharged the defendant's debt. And the issue we're struggling with is, does that mean discharge an accrued debt, or does it also, is the common law wide enough to say if you discharge what is a contingent debt, that is enough to trigger the recovery route?

GLAZEBROOK J:

Let's just work out what you're saying with "contingent", because, yes, it might be, if it's still a debt of the original debtor. But if it's a contingent debt and the contingency has not happened and cannot happen…

ELIAS CJ:

Well, the contingency hasn't happened on either of those bases on the sick leave or the redundancy, and may not happen. So maybe it's, if we're talking about what's just and reasonable, which ultimately seems to be the underlying common law standard, perhaps against the statutory scheme it is understandable that the risk is taken on by the new employer in the case of sickness and redundancy.

MR SKELTON QC:

That may be so, and –

ELIAS CJ:

But there's an existing debt at the time of transfer, of which the old employer gets the benefit on the Court of Appeal approach.

MR SKELTON QC:

Well, certainly, and while I'm saying that the Court can't and shouldn't have regard to the Bill, but the way the provisions in the Bill were drafted was along those lines, to say the new employer has to bear the risk of sickness, no right to recoup on sick

leave, but for annual leave and for alternative leave, yes, you can recover. So maybe, you know, that's, that trade-off applies. But in the common law right to recover, if – what I'm saying is if it is a, all we have to show is a discharge of an obligation, and it's a contingent obligation in case of sick leave –

ELIAS CJ:
Which may never arise.

MR SKELTON QC:
– which may never arise, but when it comes to claiming the payment it has arisen, that's Justice Woolford's point. You obviously can't claim and recover anything if it doesn't arise, but if it crystallises and the new employer actually pays out sick leave to the employee, referable back to their previous service, then you can recover.

GLAZEBROOK J:
But where is the debt for the old employer on that basis? Because the statute says use it or lose it.

MR SKELTON QC:
The statute says use it or lose it, but is says with holiday pay and for accrued, pay it out. This, Part 6A says, no, transfer it across.

ELIAS CJ:
I wonder really whether we're going round in circles a bit on sick leave and so on. I think it would help us, Mr Skelton, if you're able to bring your submissions to a close before lunch, so that the respondent can have a fair crack?

MR SKELTON QC:
Yes. Just a very brief point at 6.7, the disclosure regime, that's part 2 of 6A of the Act, the respondents rely upon that as justifying a argument that there's no continuing obligations. The Court of Appeal didn't find that a decisive factor. I've referred Your Honours to the decision of Justice Toogood in this matter, which he deals with the reasons why the disclosure regime doesn't assist the respondents' argument here, and in very brief summary it's because you do not know whether employers will be made redundant from the old employer if a contract is lost, you do not know how many of them will elect to transfer across or not, so the disclosure information that you receive prior to the tender documents going in can't provide the

new employer with any meaningful information that could enable them to sort factor it in to any pricing.

The final point, Your Honour – and I'll leave my section 7 to maybe a reply, if I need to, which is to respond to some of the plaintiff's submissions – is the acknowledged problems that the Court of Appeal judgment creates, and we've focused largely this morning on reversing what would be otherwise, I submit, an unjust enrichment of the defendants, if there was no obligation to reimburse. But the other practical problems that were acknowledged in the Court of Appeal, if there's no reimbursement obligation between the old and the new employer, then there's no level playing field in terms of the tendering process, you have, secondly, an unsatisfactory position where, say, Singapore Airlines has already paid the old employer under their old contract for employee costs, including leave entitlements, and would they have to pay a second time to the new employer if those costs end up having to be borne by the new employer that –

ELIAS CJ:
If they build it in into the tender, you mean?

MR SKELTON QC:
Well, if they, if – yes, if LSG built those costs back into the tender. So that suggests that, okay, Parliament couldn't have intended that situation to arise.

And then the final point really is in relation to the Court of Appeal, I submit, erred when it said that it could get support for the position that it held by reference to the Bill, because while it's well-known that you can resort to parliamentary materials to help interpret a statute, a Bill that may or may not ever be passed that is introduced many years after the statute itself, it's difficult to see how that could possibly be of assistance in interpreting what Parliament intended at the time they enacted the primary legislation.

So, Your Honours, I will conclude, unless there are any further questions.

ELIAS CJ:
Thank you, Mr Skelton, we'll take the lunch adjournment now.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.17 PM

ELIAS CJ:
Yes Mr Stewart.

MR STEWART QC:
Thank you Your Honour. It's submitted when I was preparing some notes last night that the central question on this appeal is whether Pacific remained liable to the transferring employees in respect of their accrued leave entitlements as at the date of transfer and in my submission the exchange with my learned friend this morning that's where the focus has mostly been.

Now, just to underscore that, if we look at the pleaded case, which is at volume 1, tab 3, at page 11. Paragraph 22 it pleaded that under section 69J(2), "The Act compels the plaintiff to discharge the first and/or second defendant's liability to pay the transferred employees' accrued sick leave, annual holidays." It was a claim brought on the basis that LSG was compelled by statute, or compelled by law to make these payments for which the transferring employees – for which Pacific was liable. Now by Part 6A of the Act Parliament has expressly and clearly imposed liability for all accrued leave entitlements, wages and redundancy costs on the new employer and that reflects the underlying statutory purpose that employees are to look to the new employer for their entitlements. It is significant in this regard that Parliament has contained absolutely nothing in Part 6A of elsewhere that requires that the old employer had any remaining liability. There's not a suggestion of it. The whole focus is on the transfer of those obligations to the new employer. The notion that a transferring –

ELIAS CJ:
Sorry, the whole focus is on transfer of what? It's continuance of employment, isn't it, that the focus is on?

MR STEWART QC:
It is and as part of that seamless transition is that the new employer was responsible for all of the accrued leave entitlements. I'll come to what they are in a minute. That's the…

ELIAS CJ:

Yes.

MR STEWART QC:

And it's submitted that the notice that a transferring employee could subsequently have recourse or look to the old employer to discharge any of the accrued leave entitlements which had been transferred across to the new employee, is contrary to the express words and provisions of Part 6A. Even the new proposed legislation, which didn't get across the line earlier this year as a result of Mr Banks' resignation, in addressing the performance of this legislation on a statutory review period, made no provision for the transferring employees to have any recourse or claim against the old employer in any circumstances. What it did, it contemplated a provision that at the time of transfer the old employer would pay an amount representing the accrued leave but not the sick leave. Holiday pay and alternative leave only.

Now the Court of Appeal looked specifically at the case on this basis. If we go to tab 10 of volume 1, under the heading on page 81 of the case, "Was Pacific contractually liable to the transferring Pacific employees for pre-transfer entitlements?" Now my learned friend did take you to these paragraphs towards the end of his submissions but I'd just like to go to the provisions there, 69I(2)(a), "If an employee elects to transfer to the new employer, then to the extent that the employee's work is to be performed by the new employer, the employee (a) becomes an employee of the new employer on and from the specified date; and (b) is employed on the same terms and conditions by the new employer as applied to the employee immediately before the specified date, including terms and conditions relating to whether the employee is employed full-time or part-time." We've looked at the no entitlement to redundancy. Now it says, "To avoid doubt," and we didn't look at (3)(a), we haven't looked at this previously, "The election of an employee to transfer to a new employer may result in the employee being employed by more than one employer," in two specified situations, neither of which come anywhere near the present situation where LSG's suggesting that the transferring employees still have rights against the old employer. Now my submission, the two categories specified there are the only two and if neither of those situations exist then it is submitted that it is implicit that there is only one employer following transfer.

WILLIAM YOUNG J:

But that's not on dispute though.

ELIAS CJ:

On the specified date.

WILLIAM YOUNG J:

Yes, that's not in dispute. That there's only one employer from the specified date.

MR STEWART QC:

All right, we've got that. In order to succeed on the claim as pleaded had to prove that the employees, not LSG, but the employees can have recourse to the old employer. That's in my submission the crucial point.

McGRATH J:

Pre-transfer obligations?

MR STEWART QC:

Yes. And I don't want to put this too highly, there's not a suggestion anywhere in the Act that those transferring employees can go back to the old employer on – for anything.

WILLIAM YOUNG J:

Well say the new employer fails the day after the transfers. Are they unable to get any recovery at all, the employees?

MR STEWART QC:

Correct, Sir. I mean, it's – in my submission, just looking at that –

WILLIAM YOUNG J:

Not very likely perhaps…

MR STEWART QC:

Well, if a company like LSG comes along and takes over a substantial business, being the catering for Singapore Airlines, the company that's no longer in business is Pacific, having lost 42% of its business when this, when it lost Singapore Airline. Generally speaking, there are exceptions, but you'd expect that the company affecting the takeover is much better placed than the company being taken over.

ELIAS CJ:

But it might be a sale. It might be one company selling to a related company.

MR STEWART QC:

And as I think Justice Glazebrook put to my learned friend, they will invariably involved negotiations. This will not.

ELIAS CJ:

Well, they might not.

WILLIAM YOUNG J:

What if it's a related company? Is there something specific in the Act about related sales to related companies?

MR STEWART QC:

Not that I'm aware of.

ELIAS CJ:

Might be something in the Companies Act 1993.

WILLIAM YOUNG J:

I thought there was something in the definitions. I'm sorry.

MR STEWART QC:

Back at page 4 is it, I think?

GLAZEBROOK J:

So new employer 69D. Oh no, that's just some…

WILLIAM YOUNG J:

At page 86?

MR STEWART QC:

Page 86.

WILLIAM YOUNG J:

A restructuring doesn't include –

MR STEWART QC:

Did you say 86?

WILLIAM YOUNG J:

86, yes. Sorry, AB, sorry, nine.

MR STEWART QC:

Thank you.

WILLIAM YOUNG J:

No, that's just the sale of shares.

MR STEWART QC:

Yes. On a failing company, Your Honour, the –

ELIAS CJ:

No, it's only if the saving from, in terms of bankruptcy or receivership or liquidation is only after those events. Adjudged bankrupt, et cetera. So it's not even…

MR STEWART QC:

Company employees get a preferential status in the liquidation or receivership –

ELIAS CJ:

Yes, yes.

MR STEWART QC:

– of a company. This legislation was not concerned with the solvency of the vulnerable trades.

ELIAS CJ:

Oh, sorry. So there's a contract – it's a restructuring under – in those circumstances that –

MR STEWART QC:

Yes.

ELIAS CJ:

Yes, I see. Sorry.

MR STEWART QC:

Then if we just, while we're at 69I – yes, we haven't looked at section 69I(2)(b), which captures – sweeps up both the individual contracts and the collective contracts. It's wide enough to do that. Whatever the contract is, the terms, the rights transfer.

And just finally on section 69I is (3)(c) which is at the top of page 18, "This section does not affect the employment agreement of an employee who elects not to transfer to the new employer." The flipside of that is it does affect the employee agreement of those who do transfer.

ARNOLD J:

In that example, just under that paragraph you've referred to, the bottom paragraph of the example says, "The cleaner may elect to transfer and become an employee of the second independent contractor in relation to 1 shop while remaining an employee of the first independent contractor in relation to the other 2 shops."

MR STEWART QC:

Sorry Sir I've just lost, where are you reading from?

ARNOLD J:

Sorry. Under that – page 18, under that – the example under that provision you've just referred us to. And that envisages two – an employee being employed by two employers in relation to different shops. It's an example. And I just wondered, does the Act tell you how the employment relationship works out as between the two employers?

MR STEWART QC:

No. But –

ARNOLD J:

So the two employers are supposed to negotiate it, sort it out somehow?

MR STEWART QC:

I guess they would have to.

WILLIAM YOUNG J:

It's probably referable to what sites are transferred and who was working at what sites, I guess.

ARNOLD J:

That's right. That's –

GLAZEBROOK J:

And the wages might be split as well, which would then split the holiday pay entitlements.

MR STEWART QC:

We're going to come to this but it's an opportune time to do it, just putting the, in context what sort of businesses are subject to this Part 6A, these are businesses that are subject to frequent restructuring or takeovers. If we go to page 30, the last page of the Act at page 35, Schedule 1A. And it says there's a power to amend and add to the list of types of businesses that are subject to the protection of Part 6A at paragraph 4. The criteria for being added to the list are, "whether the employees concerned are employed in a sector in which the restructuring of an employer's business occurs frequently". Now, at paragraph 36 we have the Schedule 1A which is –

ELIAS CJ:

But if you carry on, because those are quite revealing, whether restructuring has tended to undermine the employees' terms and conditions of employment. And of course what is being preserved here are the terms and conditions on restructuring.

MR STEWART QC:

Yes. But what we're looking at is, what did Parliament contemplate was the terms in which these transfers would occur? And is say a central question for the Court is whether or not upon transfer did the employee have any right to go back to the old employee at all?

ELIAS CJ:

What the disadvantage in having belt and braces? Why would Parliament have been concerned if its object was to strengthen the position of vulnerable employees?

MR STEWART QC:

I can only speculate as to that, but –

ELIAS CJ:

Well, I'm just really feeling for what policy there is in…

MR STEWART QC:

All right. If you've got, let's say, 40 employees transferred in this case. If you had two employers who are going to be – well, you've got your new employer, and if they could have recourse to the old employer and said, "I'd like you to pay me my holiday pay," or, "I want to take cash instead of holiday pay but my other employer won't let me," these sort of practical complications arise. I mean, the whole notion of working, being transferred to a new employer, being paid there, getting your payslips there, and then having recourse to an old, a former employer, in respect of precisely the same things that the new employer –

ELIAS CJ:

In respect of the debt, that's all they'd have recourse in respect.

MR STEWART QC:

Well, no, no. And the reason why "recognised" is used in the legislation rather than "pay" –

ELIAS CJ:

Yes.

MR STEWART QC:

– is because these entitlements are met by –

ELIAS CJ:

Providing the opportunity to…

MR STEWART QC:

– leave.

ELIAS CJ:

And it's also, a timing issue is –

MR STEWART QC:
Yes.

ELIAS CJ:
– one of the terms and conditions that is carried through.

MR STEWART QC:
Yes, but the sense of this Part 6A was that the company taking over the work would take over the, those employees who wanted to go across, and they'd have one new employer from that date.

ELIAS CJ:
Agreed.

McGRATH J:
But might they still not have the owed obligations by the former employer up to the period of the transfer?

MR STEWART QC:
Well, my learned friend did mention that, that there's nothing unusual as a matter of principle in an employer, an employee, who's left the employment, reverting to the employer for some undelivered right or obligation or payment or whatever –

McGRATH J:
Which was accrued as at the date of transfer.

MR STEWART QC:
Yes. But when, in this case, why that can't happen is because Parliament has provided for all of those entitlements to be the responsibility of the new employer, there's no need to go back to the old employer, if it's meant to be a seamless transfer.

McGRATH J:
It's provided for the employee's entitlements to be transferred, but I'm yet to see that it's provided also for all of the obligations pre-transfer of the former employer to be

transferred, in the sense of any sense of extinguishing of them as the duties of the old employer.

MR STEWART QC:
Well, I only need to limit it to the accrued leave entitlements, which are the subject of this litigation. If there are any other obligations, like there may have been an employer had promised somebody as a bonus a holiday in Fiji, I couldn't see any reason why that couldn't be pursued by that employee following transfer, that wouldn't be dealt with by this legislation.

ELIAS CJ:
Well, why not, on your argument?

MR STEWART QC:
Well, because it's only the accrued leave –

ELIAS CJ:
Yes.

MR STEWART QC:
– and that would be a bonus. We're talking about specified in matters in here that they're talking about.

ELIAS CJ:
So you're saying that not all obligations, you accept, would be extinguished, those which have fully accrued and which are not transferred remain, is that right?

MR STEWART QC:
Well, I haven't really thought about it. I was just looking at the ones listed in the legislation that the Act deals with.

WILLIAM YOUNG J:
Well, why wouldn't it be on the same – if the term is that, as of August I'm going to have a week – I'm going to give you a week's holiday in Fiji, why wouldn't that carry over?

MR STEWART QC:

Well, I'm just going to look for the…

GLAZEBROOK J:

Well, it may not be a – because if it's not in the employment contract it mightn't carry over with the legislation possibly, so it might have been a –

ELIAS CJ:

One-off.

ELIAS CJ:

– because you fit into the employment contract. It's probably not a terribly good example.

MR STEWART QC:

No, I was just answering –

ELIAS CJ:

I think it's quite a good example.

WILLIAM YOUNG J:

Well, you're employed on the site, but you're employed on the –

GLAZEBROOK J:

Well, no, I mean it's a good example but I don't think it fits. If it was in the contract then that obligation would be transferring presumably.

ELIAS CJ:

Well it might be a contract, a variation.

MR STEWART QC:

It could be both. The ones we're specifically looking at are at page 19 of the appellant's book and under Roman numeral (iii).

ELIAS CJ:

So Roman numeral (iii)?

MR STEWART QC:

Yes on page 19. Any sick leave, any annual holidays not taken before the date of transfer, any alternative holidays and that seems to be.

WILLIAM YOUNG J:

But what if you go back to page 17 and look at 69I(2)(b), "Is employed on the same terms and conditions by the new employer as applied to the employee immediately before the specified date."

MR STEWART QC:

Yes, well if it's in a crude promise to send you to Fiji for a week.

WILLIAM YOUNG J:

So it's a future promise, say, as of August, sorry, as of December this year you can have a holiday in Fiji and the transfer is in two weeks beforehand.

MR STEWART QC:

All right that maybe the case, the would have to stand outside because what happens here there is a process for handing over the details of the approved pay and also there's a disclosure regime that operates before the tendering whereby the, in this case, LSG are entitled to get details of the aggregate of accrued holiday pay, sick leave and alternative leave.

ARNOLD J:

So is that specifically identified in the disclosure regime, accrued leave, are those things specifically mentioned or is it?

MR STEWART QC:

Service-related entitlements, that's what it's referred to Sir.

ARNOLD J:

Service-related entitlements.

MR STEWART QC:

Yes, which includes those items.

ELIAS CJ:

Are service-related entitlements defined? I suppose in the – I just don't know what they mean.

MR STEWART QC:
It's not defined in –

ELIAS CJ:
It'll be in the main Act will it?

MR STEWART QC:
It's referred to in 69J(2) for an example but it's not a defined term.

GLAZEBROOK J:
I'm not sure it's a term of – in the rest of the Act.

MR STEWART QC:
I'm advised by an expert in the area that it's not defined anywhere in the Act but –

WILLIAM YOUNG J:
And the holiday in Fiji will be picked up by little (v) on page 24.

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
Possibly the other entitlements. Entitlements already agreed but not due.

MR STEWART QC:
Yes.

WILLIAM YOUNG J:
So this does give a hint I suppose that this is of something that's of interest to someone who's tendering.

ARNOLD J:
Well it's interesting, well it's a definition of employee transfer costs information which tells you something.

GLAZEBROOK J:
I think I've lost where we are?

MR STEWART QC:
This is at page 23.

GLAZEBROOK J:
23, I had, I was on 24.

WILLIAM YOUNG J:
And 24 too.

MR STEWART QC:
And 24, yes, it goes over.

GLAZEBROOK J:
I see.

ARNOLD J:
So it's that definition of employee transfer costs information.

MR STEWART QC:
You can get details of the number of employees who are eligible to elect to so. Wages and salary are payable in a stated period and so forth.

Now the other thing is that these businesses not only do they frequently restructure or are taken over or change hands, if you get and can happen two a year or three times in a year, one industry may be subject to a takeover, you would then have multiple recourses by employees who elect to transfer maybe on successive occasions wanting to go back to two or three earlier employees – earlier employers. The amount of money involved in these – take this case, for example. Pacific was servicing Singapore Airlines as a $12 million a year turnover contract but that's – or Pacific, sorry. Pacific was turning over $12 million a year on its servicing of the airlines. For Pacific that represented 42%, a $5.1 million business and the amount –

WILLIAM YOUNG J:

Sorry, I missed that sorry?

MR STEWART QC:

For this contract that Pacific lost, it was turning over $5.1 million a year for Pacific.

WILLIAM YOUNG J:

So what was $12 million? Pacific's total business?

MR STEWART QC:

Pacific's total business.

WILLIAM YOUNG J:

I see, okay.

MR STEWART QC:

42% of it was made up of Singapore Airlines. From that transaction there are at issue 90 to 140,000, somewhere in that range, of accrued leave costs, including sick pay, that are at issue. Now in this case LSG didn't bother to undertake the disclosure requirements it could have done to get a feel for what –

ELIAS CJ:

To seek a disclosure requirement.

MR STEWART QC:

Yes, it didn't wish to. It said it wasn't of great value to it because you only get the aggregate because you don't know how many would be transferring, how many would elect to transfer, but at least you know what the total of people are who are working there, they probably have some idea anyway. Some idea about the business they're looking to take over, they're specialists in airline catering. But it's not significant amounts of money. One asks the question why we're here today but –

WILLIAM YOUNG J:

Too philosophical really I think Mr Stewart.

GLAZEBROOK J:

So 90 to 100,000 was, is that the total, or the total of the people who did transfer?

MR STEWART QC:

The amount of the – the amount that LSG is claiming is somewhere between 90,000 –

GLAZEBROOK J:

So it's the claims, so that is –

MR STEWART QC:

– and 140,000, yes, District Court claims really.

ELIAS CJ:

Can I – I know you're going to discuss subpart 2 I think, are you, we've been taken to it quite helpfully and I would have thought it was not unhelpful to you, but I'm also interested in subpart 3 again because we do need to understand the whole structure of this Act. Am I right, on my quick reading, in thinking that under subpart 3 there is a requirement that the collective agreements contain transfer arrangements to protect employees? It's left to be worked out.

MR STEWART QC:

Yes there is a provision in the collective agreement to that affect.

ELIAS CJ:

And is there any indication in the Act of what has to be included in those? What an employee protection provision looks like?

MR STEWART QC:

Can I just consult with…

ELIAS CJ:

Yes, thank you. Sorry, 69OI?

MR STEWART QC:

(1)(b), it would have had to include.

GLAZEBROOK J:

So it doesn't, it's, what it looks like is it says that the person transferring has to try and negotiate those but, of course, if it can't, it can't.

MR STEWART QC:
That's correct.

ELIAS CJ:
But presumably then if it can't, it doesn't.

GLAZEBROOK J:
Yes.

ELIAS CJ:
There isn't a…

GLAZEBROOK J:
Well I would then pay out the accrued holiday pay. I wouldn't pay out the sick pay. If it can't.

MR STEWART QC:
Yes, correct.

GLAZEBROOK J:
And it would pay out redundancy if it needed to as well presumably?

MR STEWART QC:
Yes. The next note that the Court of Appeal considered at paragraph 25 was 69M(2) which we've looked at.

ELIAS CJ:
Sorry, what are you referring to now?

MR STEWART QC:
Page 21 of the appellant's casebook, 69M(2). There's a substituted employer under the collective agreement or any agreement.

ELIAS CJ:

Well it doesn't say is substituted, it's really very loose drafting for – if you're saying that this effects a substitution the language doesn't really help you very much, does it, it simply makes the new employer a party?

MR STEWART QC:

Yes but as we'll see shortly the former agreement ceases on transfer as far as a transferring employee goes, only as far as a transferring employee goes and that is 69J. "The employment of an employee who elects to transfer to a new employer is to be treated as continuous, including for the purpose of service-related entitlements whether legislative or otherwise. To avoid doubt without limiting subsection (1) the period of employment of an employee with the employer that ends with the transfer must be treated as a period of employment with the new employer for the purpose of determining the employee's entitlement to annual holidays, sick leave and bereavement leave."

ELIAS CJ:

How does that help you? I mean that's just identifying the period of employment that ends with the transfer must be and so on. It's just providing for continuity, isn't it?

MR STEWART QC:

Yes but as far as that employee is concerned that contract with the old employer has ended.

ELIAS CJ:

Well it doesn't say that really Mr Stewart.

MR STEWART QC:

Well –

GLAZEBROOK J:

But doesn't that just happen?

ELIAS CJ:

Well it may but I'm just –

GLAZEBROOK J:

Because if you're no longer employed by somebody because you've been transferred to someone else then the employment just has to come to an end, doesn't it? It doesn't need to say so because –

ELIAS CJ:

Well it's not saying anything like that though. Anyway –

GLAZEBROOK J:

Well no but just by operation of transfer from one employer to another. If the registrar goes and works for some other –

ELIAS CJ:

Sorry, we're not talking about the ongoing employment, we're simply talking about the liability that the employer had before the transfer.

MR STEWART QC:

And whether, after transfer, there is any further liability in respect of those accrued rights, the accrued leave entitlements.

ELIAS CJ:

Whether that liability is extinguished by the transfer.

MR STEWART QC:

Well it's transferred, the liability is transferred and my submission is it's extinguished as far as the old employer is concerned.

GLAZEBROOK J:

But liabilities that remain with the old employer aren't extinguished, I think you'd accepted that so the liability for the final weeks pay or the two weeks pay still remains with the old employer?

MR STEWART QC:

Yes it's these specific ones that the Act identifies as being transferred and must be recognised by the new employer.

Then having considered those provisions the Court of Appeal at paragraph 26 says, “The combined effect of these provisions is that from the time of transfer the

transferring employee becomes an employee of the new employer and ceases to be an employee of the old employer. In those circumstances there is no contractual basis for a claim by the transferring employee against the old employer for pre-transfer leave entitlements. Rather, the transferring employee can now make a claim against the new employer which has become a party to the collective agreement in respect of which the transferring employee is treated as having been continuously employed both before and after the date of transfer." And the Court goes on to say that it considers, at section 69I(3), supports that conclusion – no, it refers to those two situations where there'd be more than one employer, and the Court of Appeal says, at the top of page 82, towards the end of the first paragraph, "If LSG were correct that a transferring employee remains an employee of his or her old employer in a situation such as the present case, one would have expected that would have been stated in 69I(3) or elsewhere in Part 6A."

Now having got far, if Your Honours will turn to paragraph 32 and 33 of the judgment, having discussed that regime, the last sentence of paragraph 32, the Court of Appeal said, "That regime places responsibility on the new employer, so that the transferring employee now looks to the new employer for his or her entitlements," and at 33 the Court says, "In the absence of anything indicating to the contrary, there is no reason to believe that Parliament intended that the old employer maintain some ongoing responsibility to the transferring employee such that the transferring employee could look to the old employer for payment in the event of a failure to pay by the new employer. There is not, as the Judge held, some form of statutory guarantee by the old employer of the new employers obligations, nor is there anything that indicates a parliamentary intention that the old employer should be liable to the new employer in relation to pre-transfer entitlements. That seems to be something of a lacuna." Now, in relation to this word "lacuna" – I think it's mentioned twice in the judgment – the lacuna referred to is a reference to the position of the old and new employers, not with the employee, so there's no lacuna with the employee. The employee's position is firmly established with the new employer.

ELIAS CJ:
What do you think they meant by that, that it was unfair?

MR STEWART QC:
Sorry, Your Honour?

ELIAS CJ:

What did they mean by, “Identifying a lacuna”?

WILLIAM YOUNG J:

That nothing was specific as to the cost of, as to who should bear the ultimate burden of transfer costs.

MR STEWART QC:

Yes.

ELIAS CJ:

There’s just a gap?

MR STEWART QC:

Yes. Now –

ELIAS CJ:

But on your argument there isn’t a gap, because the legislation does it all, and it extinguishes the liability. So why would the Court of Appeal say there’s a lacuna?

MR STEWART QC:

Well, it’s a lacuna, it doesn’t, there’s no provision, for whatever reason, for a statutory mechanism for the new employer to get any reimbursement for the obligations that it has picked up as part of the takeover of the business.

ELIAS CJ:

But if that, as you argue, is the purpose and effect of the statute, there is no lacuna.

MR STEWART QC:

No, that's correct.

ELIAS CJ:

Yes.

MR STEWART QC:

But if you –

ELIAS CJ:

They mis-spoke.

MR STEWART QC:

Well, that word wasn't used in submission by either party, but a clue may be here that the legislation provided for a three-year period of operation and then there would be a statutory review, which has now been undertaken, to see how it works, and something like, I think, over 1300 submissions were received, and we saw the draft legislation as it came out. Some of these situations would be negotiated, some would be hostile takeovers or competitive tendering for businesses. These cleaning businesses, which is what they mainly are, have a high turnover of staff. It's probably not meant to be directed at larger commercial enterprises like these two, it's a bit of a surprise, in my submission, to find airline catering in this group because it's a reasonably stable business. We don't change airline caterers very much in New Zealand. Maybe it happened because the food and services union have a lot of members in the airline catering. But we can only speculate why. Perhaps they wanted to see how it would shake down before they tried to deal with what provisions if any should be there by way of reimbursement.

McGRATH J:

Maybe but it doesn't help us.

MR STEWART QC:

Doesn't help you, no.

McGRATH J:

But Mr Stewart, I suppose the trouble I have with the Court of Appeal's analysis here, it doesn't address the argument that at least has been put firmly in front of us today by Mr Skelton, that as to whether Part 6A implicitly removes the contractual obligation Pacific had at the time of transfer. Explicitly or implicitly if you like. It really assumes it's been removed but I can't find any rationale for that. So how do you answer that? How does Part 6A remove the contractual obligation that Pacific had at the time of transfer?

MR STEWART QC:

Simply that it has specifically dealt with the transfer of those entitlements to the new employer and in mandatory terms said that these must be recognised by the new employer.

McGRATH J:
It's certainly dealt with transfer of entitlements of employees. What's not clear is how it's – how that impacts on obligations as at the time of transfer. I mean what's this – how – you've got to point to something in the statute that say, "That in effect removes Pacific's contractual obligation."

MR STEWART QC:
Well…

McGRATH J:
Otherwise it continues to exist.

MR STEWART QC:
Well it's an odd thing if it does continue, just because it can't be enforced by the employee. I mean the employee getting its rights observed by the new employer, so anybody who came to see the employee would be the new employer, who would go out to the old employer. You wouldn't get an employee coming along to Pacific and saying, "I want my holiday pay."

McGRATH J:
Well it might if for some reason it was unable to recover from the appellant.

MR STEWART QC:
Well, there might be some difficulties there.

McGRATH J:
Well, as I say, I'm really looking for the answer, to find the answer in the statute.

MR STEWART QC:
Well there's a complete prohibition on the payment out of accrued holiday pay.

McGRATH J:
Yes.

MR STEWART QC:

So if an employee came along and said, “I want my holiday day please,” they’d say, “I’m sorry, I am not allowed by statute to do that. You’ve got a new employer.”

ELIAS CJ:

Well –

McGRATH J:

And you won't get it from him either, because the statutory obligation applies to him. You’ll get your holidays in due course.

MR STEWART QC:

Yes.

McGRATH J:

I’m not really sure that that bites in the way that I’m looking for.

ELIAS CJ:

I’m not sure why that provision’s necessary on your argument anyway.

MR STEWART QC:

Well it...

ELIAS CJ:

If they haven't paid it out and the employee has been transferred, well, the first employer would be acting totally contrary to his interest on your view, because he has no liability.

MR STEWART QC:

Well no, he doesn’t have any liability but he can, on respect of the holiday pay he can point to the statute and say, “I’m not allowed to pay this out to you.”

ELIAS CJ:

Well, yes, I understand that, but on your approach there is no liability once the transfer takes place in any event.

MR STEWART QC:
That's right. That liability is transferred to the new employer.

GLAZEBROOK J:
But if you go back to the contract the only right under the contract, say it's an accrued right, is to be paid in accordance with the Holidays Act. The only right in the Holidays Act once you terminate employment is to be paid out your holiday pay, and that's been explicitly abrogated by Part 6A.

ELIAS CJ:
Because it's not a termination of employment.

GLAZEBROOK J:
Well that's the argument. So that it's treated as if it's a continuation of employment. So when the employee went back he or she would be answered by, "I'm no longer your employer," and that's just a function of the transfer, "and the only obligation I have at the time of transfer was to pay an accrued holiday pay under the holiday pay Act, because that's what was brought in, and I was told not to do that and I'm not allowed to do that by statute." That has to be how the argument goes, doesn't it?

MR STEWART QC:
Yes.

WILLIAM YOUNG J:
Just looking at section 69J(2)(a), the period of employment means presumably all employment by that employee with the former employer.

GLAZEBROOK J:
Well it might be cumulative as well as – Mr Stewart I think mentioned you might have had four employers who will all pick up. So you might have a deemed cumulative –

WILLIAM YOUNG J:
All right. Okay. All accumulated entitlements. Now, "must be treated as a period of employment with the new employer". Now it may be that that eliminates the holiday pay issue in relation to this dispute because if that provision applies generally it means that all accrued entitlements are to the account of the new employer.

ELIAS CJ:

That's your argument.

MR STEWART QC:

Well that's what the Act says.

WILLIAM YOUNG J:

Yes.

MR STEWART QC:

Over the page, a new employer must recognise.

WILLIAM YOUNG J:

But it also may in itself eliminate what would otherwise be the liability of the old employer.

MR STEWART QC:

Well –

WILLIAM YOUNG J:

Because –

MR STEWART QC:

– there's no basis for – for the purpose of this legislation, which is just to give continuity of employment, not to give it protection against insolvency. There's no reason to believe that the new employer that they elect to transfer will not be able to discharge those obligations. After about a year they'd be –

ELIAS CJ:

You might be better to hang on to the statutory extinguishment if that's the way it's to be construed.

MR STEWART QC:

My learned junior –

ELIAS CJ:

That's a prohibition on payment which is enacted in order to preserve the ability to take holidays. That's to read a prohibition on payment as extinguishing liability.

MR STEWART QC:
Yes, but you can't ignore the plain words that you can't do it, whatever the purpose is. There's a prohibition.

ELIAS CJ:
Well why not, "is not liable"? The purpose is simply to enable the employee to maintain a holiday entitlement for humanitarian reasons.

MR STEWART QC:
Well even without that in my submission the effect of the transfer – see the disclosure regime there is available to the tenderer in this case, so because they need to know or wish to know, or if they do wish to know they can find out, they bear the cost. They will be the ones who will have the responsibility for these payments going forward. Now, if they were going to get reimbursed for those costs why would there be a disclosure regime? Because it would only be – well, a temporary period between their paying it out and getting reimbursed.

ELIAS CJ:
I think you probably need to take us through the – through subpart 2 if there's anything additional you need to –

MR STEWART QC:
When I'm finished, which won't be too long, my learned junior is going to address you on that because he's got that sorted.

ELIAS CJ:
Right.

GLAZEBROOK J:
Well can I understand the argument though, the argument is that the combination of section 69J(2)(i) and (ii), and I suppose (iii) means that all of the obligation has been transferred in respect of in terms of (i) annual holiday, sick leave and bereavement, which they don't talk about additional holidays but… Well, alternative holidays, but that's probably because you can pay out for those.

MR STEWART QC:
Yes. And the disclosure regime.

GLAZEBROOK J:
And under the contract the only thing that the old employer's liable to do is to pay out on termination, which it's been told it mustn't do.

MR STEWART QC:
Yes.

GLAZEBROOK J:
But which it's prohibited from doing.

MR STEWART QC:
You see, really, struggling to try and find the answer to this is probably a mission we don't need to undertake because it's only because LSG want reimbursement and need to establish that the old employer has an obligation or a debt obligation there, which gives it the way through to get compensated.

You see, LSG got significant benefits, taking the 40 employees, just to put – and it's the last matter of context I wish to raise. They didn't have to pay any money for goodwill, taking over this business, they got it in a competitive tender programme. They get the benefit of trained staff being transferred, they don't have any recruitment costs, and these workers, who are experienced in airline catering, transfer with airport licences, because when they go to the airport they have to have a licence because they're frequently in and out, and these licences attach to the individual, and they are also certified under the food and service workers union as fit to deal in handling of foods. So all of those come at no cost to LSG. And then you've got the statutory review, which may be an explanation why this was to see how the Part 6A operated –

WILLIAM YOUNG J:
Was there any evidence about what employment, you know, what people allow for recruitment?

MR STEWART QC:

No.

WILLIAM YOUNG J:
And there's no evidence as to how these liabilities are accounted for, whether they're accrued and expensed or whether they're just paid on a pay-to-go basis?

MR STEWART QC:
No, no. Now, I've got two more areas to cover. I have set out here, Your Honours – these may or may not be of assistance to you, but I had them –

ELIAS CJ:
How will they give assistance?

MR STEWART QC:
Well, of the cases in my submission, some of the facts are a bit difficult to discern because in one of them they've only got the head note and it's hard work in fact, but these are diagram –

ELIAS CJ:
Oh, I see, chart of the facts.

MR STEWART QC:
– charts of the facts in each of the cases.

ELIAS CJ:
Yes, thank you.

MR STEWART QC:
If they're no good, well, then, you can turn them over and use them as scrap paper. Now, just to deal with the legal submission, it's set out reasonably fully, but at the top of page 7…

McGRATH J:
Your submissions, is it?

MR STEWART QC:

Yes, yes. Now it's probably good if we clarify something between my learned friend and myself. It's not Pacific's case that there needs to be what's known as a common liability that the third party has. So in other words, it doesn't have to be a liability on exactly the same basis. They call it a co-ordinate liability. Sometimes you get it in the insurance industry where there is two policies insuring the same subject matter, the policies will be on different terms but if one insurer pays out they can then get a contribution from the other insurer. But what is clear is that the payment must discharge the debt of the defendant. That's at the top of page 7.

Now you see this at tab 19, actually I can take you to a, if you've got the judgment at paragraph 15, the Court of Appeal judgment, *Halsbury's Laws of England*. Number 1, "The claimant must have made an actual or virtual payment of money."

ELIAS CJ:
What's that, "a virtual payment"?

MR STEWART QC:
What did we say it was? Monies worth, we looked it up last night.

ELIAS CJ:
Is that footnoted in the original to mean monies worth, it's just it seemed a very modern term to find.

MR STEWART QC:
Yes, well I was going to say Your Honour, although a lot of these cases are very old they are all dealt with in some detail in the modern text.

ELIAS CJ:
Yes, I realise that. Is any of this case law really in contention? Your argument is that the statute leaves no room for debt. I understand Mr Skelton to be accepting that there has to be a liability to the employee.

MR STEWART QC:
Yes I think so, you do, don't you? Yes. And a payment that discharges that debt that the old employer had.

ELIAS CJ:

Yes.

MR STEWART QC:

Without that he can't succeed on the action he has pleaded.

ELIAS CJ:

Yes.

MR STEWART QC:

Now page 8.

ELIAS CJ:

But with the twist of that fur case.

MR STEWART QC:

The fur case, squirrel skin.

ELIAS CJ:

That where there was co-ordinate liability imposed by the statute.

MR STEWART QC:

Yes that was dual liability.

ELIAS CJ:

Yes.

MR STEWART QC:

They were liable for the same debt.

ELIAS CJ:

Yes.

MR STEWART QC:

In the case it was a common liability.

ELIAS CJ:

Yes, and yet they were still able to recover under the common law action.

MR STEWART QC:
Yes they were. A common liability is –

ELIAS CJ:
Because the position between the defendant and the plaintiff needed to be adjusted.

MR STEWART QC:
Yes.

ELIAS CJ:
In the present case why is it not the case that the statute deal with liability to the employee leaving the common law to sort out the position as between those, I mean understand you say that they are not jointly responsible because you say the second employees obligations supersede the first employers?

MR STEWART QC:
Yes what they need to establish is that Part 6 left intact the old employer's obligation to make these payments to the former employer.

ELIAS CJ:
Yes but if we accepted that then do you accept that the principle in that fur case, squirrels, would apply. It's only the fact that you say the statute extinguishes the liability of Pacific.

MR STEWART QC:
Yes.

ELIAS CJ:
That takes you outside the principle.

MR STEWART QC:
That's not an invitation to make that finding.

ELIAS CJ:
No, not at all. Well everything falls on the statute as far as you're concerned.

MR STEWART QC:

Yes. Now –

ELIAS CJ:

Which is why I'm querying whether it's necessary for us to get into the cases, unless you've got another fall-back point?

MR STEWART QC:

No. Live or die by that, and so does my learned friend.

ELIAS CJ:

Yes.

MR STEWART QC:

To show you where it doesn't work, if you go to the chart that's got *Bonner v Tottenham and Edmonton Permanent Investment Building Society* [1899] 1 QB 161 (EWCA) there, down the bottom it's got, "Claim filed because no liability to extinguish." Here the landlord leased the property to the tenant plaintiff, who then assigned it to a third party, and then the third party mortgaged it to a mortgagee, and the third party defaulted and the mortgagee went into possession and collection the rents and profits from the property. The landlord sued the plaintiff and got paid, and then the plaintiff went after the mortgagee and it was held that the mortgagee couldn't recover – the landlord couldn't recover – the plaintiff couldn't recover against the mortgagee because mortgagee had no liability to the landlord on those facts.

WILLIAM YOUNG J:

Is it in relation to the period before going into possession or after or both?

MR STEWART QC:

It was both.

ELIAS CJ:

Might there have been another cause of action though?

MR STEWART QC:

Well, what don't you –

ELIAS CJ:

Not this cause of action maybe, but there surely must have been if the mortgagee received –

MR STEWART QC:

Was receiving the rents.

ELIAS CJ:

Yes.

MR STEWART QC:

Yes. Well, the plaintiffs remedy was to cancel the assignment to the third party mortgagee, who hadn't been paying the plaintiff.

WILLIAM YOUNG J:

Is that what the Court said?

MR STEWART QC:

No, I don't think it did discuss it, I think that must have been the assumption.

McGRATH J:

By getting rid of the mortgage?

MR STEWART QC:

Beg your pardon, Sir – well, yes, I mean, but that's everyday standard. If you've got a leasehold property and you're the mortgagee, the bank –

McGRATH J:

Yes, I understand that.

MR STEWART QC:

– if the landlord's going to cancel you've got to bring it up to date, yes. Yes, you're right, Your Honour, there was a more expedient remedy for the plaintiff in that case.

Now, at paragraph 32 we talk about co-ordinate liability under the phrase, in the middle of that quoted passage in 32, "community of interest". "Co-ordinate liability" is mentioned down the bottom in a very famous judgment of Vaughan, Lord Justice

Vaughan Williams. At page 14 I discuss two cases, *Exall v Partridge* and *Johnson v Royal Mail* that my learned friend relies upon, and I explain why they do no violence to the principle and play in these compulsion cases. In both those cases we had situations where one was a distraint, and so the plaintiff had to pay the money in order to protect the property that was on the defendant's land, and the other one was the plaintiff were mortgagees of two ships which were subject to a maritime lien for non-payment of the crews' wages, and that payment was held to be a compelled payment which gave rise to a remedy against the person who was responsible for paying the maritime wages.

At page 19 – I'm not going to address sick leave, though I think that's, I've followed the discussion on that and I've got nothing to add.

Now, I do have a section on the reliance that my learned friend places on *New Zealand Forest Research Institute* and why it has, it's distinguishable from this case. In that case the –

ELIAS CJ:
Isn't the valuable point, which is of general application, to be taken from that simply that a deeming provision has to be looked at in its own terms and in context and is not to be more widely used than the context suggests?

MR STEWART QC:
Exactly, and that deeming provision was to do with the employment, not with the revenue obligations of the research institute and that's why it was deemed to be a capital transaction rather than a revenue transaction by the Privy Council. Now in this case, though, these provisions do bear directly on the relationship with which this litigation is concerned and I've set those matters out at paragraph 72 and 73, "It is immediately clear from section 69J itself, and the surrounding statutory provisions, that Parliament *did* intend to affect the relationship between the employees and the old employer… (a) It used the clearest possible language to impose the obligation of accrued leave entitlements on the new employer: '*the new employer <u>must</u> recognise the employee's entitlements.'* (b) It expressly directed the old employer *not* to pay accrued holiday entitlements… It expressly directed that, from the date of transfer, the employee was to be employed by the new employer, not the old employer: '*the employee… becomes an employee of the new employer on and from the specified date'.*" And then section 69I(3), "*To avoid doubt… this section does not affect the*

employment agreement of an employee who elects not to transfer to the new employer. The clear implication of this provision is that Parliament *did* not *[sic]* intend to affect the employment relationship between the old employer and the transferring employees." So for all those reasons that's why the *New Zealand Forest Research Institute Ltd v Commissioner of Inland Revenue* [2000] 3 NZLR 1 (PC) case is distinguishable enough, unhelpful in resolving this matter.

Now in the Court of Appeal my learned friend at paragraph 77 is dealing with the redundancy argument. Section 69(2)(c), that prohibits a transferred employee from claiming redundancy compensation. The Court of Appeal – well it was argued – LSG argues that had Parliament intended to exclude claims for the accrued leave entitlements then it would have done so expressly. "The Court of Appeal rejected this argument on the ground that 69I(2(c) was not of significance. However, Pacific submits that this section supports its position because it provides further confirmation of the intention underlying Part 6A. Namely, that the obligation for employee entitlements, whether they are accrued leave or redundancy entitlements, are to rest with the new employer alone."

GLAZEBROOK J:
It's not really accrued leave entitlements in terms of money though is it? The entitlement under the contract is to have a paid holiday which is different from actually paying an amount.

MR STEWART QC:
Yes.

GLAZEBROOK J:
You can exchange it but that's, or one week of it.

MR STEWART QC:
Yes, come Christmas time you get money going into your bank each week while you're on holiday.

GLAZEBROOK J:
But its' just, it's just an ordinary payment of wages but you just don't happen to have to work for it during that period.

MR STEWART QC:
Correct.

GLAZEBROOK J:
So it's not a debt in the sense of it's just an ordinary payment of wages.

MR STEWART QC:
Yes.

GLAZEBROOK J:
You just happen to have a statutory entitlement not to work while you'd ordinarily have been paid wages so isn't the argument of the appellants is that there's a liability to pay wages by the old employer. It just happens to be the amount that you're allowed to not work in terms of have a holiday is referable to your service requirements but it's not a debt of the old employer.

MR STEWART QC:
I can see what you're saying. The other thing is, I mean, the wages will be paid by the new employer who had the bank account details, or where the monies are to be paid. The old employer won't any longer have that information. It's an entitlement –

GLAZEBROOK J:
You'd have to audit it as well, presumably, and actually go and check that the holidays were taken.

MR STEWART QC:
Yes, well in the submission – I won't take you through this but I should bring it to your attention. At paragraph 63, and at the top of page 18 are listed some of the problems that would be associated with such dual liability such that Parliament could not have intended dual liability was to exist, ie two employers.

Now unless Your Honours have any questions there's a section on statutory review at the back and…

ELIAS CJ:
I'd like to be taken, because I haven't been – oh I suppose I can look it up myself but –

MR STEWART QC:
I'm going to deal with – my learned friend's going to deal with the disclosure.

ELIAS CJ:
Yes, no you've just – oh I see. Yes, I was looking at your footnote reference to LSG accepting that they didn't believe they could obtain precise information. Is that something I'm going to be taken to?

MR STEWART QC:
Yes, that comes out on the disclosure section.

ELIAS CJ:
Thank you Mr Stewart.

MR STEWART QC:
Thank you Your Honour. Yes, Mr Goodall.

MR GOODALL:
Yes, thank you Your Honours. I'll just take Your Honours swiftly through the disclosure regime that appears in subpart 2. Now Your Honours will find that tab 1 of the appellant's bundle from page 23. And the object noted there, "Is to provide for the disclosure of employee transfer costs information". And Your Honours have already been taken through the definition of that at 69OB. It includes various aspects of the service entitlement including service-related entitlements, which is accrued leave.

Now, the object provision provides there in 69OA(a) it is, "disclosure is sought for the purpose of" and then it's (iv), "tendering for an agreement" is the relevant provision here. So you've got LSG looking to tender for an agreement. And, subpart (b), "a restructuring would result if the agreement", being the Singapore tender, "were to be concluded", in (ii), so that's our situation.

ELIAS CJ:
Well here it's "awarded" is it?

MR GOODALL:

Or awarded I think, Your Honour. One or the other. Now that purpose provision is largely restated over the page at 69OC, which is the mechanical provision. And again that simply restates the point that that employee transfer costs information is available on a tender being successful. Subpart 2 of that provision sets out who can make the request of that sort of information and (2)(c) is the relevant provision here, it's "person C in the definition of subsequent contracting". That links back to section 69C and that's LSG, the appellant.

And over the page at (3) it tells you who can request the information. And again we're into (c), "person A in the definition", which is in fact Singapore Airlines.

WILLIAM YOUNG J:
Sorry, why isn't it Pacific?

MR GOODALL:
I'll come to that in a minute Sir.

WILLIAM YOUNG J:
There's another link in the chain?

MR GOODALL:
Yes, there's another link. So LSG makes the request from Singapore Airlines. There's a provision at (4) that provides the information must be provided and at (5) importantly it provides that it must be provided in sufficient time, "for the person who made the request to take the information into account for the purpose for which it was requested." In other words, for the purpose of the tender.

WILLIAM YOUNG J:
Sorry, but how does Singapore Airlines get that from Pacific?

MR GOODALL:
Yes, so thank you Your Honour, down at 69OD, see there's a reference to, "Subsection (4) applies to a person who receives a request for employee transfer costs information under section 69OC(3)(c)." Which is what we've just looked at. It's rather clunky but over the page again you'll see the link. So there's ultimately a requirement for Pacific to provide that information.

McGRATH J:

Singapore must require Pacific to provide it?

MR GOODALL:

Yes, that's right Sir.

McGRATH J:

And there's an implicit obligation on Pacific to provide it?

MR GOODALL:

Yes.

McGRATH J:

Okay.

MR GOODALL:

And also there's requirement on page 27 at sub (2) but the information has got to be up to date and refreshed. So the obvious point here is it's very clear that this accrued leave information has to be disclosed in advance for tender for the purpose of the tender, and in our submission the only reason that the legislation is providing that is because the assumption is that it will be the new employer that is bearing the cost. And they therefore need to factor it into the tender or decide not to tender. And there's a reference in the respondents' submissions, Your Honour, to the speech of Lianne Dalziel in the house.

WILLIAM YOUNG J:

Do, does the information identify how many employees there are?

MR GOODALL:

The information has to be provided in aggregate form and it includes, if you go back, Your Honour, to the definition of employee transfer costs information, on page 23, the obligation is to provide the number of employees eligible to transfer. So there is some uncertainty of course in who will out of that pool transfer, but the point is that you've got the maximum cost, an estimate of the maximum who could transfer if they wanted to.

WILLIAM YOUNG J:

So if this process is engaged it would be in the interests of the incumbent to pump up this, the costs as high as possible, I guess. Is that addressed in the legislation? Presumably there's some obligation –

ELIAS CJ:
To be truthful.

WILLIAM YOUNG J:
– for the information to be accurate.

MR GOODALL:
Well that is one of the proposed amendments, Your Honour. So it doesn't sit in this legislation.

WILLIAM YOUNG J:
So it's not an offence to give exaggerated information.

MR GOODALL:
Oh well I think, Your Honour, implicit here is that you're giving accurate information.

WILLIAM YOUNG J:
Oh of course. Of course that's right, but it's just I'm just trying to get a handle on the dynamic of it.

McGRATH J:
Mr Goodall, you say it assumes the new employer's bearing the costs.

MR GOODALL:
Yes.

McGRATH J:
That's – do you mean the future cost on which the past – the future continuing cost or do you mean the cost of the entitlements being taken over as a burden?

MR GOODALL:
I mean both, Your Honour. Because if there was a mechanism, if Parliament was passing this legislation on the assumption that there's a common law right for

recoupment of this cost the cost would be irrelevant. You would simply go through the tender on your, based on your ordinary cost structure, and then you would turn around and you'd answer your common law claim. You wouldn't need to factor this cost into your tender because it would be a cost that can be recovered.

GLAZEBROOK J:

It's not totally right though, is it? Because you would have to factor in the costs of the wages or salary payable in the stated period because if you had lower paid employees then you'd have to factor in the cost that you might have to pick up, these higher paid employees, and that wouldn't be recouped.

MR GOODALL:

There's certainly the usual salary and wage cost that you'd have to factor, which forms part of the disclosure, and –

GLAZEBROOK J:

But you say that it's worth putting the other things in if in fact – but, like, service-related entitlements could be future entitlements as well though.

MR GOODALL:

Well, I think under the transfer costs mechanism it's purely accrued costs, because the employment hasn't started at that point. This is all being done in advance of the tender.

ELIAS CJ:

So would leave be a service-related entitlement?

MR GOODALL:

Yes, Your Honour, and I think that although the term "service-related entitlement" is not specifically defined, it links very clearly back to that section 69J which we've looked at.

ELIAS CJ:

Well, it's not a term of art, and it is clearly broad, because in 4 it's, "Whether legislative or otherwise," so that could be under the Holidays Act.

MR GOODALL:

Yes, Your Honour.

GLAZEBROOK J:

But all I'm saying is the service-related entitlement isn't necessarily something that's accrued, it can be something that is an obligation under the contract, such as to provide a vehicle or to provide protective clothing or something of that nature. So all of these could be nevertheless looking at future requirements that the new employer would have to pick up if he or she employs, or if the employee decides to transfer.

MR GOODALL:

Yes, Your Honour, that's right. It would be, it's essentially everything that the old employer was obliged to recognise, which the new employer would be obliged to recognise if the restructuring occurs.

ELIAS CJ:

And if you haven't taken leave, that's a future entitlement, is that what you're saying?

MR GOODALL:

Well, no, it's – well –

ELIAS CJ:

I'm just thinking about the service-related Holidays Act entitlement, how it's properly characterised.

ARNOLD J:

But isn't that clear from 69J(1), "Including, for the purpose of service-related entitlements, whether legislative or otherwise," and then in section 69J(2) it talks about a whole lot of entitlements, but it includes within those, it says, "The employer must not pay the employee for annual holidays not taken," so necessarily it is covering –

ELIAS CJ:

Yes.

ARNOLD J:

– accrued holidays within the concept of service entitlement.

ELIAS CJ:

Yes, but it may be through a slightly different lens of not treating them as accrued entitlements but as future entitlements because they haven't been taken, they are holidays.

ARNOLD J:

Yes, their entitlements carried over, yes, I agree.

ELIAS CJ:

Yes.

MR GOODALL:

But, importantly, they're entitlements that the employees would have been able to obtain from the old employer prior to transfer –

ELIAS CJ:

Yes.

MR GOODALL:

– and so it links in with this, this restriction in section 69J(2)(ii), which is the old employer can't pay it, and there has been some exchange about the idea of there being a debt which somehow can't be enforced, and on that particular point I just wanted to direct Your Honours to tab 10 of the appellant's bundle on page 129, where Lord Justice Vaughan Williams may have something of relevance to say about this point. On page 129 you'll find the Lord Justice, about three-quarters of the way down that page, he refers to the decision in *Moule v Garrett* and he sets out his understanding of what was held in that case, and he says first that the plaintiff and defendants were both liable to be sued by the lessor for the same breaches of the same covenant –

GLAZEBROOK J:

Sorry, I think I might have lost exactly where on the page we are.

MR GOODALL:

Sorry, Your Honour, it's the, about three-quarters of the way down the bundle, page 129, and there's a reference to Channell, the Baron Channell, Blackburn and Willes, in brackets, Willes. I'm happy to be assisted with –

ELIAS CJ:

No actually there's a debate about that on the Bench. One of the greatest Judges of the common law.

GLAZEBROOK J:

Okay, I see, yes.

McGRATH J:

Actually he's had a nice observation of this case.

MR GOODALL:

Perhaps that adds some weight then to the point Your Honours but you can see there after the question that's been posed what was the condition of liability in that case and the Lord Justice is saying that the plaintiff and defendants were both liable to be sued. So, again, the idea is not that there's a sort of part debt which nothing can happen about it's actually that it's something that's enforceable against both parties and it's the release of that enforceable debt that is the benefit and that justifies recovery. And in our submission, the roadblock in this case for the appellants is the restriction in section 69J. The old employer is not, must not pay out the accrued holiday pay.

McGRATH J:

Can I just ask you to go back, that's an interesting observation from *Bonner* but can I just ask you to go back to *Moule v Garrett* at page 102.

ELIAS CJ:

Where do we find that? What tab?

McGRATH J:

This is in the, this is under tab 8.

MR GOODALL:

Yes, Mr Leakes' quote.

McGRATH J:

And Justice Willes if I –

ELIAS CJ:

What page?

McGRATH J:

Page 102. But his little formulation doesn't seem to get reflected quite so much but would you accept the statement of the proposition as he puts it there in those seven lines? In which case the issue might be whether the obligation is common?

MR GOODALL:

Yes I'd accept that Your Honour. That is a classic case of where you've got a common liability under a contract, that's very similar to the co-insurers example that my learned senior referred to and, again, it's the discharge of that obligation conferring a benefit that justifies the recovery.

McGRATH J:

And the issue you take on the basis of section 69J is whether the obligation is common. You say it's –

MR GOODALL:

No, no, Sir, I don't say that. I mean our position is not that there needs to be a common liability. It's very clear that you can also have an example of a co-ordinate liability and a release of a co-ordinate liability and *Whitham v Bullock* [1939] 2 KB 81 which is referred to in our submissions is an example of that. Your Honours have got the handout where you've got, in fact we can probably refer to it. That's on the second page in and Your Honours will see there that what's happened in this case is that the landlord has leased premises to the lessee and the lessee has then broken the lease up into two parts, two different parts to the plaintiff and the defendant and what happened in that case was that the defendant's part, the property was unhelpfully bold as a result of some public works legislation and the defendant stopped paying the rent and the landlord could sue either of them direct but only for their share of the rent but, importantly, he had the right to distrain on both properties for the full amount of the rent and that's what he did. So the landlord distrained against the plaintiff's assets and the plaintiff was forced to pay not only his share of the rent but the defendant's share, and then brought a claim against the defendant to recover his share of the rent and the Court allowed that. And that was a clear case of where you've got a different form of liability that is discharged and no obligation on

the plaintiff to pay for that part of it. So there's no obligation on the plaintiff but there was a practical requirement that he had to make payment to avoid the distraint, because that's an example of where you've got different liabilities but still a recovery. So to answer Your Honour's question, we don't insist on there being a common liability but we certainly insist on there being some form of liability, whether it's co-ordinate or common

So unless there are any questions…

ELIAS CJ:
Well I was just interested in this footnote reference in 81 of your submissions to the evidence, which I haven't looked at. What –

MR GOODALL:
Oh, the comments in the House, Your Honour?

ELIAS CJ:
Yes.

MR GOODALL:
Yes, well that was –

ELIAS CJ:
I see, it's over the page at page 125.

MR GOODALL:
Sorry, I think I'm lost. Can I just confirm which paragraph you're looking at Your Honour?

ELIAS CJ:
Well it's your footnote 81 and I'm now following that up and it looks as if it's the meat in it is at page 125 of volume 2. It's not particularly useful information.

MR GOODALL:
Oh, well, look, I think the point there, Your Honour, is that it actually doesn't matter whether it's useful or not. And the reason for that is that Parliament's assumption was that it was useful. Whether it's in fact useful in practice I'd submit is something

quite different and it may be that in certain situations, given how particular parties act, it might not be particularly useful. But when Parliament has put in this disclosure regime the underlying assumption clearly was that it was going to be something of use. Because that's why it's there.

ELIAS CJ:

Well, but if Parliament has missed fire on this I don't know that we would necessarily be very comfortable about saying they could have obtained information, which is probably why the Court of Appeal said that they weren't placing reliance on that.

MR GOODALL:

Well in relation to that, Your Honour, I think the point is that it's merely – the disclosure regime is really one link in a chain of argument.

ELIAS CJ:

Yes. No, I understand that.

MR GOODALL:

No, it's…

GLAZEBROOK J:

Well though I can't see why it's not useful. To be honest. Because you must have some idea – well first of all you know the maximum amount you can be responsible for, and secondly you must have some idea whether employees will want to transfer or not.

MR GOODALL:

Yes. I think the argument –

GLAZEBROOK J:

You could take a good stab at it.

MR GOODALL:

The argument has always been up to this Court by the appellant, that the reason it's not useful is that you don't know how many employees want to transfer. But as Your Honour Justice Glazebrook has just observed, what you do know is the maximum exposure, and then you can make your own assessment in that context as

to how many are going to transfer. We've also got to remember that the whole purpose of this legislation was to help vulnerable employees and prevent them losing their jobs, and so I think that it's probably a fair inference to draw that most of them would transfer. They are on, unfortunately, the bottom-rung jobs. They're in a vulnerable situation. They want to maintain their employment and actually that's what is borne out in this case. the employees who were eligible for transfer did transfer.

There's also the reference in our submissions, Your Honours, at paragraph 81. That just picks up again on the similar point. I mean certainly Parliament did consider that the regime was going to be useful, and you can see that there from the quote from the Honour Lianne Dalziel when this amendment was read. It was very clearly on the basis that businesses could use that information.

And just one final point actually before I do retire, there has been reference to the tax case by both parties and I just point out in addition to the point my learned senior made in relation to that, that case, that the relevant statutory provision, section 41, it didn't have those two subsequent requirements that we've got in this case, which is that the new employer must pay out and the old employer mustn't. So that statutory imperative, the old employer must not pay out, that wasn't in that prior deeming legislation in the tax case.

McGRATH J:
Just before you finally go, Mr Goodall, looking at 69J(2)(a)(ii), the prohibition on the old employer paying out, just wondering whether it's implicit in that that the old employer can't pay out while the employment continues with the, with both the old and new employer.

MR GOODALL:
You're saying, Your Honour, suggesting that perhaps, so I understand, when the new employer ceases employing the employee that restriction no longer applies? Is that…

McGRATH J:
No. I'm contemplating that perhaps the obligation continues but with a bar in the statutory provision, the obligation of the old employer continues but with a bar, but

the bar may fall if during the period of employment with the new employer the employment is terminated.

MR GOODALL:
Well I think if you were to do that you'd certainly have to read some form of words in to qualify that provision.

McGRATH J:
Yes.

MR GOODALL:
And I'd have to say that I'm not aware of any justification in some of the other provisions that would allow that to be read in. I mean you've got this provision that not only has that restriction but at the same time you've got section 69J(2)(a), the deeming provision, so the deeming that past service period to be the new employer's service period. So that's only – the prohibition is only part of it.

McGRATH J:
Context doesn't allow it.

MR GOODALL:
Yes Sir, that would be my submission.

ELIAS CJ:
Thank you Mr Goodall.

MR GOODALL:
Thank you Your Honours.

ELIAS CJ:
Yes Mr Skelton.

MR SKELTON QC:
Your Honours, I'd like to just begin in reply dealing with the submissions by my learned friend Mr Goodall on subpart 2 about the employee transfer cost regime. Your Honours, Justice Toogood considered the disclosure regime under Part 2 of

section 6A in a decision that's in the bundle of authorities, tab 18, page 201. It's between the same parties, LSG Chefs and Pacific –

McGRATH J:
Is it in the same proceeding?

MR SKELTON QC:
Yes. The relevant –

ELIAS CJ:
Oh, this was the strike out?

MR SKELTON QC:
This was the strike out, because there was an argument that there was a defence to this claim based on passing on the costs to defendants. It was struck out. But he dealt with the issue of transferred cost information, paragraphs 51 and 52 of the judgment. As to – the point being that inevitably it would be the case in a competitive tendering situation for a subsequent contract that the notification of the right to elect to transfer will not be given to employers until after the 10-week process has been completed. So it's not helpful in –

ELIAS CJ:
Sorry? The –

MR SKELTON QC:
Paragraph 51. You'll see half way down, third way down there it starts, "S 69I of the Act, it will inevitably be the case, in a competitive tendering situation for a subsequent contract, that notification and a right to elect to transfer will not be given to the employee until after the tender process has been completed. The prospective employer could not know in advance of submitting the tender how many employees would later elect to transfer."

This disclosure regime that was enacted under Part 2 does provide some useful information to a prospective purchaser because it will tell, for example, rates of pay. It will allow them to know that if they win the tender how much they will have to pay the employees that transfer across but they won't know, won't be able to ascertain costs associated with accrued leave entitlements because at that point where the

tendering process is going on the old employer does not have to determine how many, if any of these employees are going to be made redundant. If they are made redundant how many of them will elect to transfer across or will not elect to transfer across so the prospective employer just does not have that information.

Now what Justice Toogood also comments on at paragraph 52, "The prospective new employer seeking to price the tender competitively may consider it unattractive to the offeree to provide in the tender for a direct imbursement by the offeree of the payment of the transferred entitlements. The offeree is unlikely to meet the costs of those entitlements under the terms of the terminating contract and would be unlikely or unwilling to accept the burden of meeting them twice."

So it's not – the argument was that, well, you could seek that information then pass it on to Singapore again under your tendering process but they've already paid that to Pacific why would they want to pay it twice.

Now Your Honours, what actually happened in practice, the chronology of events on the plaintiff's, in the plaintiff's submissions, it's the last page of the appellant's submissions there is a short chronology of events that lists what information was, in this case provided by Pacific to LSG. Do Your Honours have that?

ELIAS CJ:
Yes.

MR SKELTON QC:
A request for proposal goes out in June 2010. You get in December LSG seeking information regarding or transferring employers initially told 55 employees going to transfer estimated accrued leave Pacific said was $440,000, estimated redundancy costs 710 and by 21 January Pacific is advised that its 48 employees are going to transfer across and the accrued leave amounts were 315,000, redundancy 704 and I've set out the references to the case on appeal where the evidence is shown. And that by February 2011 it was 42 employees transferring across. The accrued leave entitlements 204,000 and then eventually on the transfer date Pacific says to LSG the accrued leave entitlements are $256,000.

Now at trial, Your Honour, it came out that the evidence was that Pacific had deliberately inflated these leave balances in two respects. They had increased the

hourly rates of these employees and they had added additional leave balances to these employees without these employees knowledge or consent. And I will just, I won't go through the evidence –

ELIAS CJ:

How's it relevant? Because I know the Court of Appeal didn't think it was ultimately relevant even though it deprecated it. How is it relevant to the arguments that you're making to us?

MR SKELTON QC:

Because if the Court of Appeal's interpretation of the scheme is correct then this type of behaviour is incentivised.

ELIAS CJ:

But how does it –

MR SKELTON QC:

– and the reason is –

ELIAS CJ:

How does it impact in the end because you didn't know any of this until after you'd tendered anyway, you didn't know the dire position until after you'd tendered and then by the time you, the transfer date came up it had come down a lot. So why does it matter?

MR SKELTON QC:

Well the point Your Honour is that if, as the appellant's submit, there is a right for the new employer to recoup, get a reimbursement of the leave entitlements from the old then there's no incentive for this sort of behaviour to take place to inflate leave balances.

ELIAS CJ:

Well what's the incentive –

MR SKELTON QC:

And that's what happened in this case.

ELIAS CJ:

Sorry, what is the – I don't understand, what is the incentive for inflating matters?

MR SKELTON QC:

Well because the incumbent contractor –

ELIAS CJ:

But this is all post your tender?

MR SKELTON QC:

Well what – it's because, it's a poisoned pill. What the old –

ELIAS CJ:

You say it could be applied pre-tender?

MR SKELTON QC:

These are two competitors who are at each other's throats. So what they've done is they've transferred across these employees at additional costs and additional leave to their main competitor. Now, if the appellant's argument is right and there is an ability to recoup those costs from the old employer then what happened, as happened here is at trial they go, oh, those leave balances were actually inflated. We don't have to pay you back $256,000 as we told you –

MR STEWART QC:

Evidence from the Bar, Your Honour, I object, because it wasn't done at trial. These matters were disclosed way before trial. Now if my friend's going to address the Court on it he's got to be accurate I'm afraid.

ELIAS CJ:

Well I'm still floundering to know how it's anything that bites. I might be behind on this –

MR SKELTON QC:

It's because, Your Honour, if there is a right to recoup from the old employer for the accrued leave balances that have crystallised, that they've transferred, there's no incentive to inflate figures, to behave in this way.

ARNOLD J:

Mind you it might create a whole lot of incentives the other way. Doesn't it? I mean, if you've got a right to recoup and if you're right about sick leave and so on so that you can do it off into the future there are a whole lot of transaction costs and incentives involved in all of that. I mean at the end of the day don't we have to look at the regime, the statutory regime –

MR SKELTON QC:

Mmm.

ARNOLD J:

– and see how it works? Was intended to work.

MR SKELTON QC:

Well that is correct, and the, but the point my learned friends are making is that Part 2 of 6A, they're calling that in support to say that Parliament must have intended to transfer these rights across without any ability to recoup those costs from the common law.

GLAZEBROOK J:

But isn't the thing, why provide that information if it doesn't matter a fig to the tenderer? That's the submission. Why require that information to be provided if it wouldn't matter to the tenderer if it was $1 million or $2 because it can get it back.

MR SKELTON QC:

Well because you need to know that information from a practical operational point of view so that you can add the information into your payroll systems. You need to know what the pay rates are, what the accrued leave entitlements are. It's not simply limited to what price you put on your tender arrangement. Those transfer cost information are very important practically in actually seamlessly transferring across the employees into your new organisation. So there are good practical purposes for it. But I submit it doesn't suggest that there was any Parliamentary intent to discharge the underlying contractual obligation that existed up until date of transfer.

Now, Your Honour Justice Young asked a question as to whether there was any evidence of what happens to the accrued leave entitlements at trial. There was, Your Honour, evidence given by an industry expert at trial of what current industry

practice was at the time and I'll just refer Your Honours to the High Court judgment where this matter's dealt with. It's paragraph 16 to paragraphs 21 in the High –

WILLIAM YOUNG J:
Well the evidence from the payroll system recorded it. So presumably it would be expensed. It recorded – all these items were recorded accurately or inaccurately in Pacific's payroll system.

GLAZEBROOK J:
I'm not sure whether it's expensed or whether you just accrue it at the end of the year as an accrued liability. Because –

WILLIAM YOUNG J:
Yes, well we don't know.

GLAZEBROOK J:
Well exactly.

MR SKELTON QC:
There wasn't, I believe –

GLAZEBROOK J:
I was trying to look quickly.

MR SKELTON QC:
The evidence I'm referring you Court to in the High Court judgment at paragraph 16 to 21 was evidence of industry practice that occurred by – which confirmed that the practice was for the old employer to account to the new employer for accrued entitlements at date of transfer. And that's the evidence of Mr Young that's referred to in the High Court judgment at that paragraph.

Now my friends referred to alleged problems, practical problems, if there was dual liability imposed in this situation, and they referred to paragraphs 63 of their submissions. I submit the practical problems referred to by my friends are misconceived and over-stated. The easy solution for them is just to follow what was the standard industry practice at the time of accounting for and paying over the accrued leave entitlements at date of transfer, so any increased pay rates that might

have occurred subsequently, no suggestion at all that LSG can claim that, didn't claim that in the Court proceedings, isn't claiming that at the Court proceedings, it's simply seeking the value of the entitlements at the time and date of transfer of employment. And, Your Honours, that the point I've made, that the actual practical difficulties that have arisen in this case have actually arisen out of the inflation of those balances and increased pay rates without consent of the employees, that I've referred Your Honours to in the High Court judgment – it's paragraph 8 of the High Court judgment, paragraph 8 of the Court of Appeal judgment.

My learned friend referred you to *Moule v Garrett*, and on the discussion about whether or not the common liability to be sued was a condition. Your Honours, Chief Judge Cockburn in his judgment referred to what he says is the preferred ground for the decision, and that was based on the extract from the Leake text book – it's at page 102 of the bundle of authorities, the appellant's bundle of authorities. If we look at 101, he said, "There is another ground upon which the judgment below may be upheld, which I think is the preferable one," and then he refers to Leake on contracts, and that formulation was the formulation that Lord Wright adopted as his ratio in *Brook's Wharf*, and it doesn't require common liability to be sued.

McGRATH J:
So what do you say about Mr Justice Willes's observation?

MR SKELTON QC:
Well, on the facts of *Moule v Garrett* there was a common liability to be sued, and so that is a sufficient basis for giving the remedy, but it's not a necessary basis. And I gave you the examples of *Exall*, that old decision whether the carriage was left on the site, distrained, he had to pay the money to release his cart, he was paying the rent that the tenant in possession had. There was no common liability to be sued, because the carriage owner certainly had no contractual obligation or any obligation to pay the rent. The example –

McGRATH J:
So the broader observation of Lord Wright is what's been carried though –

MR SKELTON QC:
Is correct.

McGRATH J:

– as being seen as the true ratio of this case?

MR SKELTON QC:

Yes. The true ratio is discharging the obligation of the defendant, that's the enrichment. Now if there is a common liability to be sued, that goes to the unjust factor that goes to the payment is under compulsion, because you are both under the same obligation to pay. But there's no issue in this case, compulsion arises under the statue, because LSG is being compelled to pay.

Now, Justice Young referred to the possibility of a sale of a business to a related entity or a shell company, was that covered, and there was reference to the definition of "restructuring". It's at page 9 of the appellant's bundle of authorities. And the definition of "restructuring" goes on to say to avoid doubt it doesn't include the case of an employee that has accompanied the sale of shares. So if it's a share sale and not an asset sale the regime doesn't apply and that's because there's no change of employer. They're just selling the shares, the employment relationship just continues. There's a carve-out for a situation where any contract arrangement, sale, transfer entered into or concluded while the employer is adjudged bankrupt or in receivership or liquidation. So if a liquidator sells off the catering business to someone else the regime doesn't apply.

But it does apply to a situation where an employer who let's assume has $1 million of accrued leave entitlements, transfers the catering contract to a $100 subsidiary company that they operate, employees transfer across, and then that company's wound up, and then these employees, on the interpretation of the Court of Appeal, would not have any right of – to come back against their old employer for those entitlements. It's not a farciful example. It's quite common these days for large employers to set up separate subsidiary companies that are employment companies that actually hold all of the employees. And those companies often don't have the assets, they just simply employ people with the holding company owning all of the assets.

Now, the construction of the regime that does recognise, as Justice McGrath said, that when the employment relationship comes to an end and there's no longer any continuity of employment their rights, your contractual rights to go back against your

old employer arise, would have the advantage and benefit of enhancing employee protection, which is, again, the purpose of the regime.

And then the final point I wish to make is simply to comment about subpart 3 of the 6A, which is the employment protection provisions, the ones that deal with employees who are not vulnerable employees and governed by subpart 1. And the definition that my friend's referred you to, section 69OI, it's at page 28 of the appellant's bundle of authorities. So for employees not covered by Part 1 you have to include an employee protection provision into their employment agreement, and what does it mean? It has to include a process that the employer must follow in negotiating with the new employer about the restructuring to the extent that it relates to affected employees. Matters relating to the affected employees' employment, that the employer will negotiate with the new employer, including whether they will transfer to the new employer on the same terms and conditions and a process to be followed at the time of the restructuring to determine what entitlements if any are available for employees who do not transfer, ie do they get redundancy or not, you know, if you don't transfer across will you get redundancy?

So what happens in practice, you've got to put a clause in your contract saying, "If I sell my business I will negotiate with the new employer to determine whether or not the purchaser wants to take you on, on the same terms and conditions of employment. And then you've set out that process full stop. There's no right to elect to go across. There's no protection for employees in that situation who are not vulnerable employees covered by the subpart 1.

Your Honours, unless there are any further questions…

ELIAS CJ:

No, thank you Mr Skelton. Thank you counsel for your assistance in this matter. We will take time to consider our decision.

COURT ADJOURNS: 4.20 PM