Case: **1801947/2017 and others**

EMPLOYMENT TRIBUNALS

Claimants: **Ms E Box and others**
Respondents: **Kellie Noble and Paul Stott trading as Ingrams Solicitors and others**

And;

Claimant: **Kellie Noble**
Respondent: **Paul Stott trading as Ingrams solicitors**

AT A PRELIMINARY HEARING

Heard at: **Hull** **On: 19th March 2018 (The decision then reserved to be given in writing)**
Before: **Employment Judge Lancaster**

Representation:

For the Claimants:	**In Person (see schedule of attendance)**
For Mr Stott:	**Did not enter an appearance and no attendance**
For Ms Noble:	**Mr MacKenzie**
For Lawyers Incorporated Ltd ("LIL"):	**No attendance as previously notified**
For the Secretary of State:	**No attendance but relied on written submissions**

JUDGMENT

1. The Claimants, Ms E Box and others, were at all material times from 8th December 2016 to 28th July 2017 employed by Kellie Noble.

2. Kellie Noble was not at all material times from 8th December 2016 to 28th July 2017 an employee.

3. The claim by Kellie Noble against Paul Stott trading as Ingrams Solicitors (1801550/2018) is therefore dismissed.

4. There will be a further attended preliminary hearing with a time estimate of ½ day to identify the outstanding issues and give further directions as appropriate. Notice of hearing will follow in due course.

REASONS

1. Ingrams was a firm of solicitors in Hull founded in 2001. It had latterly incorporated the well-established practice of Max Gold, a prominent local figure who sadly died in April last year, whilst the events to which these claims relate were unfolding. A number of these Claimants, having been transferred at various times from that or from other legal firms in the city, have significant lengths of continuous service. Ingrams closed on 28th July 2017. These claims, which are principally for redundancy, arise out of that closure. Shortly afterwards the Solicitor's Regulation Authority (SRA) intervened and the practice was wound up.

2. This is one of those cases where the individual ex-employees, who would clealry appear to have legitimate claims against somebody are, largely unwittingly, caught up in a dispute between the prospective respondents as to who should bear liability.

3. The issue for determination at this hearing is to decide the primary dispute between Miss Noble and Mr Stott as to whether either or both of them was the employer of Ingrams' staff at the material time. There is potentially then a further dispute as to whether there has been a transfer of undertaking of any part of Ingrams' business to Lawyers Incorporated Ltd. (LIL) but that is not to be resolved today. Also the Secretary of State for Business , Energy and Industrial Strategy (BEIS) has been joined as a party to all claims because it is highly probable that the ultimate responsibility in respect of any awards will fall on the Redundancy Payments Fund. That is because Mr Stott is bankrupt and Miss Noble, although no longer in fact currently the subject of an Individual Voluntary Arrangement (IVA) is admitted by the Secretary of state for BEIS to have been insolvent at the date employees were dismissed. She is also unfortunately likely, in all the circumstances, to become insolvent again. The position of the Secretary of State for BEIS on this issue is not neutral. In the Response submitted to the claim of Mr Alton - which stands as his submissions at this hearing - he argues that Miss Noble was a full partner, that she then bought the business outright from Mr Stott and that she was therefore at all times the employer.

4. Miss Noble was employed by Ingrams as a solicitor in March 2011. On 1st October 2011 she became a "salaried partner". At that point, whatever the previous position may have been, Mr Stott was a sole practitioner, trading under the style of Ingrams Solicitors which he alone owned. Ms Noble was then the only other named partner. There is no dispute that from that time her name appeared on the letterhead.

5. It is firstly the contention of the group of ex-employee Claimants, as advanced on their collective behalf by Ms Box and Mrs Densley, that the salaried partnership agreement operated to make Miss Noble a full partner. That is also the assertion of the Secretary of State for BEIS. I do not accept that argument. I am satisfied as a fact, applying Stekel v Ellice ChD [1973]1WLR 191, and upon a true construction of the agreement that the substance of the relationship between Miss Noble and Mr Stott remained one of employer and employee. Miss Noble contributed no capital. She was not entitled to any share of the profits. Conversely she was indemnified against any debts of the partnership. She continued to be paid a fixed salary by Mr Stott with deductions of PAYE, for which purpose he alone remained registered with HMRC. She

remained subject to the management and control of Mr Stott, who also alone had the power without her consent to appoint other partners, whether "salaried" or "equity". This was clearly still a contract of employment in which Miss Noble's job description is now aptly described as "salaried partner" but without in any way altering the essential character of their relationship.

6. Ms Box advances a subsidiary argument before me that section 14 of the Partnership Act 1890 will fix liability on Miss Noble because she has, admittedly, represented herself as a partner. Leaving aside the question of whether or not an employee of a partnership can properly be said to have "given credit to the firm " (which I am not prepared to accept is the case without being referred to some specific authority which assists this interpretation) there is simply no evidence that any claimant in fact acted upon that representation by Miss Noble. The majority of claimants entered into their contract of employment before the salaried partnership agreement came into effect or were transferred across to Ingrams as a matter of law. The few who joined Ingrams after Miss Noble became a partner do not say that they were induced to accept the offer of employment by her representing herself as a partner. In actual fact it appears to have been Mr Stott and his wife Anne – the practice manager - who were responsible for recruitment and appointment. I do not need therefore to concern myself with this argument. It is clearly unsustainable on its facts: cf Walsh and others v Needleman Treon (A Firm) and others [2014] EWHC 2554 (Ch).

7. Mr Stott, having been under investigation by the SRA for some time, was struck off the roll of solicitors on 28th October 2016 following a finding of serious dishonesty. Ingrams carried on. An application was initially made to the SRA for emergency authorisation to continue in the joint names of Miss Noble, Mr Gold – who was a consultant – and Lawrence Watts, an employed criminal solicitor. The actual authorisation was for Miss Noble alone who therefore continued to run the firm as a sole practitioner. That emergency authorisation was subsequently confirmed by the SRA, once again in her sole name. Under the salaried partnership agreement Miss Noble had limited delegated authority to control and manage the practice. She was the only salaried partner and therefore the only employed lawyer within Ingrams who had such authority. It is not at all surprising therefore that she should at this time have effectively assumed the role of managing partner.

8. I do not accept the contention of the Secretary of State for BEIS that Miss Noble as the surviving partner accepted sole responsibility for the other 30 employees of Ingrams as from the date of Mr Stott's being struck off. I have already explained why I do not agree that Miss Noble was a full partner with joint and several liability to the firm's employees. The Secretary of State for BEIS seeks further to rely upon paragraph 13 of Miss Noble's statement accompanying her IVA application. I do not construe this as any admission of her taking sole legal responsibility for the employees' contracts. I accept Miss Noble's evidence on this point that she was merely referring to a sense of moral responsibility to seek to ensure that the business continued to function. Although Mr Stott was debarred from any active involvement he was still the sole owner of the firm and the lease of the premises from which it operated was also vested in his sole name. Miss Noble had not been the employer up to 28th October 2016 and nor did she become so immediately afterwards. She was simply, by reason of her salaried partner's job description, the senior employed solicitor and the person licensed by the SRA to run the practice pending resolution of it's owner Mr Stott's affairs. I note that

that is also the analysis of the situation adopted by the SRA in its letter to Miss Noble dated 6th December 2016. In that letter the SRA states:

"The sole equity owner of Ingrams is Mr Stott. That continues to be the case even though he has been struck off. As a salaried partner, you are an employee of Mr Stott. Since he is the sole equity owner, clients' retainers are with Mr Stott and there are some potentially serious legal issues arising from that such as possible frustration of the contract arising from his strike off.

"The current position appears to be that you are effectively managing Mr Stott's law firm and the temporary emergency authorisation protects you from being in breach of practising requirements. However that does not remove the significant risk to the public arising from Mr Stott being the equity owner of the firm."

9. At or around this time Mr Stott was taking active steps to secure a buyer for the business. At various stages potential purchasers were identified, including Mr Hakim, one of the Claimants in this case, Roy Foreman &Co - a solicitors' firm in Grimsby – and also LIL. It also appear from Miss Noble's evidence that Mr Gold may have been interested in buying the business in the short term but that the terms of his current practising certificate precluded him from becoming the proprietor.

10. In the event it appears that the SRA lost patience with the slowness of the process of sales negotiations, particularly with Roy Foreman & Co. Miss Noble's evidence is that Mr Stott received an ultimatum from the SRA requiring him to divest himself of his interest in the firm by 4pm on 8th December 2016, with an implied or explicit threat of intervention if he did not. Although that letter itself is not produced before me I am satisfied that something in those terms was indeed sent by the SRA. It would have been entirely consistent with the concerns expressed by the SRA in its letter to Miss Noble of similar date, and which I have quoted above. I also note that in its letter to Miss Noble the SRA also set the time for her response at 4pm on 8th December 2018.

11. Therefore on 8th December 2016, just before the deadline set by the SRA Miss Noble entered into an Asset Purchase Agreement with Mr Stott to buy the business. This is a pro forma document prepared on Mr Stott's behalf and presented to Miss Noble at a meeting held on that same day between herself, Mr Stott and Mr Gold.

12. Although there were clearly pressures of time I can see no evidential basis upon which Miss Noble might, as she argues she could, seek to set aside this agreement on the grounds of undue influence. She and Mr Stott were partners, and she was of course herself a qualified solicitor. She was already aware from her own correspondence with it of the pressure being applied by the SRA to secure a speedy sale so that the exigency of the situation will not have taken her entirely by surprise. The agreed purchase price of £12,000.00 does not appear in any way to be excessive. There were also clearly perceived benefits to Miss Noble in her entering into this transaction with a view to selling on to LIL and so securing her own position: she expected to receive at the end of all this "a very good income , including profit –related bonuses". Whether or nor there was undue influence exerted by Mr Stott is not, however a matter that would fall within this jurisdiction.

13. From the employment law perspective I am satisfied that Miss Noble knowingly entered into this agreement with the express intention of securing the employment protection of the other employees. Those employees had, of course, remained in continuous employment after Mr Stott's striking off. They remained an "economic entity" within the meaning of regulation 3 (2) of The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) – that is "an organised grouping of resources which has the objective of pursuing an economic activity". They were the people who carried on the solicitors' practice which was Ingrams. Miss Noble acknowledges in her evidence that her entering into the Sale Agreement was "the only way the firm could continue, that the jobs of the staff could be protected." An issue subsequently arose as to whether the Sale Agreement was in fact effective in law to pass the assets to Miss Noble as it had purportedly done. It is expressly provided, of course, in regulation 3 (6) (b) of TUPE that a relevant transfer "may take place whether or not any property is transferred by the transferor to the transferee".

14. The Agreement which Miss Noble signed with this express intention of securing the employment of the staff in fact explicitly identified that this would take effect by means of a TUPE transfer. Under clause 9 of the Agreement the parties agreed "that the sale pursuant to this agreement will constitute a relevant transfer for the purposes of TUPE". I am not at all impressed by Miss Noble's argument that the absence of any schedule attached to the Sale Agreement identifying the employees who would transfer nullifies this provision. Protection of employment preserved under TUPE - or under the analogous provisions for continuity of employment under section Part XIV of the Employment Rights Act 1996 – is a statutory not a contractual construction. The contracts of all those who were employees immediately before the transfer automatically pass, irrespective of whether or not they have been named in any document. Failure on the part of the transferor to provide the requisite information may have consequences as between him and the transferee but it does not affect the rights of the individual employees. In any event Miss Noble knew full well who was employed by Ingrams at the material time and she fully understood that she was to be their employer from that time, so as to keep the firm intact just as it was.

15. The signing of the Sale Agreement also necessarily, and by mutual consent, terminated the contract of employment between Mr Stott and Miss Noble. Its terms are wholly inconsistent with there being any continuing employment relationship between the parties.

16. From 8th December 2016 Miss Noble assumed control of Ingrams. Although she continued to be paid what purported to be a salary she assumed sole authority to manage the business and its revenues. The purchase price agreed to be payable to Mr Stott was not in fact paid out of Miss Noble's own pocket but was made up of various instalments over the next one or two months all of which came out of the Ingrams account on Miss Noble's authorisation. This was in effect therefore an additional drawing of £12,000.00 on the business over and above the regular monthly drawings that Miss Noble continued to pay herself as "salary". Whereas the business had been Mr Stott's sole property she was now treating it as hers to do with as she wished. Eventually, of course, it was Miss Noble who took the decision to close the business and issue staff with notices of redundancy. I note that in the letter of termination issued to Mrs Densley dated 25th July 2017 – and which I presume was sent in identical form to all the other employees made redundant –Miss Noble expressly states that "I would like to thank you for all your support and hard work since I took over the firm in

December 2016." Taking over the firm, including its employees, was precisely what Miss Noble understood herself to be doing as from 8th December 2016 and it was entirely in accordance with the agreement she entered into on that date with Mr Stott.

17. Mr Stott was declared bankrupt on 25th April 2017. Miss Noble therefore now seeks to rely upon section 284 of the Insolvency Act 1986, which she argues renders the entire Sale Agreement void including any consequent transfer of employment under TUPE.

18. Section 284 provides:

"(1) Where a person is adjudged bankrupt, any disposition of property made by that person in the period to which this section applies is void except to the extent that it is made with the consent of the court, or is or was subsequently ratified by the court.

"(2) Subsection (1) applies to a payment (whether in cash or otherwise) as it applies to a disposition of property and, accordingly, where any payment is void by virtue of that subsection the person paid shall hold the sum paid for the bankrupt as part of his estate.

"(3) This section applies to the period beginning with the day of the presentation of the bankruptcy order and ending with the vesting, under Chapter IV of this Part, of the bankrupt's estate in a trustee."

Subsection 4 then provides a defence to a purchase in good faith and for value without notice of the presentation of the bankruptcy petition.

19. It is only after the adjudication of Mr Stott's a bankruptcy on 25th April 2017 that this section had any effect. As the petition had been presented in July 2016 the Sales Agreement of 8th December 2016 is therefore caught by it. It does not however mean, in my view, that that agreement was void at the time it was entered into. Although it is not relevant in this case there is always the possibility of the good faith defence being raised: therefore not all dispositions of property by a prospective bankrupt are capable of being made void at all. Even after the bankruptcy this sale might have been validated retrospectively upon an application to the court. It was indeed envisaged by both Mr Stott's trustee in bankruptcy and by Miss Noble that such an application would be made by her. I have been referred to a practice direction which provides only for the application to be made by the bankrupt: in any event Miss Noble decided not to seek to pursue any such application herself – whether or not she would have had the standing to do so – because of the prohibitive cost of going to court. Neither has the trustee in bankruptcy been to court to seek to enforce the return of any property purportedly vested in Miss Noble but has, without any order, taken possession of Ingrams' assets – such as they were, and I understand the majority of the property was subject to charges – following the closure of the business.

20. I therefore conclude that the Sale Agreement in so far as it related to the "disposition of property" was a perfectly legal transaction at the time, although it was potentially voidable in the event of Mr Stott being declared bankrupt and there then being no successful application for validation. The employees were not, however, Mr Stott's property to dispose of to Miss Noble. I find therefore that the contracts of employment which the Claimants had, either with Mr Stott before 28th October 2016 or with Miss

Noble after that date are not and cannot be the subject matter of the contract between the two of them. In any event the transfer of undertaking is not solely dependant upon the written contract between the transferor and the transferee. It is a question of fact whether there was or was not a transfer of an economic entity which retained its identity and the terms of any contract will not necessarily be determinative of that issue. The TUPE transfer as at 8th December 2016 is therefore unaffected. As I have already indicated that transfer of the workforce as an economic entity is not dependent upon there also being any transfer of property. I do not therefore accept Miss Noble's argument that this is an entire agreement which cannot be severed and which is automatically void so that therefore the complete transaction is of no effect. I do not recognise the concept of a vanishing transfer whereby employees who have, applying TUPE, continued in new employment for 4 ½ months before the bankruptcy and for a further 3 months beyond that are then to be deemed not to have transferred at all. The employment contracts are separate from and are not in any way tainted by the voidability of the property elements of the Sale Agreement. Both Miss Nobel and the individual employees had full legal capacity to enter into contracts of employment, and that is what they did.

21. Nor do I accept any suggestion that Miss Noble , having agreed a mutual termination of her employment, is then somehow to be held to have continued in Mr Stott's employ throughout by reason of a void commercial transaction between them. There was no intention to create any continuing legal relationship after 8th December except in respect of enforcing the finalised Sale Agreement. Mr Stott, of course, exercised no control whatsoever over Miss Noble: she was free to and did run the business entirely as she saw fit. In no sense did Miss Noble continue to provide her services as a solicitor to Mr Stott in return for any remuneration from him. There was no mutuality of obligations consistent with a contract of employment. It is meaningless to suggest that Miss Noble was still an employee of Mr Stott throughout this period.

EMPLOYMENT JU DGE LANCASTER

DATE 22nd March 2018