Neutral Citation Number: [2020] EWCA Civ 1017

Case Nos: A2/2019/2882 and A2/2019/2884

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
(Business and Property Courts) Manchester
His Honour Judge Davies
[2019] EWHC 2890 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2020

Before :

LORD JUSTICE FLOYD
LORD JUSTICE NEWEY
and
LADY JUSTICE ASPLIN

- -

Between:

The Secretary of State for Business, Energy and Industrial Strategy	**Appellant**
- and -	
PAG Asset Preservation Limited	**Respondent**

and Between:

The Secretary of State for Business, Energy and Industrial Strategy	**Appellant**
- and -	
MB Vacant Property Solutions Limited	**Respondent**

- -
- -

Mr Paul Chaisty QC and Ms Lucy Wilson-Barnes (instructed by **Gowling WLG**) for the **Appellants**
Mr David Chivers QC and Mr Nicholas Trompeter (instructed by **Gorvins Solicitors**) for the **Respondents**

Hearing date: 15th July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 12.00 noon on Friday 31 July 2020

Lady Justice Asplin:

1. The issue raised by these appeals is whether companies operating a scheme to enable property owners to avoid liability for national non-domestic rates ("NNDR" or "business rates") in respect of unoccupied commercial properties, in the form of what is referred to in the judgment below as "Scheme 3", should be wound up on public interest grounds because it is said that their business model "lacks commercial probity in their operation of Scheme Three which misuses and/or abuses and/or subverts the insolvency legislation and process".

2. HHJ Stephen Davies, sitting as a judge in the High Court, dismissed petitions presented by the Appellant, the Secretary of State for Business, Energy and Industrial Strategy (the "Secretary of State") pursuant to section 124A, Insolvency Act 1986 and declined to wind up either PAG Asset Preservation Limited ("PAGAPL") or MB Vacant Property Solutions Limited ("MBV") (together referred to as the "Companies"). The judge's reasons are to be found in his judgment, the neutral citation of which is [2019] EWHC 2890 (Ch).

3. Scheme 3 is a variant upon two earlier schemes which are no longer in operation. Scheme 3's immediate predecessor is described in the judgment below as Scheme 2. The operator of Scheme 2 was PAG Management Services Limited ("PAG Management"). It was wound up on public interest grounds following a trial before Norris J: *In re PAG Management Services Ltd* [2015] BCC 720. Norris J decided that it was just and equitable to wind up PAG Management, because its business model demonstrated a lack of commercial probity as a result of a misuse of the insolvency legislation.

4. It is common ground that the Companies were incorporated and their business models, which took the form of Scheme 3, were specifically designed to seek to overcome the issues identified in relation to Scheme 2 in the *PAG Management* case.

5. In essence, therefore, the issue before us is whether the variations made in Scheme 3 were sufficient to enable the judge to come to a different conclusion from that of Norris J in the *PAG Management* case. The issue is of some importance as Scheme 3 accounts for millions of pounds of business rates which would otherwise be due, and there are numerous other schemes available in the marketplace with similar features.

Relevant provisions and the basic mechanism adopted

6. PAGAPL was incorporated on 22 February 2016 and ran Scheme 3 from April 2016 until February 2017. MBV took over that business and continues to operate Scheme 3. PAGAPL is now effectively dormant.

7. As I have already mentioned, Scheme 3, and its predecessors, enables owners of premises to avoid paying business rates on empty commercial properties owned by them. A person is liable to pay a business rate in relation to an unoccupied hereditament in respect of a chargeable financial year, if the conditions in section 45(1) of the Local Government Finance Act 1988 (the "1988 Act") are met. These include the condition that in respect of any day in that year, the person is the owner of the whole of the hereditament (section 45(1)(b)). Section 65(1) of the 1988 Act provides that the owner

of a hereditament is the person entitled to possession of it. A further condition, contained in section 45(1)(d), is that the hereditament falls within a class prescribed by regulations. Regulation 3 of the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008 (SI 2008/386) (the "2008 Regulations") prescribed all non-domestic hereditaments other than those exempted by Regulation 4. Regulation 4(k) contains an exemption in respect of:-

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

8. In outline, under both Scheme 2 and Scheme 3, business rates were avoided by the landlord leasing its empty commercial property to a special purpose vehicle company ("SPV") incorporated or purchased, in the case of Scheme 3, by PAGAPL or MBV. The effect of the grant of a lease ("Scheme Lease") is that the SPV becomes the owner of the hereditament for the purposes of section 45(1)(b), as a result of section 65 of the 1988 Act, and liable for business rates in relation to it. The SPV is then placed into members' voluntary liquidation ("MVL") with the effect that it is relieved of liability to pay business rates as a result of regulation 4(k) of the 2008 Regulations. The MVL continues until the lease expires, by which time, if not before, the landlord may well have been able to find a new commercial tenant.

9. Mr Chaisty QC and Miss Lucy Wilson-Barnes, on behalf of the Secretary of State, contend, therefore, that both Scheme 2 and Scheme 3 are dependent upon the same elements and as a result, are both a misuse and subversion of the insolvency legislation. Those elements were referred to in the Petition and in the judgment below as "the Common Element" and are: the incorporation or acquisition of the SPV with the intention of being placed into MVL; the entry by the SPV into Scheme Leases with landlords for the sole purpose of being held by the SPV; and the SPV being placed into MVL so that the liability for business rates is avoided. They say that the additional features of Scheme 3 are entirely artificial and make no difference.

10. As the similarities and differences between Schemes 2 and 3 are at the heart of the appeals, it is necessary to consider them and the judge's approach to them, in some detail.

Scheme 2 and Norris J's approach

11. The judge adopted Norris J's summary of the operation of Scheme 2 at [42] of the judgment, as follows:

> ". . .
>
> (a) PAG Management incorporates a special purpose vehicle ("the SPV")
>
> (b) Contemporaneously PAG Management's client companies will grant leases to the SPV:

(c) The leases are generally for a term of 3 years at a rent of £1 per annum (and containing obligations as to use and repair) but terminable on 7 days' notice:

(d) Contemporaneously with the grant of the lease to the SPV the landlord waives the right to receive sums due under the lease:

(e) Contemporaneously with the grant of the leases the SPV is placed in members' voluntary liquidation (a course that is possible because, by virtue of the landlords' waiver, the directors of the SPV can make a statutory declaration of solvency):

(f) The SPV is now a company in members' voluntary winding up and is itself exempt from NNDR:

(g) The landlord (PAG Management's client company) is not in occupation of the hereditament:

(h) The members' voluntary liquidation proceeds slowly:

(i) Under a fee agreement entered into between the Landlord and PAG Management the latter receives by way of fee a percentage (varying between 15% and 40%) of the NNDR saved at a result of the lease being in place:

(j) Meanwhile the landlord refurbishes and/or markets the property and if a taker is found then the lease to the SPV is terminated and the new tenant takes occupation, no "empty rates" having being paid in the meanwhile."

12. Norris J did not accept many of the complaints put forward in relation to Scheme 2 including the complaint that the business of PAG Management "was artificial and demonstrated a lack of commercial probity as regards the object of the scheme itself being the avoidance of business rates". However, Norris J did accept that "Scheme 2 subverted the purpose of liquidations and that [as] such demonstrated a lack of commercial probity such that it was just and equitable to wind up the Companies." The judge set out Norris J's reasoning, as follows:

> "46. . . .
>
> > "65. I find that the business of PAG Management necessarily involves (a) the creation by PAG Management of companies which exist for no purpose other than immediately going into liquidation; (b) the creation by PAG Management of assets for the sole purpose of their being held by those companies in liquidation (subject to the right of the freeholder to recover them if the freeholder can turn them to advantage); (c) the putting in place by PAG Management of arrangements which enable it to have effective control over the conduct of these liquidations as regards the maintenance in being of those assets; and (d) the exercise of that control to secure that the liquidations continue rather than proceed to a conclusion, the real objective being that each liquidation

shall act as a shelter for the assets specifically created to be held by the company in order that PAG Management might earn fees in relation to those assets. In my judgment the purpose of liquidation is the collection, realisation (though not invariably) and distribution of assets in satisfaction of the claims of creditors and the entitlements of members. The adjustments made to third party rights (whether they be stays upon enforcement or exemptions from fiscal liabilities otherwise falling upon companies) are made to achieve that purpose. I hold that there is a clear public interest in ensuring that the purpose of liquidations is not subverted, as I consider it is by treating a company in liquidation as a shelter (and seeking to prolong it continuation as such). This misuse of the insolvency legislation demonstrates a lack of commercial probity. It *(sic)* its own way it also "subvert[s] the proper functioning of the law and procedures of bankruptcy."

"47. He [Norris J] dealt with the submission by Mr Chivers that there was nothing improper in using the corporate insolvency process to achieve other purposes at [67] in these terms:

> "67. Mr Chivers QC, who has great experience and high standing in this field, gave evidence from the Bar that many corporate reconstruction schemes involve the interposition of a company to receive assets and then to be wound up (perhaps for tax reasons or as a mechanism of distribution) and that it had never been suggested that this was improper; and that many schemes of very many sorts require directors to take steps which are wholly predetermined (in relation to which it was never contemplated that they would exercise independent judgment). Of such schemes I say nothing, save that if the liquidation is not genuinely a collection and distribution of assets then its propriety might need to be reconsidered. For me it is the use of the company in liquidation as an asset shelter and the inherent bias towards prolongation of the liquidation that is subversive of the true purpose and proper functioning of insolvency law. So I cannot accept Mr Chivers QCs submission that the operation of the scheme through the medium of insolvency is not commercially improper."

48. His final conclusion was at [69]:

> "69. PAG Management is an active and solvent business. That business involves the promotion of an NNDR mitigation scheme. Of itself the promotion of tax mitigation schemes is not an inherently objectionable activity. In the course of so doing it incidentally uses artificial leases having no commercial reality and containing some terms which are mere pretences; and on occasion having procured that its creature companies enter liquidation, it has delayed appointing new officeholders. These historic events would not of themselves be of sufficient weight to warrant a winding up. But PAG Management's business model involves a misuse of the insolvency legislation in the way I have described and the SoS has satisfied me that it is just and equitable to wind up the company that I ought to exercise the

> discretion conferred by 124A of the 1986 Act in that way: and I will so order."

Scheme 3 in more detail and the judge's approach to it

13. A detailed description of Scheme 3 is set out at [50] – [82] of the judgment. Reference should be made to those paragraphs for a full description of the regime as a whole. I shall refer only to the essential elements and findings here. The following features are of particular note.

14. The fee agreements between PAGAPL or MBV and the landlord of the empty premises contain an express term under which the landlord agreed to pay a monthly fee as long as the Scheme Lease to be granted by the landlord to the SPV subsisted, the amount being either 30% of the business rates which would have been payable or a similar negotiated fixed fee: [55].

15. The sum payable in consideration for the grant of a Scheme Lease was slightly greater than the SPV's liability for business rates in the period between taking the Scheme Lease and entering into the MVL. Although it was envisaged that the SPV would go into MVL seven days after the grant of the Scheme Lease, (rather than immediately under Scheme 2) the payment covered nine days' worth of business rates to allow for slippage: [60] and [74].

16. The rent payable under the Scheme Leases was a nominal £1 per annum "if demanded" and it was common ground that the SPV was not entitled to occupy or use the property. It did, however, undertake to pay business rates in respect of the property "as required by law" which, in practice, meant that it was liable to pay business rates unless and until it went into MVL: [59].

17. A Scheme Lease was for a fixed duration of three years, the renewal provisions of Part 2 of the Landlord and Tenant Act 1954 having been excluded. However, it was determinable at any time on service of written notice upon the SPV. This was to enable the landlord to lease the premises to a commercial tenant if one should become available.

18. The right to determine the Scheme Lease was conditional, however, upon the payment of a "determination premium": [61]. The amount of that premium increases through the contractual term: [61] and [62]. It was accepted that the determination premium was "uncommercial" and that the provision relating to its payment is "entirely artificial". Furthermore, it was conceded that the premium was devised "with a view to creating something of value to the SPV within the lease which was in the nature of a contingent asset since the determination premium might be paid at any time up to the date of expiry of the lease." Further, "[T]he intended consequence was that the liquidator would not only be justified in, but positively required, all things being equal, not to disclaim the lease and instead to maintain the MVL in being for the duration of lease so as not to lose the opportunity of receiving the crystallised contingent asset represented by the determination premium should the landlord exercise his right of determination": [64].

19. Further, the judge noted that it was common ground that the Scheme Leases themselves are artificial in the sense that they are not reflective of a commercial arm's-length transaction, have no assignment value and were created solely to be held by the SPV,

which was to be put into and remain in MVL for the term of the leases: [81], [95] and [96].

20. The majority of the fee agreements entered into by PAGAPL also contained a break penalty clause under which PAGAPL agreed to repay the landlord a substantial proportion of any sum paid by the landlord in respect of the determination premium under the Scheme Lease. Many landlords did in fact determine the Scheme Leases prior to expiry of their contractual terms. In the second iteration of Scheme 3 after MBV took over the business, the provision in the fee agreements requiring repayment of the determination premium by PAGAPL/MBV was removed. However, MBV would agree to do so, if asked, in order to maintain a relationship, but rather than a refund would agree to a reduction in fees under the fee agreement, as a form of loyalty bonus: [66] and [69].

21. The judge accepted that the presence of the provision meant that the landlord would be reimbursed the vast majority of any determination premium which had been paid and that that made it even more clear that the determination premium was an artificial construct. He went on, however, to note that the determination premium is received by the SPV and that PAGAPL had no right of reimbursement from the SPV for having reimbursed the landlord. He concluded, therefore, that "as between the SPV and the landlord it is still a genuine legal obligation . . ." which he did not consider to be "objectionable as such."

22. The judge held that "as the SoS [the Secretary of State] rightly accepted: (a) the leases were genuine (albeit artificial) legal contracts with genuine (again albeit artificial) terms as to determination premium; and (b) the determination premiums were genuinely paid by the landlord to the SPV if and when they became due, even if the landlord was subsequently refunded almost all such payments by PAGAPL": [68].

23. As I have already mentioned, it was an integral part of Scheme 3 that the SPV should go into MVL and that, whereas under Scheme 2, the MVL was simultaneous with entering into the Scheme Lease, under Scheme 3 it was decided to introduce a 7-day time lapse between the grant of the lease and the MVL. The judge noted at [74] that "[T]his appears to have been intended to overcome any argument that the lease or the MVL were sham transactions and to address concerns apparently expressed by the bodies which regulated the liquidators involved in Scheme 2. However, nothing of substance turns on that change."

24. Before Scheme 3 was put into effect, liquidators were chosen, the scheme was explained to them and they agreed to act: [75]. The judge held that the liquidator "was entitled to conclude that the key difference between Scheme 2 and Scheme 3, being the provision for the payment of the determination premium, entirely justified him in concluding that it was legitimate for him as a liquidator to accept an appointment and to continue the MVL for as long as the leases remained extant in order to ensure that the prospect of those contingent assets materialising was not prejudiced. . . .": [76]. Furthermore, there was "no basis . . . for suggesting that Mr Stanley [one of the two liquidators appointed] was deliberately dragging his feet . . . with a view to prolonging the course of the liquidations": [82].

25. The judge rejected the contention that the inherent intention was to prolong the MVLs for as long as possible until the Scheme Lease was determined by the landlord or

expired, rather than the priority being the collection and distribution of assets. He held that although it was true that the intention was to continue the MVL until all leases held by the SPVs were determined or had expired, this was:

> "90. . . not the same as intending to "prolong" the MVLs by seeking to achieve an outcome whereby the MVLs are continued beyond the time when the assets would have been realised and distributed. Under Scheme 3 the liquidator will not know until all of the leases have either been determined or expired the value of the assets which may be realised in terms of payment of any determination premium and, hence, what assets will be available for distribution. It follows that Scheme 3 does not require the artificial prolongation of the MVLs, since it is inherent in its design and effect that in ordinary circumstances each MVL will last until all of the leases held by the SPV have come to an end."

26. The judge concluded that although the essence of Scheme 3 was similar to Scheme 2, the "key difference . . . was the provision in the leases relating to the determination premium": [53] and identified the real question to be whether the Common Element rendered Scheme 3 a misuse of the insolvency legislation and process: [93] and [99].

27. Having concluded that sections 91(1) and 107 of the Insolvency Act 1986 "amply justify the conclusion reached by Norris J that the purpose of a voluntary liquidation, whether an MVL or a CVL, is to collect, realise (where appropriate) and distribute the assets" ([108]), the judge went on, nevertheless, to accept that "as a matter of principle there is nothing inherently wrong or unusual about the incorporation of a SPV to act as an asset shelter or for the purposes of furthering some artificial transaction designed to avoid tax and that [that] does not involve a misuse of the companies legislation". He decided, however, that that was different from Norris J's conclusion that it is "the use of the company <u>in liquidation</u> as an asset shelter which is objectionable": [112]. He pointed out at [115] that none of the examples of the use of SPVs to which he had been referred:

> ". . . involves the company, whether acting by its liquidator or otherwise, simply sitting on the assets of the company and maintaining them in MVL with no intention of either realising them or distributing them to the members. In my judgment it cannot be said that holding assets in a SPV whilst it is in a MVL, without taking any steps to realise them where necessary or to distribute them to the members, can fall within the purpose of a MVL."

28. He went on to conclude at [116] that:

> "Nonetheless, in my judgment Mr Chivers is on stronger ground where he contends that the court ought not to be concerned with the motives of those involved where a company is put into MVL, so long as it can be demonstrated by reference to objective evidence that the purpose of the MVL is indeed the collection and realisation (where necessary) and the distribution of genuine (as opposed to sham) assets. It should not matter if the motive of those involved in so doing is to enable the company in MVL to act as an asset shelter or for the purposes of furthering some artificial transaction designed to avoid tax, since this does not involve the

> misuse of companies legislation or the insolvency legislation so long as the MVL does nonetheless objectively and without sham transactions involve the collection and realisation (where necessary) and distribution of its assets."

29. Having noted that it was accepted that the incorporation or acquisition of the SPV, the execution of the Scheme Leases and putting the SPVs into MVL were all legally effective transactions as opposed to shams: [117]; and that the determination premium transactions were not shams either: [118]; the judge stated that "equally importantly, the liquidators of the SPVs were and are genuinely entitled to decide that because of the existence of the determination premiums it is (save in exceptional circumstances which so far have not occurred) appropriate to continue the MVLs until all of the leases are either determined or expire": [119]. He concluded that:

> "119. . . . This process does indeed genuinely therefore involve the collection of assets with a view to their distribution among the members once all liabilities have been discharged. Although that has the convenient intended effect that the liquidators must wait until all of the leases are either determined or expire before they can safely conclude that they have indeed collected all of the potential assets of the SPV, there can be no criticism of the liquidators in waiting in those circumstances. Therefore, although this is also again a wholly artificial process, where all involved are fully aware that the motive and effect is to avoid business rates, the liquidation is a genuine process whose purpose is indeed the collection, realisation and distribution of assets.
>
> 120. In my judgment there can be no proper objection, whether as a matter of the business rates legislation or the insolvency legislation, and whether by reference to specific statutory provisions or an application of the *Ramsay* principle or otherwise (and where the GAAR does not apply), to the members of a company putting the company into MVL for the purpose of avoiding business rates after creating and placing an artificial asset (in this case, the lease containing the determination premium) into the tax "shelter" created by the company being in MVL, so long as putting the company into MVL and maintaining the company in MVL is, considered objectively in law and in fact, for the purpose of the collection, realisation and distribution of the assets of the company. That is not contrary to the general purpose of the insolvency legislation or to any specific provisions of the insolvency legislation applicable to MVLs. Here that is indeed what is happening in my judgment, notwithstanding that the scheme is an artificial construct designed and implemented solely in order to avoid rates liability."

30. Accordingly, the judge held that the existence and effect of the determination premium provisions amounted to "a substantial and significant difference between Scheme 2 and Scheme 3" which justified him reaching a different conclusion from that of Norris J. This was because in Scheme 2 there were never any assets held by the SPV which had any realisable value and therefore the liquidators had no real expectation of realising any value from exploiting the leases, took no steps to seek to do so and were effectively nominal liquidators. The judge concluded that under Scheme 2 "[T]he end result was that the MVLs continued solely for the purpose of allowing the property to be owned

by a company in liquidation and not for the purpose of collecting or realising assets for distribution": [121]. Although the changes made in Scheme 3 were admittedly artificial and designed precisely to have this effect, the judge held that he could not simply disregard them on the basis that they are were artificial: [122].

The exercise of the section 124A jurisdiction

31. Having reached these conclusions, the judge considered the exercise of the jurisdiction under section 124A. First, he reminded himself that the Secretary of State had confirmed that the Petitions were not based upon the contention that it was contrary to public policy to operate a scheme which facilitates the non-payment of business rates and, therefore, was lacking in commercial probity and found that there was no evidence of harm to individual members of the public or to anyone or anything through the activities of the Companies other than a reduction in the monies which would otherwise be paid into the coffers of the local authorities, and that it would be wrong to conclude that Scheme 3 is inherently objectionable upon the basis of the loss suffered by the general public as a result of the non-payment of business rates: [125].

32. Secondly, he accepted Mr Chivers' submission that it cannot be said that to design a scheme such as Scheme 3 is lacking in commercial probity or otherwise contrary to the public interest, because to say so would be inconsistent "with the accepted general principle that it is perfectly proper for companies as artificial constructs to be incorporated with a view to obtaining a fiscal advantage, to create or have transferred to them assets which are artificial from a commercial perspective to achieve the same purpose and/or to be placed into liquidation, again artificially from a commercial perspective to achieve the same purpose, so long as each transaction is a legally genuine and effective transaction and not a sham and so long as each step in the transaction is in accordance with, and not contrary to, the general purpose or a specific purpose of the legislation governing such transactions": [126].

33. Lastly, the judge went on to reject the submission that there was still a misuse of the insolvency legislation since the first two elements of Scheme 2, identified by Norris J in his judgment at [65] were present in this case, namely the creation of the SPVs for the sole purpose of going into MVL and the creation of Scheme Leases for the sole purpose of their being held by the SPVs in MVL: [129]. In particular, he held at [129(a), (b) and (c)] as follows:

> "(a) Mr Chivers is right when he submits that this paragraph of this judgment [paragraph [65]] should not, with respect to Norris J, be treated as the equivalent of a statutory checklist where it is sufficient if any one or more of the identified features are present, nor could Norris J ever have intended that it should be used in such a way;
>
> (b) What Norris J was really identifying at [65] to be objectionable was that the "real objective" was that "each liquidation shall act as a shelter for the assets specifically created to be held by the company", because that was contrary to the purpose of liquidation as being the collection, realisation and distribution of assets. In my view what was crucial in that case was that there was no collection, realisation and distribution of assets intended or effected in the voluntary liquidations operated by PAGMS

[PAG Management] so that the only purpose of those liquidations was for them to operate as a shelter for assets which were not being collected, realised or distributed. That, as I have said, is not the case here.

(c) The insolvency legislation is not misused where the MVLs do indeed involve the collection, realisation and distribution of assets, even though the process is designed to achieve that objective and deploys the use of artificial assets for that very purpose. Alternatively, to the extent that it might be said that there is a misuse, it is not sufficiently reprehensible when set against the whole of the factual and legislative context to justify a conclusion that the activities of the Companies are so clearly lacking in commercial probity or otherwise so clearly against the public interest as to justify their being wound up on public interest grounds."

Grounds of appeal and Respondents' Notice

34. There are twenty grounds of appeal. As Lewison LJ noted when giving permission to appeal, they are repetitive and prolix. Nothing would be gained by setting them out here. Lewison LJ proceeded on the basis of the Secretary of State's skeleton argument for permission to appeal. I shall also proceed on that basis, subject to the gloss placed upon it in writing and oral submissions.

35. Although Mr Chaisty does not submit that any elements of Scheme 3 are a sham, as I have already mentioned, the overarching complaint is that Scheme 3 and the elements of it are an artificial construct designed merely to distinguish it from Scheme 2. It is said that the judge erred, therefore, in failing properly to apply the reasoning of Norris J in the *PAG Management* case to Scheme 3 or otherwise erred in distinguishing the facts of this case from those in *PAG Management*. In particular, it is said that the judge erred in concluding that the existence of the determination premium in the Scheme Leases was a "key difference" between Scheme 2 and Scheme 3 which justified departure from Norris J's decision. It is said that the inclusion of an artificial asset which is entirely contrived in order to be able to realise it in the MVL does not prevent Scheme 3 from being a misuse of the Insolvency legislation and should not prevent the Companies from being wound up in the public interest.

36. In oral submissions, Mr Chaisty went as far as to imply that the Secretary of State's complaint is that the Scheme is effective and that others might use similar methods. However, as I have already mentioned, the Secretary of State has confirmed that the Petitions were not based upon the fact that Scheme 3 is designed to avoid business rates.

37. In addition, the Companies seek to uphold the judge's decision on the additional grounds that:

i) The judge erred in law holding that the purpose of a members' voluntary liquidation is the collection, realisation (where appropriate) and distribution of assets; and

ii) If contrary to i), the judge was correct in law in holding that the purpose of a members' voluntary liquidation is the collection, realisation (where appropriate) and distribution of assets, and if further (contrary to the judge's findings of fact)

the operation of Scheme 3 did not genuinely involve the collection of assets with a view to their distribution amongst the members of the SPVs, then, and, in any event, the operation of Scheme 3 (generally) and the activities of the Companies (specifically) are not contrary to the public interest.

In the event, we have not found it necessary to consider the arguments raised on the Respondents' Notice.

Section 124A

38. It is important to have both section 124A of the Insolvency Act 1986 and the principles which apply in relation to winding up in the public interest in mind. Section 124A provides that where it appears to the Secretary of State from any of the sources referred to in (a) – (d) that it is expedient in the public interest that a company should be wound up, he may present a petition for it to be wound up "if the court thinks it just and equitable for it to be so".

39. The principles to be applied are not in dispute. They were helpfully summarised by Norris J in the *PAG Management* case at [5] and were set out by the judge in this case at [31] and adopted at [32]. They are as follows:

> "5. There was a large measure of agreement about the principles to be adopted in the exercise of this jurisdiction. The principles I shall apply are these:-"
>
> a) Even if the SoS thinks it expedient in the public interest to wind up a company, the Court still has a discretion whether or not to make an order.
>
> b) Before making an order the Court must be satisfied that it is just and equitable to wind the company up.
>
> c) The burden of proof lies on the SoS to persuade the Court (having proved matters of fact to the requisite civil standard) that it is just and equitable to wind the company up.
>
> d) The Court must balance competing reasons why the company should be wound up and why it should not be wound up upon a consideration of the totality of the evidence (per Nicholls LJ in *Re Walter L Jacob & Co Limited* [1989] BCLC 345 at 353 b-d).
>
> e) As a result of undertaking that exercise the Court must be able to identify for itself the aspects of the public interest which would be promoted by making a winding up order in the particular case (ibid at p353f);
>
> f) It is not necessary for the business of the company to involve illegality. As Millett LJ said in *Re Senator Hanseatische* [1997] 1 WLR 515 at 522h:-
>
> "On the contrary the phrases used (namely "expedient in the public interest" and "just and equitable") to my mind indicate

that Parliament did not intend to impose such a restriction but instead simply decided to leave to the Secretary of State to form a view as to what was expedient in the public interest and the court then to decide on the material before it whether the justice and equity of the case dictated that the company concerned should be wound up".

g) Where the business of the company does not involve the commission of illegal acts or breaches of regulatory requirements the company may nonetheless be wound up if its business is "inherently objectionable" because its activities are contrary to a clearly identified public interest. So in *Abacrombie & Co Limited* [2008] EWHC 2520 (Ch) the company operated a debtor advisory service. David Richards J explained:-

"The purpose of the company's business as it related to clients with equity in their residential property was, prior to the client's bankruptcy, to sell the equity to the client's spouse or partner at as low a price as possible and to use the proceeds to fund the company's charges which were both excessive and unjustifiably charged to the debtor client. The effect, as the company…well appreciated, was to deprive the debtor's estate of any substantial return or value from the debtor's beneficial interest which was likely to have been the only asset of any substance. The effect was detrimental to creditors and undermined the proper administration of the bankruptcy of the debtor" (see paragraph [60]).

He had earlier at paragraph [15] held:-

"The arrangements, as operated by the company, in my judgment, subverted the proper functioning of the law and procedures of bankruptcy".

h) Such conduct is sometimes described as disclosing "a lack of commercial probity", and whilst this frequently might involve preying on the public and inducing individual members of the public to participate in transactions which are without benefit to them, it can also involve prejudice to the public generally (for example by casting burdens on the general body of tax payers). An illustration of this may be found in *SoS for Business Innovation and Skills v PGMRS Limited* [2010] EWHC 2864 (Ch) in which four companies traded at the expense of HMRC (by not paying either VAT or PAYE) until such time as they were insolvent, conduct that the judge held represented a lack of commercial probity.

i) However in making the judgment whether a business is inherently objectionable "the court has to be careful of being priggish" (see *Re Force Sun Limited* [2002] EWHC 443 (Ch) at paragraph [26], a point which Mr Chivers QC reinforced with a

> submission that this was a court of law and not a court of morals. If this is simply a submission that I am bound to decide the case according to law and by reference to principle and precedent I unhesitatingly accept the submission. If this is a submission that the law in this area is devoid of moral content, then I disagree. Concepts such as "inherent objectionability" or "want of commercial probity" are bound to have some moral content, though that content is not the subjective moral perception of the individual judge, but must be informed by any discernable policy of the law and guided by the view of other judges in other cases.
>
> j) Finally, to wind up an active and solvent company is a serious step, and the Court must be satisfied that reasons of sufficient weight have been advanced to justify taking that course (*Re Walter L Jacob & Co Limited* (supra) at p354d-e)."

40. It is important to bear in mind, therefore, although the opinion of the Secretary of State that it is expedient in the public interest that a company should be wound up is the prerequisite to the presentation of a petition by him or her, it is for the court to carry out a balancing exercise based upon all the circumstances and all the evidence before it. It must weigh the factors which point to a conclusion that it would be just and equitable to wind up the company against those which point away from it. In order to carry out the balancing exercise, where the petition is based upon the public interest: "the court must be able to identify for itself the aspect or aspects of public interest which, in the view of the court, would be promoted by making a winding-up order in the particular case." See *Re Walter L Jacob & Co* [1989] BCLC 345 at 353f.

Submissions, Discussion and Conclusions

41. First, in the light of the breadth of Mr Chaisty's submissions, I must address the contention that Norris J's decision in the *PAG Management* case has wide application and should have been applied generally by the judge in this case, despite the differences between Scheme 2 and Scheme 3. It seems to me that it is quite clear that Norris J was considering Scheme 2 and the particular aspects of it. He was not making any wider generalisations either about business rate avoidance schemes or in relation to the business model of the PAG companies as a whole. It would have been surprising if he had done so. At [60] of his judgment, Norris J made clear, quite rightly, that it was "not possible to find that NNDR [business rate] avoidance/mitigation schemes are contrary to the public interest (although they may be): nor would it in principle be right for the court in one case to resolve what is essentially a far-reaching economic and political question that is properly the province of Parliament".

42. Further, having stated at [61] and [62] of his judgment that the conclusion could not be reached in that action that avoidance/mitigation schemes are contrary to the public interest and that he was not persuaded that companies and partnerships that offer tax mitigation schemes are in general carrying on a business which is inherently objectionable, even if the products offered are highly artificial, he went on to consider the remaining grounds in the petition. Furthermore, at [65] he set out PAG Management's business model by reference to the essential elements of Scheme 2 before holding that there "is a clear public interest in ensuring that the purpose of liquidations is not subverted, as I consider it is by treating a company in liquidation as

a shelter (and seeking to prolong its continuation as such)". It is clear, therefore, that Norris J made those observations solely in the context of and based upon the details of Scheme 2 and had eschewed the promulgation of any wider principle.

43. Mr Chaisty's oral submissions in relation to a wider application of Norris J's reasoning in the *PAG Management* case came close to an argument that all business rate avoidance schemes, and certainly all those in which there is a pre-determined and artificial lease to an SPV which it is equally pre-determined will go into MVL providing a shelter for the lease, are morally reprehensible and therefore, contrary to the public interest.

44. In that regard, he referred us to a decision of this court in *Rossendale Borough Council v Hurstwood Properties (A) Limited and Ors, Wigan Council v Property Alliance Group Ltd* [2019] 1 WLR 4567 and to *R (on the application of Principled Offsite Logistics) v Trafford* [2018] EWHC 1687 (Admin). In my judgment, neither case assists him and even if they did, his submission goes beyond the actual basis of the Petitions. As I have already mentioned, they were based upon the misuse of the insolvency legislation and not upon the purpose of the MVL.

45. The *Rossendale* case was concerned with claims brought by local authorities to recover business rates avoided by use of leases to SPVs which were placed into MVL. Mr Chaisty referred us, in particular, to the judgment of David Richards LJ at [51] at which he stated that "[V]iews may differ as to whether the purpose for which the SPVs were used was socially reprehensible . . .". The *Trafford* case was concerned with what constitutes occupation of premises for the purposes of business rates. It arose in the context of the avoidance of business rates by means of the grant of leases to "professional occupiers" which charge a "reverse rent" so that the tenant is paid to occupy the premises instead of paying to do so. Kerr J stated that there was no question but that the transactions were genuine and that: ". . . where transactions are genuine and mean what they say, their meaning and effect, and the general law, must not be distorted or manipulated in the name of morality . . .": [117] and [118].

46. Accordingly, even if the submission were open to him, the authorities do not support the proposition that a transaction should not be regarded as genuine or a scheme should be considered to be contrary to the public interest on the grounds that their effects might be considered by some to be socially reprehensible.

47. Mr Chaisty also submitted that the SPV was being used purely as a shelter to avoid business rates and the Companies should be wound up because Scheme 3 involves a subversion of the insolvency laws when one took into account "what was going on". It seems to me, therefore, that he sought to taint the way in which Scheme 3 operates and the Companies' business model by reference to its ultimate object. In my judgment, this is no more than another attempt to rely upon the purpose behind Scheme 3 and in the light of the Secretary of State's confirmation that it was not alleged, per se, that it is contrary to public policy to operate a scheme which facilitates the non-payment of business rates and the acceptance that the Scheme Lease and the determination premium were both genuine and not shams, this line of argument is not open to Mr Chaisty. As the judge stated at [116], in the circumstances of this case given the basis of the Petitions, the court ought not to be concerned with the motives or overall purpose of those involved in placing a company into MVL, as long as it can be demonstrated by reference to objective evidence that the purpose of the MVL itself is not subverted.

48. Nor can it be relevant that each of the sequence of events is pre-determined. As Norris J noted at [67] of his judgment in the *PAG Management* case, Mr Chivers QC on behalf of the Companies pointed out the pre-determined use of an SPV to which assets are transferred is a familiar feature in many corporate reconstruction schemes. Taking time in advance, to decide which steps to take, cannot of itself render the steps themselves contrary to the public interest.

Determination Premium and the position of the liquidator

49. That brings one to the question of whether the judge was right to consider that the existence of the determination premium and its effects created a "substantial and significant difference" between the schemes and entitled him to conclude that in this case, there was no subversion of the insolvency legislation. In my judgment, he was.

50. First, as the judge pointed out, the determination premiums are legally effective terms of legally effective leases which the respective landlords expected to pay and did pay to the relevant SPV if they wished to determine the lease, notwithstanding that they were reimbursed for the most part, either under the fee agreements or otherwise. Although the point had been taken below and in writing, Mr Chaisty accepted before us that the reimbursement by PAGAPL and/or MBV did not render the payments circular.

51. Secondly, the determination premium created significant differences between the schemes. As the judge pointed out at [121] of his judgment, under Scheme 2 the SPVs never had an asset with a realisable value which the liquidators could realise. They were effectively nominal liquidators who dragged their feet and were eventually removed and not immediately replaced. The liquidation was artificially prolonged solely to shelter the leases which were of no commercial value in order to allow the empty commercial property to continue to be "owned" by an SPV in MVL.

52. By contrast, under Scheme 3, the determination premiums were genuine contingent assets in the liquidation and as the judge found, the liquidators of the SPVs were entitled if not required to continue the MVL until all of the leases were determined or expired in order to be able to be satisfied that they had collected in all of the potential assets. The fact that they might be at risk of a misfeasance claim if they failed to do so does not render the continuation of the MVL improper or artificial in some way, as Mr Chaisty implied. It points the other way.

53. Thirdly, I am unable to accept Mr Chaisty's submission which, in effect, requires us to ignore the determination premium despite the fact that he accepts the judge's conclusions that it is not a sham and that the MVL process genuinely involved a collection of assets and was not artificially prolonged. Mr Chaisty's submission appears to be based upon the artificiality of Scheme 3 as a whole and the determination premium, in particular, and the effect which the determination premium has upon the potential length of the MVL.

54. It seems to me that once it is accepted that the determination premium is genuine and not a sham, it cannot be undermined by the motive behind its creation. The approach to its status should be similar to that adopted in relation to the licence in the case of *Aldrington Garages v Fielder* (1983) 7 HLR 51 and the limited partnership in *MacFarlane v Falfield Investments Limited* 1998 SC 14 to which Mr Chivers referred

us. Although the circumstances in those cases are far removed from section 124A, the approach adopted is of some assistance here.

55. In the *Aldrington* case the question was how to construe the separate agreements which had been signed by two occupants of a flat and whether they amounted to the grant of a tenancy or were a successful device to avoid the Rent Acts. Before determining the issue, Geoffrey Lane LJ stated that it was important to define one's approach to the problem first. He went on at 62 – 63 as follows:

> "There is a temptation to strain the facts or the law in favour of the occupier because the owner is obviously, if not avowedly, trying to avoid the provisions of the Rent Acts in order, amongst other things, to increase his profit. But, as I have indicated before, there seems to be nothing wrong in trying to escape the provision of those Acts . . . If what the parties have agreed is truly a licence and not a tenancy dressed up in the verbiage or trappings or clothing of licence, then the owner is entitled to succeed. . . . Perhaps it is healthy, at this stage, to see what it was that Lord Justice Buckley had to say on this subject in *Shell Mex v Manchester Garages* [1971] 1 WLR 612 at 619.
>
> > "…It may be that this is a device which has been adopted by the plaintiff company to avoid the possible consequences of Land and Tenant Act 1954, which would have affected a transaction being one of landlord and tenant; but, in my judgment, one cannot take that into account in the process of construing such a document to find out what the true nature of the transaction is. One has first to find out what is the true nature of the transaction and then see how the Act operates upon that state of affairs, if it bites at all.…"

56. In the *MacFarlane* case, the court was concerned with whether the grant of a limited partnership in relation to two agricultural holdings, the landlords being limited partners and the pursuer being the general partner, avoided the effects of the security of tenure provisions in the Agricultural Holdings (Scotland) Act 1991. The Lord President, Lord Rodger, noted that an attack was being made on the very nature of the scheme. He observed at 30G:

> "This submission runs together two distinct propositions. The first is that the purpose of introducing a limited partnership was to avoid the protection afforded by the 1991 Act. The second is that in some sense the limited partnership was not genuine – the suggestion apparently being that, *because* the partnership was introduced to avoid creating a situation where a tenant would be entitled to security of tenure, the partnership should *for that reason* be regarded as not genuine and indeed, in the terms of the first and third declarators, it should be regarded as 'a nullity'.
>
> Such an argument is a *non sequitur*. . . ."

57. A similar approach was adopted by Neuberger J, as he then was, in *National Westminster Bank plc v Jones & Ors* [2001] 1 BCLC 98. In that case, in order to seek to protect farmland and assets from the bank as mortgagee, the defendants formed a company of which they were the sole directors and beneficial owners and granted it a

20-year agricultural tenancy of the farm at full market rent and sold the farming assets to it. The bank, having appointed receivers, one of the questions which arose was whether the agreements were shams. It was conceded that the formation and acquisition of the company, the grant of the tenancy and the sale agreement were artificial and that they occurred solely because the defendants wished to do their best to protect their farming business and their home from being sold by the bank. Neuberger J held at [30]:

> "In the absence of a specific statutory provision to that effect, it appears to me that, as 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, and that, in the absence of the statutory provision, it would not have been possible to enter in the transaction at all. The fact that the purpose for which a transaction has been entered into can be characterised as artificial in no way invalidates the transaction, unless, of course, the transaction is actually a sham . . ."

58. It seems to me that Mr Chaisty is asking us to reason in the way which the Lord President, Lord Rodger, described as a non sequitur. He requires us to conclude that the determination premium is not genuine in some way or should be ignored because it is a contingent asset in the MVL which enables the MVL to be continued whilst the Scheme Leases are in existence.

59. Not only does that go behind the judge's finding that the determination premium is genuine, which Mr Chaisty does not challenge directly, it also requires one to take account of its purpose/the motive for its creation when determining whether it is genuine. Just as Buckley LJ held in the *Shell Mex* case (quoted by Geoffrey Lane LJ in *Aldrington*) one must first determine the status of the transaction or provision in question, in this case, the determination premium, before considering its purpose.

60. In my judgment, therefore, the judge was entitled to distinguish this case from the facts which were under consideration in the *PAG Management* case and to decide as he did at [129] of his judgment. As he explained, the only purpose of the liquidation in that case was to shelter the leases. That was not the case in Scheme 3. The determination premium is a genuine contingent asset which the liquidators were entitled and obliged to wait to collect in, the liquidation was not artificially prolonged and the liquidators collected and realised assets which they distributed to members. Accordingly, there was no abuse or subversion of the insolvency provisions.

61. Furthermore, when determining whether it is just and equitable to wind up a company under section 124A, the court is required to identify for itself the aspects of the public interest which would be promoted by making a winding up order. In this case, however, there is no challenge to the judge's finding that there was no evidence of harm to the public and in oral submissions before us, Mr Chaisty was unable to identify any class of the public who were or might be harmed. An essential element, therefore, is missing.

62. Lastly, and in any event, in my judgment, the judge was entitled to exercise his discretion in the way he did in the last sentence of [129(c)]. Having evaluated all the evidence and balanced all of the relevant factors, he concluded that even if it there had been a misuse of the insolvency process, it was not sufficient to warrant winding up under section 124A. He was entitled to come to the conclusion he did.

63. For all the reasons set out above, I would dismiss the appeals.

Lord Justice Newey:

64. I agree.

Lord Justice Floyd:

65. I also agree.