

KEMP  
—  
LITTLE

**Over 15 years' experience  
of one thing. Rapid change.**

## Employment Aspects of Outsourcing

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## Today's session

- TUPE refresher
  - Basic principles
  - Multi-sourcing considerations
  - When will TUPE not apply?
- Strategy and commercial considerations
  - Considerations at the outset
  - Approach to splitting liabilities
  - Provisions during the term
  - Common pitfalls
- Other TUPE issues
  - Changing terms and conditions
  - Redundancy and offshoring



TUPE Refresher

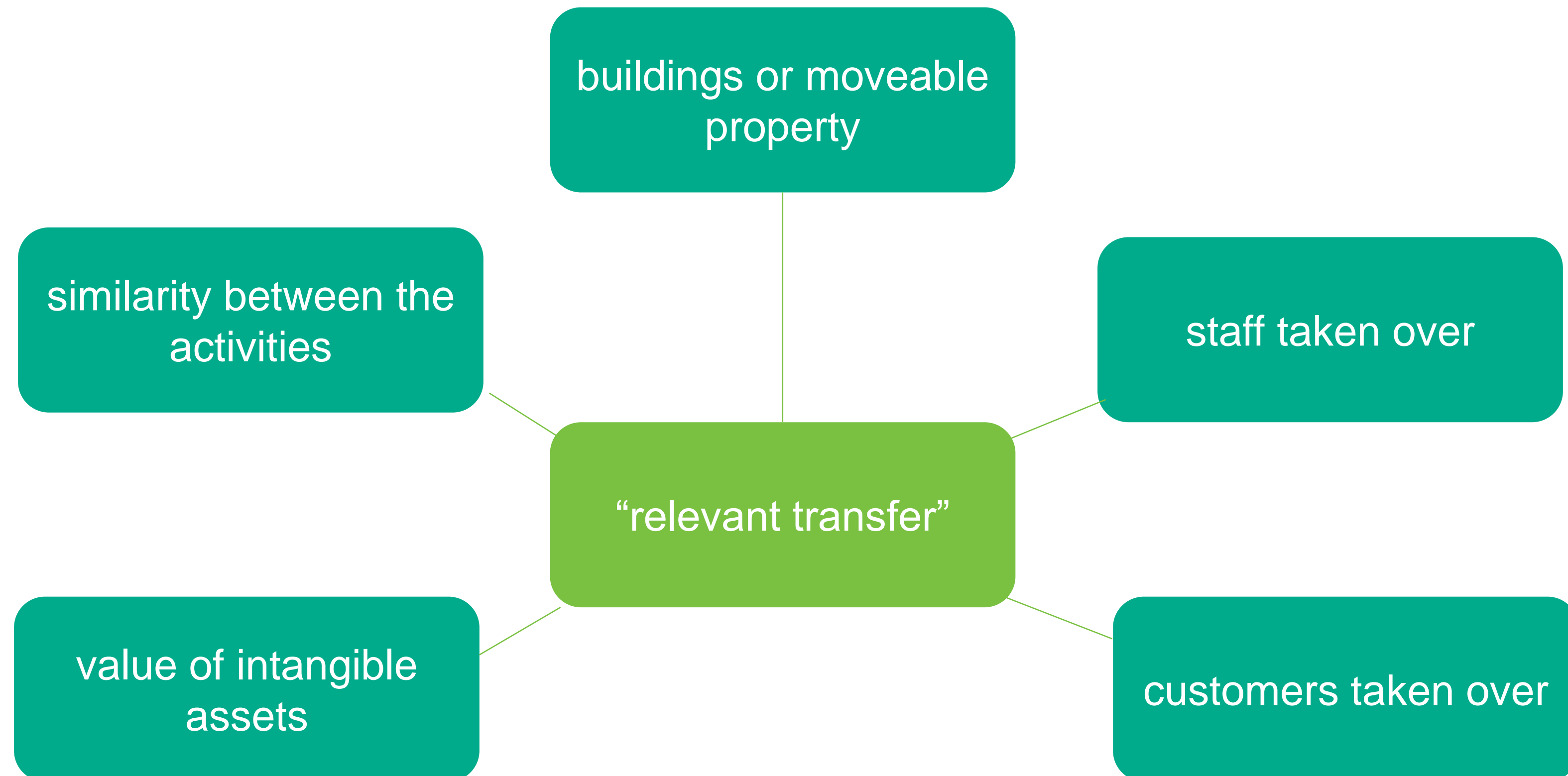
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## The critical question – TUPE or no TUPE?

### Two tests:

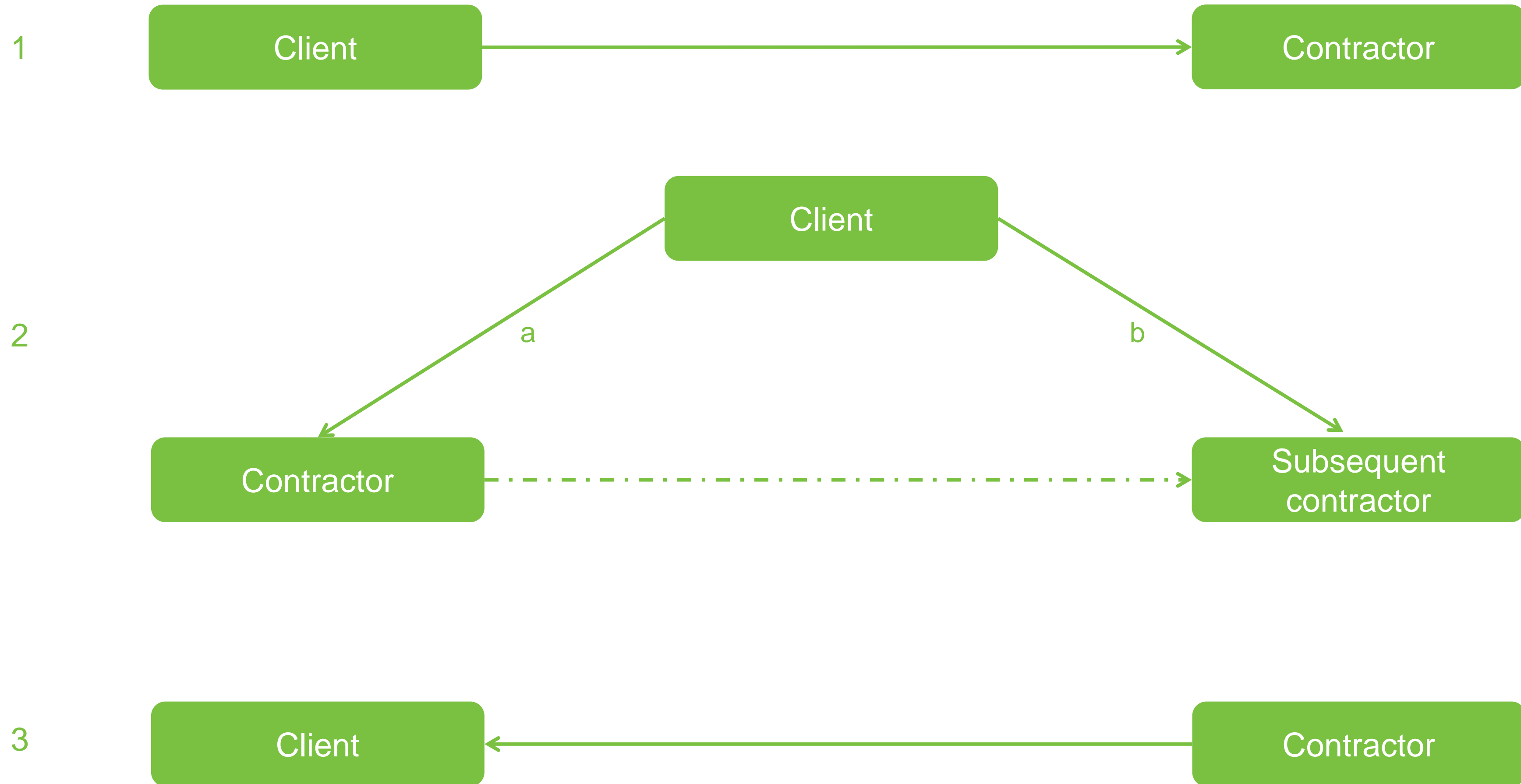
- **Standard business transfer test**
  - Most common in sales of businesses
- **Service provision change**
  - First-generation outsourcings
  - Second-generation outsourcings
  - Taking services back in-house

## Standard business transfer test



A transfer of a stable economic undertaking which retains its identity

## Service provision changes



N.B Scope for TUPE to apply in contract - termination of discrete work packages/service towers

## Service provision changes – contd.

### Organised grouping of employees

- Located in Great Britain
- Whose principal purpose is the carrying out of the activities
- Specifically organised by reference to the client

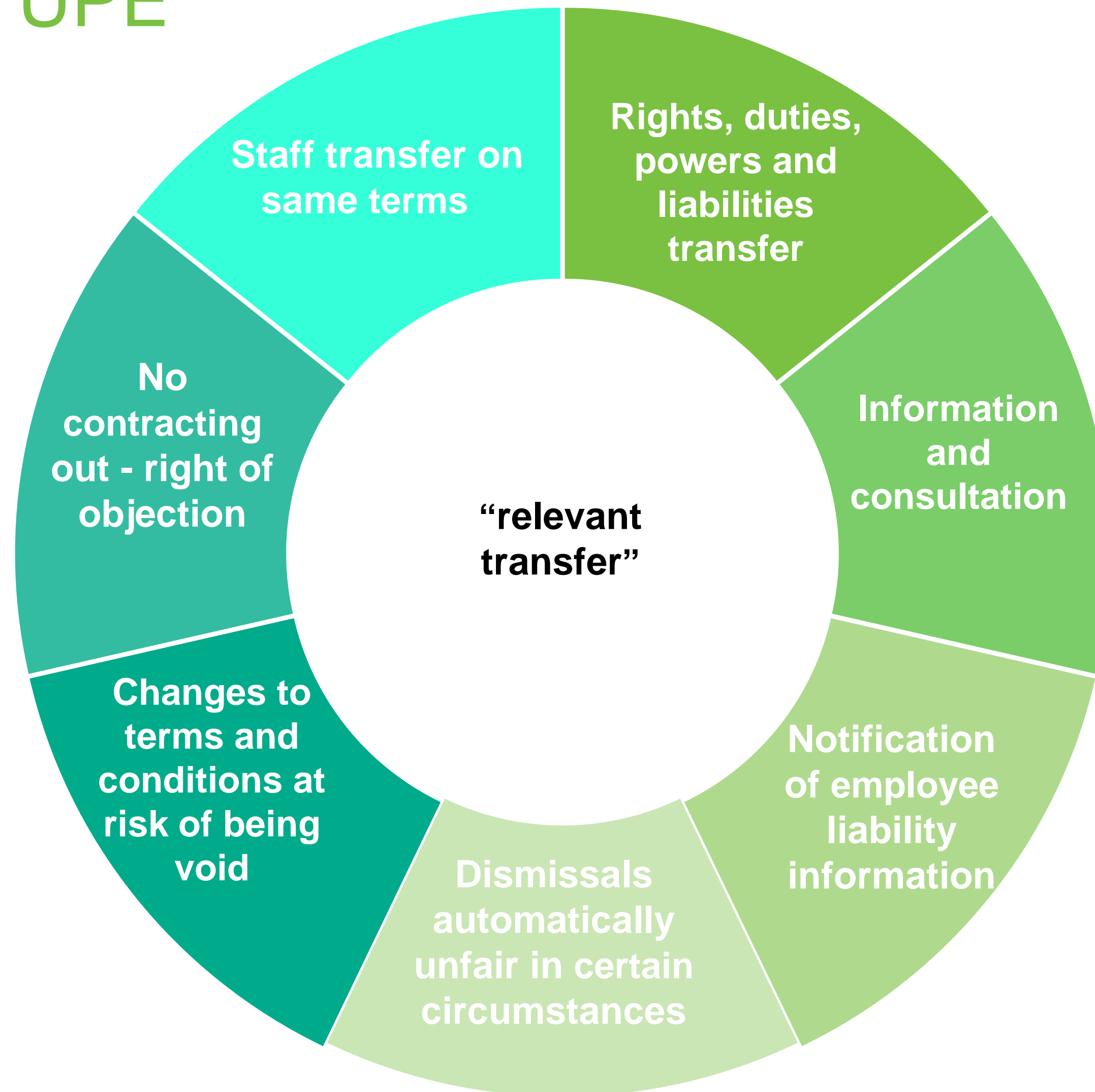
### Fundamentally the same activities

- Caselaw codified in TUPE

### Assigned to that grouping

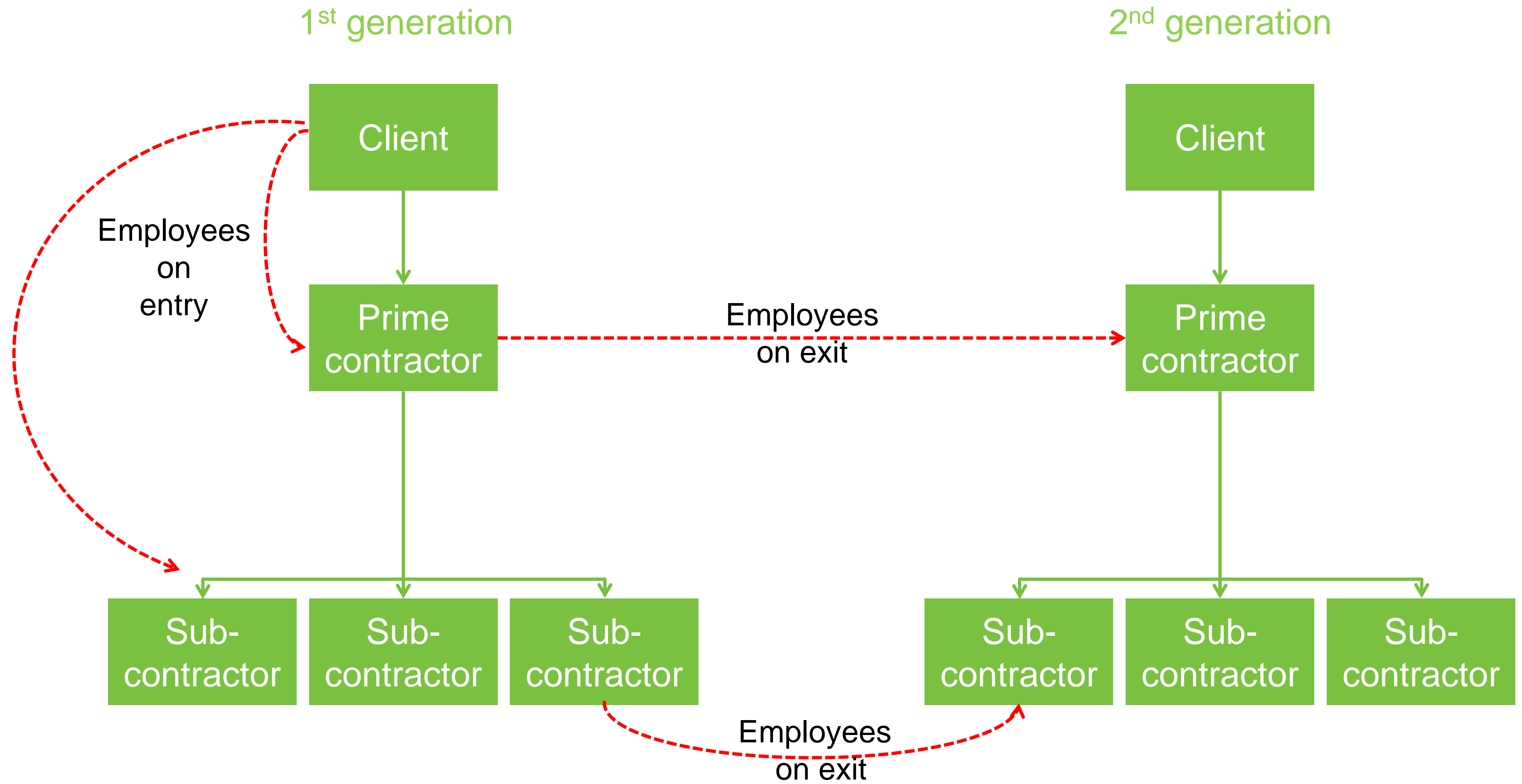
- Immediately before the transfer
- A question of fact, applying a multifactorial test:
  - percentage of time spent
  - title
  - reporting structure

## Implications of TUPE

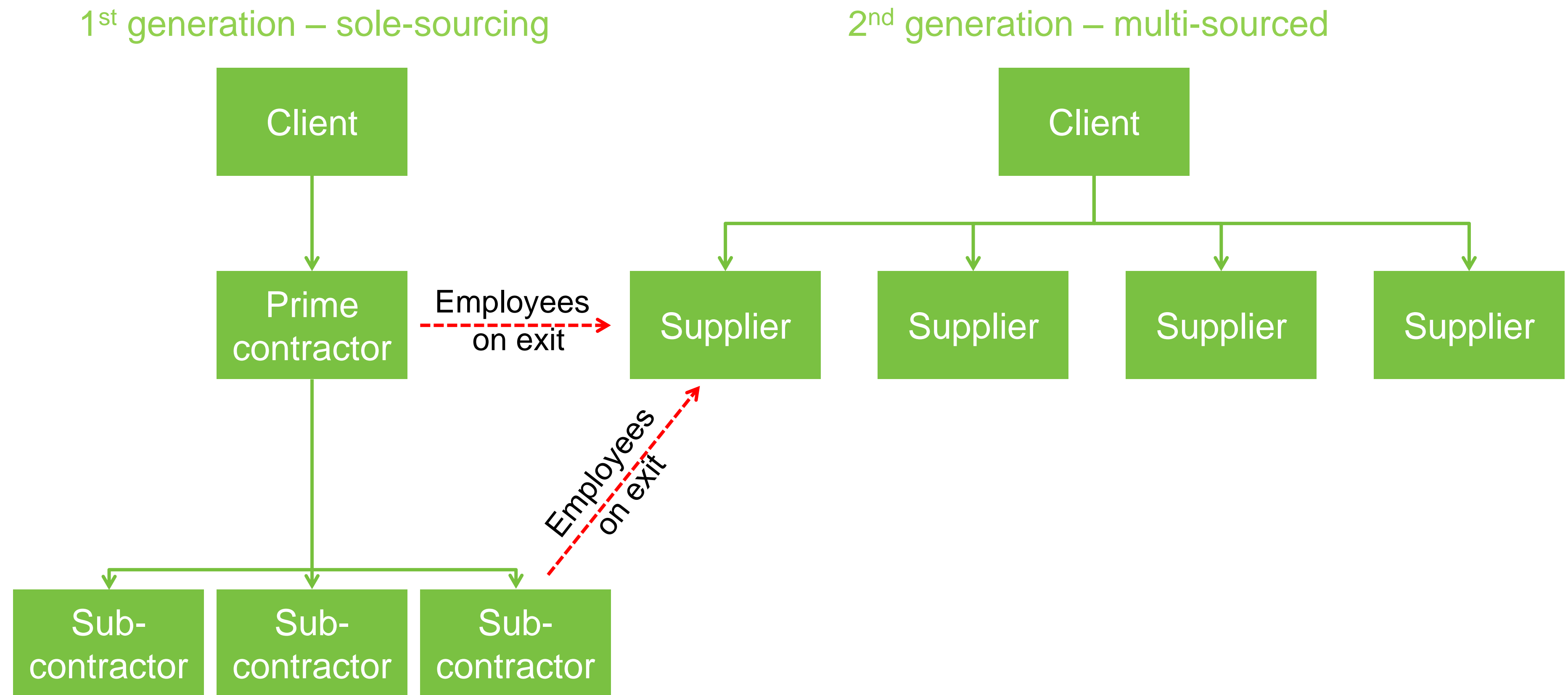




# Typical sole-sourcing model



# TUPE: Moving from sole-sourcing to multi-sourcing model



## When TUPE doesn't apply (1): fragmentation of the services

- TUPE may be avoided where services are randomly distributed
- Is it possible to identify the destination of the activities?
- Is there a discernable pattern of reallocation?

## When TUPE doesn't apply (2): services not “fundamentally the same”

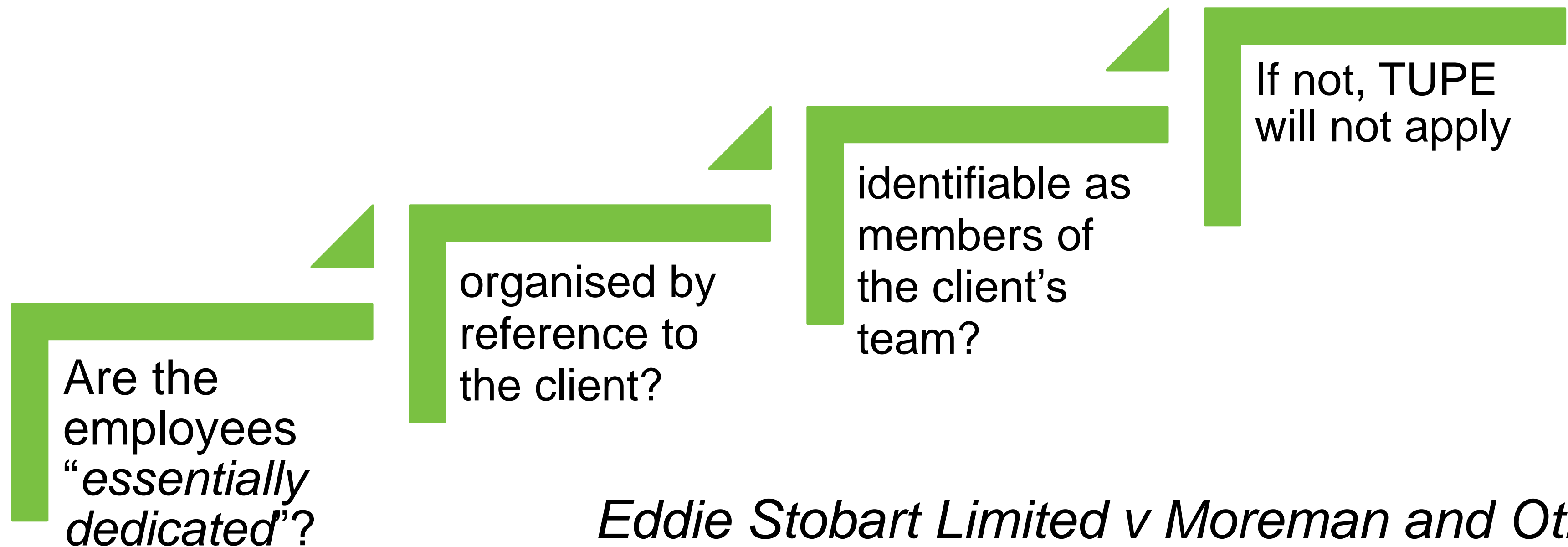
- Are the activities “fundamentally or essentially the same as those carried out by the alleged transferor?”

15%  
difference  
may be  
enough

Change  
in “ethos”

What  
happens  
in  
practice,  
not just  
contract

## When TUPE doesn't apply (3): no organised grouping of employees



*Eddie Stobart Limited v Moreman and Others*  
*London Borough of Hillingdon v Gormanley*  
*Rynda UK Limited v Rhijnsburger*

## When TUPE doesn't apply (4): employees not assigned

- Rule of thumb: >50% of the employee's time is spent on the services
- But not a failsafe method
- Costain v Armitage – project managers
- Jakowlew v Nestor Primecare Services Limited t/a Saga Care – long term sickness absence

## When TUPE doesn't apply (5): single task / event of a short term duration

- Exception if single task or event of short term duration.
- What was the parties' intention at the start of the contract?

*Horizon Security Services  
v Ndeze*



# COFFEE BREAK

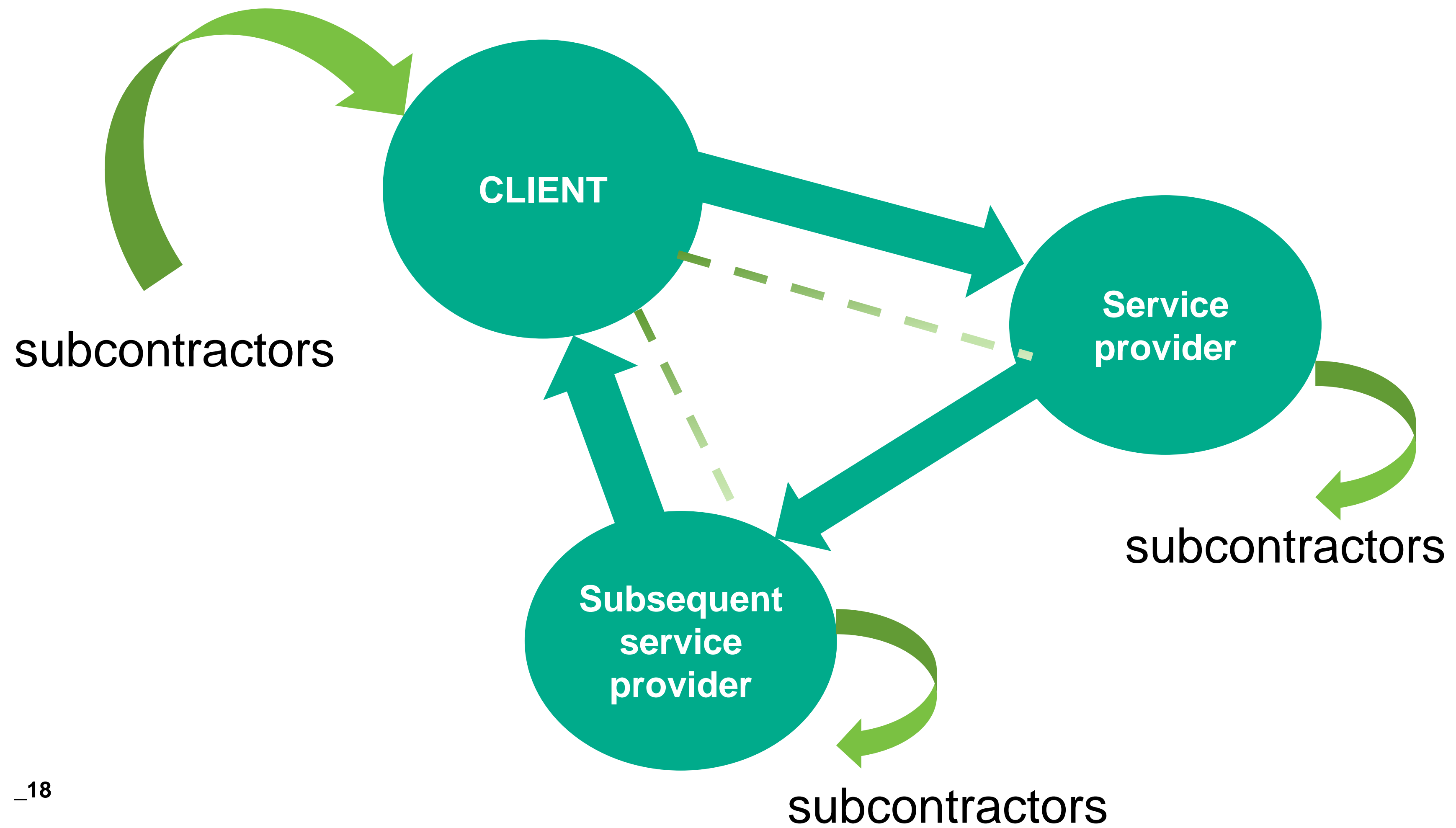




Strategy and Commercial  
Considerations

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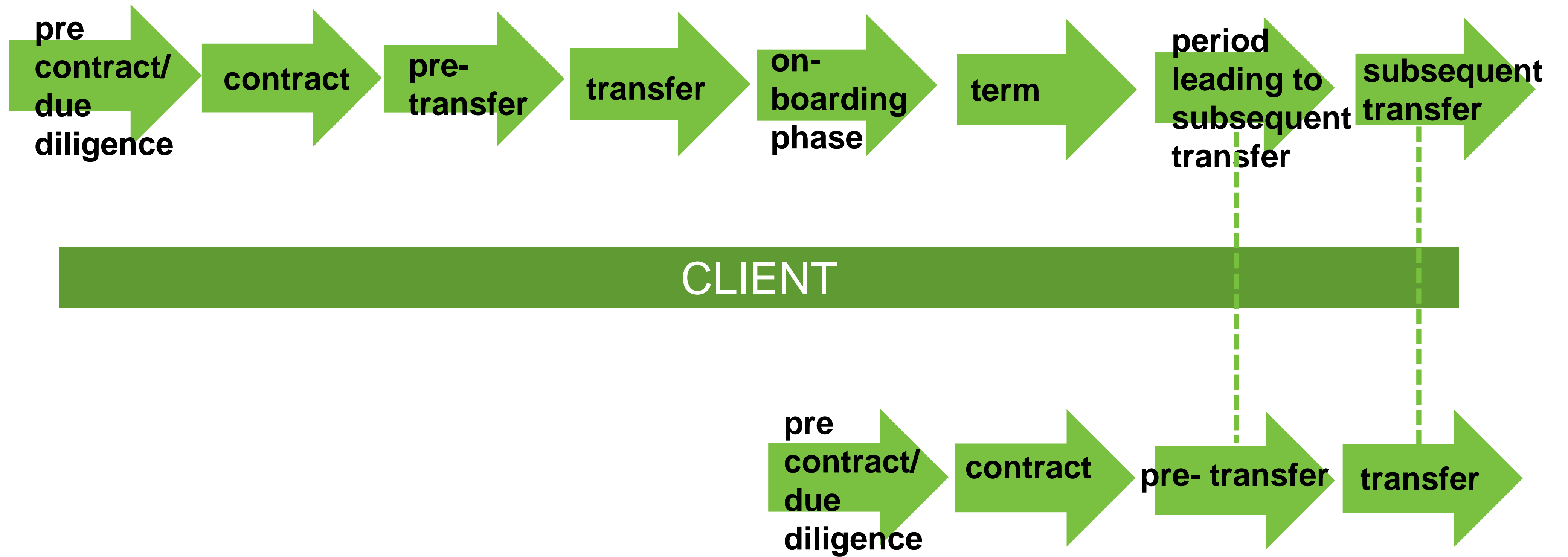
## The wheel of fortune



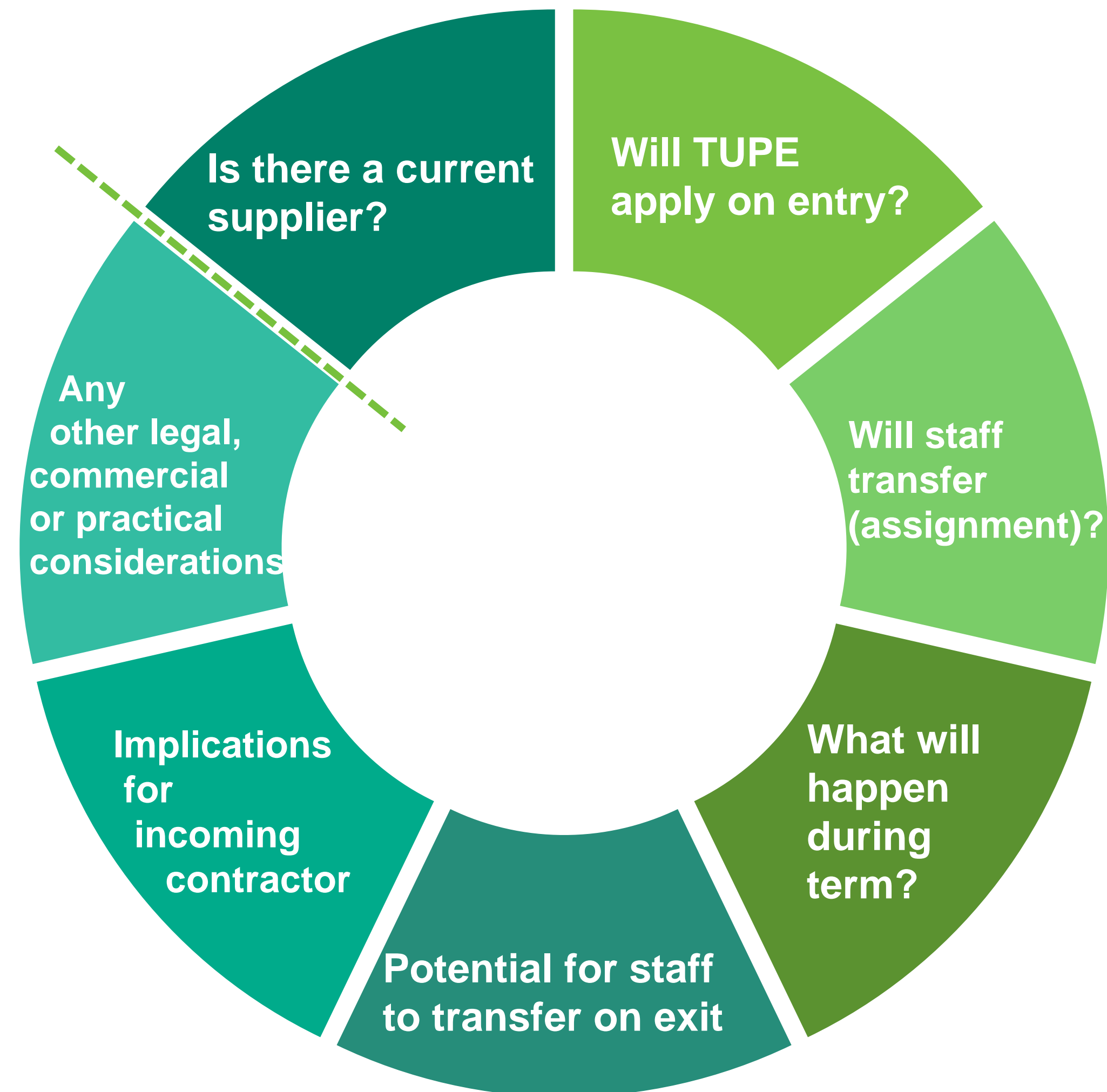
## Strategy – key considerations



# The outsourcing cycle



## Considerations at the outset



## Splitting liabilities – the standard approach

Entry	Exit
<ul style="list-style-type: none"> <li>Client (on behalf of outgoing supplier) indemnifies incoming supplier for everything prior to the transfer</li> </ul>	<ul style="list-style-type: none"> <li>Outgoing supplier indemnifies client (for benefit of incoming supplier) for everything prior to the transfer</li> </ul>
<ul style="list-style-type: none"> <li>Client (on behalf of outgoing supplier) indemnifies incoming supplier for failure to consult (unless arising from default by incoming supplier)</li> </ul>	<ul style="list-style-type: none"> <li>Outgoing supplier indemnifies Client (for benefit of incoming supplier) for failure to consult (unless arising from default by incoming supplier)</li> </ul>
<ul style="list-style-type: none"> <li>Incoming supplier indemnifies Client and outgoing supplier for everything on and from the transfer date</li> </ul>	<ul style="list-style-type: none"> <li>Client (on behalf of incoming supplier) indemnifies outgoing supplier for everything on and from the transfer date</li> </ul>

## Splitting liabilities – the blanket indemnity

Entry	Exit
If anyone transfers:	If anyone transfers:
<ul style="list-style-type: none"> <li>▪ Supplier can terminate</li> </ul>	<ul style="list-style-type: none"> <li>▪ Client (or incoming supplier) can terminate</li> </ul>
<ul style="list-style-type: none"> <li>▪ Client will indemnify for all liabilities</li> </ul>	<ul style="list-style-type: none"> <li>▪ Supplier will indemnify client (for benefit of incoming supplier) for all liabilities</li> </ul>
<ul style="list-style-type: none"> <li>▪ Client/outgoing supplier can offer employment before Supplier terminates</li> </ul>	<ul style="list-style-type: none"> <li>▪ Supplier can offer employment before Client (or incoming supplier) terminates</li> </ul>

## Provisions during the term





## Dealing with the human stock

- **Too many employees**
- **Not enough employees**
- **Wrong skills/location**
- **Key employees**
- **Assignment issues**
- **Splitting liabilities – practical considerations**



## Avoiding a TUPE transfer/positioning yourself for a renegotiation

No organised  
grouping

No employees  
assigned at exit

Fragmentation

Change in  
services

## Common pitfalls

### **Failing to**

- Deal with implications if :
  - TUPE applies
  - TUPE does not apply
- Procure the parties work together to reduce costs/liabilities
- Protect incoming contractors in a legally binding manner
- Deal with a dynamic relationship
- Consider implications and options for exit at outset



Other TUPE issues

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## Changing terms and conditions and TUPE transfers

- Changes are void if the sole or principal reason is the transfer unless:
  - The contract provides for the change; or
  - Sole or principal reason is an ETO reason and the employee agrees.

- Options
  - Think of another reason!
  - Delay the timing
  - Settlement agreements

ETO = economic, technical or organisational reason “entailing changes to the workforce”

## Redundancies and managing offshoring

- *Holis Metal Industries Limited v GMB*
- Few options for dealing with consultation obligations
- Option two now expressly permitted where transferor consents

1	▶	<ul style="list-style-type: none"> <li>▪ Transfer</li> <li>▪ Collective consultation</li> <li>▪ Dismissal</li> </ul>
2	▶	<ul style="list-style-type: none"> <li>▪ Collective consultation</li> <li>▪ Transfer</li> <li>▪ Dismissal</li> </ul>

## HR Bytes

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