Neutral Citation Number: [2017] EWHC 3461 (Ch)

Case Nos: D30LV282/344

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LIVERPOOL DISTRICT REGISTRY

Liverpool Civil & Family Courts,
35 Vernon Street,
Liverpool,
L2 2BX.

Date of hearing: Thursday 30th November 2017
Start Time: 10.10 am. Finish Time: 12.41 p.m.

Before:

HIS HONOUR JUDGE HODGE QC
(Sitting as a Judge of the High Court)

Between:

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ROSSENDALE BOROUGH COUNCIL

- v - **Claimant**

HURSTWOOD PROPERTIES (A) LIMITED
& Others

Defendants

And between:
WIGAN COUNCIL

Claimant

- v -

PROPERTY ALLIANCE GROUP LIMITED **Defendant**

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MR. ROBIN MATTHEW QC and MR. JAMES COUSER (instructed by **Alexander Whyatt**) for the **Claimants**
MR. NICHOLAS TROMPETER (instructed by **Irwin Mitchell LLP**) for the **Defendants**

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JUDGMENT (Approved in Manchester without reference to any papers and without checking any citations)

HIS HONOUR JUDGE HODGE QC :

1. This is my extemporary judgment on the hearing of applications by the Defendants to strike out the claim form and particulars of claim in two claims, Wigan Council v Property Alliance Group Limited, D30LV344, and Rossendale Borough Council v Hurstwood Properties A Limited and five others, claim number D30LV282. Those two claims have been selected as representative test cases.

2. The Defendants, and applicants on this strike out application, are represented by Mr. Nicholas Trompeter (of counsel). The Claimants, and respondents to the strike out applications, are represented by Mr. Robin Matthew QC leading Mr. James Couser (also of counsel).

3. It has been recognised for a considerable amount of time that rate payers or potential rate payers can and do organise their affairs so as to avoid paying rates. The question in the present case is whether the arrangements entered into by the Defendants in the present cases arguably fall outside the scope of the principle that rate payers are entitled to organise their affairs legitimately so as to avoid paying rates.

4. The application in the Hurstwood case is made by notice dated 6th July 2017 and issued on 4th August 2017. The application in the Property Alliance Group case is made by application notice dated 24th July 2017 and issued on 7th August 2017. Both application notices seek the striking out of either the entirety or alternatively a particular paragraph of the particulars of claim pursuant to CPR 3.4(2) on the basis that the statement of case discloses no reasonable grounds for bringing the claim. The application notices also seek

orders that the Claimant should pay the Defendants' costs of the action on the indemnity basis.

5. The Defendants in the two cases are separate legal entities with no commercial connection to each other, being part of separate group structures with different shareholders. The only connection between them is that they are both represented by Irwin Mitchell LLP and that they have a common interest in the proceedings. The two claims are but two of a large number of very similar sets of proceedings which are currently before the Liverpool District Registry of the Chancery Division. Alexander Whyatt act for the respective Claimants to these proceedings. Irwin Mitchell act not only for these two Defendants but for the Defendants in some 25 other claims identified in a schedule to an order made by me on 29th August 2017. Depending on the outcome of the instant applications, I will need to consider consequential case management directions, not only for the instant two claims, but also for the other claims identified in the order.

6. The background to the applications is conveniently set out in the skeleton argument of Mr. Trompeter. The proceedings which give rise to the applications are for the recovery of national non-domestic rates (to which I shall refer as “business rates”). The claimed business rates relate largely, albeit in the Hurstwood claim not exclusively, to unoccupied hereditaments. The alleged liability periods in respect of which the business rates are said to be due vary from case to case. Some of these liability periods stretch back close to a decade and may give rise to limitation defences should matters get that far.

7. By virtue of section 45(1) of the Local Government Finance Act 1988 a person is liable to pay business rates for an occupied property in respect of any day in the year if four conditions are satisfied. One of those conditions is that on the day in question, the rate payer is the "owner" of the whole of the hereditament. Section 65(1) of the 1988 Act defines the owner of a hereditament as "the person entitled to possession of it".

8. The phrase "entitled to possession" in section 65(1) was considered by Mrs. Justice Arden in the case of *Brown v. City of London Corporation* [1996] 1 WLR 1070. In that case, at page 1083 letters A to B, the learned judge accepted propositions of counsel previously set out at page 1080 letters E to H as follows:

> "The definition of 'owner' in section 65(1) of the Act of 1988 refers to 'the person entitled to possession' of the hereditament and this requires one to identify the person who has the immediate legal right to actual physical possession… In contrast with the word 'occupation' the word 'possession' conveys the notion of exclusive entitlement to occupy".

9. It follows that where an occupied property is let to a tenant, the tenant is the party liable to business rates as being the person entitled to possession of it.

10. In his oral submissions Mr. Trompeter submitted that where there is a landlord and tenant relationship, it is the tenant who is the person entitled to possession as an incidence of that landlord and tenant relationship. It is said by Mr. Trompeter to be a feature common to both claims that the Defendants availed themselves of a scheme or schemes to mitigate business rate liabilities in respect of unoccupied hereditaments. Although the schemes in the two cases are not identical they are said to share a number of key elements as follows:

(1) A scheme provider incorporates a special purpose vehicle (or "SPV").

(2) The Defendant, as the case may be, grants, and the relevant SPV takes, a lease of the unoccupied hereditament (referred to as "the scheme lease").

(3) As a consequence of the foregoing, (a) the SPV becomes the "owner" of the hereditament for the purposes of section 45(1) of the 1988 Act and thereafter (b) the Defendant is no longer liable to future business rates.

(4) In the variant of the scheme adopted in the Property Alliance Group claim, contemporaneously with, or shortly after, the grant of the scheme lease the SPV is placed into members' voluntary liquidation. The SPV is then exempt from liability to business rates by virtue of regulation 4K of the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008 No 386 which exempts any hereditament

> "whose owner is a company which is subject to a winding up order made under the Insolvency Act 1986 or which has been wound up voluntarily under that Act".

(5) In the variant of the scheme adopted in the Hurstwood Claim, the SPV ends up being struck off the register pursuant to either sections 1000 or 1003 of the Companies Act 2006. By the operation of section 1012 of that Act, all property vested in the SPV, including leasehold property, is deemed to be bona vacantia and belongs to the Crown or, as appropriate, the Duchy of Lancaster or the Duke of Cornwall. Until the Crown or Duchy disclaims the leasehold property, it is the "owner" of the hereditament in question and thus liable to business rates.

11. In the course of his oral submissions, Mr. Trompeter emphasised that there were two stages to the scheme. The first was the grant of the lease of unoccupied property to an SPV. Upon the grant of that lease, the SPV became the owner of the property for rateable purposes. Secondly, and quite separately, the SPV itself acted, or omitted to act, in a way which resulted in it ceasing to be liable for business rates itself. Under the Non-MVL scheme, the company permitted itself to be dissolved. The leasehold interest then vested in the Crown or the Duchy. Alternatively, the company entered into members' voluntary liquidation. Mr. Trompeter said that it did not make any difference which course the SPV followed. After step 1, the liability for business rates had already effectively passed to the SPV.

12. The members' voluntary liquidation scheme was the subject of judicial consideration in the case of *Secretary of State for Business Innovation and Skills v PAG Management Services Limited* [2015] EWHC 2404 (Ch), reported at [2015] BCC 720. That was in the context of a public interest winding up petition presented in relation to the company PAG Management Services Limited. In that case, Mr. Trompeter points out that at paragraph 55 Mr. Justice Norris held that in principle the scheme was not by its nature contrary to the public interest.

13. In his skeleton argument, Mr. Matthew, for the Claimants, contends that that was not really what Mr. Justice Norris was saying at all because he later unreservedly condemned the business rate avoidance schemes marketed and effected by the company. What Mr. Matthew says that the judge was saying was that the promotion of schemes to avoid business rates was not of itself a

basis for saying that there was a lack of commercial probity in principle, and that the business rates avoidance scheme was not by its nature contrary to the public interest.

14. The judge went on to condemn the scheme in that case as a misuse of the insolvency legislation, demonstrating a lack of commercial probity, and as involving the creation of artificial leases incorporating elements of pretence, and the use of "placemen" in order to distance the company's owners and managers from the liquidation process.

15. I was taken in detail through Mr. Justice Norris's judgment in that case. In the course of his oral submissions, Mr. Trompeter submitted that pejorative epithets were unhelpful and a distraction from the real task of analysing whether, as a matter of law, the business rates avoidance scheme was effective. He submitted that there was nothing inherently objectionable in offering a business rates avoidance scheme as a matter of avoiding liability for business rates.

16. The question in the case before Mr. Justice Norris was whether the promotion of schemes for the mitigation or avoidance of business rates was of itself contrary to the public interest, or involved a lack of commercial probity. In the event, Mr. Justice Norris held that it was, but only because the schemes in that case also involved a misuse of the insolvency legislation. Here the question before the court is quite different. It is whether it is properly arguable that such schemes fail to achieve their intended purpose of avoiding a liability that would otherwise fall on a party for business rates. I therefore say no more about Mr. Justice Norris's decision.

17. Mr. Trompeter in his skeleton points out that, from the perspective of the Defendants, the efficacy of the schemes depend upon the validity of the scheme leases. In other words, if the scheme leases taken by the SPVs are genuine and valid, then the Defendants will have successfully divested themselves of liability to business rates as regards the unoccupied hereditaments in issue over the liability periods in question. The subsequent steps, such as members' voluntary liquidation, which the SPV proceeds to take to avoid or mitigate its own business rates liability is said to be a separate matter in which the Defendants have no involvement.

18. Finally, Mr. Trompeter says that it is important to note the Non-Domestic Rating (Collection and Enforcement) Local List Regulations 1989 No. 1058. As prescribed by Regulation 7(6):

> "No payment towards business rates needs to be made by a rate payer unless and until a requisite demand notice has been served".

19. By regulation 5(1), the charging authority is under a statutory obligation to serve such a demand notice on or as soon as practicable after 1st April in the relevant year.

20. It was made clear by Mr. Justice Burnett in *North Somerset District Council v Honda Motor Europe Limited* [2010] EWHC 1505 (QB) at paragraphs 12 and 19 that the duty on the part of the ratepayer to pay business rates arises only following the service of a valid notice under the 1989 Regulations. To put it another way, the service of a demand notice is an integral part of the cause of action entitling the charging authority to recover business rates from the ratepayer.

21. I find that a ratepayer is liable for business rates prior to the service of a demand notice, but that he is not actually obliged to pay business rates until then. The ratepayer is already subject to a liability for business rates, but he only comes under a duty to pay them upon the service of a demand notice.

22. Over the course of the months of May to June 2017, Alexander Whyatt issued the two claims on behalf of the respective local authorities. The brief details of claim endorsed on the front of the claim forms describe the claims as being for underpaid and/or unpaid national non-domestic rates that are claimed pursuant to the Local Government Finance Act 1988. In short, by those claims, each local authority seeks to challenge the efficacy of the schemes utilised by the Defendants, and to make them liable to the business rates which they would otherwise have avoided by use of the schemes. The Hurstwood Claim is for some £470,726. The Property Alliance Group claim is for some £179,614. Both sets of proceedings are said to involve or include claims for business rates in respect of historic liability periods extending back many years and, in the case of the Property Alliance Group case, close to a decade ago.

23. It is convenient at this point for me to refer to the particulars of claim. I will do so by reference to the particulars of claim in the Property Alliance Group case because they are the shorter. The particulars of claim seek two broad heads of relief in the form of two forms of declaratory relief and monetary relief. The declarations at paragraph 16 of the particulars of claim in the Property Alliance Group claim are in the following terms:

(1) A declaration that the tax scheme was ineffective and at all times the Defendant remained liable for national non-domestic rates.

(2) A declaration that Newco and/or any of the Newco's constituent companies was at all material times a sham or, if not a sham, then a nullity and/or their trustee, agent, and/or nominee or alter ego of the Defendant, or an entity that is ineffective or to be disregarded as a matter of English law.

24. Mr. Trompeter points out that, curiously, the prayer for relief at the conclusion of the particulars of claim expresses the declarations in slightly different terms. The first declaration sought is that the tax scheme represented an artifice of tax avoidance, alternatively tax evasion. The second declaration sought is that the Newco and/or any of its constituent companies was at all material times a sham or, if not a sham, then a nullity, and/or an entity that is ineffective as a matter of English law.

25. The monetary relief pleaded in paragraph 21 of the Property Alliance Group claim and paragraph 73 of the Hurstwood claim is described as an ancillary order to give effect to the declarations by ordering the Defendant to pay the total sum in respect of national non-domestic rates which has been improperly avoided by the Defendant's participation in the tax scheme.

26. The particulars of claim introduce the parties and, at paragraph 3, the Claimant's case is said to be that at all material times the Defendant (1) was liable to the Claimant in respect of national non-domestic rates relating to the premises but sought to extinguish or minimise its liability in that respect by its participation in the tax scheme described below ("the tax scheme"), and (2) had a liability in respect of national non-domestic rates for a number of

periods which it has not satisfied. Appended to these particulars is said to be a schedule setting out the periods by reference to the premises.

27. Paragraph 4 sets out the Claimant's contention that the tax scheme failed in the Defendant's objective of avoiding national non-domestic rates, remaining properly the liability of the Defendant, in that:

(1) The tax scheme was no more than an artifice or a set of contrived arrangements or transactions of tax avoidance effected by, inter alia, the establishment or use of a limited liability company combined with a non-commercial lease, not being an arrangement at arms' length, although apparently so. It is a feature of the tax scheme that the leases in question were not registrable and so were not known about by the Claimant prior to reliance being placed upon them as a means of defeating the Defendant's liability in respect of national non domestic rates.

(2) Alternatively, notwithstanding the tax scheme, the limited company at all material times was a mere nominee, agent or bare trustee of the Defendant, so that any proprietary or other realty interest held or legally owned by the limited company was held absolutely for the Defendant.

(3) Alternatively, the limited company so established was a sham or, if not a sham, then a nullity, and ineffective as a matter of English law in terms of the tax scheme.

(4) Alternatively, the tax scheme was predicated upon and involved the establishment and/or use of the limited company being procured directly or indirectly by the Defendant, and the limited company was at all material times

established for the purposes of or, as the case may be, interposed in the tax scheme for the purpose, and only for the purpose, of avoiding an existing or imminent charge to national non-domestic rates. The establishment and/or use of the limited company was thus an act of impropriety with a view to avoiding a potential or immediate legal obligation or liability, evading the law or frustrating the enforcement of the relevant legal obligation.

28. The particulars of claim then go on to set out the relevant provisions of the 1988 Act and Regulations made under it governing the collection of business rates.

29. At paragraph 12 the tax scheme is set out. It is said that the Defendant determined, on dates unknown to the Claimant, either itself, wholly or in part, to set up and procure arrangements to effect the tax scheme, or the Defendant retained, for valuable consideration, the services of a provider of such schemes to avoid or evade, as the case may be, a liability to national non-domestic rates. The Claimant is said to be unable presently to identify the scheme provider, if any, or the precise date upon which the services of the scheme provider were retained, such information being within the knowledge of the Defendant, but it reserves the right to provide further and better particulars on that issue once disclosure has been provided. It is said that at all material times the scheme provider, if any, held itself out as offering for reward the tax scheme which had as its sole aim and purpose providing contrived arrangements for those in the position of the Defendant to try and avoid the incidence of national non-domestic rates. Pursuant to the tax scheme, the Defendants, alternatively the scheme provider acting on behalf of and at the

behest of the Defendants, acquired a limited company solely for the purposes of the arrangements effected pursuant to the tax scheme, being newly incorporated companies, the details of which are set out in a table. Once acquired or procured for the purposes of the tax scheme, the Defendant arranged, directly or indirectly, that Newco be granted short leases, not being liable for statutory registration, upon the terms recited below. Thus it was arranged that each Newco company held a short lease, and undertook no activity whatsoever, with a view to its dissolution, either compulsorily or otherwise, so providing a statutory exemption, or for some other reason unexplained to the Claimant, but possibly that the national non-domestic rates liability was not that of the Defendants but was that of each Newco company, which had no means to discharge it.

30. The Claimant then proceeds to set out its case in relation to each of the three named Newcos. I will refer only to the case in relation to the first of those new companies, HR Packaging. In relation to that company the claim is said to be as follows:

(1) The Claimant is not presently able to plead to the precise date but it believes the date to be on or around 12th December 2008, the Defendant purposefully granted HR Packaging a lease, alternatively a sub-lease or under-lease, over Unit 5B South Lancs Industrial Estate, on terms which were uncommercial, being terms pertinent to effecting the tax scheme only.

(2) The Claimant is not presently able to plead to the terms of the HR Packaging lease with precision and reserves the right to provide further

and better particulars in that respect upon receipt of disclosure. However, the Claimant's understanding of the HR Packaging lease, based upon other leases granted in connection with the tax scheme, is said to be as follows:

i) the consideration for the lease was £1 per annum or a peppercorn per annum or some other sum that it was never intended would be collected and which was in fact never collected, alternatively, never collected in full;

ii) the lease was terminable by the Defendant on giving short notice to HR Packaging;

iii) the lease did not contain the usual clause allowing the Defendant to forfeit the lease and re-enter the unit in the event of the company becoming insolvent or entering into any of the insolvency regimes contained within the Insolvency Act 1986;

iv) the Claimant will refer to the terms of the lease in full at trial for its true meaning and effect.

(3) HR Packaging never carried on any business whatsoever and it was never intended that it should do so.

(4) HR Packaging, after incorporation and during the winding-up, merely held the lease, along with a number of other disclaimed leases, and had no other assets, save the sums paid up on its issued capital.

(5) On 16th December 2008 a declaration of solvency was sworn by Mr. Brian Russell in his capacity as director of HR Packaging.

(6) On the same day, and apparently after the lease being entered into, HR Packaging purportedly was placed into members' voluntary liquidation. However, no liquidator was appointed.

(7) Thereafter, no meaningful further steps were taken in the HR Packaging liquidation and, in particular, the lease was left purportedly running until such time as the Defendant wished to re-enter the unit again. There were no material or continuing costs to HR Packaging in holding the lease, it having no assets, prospects or business.

(8) On 31st May 2011 the Secretary of State for Business, Innovation and Skills presented a public interest winding-up petition against HR Packaging, and on 27th July 2011 the company was wound up by order of the Manchester District Registry of the High Court.

31. I have already set out the terms of the declaration sought. At paragraphs 17 and 18 are said to set out particulars of tax avoidance:

> "17. The Defendant entered into the tax scheme for the sole purpose of defeating the lawful liability of national non-domestic rates in circumstances where the Defendant was not insolvent and accordingly was not entitled to rely upon the exception to national non-domestic rates provided to insolvent companies.
>
> 18. The tax scheme is predicated upon the interpositioning of Newco and/or any of Newco's constituent companies between the Claimant and the Defendant in circumstances where Newco and/or any of Newco's constituent companies has no business purpose or rationale whatsoever and is or was never intended to have any such business purpose or rationale."

32. Particulars of sham are set out at paragraph 19. I quote:

> "The sole or dominant and principal purpose motivating the interpositioning of Newco and/or any of Newco's constituent

> companies between the Claimant and the Defendant was to give the impression to the Claimant and others that all or any of the leases were a consequence of a genuine commercial/business transaction and a valid commercial document rather than a mechanism within the tax scheme arrangements apparently affecting the legal title and the occupation of the premises and thus providing an excuse for improperly avoiding the incidence of national non-domestic rates by claiming relief therefrom on a wholly insubstantial and improper basis".

33. Particulars of nullity and/or legal ineffectiveness are set out at paragraph 20.

> "As Newco and/or any of Newco's constituent companies was established without any genuine business or other commercial purpose or rationale and was instead intended only as a means of improperly avoiding charges to national non-domestic rates Newco and/or any of Newco's constituent companies was from its incorporation and the outset a nullity and/or of no legal effect in that:
>
> (i) the veil of incorporation may be pierced by the court to ascertain the true and just position;
>
> (ii) all or any of the leases are either properly to be disregarded as a mere sham or nullity or to be treated at all material times as the beneficial property of the Defendant."

34. I have already summarised the paragraph relating to ancillary orders for monetary relief and I have already summarised the terms of the declarations as sought in the prayer for relief. There is as yet no defence in the Property Alliance Group Limited claim. A defence has been served in the Hurstwood claim. In the course of his oral address, Mr. Matthew referred to a few provisions in that defence. In particular, he drew the court's attention to sub-paragraph 11.1 where it is pleaded that the Defendants have taken lawful advantage of the tax scheme as a means of avoiding liability to a non-domestic rate as regards a number of the premises. At sub-paragraph 11.2 it is said that the Defendants are not liable to any non-domestic rate either as alleged or at all. At paragraph 15 it was admitted that the Defendants retained the services

of a scheme provider in order lawfully to avoid liability to a non-domestic rate.

35. At paragraph 29 it was admitted that the rent passing under the tax scheme leases was never actually collected. The Defendants did not expect to collect any such rent unless the tax scheme companies were able to sub-let the premises in question.

36. Mr. Trompeter addresses the legal principles applicable to strike-out applications at paragraphs 37 through to 41 of his skeleton argument. Under CPR 3.4(2) the court may strike out a statement of case if it appears (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim, (b) that the statement of case is an abuse of the court's process or otherwise likely to obstruct the just disposal of the proceedings, or (c) that there has been a failure to comply with a rule, practice direction or court order.

37. Practice Direction 3A adds that examples of cases where the court may conclude that particulars of claim fall within rule 3.4(2)(a) are those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the Defendant.

38. The principles applicable to the jurisdiction are said to be well known and need not be set out in any detail. They are said to be found in, for example, *Charter UK Limited v. Nationwide Building Society* [2009] EWHC 1002 (TCC) at paragraph 16 per Mr. Justice Akenhead, albeit relating to the circumstances in which it is appropriate to strike out parts of pleadings.

39. Ultimately, the basis upon which strike-out applications are capable of being made is set out in the Civil Procedure Rules. Cases may fall into one or more of the categories within those rules. The starting point for an application is for the party complaining of the pleading to set out how it says that the document or passages fall within one or more of the provisions of the rule. It is the function of the court simply to weigh the complaint or complaints against the particular pleading, and on the facts of the particular case, and decide whether or not an allegation is sufficiently irrelevant or incomplete or in breach of the rules, or a combination thereof, that it is appropriate to order all or part of the pleading to be struck out as a consequence.

40. Reference is made to the judgment of Miss Sara Cockerill QC sitting as a Deputy Judge of the High Court in *Ventra Investments Limited v Bank of Scotland plc* [2017] EWHC 199 (Comm).

41. In his written skeleton argument Mr. Matthew points out that, summarily and briefly, the requirements of CPR 3.4(2) that there are no reasonable grounds for bringing the claims require the particulars of claim to disclose no legally recognisable claim. It is said that the court must be certain that the claim will fail whilst not striking out areas of developing jurisprudence. Furthermore, it is said that if the claim is defective, then the court should give the Claimant a chance to cure it.

42. Addressing that last point, in his oral submissions Mr. Trompeter submitted that a party should only be given a chance to cure a defective pleading where there are grounds for concluding that the relevant party is ready, willing and able to cure the relevant defect. Mr. Trompeter also submitted that defects in a

statement of case cannot be cured as a matter of construction simply by recourse to correspondence passing between the parties or their solicitors.

43. Against that background I turn to the parties' submissions. Mr. Trompeter had produced a detailed written skeleton argument extending to some 82 paragraphs over 34 pages. In it he had referred the court to 20 case law authorities, and he added a further two cases during the course of his oral submissions. Over the course of some two hours and 20 minutes, Mr. Trompeter presented a well-structured and eloquent argument in support of his strike-out application, addressing six points, namely (1) aspects of the statutory scheme for the collection of business rates; (2) observations about the scheme used in the instant cases; (3) a review of the particulars of claim; (4) the legal principles applicable on a strike-out application; (5) the substantive legal principles identified by Mr. Matthew and his junior in their written skeleton argument; and (6) explaining why the particulars of claim in the instant cases should in fact be struck out.

44. For the Claimants, Mr. Matthew, assisted by his junior, produced a shorter skeleton argument, although after the short adjournment yesterday he produced a further written note explaining how the claim for business rates arose. In his skeleton argument, Mr. Matthew had referred to an additional 12 case law authorities, to which he added a further two although, according to Mr. Trompeter, he was provided with those additional authorities only just before Mr. Matthew began his oral address after the short adjournment yesterday afternoon. Mr. Matthew addressed me for a little over two hours. Mr. Trompeter then addressed me in reply for about 45 minutes yesterday

afternoon. There was a brief rejoinder from Mr. Matthew for about five minutes. The hearing concluded yesterday at about 5 p.m. when I adjourned to ten o'clock this morning in order to deliver this extemporary judgment.

45. In my judgment, the appropriate and logical order in which to address the issues I have to decide is as follows: first I should consider whether the scheme leases are sham transactions. If they are, then the scheme will have failed in its objective of divesting the Defendants of liability for business rates, and it will be unnecessary to go on to consider the potential application of the *Ramsay* principle.

46. Secondly, and only if the scheme leases are genuine, should I go on to consider the application of the *Ramsay* principle. Thirdly, and only if the *Ramsay* principle has no application, should I go on to consider whether the separate corporate existence of the relevant SPVs can be disregarded, effectively by piercing the corporate veil. I bear firmly in mind that I am not trying this action; that is for the future, if at all. I am simply concerned here with a strike-out application, where the focus is firmly on considering whether the statements of case disclose no reasonable grounds for bringing the claim.

47. I proceed, first, to consider the question of whether the scheme leases can arguably be regarded as sham transactions. Mr. Trompeter points out that from the Defendants' perspective, the efficacy of the schemes depends upon the validity of the scheme leases. It is only if they are properly to be considered as shams that the schemes will have failed in their objective of divesting the Defendants of liability to business rates.

48. Mr. Trompeter therefore goes on to consider what is meant by a sham transaction. Unsurprisingly, he starts with the classic definition of "sham" to be found in the judgment of Diplock L.J. in *Snook v London & West Riding Investments Limited* [1967] 2 QB 802 at letters C to E:

> "I apprehend that if the legal concept of 'sham' has any meaning in law it means acts done or documents executed by the parties to the sham which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations, if any, which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities: for acts or documents to be a sham, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

49. Mr. Justice Neuberger put the matter in slightly different terms in *National Westminster Bank plc v Jones* [2001] 1 BCLC 98 at paragraph 45:

> "The whole point of a sham provision or agreement is that the parties intend to give the impression that they are agreeing that which is stated in the provision or agreement while in fact they have no intention of honouring their respective obligations or enjoying their respective rights under the provision or agreement".

50. Mr. Trompeter makes three points about that. First, he says, citing authority, that a sham imports a degree of dishonesty. It involves an element of pretence, where parties do one thing and say another. The parties must have intended to create different rights and obligations from those appearing from the relevant document; and, in addition, they must have intended to give a false impression of those rights and obligations to third parties.

51. Secondly, before a transaction can be construed as a sham, all the parties to the transaction must share the common intention that the document in question

will not create the legal rights and obligations which it gives the appearance of creating.

52. Thirdly, it has been made clear repeatedly that a transaction is not rendered a sham merely because it is entered into for an artificial purpose.

53. In my judgment, all three propositions are amply supported by the authorities cited in support of them by Mr. Trompeter. In the property context, the third of those propositions is said to be well illustrated by a trilogy of cases, namely, *Wentworth Securities Limited v Jones* [1980] AC 74, *Hilton v Plustitle Limited* [1989] 1 WLR 149, and *Belvedere Court Management Limited v Frogmore Developments Limited* [1997] QB 858; and also by a fourth case, that of *National Westminster Bank plc v Jones* (previously cited).

54. Mr. Trompeter proceeds to consider those cases in some detail at paragraphs 50 through to 54 of his written skeleton argument. I proceed to pass over the *Wentworth* and *Plustitle* cases and go immediately to the *Belvedere* case. There the freeholder of a block of flats had entered into an apparently artificial transaction with a company it effectively owned as part of an elaborate scheme the purpose of which had been significantly to reduce the benefit of the rights which the tenants of the flats would otherwise have had under the provisions of the Landlord and Tenant Act 1987. In County Court proceedings the tenants had sought declaratory relief that the transaction was a sham, intended to deprive the tenants of their rights under the 1987 Act. That argument had been dismissed at trial, and the Court of Appeal agreed.

55. In the course of his judgment Sir Thomas Bingham, the Master of the Rolls, said (at page 876 letters D to F):

> " I share the judge's view that these arrangements were not a sham. The parties were not doing one thing and saying another. I would also accept the judge's view that the Atherton leases were an artificial device intended to circumvent a result the Act would otherwise have brought about, but the finding of such a device did not defeat the reversioners in *Jones v Wrotham Park Settled Estates* nor the lessor in *Hilton v Plustitle Limited* and I am not for my part satisfied that in the field of real property the principles in *Ramsay v Inland Revenue Commissioners* and *Furness v Dawson* entitle the court simply to ignore or override apparently effective transactions which on their face confer an interest in land on the transferee. Many transactions between group companies may be artificial. That does not entitle the court in ordinary circumstances to treat such transactions as null."

56. To a similar effect, in the *National Westminster Bank* case, Mr. Justice Neuberger said (at paragraph 30):

> "In the absence of a specific statutory provision to that effect, it appears to me that as a matter of principle it is not open to a party to challenge a transaction simply on the basis that it was entered into solely to obtain an advantage as a result of a statutory provision. The fact that the purpose for which a transaction has been entered into can be characterised as artificial in no way invalidates the transaction. An artificial transaction is not the same as a sham transaction".

57. Mr. Trompeter submits that the facts of the *Westminster Bank* case are particularly illuminating. There, Mr. and Mrs. Jones had granted a tenancy of a farm to a company of which they were the directors and beneficial owners. It was admitted that the formation of the company and the grant of the tenancy were artificial, in that they occurred solely because the Defendants wished to do their best to protect the farming business and their home from being taken from them and sold over their heads by the bank.

58. During evidence, it became apparent that when the tenancy was granted Mr. Jones did not know the level of rent and instalments and had no idea when they fell due. Moreover, after the tenancy was granted, the company had

made no attempt whatsoever to pay any part of the rent, and no thought had been given by either Mr. and Mrs. Jones, in their capacity as landlords, to enforcing their rights, such as forfeiting the lease. Nevertheless it was not shown that the agreement was a sham.

59. At paragraph 68 Mr. Justice Neuberger said this:

> "Both principle and the authorities indicate that the court is slow to find that an agreement is a sham and that before the court can reach such a conclusion it must be satisfied that the purported agreement is no more than a piece of paper which the parties have signed with no intention of its having any effect save that of deceiving a third party and/or the court into believing that the purported agreement is genuine. Taking all the evidence together, I think that the bank has plainly fallen short of discharging the onus which it undoubtedly has of establishing that the agreement was a sham."

60. Drawing all of the threads together, Mr. Trompeter summarises the legal position on sham at paragraph 55 of his written skeleton argument:

(1) An artificial transaction is not the same as a sham transaction.

(2) Persons are entitled to arrange their affairs to their best advantage, so long as the law allows it.

(3) A transaction cannot be challenged merely because it was entered into solely to obtain an advantage as a result of a statutory provision.

(4) The court has no power to fill a gap in a statute.

(5) A transaction is only a sham if the parties thereto have the dishonest common intention that the transaction is not going to create the legal rights and obligations which it gives the appearance of creating.

(6) The court is slow to find that an agreement is a sham.

61. In my judgment, all six of those propositions are amply supported by the authorities cited by Mr. Trompeter.

62. Mr. Trompeter goes on to apply those principles to the present case at paragraphs 71.5 to 71.8 of his written skeleton argument. He submits that from the perspective of the Defendants, the efficacy of the schemes depends entirely upon their first stage, or more specifically upon the validity of the scheme leases taken by the SPVs. Self-evidently, they can only be treated as invalid or as nullities if they are properly to be categorised as shams. To put it another way, in order to succeed in their claims, he says that the local authorities have to plead and prove that the scheme leases are sham transactions of no legal effect. It is for this reason he says that it becomes necessary to appreciate both the juristic nature of a sham and the requirements for pleading dishonesty.

63. He submits that the particulars of claim do at points suggest or insinuate that the scheme leases are shams or nullities. Crucially, however, he says this: first, that the particulars of claim do not allege that the Defendants and the relevant SPV entered into the scheme leases with a dishonest common intention of deceiving third parties. In fact, there is said to be no allegation of dishonesty whatsoever, let alone an allegation of a dishonest common intention. Furthermore, contrary to the requirements on pleading dishonesty to be found in the decision of the House of Lords in *Three Rivers District Council v Bank of England* (No.3) [2003] 2 AC 1, in particular at paragraphs 184 and following per Lord Millett, the particulars of claim do not plead any

primary facts on which the Claimants rely and which justify any inference of dishonesty in relation to the scheme leases. At most, they allege only that the scheme leases were uncommercial transactions.

64. The fact that a transaction may be described as uncommercial or artificial does not render it a sham. Although the particulars of claim are said to contain some oblique references to sham transactions, it does not appear as though the Claimants actually allege that they are shams at all. The particulars of claim are said to be replete with unqualified references to the Defendants granting, and the SPVs taking, scheme leases of the hereditaments in question. A letter written by the Claimants' solicitors of 16th August 2017 is said to clarify the true nature of the Claimants' cases, namely an acceptance that the scheme leases can "probably be accepted" as genuine.

65. In his skeleton argument, Mr. Matthew addressed the issue of sham at paragraph 16. There it is said that as a consequence of the leases in question being granted, in light of the apparent scheme, to a newly incorporated company with no genuine commercial raison d'etre, the overall transactions may well constitute a sham, depending on facts to be established by the documentary and oral evidence of, principally, the Defendants, within the meaning given to that term in *Snook*.

66. The arrangements in the tax scheme which involve the manipulation of the insolvency legislation are said to be in all probability dishonest on the criteria set out by the Supreme Court in the recent decision of *Ivey v Genting Casinos UK Limited* [2017] UKSC 67 in that the arrangements purported to be something which they were not, irrespective of the quite separate

consideration of whether the scheme in question happens to be clever and well thought out or required a considerable degree of skill to devise and operate.

67. In my judgment, the particulars of claim contain no sufficient allegation that the scheme leases were shams. At the highest, all that is pleaded is that they were artificial, and not that they were sham transactions. In my judgment, on a proper reading of the particulars of claim, there is no sufficient allegation of sham to satisfy the requirements of the *Snook* case. An artificial transaction is not the same as a sham transaction, and a transaction cannot be challenged merely because it was entered into solely to obtain an advantage as a result of a statutory provision. A transaction is only a sham if the parties to it had the common intention, which necessarily is a dishonest intention, that the transaction should not in fact create the legal rights and obligations which it gives the appearance of creating. There is nothing in the material in the particulars of claim that gives rise to any reasonable grounds for bringing a claim that the scheme leases were sham documents, which did not in fact have the legal effect that on their face they purport to create.

68. In my judgment, there is no arguable basis for saying that these were not genuine leases. Indeed, the whole purpose of the business rates avoidance scheme predicated that the leases were genuine. Thus, on the issue of sham I am satisfied that no reasonable grounds for maintaining that case have been shown.

69. It is therefore necessary to go on to consider whether, on the footing that the leases were genuine, they can arguably be challenged by the application of the

principles to be derived from the decision of the House of Lords in the case of *Ramsay v IRC* [1982] AC 300.

70. In the course of his oral submissions, Mr. Trompeter described *Ramsay* as involving a transaction by which the tax payer acquired shares for X pounds and sold them for X minus Y pounds, and the question was whether that gave rise to a loss for the purposes of particular provisions of the Finance Act 1965.

71. It is necessary to look to see the basis of the House of Lords' reasoning in *Ramsay*. I begin with the leading speech of Lord Wilberforce. At page 323 letter C Lord Wilberforce began by restating some familiar principles. The first was that a subject is only to be taxed upon clear words and not upon intendment or upon the equity of an Act of Parliament. The second was that a subject is entitled to arrange his affairs so as to reduce his liability to tax. The fact that the motive for a transaction might be to avoid tax did not invalidate it unless a particular enactment so provided. It must be considered according to its legal effect. The third was that it was for the tribunal of fact to decide whether a document or a transaction was genuine or a sham. In that context, to say that a document or a transaction was a sham meant that, while professing to be one thing, it was in fact something different. To say that a document or transaction was genuine meant that in law it was what it professed to be and it did not mean anything more than that.

72. The fourth principle was that given that a document or transaction was genuine, the court could not go behind it to some supposed underlying substance.

73. At paragraph 325 at letters D to E Lord Wilberforce said that earlier authority showed that although separate steps were genuine and had to be accepted, the court could, on the basis of the findings made and of its own analysis in law, consider a scheme as a whole, and was not confined to a step by step examination.

74. The ratio of the case is set out at page 326 between letters D and F. There Lord Wilberforce said that capital gains tax was created to operate in the real world and not that of make believe. It was a tax on gains, or gains less losses, and not on arithmetical differences. To say that a loss or gain which appeared to arise at one stage in an indivisible process, and which was intended to be, and was, cancelled out by a later stage, so that at the end of what was brought as, and planned, as a single continuous operation, there was not such a loss or gain as the legislation was dealing with, was, in Lord Wilberforce's opinion, well, and indeed essentially, within the judicial function.

75. I was also referred by Mr. Matthew to what Lord Fraser of Tullybelton had to say at page 337, letters C to D:

> "An agreement which was really a hire purchase agreement but which masqueraded as a lease would be a sham. Although none of the steps in these cases was a sham in that sense, there still remained the question whether it was right to have regard to each step separately when it was so closely associated with other steps with which it formed part of a single scheme".

76. I turn next to one of Mr. Trompeter's additional authorities, the case of *MacNiven v Westmoreland Investments Limited* [2001] UKHL 6 reported at [2003] 1 AC 311. At paragraph 1, Lord Nicholls of Birkenhead reminded himself what the House had decided in *Ramsay*. He said that the very phrase "the *Ramsay* principle" was potentially misleading. In the *Ramsay* case, the

House had not enunciated any new legal principle. What it had done was to highlight that, confronted with new and sophisticated tax avoidance devices, the court's duty was to determine the legal nature of the transactions in question and then relate them to the fiscal legislation.

77. The *Ramsay* case was said to bring out three points in particular. First, when it was sought to attach a tax consequence to a transaction, the task of the courts was to ascertain the legal nature of the transaction. If that emerged from a series or combination of transactions intended to operate as such, it was that series or combination which might be regarded. Courts were entitled to look at a pre-arranged tax avoidance scheme as a whole. It mattered not whether the parties' intention to proceed with a scheme through all its stages took the form of a contractual obligation or was expressed only as an expectation without contractual force.

78. Second, that was said not to be to treat a transaction, or any step in a transaction, as though it were a sham, meaning thereby that it was intended to give the appearance of having a legal effect different from the actual legal effect intended by the parties. Reference was made to the classic definition of Diplock L.J. in *Snook*. Nor was it to go behind a transaction for some supposed underlying substance. What that did was to enable the court to look at a document or transaction in the context to which it properly belonged.

79. Third, having identified the legal nature of the transaction, the courts must then relate this to the language of the statute. For instance, if the scheme had the apparently magical result of creating a loss without the tax-payer suffering

any financial detriment, was that artificial loss a loss within the meaning of the relevant statutory provision?

80. I was taken to a number of passages in the speech of Lord Hoffmann. At paragraph 28, Lord Hoffmann stated that everyone was in agreement that *Ramsay* was a principle of construction; but he went on to consider what was the principle.

81. At paragraph 30, Lord Hoffmann pointed out that *Ramsay* had been concerned with a tax avoidance scheme designed to manufacture a capital loss to set off against a capital gain. Both the acquisition and sale of the shares in that case had formed part of a pre-planned series of transactions by which the alleged loss was exactly balanced by a gain which was alleged to fall within an exemption from the charge. The aggregate effect was said to be that the tax-payer suffered no loss except the payment of a fee to the promotors of the scheme.

82. At paragraph 32, Lord Hoffmann pointed out that there had never been any commercial possibility that the transactions would not have cancelled each other out. Therefore, notwithstanding the juristic independence at each of the stages of the circular transaction, the commercial view would have been to lump them all together, as the parties themselves had intended, and to describe them as a composite transaction which had no financial consequences. The innovation in the *Ramsay* case was said to be to give the statutory concepts of disposal and loss a commercial meaning. The new principle of construction was a recognition that the statutory language was intended to refer to commercial concepts, so that in the case of a concept such as a "disposal", the

court was required to take a view of the facts which transcended the juristic individuality of the various parts of a pre-planned series of transactions.

83. At paragraph 35, Lord Hoffmann said that what Lord Wilberforce had been doing in the *Ramsay* case was no more, but certainly no less, than to treat the statutory words "loss" and "disposal" as referring to commercial concepts, to which a juristic analysis of the transaction, treating each step as autonomous and independent, might not be determinative.

84. At paragraph 41, Lord Hoffmann said that in saying that the transactions in the *Ramsay* case were not sham transactions, one was accepting the juristic categorisation of the transactions as individual and discrete, and saying that each of them involved no pretence. They were intended to do precisely what they purported to do - they had a legal reality; but in saying that they did not constitute a real disposal giving rise to a real loss one was rejecting the juristic categorisation as not being necessarily determinative for the purposes of the statutory concepts of disposal and loss as properly interpreted. The contrast was said to be with a commercial meaning of those concepts; and in saying that the income tax legislation was intended to operate in the real world one was again referring to the commercial context, which should influence the construction of the concepts used by Parliament.

85. At paragraph 58, Lord Hoffmann addressed the limits of *Ramsay*. The limitations of the *Ramsay* principle were said to arise out of the paramount necessity of giving effect to the statutory language. One could not elide the first and fundamental step in the process of construction, which was to identify the concept to which the statute refers. Lord Hoffmann readily accepted that

many expressions used in tax and other legislation could be construed as referring to commercial concepts, and that the courts were today readier to give them such a construction than they were before the *Ramsay* case, but that was not always the case. Taxing statutes often referred to purely legal concepts; they used expressions of which a commercial man, asked what they meant, would say: "You had better ask a lawyer".

86. Then, crucially, Lord Hoffmann said:

> "If a transaction falls within the legal description it makes no difference that it has no business purpose. Having a business purpose is not part of the relevant concept. If the disregarded steps in *Furness v Dawson* had involved the use of documents of a legal description which attracted stamp duty, duty would have been payable".

87. At paragraph 62, Lord Hoffmann said that when the statutory provisions did not contain words like "avoidance" or "mitigation", he did not think that it helped to introduce them. The fact that steps taken for the avoidance of tax are acceptable or unacceptable was the conclusion at which one arrived by applying the statutory language to the facts of the case; it was not a test for deciding whether it applied or not.

88. Mr. Matthew cited the decision of the Hong Kong Court of Final Appeal in *Collector of Stamp Revenue v Arrowtown Assets Limited* [2003] HKCFA 52. Although not cited to me, I find the observations of Permanent Judge Mr. Justice Chan at paragraph 6 helpful. There he said that what the *Ramsay* principle entailed, as elaborated and developed in subsequent cases, was this: that when faced with a tax avoidance scheme, the court's task was to ascertain the nature of the transaction, or composite transactions, in question, and the true meaning of the relevant statutory provision, having regard to the purpose

and intention of the legislation, and then apply it to the facts of the case, not taking into account any steps in the transactions which had no commercial purpose other than to avoid tax. The court adopted a purposive construction to the tax legislation and applied it to the end result of the transactions.

89. I was taken to the judgment of Lord Millett at paragraph 35. There he said that the driving principle in the *Ramsay* line of cases continued to involve a general rule of statutory construction, and an unblinkered approach to the analysis of the facts. The ultimate question was whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically. Where schemes involved intermediate transactions, having no commercial purpose, inserted for the sole purpose of tax avoidance, it was quite likely that a purposive interpretation would result in such steps being disregarded for fiscal purposes, but not always. *MacNiven* was said to be a good example of a case where a purposive interpretation of the statute, and its application to the facts, did not dictate excluding the tax-payer's payment of interest from the statutory provision, treating such payments as deductible charges on income. On the true construction of the statute, it mattered not that there had been a circular movement of money between the debtor and the tax-exempt creditor to fund the relevant interest payment, having no commercial purpose other than to avail themselves of an allowable tax loss. Lord Millett, of course, was the driving force for the *Ramsay* principle in his capacity as counsel for the Revenue in the *Ramsay* case itself.

90. I was also taken by Mr. Matthew to the judgment of Mr. Justice Lewison in the case of *Bury v Revenue & Customs Commissioners* [2011] UKUT 81

(TCC), reported at [2011] STC 1057. At paragraph 31 Mr. Justice Lewison stated his conclusions on what he described as an array of learning on the *Ramsay* principle:

(i) The *Ramsay* principle is a general principle of statutory construction.

(ii) The principle is two-fold and it applies to the interpretation of any statutory provision (a) to decide on a purposive construction exactly what transaction will answer to the statutory description, and (b) to decide whether the transaction in question does so.

(iii) It does not matter in which order these two steps are taken, and it may be that the whole process is an iterative process.

(iv) Although the interpreter should assume that a statutory provision has some purpose, the purpose must be found in the words of the statute itself. The court must not infer a purpose without a proper foundation for doing so.

(v) In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words but must have regard to the context and scheme of the relevant Act as a whole.

(vi) However, the more comprehensively Parliament sets out the scope of a statutory provision or description, the less room there will be for an appeal to a purpose which is not the literal meaning of the words. It is one thing to give the statute a purposive construction; it is another to rectify the terms of highly prescriptive legislation in order to include provisions which might have been included but are not actually there.

(vii) In looking at particular words that Parliament uses, what the interpreter is looking for is the relevant fiscal concept.

(viii) Although one cannot classify all concepts a priori as commercial or legal, it is not an unreasonable generalisation to say that if Parliament refers to some commercial concept such as a gain or loss it is likely to mean a real gain or a real loss rather than one that is illusory, in the sense of not changing the overall economic position of the parties to a transaction.

(ix) A provision granting relief from tax is generally, though not universally, to be taken to refer to transactions undertaken for a commercial purpose, and not solely for the purpose of complying with the statutory requirements of tax relief. However, even if a transaction is carried out in order to avoid tax, it may still be one that answers the statutory description.

(x) In approaching the factual question whether the transaction in question answers the statutory description, the facts must be viewed realistically.

(xi) A realistic view of the facts includes looking at the overall effect of a composite transaction rather than considering each step individually.

(xii) A series of transactions may be viewed as a composite transaction where the series of transactions is expected to be carried through as a whole, either because there is an obligation to do so or because there is an expectation that they will be carried through as a whole, and no likelihood in practice that they will not.

(xiii) In considering the facts, the fact-finding tribunal should not be distracted by any peripheral steps inserted by the actors that are in fact irrelevant to the way in which the scheme was intended to operate.

(xiv) In considering whether there is no practical likelihood that the whole series of transactions will be carried out, it is legitimate to ignore commercially irrelevant contingencies and to consider it without regard to the possibility that, contrary to the intentions and expectations of the parties, it might not work as planned. Even if the contingency is a real commercial possibility, it may be disregarded if the parties proceeded on the basis that it should be disregarded.

91. Mr. Matthew relied in particular on the principles stated at (viii) through to (xiii). Mr. Trompeter relied in particular on the principles stated at (i), (v) and (vi).

92. Mr. Trompeter's second additional authority was the decision of Mr. Justice Mann in the case of *Westbrook Dolphin Square Limited v Friends Life Limited (No. 2)* [2014] EWHC 2433 (Ch), reported at [2015] 1 WLR 1713. That was a claim in which the claimant was seeking a declaration that it was entitled to acquire the freehold of a large residential complex built in the 1930s and known as Dolphin Square. The application was made under the Leasehold Reform, Housing and Urban Development Act 1993. The claimant was the nominee of the tenants claiming the right and served a notice under that Act; and the defendant, which was the freeholder of the property, challenged the validity of that notice and the entitlement of the claimant, which was a nominee purchaser, to purchase.

93. The judgment is a lengthy one. At paragraph 100 Mr. Justice Mann found that it was plain that the Westbrook Group as a whole had set up the present structure with a view to being able to enfranchise, and that it had been done with an eye to two specific subsections so that the SPVs were not controlled by any one body. It was said to be a somewhat elaborate and carefully crafted scheme. There was said to be no particular commercial purpose behind the particular scheme; it had been done for enfranchisement purposes and the claimant had not really contended otherwise.

94. At paragraph 128, Mr. Justice Mann observed that the argument for the defendant had not involved saying that the Westbrook structure had not conferred the interests which it purported to confer. The defendant's argument was that those arrangements were not on their true construction within the meaning of the Act because of their artificiality and purpose.

95. At paragraph 134, Mr. Justice Mann said that the defendant's argument would have had no basis were it not for section 5(5). The defendant used that to say that a person could not be a tenant of the flat under a long lease for the purposes of section 5 if the only reason that he had become one was as a result of a scheme which had no purpose other than to avoid the application of subsections 5(5) and 5(6). That argument was said not to fit the reasoning and decision in the *Arrowtown* case: it did not go to the quality of the interest that the SPVs had, it merely went to motivation, and motivation by itself was not the basis of the decision in the *Arrowtown* case, or indeed other cases in the *Ramsay* line.

96. At paragraph 135, Mr. Justice Mann said that in his view that exposed the argument for what it was, which was not so much an attempt to construe words in the statute but to divine a purpose behind a provision in the statute, extract that purpose, and then apply a principle that a person should not be able to evade that purpose because it was Parliament's purpose.

97. At paragraph 139, Mr. Justice Mann said that at the heart of the Defendant's submissions was his case that if Parliament had appreciated that this sort of thing could happen, it would have legislated to prevent it. That might or might not be so, but it was not determinative of much. The same point was said to have been dealt with in *Jones v Wrotham Park Estates*.

98. One of Mr. Matthew's additional authorities was the case of *UBS AG v Revenue & Customs Commissioners* [2016] UKSC 13, reported at [2016] 1 WLR 1005. The effect of the decision is summarised in the headnote. In considering whether a scheme devised to be used by a tax-payer had achieved its intended tax advantage or exemption, the court would adopt a purposive approach to the enactment in question in order to determine the nature of the transaction to which the enactment was intended to apply, and would then decide whether the tax-payer's transaction, which might be made up of a number of elements intended to work together, answered to the statutory description; but since tax statutes were generally concerned with real world transactions with real world economic effects, it was likely that intermediate transactions devoid of business or commercial purpose, and inserted into a scheme solely for the purpose of tax avoidance, would be disregarded, as would commercially irrelevant contingencies included to create an acceptable

risk that the scheme might not work as planned; but that ultimately each case would turn on the interpretation of the particular statutory provisions and its application to the facts of the case.

99. The leading judgment was delivered by Lord Reed. At paragraph 61 Lord Reed identified two features which the *Ramsay* case had done away with. The first was a literal interpretation of tax statutes, and the second was an insistence on applying the legislation separately to the individual steps in composite schemes. Lord Reed said that the significance of the *Ramsay* case had been to do away with both those features. First, it extended to tax cases the purposive approach to statutory construction which was orthodox in other areas of the law. Secondly, and equally significantly, it established that the analysis of the facts depended on that purposive construction of the statute. Thus, in *Ramsay* itself, the terms "loss" and "gain", as used in capital gains tax legislation, were purposively construed as referring to losses and gains having a commercial reality. Since the facts concerned a composite transaction forming a commercial unity, with the consequence that the commercial significance of what had occurred could only be determined by considering the transaction as a whole, the statute was construed as referring to the effect of that composite transaction.

100. At paragraph 63, Lord Reed referred to a summary of the position in the *Barclays Mercantile* case. The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply; and then to decide whether the actual transaction, which might involve considering the overall effect of a

number of elements intended to operate together, answered to the statutory description.

101. At paragraph 65, Lord Reed said that everything depended on the construction of the provision in question. Some enactments, properly construed, conferred relief from taxation even where the transaction in question formed part of a wider arrangement undertaken solely for the purpose of obtaining the relief.

102. The crux of the decision is at paragraphs 67 to 68. References to reality should not be misunderstood. In the first place, the approach described in *Barclays Mercantile* and the earlier cases in this line of authority had nothing to do with the concept of a sham, as explained in *Snook*. On the contrary, tax avoidance was the spur to executing genuine documents and entering into genuine arrangements.

103. Secondly, it might be said that transactions must always be viewed realistically if the alternative was to view them unrealistically. The point was that the facts must be analysed in the light of the statutory provision being applied. If a fact was of no relevance to the application of the statute, then it could be disregarded for that purpose. If, as in *Ramsay*, the relevant fact was the overall economic outcome of a series of commercially linked transactions, then that was the fact upon which it was necessary to focus. If, on the other hand, the legislation required the court to focus on the specific transactions, then other transactions, although related, were unlikely to have any bearing on its application.

104. In my judgment, the *Ramsay* principle has no arguable application on the facts as pleaded in the present case. On the grant of the scheme lease to the relevant

SPV, the entitlement to possession of the relevant hereditament passed to the SPV. The entitlement to possession would only re-vest in the Defendant Company on a disclaimer by the liquidator or by the Crown.

105. Mr. Matthew's argument on this point is to be found at paragraph 13 of his skeleton argument. There there are said to be three relevant points in relation to the *Ramsay* argument. First, in undertaking an analysis of the tax scheme or any tax mitigation, the correct approach is said to be to consider initially whether the principles of the new approach to tax avoidance were applicable, as explained and developed in *Ramsay* and subsequent cases. Mr. Matthew says that it is clear that in the instant case, elaborate arrangements were put in place to found the tax scheme which otherwise would not have been undertaken. There was said to be no genuine commercial or other bona fides justification for those arrangements in terms of the *Ramsay* approach, as developed judicially.

106. Mr. Matthew refers to the judgment of Mr. Justice Warren in the case of *Aberdeen Asset Management v Revenue & Customs* [2012] UKUT 43 (TCC). Mr. Justice Warren is said to have cogently summarised the *Ramsay* principle at paragraph 14 by reference to what Lord Nicholls had said in the *Barclays Mercantile* case. There Lord Nicholls had said that the view that in the application of any taxing statute, transactions, or elements of transactions, with no commercial purpose should be disregarded was to go too far. It was said to elide the two steps which were necessary in the application of any statutory provision: first, to decide on a purposive construction exactly what

transaction would answer to the statutory description; and secondly, to decide whether the transaction in question did so.

107. Lord Nicholls had cited from the judgment of Permanent Judge Ribeiro in *Collector of Stamp Revenue v Arrowtown Assets*. The ultimate question was said to be whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.

108. Mr. Matthew also referred to the summary of the new approach provided by Mr. Justice Lewison in his judgment in the *Bury v Revenue & Customs Commissioners* case (previously cited); and he referred in particular to sub-paragraphs (viii) to (xiii).

109. In the course of his oral submissions, when asked to identify how the *Ramsay* principle applied in the instant case, Mr. Matthew submitted that it had been the bolting-on of the tax scheme to the lease that the court should excise.

110. In my judgment, that is not a proper application of the *Ramsay* principle. You have to look, first, at what transaction answers to the statutory description, and then you have to ask whether the relevant transaction does so. In the present case, what one has to do is to ask whether the relevant scheme lease granted to the SPV has the effect of entitling the SPV to the immediate legal right to actual physical possession of the relevant hereditament. The fact that steps are taken subsequently which have the effect of moving the SPV into either members' voluntary liquidation or to dissolution does not affect the fact that the Defendant lessor has effectively divested itself of the immediate entitlement to possession. The fact that the SPV enters into members' voluntary liquidation, or moves to dissolution, does not re-vest the entitlement

to possession in the Defendant lessor without more. A notice of disclaimer of the lease by either the liquidator or the Crown is required to re-vest the lease in the landlord company. I simply do not see how the *Ramsay* principle has any arguable application in the circumstances of the present case. The schemes may involve, and have undoubtedly been motivated by, the avoidance of liability for business rates, but that is simply the consequence of the way in which the statute operates. It is not for the court, as distinct from Parliament, to alter the effect that statute has imposed. So in my judgment, the *Ramsay* principle has no arguable application in the present case.

111. It is therefore necessary to go on to consider whether the Claimants can arguably rely upon the third of the matters prayed in aid by Mr. Matthew, namely whether the separate corporate existence of the relevant SPV can arguably be disregarded, effectively by piercing the corporate veil. That will involve a detailed consideration of the recent decision of the Supreme Court in the case of *Prest v Petrodel Resources Limited* [2013] UKSC 34, reported at [2013] 2 AC 415.

112. As to that, Mr. Matthew's argument was set out at paragraph 15 of his written skeleton. He submits that the Defendants can derive no protection from the fact that the limited company used in the tax scheme was a separate legal entity when it was incorporated for no other purpose or reason than to avoid, or possibly evade, a tax liability faced by the person who directly or indirectly procured the incorporation. Reference is made in particular to Lord Sumption's judgment at paragraphs 27 and 28.

113. Mr. Matthew notes that the Supreme Court in *Prest* held that where a person, including for these purposes a company, was under an existing legal obligation or liability which he deliberately evaded, or the enforcement of which he deliberately frustrated, by interposing a company, the court could pierce the corporate veil for the purpose of depriving that company, or its controller, of the advantage which they would otherwise have obtained by the company's separate legal personality.

114. Mr. Trompeter, for the Defendants, disputes the application of the principle of piercing the corporate veil, or disregarding a corporate entity, in the present case. Mr. Trompeter refers to paragraphs 27 and 28 and 34 and 35 of Lord Sumption's judgment. It is necessary for me to refer to the relevant passages in that judgment.

115. At paragraph 27 Lord Sumption says that in his view the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities.

116. At paragraph 28 Lord Sumption said that the difficulty was in identifying what was a relevant wrongdoing. References to a facade or sham were said to beg too many questions to provide a satisfactory answer. It seemed to Lord Sumption that two distinct principles lay behind those protean terms, and that much confusion had been caused by failing to distinguish between them. Lord Sumption conveniently called them the "concealment" and the "evasion" principles. The concealment principle was legally banal and did not involve piercing the corporate veil at all. It was that the interposition of a company, or

perhaps several companies, so as to conceal the identity of the real actors would not deter the courts from identifying them, assuming that their identity was legally relevant. In those cases, the court was not disregarding the facade but only looking behind it to discover the facts which the corporate structure was concealing.

117. The evasion principle was said to be different. It was that the court might disregard the corporate veil if there was a legal right against the person in control of it which existed independently of the company's involvement, and a company was interposed so that the separate legal personality of the company would defeat the right or frustrate its enforcement. Many cases would fall into both categories, but in some circumstances the difference between them might be crucial.

118. That might be illustrated by reference to those cases in which the court had been thought, rightly or wrongly, to have pierced the corporate veil. The first and foremost of them was said to be *Gilford Motor Company Limited v Horne* [1933] Ch 935. Lord Sumption described the facts of that case. Mr. Horne had been the Managing Director of Gilford Motor Company. His contract of employment had precluded him from being engaged in any competing business in a specified geographical area for five years after the end of his employment, either solely or jointly with, or as agent for, any other person, firm or company. He left Gilford and carried on a competing business in the specified area, initially in his own name. He then formed a company, J. M. Horne & Company Limited, named after his wife, in which she and a business associate were shareholders. The trial judge, Farwell J, had found that the

company had been set up in this way to enable the business to be carried on under his own control, but without incurring liability for breach of the covenant. However, the reality, in his view, was that the company was being used as the channel through which the Defendant Horne was carrying on his business.

119. Farwell J in fact dismissed the claim on the ground that the restrictive covenant was void. The Court of Appeal allowed the appeal on that point and granted an injunction against both Mr. Horne and the company. As against Mr. Horne, the injunction was granted on the concealment principle. Lord Hanworth MR said that the company was a mere cloak or sham because the business was really being carried on by Mr. Horne. The only relevance of the interposition of the company had been to maintain the pretence that it was being carried on by others. Lord Hanworth MR did not explain why the injunction should issue against the company; but Lord Sumption thought it to be clear from the judgments of Lords Justices Lawrence and Romer that they were applying the evasion principle. Lawrence LJ, who gave the fullest consideration to the point, was said to have based his view entirely on Mr. Horne's evasive motive for forming the company. This showed that it was a mere channel used by the Defendant Horne for the purpose of enabling him, for his own benefit, to obtain the advantage of the customers of the Plaintiff company, and that therefore the Defendant Company ought to be restrained as well as the Defendant Horne. In other words, Lord Sumption commented, the company was restrained in order to ensure that Horne was deprived of the benefit which he might otherwise have derived from the separate legal personality of the company. Lord Sumption agreed that that was properly to

be regarded as a decision to pierce the corporate veil. The case was said to be authority for that proposition.

120. Lord Sumption went on to consider a number of other cases and, at paragraph 34, he referred to the broader principle that the corporate veil might be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. He then said this, and it is a sentence that is particularly relied upon by Mr. Trompeter: "It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely on the fact, if it is a fact, that a liability is not the controller's because it is the company's. On the contrary, that is what incorporation is all about. Thus, in a case like *VTB Capital v Nutritek* where the argument was that the corporate veil should be pierced so as to make the controllers of a company jointly and severally liable on the company's contract, the fundamental objection to the argument was that the principle was being invoked so as to create a new liability that would not otherwise exist. The objection to that argument was obvious in the case of a consensual liability under a contract where the ostensible contracting parties never intended that anyone else should be party to it, but the objection would have been just as strong if the liability in question had not been consensual".

121. Lord Sumption expressed his conclusion at paragraph 35 in the following terms: "I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose

enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality".

122. Mr. Trompeter submits that the other members of the Supreme Court appeared to agree with Lord Sumption's analysis, although some of them posed the possibility that there might be other rare situations in which piercing the veil might be relevant. Mr. Trompeter submits that it is clear from the judgment of Lord Sumption that it is only possible to pierce the corporate veil if two conditions are satisfied. The first is that there exists a legal obligation against the person controlling the company independently of the company's involvement; and the second is that that person deliberately evades or frustrates that obligation by interposing a company under his control; and Mr. Trompeter emphasises that the company must be under the person's control.

123. At paragraph 76 of his written skeleton argument, Mr. Trompeter observes that the particulars of claim do not plead the ingredients relating to a claim to pierce the corporate veil. He says that, specifically, there are no allegations that the Defendant (i) controlled the relevant SPV, (ii) was under an existing legal obligation independently of the relevant SPV's involvement, or (iii) deliberately frustrated or evaded that obligation by interposing the SPV.

124. More importantly, Mr. Trompeter submits that the nature of the proceedings do not permit the Claimants to rely upon a *Prest* type argument. This is because (1) under section 45(1) of the 1988 Act liability to business rates in

respect of unoccupied hereditaments arises day to day over the course of the year; (2) the Defendants took advantage of the scheme to avoid prospective business rates liability in respect of future days in the year; (3) the scheme leases did not operate to divest the Defendants of any existing liability; and (4) at most, all that can be said is that the Defendants caused a legal liability to be incurred by the SPV; but, as Lord Sumption noted in *Prest* at paragraph 34, that is not an abuse of corporate personality.

125. In his oral submissions, Mr. Trompeter submitted that the principle in *Prest* can only operate when all other conventional remedies have proved of no avail. He also submitted that as an irreducible minimum three factors needed to be established. First, that person A controlled company B; secondly, that there was an existing legal obligation on the part of person A quite independent of company B's involvement; and, thirdly, that person A deliberately evaded that obligation by interposing company B.

126. Mr. Trompeter made two broad points: First, that as a matter of form none of those three ingredients was pleaded. There is no allegation that the relevant Defendant controlled the relevant SPV. Secondly, there is no existing legal obligation on the part of the Defendant either identified or pleaded. That was said to be unsurprising since the liability for business rates was said to arise from day to day.

127. Paragraph 4.4 of the particulars of claim was said to constitute a tacit recognition of this. Reference was made to a potential or immediate legal obligation or liability. It was not clear which was really intended. Certainly there was no pleading that the Defendant had deliberately evaded an existing

obligation by the interposition of an SPV. It was said that *Prest* could not apply because business rates accrued from day to day so no existing liability had been avoided or evaded. All that the Defendant had done was to cause an SPV liability to be created in the first place, but that was not an abuse of the doctrine of separate corporate personality sufficient to entitle one to pierce the corporate veil.

128. In his oral submissions, Mr. Matthew submitted that in procuring the relevant tax scheme the Defendants had procured the SPV which had done as it was told. The SPVs were effectively puppets on the Defendants' string. The SPVs were not independent in the sense that Lord Sumption had been predicating in the *Prest* case.

129. Mr. Matthew also submitted that *Prest* was a developing area of jurisprudence. If one did as the Defendant had done by commissioning and paying for a scheme company to take a lease, the commissioning landlord was effectively the piper who was calling the tune.

130. In the course of Mr. Matthew's submissions, I suggested that what Mr. Matthew was effectively submitting was that the Defendant in each case had been under a contingent or future liability for business rates which would have accrued on a day by day basis in the future but for the grant of the lease to the SPV. By granting the lease to the SPV, the Defendant had divested itself of that contingent or future liability for business rates. Mr. Matthew accepted that analysis of the position. Mr. Matthew submitted that the SPVs had effectively been procured by the Defendant to divest the Defendant of its

continuing liability for business rates going forward for the relevant hereditament.

131. In his reply Mr. Trompeter emphasised that *Prest* made it clear that there must be some pre-existing liability that was evaded by the intervention of the SPV in question. These cases were said to fall within the scope of what had been said by Lord Sumption at paragraph 34 to be permissible. It was not an abuse to cause legal liability to be incurred by the SPV in the first place; it was not an abuse to rely on the fact that the liability for business rates going forward on a day to day basis was not the Defendant's but rather was now the liability of the relevant SPV. The fact was that fresh liabilities for business rates were being incurred on a day by day basis, not by the Defendant but by the relevant SPV.

132. Mr. Trompeter postulated the example of a sole trader who incorporates a corporate vehicle so as to avoid the sole trader's future liability for income tax. Upon incorporation the company would become liable for future corporation tax on the former sole trader's activities. Moreover, Mr. Trompeter submitted that there must be control of the interposed company by the party who had set it up. Here the Defendant had merely avoided its liability for future rates as they accrued on a day to day basis because the Defendant had parted with the entitlement to possession of the premises to the SPV, as it was entitled to do under the rating legislation.

133. In my judgment, the Claimant does have an arguable case on this particular ground. The doctrine of piercing the corporate veil is a developing area of jurisprudence. I am not satisfied that Lord Sumption's judgment was intended

as an exhaustive statement of the circumstances in which the court might disregard the corporate veil. In my judgment, there is a crucial distinction between the situation envisaged by Lord Sumption at paragraph 34 and emphasised by Mr. Trompeter and the situation in the present case. Here, prior to the grant of the scheme lease to the SPV the Defendant was under an ongoing liability for business rates. True it is that that liability arose day by day by virtue of the Defendant's continuing entitlement to possession of the relevant hereditament; but nevertheless there was a continuing obligation to pay business rates which was avoided by the grant of the lease to the SPV. Had that been an ordinary commercial transaction, then clearly it would have operated to divest the Defendant of its ongoing liability for business rates. But these were not ordinary commercial transactions, as the various features identified in the particulars of claim show. In my judgment, it is at least arguable that Lord Sumption's principle is capable of application, or principled development, so as to apply to a situation in which an actor divests himself of an ongoing existing liability for business rates by the interposition of an artificial SPV. The question of the extent to which the Defendant could be said to have control of the SPV is, it seems to me, a matter for disclosure and for trial. I note that in the *Gilford Motor Company v Horne* case the company was one of which the de jure shareholders and directors did not include Mr. Horne himself. The shareholders and directors were Mrs. Horne and an employee of the company other than Mr. Horne. Mr. Justice Farwell appears to have treated Mr. Horne as a de facto or shadow director of the company, and as the person controlling it; but it does seem to me that it is a matter for

trial on evidence as to whether there could be said to have been a sufficient degree of control by the Defendant of the relevant SPV.

134. In my judgment, the Defendant has not demonstrated, in relation to the *Prest* argument and that part of the claim in which a declaration is sought that the SPV was an entity that was ineffective or to be disregarded as a matter of English law, that the statement of case discloses no reasonable grounds for bringing that claim. If that limb of the claim succeeds then, it seems to me that there would also be an arguable claim for a consequential declaration that the tax scheme was ineffective and that at all material times the Defendant remained liable for national non-domestic rates.

135. In summary, therefore, I am satisfied that none of the relevant scheme leases can properly be characterised as a sham document. I am also satisfied that, on a proper application of the *Ramsay* principle, the scheme was effective; but either on a proper application, or a principled development, of the *Prest* case, there is an arguable case that the relevant SPV should be disregarded as a matter of English and Welsh law, and that the Defendant should continue to be treated as the person liable for business rates for the relevant hereditament.

136. So far as the money claims are concerned, it seems to me that there is an arguable case that there is an existing liability to pay business rates. An obligation to pay arises only upon service of a statutory demand in accordance with the provisions of the applicable collection regulations. The Claimant should be pleading when such demands are sent. It is to be inferred from the correspondence, in light of the response to the request for further information, that the Claimant's case is that the relevant demand notices were sent out on or

shortly after their dates of issue. That should, however, be expressly pleaded in relation to the alleged liability for each hereditament in each individual case. I will leave it for counsel to decide how that is properly to be addressed by way of order going forward.

137. That concludes this extemporary judgment. I am afraid it is not as polished as I would have liked, given the short space of time I have had to consider it, but I hope that it is sufficiently clear.
