EMPLOYMENT TRIBUNALS

Claimants: 1. Mr J Sinnott
2. Ms F Bennett
3. Mr I Miah
4. Miss A Mosdell
5. Mr D Mosdell

Respondents: 1. Urbanbubble Liverpool Limited (in Creditors' Voluntary Liquidation)
2. Urban Evolution
3. Nationwide Facilities Management Limited

Heard at: Manchester (by CVP)

On: 9 - 10 August and 10 September 2021 and in chambers on 6 and 23 December 2021

Before: Employment Judge McDonald (sitting alone)

Representatives

For 1st, 2nd and 3rd claimants:	In person
For 4th and 5th claimants:	Mr A Mohammed (Trainee Solicitor)
For the 1st respondent:	Did not attend
For the 2nd respondent:	Mr S El Paraiso (Managing Director)
For the 3rd respondent:	Mr D Flood (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. There was no relevant TUPE transfer by way of a service provision change from the first respondent to the second respondent.

2. There was no relevant TUPE transfer by way of a service provision change from the first respondent to the third respondent.

3. The claimants' claims against the second and third respondents fail and are dismissed.

4. The Tribunal will issue further directions in relation to the claimants' claims against the first respondent.

REASONS

Introduction

1. This was a preliminary hearing to decide the issues identified by Employment Judge Allen in his Case Management Order dated 12 February 2021, namely:

(i) Whether there was a transfer of an undertaking ("a TUPE transfer") from the first respondent (Urbanbubble Liverpool Limited) to the second respondent (Urban Evolution) or to Nationwide Group;

(ii) If there was a TUPE transfer, who was the transferor and who was the transferee;

(iii) Which of the claimants were covered by that TUPE transfer?

2. The hearing was held on 9-10 August and 10 September 2021. I heard the claimants' evidence on day 1. For the reasons explained below I heard Mr El Paraiso's evidence for the second respondent on day 3. I reserved my decision and directed that the parties provide written submissions. I considered the matter in chambers on 6 December 2021. The second respondent had supplied further evidential documents with its submissions. Final consideration of the matter in chambers was delayed to 23 December 2021 to enable the parties to make written submissions about the admissibility of those additional documents. I apologise to the parties for the delay in finalising this judgment since that chambers day due to a combination of absences from the Tribunal and other judicial commitments.

3. To try and make this judgment easier to read I have referred to the parties by name rather than as, for example, "the third claimant". I refer to the claimants by name, to the first respondent as "Bubble", the second respondent as "Evolution" and the third respondent as "Nationwide".

Preliminary matters

<u>Non-attendance and liquidation of Bubble</u>

4. Bubble had defended the claims, sent witness statements and prepared the bundle for the preliminary hearing but did not attend at the hearing. It subsequently

confirmed that it had entered into creditors' voluntary liquidation from 14 September 2021.

Nationwide's application to extend time for its response

5. Nationwide had not filed a response to the claims. I heard its application for an extension of time to do so at the start of the hearing and refused it. I gave reasons orally and provided them in writing in my Case Management Order dated 17 August 2021.

Nationwide's participation in the hearing

6. I decided it was in accordance with the overriding objective to allow Nationwide to participate to the extent of making submissions in the case, but not to call evidence or cross examine witnesses. However, on the second day of the hearing Mr El Paraiso applied on behalf of Evolution for permission to admit additional documentary evidence not in the original bundle for the preliminary hearing. After hearing submissions, I decided that the most appropriate way to proceed in accordance with the overriding objective was to allow the documents in evidence and extend Nationwide's participation to the extent of allowing it to cross examine Mr El Paraiso. There would be a need for an adjournment for Mr Flood to take instructions. However as I had already set 10 September 2021 as an "in chambers" day we could instead use that as a third day of the hearing. I had by that point already heard evidence from the claimants. However, Mr Flood confirmed that he did not intend recalling any of the claimants to cross examine them. I gave my reasons for my decision to admit the documents and extend Nationwide's participation orally and included them in writing at Annex B to my case management order of 17 August 2021.

Bundles

7. At the end of the hearing on 10 August 2021 I gave directions for preparation of a supplementary bundle for the adjourned hearing on 10 September 2021 and also ordered the claimants to serve updated schedules of loss. References to page numbers in this judgment are to page numbers in the original Preliminary Hearing Bundle consisting of an index and 607 pages ("the Bundle"). References in this judgment to page numbers in the format "AB p.XX" are to pages in the additional bundle.

Evidence and Findings of Fact

8. Having considered the evidence I heard from the parties and the relevant documents, I make the findings of fact set out below.

9. For the avoidance of doubt, I have not taken into account the documents sent in by Mr El Paraiso on behalf of Evolution on 15 October 2021 after the hearing had taken place. In response to the written submission for Miss and Mr Mosdell, he had

sent in copies of the management agency agreements between Evolution and the RTM companies for Norfolk House 1 and Norfolk House 2. Mr El Paraiso submitted that supported the second respondent's case that there was no SPC to Evolution because the client for the services for those 2 buildings had changed.

10. On my direction the parties sent in written submissions on whether those documents should be admitted in evidence. I have seen no reason why those documents should be allowed in after the hearing. Although relevant to the issues in the case they were clearly available prior to the hearing on 9-10 August 2021. In addition, in this case there was a break between the hearing dates in August and September 2021 specifically to enable Evolution to provide relevant documents. These additional documents were not included in those further documents disclosed before the resumed hearing on 10 September 2021.

11. I make my findings therefore based on the witness evidence I heard and the documents I had before me as at 10 September 2021.

Background Facts

12. This case involves the provision of management agency services in relation to a number of buildings in Liverpool which consist in the main of residential flats ("the Properties"). The transfer which is said to be a SPC took place in February 2020.

13. The Freehold to the Properties was owned by Elliot Group International Limited ("Elliot Group"). Elliot Group was in turn ultimately under the control of Mr Elliot Lawless ("Mr Lawless") the sole director of that company. Each of the Properties was held on a lease by different companies ultimately controlled by Mr Lawless.

14. On various dates from November 2016, Bubble signed management agency agreements ("MAAs") in relation to various properties with different companies. In brief, the details were as follows:

(1) On 1 November 2016: a MAA for a term of 5 years from that date relating to Parliament Place with Parliament Place Limited (page 282);

(2) On 1 November 2016: a MAA for a term of 5 years from that date relating to Queensland Place with Queensland Place Limited (page 298)

(3) On 1 November 2016: a MAA for a term of 5 years from that date in relation to Norfolk House (referred to in this decision and by the parties as Norfolk House 1) with Baltic Property Management Limited (page 314);

(4) On 1 November 2016: a MAA for a term of 5 years from that date also in relation to Norfolk House 1 with Baltic Property Management Limited (page 330). I have referred to this below as "the Second Norfolk House 1 MAA").

(5) On 1 November 2016: a MAA for a term of 5 years from that date in relation to Norfolk House 2 with Baltic Property Management Limited (page 342);

(6) On 8 January 2018: a MAA for a term of 5 years from 1 November 2017 in relation to Falkner Place with Falkner Street Limited (page 354); and

(7) On 2 January 2018: a MAA for a term of 5 years from that date in relation to Wolstenholme Square with Wolstenholme Square Developments Limited (page 370).

15. In this judgment I refer to the companies with which Bubble contracted as "the property companies". Each MAA named the relevant property company with which Bubble was contracting as "the Client". In each MAA the Client's email was stated to be "Elliott Lawless – elliot@elliotgroup.co".

The activities carried out by Bubble under the MAAs

16. The MAAs entered into between Bubble and the property companies were in near identical, standard terms. Other than the Second Norfolk House 1 MAA and the MAA relating to Norfolk House 2, they included a set of appendices which included one defining the services to be provided by Bubble (Appendix II) and another setting out which "additional services" Bubble was to provide (Appendix III) and the charging basis for those.

17. In summary, the services and additional services taken together were those of managing the relevant property. That included collecting service charges, liaising with the Client and any residents' association, arranging periodic health and safety checks, dealing with day-to-say lessee issues and reporting to and taking instructions from the Client on lessees' dissatisfaction.

18. Centrally to this case, the services in Appendix II of those MAAs included "engaging and supervising on behalf of the Client site staff for the Property and dealing with all matters relating to their employment other than pension and Employment Tribunal matters". The additional services agreed to be provided by Bubble in Appendix III of those MAAs included "advertising and recruiting site staff on behalf of the client" and "dealing with any pension issues relating to site staff".

19. The Second Norfolk House 1 MAA and the MAA relating to Norfolk House 2 did not include those two appendices, the services to be provided said to be defined in the lease and the additional services to be agreed between the Client and Urban. It was not clear to me why there were two overlapping MAAs in relation to Norfolk House 1 but it does not seem to me that is something I need to resolve in order to decide the issues in this case.

20. None of the parties suggested that the services or additional services provided by Bubble under the MAAs were different for Norfolk House 1 and 2 from

those provided for the other Properties. I find that in relation to each, the property management services provided by Bubble included directly engaging site staff. It was not disputed that the two principal roles carried out by the site staff employed by Bubble were cleaning and concierge/front of house. The claimants were all employed by Bubble pre-transfer. I heard evidence from each about the roles they carried out in the immediate pre-transfer period.

Mr Sinnott

21. Mr Sinnott worked as a night concierge. He had initially worked at Queensland Place but by the time of the transfer he worked at Wolstenholme Place while also covering Falkner Place. Mr Sinnott worked 12 hours shifts from 7 p.m. to 7 a.m. His usual rota was four nights on and four nights off. He received his rota and otherwise liaised with his manager by email. The concierge role involved manning the front desk but also dealing with any emergencies that might arise. He also carried out health and safety checks. I find that an important element of the role was to provide assistance to tenants on request as well as fulfilling a security/guarding role. As part of his role Mr Sinnott would also, when time allowed, deal with the phone service on behalf of Urbana Apartments a letting business run by Bubble.

Ms Bennett

22. Ms Bennett was a daytime concierge at Wolstenholme Place. Like Mr Sinnott she also covered Falkner Place. Her shifts mirrored those of the night-time concierge, running from 7 a.m. to 7 p.m. on a four days on/four days off rota. Her role also mirrored Mr Sinnott's in terms of duties, i.e. providing assistance to tenants on request and health and safety responsibility such as checking the fire alarm. She was also responsible for bin management and helping out with cleaners as and when required. She received her rota by email which was also her point of contact with her manager. As with Mr Sinnott, she also carried out bookings for Urbana when time allowed.

Mr Miah

23. Mr Miah was a night concierge. He was based at Norfolk House 1 and would cover Norfolk House 2 by using the CCTV at those premises. Like Mr Sinnott he worked 12 hour shifts 7.00pm to 7.00am. He confirmed that his was a full concierge role like Mr Sinnott's. That meant doing things like taking in parcels received for tenants. He was responsible for taking out the bins two days a week and for checking the fire alarms. As with Mr Sinnott, there were emergency matters where Mr Miah had to get involved with the emergency services. That included where there had been break-ins and he needed to call the police.

Mr and Miss Mosdell

24. Miss Mosdell was the cleaner of the common parts at Norfolk House 1. She also had responsibilities in relation to health and safety and ensuring the fire alarm

worked. She worked 20 hours per week Monday to Friday, 8.30am to 12.30pm. She reported to the Community Manager, Dee Hodges. If there were any issues which she needed to resolve which she could not sort out herself she would ring Dee, who was based in Bubble's office. Miss Mosdell had originally started off working at Queensland Place, usually cleaning Norfolk House 1 in the morning and Queensland Place in the afternoon. She had then reduced her hours to only work at Norfolk House 1.

25. Dee Hodges managed Norfolk House 1 and Norfolk House 2. She was also Mr Mosdell's manager. He was the cleaner at Norfolk House 2. He worked 20 hours a week, namely 8.30am to 12.30pm Monday to Friday.

The ending of Bubble's MAAs

26. It is clear that by early 2020 the relations between Bubble and the Elliot Group had deteriorated. In January 2020 Elliot Group told Bubble it was going to replace them as managing agents with Evolution (p.398). In February 2020 Mr Lawless sent an email to Mr Howard, the MD of Bubble saying "Over my dead body will I allow [Bubble] to swipe the management of my buildings away from me" (p.398). That was a response to Bubble writing to the apartments owners to encourage them to use the legislative right to manage process to set up a Right to Manage company ("a RTM company") to acquire the right to manage the property. Bubble intended to then ask the RTM company to (re)appoint it as managing agent for the property.

27. On 3 February 2020 Mr Lawless emailed Mr Howard to say that from 4 February 2020 Bubble's staff were no longer required to attend site and would be effectively trespassing if they did so. On 4 February 2020 Bubble emailed its staff to notify them that Evolution was replacing it in relation to all the properties owned by the Elliot Group, i.e. Queensland Place, Parliament Place, Norfolk House 1 and 2 and all of Wolstenholme Square (p.426). It reassured them that TUPE would apply and that they would transfer to the incoming agent on the same terms and conditions.

28. On 6 February 2020 the residents of the properties were informed of the takeover by notice from the Elliot Group (page 463). On that same day Nationwide took over physical control of the properties. It is apparent from the email correspondence (at p.479 and p.487) that on Elliot Group's instructions all Bubble staff were refused entry to the properties from that date.

29. The proposed transfer date discussed was 21 February 2020. Bubble took steps to comply with its obligations under TUPE by appointing employee representatives (of whom Mr Sinnott was one). There were email exchanges between Bubble and Evolution about provision of employee liability information. It appears that up until 17 February 2020 both were proceeding on the assumption that TUPE applied. However, on that date Evolution told Bubble it would be difficult for it to take on any Bubble employees because Mr Lawless had made it clear they were excluded from the properties. On 19 February 2020 Evolution told Bubble that no

employees would transfer under TUPE because they were not attending on site at the time of the transfer. Bubble rejected that argument (correctly it seems to me) and it was not pursued before me. Evolution took on the management of the properties from 21 February 2020 but did not take on any of the claimants as employees.

The activities carried out by Evolution and by Nationwide post-transfer

30. Mr El Paraiso's evidence was that cleaning services and security services (i.e. the services which it was alleged were carried out by the claimants) were not provided by Evolution post transfer but were instead provided by Nationwide. I find that evidence is corroborated by the documents in the case. First, the MAA dated 6 February 2020 entered into by Evolution relating to Queensland Place does not include as part of the "services" listed in its Appendix II engaging site staff as the Bubble MAAs did. Second, "recruiting site staff" and "dealing with any pension issues relating to site staff" on behalf of the Client are specifically excluded from the "additional services" in Appendix III. Again, that contrasts with the MAAs signed by Bubble where those additional services are included. I accept Mr El Paraiso's evidence that the MAAs entered into by Evolution in relation to the other properties were in the same terms. That evidence was not challenged in cross examination. Third, there were invoices in the additional bundle from Nationwide to various companies relating to provision of cleaning and security services relating to the properties from 7 February 2020 onwards. I find that in relation to those services the transfer took place on 7 February 2020.

31. In terms of the activities relevant to the claimants' claims, i.e. the provision of cleaning and concierge services, I find that Evolution did not carry out those activities post transfer.

32. When it comes to Nationwide, I find that it did carry out cleaning services at the properties post transfer, i.e. from 7 February 2020 onwards. Specifically I find that it carried out cleaning services at Norfolk House 1 (where Miss Mosdell had worked as the cleaner) and Norfolk House 2 (where Mr Mosdell worked as the cleaner). There were invoices relating to those cleaning activities from 7 February 2020 onwards at pp.228-237). The hours worked by the cleaners are not the same as those worked by Miss and Mr Mosdell but there was no evidence to suggest that the activities carried out were different in kind to those they carried out pre-transfer.

33. I also find that Nationwide provided security guards at the properties post-transfer. There is, however, a dispute about whether the activities carried out by those guards was fundamentally the same as those carried out by the concierge staff employed by Bubble pre-transfer.

34. The invoices for those security guard services (e.g. p.140 relating to Wolstenholme Square) confirm that the guards were working 12 hours shifts in the same way as the concierge did pre-transfer. Mr El Paraiso's evidence, which I accept, was that there was a substantial difference between the duties of the pre-transfer concierge and the post-transfer security guards. His evidence was that the

security guards provided by Nationwide dealt with security only. I also find that the Elliot Group had to reintroduce concierge staff to supplement the security function because of concerns raised by residents about the absence of a resident-facing aspect to the security guard role.

Who was Nationwide's client?

35. I have found that if there was a transfer of the cleaning and concierge activities that was to Nationwide not to Evolution. Both Evolution and Nationwide submitted that even if there was potentially a SPC there was not one in this case because "the client" had changed.

36. Mr El Paraiso's evidence was that Evolution did not provide any services to the pre-transfer "client". I accept his evidence that the MAAs entered into by Evolution were not with the same property companies as Bubble's MAAs. Instead they were as follows:

(1) In relation to Parliament Place: QP Chatham Place RTM Company Limited;

(2) In relation to Queensland Place: QP Chatham Place RTM Company Limited;

(3) In relation to Norfolk House 1: Norfolk House Phase 1 Liverpool RTM Company Limited;

(4) In relation to Norfolk House 2: Norfolk House Phase 2 Simon Street Phase 2 Simon Street RTM Company Limited;

(5) Wolstenholme Square: Wolstenholme Square RTM Company Limited.

37. Evolution's MAA with QP15-17 Chatham Place Liverpool RTM Company Limited in respect of Queensland Place Liverpool dated 6 February 2020 was in the bundle (page 383). Mr El Paraiso's evidence was that this was a contract in a standard form and that there were MAAs in identical terms between Evolution and the relevant RTM company listed above. Although Mr Mohamed challenged that assertion in the submissions for Miss and Mr Mosdell in the absence of any documentary evidence, Mr El Paraiso's evidence on this point was not seriously challenged at the hearing and I accept it. In each of those MAAs I find the named client was the relevant RTM company.

38. For Mr Mosdell and Miss Mosdell, it was submitted that the "real" client in relation to all the cleaning services provided both pre and post transfer was the Elliot Group and/or Mr Lawless. There was no evidence, including at Companies House, that the RTM companies were controlled by or part of the Elliot Group. On the face of it, it would be strange if it was given that the idea of an RTM, as I understand it, is to enable the residents to take collective control of the management of their property. I find that Evolution's client in relation to each property was the relevant RTM

company which is a different "client" from those which Bubble had in relation to each property.

39. Who Nationwide's client was for the cleaning and security services is harder to pin down due to the lack of any written contract with the RTM companies or anyone else. There were, however, invoices from Nationwide relating to the cleaning and security services provided.

40. Dealing first with the cleaning services for Norfolk House 1 and Norfolk House 2. Pre-transfer they were part of the services provided by Bubble under MAAs with Baltic Property Management Limited. From 7 February 2020 until the end of June Nationwide invoiced Elliot Group Ltd for these services (pp.228-237). From 1 July 2020 I find that the cleaning services were taken over by UE Services Ltd, which is a company run by Mr El Paraiso's wife. That company in turn provided the cleaning services for less than a year and the contract was passed on again (additional bundle page 283).

41. Pre-transfer, the concierge services at Norfolk House 1 and 2 (where Mr Miah worked) were part of the services provided under Bubble's MAAs with Baltic Property Management Limited. From 1 March 2020 Nationwide invoiced Percy Place Developments for the security guard services at Norfolk House 1 and 2 (AB pp.158-215). There did not appear to be any invoices for those services for February 2020.

42. Pre-transfer, the concierge services at Wolstenholme Square (where Mr Sinnott and Ms Bennett worked) were part of the services provided under Bubble's MAA with Wolstenholme Square Developments Limited. From mid-April 2020 Nationwide invoiced Wolstenholme Square Developments Limited for what appears from the shift patterns to be security guard services although the invoices do not refer to Wolstenholme Square (AB pp.140-157). There did not appear to be any invoices for those services relating to the property prior to April 2020.

43. The other invoices levied by Nationwide were levied on different companies at the behest (according to Mr El Paraiso's evidence) of Mr Lawless and the Elliot Group. In or around September 2020 Nationwide began to invoice "Urban Evolution" (e.g. in relation to what appears from the shift pattern billed to be security/concierge services at Norfolk House AB p.78). Even later in 2020 it invoiced "Urban Evolution Asset Management Limited" (e.g. in relation to Queensland Place concierge services in November 2020 – AB p.87). When Nationwide was chasing payment for some of their invoices they wrote to Mr Lawless directly. Those emails suggest that the Elliot Group were liable for the invoices relating to the Properties (AB pp.59-60) and Mr Lawless did not seem to dispute that (AB pp.57-58).

44. The picture is a confused one. Doing the best with the evidence before me and Mr El Paraiso's evidence (he being best placed to know from the witnesses I heard from) I find that from 7 February 2020, Nationwide provided cleaning services at the properties under an oral agreement with Elliot Group. I find that it also provided security guard/concierge services under an agreement with the Elliot

Group. That seems to me consistent with the reality of the situation, namely that it was the Elliot Group as the freeholder who engaged Nationwide to take physical possession of the properties from 6 February 2020.

Findings in relation to the reg 3(3)(a) conditions

45. When it comes to whether there was an "organised grouping" I find that although the claimants' contracts each included a mobility clause, by February 2020 each of the claimant's role had become "attached" to a particular property and (by extension) to a particular MAA. They were not part of a wider team who were assigned to any of the properties in relation to which Bubble had an MAA.

46. When it comes to reg. 3(3)(ii), Nationwide on the first day of the hearing suggested that it would seek to argue that the intention was that it should provide the cleaning and security services for a short-term duration. It subsequently indicated it would not be pursuing that argument. It seems to me, however, that I need to be satisfied that that condition applies before I can decide whether there was a SPC. However, I cannot decide that issue without first deciding who "the client" is whose intention I am determining. I will therefore return to this issue after I have set out the relevant law and the parties' submissions about who the "client" was in this case.

Relevant Law

47. Regulation 2 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the TUPE regs") defines a "relevant transfer" as a transfer or a service provision change. In this case, the claimants did not suggest that there had been a transfer of an undertaking as defined by reg.3(1)(a). Instead, they argued that there had been a service provision change ("SPC"). Specifically, they said that there had been a SPC on a change of contractor. That is defined in regulation 3(1)(b)(ii) as being where:

> **(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf.**

48. To be a SPC the following conditions set out in reg.3(3) must apply:

> **(3) The conditions referred to in paragraph (1)(b) are that—**
>
> **(a) immediately before the service provision change—**
>
> **(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;**
>
> **(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in**

> **connection with a single specific event or task of short-term duration; and**
>
> **(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.**

49. In **Kimberley Group Housing Ltd v Hambley and Ors [2008] IRLR 682**, the EAT identified the first question for a tribunal dealing with reg.3(1)(b) as being to identify the relevant activities, or as it may be relevant activity.

50. Reg.3(2A) says that the activities must be "fundamentally the same" as those carried out by the person who ceased to carry them out.

51. In **Salvation Army Trustee Company v Coventry Cyrenians Limited [2017] IRLR 410** the EAT summarised the principles in deciding whether activities are "fundamentally the same":

> "The words in regulation 3(1)(b) including the word 'activities' are to be given their ordinary everyday meaning…The activities must be defined in a common sense and pragmatic way…On the one hand they should not be defined at such a level of generality that they do not really describe the specific activities at all. On the other hand the definition should be holistic, having regard to the evidence in the round avoiding too narrow a focus in deciding what the activities were. A pedantic and excessively detailed definition of 'activities' would risk defeating the purpose of the service provision change provisions."

52. Since "activities" is undefined, there is nothing in principle to prevent some only of the activities that form part of a service from being considered in the context of an SPC (**Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust & Others [2016] I.C.R. 607**). The division of the activities in the service carried out by the original contractor between more than one subsequent contractor does not prevent there being an SPC. In some cases, however, the extent of "fragmentation" of the service may mean that nothing which one can properly determine as being a SPC has taken place (**Hambley, para 35**).

53. In **Amaryllis Ltd v McLeod and ors EAT 0273/15** the EAT made it clear that an 'organised grouping of employees' as the phrase is used in reg.3(3)(a)(i) is not synonymous with a 'grouping'. The organised grouping within the putative transferor's business must be shown to have had as its principal purpose the carrying out of the relevant activities for the particular client.

54. When it comes to the condition in reg.3(3)(a)(ii), Her Honour Judge Eady QC in **Horizon Security Service v Ndeze [2014] IRLR 854** said that the intention of the client could be expressed by the client or inferred by the Tribunal. In either event, the question is to be answered looking at the intention as at the time of the service provision change. Moreover, the intention must relate not to the activities but to the task to be carried out. As to what would be short-term, that must be a question of fact and degree for the Tribunal and will depend on context and the factual

circumstances of the case. Where the task has been carried out for a number of years in the past and the task for the future is a matter of months, then that might well be relevant.

55. In **ICTS UK Ltd v Mahdi [2016] I.C.R. 274** the EAT confirmed that the relevant intention must relate to the "task" to be carried out and its intended duration rather than to "the activities"; an "intention" is more than a "hope and wish"; and the question of what the relevant intention was is one of fact for the Tribunal. In deciding such a question of fact it is almost invariably necessary for a Tribunal to draw an inference from all the relevant surrounding circumstances presented to it. Such circumstances can obviously include contemporaneous expressions of intent and actions by the relevant party or its agents; but they can also include what the party says or does not say after the relevant event, in particular in response to the forensic process; and there is no reason why they cannot also include subsequent events (or non-events), provided of course that those events are capable of casting light on the intention of the relevant party at the relevant date, and that the fact-finder bears in mind that the ultimate issue to be decided is intention and not outcome.

56. In **Hunter v McCarrick [2012] IRLR 274** the EAT (upheld by the Court of Appeal in **[2013] ICR 235**) decided that for there to be a SPC the activities pre and post transfer must be carried out for the same the client. In this case the respondents argue that there has been a change in "the client" so there can be no SPC. For Miss and Mr Mosdell, Mr Mohamed submitted that the subsequent decisions in **Horizon**, **Ottimo Property Services Ltd v Duncan and another [2015] IRLR 806** and **Jinks v London Borough of Havering [UKEAT/0157/14/MC]** meant that a Tribunal can apply a more flexible approach in identifying who the "real" client is. Specifically, in this case it was submitted for Miss and Mr Mosdell that it was permissible for me to find that "the client" throughout was the Elliot Group and/or Mr Lawless as the ultimate owner and (in the case of Mr Lawless) the "controlling mind" of all the property companies.

<u>The parties' submissions on the "client" point</u>

57. In their written submissions and Nationwide' rebuttal submissions, Mr Mohamed for Miss and Mr Mosdell and Mr Flood for Nationwide set out different interpretations of the extent to which **Horizon**, **Ottimo** and **Jinks** allow a Tribunal to go beyond the strict contractual position to identify the "real client". I have set out their submissions fully because of the centrality of the point to this case.

The submissions on the "client" point for Miss and Mr Mosdell

58. It was submitted that **Ottimo** established that it is possible that a service can be provided to more than one client and under more than one contract provided the clients are a group with a common intention as to the manner in which the activities are to be carried out and those activities remain the same post transfer.

59. In **Jinks**, it was submitted, the EAT held there could be a "top client", i.e. the principal (rather than a contractor who had in turn subcontracted services) and there could be a SPC where that "top client" remained the same. A lack of contract is not a determinative issue.

60. The submissions also drew to my attention what was said By Mr Recorder Luba QC at para.27 of **Jinks** namely:

> "But in my judgment Mr Matovu was correct to draw my attention to three important principles established by the **Horizon** case. The first principle is that the question of who is the client for Regulation 3 purposes is one of fact, not law. Secondly, the principle that there could be more than one "client" in any given case. Thirdly, the principle that the terms of Regulation 3(1)(b)(iii) , read together with Regulation 2(1) . Together they show that the person on whose behalf services are provided by a sub-contractor may not necessarily be the contractor from whom the sub-contract is held."

61. **Ottimo**, Mr Mohamed submitted, illustrated that a careful analysis of on whose behalf it is that the transferred activity is being undertaken is required. On the facts of this case, Elliot Group, and by extension Mr Lawless, was the principal or top client in this case and the cleaning services were carried out on behalf of the Elliot Group before and after the transfer.

62. Mr Mohamed also submitted that a contract existed between the Elliot Group and Bubble and then Nationwide. As I understand it, his argument was that the correct way to view the role of Baltic Property Management Limited pre-transfer and the two Norfolk House RTM companies post-transfer was as contractors and that in light of **Jinks** there was nothing to prevent the Elliot Group being the client of the sub-contractors (**Bubble** and **Nationwide** respectively).

63. Finally on the "client" point, Mr Mohamed submitted that it was clear from the evidence that the Elliot Group and Mr Lawless had no intention of taking on the employees of Bubble after the date of the relevant transfer, (see e.g. pp.417 and 479) and that any restructuring of the property companies and contracts was done in a way to deliberately avoid the application of the TUPE regs making use of the strict application of 3(1)(b) in **Hunter**. That being so, I should take a purposive approach to interpreting who the client was in this case to stop the purpose of the TUPE Regs being avoided.

The Third respondent's Rebuttal Submissions on the "client" point

64. I had given the parties an opportunity to rebut the submissions of the other parties. Mr Flood for Nationwide did make written rebuttal submissions dated 26 October 2021.

65. In those, Mr Flood submitted that I should be cautious in accepting the submissions on the law made on behalf of Miss Mosdell and Mr Mosdell in relation to the cases of **Horizon**, **Ottimo** and **Jinks**.

66. In relation to **Horizon**, it was submitted that the case was often quoted for an obiter comment made by Judge Eady QC at paragraph 41, namely that:

> "Further, it may well be that there will be situations where there might appear to be more than one client perhaps in an agency situation. In such cases, however, the Tribunal would need to ask (as in the **Denton** case) who was the real client."

67. Not only was this remark obiter but it was also very limited in its scope, envisaging "no more than the possibility that an agency situation may produce a set of facts which would require an Employment Tribunal to decide who the real client (singular) was".

68. In **Ottimo**, Mr Flood submitted, the Tribunal in that case had dismissed the claim on the basis that:

> "It is not permissible for a number of contracts with different clients to be added together to make one overall service provision change. Recent cases have made it clear that [this] section of the TUPE regs is to be given a literal interpretation. The relevant wording clearly refers to a client and the client throughout which means [that] a single client is being referred to not a group of two or more clients."

69. The appeal therefore was on the single point of whether "client" could mean the plural. What Her Honour Judge Eady QC had decided was that it could in theory but subject to a number of qualifications. Mr Flood summarised the qualifications (paragraphs 43, 46 and 48 of the decision in **Ottimo**) as follows:

(1) If there was more than one client they would have to remain identical before and after the transfer;

(2) Any group of persons defined as "the client" would have demonstrated common intent in entering into the contract as collectively one party to its terms; and

(3) There must be some link, some commonality between them to permit the identification of intention for regulation 3(3)(a)(ii) purposes. That would be all the harder to demonstrate where there is no umbrella contract defining "the client". That did not mean that there must be a single contract between the legal entities comprising the client or clients and the contractor. There must however be an ability to ascertain a common intent.

70. Mr Flood submitted that **Ottimo** was a decision in principle only (no findings of fact being made) and subject to a number of caveats.

71. When it came to **Jinks**, no finding was made by the EAT on the facts. All that was found was the decision of the Employment Tribunal to strike out the claim on the basis the council in that case could not have been the client was a question of fact now law, and the effect of regulation 2(1) of the TUPE regs could produce a finding of fact where the contractor was not the subcontractor's client.

72. Applying those points to the facts of this case, the third respondent submitted this was not a case about identifying a "top client". Mr Mohamed's submissions did not set out who the "clients" were and did not demonstrate the characteristics required in **Ottimo** i.e. that there was common intent/commonality about the transfer. The submission in essence was that the assertion that Mr Lawless and/or Elliot Group is ultimately in control of all the companies was not sufficient (and in any event not made out).

73. In relation to **Jinks** it was said that that is only authority for the proposition that a subcontract may be the basis for a finding of fact that the contractor is not the client for the purposes of the TUPE regulations. Here there was no evidence of any contract between the Elliot Group or Mr Lawless and any of the companies that Bubble contracted with pre-transfer. Neither was there any evidence of any contract between the new RTM companies and Mr Lawless or the Elliot Group. In the absence of that, as I understand the submission, Urban and Nationwide were not in the position of being subcontractors so the issue in **Jinks** did not arise in this case.

74. Mr Flood concluded by submitting that what the submissions for Miss Mosdell and Mr Mosdell were in effect asking the Tribunal to do was to make the inference which the EAT found was impermissible in **Horizon**, i.e. that in the absence of any contractual evidence Mr Lawless and/or the Elliot Group were the "client" in respect of Bubble, specifically in relation to Norfolk House 1 and 2.

My conclusions on the submissions on the "client" point

75. Dealing first with the significance of **Horizon** I do accept that the comment about identifying the "real" client in paragraph 41 is obiter. However, I note that in **Jinks** (para 29 and 30) Record Luba QC approved what was said in that paragraph and noted that although the Tribunal's decision in **Horizon** was overturned by the EAT that was not because the conclusion the Tribunal reached was contrary to the true construction of TUPE regs. Rather it was overturned because the Tribunal had impermissibly drawn an inference (that the Council in that case was the client) from the facts it found. At paragraph 24 of **Jinks** it is also said that "the **Horizon** case supports the conclusion that the strict legal or contractual relationships do not necessarily answer the regulation 3 question".

76. Based on what is said in **Jinks** about **Horizon**, I accept Mr Mohamed's submission that the question for me is who the "real" client was. There can be more

than one. That is a question of fact and not one to be approached in too legalistic or pedantic a way. I must give the wording of the TUPE regs their natural meaning and decide on the facts "on whose behalf" the services were provided by Bubble pre-transfer and by Nationwide post-transfer. I also do not think that the reference in para 41 of **Horizon** to agency was intended to confine the situations where there could be more than one client to that situation. Agency seems to me to be given as an example with no suggestion it is exhaustive of the situations which can arise.

77. When it comes to **Ottimo**, I accept what Mr Flood says about the caveats which apply when it comes to "collective" clients. I accept that key features are that the collective client not only have a common intention but also retain their identity pre and post transfer. I note that another aspect of the **Ottimo** decision was the possibility that where there are a number of contracts (such as the MAAs with Bubble in this case) each one may be a service which may be subject to a SPC if the client(s) remain the same).

Discussion and Conclusions

"Fundamentally the same activities"

78. I have found the services provided by Bubble pre transfer consisting of property management services and the provision of cleaning and concierge site staff were divided post transfer between Evolution and Nationwide. The division of the activities in the service carried out by the original contractor between more than one subsequent contractor does not prevent there being an SPC. I do not find that In this case the extent of "fragmentation" of the service meant that nothing which one could properly determine as being a SPC had taken place. The "cleaning" and "concierge" staff site part of the service carried out by Nationwide are the ones relevant to the claimants' claims and I find they retained their identity post transfer.

79. Dealing first with whether the activities carried out by Bubble prior to the transfer were fundamentally the same as those carried out by Nationwide, I find the position is different for the cleaning and the concierge activities.

80. On the facts, I find that in relation to the cleaning activities, the roles carried out Mr and Miss Mosdell at Norfolk House 1 and 2 continued to be carried out in fundamentally the same way pre and post the transfer.

81. In relation to Mr Sinnott, Ms Bennett and Mr Miah, I find that activities pre and post transfer did change. I find that pre-transfer the roles were genuine concierge roles, focussed as much on providing services to residents as on maintaining the security of the properties. That resident-facing element was not present post transfer. Instead the role was a security guard one, focussed on protecting the properties. I take into account the guidance in the authorities which warn against too pedantic and detailed an analysis of the activities. Doing so, however, I find that the activities were not fundamentally the same because of that shift in focus of the role. It seems to me that is supported by the fact that the change in activities were

sufficiently marked to provoke complaints from residents which ultimately led to the re-introduction of a fuller concierge service late in 2020. That switch back to a concierge service does not seem to me to assist Mr Sinnott, Mr Miah and Ms Bennet since what I must compare is activities immediately pre and post transfer.

82. In reaching that conclusion I have not taken into account the duties relating to Urbana which Ms Bennett and Mr Sinnott gave evidence about. It seems to me those activities were not carried out on behalf of anyone other than Bubble and so do not fall to be considered when deciding whether the pre and post transfer activities on behalf of the client are the same.

83. I therefore find there was no SPC in relation to the concierge activities. That means any claim Mr Sinnott, Ms Bennett and Mr Miah have is against Bubble rather than Nationwide.

The same client

84. In relation to Miss Mosdell and Mr Mosdell I have found the activities carried out pre and post transfer were fundamentally the same. Their claim that there was a SPC will not succeed, however, unless the client pre and post transfer was the same. On the face of it the client is not the same – Bubble's MAA in relation to Norfolk House 1 and 2 (to which I found they were assigned) was with Baltic Property Management Limited ("Baltic") whereas I have found that post transfer Nationwide had an oral contract with the Elliott Group for the cleaning services.

85. I remind myself that I need to give the wording of the TUPE regs their natural meaning. It is a question of fact who the real client was on whose behalf Bubble carried out activities.

86. The starting point, it seems to me, must be the MAA under which Bubble carried out its activities. The "client" named in that MAA is Baltic. There was, however, a clear link between Baltic and Elliot Group because they shared the same sole director, Mr Lawless. That link is evident on the face of the MAA where the contact point for Baltic is Mr Lawless at an Elliot Group email address. Elliot Group instigated the transfer in this case by terminating Bubble's MAAs and instructing Evolution in its place. Elliot Group gave the instruction to Nationwide to take possession of the properties and gave the instructions to Evolution that Bubble's staff were to be permanently excluded. The notice to tenants on 6 February 2020 (p.431) confirms that "the freeholder, Elliot Group, has disinstructed their former agent, [Bubble] replacing them with a new managing agent [Evolution]."

87. On that basis, it seems to me that Elliot Group was a client of Bubble pre transfer. The question I have found more difficult is whether I can say it was "the real client". Ultimately I have decided that while **Horizon** allows a focus on the "real client" it does not allow me to ignore the reality of the contractual relationships in this case. Deciding that Elliot Group was "the client" would ignore the fact that Bubble's MAA was not with the Elliot Group but with Baltic. I do not think the case-law on

sub-contracting such as **Jinks** assist in this case because there was no evidence of a contractor-sub-contractor relationship between Elliot Group and Baltic. Neither does there seem to me to be evidence for a finding that Baltic had an agency relationship with the Elliot Group nor that it was a subsidiary company of Elliot Group.

88. Instead it seems to me that the situation in this case is that envisaged by Her Honour Judge Eady QC in **Ottimo** where more than one entity together constitutes "the client". For the Norfolk House 1 and 2 cleaning activity I find "the client" pre transfer was Baltic and Elliot Group. There is no difficulty in this case with establishing a common intention because Mr Lawless was the sole director of both companies and the decision maker in practice.

89. Post transfer, however, I have found that Nationwide's client was Elliot Group alone. Baltic does not figure post-transfer. **Ottimo** requires that the identity of the collective client remains the same pre and post transfer if there is to be a SPC. In this case it did not. Baltic drops out of the picture.

90. I find, therefore, that the client pre and post transfer was not the same. Following **Hunter** that means that there was no SPC in this case even in relation to the cleaning activities which I have found remained fundamentally the same when carried out by Nationwide.

91. In reaching that decision I also considered whether it was possible that "the client" was Mr Lawless. The evidence is that he ultimately controlled both Baltic and Elliot Group. He was not personally the freeholder of the properties, however, and I do not find that it could be said that the services were carried out on his behalf rather than on behalf of Elliot Group and Baltic. If I am wrong about that, there would still not have been a SPC because of the absence of Baltic in the post transfer arrangements. The identity of the collective "client" would still change pre and post transfer because of that even if Mr Lawless was part of that collective client.

92. Had I found that the client pre transfer was Elliot Group and/or Mr Lawless I would have found that the client was the same post transfer in relation to the cleaning services at the properties including Norfolk House 1 and 2. In reaching that decision I take into account the submissions made by the respondents that the involvement of the RTM companies meant there was a change in client. There is no evidence that Elliot Group had any involvement with the RTM companies. There was no evidence that the RTM companies had anything to do with the activities carried out by Nationwide. They did not at any point invoice them nor were they mentioned in any document I saw as being potentially liable for those invoices.

93. Had I decided that "the client" pre and post transfer was the Elliot Group and/or Mr Lawless I would have had to decide whether the condition in reg.3(3)(a)(ii) was satisfied. I would have to ascertain what the "client's" intention was.

94. Turning to that question, I remind myself that what I need to decide is what the intention was in relation to the tasks at the time of the transfer. The relevant tasks are the cleaning activities at Norfolk House 1 and 2. There was no direct evidence from Mr Lawless about his intention when it came to Nationwide providing the cleaning services. Reg 3(3)(a)(ii) refers to a "specific event or task of short-term duration". While I can see that taking possession of the properties and excluding Bubble's staff could be seen as a "specific event or task" it is harder to see a regular cleaning service falling into that definition. It is permissible (**ICTS**) to take into account what actually happened in ascertaining the intention at the time of the transfer. In this case Nationwide continued to provide the cleaning services until the end of June 2020, so a period of just over 4 months. The absence of a contract arguably points to an intention of a "short duration" task but could equally speak of a need to get the alternative cleaning provision for the properties set up in a hurry rather than any intention that once in place it should be a stop gap. Nationwide in its submissions did not suggest that its appointment fell into the "short duration task" category. On balance, had I been required to do so I would have concluded that there was no intention that Nationwide's appointment to carry out cleaning should be a "short duration task" and that the conditions in reg 3(3)(a) are met.

Outcome and next steps

95. Because I have found that there was a change in client pre and post transfer I find that there was no SPC in this case. That means the claimants claims are against Bubble. It filed a response to their claim but is now in liquidation. The next step will be for the Tribunal to write to the liquidator to ask for confirmation of whether the response to the claims is still actively pursued. If it is not then the response will be struck out and judgment may be given for the claimants under rule 21 of the Employment Tribunal Rules. If that happens it may then be necessary to hold a remedy hearing to determine what compensation the claimants should be entitled to.

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Employment Judge McDonald

Date: 22 February 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22 February 2022

FOR THE TRIBUNAL OFFICE

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