Case Number: 3326047/2019

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Aldridge & others **v** **(1) BSCL Realisation Ltd (in administration)**
(2) Home Base Rooms Ltd
(3) The Secretary of State for Business, Energy and Industrial Strategy

Heard at: Watford by CVP **On**: 13 to 16 September 2022

Before: Employment Judge Andrew Clarke KC

Appearances
For the Claimant: Ms Nuala Toner (Solicitor)
For the First Respondent: No appearance
For the Second Respondent: Mr Richard Ryan (Counsel)
For the Third Respondent: No appearance

RESERVED JUDGMENT

1. Regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 has no application to the contracts of employment of any of the claimants. Hence, their material contracts of employment remained contracts between them and the First Respondent and did not become contracts to be treated as if originally made between them and the Second Respondent.

REASONS

Introduction

1. This preliminary hearing was listed in order to decide four interrelated issues in relation to claims brought by five former employees of the First Respondent. In short, they maintain that by reason of the operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") their contracts of employment are each to be treated as if they had been made between them and the Second Respondent whom they allege to

be the transferee of the business formerly carried on by the First Respondent. When these claims began there was a considerably larger body of claimants. For various reasons claims have been dismissed in respect of all but the five who remain.

2. The five individual claimants are:

   2.1 Abbie Lahiffe. She was a Human Resources Business Partner Lead (as so described in her email footer). She described herself to the tribunal as one of two HR Vice Presidents of the First Respondent. She played a leading role in the provision of information relating to employees of the First Respondent to the Second Respondent at and immediately following the acquisition by it of a number of stores previously operated by the First Respondent.

   2.2 Mr Peter Louden. He was latterly a Sales Consultant employed at the Edinburgh Central store.

   2.3 Mr Reece Goddard. He was latterly a Sales Consultant employed at the Nottingham Nuthall store.

   2.4 Mr Anthony Summers. He was latterly the Showroom Manager for the Beckenham store.

   2.5 Mr David Dunn. He was latterly the Showroom Manager for both the Stockton and Gateshead stores.

3. Each of those five individuals gave oral evidence to the tribunal and was cross examined. The evidence of all but Ms Lahiffe was relatively brief and of limited assistance. Ms Lahiffe gave detailed evidence. I am satisfied that she sought to provide an accurate picture of the events leading to and immediately subsequent to the acquisition of certain stores by the Second Respondent. I considered that her evidence was somewhat hampered both by the passage of time and by the fact that her involvement was limited and episodic. As a result, the picture that she was able to paint, even with the assistance of some contemporaneous documents, was necessarily incomplete.

4. The Second Respondent called two witnesses:

   4.1 Mr Mark McNaughton. He was the Business Development and Strategy Manager tasked with undertaking much of the financial analysis and consequential planning which took place in the lead up to the Second Respondent's acquisition of certain stores and in the immediate aftermath.

   4.2 Mr Brian Greswolde. He was at the material times the Human Resources Busines Partner tasked with assembling the information relevant to TUPE consultation as regards the staff of the acquired stores and the carrying out of that consultation. From time to time he was also given other tasks in relation to the integration of the

acquired stores into the wider Homebase business. The Second Respondent formed part of the Homebase group of companies. This involved him in activities relating to the recruitment of employees needed to cover vacant positions at the acquired stores. He also had a limited involvement in the recruitment of additional employees, recruited at about the same time, for work elsewhere within the Homebase management structure and who had previously been employed by the First Respondent.

5. Mr McNaughton's evidence was clear and detailed. His recollection was assisted by detailed contemporaneous documents (such as the administrator's report for the First Respondent) and necessarily concentrated upon an overview of the progress of the transaction and, in particular, on its financial implications.

6. Whilst Mr Greswolde's evidence had a somewhat broader ambit than that given by Ms Lahiffe, it suffered from the same two limitations. Much time has passed since the events in question, they took place over a relatively short period of intense activity where key aspects of the overall picture were constantly changing (such as the number of individuals actually attending for work at each of the acquired stores) and the paperwork available in the bundle to assist his recollection proved to be limited and, to a significant extent, enigmatic, given that it was written to and from individuals currently steeped in an ongoing transaction and who (understandably) sent emails to each other which assumed a knowledge of that developing state of affairs. Furthermore, like Ms Lahiffe, his involvement was only with certain aspects of the ongoing state of affairs. Hence, as I shall make clear in the findings of fact, he was unable to assist in providing what would have been further relevant details.

7. The respondent has intended to call evidence from his immediate superior, Ms Findley, but she is no longer employed within the Homebase Group and proved uncooperative. I have read a witness statement which she provided some time ago, at a time when there were far more claimants than there presently are. Mr Greswolde's witness statement dealt with those aspects of her statement with which he was equipped to deal. Without her being taken (in chief or cross examination) to various salient documents in the bundle, the additional matters she dealt with do not assist me. Her evidence on those matters is in very general terms, in the main, and the case has moved on since she wrote the statement.

8. The claimants from time to time complained of a lack of documentation and of the Second Respondent's failure to provide detailed evidence on certain points. After enquiry, it was not suggested that the Second Respondent was in breach of any order from the tribunal either to provide disclosure of documents or to provide particular information.

9. The administrators of the First Respondent made clear that they would take no part in this hearing. They indicated that given the financial state of the First Respondent, it would make no economic sense for them to do so. The

Third Respondent has not attended the hearing but did submit what might be described as a neutral ET3.

10. I was supplied with an electronic bundle of documents comprising 671 pages. I have only read those pages referred to in evidence, together with a small additional number of documents which I was asked to read and which, I accept, have an obvious evidential significance without any witness speaking to them because they are, for example, statements from the Administrators and company reports which neither party suggested were other than accurate. In closing submissions, the claimants' representative referred me to some other documents in the bundle which had not been the subject of either written or oral evidence. I have read those documents, but note that without any witness being asked about them I found them of little assistance save where they were entirely consistent with evidence which had already been given. In particular, several of such documents appeared in a detailed chronology attached to the claimants' closing submissions.

11. In addition to that chronology, I was supplied with a short (supposedly neutral) chronology and a cast list. The cast list purported to serve two functions. Firstly, it named individuals referred to in the evidence and gave an indication of their role. Secondly, and more problematically, it sought to indicate in respect of some individuals that they had become employed within the Homebase Group sometime after their employment by the First Respondent ceased.

12. The circumstances of their leaving the First Respondent's employment and their entering the employment of the Second Respondent (or some other entity within the Homebase Group) were matters which were sought to be explored in evidence. As I shall indicate, when dealing with the findings of fact, it became clear that what was contained within the case list was not necessarily accurate or complete. Whilst Mr Greswolde was being cross examined Counsel for the Second Respondent provided a further list of individuals who, according to the Second Respondent, had previously been employed by the First Respondent and who had subsequently become employed by the Second Respondent or some other entity in the Homebase Group. Some further detail as to their roles in each organisation were provided. Ms Toner, for the claimants, cross examined Mr Greswolde on this list. However, it rapidly became clear that his knowledge of the individuals concerned and their employment history certainly did not extend beyond what was said on the list and, in may instances, was less extensive than what was said on the list. Hence, many questions which Ms Toner considered important remained unanswered.

The issues to be determined

13. As previously stated, this preliminary hearing was listed in order to deal with four issues. By agreement between the parties (endorsed by me) two additional issues were added. Hence, the agreed issues for determination are as follows:

13.1 Was there an undertaking, business or part of an undertaking or business situated in the UK immediately before the transfer?

13.2 Was there an economic entity before the transfer, ie an organised grouping of resources which had the objective of pursuing an economic activity whether or not that activity was central or ancillary?

13.3 Was there a transfer of that economic entity from R1 to R2?

13.4 Has that economic entity retained its identity post transfer?

13.5 So far as each claimant is concerned, was that claimant employed by R1 immediately before the transfer?

13.6 So far as each claimant is concerned, was that claimant assigned (other than on a temporary basis) to the organised grouping of resources that is the subject of the transfer (if any)?

Findings of fact

14. The First Respondent is the entity which owned and operated the business formerly known as Bathstore.com limited ("Bathstore"). That company traded via high street (and some out of town) stores as well as online. It sold complete bathroom packages and (in some stores) individual items associated with bathrooms. There was also a franchise arm of the business, but this case is not concerned with the detail of that. Suffice it to say that the franchise outlets ceased to trade under the Bathstore umbrella from the moment it entered administration. The franchisees had each run a Bathstore store which, to the public, would have looked like any other Bathstore store and which was supported within the Bathstore business just like its own stores.

15. Prior to the administration the Bathstore business was structed in a manner typical of many such businesses selling bathrooms. There were some 135 stores. These were showrooms with a manager and two or three showroom Sales staff. They sought to attract both retail and trade sales, albeit in the locations I heard evidence about, retail sales far exceeded trade ones in value. Each store was described by the First Respondent (for example on payslips) as a cost centre. Each had a profit and loss account and annual targets. Each store manager would divide the sales targets between his or her staff as he or she saw fit and was responsible for the running of that store.

16. There was a head office with various central functions such as payroll, purchasing and administration. Some supervisory or support staff were field based. They liaised with senior staff at head office, but spent much of their time working with and at individual stores. Human Resources ("HR") for example consisted of about 10 staff. The HR director was based at head office as were the payroll staff. Two HR vice presidents (or lead business partners) covered about half of the stores each. They would aim to visit

some 30 stores each month, but problems at a particular store might mean that this number was reduced.

17. The stores were split into regions each of which had a regional manager. The stores making up all but one of the regions were determined geographically. One region comprised the so-called premium stores, being the most profitable ones. They were located in various parts of England, Wales and Scotland. The makeup of the regions varied only occasionally, but usually because one or more stores were moved into or out of the premium stores region at an annual review.

18. Stores were at the heart of the Bathstore business. Potential customers could place orders online and might do so without visiting a store for some (particularly lower value) products, but to buy a complete bathroom tailor made for their home, most customers were retail ones and would want to see the ranges available in store and use Bathstore's salesforce to measure up and design their bathrooms. Visits to a store showroom could take several hours and customers would occasionally be sent to neighbouring stores to view other products which those stores had on show.

19. One of the claimants, Ms Lahiffe, was the HR Vice President who covered the more southern geographical regions and the premium stores region. The other claimants were Store Managers (Mr Summers, Mr Louden and Mr Dunn) and a Sales Consultant (Mr Goddard).

20. All contracts of employment contained a mobility cause. For field based senior staff this was very extensive in its ambit. Sales staff had a clause allowing a move to neighbouring stores. The sales force mobility clauses were used:

    20.1 To enable staff to be moved to neighbouring stores on a temporary basis to over holidays, sickness or staff shortages. Sometimes this would mean that individuals split their time between their base store and another store for a short period.

    20.2 To facilitate trials of new structures. For example, Mr Louden managed Edinburgh Central, but for an eight-month period to March 2019 he also visited three other Scottish stores in Perth, Dundee and Stirling to provide assistance the Regional Manager. Although the experiment ended, he still maintained contact with those stores to provide some support and assistance. At all times he regarded his base store (his cost centre to use the terminology of his payslip) as being Edinburgh Central.

    20.3 To enable staff to be moved from one store to another on a permanent basis. Such moves were for commercial reasons and were usually accomplished by agreement. Where an employee's base store changed, a letter confirming that change would be sent. Hence, at any time all store managers and sales staff had a base store, the identity of which they had been informed in writing by their contract of employment or by a subsequent letter.

21. There were occasional instances of managers being asked to manage two stores, sometimes permanently, sometimes for a limited period. This happened to only one of the claimant managers. Again, a letter to confirm this would be sent out to record the change.

22. Bathstore offered installation for bathrooms purchased from it. The fitters were self-employed sub-contractors. However, there was an installation infrastructure which consisted of staff responsible for both pre and post installation matters. Some were based at head office and others in the field. The precise number of staff engaged in this activity and whether they were also responsible for other aspects of the Bathstore business was not evidenced.

23. The Administrator's report makes clear that the business had been struggling financially for some time prior to its entering administration on 26 June 2019.

24. The Administrators very quickly established that they could not continue to run the business as it then stood even for a short period whilst looking for purchasers.

25. On 27 June 85 head office employees were dismissed, leaving some 446 other employees. There then followed a period of marketing what remained whilst the business continued to trade, albeit that the main activities in this period consisted of informing existing customers who had ordered bathrooms of what had happened and the implications for them and selling stock (much of it display items) often at a discount. To achieve the sale of stock at the best price the Administrators engaged Hillco Property Limited, specialists in trading during administrations, to advise them. Other specialist third parties were engaged, for example to liaise with landlords so as to minimise on going liabilities whilst preserving the possibility of selling the business as a going concern. Almost immediately after the administration commenced all installation work was ceased as was the support for franchise outlets.

26. Although 23 parties signed non-disclosure agreements and were then given access to financial and operational information with a view to considering the purchase of Bathstore, only three formal offers were received by the deadline of noon on 5 July 2019. The Administrators concluded that only the Homebase offer was capable of completion.

27. Homebase's offer was for the purchase of some stock and intellectual property together with a licence to occupy 44 stores. The offer accepted the application of TUPE to employees based at those stores, being 154 employees. The offer assumed that staff at the other stores (being 91 stores), staff at head office and field based support staff would not transfer to the Homebase entity chosen to enter into the Sale and Purchase Agreement. The Administrators and Homebase then began to work towards a final agreement with a view to transfer taking place on 21 July 2019. In fact, the Sale and Purchase Agreement was signed on that date, but completed the day after.

28. Bathstore's warehousing was conducted by a third party (DHL). It also happened to be the supplier of warehousing services to Homebase. DHL had a lien on about £3.5 million worth of stock, although it is unclear whether stock of that value was actually being held in the warehouse. DHL was supportive of the sale to Homebase which meant that it would facilitate the release of stock to meet existing customer orders and it would enable the busines to continue to trade prior to the completion of the sale.

29. In the circumstances the Administrators recommended the deal to the secured creditors and they approved it. The total consideration was a little over £1.2 million, for stock, intellectual property and some commercial records. The stock was the remaining display stock at the 44 stores to be acquired and any warehouse based stock not yet sold or invoiced a particular customer. The company name was sold together with other intellectual property to a company in the Hillco Group which subsequently granted a licence to use it to the Second Respondent. One company within the Hillco Group is also the effective parent company of Homebase. That company in the Hillco Group which acquired the intellectual property specialises in the acquisition (and, often, subsequent sale) of intellectual property rights associated with businesses.

30. Customer contracts formed no part of the Sale and Purchase Agreement. They were not novated to Homebase, but remained the responsibility of the First Respondent. Homebase was responsible only for such contracts as might be made by the 44 acquired stores after the Sale and Purchase Agreement was completed.

31. In addition, two further matters were agreed between Homebase and the Administrators. A fee of £267,000 was agreed for a licence to occupy the 44 stores up to 31 August 2019 and a monthly fee was payable thereafter until the licences in respect of those stores expired. That was to be on 21 January 2020 at the latest. Secondly, a Transitional Services Agreement ("TSA") was entered into whereby the First Respondent and the Administrators themselves agreed to supply certain services for a limited period to Homebase for (1) a weekly sum calculated so as to reimburse the First Respondent for that proportion of the employment costs of its retained employees as represented the time spent by them providing the transitional services and (2) a fee of £20,000 per week in respect of the services to be provided by the Administrators themselves (or third parties engaged by them).

32. The transitional services were the providing of information and assistance in relation to the establishment of Homebase's operations. This included the provision of HR related information. Whilst some of that work was undertake by the First Respondent's employees and some by the Administrator's own staff, other work was undertaken by the third parties already engaged by the Administrators, such as the provider of IT services. Such services as were provided by the First Respondent's remaining employees were performed alongside their work in relation to the administration. Their work under the TSA ceased by the end of August 2019 and all work under the TSA ceased by the end of November.

33. Bathstore had contracts with various suppliers of goods and services. I know little about what happened to most, but as regards two important ones there was significant and undisputed evidence. I deal elsewhere with the warehousing contract, a vital contract as the stores themselves carried almost no saleable stock. The other is the contract for the supply of IT services. Bathstore used different point of sale and associated software to that which Homebase used. Hence, Homebase needed that suppliers assistance (under the TSA) only for a very short period of weeks to enable relevant data to be migrated to the Homebase software systems and for these to be installed in the relevant stores. In fact, the period became even shorter than that expected as the supplier proved uncooperative or wanted too higher price for its co-operation.

34. I need to say a little about Homebase's future intentions when entering into the deal, the integration of what was acquired into the Homebase business and its engagement of certain former Bathstore employees over and above the staff based at the 44 stores. However, I will first look at what happened to the remainder of the Bathstore business.

35. Unsurprisingly, the 44 stores comprised the most profitable ones in the Bathstore portfolio. In fact, Homebase was really interested in only 24 of them, but for commercial reasons it decided to take a further 20 of marginal profitability. I deal with its reasoning below. That left the Administrators to deal with 91 unprofitable stores and their associated employees. There was also the balance of head office staff (over and above the 85 already dismissed) and the field based support staff who did not (as Homebase saw it) work based at any of the 44 stores and, hence, were not to transfer to it.

36. The Administrators had sought to market the entire business of Bathstore, doubtless with little hope or expectation that they could sell it all as a going concern. They had taken the immediate decision to dismiss 85 head office staff and to cease the installation side of the business as well as the support for franchises. Having taken professional advice, the Administrators learned that the store leases (for all 135 stores) had little or no commercial vale and its stock at the warehouse had little commercial value given the substantial discounts which would be needed to dispose of it rapidly. Furthermore, as regards that stock, the warehouse operators had a lien.

37. Once the Administrators had established that they could only dispose of 44 stores and a limited amount of stock in the deal with Homebase, they had to decide how to dispose of the remaining assets (using that term loosely). The remaining stores were loss making, but did have some display stock and some customer orders which could be fulfilled (given the cooperation of DHL).

38. The Administrators closed 36 stores on 19 July, that is a couple of days before the Sale and Purchase Agreement was completed. It is not clear how many employees were affected. One could speculate that it might be in the order of 72 employees, given that almost all stores had a manager and some two or three sales staff, but that some posts would inevitably be vacant and some employees would have left already given the uncertainty

of the situation and the availability of other jobs. The claimants invited me to adopt a somewhat higher figure, but I see no basis upon which I could make any finding in this regard save that the number would inevitably have been substantial.

39. That left another 55 stores to be run by the administrators until closed by them and the 44 stores the subject of the about to be completed Sale and Purchase Agreement. Those 55 stores were closed as and when the Administrators determined that the cost of retaining them exceeded the return from selling stock and finalising existing orders for stock located in the warehouse. In addition, the Administrators retained staff from the head office and field support staff who were needed to supply the services under the TSA and to run down the remaining stores. Those employees were dismissed in the succeeding weeks after the completion of the Sale and Purchase Agreement. No details of when precisely individual employees were dismissed was provided in evidence, but the staff still being used to fulfil the TSA were retained until mid-August at the earliest.

40. I now turn to look at the Sale and Purchase Agreement as it was worked out in practice. As I have already noted, Homebase's parent company is a member of the Hillco Group. Hillco had first discussed the possibility of a buy out of part of Bathstore's business prior to the administration. It had been supplied with a proposal from Bathstore's senior managers which it passed on to Homebase and which led to a meeting between certain of those executives and Homebase on or about 20 June 2019. It is unclear whether the discussions at that meeting proceeded on the basis that there would be an administration.

41. The proposal from the Bathstore executives appears to have been, in very simple terms, that Homebase should acquire 20 of the 135 stores operated by Bathstore and should establish, over time, Bathstore concessions located in several Homebase stores. The executives appear to have pitched the idea on the basis that they would move to Homebase as the management team for this new business and would run the 20 stores and build up the concession sites.

42. It is not possible for me to determine Homebase's reaction to that proposal in any detail, as those who discussed it did not give evidence and I was not taken to any relevant documents. What is clear is that some time later Homebase employees, including Mr McNaughton, were asked to look at the possibility of acquiring some Bathstore stores and the possibility of using the Bathstore brand within what was referred to variously as the Mezzanine Project and the Rooms Project.

43. Homebase itself had previously been in financial difficulties and 85% of the business was acquired by the investment division of Hillco with 15% of the shares being acquired by Homebase management. The new principal owners were keen to develop mezzanine floors in Homebase stores as showrooms to sell kitchens, bathrooms and bedrooms as well as associated free standing furniture and lighting. The view was taken that acquiring the Bathstore brand would fit well with this developing side of Homebase's

business, especially as many stores were yet to be reconfigured in accordance with what appears to have been a rolling programme of building or refurbishing existing mezzanine floors.

44. A detailed review of store profitability was undertaken and it was decided that 24 stores were ones which Homebase would wish to retain alongside the developing concession business. There was, however, a complication in that while Homebase wanted to acquire the display stock in those stores and needed a stock of bathrooms to keep the 24 stores going, it did not want to acquire the amount of stock held at the DHL warehouse used by Bathstore. This was not least because the warehouse deal which Bathstore had done with DHL was a very expensive one (in comparison to Homebase's own deal with DHL) and Homebase wanted to move such stock as it took to its own warehouses. These had the capacity to accommodate the stock it wished to acquire for the immediate needs of the 24 stores, but little more than that.

45. Clearly there must have been negotiations which led to the deal which was ultimately reflected in the Sale and Purchase Agreement. I heard nothing in detail about those negotiations, but I was told (and accept) that discussions with DHL formed part of them. By the ultimate deal, Homebase agreed to take all the stock in the warehouse which was not allocated to existing customer transactions together with an additional 20 stores over and above the 24 that it wanted in the long term. It intended to keep the extra 20 stores open only for a short period of time, being sufficient to enable it to sell (through all 44 stores) the surplus stock over and above the stock it actually wanted and could accommodate in its existing warehouses.

46. Homebase accepted that by this deal it would acquire, via TUPE, the staff based at all 44 of the stores, even though it only really wanted 24 stores (and their staff) save in the short term. I heard evidence as to what happened in practice from the respondent's witnesses who had also dealt with other deals of this kind in the retail world. Based on that evidence I conclude that it seemed likely to those who were negotiating the deal on behalf of Homebase that some of the employees from the extra 20 stores might be offered the possibility of continued employment in due course in order to replace employees from the 24 stores who either failed to turn up for work after the transfer, or who declined to transfer after consultation. There was also the possibility that some of those staff from the additional stores might, in due course, be offered work in one of the new (or newly refurbished) mezzanine floors at a Homebase store.

47. I note that it was never suggested to me that the locations of the new mezzanine floors were chosen to mirror (either wholly or substantially) the locations of the Bathstore stores which were to be closed, either by the administrators or by Homebase. Nor was it suggested that large numbers of former Bathstore employees were reemployed by Homebase shortly after their dismissal in order to work in either existing or newly opened (or about to be opened) mezzanine levels at Homebase stores located near to their former Bathstore store.

48. At some point in time the idea put forward by the Bathstore executives that they should be taken on to run a new Bathstore business within Homebase, was rejected. From what Ms Lahiffe was able to say, it appears likely that the decision was either made, or certainly communicated to some of those executives, very late in the day being shortly prior to the announcement on 16 July by the Administrators to senior staff of the likely impending deal. It may, of course, be that the decision was made much earlier and kept from the former CEO of Bathstore and his senior colleagues until the last possible moment.

49. What Homebase had decided was that the administration and support of the 24 stores could be handled by existing Homebase management who had already been engaged for or moved to the Mezzanine Level Project. It was recognised that head count might have to be expanded in places in that organisation as a result of the acquisition of the 24 stores and that, in particular, a regional manager or managers would be needed for those stores. As a few additional former Bathstore head office and field based employees were recruited by Homebase in the period immediately after the TSA had ceased to operate so far as Bathstore employees were concerned, I am satisfied on balance that it had been recognised from the outset that a few additional former Bathstore employees who were not store based, might be offered jobs by Homebase either to do something similar to what they previously did (but not limited to work in relation to the 24 stores) or to work across the Homebase Mezzanine Project. That would mean working for existing or yet to be opened mezzanine floors and would involve covering the whole range of products that those floors were to sell, for example as buyers, designers and the like.

50. It is appropriate at this juncture to deal with the role of the Second Respondent in the Homebase Group and in relation to the establishment of the Bathstore brand within Homebase. The Second Respondent was a special purpose vehicle incorporated for the purpose of being the purchaser of most of the assets acquired by the Homebase Group. The sale and purchase of most of the assets acquired by Homebase was dealt with in the Sale and Purchase Agreement, but the showroom display stock at the 44 stores and the right to use the website was sold to Homebase Brands Limited, another Homebase Group Company. The reason for this split of the assets was not explained. In practical terms, the transactions referred to above, together with the licence granted by Hillco to use the name and other intellectual property, gave the Homebase Group the assets which they needed to exploit the Bathstore brand in the ways intended.

51. The Second Respondent was to become the employer of the store based staff at the 44 stores. It was a subsidiary of Homebase (UK and Ireland) Holding Limited, another company within that group of which HHGL Limited is the main operating company.

52. Mr Greswolde was unclear as to whether other ex-employees of Bathstore who joined the Homebase Group were employed by the Second Respondent, or by HHGL Limited, which was the employer of many Homebase store staff. He believed that the intention had been that those

working in or in relation to Homebase stores on the Mezzanine Project would be employed by HHGL Limited, but considered that in the fast moving situation in the weeks after completion of the Sale and Purchase Agreement, it might well be that they were employed by the Second Respondent, because that was the entity that was employing the store based staff who transferred and the Homebase. He thought (and I accept) that staff tasked with integrating the acquired assets into the Group might well have used the Second Respondent as the employer for any individual whom they were intending to employ because no-one had explained to them the plan to use HHGL Limited as the employer for some, or had reminded them of this.

53. The evidence presented to me in respect of non-sales staff formerly with Bathstore and later employed by Homebase (but not regarded as the subject of TUPE) was unsatisfactory. Ms Lahiffe was able to give evidence that some people employed by the former were later employed by the latter, but it was unclear in what capacity they were employed within the Homebase Group in most cases.

54. During the course of Mr Greswolde's evidence, the Second Respondent produced a schedule of 33 people once employed by Bathstore and later employed within the Homebase Group. It was not an agreed document and it became clear that Mr Greswolde's knowledge of those employees dealt with in it was limited. For example a Keith Pulley was employed by Bathstore as a "Profit Protection Manager" according to the schedule and by Homebase as a "Loss Prevention Manager". The titles suggest that his role may have been very similar in both instances, but it was unclear whether he was covering the 24 stores (or any of them), or mezzanine floors (or any of them), or Homebase stores generally (or some of them), or some combination of those.

55. Shahid Zamir had been the Regional Manager for the premium stores when employed by Bathstore and he was employed as a Regional Manager by Homebase. On balance and having regard to what Ms Lahiffe and Mr Greswolde could tell me, I find that he managed the 24 stores. Whether he had anything to do with the Mezzanine Floors Project is unclear.

56. The analysis of what happened to these people is also complicated by the fact that the plans of Homebase changed as a result of the unexpectedly poor performance of the 24 stores, the relative strength of mezzanine floor trading as new floors opened and the advent of covid and lockdowns. Ultimately, this led to all of the 24 stores being permanently closed. However, I note that one store was converted to a Homebase store by acquiring neighbouring properties. It then had a mezzanine floor constructed.

57. Also within that group of employees is Anne Marie Frost who was an Installation's Co-ordinator with Bathstore and took employment with Homebase as a Recovery Team Lead. As Homebase does not offer an installation service and given her job title, I consider it likely that what she was engaged by Homebase to do was wholly different from what she

previously did, but I note that I heard no evidence on this over and above the brief statement in the schedule.

58. Without further evidence it is impossible for me to reach conclusions with regard to the other 12 non-store based employees dealt with in the schedule. Hence, in summary, one non-store based employee certainly managed (as Regional Manager) the 24 stores, several of which he had previously managed and others may have done work in relation to the Bathstore brand and the 44 stores on behalf of Homebase after the transfer, but doing what in relation to the brand and those stores and doing what, if any, other work for Homebase is completely unclear.

59. I now turn to store based staff (being managers and sales staff) who were employed by Bathstore, later employed by Homebase and who were not amongst those Homebase accept to have been the subject of a TUPE transfer. The schedule produced during Mr Greswolde's evidence lists 18 of these people. Mr Greswolde accepted that there was a possibility that there could be more, but I have no evidence on which I could find this to be so. Furthermore, the evidence shows that at least one of these individuals took employment with a third party (Howdens, another business dealing with the sale and marketing of kitchens) but shortly thereafter applied for and got employment with Homebase. As the evidence provided to me did not include any evidence with regard to the date of commencement of employment, it is not possible for me to find whether or not any other of the 18 people listed in the schedule had a significant break between their employment by Bathstore and their employment by Homebase.

60. Once the Sale and Purchase Agreement had been completed Homebase began TUPE consultations. This process enabled it to see what staff actually turned up for work, which staff had simply vanished and which staff might indicate they did not want to transfer. As I have noted, Homebase staff experienced in these matters expected to find a number of staff falling into the second and third categories. I also accept the unchallenged evidence that this was a competitive market at the time for such managers and sales staff and that the skills of good bathroom and kitchen salespeople were interchangeable as well as being in high demand.

61. Homebase had two ready sources of employees to fill the gaps in the workforces of the 24 stores which had a long-term future. There were those in the 20 stores they had also acquired and intended to close. There were also those who the administrators either had dismissed or were about to dismiss in the immediate future at the retained stores. In addition to those posts, Homebase also had vacancies for sales staff to work in the mezzanine floor concessions, working on kitchens and bedrooms in addition to bathrooms. The documents I have seen show that Ms Lahiffe was supplying information about staff who expressed interest in those various posts to Homebase. It is unclear whether these people were responding to adverts (which were certainly placed) or contacting her (or others they knew at Bathstore) in the hope of work or because they had heard that work might be available. As I have noted, there were at least 18 such people eventually employed, but I have very limited information about them.

62. From emails I was shown it seems likely that at least 1 of the 18 applied for a job at a store she had previously spent time at, but which was not her base store at the time of the Sale and Purchase Agreement. Others seemed to have moved to stores which had vacancies. In particular, 3 employees at Edinburgh Morningside objected to the transfer. I consider it possible that staff from other stores which the administrators had closed or were about to close applied for and got one or more of those posts. Of course, some could have been filled by staff from Scottish stores which were within the 20. So far as the other members of that group of 18 are concerned, I cannot tell if they took jobs in one of the 24 stores or working on a mezzanine floor.

63. I now turn to consider the circumstances of the five individual claimants. The situation as regards each of the four store based claimants is somewhat similar:

    63.1 Mr Goddard was a Sales Consultant who had worked for Bathstore for some four years. He was based at one of the two Nottingham stores at the time of his dismissal by the administrators. He had also provided cover at the other of the Nottingham store and the Chesterfield store during his employment. This would happen two or three times a year, usually for a day or two, but once for a period of a week. His base store was not one of the 44 and he was dismissed once the display stock in his base store had been sold on 7 July 2019.

    63.2 Mr Louden was promoted to Store Manager in October 2011. At that moment he moved from Edinburgh Central to Edinburgh Morningside. However, 18 months later he returned to Edinburgh Central as Manager and remained there from that time onwards. Before working for Bathstore he had worked for Homebase selling kitchens, bathrooms and bedrooms. He accepted that moving between kitchens and bathrooms was common in the industry. He had temporarily acted as a Regional Support manager for other Scottish stores when such posts were trialled, but then reverted to just managing his own store, however he also provided cover to other stores from time to time both before and after the trial, as did other managers and store staff. He was dismissed by the administrators on 1 August 2019 when the display stock in Edinburgh Central had been sold. He knew of the separate announcements made by the administrators to the staff of the 44 stores and to the rest as he had stood in for the Edinburgh Morningside Manager (at his request) for a call to the staff at the 44 stores telling them of the transfer of those stores to Homebase. There was then a second call to the staff of all other stores (including Edinburgh Central, his base store) to tell them of the deal. Those calls took place some days before the Sale and Purchase Agreement was completed, but the exact date was not evidenced. On balance it appears to me that the calls took place prior to the closure of the 36 stores on 19 July, because there was no witness or documentary evidence of a separate communication to the

staff of those stores and it would seem to make commercial sense to make the announcements to staff before any closures were commenced. One of Mr Louden's sales team, Jacalynn Fairhome (who had been dismissed like him) applied for one of the vacancies for Sales Consultants at Edinburgh Morningside, where (see above) consultants had declined to transfer. Apparently, they had obtained other jobs. Her application was successful.

63.3 Mr Summers was another Store Manager, but he had only been employed since March 2018. After training in other stores, he quickly moved to the store in Camberley where he remained for a couple of months before being moved permanently to Beckenham, where he stayed until dismissed by the administrators. This was one of the 36 stores closed on 19 July. Like the others he had spent short periods of time providing cover elsewhere. When moved from Camberley to Beckenham he got a letter which confirmed that his place of work had changed. He did not get such a letter when he was asked to provide cover at other stores.

63.4 Mr Dunn was a Store Manager from March 2012 until his dismissal by the administrators on 5 August 2019 after the display stock had been sold at the two stores he then covered as manager. For the last six months of his employment he had covered both the Stockton and Gateshead stores as their permanent manger. Prior to that he had managed just the Gateshead store. Like the others he had provided temporary cover at other stores for a few days at a time, as had his sales consultants, but they had all then returned to their permanent base store.

64. I now turn to the situation of Ms Lahiffe. She had been employed in Bathstore's HR function since October 2012. She was dismissed by the administrators on 13 Septemebr 2019. Although her title (as used on her emails, for example) was Lead HR Busines Partner, she said in evidence that she was one of two HR Vice Presidents. In fact, there was no layer of HR support for stores (or any other employee group) below her. She and her colleague covered roughly half the store network each. She covered the southern stores and her colleague the northern ones, but she also covered all of the so called premium stores, wherever they were located.

65. Hence, she provided HR support for about 70 stores. Of these some 30 were within the 44 stores transferred to Homebase. She would plan to visit about 30 of her stores each month, but the number actually visited would depend on what issues arose during the month. The store managers also all indicated that they would get a brief HR visit roughly once every three months. None of them appeared to have had the sorts of problems which required significant HR involvement, but they (like she) noted that HR support was available on the telephone when needed.

66. In June and early July 2019 the then CEO of Bathstore told her that he was to lead the management team for the new Bathstore business to be owned by Homebase. This team was to consist of the senior managers of the old

Bathstore business, including herself. Eventually he told her that he was not moving to Homebase after all.

67. Ms Lahiffe was not included in the group of 85 head office staff dismissed when the administration began. She was asked to stay on to help with the sale process and the administration generally and did so.

68. She had conversations with the Homebase HR Director, Joe Attenborough, about her own future. She was told that the remaining head office staff (which Homebase saw her as being part of) would not be transferring to Homebase, but that there would be roles in Homebase for which she and others could apply.

69. Once the Sale and Purchase Agreement had been announced she was tasked by the administrators with assisting the Homebase staff who were dealing with the transfer of the 44 stores. In practice, this involved providing information as to the transferring store employees to Mr Greswolde and information about others who were applying for jobs both to him and to others who were interviewing to fill the vacancies at the 24 stores seen as having a long-term future. She was also asked by Homebase to contact employees at stores outside the 44 to remind them of the possibility of applying for one of the vacant jobs at one of the 24 stores, which jobs Homebase was advertising internally and on job boards and websites used to advertise the availability of jobs of that type.

70. Neena Findley, Homebase Director of Business Development, asked Ms Lahiffe whether she would be interested in a job with Homebase. She (and most probably other Homebase senior employees) had similar conversations with other current and former Bathstore head office employees, but save as regards the Regional Manager referred to above, it is unclear whether Homebase was considering employing them to do work in substantially in relation to the 44 stores acquired from Bathstore. However, I consider that it was likely that what was under consideration for at least some of those spoken to was their doing work in relation to the transferred stores and the kitchen, bathroom and bedroom business to be conducted on the mezzanine floors. In that context, Ms Lahiffe was asked to provide details of employment terms and job descriptions of some present and previous head office staff.

71. In late July 2019 Ms Attenborough offered Ms Lahiffe a five month fixed term contract. It was intended that she would continue to assist with the transition of the 44 stores and their employees to Homebase. It was indicated to her then and in conversations with Mr Ian Penney (who then headed up the Mezzanine Floors Project) that he would be expanding his HR Team in due course and there could be a job for her in that Team.

72. She was invited to a meeting to discuss the future of that project (including the future of the 24 former Bathstore stores with a long term future) on 12 August 2019. The invitation came from Laura Freeman on behalf of Mr Penney. Ms Freeman had been employed at Bathstore, but was now

Project Manager and Business Improvement Manager for the Mezzanine Floor Project.

73. That invitation was withdrawn at the last moment. No offer of permanent employment was made to her and the offer of the five month contract was implicitly withdrawn when she was told that it had been decided that a named existing Homebase employee could provide the services required. It was suggested to Mr Greswolde that the withdrawal of the invitation to attend the meeting was because she had been questioning why all head office staff and the store staff employed at the stores outside the 44 had not transferred under TUPE, suggesting that they all should have done. Mr Greswolde's knowledge was very limited. He had not been involved either in the decision to offer the fixed-term contract, or to withdraw that offer, or in setting up the meeting or withdrawing her invitation to attend it.

74. Mr Greswolde himself had periodically made favourable comments about Ms Lahiffe's performance when asked by Homebase managers. She had, he felt, done a good job in helping him during the few weeks after the Sale and Purchase Agreement was completed. Some Homebase employees had told him of problems they had experienced with her and he passed this information on. He did not investigate their concerns and was unaware if anyone else had. He could not say whether their concerns were legitimate or had played any part in the decisions to withdraw the offer of a five month contract and the invitation to attend the meeting.

75. The contemporaneous emails show that Ms Lahiffe regularly raised the question of whether further Bathstore employees should be (or should have been) transferred under TUPE. Such sensible questions had not prevented the offer of the fixed term contract being made, or her being invited to the meeting on 12 August. On the evidence I have, it is impossible for me to assess the role played, if any, in subsequent decision making by the concerns raised by Homebase employees.

76. What is clear from all the material I have looked at and the oral evidence is that this was a very fluid situation and Homebase was constantly reassessing its employment requirements going forward. On balance, I consider that on or about 12 August, in the context of reassessing the needs of the Mezzanine Floor Project in the short and long terms for the meeting about to take place for that purpose on 12 August, it was decided that the existing HR Team was sufficient and there was no need for Ms Lahiffe's services save for a short farther period where they would be provided in the context of the TSA. Hence, she remained employed by the First Respondent until 10 September 2019 when she was dismissed by the administrators. She was never employed by Homebase.

77. I need to deal with one further matter explored with Ms Lahiffe in cross examination. This was whether or not the approach of Homebase to the acquisition was being said to amount to a nefarious attempt to avoid the impact of TUPE. Ms Lahiffe disavowed any such allegation. She explained that she had not detected any artifice in Homebase's actions or decision making which she accepted was always driven by commercial

considerations and not by a desire to avoid the consequences of the operation of TUPE. Having heard her evidence and that of the two witnesses called by the Second Respondent and having examined much contemporaneous documentation, I share her view. Whether or not motive is relevant (at times Ms Toner appeared to suggest that it was) I consider that Homebase's motivation was commercial. It did not structure the transaction (or thereafter conduct its affairs) so as to avoid the operation of TUPE, so far as possible. Rather, it took decisions based on its commercial needs and then sought advice as to whether that which it intended to do would amount to a TUPE transfer and, if advised that this was the case, as to which contracts of employment would be caught by the operation of regulation 4.

The law

78. Both representatives cited numerous authorities in their written and oral submissions, some of which I shall refer to below. However, on analysis their submissions as to the fundamental legal principles did not differ in any material respect. They did, of course, differ as to the application of those principles to the facts, both to the factual findings they each contended for and the factual findings sought by their opponent. The authorities to which they referred and which I do not cite below either reinforced expressions of principle found in previous authorities, or represented case specific observations on the application of the law to the particular facts of that case. Finally, both sides cited several authorities dealing with the concept of "establishment" in the Trade Union and Labour Relations Consolidation) Act 1992, which I did not find to be of assistance.

79. Regulations 3(1) and (2) of TUPE, so far as material, provide as follows:

> 3.(1) These Regulations apply to—
>
> (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;
>
> …
>
> (2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary."

80. Guidance as to what constitutes an undertaking or part of one for TUPE purposes and when it is to be regarded as transferred is found in many cases. There is no comprehensive test established for answering either question. Rather, the case law sets out some questions which may usefully be asked in particular kinds of case and explains the phrase "economic entity" in a little more detail than do the regulations themselves.

81. The European Court in Spijkers v Gebroeders Benedik Abattoir CV and another [1986] 2 CMLR 296 provides a convenient starting point for the

transfer question to be answered in our case. This case concerned a manger of a slaughterhouse. The purported transferor had ceased to trade before the alleged transfer and no goodwill subsisted (hence no goodwill could be transferred), but the purported transferee acquired the slaughterhouse and associated premises together with some trade goods and all the employees save for Mr Spijkers and another person. It then, in effect, recommenced the business.

82. The European Court echoed the views expressed on behalf of the UK Government in finding that no one single factor (for example the absence of the transfer of goodwill) was decisive. Rather, all of the relevant factors needed to be looked at, but in the context of the broad question of whether the business (or part of it) in question retained its identity after the transfer. In paragraph 13 a non-exhaustive list of potentially relevant factors is set out as follows:

> "… The type of undertaking or business, whether or not the business's tangle assets, such as buildings and moveable property, are transferred, the value of its intangible assets at the time of the transfer, where or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation."

83. In the context of the present case, it is also worth noting what was said by Advocate General Slynn as to changes in business methods and so on by the transferee:

> "… The fact that the business is carried on in a different way is not conclusive against there being a transfer, new methods, new machinery, new types of customer are relevant factors but they do not of themselves prevent there being in reality a transfer of a business or undertaking."

84. After Spijkers there followed a series of European Court decisions dealing with particular fact situations which, so the referring court thought, might give rise to a need for further guidance from the European Court on either the identification of the relevant undertaking or the transfer question. From time to time both the Employment Appeal Tribunal and the Court of Appeal were invited to review that expanding list of European Court cases and, in particular, consider whether the broad position set out in Spijkers had been modified or expanded upon.

85. One such case, relied upon by both sides here, is Cheesman v R Brewer Contracts Limited [2001] IRLR 144. In that case Lindsay P reviewed the then state of the European case law and two decision of the Court of Appeal in ECM (Vehicle Delivery) Service Limited v Cox [1999] IRLR 559 and Betts v Brintel Helicopters Limited [1997] IRLR 361. I have reviewed both of those cases as well as Cheesman itself. In Cheesman the President of the EAT noted five factors to be considered when asking whether what was alleged to have been transferred was an undertaking. A further 12

"principles" were distilled from the authorities by the President to be considered when deciding whether that undertaking had been transferred.

86. I shall not set out the guidance from Cheesman on either question, parts of which have no application here, but I note that so far as the identity of the undertaking is concerned, he commented that an activity of itself is not an entity but that the identity of an entity should emerge from other factors such as its workforce, management staff, the way in which its work was organised, its operating methods and, where appropriate, the operational resources available to it. In determining whether or not there had been a transfer he noted that account had to be taken, amongst other things, of the type of undertaking or business in issue. The degree of importance to be attached to the several criteria or principles he isolated would necessarily vary according to the activity carried on.

87. Many of the "principles" identified by Lindsey P for determining whether or not there was a transfer are designed to deal with specific types of situation (for example, where no employees are transferred, or there is an absence of any contractual link between transferor and transferee). At the heart of these principles is a restatement of the two key propositions from Spijkers, namely (1) has the entity retained its identity and (2) look at al the factors, no single factor is likely to be decisive considered in isolation.

88. I need to look briefly at four subsequent cases, but before doing so I turn to consider one early case (decided in 1996 by the European Court). In Merckx and Neuhuys v Ford Motors Company Belgium SA the European Court had to look at the purported transfer of a Ford franchise. It was a franchise covering a particular geographical area. The most important factors were said to be the identity of the area (and, hence, the potential customers) covered and the identity of the products being sold exclusively by the franchise in that area. There was found to be a transfer despite no assets being transferred between the transferor and transferee. Indeed, there was no direct agreement between them at all.

89. In Klarenberg v Ferrotron Technologies GmbH [2009] ICR 1263, the European Court of Justice noted that whilst for there to be a transfer an organisation, or part, needed to retain its economic identity that did not necessarily entail the retention of the pre-transfer organisational structure or the autonomy of the business or part transferred. The Court noted that integration of an acquired business into the acquiring entity was often the intention of the transferee and, of itself, would not prevent there being a transfer.

90. In Whitewater Leisure Management Ltd v Barnes [2000] IRLR 456 Burton J reminded employment tribunals of the importance of keeping separate the question of whether there was an undertaking and whether it had been transferred. He also noted that in addition to (or instead of) asking whether there was a stable economic entity, it could usefully be asked whether that entity was sufficiently structured and autonomous and that asking whether the entity was a "distinct cost centre" could also be useful. He also commented on the relevance of decisions taken by a purported transferee

not to take on particular employees. It would not be the case that such a decision would lead to it being deemed that there was a transfer he said. The matter would have to be carefully examined in its context to see if that decision was relevant, a point already determined by the Court of Appeal in Betts.

91. It has long been trite law that the reference to a transfer in this context is not a reference, in most instances, to a single moment in time when the transfer was completed. A transfer is something which usually extends over a period of time leading to completion of the transaction. In Spaceright Europe Limited v Baillavoine [2012] ICR 520 the vexed question of whether references to "the transfer" were references to the particular one that took place or to any possible future transfer was resolved. Both of the competing lines of authority on this point had proceeded on the basis that the transfer could (and often would) take place over weeks if not months and (for example see paragraphs 42 to 46) Mummery LJ giving judgment (in effect) on behalf of the Court proceeded on that basis.

92. Having established the existence of an undertaking or part of one which has been transferred, a tribunal must then consider whether the employees in question were employed immediately prior to the transfer and were assigned to that undertaking or part of an undertaking which transferred. Often, especially where a whole business is transferred, this is a relatively straightforward matter. Where a part of a business is transferred it will be necessary to consider whether the employees in question were assigned to that part of the business. In Duncan Webb Offset (Maidstone) Limited v Cooper and others [1995] IRLR 633 Mummery J said:

> "There will often be difficult questions of fact for industrial tribunals to consider when deciding who was "assigned" and who was not. We were invited to give guidance to industrial tribunals about such a decision, but declined to do so because the facts will vary so markedly from case to case. In the course of argument a number was suggested, such as the amount of time spent on one part of the business or the other; the amount of value given to each part by the employee; the terms of the contract of employment showing what the employee could be required to do; how the cost to the employer of the employee's services had been allocated between different parts of the business. That is, plainly, not an exhaustive list…"

93. Mummery J noted that this approach was consistent with the much earlier decision of the European Court in the Botzen case.

94. It was agreed between the parties that in looking at the issues in the case I should adopt a purposive approach to the regulations. Their purpose is to protect the employment rights of employees in the context of the business in which they worked being transferred to someone else. Whilst I have kept that important principle in mind, I have not found it of particular assistance in dealing with the problems which this case has given rise to.

Submissions of the parties

95. Both parties made written opening submissions and written closing submissions which they supplemented by oral argument. I summarise below the central features of their respective positions.

96. The claimants maintained that the whole business previously carried on by Bathstore was a single economic entity and that the whole of that entity transferred to the Second Respondent. Ms Toner's fall-back position was that there were, in fact, three entities, the installation services, the services provided to the franchises and the rest, but that this did not matter as all installations and the franchise support ceased on or very shortly after the administration commenced. The rest of the business was said to be an integrated whole comprising a central management function (from head office and field based employees), a supply function (via the warehouse) and a selling function (being the stores). The stores it was said could not operate without management and stock so could not be seen as a separate undertaking (whether considered store by store or some or all of the stores together).

97. Ms Toner maintained that looking at individual stores (or a group of stores) as an economic entity could not be right as this amounted to a breach of the TUPE Regulations (viewed purposively), because it deprived the remaining employees of protection.

98. Bathstore continued to trade after the Sale and Purchase Agreement, therefore it was said that there was a transfer of a going concern and that meant that the whole concern, not just the parts of it the subject of the sale and purchase agreement, transferred to the Second Respondent. It was, Ms Toner maintained, no answer to this to say that the Second Respondent did not want the remaining employees or the stores and head office where they worked. They had automatically got them (via Regulation 4) so the intention of the Second Respondent was irrelevant. That the stores they did take were integrated into the Homebase Group was she said irrelevant because transfers often involved such an integration. She maintained this simple proposition despite it being suggested to her that what mattered here might be said to be what was not acquired rather than what happened to the stores that were.

99. Despite accepting that transfers often take place over a period of time, Ms Toner maintained that I should look at the position as at completion. Hence, she said, I should proceed from the basis that the Second Respondent acquired 44 out of 99 stores and took on 154 employees out of a population of 336 store based employees, less the employees of the 36 stores closed before completion, but plus a few head office and field based staff retained by the administrators. The numbers in both of those two groups were uncertain, but she invited me to assume that each of the 36 stores had a manager and two or three sales staff. Hence, she maintained that the Second Respondent took on well over half of the Bathstore employees, rather than the 154 out of 531 that the Second Respondent contended for. She also suggested that the 154 had, in any event, to be increased by the

number of former Bathstore employees taken on by Homebase over and above that number, being at least the 31 staff on the schedule produced during Mr Greswolde's evidence. She did not regard it as relevant that the 154 was reduced by at least 16 due to those who left before completion or declined to transfer. Hence, she said, over half of Bathstore's relevant employees had moved to Homebase.

100. Comparing the entity before and after transfer (again taken at the point of completion of the deal) she submitted that it was clear that the business retained its identity post transfer. It continued to trade under the Bathstore brand, albeit only in 44 of the 99 stores, supported by a similar infrastructure as existed before. That infrastructure was initially supplied via a combination of former Bathstore staff employed by the Second Respondent (or, in a few cases, possibly by Homebase) and services supplied under the TSA and then, as more staff were acquired by the Second Respondent (or Homebase) on their release by the administrators, by those Homebase entities alone. The territory served remained the same, she suggested and that there were minor changes in how the business operated (such as the change in IT systems) was irrelevant, as the nature of the business remained essentially the same.

101. Although her opening submissions suggested that assignment might be the key issue in this case, in closing she saw it as a very minor issue. This was because as the whole business was transferred it was, she contended, obvious that all of the claimants were assigned to it.

102. The Second Respondent's starting position was that to look at the Bathstore business at the moment before completion of the Sale and Purchase Agreement and to compare that to the business conducted by the Second Respondent in the period afterwards, was a mistaken approach. A transfer for TUPE purposes was noted usually to extend over a period and here that period was said most sensibly to begin with commencement of the administration. Hence, in looking at the business immediately before the transfer one must look at it immediately before the administration began.

103. Mr Ryan's primary submission was that each individual store was a cost centre and what was transferred was 44 part undertakings and no more. He noted that none of the head office and field based support staff transferred as none had been assigned to any individual store. He suggested that had the Second Respondent acquired only one or two stores no one would have had any difficulty in seeing this as a transfer of each store as a part undertaking and the scaling up to 44 stores made no difference to the analysis.

104. Homebase neither wanted, nor needed, the head office, the warehouse or the field based support staff. That it advertised for and took on some staff from non-acquired stores (to fill gaps in the staffing at the acquired stores) and a very few former head office staff, did not change the outcome of the analysis. However, he accepted that when applying a "look at all the factors" test to see if there had been a transfer, these were matters properly to be considered.

105. The Second Respondent's fall back position was that if the 44 stores were together a part undertaking, this did not assist the claimants because (a) it was a distinct part undertaking and its acquisition did not mean that the whole undertaking was actually acquired and (b) the head office and field based staff were not assigned to that part undertaking comprised of the 44 stores. In particular, Ms Lahiffe's role involved her providing HR services to some 30 or so of the 44 stores, but that represented less than half of the number of stores she had serviced on behalf of Bathstore and there was no basis put forward (for example by looking at time spent, or relative importance or cost of her activities) to suggest that she was assigned to those 30 odd stores.

106. With regard to the related issues of identifying the undertaking and whether it retained its identity after the purported transfer, he pointed to 15 factors upon which he relied. In brief, and adopting his order, these were:

    106.1 The nature of the First Respondent's business, being focussed on stores and their sales staff with a support network supplied by head office and field staff.

    106.2 The head office and field staff provided necessary support to the stores, but that support could be provided by similar elements (for example the HR function) from a successor business. The franchise stores demonstrated this he maintained. They were owned and operated by third parties as separate businesses and, in effect, paid a fee to Homebase for the provision of those services.

    106.3 The Second Respondent only acquired a maximum of 154 employees out of 531.

    106.4 The Second Respondent only acquired 44 of the 135 stores and the evidence had not suggested that any particular store was very significantly larger than any other. Each appeared to have a manager and two or three sales staff.

    106.5 The head office (as a building) was not acquired and large numbers of its staff were dismissed by the administrators. Very few former Bathstore head office and support staff were eventually employed by Homebase.

    106.6 The Second Respondent did acquire some stock from the First Respondent but this was stock not allocated to any customer order or any particular store.

    106.7 Display stock at the 44 stores was purchased, but not the display stock at the other stores.

    106.8 Each store was its own cost centre with its own profit and loss account, its own targets and its own manager and staff.

106.9 No customers were transferred to the Second Respondent. He did accept that the stores transferred could loosely be seen as continuing to cover roughly the same catchment area, all be it that for some the catchment area would necessarily increase as neighbouring stores were not acquired and were then closed by the administrators.

106.10 The installation service and the few associated employees was not taken over by the Second Respondent.

106.11 Some supply contracts were renegotiated.

106.12 The key supply contract for information technology systems was carried on only for a few weeks to allow migration of data to Homebase's systems and their installation in store.

106.13 The franchise business was not acquired.

106.14 Homebase did acquire the right to use the name and logo of Bathstore. These were bought by a subsidiary of Homebase's parent company and licensed to Homebase.

106.15 The presence and operation of mobility clauses in the contracts of employment of store staff was irrelevant. This allowed temporary movement to cover absences and to facilitate training. Where there was a permanent change of store a letter varying the relevant employee's contract of employment was issued.

107. Against that background it was contended that there was an undertaking or part undertaking situated in the United Kingdom immediately before the transfer, being either each of the 44 stores, or those 44 stores taken together. Each store, or failing that the group of 44 stores, was an organised grouping of resources pursuing an economic activity. The alternative submission was advanced very much on the basis that the store by store analysis was correct and the alternative analysis strained the notion of pursuing an economic activity because the 44 were part of a group of 135 stores and until the transfer were not regarded as a distinct group of stores in any way.

108. It was accepted that the stores retained their identity post transfer, but contended that the 44 stores as a group really had no identity before the point in time when Homebase decided that this was all that it wished to acquire.

109. No claimant was assigned to any particular store or to the group of 44 stores prior to the transfer.

Conclusions

110. The first important question here is whether there was an economic entity in existence before the transfer.

111. In this instance there are three candidates, albeit that the first may be said to be capable of being defined in more than one way. These are:

    111.1 The whole of the Bathstore business.

    111.2 Each of the 44 stores acquired by the Second Respondent looked at individually.

    111.3 The group of 44 stores acquired by the Second Respondent.

112. Plainly each of these potential undertakings was situated in the United Kingdom at the material time. I consider that the phrase "immediately before the transfer" here refers to the moment before the administration began when the Bathstore enterprise was still trading, albeit at a loss. I regard the transfer as having taken place over the period of time between the commencement of the administration and the completion of the Sale and Purchase Agreement.

113. The whole of the Bathstore business was plainly an organised grouping of resources having the required objective. I consider this to be true also of the installation service and, most likely, of that part of the Bathstore business which dealt with the franchising operation. Which employees were assigned to those two distinct parts of the busines is an issue I need not grapple with. I am satisfied that each was an ancillary activity to Bathstore's main business of selling bathrooms through its stores.

114. What of each store? Could each be regarded as an economic entity in its own right? I consider that it could. I have no doubt, adopting a purposive approach to the regulations when answering this question, that if another bathroom business with multiple stores had acquired one or two of the Bathstore stores then each would be seen as an economic entity and the employment of those in the store in question would be protected if that store continued trading. Cases like Merckx suggest that that might well be so even if the store relocated to new premises.

115. I have more difficulty with the idea that the 44 stores could be seen as a single economic entity immediately before the transfer. They did not have an identity prior to the transfer separate from the identity of the Bathstore business as a whole. The claimants' position is that the 44 cannot be seen as a separate entity. The Second Respondent's position is that so regarding them is very much a fall back position because the correct analysis is to see each of the 44 stores as a separate entity.

116. I conclude that the 44 stores taken together are not a part undertaking for the purposes of Regulation 3. I consider that a part undertaking must still satisfy the requirement that it was an economic entity in its own right prior to the transfer. This group of 44 stores was not. I do not believe that a purposive approach to the regulations would yield a different result. If the grouping had existed prior to the transfer then any employees assigned to it would likewise be protected. I have considered the alternative formulation of the test suggested by Burton J in Whitewater. Was the suggested entity

of 44 stores "sufficiently structured and autonomous". In fact, it had no structure of its own prior to the transfer and was not autonomous from the rest of the Bathstore business in any sense. It was certainly not a discreet cost centre. It simply did not exist.

117. Did the whole business of Bathstore (minus the installation and franchise aspects) transfer to the Second Respondent? As required by cases such as Spijkers and Cheesman I have looked at all the factors relied upon by the parties. Indeed, I have considered the evidence as a whole.

118. The 44 stores continued to trade throughout the relevant period. They continued to use the Bathstore name and logo, whereas the other stores only used them for a few weeks of run down. Viewed from the position of the public, the Bathstore trading name continued in the areas where the stores remained open and in some other locations where the mezzanine floor at Homebase stores utilised that branding. However, I heard no evidence to suggest that Homebase mezzanine trading was substituted for Bathstore stores in areas covered by the non-transferred stores. Furthermore, the trading model for the mezzanine floors (some of which were already open, but many of which were yet to be constructed) was different. Those floors sold kitchens and bedrooms as well as bathrooms and staff would cover all products. Homebase acquire the right to use the former Bathstore website, but I heard very little evidence about how it was set up previously and how Homebase used or intended to use it as a way of getting people to see what the stores might stock and where they were located, or as a way of selling products. It seems to me to add little to the overall picture.

119. Of the 135 stores trading immediately before the transfer, Homebase took 44. This amounted to a maximum of 154 employees out of 531. Although a few of those 531 might have done work in relation to installation and franchise support, the evidence suggested that this amounted to a very few people. Those figures do not suggest that the whole business was acquired. On the contrary, they appear to me to suggest the opposite.

120. I accept that some staff from the non-acquired stores applied for and got employment with Homebase. They replaced staff who did not transfer and whose base was one of the 44 stores. This was either because the employees in question declined to transfer or simply failed to turn up for work at the acquired sores. I do not consider that this suggests that the whole business was transferred. Those recruited staff were otherwise unemployed and Homebase was looking for staff. That the interview process in regard to those people may have been little more than a discussion with store staff they already knew and that Ms Lahiffe provided details of their past employment to Homebase does not change my view.

121. These facts do not suggest a wider transfer than of the 44 stores. I consider the mobility clauses to be irrelevant. They did not make all employees in some way employees of every store. This was not a case where sales employees were, in effect, members of a large pool from which they were periodically allocated to work in particular stores, which stores changed from

time to time. On the contrary, each store had its allocated staff and any permanent changes of location were marked by written variations of the respective contracts of employment.

122. Ms Toner laid great stress on the acquisition by Homebase of a few head office and field based former Bathstore employees. The evidence in this regard was very limited. In the order of 13 such former Bathstore employees were eventually employed by Homebase. However, whilst in some cases (for example the former Regional Manager) they appeared to be employed to undertake work in relation to some of the 44 stores, in other cases the situation was far less clear.

123. It appeared to me quite possible that the new Homebase roles undertaken by some of these employees, even if broadly similar in nature to those they carried out for Bathstore, could well be carried out in relation to parts of the Homebase business not associated with the 44 stores (or even the mezzanine floors part of the business) or carried out in relation to Homebase's business as a whole. Others appeared to have a completely different role. I have set out above such conclusions as I could reach on the limited evidence presented.

124. In any event, the numbers, taken at a maximum, was small. There was certainly no acquisition of Bathstore's former head office employees as a whole, or even of the most senior members of that grouping taken together. Homebase already had (and was expanding) a bathroom sales element to its business. This was run as part of the integrated Mezzanine Floor Project alongside kitchen and bedroom sales. The support structure for the 44 stores was supplied by that which already existed for the Mezzanine Floor Project. In that context I note that only 24 of those stores was seen as having a long-term future (and, hence, needing a support structure beyond the very short term). The rest were acquired principally to trade out surplus stock for a few weeks or months at the most.

125. Some stock was acquired by Homebase from Bathstore, but not the warehouse operation which Bathstore had used and which was run for it by DHL. In due course, the stock which remained was moved to Homebase's own warehouses.

126. No customers were acquired. All orders placed before completion of the deal remained the responsibility of the First Respondent.

127. Supplier contracts were not novated. Some were renegotiated but I had no detailed evidence save as regards the warehouse contract (which was discontinued), the IT contract (which subsisted for a very few weeks whilst data was migrated to the Homebase system and the 44 stores converted to the use of that system) and the right to occupy the 44 stores (where the limit of the evidence presented to me was in relation to the granting of licences to occupy those stores for a maximum period running into January 2020). No doubt there were then negotiations between Homebase and the landlords to secure further rights, where these were required.

128. Looking at all those factors together I am not satisfied that the Bathstore business as a whole transferred to the Second Respondent. It simply acquired the 44 individual stores, each of which represented a distinct economic entity.

129. None of the claimants was assigned to any of those 44 stores. Indeed, the same would have been true even if I had found the group of 44 stores to be an economic entity. The store based claimants were not assigned to any of those stores. Ms Lahiffe might be said to have been assigned to the group of 70 or so stores she serviced, but that group is very different from the 44 store group. She serviced some 30 of those stores, but also 40 or so stores from amongst those retained by the First Respondent. There was no evidence to suggest a special link between her and the 44 stores (or the 30 or so of them that she serviced) as distinct from her link to all 70 or so of her stores.

130. Hence, in summary, I find that the relevant transfer in this case was a transfer of 44 individual stores to the Second Respondent (a subsidiary of Homebase) and that none of the claimants was assigned to a transferred entity.

131. I understand that there are aspects of this case which continue because they are not dependent upon the findings that I have made. It will be for the parties between themselves to determine precisely what aspects of the case do continue and, if possible, to suggest directions to the Tribunal so as to enable those matters to be determined. If directions can be agreed (together with a suggested length for the further hearing) it seems to me likely that no further preliminary hearing will be necessary. The further listing of the case can be dealt with in correspondence. Indeed, it was tentatively suggested in argument that these matters might be disposed of by way of written submissions. If those matters cannot be agreed, or if the parties believe that a preliminary hearing is necessary then one or both of them should so inform the Tribunal.

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Employment Judge Andrew Clarke KC

Date: 18 October 2022

Sent to the parties on: 20 October 2022

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For the Tribunal Office