Case Name: *The Secretary of State for Business, Energy and Industrial Strategy v PAG Asset Preservation Ltd and MB Vacant Property Solutions Ltd* [2020] EWCA Civ 1017 (31 July 2020)

Topic: Rates mitigation (use of insolvency regime) – public interest in winding up SPVs

Full case: Click Here

Summary: The Court of Appeal dismissed the Secretary of State's appeal of the High Court's decision of last year (reported on previously by Town Legal, the commentary on which may be found here). The High Court had decided that it was not able to accept the Secretary of State's argument that a rates mitigation scheme utilising the insolvency exemption "lacks commercial probity and is contrary to the public interest". Accordingly, it was unable to order the winding up of corporate entities created for the express purpose of avoiding payment of rates. The Court of Appeal endorsed Norris J's judgment that it is not possible to find that such mitigation schemes are contrary to the public interest and that it would not 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".

Commentary: Briefly, the case involved the grant of 3-year leases of empty properties (owned by third party landlords) to SPVs owned by PAG Asset Preservation Ltd, "PAG" (and latterly by MB Vacant Property Solutions Ltd, "MBV"), entered into in consideration of payment of a modest sum by the landlord (being slightly more than the rates liability from the date of grant to the intended date of commencement of winding up of the SPV) and for the express purpose of claiming exemption from rates.

Each SPV was placed into Members' Voluntary Liquidation ("MVL") seven days after the lease was granted. There was no intention that the SPV would ever occupy the property, but the lease contained an obligation for the tenant to pay the rates, which (by reason of the insolvency exemption) were chargeable only in respect of the short period before the SPV went into MVL.

There were separate fee agreements between the landlord and PAG/MBV under which the landlord paid a monthly fee for so long as the leases subsisted. Importantly (from the point of view of the liquidator), if the landlord exercised the right to break the lease it was also required to pay a "determination premium" to the SPV as its tenant under the lease, being an amount increasing over time (until lease expiry when no premium would be due).

The premium contingently payable under the scheme (subject to the landlord exercising its option to break) represented an asset of the relevant SPV, which had to be collected by the liquidator before the company could be wound up. The liquidator of each SPV was legally obliged to maintain the company in MVL due to the existence of the leases (so as to gather in all available assets). The question before the court was whether it was possible to show that the activity lacked commercial probity and was contrary to the public interest.

The trial judge had found that the incorporation/acquisition of the SPVs, the entering into of the leases and the putting of the SPVs into MVL were all legally-effective transactions, although pre-arranged, non-commercial and having no purpose other than to avoid liability for rates. He further found that there can be no proper objection, whether under the business rates or insolvency legislation or by reference to specific statutory provisions or the *Ramsay* [1] principle (noting that the taxation General Anti-Avoidance Rule ("GAAR") adopted by HMRC in 2013 does not apply to business rates), to the members of a company putting it into MVL for the purpose of avoiding business rates, after creating an artificial asset within the "tax shelter" arising from the MVL. This would remain the case for each SPV until expiry or determination of the last of the leases held by that corporate entity provided that putting the company into MVL and maintaining it in that state is (considered objectively in law and in fact) for the purpose of collecting, realising and distributing the assets of the company.

The Court of Appeal confirmed that "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." It was clear that there had been no abuse or subversion of the insolvency provisions, as the determination premium was a genuine contingent asset which the liquidators were both entitled and obliged to collect and realise for distribution – there had been no artificial prolongation of the liquidation process.

On the general issue of the use of SPVs as a rates mitigation tool, the Supreme Court is due to consider on 26 October 2020 the billing authorities' appeal of the Court of Appeal's decision in *Rossendale Borough Council v Hurstwood Properties (A) Ltd & Others* [2019] EWCA Civ 364 (07 March 2019). The two questions to be considered will be whether it is permissible for the court to pierce the corporate veil in such cases or whether the Ramsay principle can be invoked. Further commentary to follow…

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[1] In short, *Ramsay* established the principle that if one is looking at a tax avoidance scheme which involves a transaction effected via a series of steps, one should look at the effect of the whole series and not at the tax position of each individual step.