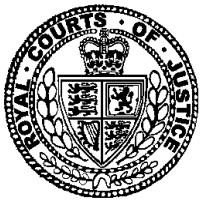

Neutral Citation Number: [2019] EWCA Civ 364

Case No: A3/2017/3463 & 3464 and A3/2017/3506 & 3507

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LIVERPOOL DISTRICT REGISTRY
HHJ HODGE QC (sitting as a Judge of the High Court)
[2017] EWHC 3461 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2019

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE HENDERSON
and
LORD JUSTICE BAKER

- -

Between:

ROSSENDALE BOROUGH COUNCIL	**Claimant/ Respondent**
- and -	
(1) HURSTWOOD PROPERTIES (A) LIMITED **(2) HURSTWOOD PROPERTIES (C) LIMITED** **(3) HURSTWOOD PROPERTIES (I) LIMITED** **(4) HURSTWOOD PROPERTIES (R) LIMITED** **(5) HURSTWOOD PROPERTIES (Y) LIMITED** **(6) HURSTWOOD GROUP 1 LIMITED**	**Defendants/ Appellants**
And Between	
WIGAN COUNCIL	**Claimant/ Respondent**
- and –	
PROPERTY ALLIANCE GROUP LIMITED	**Defendant/ Appellant**

- -

Mr Robin Mathew QC, Mr James Couser and Mr Stephen Ryan (instructed by **AW Law Limited T/A Alexander Whyatt Solicitors**) for the **Claimants**
Mr Nicholas Trompeter (instructed by **Addleshaw Goddard LLP**) for the **Defendants**

Hearing dates: 7 and 8 November 2018

- -

Approved Judgment

Lord Justice David Richards:

Introduction

1. These appeals concern two schemes designed to avoid the payment of National Non-Domestic Rates (NDR) on properties which in most instances were unoccupied. Both schemes involved the grant of leases of the properties to special purpose vehicle companies (SPVs) without assets or liabilities which, as part of the scheme in question, were then placed in voluntary liquidation or were allowed to be struck off the register of companies as dormant companies and thus dissolved.

2. The appeals arise in two cases brought by local authorities for the recovery of NDR from the defendants in respect of the properties of which they, as the freehold or leasehold proprietors, had granted leases to SPVs. The defendants maintain that, by virtue of the leases, the SPVs were the "owners" of the properties for the purposes of liability to pay NDR during the currency of the leases. The local authorities accept that this is the case unless the leases or the SPVs can as a matter of law be disregarded.

3. The appeals raise two issues. First, is it arguable that the doctrine of piercing the corporate veil is applicable to the SPVs? Second, is it arguable that the leases fall to be disregarded by the application of the principles established by the decisions in *W.T.Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 *(Ramsay*) and later cases?

4. On applications by the defendants to strike out the claims in the present cases, HH Judge Hodge QC answered the first question "yes" and the second question "no". Accordingly, he dismissed the applications as they related to the claims based on piercing the corporate veil, but he allowed the applications, and struck out the relevant parts of the particulars of claim, as they related to the *Ramsay* principles. The defendants appeal on the first issue, with the permission of the Judge, and the claimants appeal on the second issue, with permission granted by Patten LJ. The Judge also struck out those parts of the claims that alleged that the leases were shams. On that issue, both the Judge and Patten LJ refused the claimants' applications for permission to appeal. In this judgment, I refer to the parties as the "claimants" or "local authorities" and as the "defendants".

5. The Judge records that these proceedings are but two of some 55 similar proceedings pending in the Liverpool District Registry of the Chancery Division. The two present cases have in effect been chosen as test cases. The total amount of NDR claimed in all these cases is some £10 million but it may well be that the amount of NDR not paid as a result of schemes such as these is greater.

Statutory provisions for NDR

6. NDR accrue on a day by day basis. In the case of occupied premises, NDR are payable by the person in occupation of the relevant property on the day in question. This is the effect of section 43 of the Local Government Finance Act 1988 which provides in sub-sections (1) to (3):

> "(1) A person (the ratepayer) shall as regards a hereditament be subject to a non-domestic rate in respect of a chargeable financial

> year if the following conditions are fulfilled in respect of any day in the year –
>
> > (a) on the day the ratepayer is in occupation of all or part of the hereditament, and
> >
> > (b) the hereditament is shown for the day in a local non-domestic rating list in force for the year.
>
> (2) In such a case the ratepayer shall be liable to pay an amount calculated by –
>
> > (a) finding a chargeable amount for each chargeable day, and
> >
> > (b) aggregating the amounts found under paragraph (a) above.
>
> (3) A chargeable day is one which falls within the financial year and in respect of which the conditions mentioned in subsection (1) above are fulfilled."

7. The chargeable amount for a chargeable day is, save in the case of charities which pay half rates, calculated in accordance with the formula (A x B) divided by C, where A is the rateable value shown for the day as regards the property, B is the non-domestic rating multiplier for the financial year and C is the number of days in the financial year: sections 43(4) and 44.

8. Different provision is necessarily made for NDR on unoccupied premises. Section 45(1) to (3) provides:

> "(1) A person (the ratepayer) shall as regards a hereditament be subject to a non-domestic rate in respect of a chargeable financial year if the following conditions are fulfilled in respect of any day in the year –
>
> > (a) on the day none of the hereditament is occupied,
> >
> > (b) on the day the ratepayer is the owner of the whole of the hereditament,
> >
> > (c) the hereditament is shown for the day in a local non-domestic rating list in force for the year, and
> >
> > (d) on the day the hereditament falls within a description prescribed by the Secretary of State by regulations.
>
> (2) In such a case the ratepayer shall be liable to pay an amount calculated by –

> (a) finding the chargeable amount for each chargeable day, and
>
> (b) aggregating the amounts found under paragraph (a) above.
>
> (3) A chargeable day is one which falls within the financial year and in respect of which the conditions mentioned in subsection (1) above are fulfilled."

9. Under section 45(4)-(6) as originally enacted, NDR for unoccupied premises was chargeable at half the rate applicable to the premises if occupied, but that discount was removed by section 1 of the Rating (Empty Properties) Act 2007, subject to special provision for charities.

10. The 1988 Act refers to "hereditaments" which is defined by section 64 but for the purposes of this judgment it is sufficient to use the term "properties"**.** All the properties in respect of which NDR are claimed fall within the definition of "hereditaments".

11. As appears from section 45(1), NDR are payable in respect of a property if four conditions are satisfied. First, on the day in question, the entirety of the property is unoccupied. No issue arises on the applicability of this condition in the present cases. Second, the person liable for the NDR must be "the owner" of the whole of the property. The "owner" is defined by section 65(1) as "the person entitled to possession of it". As entitlement to possession connotes the exclusive entitlement to occupy the property (see *Brown v City of London Corporation* [1996] 1 WLR 1070 at 1080 per Arden J), it is not in dispute that the tenant under a lease of a property is the "owner" for these purposes. Third, the property must be shown for the day in question in a local non-domestic rating list in force for the year. Again, no issue arises in these cases on that condition. Fourth, on the day in question, the property must fall within a class prescribed by regulations, which in these cases are the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008. By regulations 3, all relevant non-domestic properties are prescribed for these purposes other than those described in regulation 4. Regulation 4 includes any property whose owner is a company "which is being wound up voluntarily" under the Insolvency Act 1986: regulation 4(k).

12. The schemes in issue in these cases that involved the grant of a lease to an SPV followed by the voluntary winding-up of the SPV sought to take advantage of the exception from NDR created by regulation 4(k). In those cases where the SPV was simply dissolved as a dormant company, the lease would vest as *bona vacantia* in the Crown or the Duchy of Lancaster or Cornwall (as appropriate). Whether NDR were in such circumstances payable by the Crown or either Duchy was not explored in submissions before us.

13. From this it can be seen that the lynchpin to the success of the avoidance schemes used in these cases was the grant of leases to the SPVs. If the leases could be disregarded either as shams or by the application of the *Ramsay* principle or if the SPVs could be disregarded by piercing their corporate veils, the schemes would not achieve their purpose and the defendant companies would be liable for NDR on the properties.

The pleaded cases

14. As these appeals arise from applications under CPR 3.4(2)(a) to strike out the particulars of claim on the ground that they disclose no reasonable grounds for bringing the claims, the focus must be on the cases pleaded by the local authorities, assuming in their favour that the pleaded facts are true.

15. I can take for these purposes the claim by Wigan Council against Property Alliance Group Limited.

16. Paragraph 4 of the particulars of claim reads as follows:

> "4. It is the Claimant's contention that the Tax Scheme failed in the Defendant's objective of avoiding NNDR (remaining properly the liability of the Defendant) in that:
>
> 4.1. 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 ("the Limited Company") combined with an uncommercial lease, not being an arrangement at arm's 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 means of defeating the Defendant's liability in respect of NNDR.
>
> 4.2. [deleted]
>
> 4.3. alternatively, the Limited Company so established was a nullity and ineffective as a matter of English law in terms of the Tax Scheme.
>
> 4.4. 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 NNDR. 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."

17. Paragraph 12 states:

> "12. The Tax Scheme that the Defendant relies upon in support of its claim that it is able to improperly avoid the incidence of NNDR relating to the Premises is as follows.

> 12.1 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 NNDR ("the Scheme Provider"). The claimant is not presently able 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 reserves the right to provide further and better particulars on this issue once disclosure has been provided.
>
> 12.2 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 NNDR.
>
> 12.3 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 the below table (and which are collectively referred to as "NewCo"): [Table]
>
> 12.4 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.
>
> 12.5 Thus it was arranged that each Newco company held a short lease, undertook no activity whatsoever, as particularised below, with a view to its dissolution either compulsorily or otherwise so providing a statutory exemption (purportedly pursuant to the provisions set out at paragraphs 10 and 11 above) or for some other reason unexplained to the Claimant (but possibly that the NNDR liability was not that of the Defendants but was that of each Newco company which had no means to discharge it)."

18. In paragraphs 13 to 15, the claimant sets out the best particulars it is able to provide as to the terms of the leases granted to the SPVs. These are that: the rent was £1 or a peppercorn per annum, which was not collected; the lease was terminable on short notice by the lessor to the lessee; the lease did not contain the usual provision permitting the lessor to forfeit the lease if the lessee went into liquidation. These terms, and the other terms of the leases, were "uncommercial, being terms pertinent to effecting the Tax Scheme only".

19. It is also pleaded in those paragraphs that: the three SPVs to which leases were granted by Property Alliance Group Limited never carried on any business nor was it intended that they should do so; they had no assets other than the leases and paid-up capital; they were placed in members' voluntary winding-up but, in two cases, no liquidators were appointed; no meaningful steps were taken in the liquidations and the leases were left running until the defendant wished to re-enter the demised properties. The two SPVs without liquidators were subsequently ordered to be wound up compulsorily on petitions presented in the public interest by the Secretary of State.

20. Paragraph 16 states that the claimant seeks declarations that, first, "the Tax Scheme was ineffective and at all times the Defendant remained liable for NNDR" and, second, that each SPV is or was "an entity that is ineffective or to be disregarded as a matter of English law".

21. Under the heading "Particulars of Tax Avoidance", paragraph 17 states that the defendant entered into the Tax Scheme "for the sole purpose of defeating the lawful liability of NNDR in circumstances where the defendant was not insolvent and accordingly was not entitled to rely upon the exception to NNDR provided to insolvent companies".

22. Under the heading "Particulars of Nullity and/or Legal Ineffectiveness", paragraph 20 states:

> "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 NNDR, 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 to be treated at all material times as the beneficial property of the Defendant."

23. The particulars of claim in the proceedings brought by Rossendale Borough Council are in largely similar terms, save that the SPVs were not placed in liquidation. Although not pleaded, it is Rossendale BC's case that the SPVs were struck off the register of companies, having met the condition that no business was carried on for three months.

Preliminary points on the pleadings

24. There are some observations to be made at this stage about the pleaded cases.

25. First, any case that the SPVs were nullities or "ineffective" (paragraphs 4.3 and 16.2 of Wigan Council's particulars of claim) does not seem to me to be sustainable, and it is fair to say that in his submissions Mr Mathew QC on behalf of the local authorities did not put their case on that basis. The SPVs were duly formed and registered as companies under the Companies Act 2006 or its predecessors, or at least the contrary is not alleged. The registrar of companies issued certificates of incorporation in respect of them under section 15 of the Companies Act 2006 which is conclusive evidence that the company was duly registered under the Act: section 15(4). The effect of registration is that the members are "a body corporate by the name stated in the certificate of incorporation",

capable of exercising all the functions of an incorporated company: section 16. It is not therefore open to the courts to treat the SPVs as nullities or "ineffective". The effect of incorporation can be reversed only by an order quashing the registration, as was done on an application by the Attorney General on the grounds that a company had been formed for illegal purposes: see *R v Registrar of Companies, ex parte Attorney General* [1991] BCLC 476.

26. Second, although the particulars of claim refer to evading, as well as avoiding, a liability to NDR, it is not part of the local authorities' case that the defendants "evaded" a liability to NDR in any dishonest sense. Their case was presented in this court on the basis that, in the absence of either piercing the corporate veil or the application of the *Ramsay* principle, the schemes succeeded in their aims of removing from the defendants any liability to pay NDR on the relevant properties during the terms of their respective leases to the SPVs.

27. Third, because the facts alleged by the local authorities are assumed for the purposes of the applications to strike out and of these appeals to be true, it is not open to the defendants to deny that the terms of the leases were uncommercial and included the specific provisions pleaded by the local authorities. Nor is it open to them to deny that they owned or controlled the SPVs. In this respect, the particulars of claim allege that the establishment and/or use of the SPVs for the purposes of the scheme was "procured directly or indirectly" by the defendants. Further, it is not open to them to assert that the schemes served any bona fide commercial purpose beyond simply avoiding the liability to NDR. I mention this because in *Re PAG Management Services Ltd* [2015] EWHC 2404 (Ch), [2015] BCC 720, Norris J did not accept on the evidence before him that these types of avoidance schemes were contrary to the public interest. That was "essentially a far-reaching economic and political question that is properly the province of Parliament": see [60]. If these cases went to trial, it would or at least might be open to the court to take a different view of this question. Norris J nonetheless ordered the company in that case, which marketed these schemes, to be wound up on the petition of the Secretary of State on the grounds that the schemes involved a misuse of the insolvency legislation, demonstrating a lack of commercial probity and a subversion of the proper function of the law and procedures of insolvency.

Piercing the corporate veil: the claimants' case

28. The essential feature of the local authorities' case that the corporate veil of the SPVs should be pierced is, as pleaded in paragraph 4.4 of Wigan BC's particulars of claim, that the SPVs were interposed "for the purpose and only for the purpose of avoiding an existing or imminent charge to NNDR". The use of the SPVs "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". It is pleaded in paragraph 20 that the effect of piercing the corporate veil of the SPVs would be to treat the leases as the beneficial property of the defendants. That would be to treat the SPVs as agents of the defendants, which is not the way in which the case has been presented. I am inclined to think that, if the corporate veil of the SPVs is pierced, their separate legal personality would be disregarded and the leases treated as granted by the defendants to themselves and therefore of no effect at all. In any event, the result would be that the defendants were at all material times the owner, as defined, of the relevant properties.

29. In their written submissions, counsel for the local authorities pose as the relevant question "whether there is an arguable case that the principles stated in the decision of the Supreme Court in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 (*Prest)* concerning the piercing of the corporate veil are capable of application, or principled development, so as to apply to a situation in which an actor divests himself of an anticipated, on-going and existing liability for business rates by the interposition of a newly incorporated company or SPV".

Piercing the corporate veil: the judgment

30. The Judge gave his reasons for not striking out the claim based on piercing the corporate veil at [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 he Defendant could be said to have control of the SPV is, it seems to me, a matter for disclosure and for trial."

Piercing the corporate veil: the authorities

31. In *Prest*, the Supreme Court examined, first, whether piercing the corporate veil existed at all as a principle of law and, second, if so, the circumstances in which it could be applied. The Court was unanimous in holding that such a principle existed and in large part unanimous in identifying the circumstances in which it had, on a very few occasions, been applied in past cases. The Court was not unanimous in its view as to whether any further development of those circumstances was possible but, if any such development were possible, it would be in a very rare case.

32. Although in a number of past cases the courts had spoken of piercing or lifting the corporate veil, Lord Sumption in his judgment demonstrated that in almost all of those cases the courts had in fact treated the company as either an agent of the defendant or as a means of deception to disguise the true involvement of the defendant as debtor or owner of assets. Those were cases in which the separate legal personality of the company had not been disregarded and in which what Lord Sumption described as the "concealment principle" had been applied.

33. There remained a very small number of cases, perhaps only two (*Gilford Motor Co Ltd v Horne* [1933] Ch 935 and *Jones v Lipman* [1962] 1 WLR 832), in which there had truly been a piercing of the corporate veil, applying what Lord Sumption called the "evasion principle". It enabled the court "to disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company in interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement" (para [28]). At [34] Lord Sumption said:

> "These considerations reflect the broader principle that the corporate veil may 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. 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 upon 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*, 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 is obvious in the case of a consensual liability under a contract, where the ostensible contracting parties never intended that any one else should be party to it. But the objection would have been just as strong if the liability in question had not been consensual."

34. Lord Sumption concluded that it was only in cases where the evasion principle applied that it was open to the courts to pierce the corporate veil. He said at [35]:

> "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. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal

> relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. Like Munby J in *Ben Hashem*, I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in *VTB Capital* who suggested otherwise at para 79. For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy."

35. Lord Neuberger, who in *VTB Capital plc v Nutritek International Corporation* [2013] UKSC 5, [2013] 2 AC 337 had doubted the existence of any principle permitting the courts to disregard the separate legal personality of a company, accepted that the principle existed to the limited extent identified by Lord Sumption and "should only be invoked" in those circumstances: see [81].

36. Baroness Hale, with whom Lord Wilson agreed, agreed with Lord Sumption that piercing the corporate veil was an example of the general principle that the courts may prevent the use of companies as an engine of fraud: see [89]. She said at [92]:

> "I am not sure whether it is possible to classify all of the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of either concealment or evasion. They may simply be examples of the principle that the individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business. But what the cases do have in common is that the separate legal personality is being disregarded in order to obtain a remedy against someone other than the company in respect of a liability which would otherwise be that of the company alone (if it existed at all). In the converse case, where it is sought to convert the personal liability of the owner or controller into a liability of the company, it is usually more appropriate to rely upon the concepts of agency and of the "directing mind."

37. Lord Mance was not prepared to rule out the possibility that situations other than those identified by Lord Sumption might arise where the corporate veil should be pierced. However, he emphasised that "the strength of the principle in *Salomon's* case and the number of other tools which the law has available mean that, if there are other situations in which piercing the veil may be relevant as a final fall-back, they are likely to be novel and very rare": see [100]. He added at [102] that "No one should, however, be encouraged to think that any further exception, in addition to the evasion principle, will be easy to establish, if any exists at all". The absence of authority in any of the cases for any further extension "speaks for itself".

38. Lord Clarke adopted a similar approach. While he did not rule out a further extension and considered that the limits of the doctrine were not clear, he expressly agreed with Lord Mance and others "that the situations in which piercing the corporate veil may be available as a fall-back are likely to be very rare and that no-one should be encouraged to think that any further exception, in addition to the evasion principle, will be easy to establish": see [103].

Application of the law to the present cases

39. It is not, in my judgment, possible to apply the evasion principle to the facts of the present cases. Liability for NDR accrues on a day by day basis. A person becomes subject to the liability only in respect of each day that it owns the property. It is not a future liability, such as a liability to pay interest during the currency of a loan, nor is it a continuing liability save in the sense that it continues while a person remains the owner. For so long as the defendants were the owners, as defined, of the relevant properties, they were liable for NDR on such properties, such liability arising on each day of their ownership, and not before. Once they granted leases of the properties to the SPVs, they ceased to be the owners and the SPVs became the owners. The position would of course be different if the leases were shams but the Judge struck out that allegation and permission to appeal has been refused. It follows that the liability for NDR arising on each day of the term of each lease was that of the SPV alone. It was not, and never had been, a liability of the defendant lessor. It is thus as a matter of law impossible to say, as one must if the evasion principle is to apply, that the defendants were under an existing obligation or liability for NDR during the terms of the leases which they deliberately evaded by interposing a company under their control.

40. In his judgment at [133], which I have earlier set out, the Judge held it to be arguable that the evasion principle, as stated by Lord Sumption, was either applicable to the assumed facts of the present cases or capable of principled development so as to apply to them.

41. Insofar as the Judge held that the evasion principle was applicable to the assumed facts, it is apparent from what I have said above that I disagree. He described the defendants as being under an ongoing or continuing liability for NDR on the relevant properties. As I have explained I do not consider that to be an apt legal analysis of the position. The liability for NDR arose day by day and if a defendant was the owner, as defined, on day 2 as well as day 1, it became liable for the NDR on day 2, but that was not a continuation of a liability that arose on day 1; it was a new liability. There can therefore be no question of the defendants, by granting the leases to the SPVs, evading or frustrating the enforcement of any existing liability. The evasion principle applies, as Lord Sumption put it at [28], "if there is a legal right against the person in control of [the company] which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement". Once a lease, which is *ex hypothesi* valid and not a sham, is granted to an SPV, it and it alone comes under a liability for NDR for each day that the lease subsists (assuming no sub-lease). There is no liability of the relevant defendant that has been defeated.

42. Alternatively, the Judge held that it was arguable that Lord Sumption's principle could be developed so as to apply to the present cases. In posing this question, the Judge said that he was 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. I do not share the Judge's view on this. As it seems to me, Lord Sumption was at [35] limiting those circumstances to the evasion principle, as also did Lord Neuberger at [81]. However, as earlier mentioned, Lord Mance and Lord Clarke did not rule out the possibility of the corporate veil being pierced in other circumstances, nor I think did Baroness Hale and Lord Wilson.

43. The question is therefore whether it is arguable that following a trial a court might develop the principle of piercing the corporate veil so as to apply to the present cases.

44. The court will be cautious of shutting out a case on the basis that such a development is unsustainable. First, no findings of fact have yet been made. However, I have already emphasised that all factual allegations made by the claimants are at this stage to be assumed to be true and it is not suggested by the claimants that there are any further facts beyond those already mentioned which are relevant to their claims. Second, cases such as these require full argument. However, in the present case there has been full argument and there is no suggestion that at trial there could be any more detailed examination of the relevant authorities and principles than has been undertaken in the written and oral submissions on this appeal.

45. I can understand the Judge's reticence on this issue but, in my judgment, this is a case where this court should grasp the nettle and decide whether the principle of piercing the corporate veil is capable of applying to the facts alleged by the claimants in these cases. It would do neither the parties nor the court system any favours to allow the cases to proceed to trial without deciding at this stage a question which is perfectly capable of decision now and which, if decided against the claimants, is fatal to their claims.

46. The citations from the judgments in *Prest* set out above make abundantly clear that, *if* there is to be any extension of the principle beyond the evasion principle, it will only be in very rare and novel cases. That was the view expressed by Lord Mance and Lord Clarke. Baroness Hale spoke of the principle as being one to prevent companies being used as engines of fraud and to prevent those who operate limited companies from taking unconscionable advantage of the people with whom they do business.

47. In the subsequent decision of the Privy Council in *Persad v Singh* [2017] UKPC 32, [2017] BCC 779, Lord Neuberger, with whom Lords Kerr, Reed, Hughes and Hodge agreed, stated at [17] that piercing the corporate veil is "only justified in very rare circumstances" and that, as Lord Sumption explained in *Prest*, it can be justified *only* where the evasion principle applies. While I do not think that this can be taken as removing the possibility of some development to the extent envisaged by the other Justices in *Prest*, it serves to emphasise the difficulties facing any extension of the doctrine beyond the evasion principle.

48. That the possibility of piercing the corporate veil should be highly circumscribed is not surprising. Registration of a company under the Companies Acts creates a separate legal person with all that follows, as the House of Lords affirmed in its seminal decision in *Salomon v A Salomon & Co Ltd* [1897] AC 22. The Acts contain no provision for disregarding that separate legal personality, unlike for example section 20(9) of the Companies Act 2008 of South Africa (see Dame Mary Arden: *Piercing the Corporate Veil – Old Metaphor, Modern Practice?* 2017 (1) JCCL&P 1). It is therefore remarkable

that by the invocation of a common law power the courts can nonetheless disregard a registered company's separate legal personality.

49. The use of companies to avoid the incidence of tax or NDR can hardly be described as rare or novel. They are frequently inserted in tax avoidance schemes for no reason other than to mitigate or avoid the incidence of one form or another of taxation. Further, as the Judge said in his judgment at [3], it has been recognised for a considerable time that ratepayers or potential ratepayers can and do organise their affairs so as to avoid liability to pay rates.

50. Given the efforts to combat tax avoidance over the last 40 years or so, it is surprising that attempts have not been previously been made to invoke the doctrine of piercing the corporate veil to defeat such schemes, if it was properly available for that purpose. If the members of the Supreme Court in *Prest* had thought that the establishment or use of companies for the purposes of tax avoidance, or NDR avoidance, was an appropriate ground for the application of the doctrine, I find it hard to imagine that they would not have said so. It is to be noted that Lord Sumption records at [36] the trial judge's finding that the husband's purpose in vesting properties in companies controlled by him was "wealth protection and tax avoidance".

51. Nor can it be said that the SPVs were used in the present cases as engines of fraud or to take an unconscionable advantage. Views may differ as to whether the purpose for which the SPVs were used was socially reprehensible but, assuming it was, there is no suggestion in *Prest* or in any of the other cases that such disapproval can found the application of the radical doctrine of disregarding the separate legal personality of a registered company.

52. In my judgment, it is not open to the courts to pierce the corporate veil of the SPVs.

53. In presenting the case of the local authorities, Mr Mathew gave prominence to his submissions based on *Ramsay*. He was right to do so. If the schemes are to be defeated, it would most obviously be achieved by disregarding not the separate personality of the SPVs but the leases granted to them. However, for the reasons given by Henderson LJ with which I agree, the principles to be derived from *Ramsay* and subsequent cases are not applicable on the facts of these cases.

54. I should mention that the defendants included in their grounds of appeal, and developed in submissions, a challenge to the adequacy of the pleaded case of piercing the corporate veil. While there are criticisms to be made of the pleading, the essential case advanced by the local authorities was set out in their particulars of claim and any inadequacies could have been cured by amendment.

Conclusion

55. For the reasons given in this judgment and in the judgment of Henderson LJ, I would allow the defendants' appeals and dismiss the local authorities' appeals, with the result that these proceedings will be struck out in their entirety.

Lord Justice Henderson:

56. For the reasons given by David Richards LJ, I agree that the defendants' cross-appeal on the *Prest* issue must be allowed. In this judgment, I explain why the claimants' appeals on the *Ramsay* issue must in my view also be dismissed, with the result (if the other members of the court agree) that the attempt by the claimant local authorities to recover NDR from the defendants in respect of the relevant unoccupied hereditaments cannot succeed and the actions brought by them must therefore be struck out.

The Ramsay principle

57. Everybody now agrees that the *Ramsay* principle, at its most basic level, is one of statutory construction. So much has been clear beyond argument since the magisterial opinion of the appellate committee of the House of Lords in the *BMBF* case (*Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684) was delivered by Lord Nicholls of Birkenhead in November 2004. As Lord Nicholls explained at [29], the new approach inaugurated by the *Ramsay* case itself ([1982] AC 300) "liberated the construction of revenue statutes from being both literal and blinkered", and at [32] he stated the "essence of the new approach" in these terms:

> "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. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, 320, para 8: "The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.""

58. Lord Nicholls continued, at [33]:

> "The simplicity of this question, however difficult it might be to answer on the facts of a particular case, shows that the *Ramsay* case did not introduce a new doctrine operating within the special field of revenue statutes. On the contrary, as Lord Steyn observed in *McGuckian* [1997] 1 WLR 991, 999 it rescued tax law from being "some island of literal interpretation" and brought it within generally applicable principles."

59. These observations are of particular relevance in the present case, because in some contexts NDR would probably not be regarded as a form of taxation. They do not, for

example, fall within the scope of the general anti-abuse rule (or "GAAR") in Part 5 of the Finance Act 2013: see the list of taxes to which the GAAR applies in section 206(2). But precisely because the *Ramsay* principle is one of potentially general application, it has rightly not been suggested on either side that the NDR-avoidance schemes into which the defendants entered are, by reason of their subject-matter alone, immune from application of the principle.

60. Of equal importance is the salutary warning which Lord Nicholls proceeded to give, at [36] to [39], that the mere fact of entering into a composite transaction which includes elements devoid of any commercial purpose does not necessarily lead to the conclusion that the composite transaction will fail in its objective of escaping a charge to tax or, as the case may be, falling within an exemption from tax. Everything always depends, as Lord Nicholls said at [39], on "the need for a close analysis of what, on a purposive construction, the statute actually requires." Thus, in the *BMBF* case itself, the taxpayer was entitled to a capital allowance for the expenditure of £91 million which it had incurred in the provision of a pipeline for the purposes of its finance leasing trade, even though the financing arrangements which the taxpayer had made for the purchase and leaseback of the pipeline were not only pre-ordained and circular, but also resulted in "the bulk of the purchase price being irrevocably committed to paying the rent": see [42].

61. A further illustration of the same point is provided by the *MacNiven* case, in respect of which the House of Lords in *BMBF* provided this important guidance at [37] to [38]:

> "37. The need to avoid sweeping generalisations about disregarding transactions undertaken for the purpose of tax avoidance was shown by *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311 in which the question was whether a payment of interest by a debtor who had borrowed the money for that purpose from the creditor himself and which had been made solely to reduce liability to tax, was a "payment" of interest within the meaning of the statute which entitles him to a deduction or repayment of tax. The House decided that the purpose of requiring the interest to have been "paid" was to produce symmetry by giving a right of deduction in respect of any payment which gave rise to a liability to tax in the hands of the recipient (or would have given rise to such a liability if the recipient had been a taxable entity.) As the payment was accepted to have had this effect, it answered the statutory description notwithstanding the circular nature of the payment and its tax avoidance purpose.
>
> 38. *MacNiven* shows the need to focus carefully upon the particular statutory provision and to identify its requirements before one can decide whether circular payments or elements inserted for the purpose of tax avoidance should be disregarded or treated as irrelevant for the purposes of the statute. In the speech of Lord Hoffmann in *MacNiven* it was said that if a statute laid down requirements by reference to some commercial concept such as gain or loss, it would usually follow that

> elements inserted into a composite transaction without any commercial purpose could be disregarded, whereas if the requirements of the statute were purely by reference to its legal nature (in *MacNiven*, the discharge of a debt) then an act having that legal effect would suffice, whatever its commercial purpose may have been. This is not an unreasonable generalisation, indeed perhaps something of a truism, but we do not think that it was intended to provide a substitute for a close analysis of what the statute means. It certainly does not justify the assumption that an answer can be obtained by classifying all concepts a priori as either "commercial" or "legal". That would be the very negation of purposive construction: see Ribeiro PJ in *Arrowtown*, at paras 37 and 39 and the perceptive judgment of the special commissioners (Theodore Wallace and Julian Ghosh) in *Campbell v Inland Revenue Comrs* [2004] STC (SCD) 396."

62. The judgment of the appellate committee in *BMBF* was delivered some fourteen years ago, but it remains in my view the leading modern authority on the nature and scope of the *Ramsay* principle. To say that, however, is not in any way to diminish the significance of the more recent restatement of essentially the same principles by Lord Reed JSC (with whom the other members of the Supreme Court agreed) in *UBS AG v Revenue and Customs Commissioners* [2016] UKSC 13, [2016] 1 WLR 1005. The section of Lord Reed's judgment dealing with the *Ramsay* approach runs from [61] to [68]. After referring to Lord Nicholls' formulation of "the essence of the new approach" in *BMBF* at [32], Lord Reed continued in a passage which I need to quote in full:

> "64. This approach has proved to be particularly important in relation to tax avoidance schemes as a result of two factors identified in *Barclays Mercantile*, para 34. First, "tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said, "in the real world"". Secondly, tax avoidance schemes commonly include "elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge". In other words, as Carnwath LJ said in the Court of Appeal in *Barclays Mercantile* [2003] STC 66, para 66, taxing statutes generally "draw their life-blood from real world transactions with real world economic effects". Where an enactment is of that character, and a transaction, or an element of a composite transaction, has no purpose other than tax avoidance, it can usually be said, as Carnwath LJ stated, that "to allow tax treatment to be governed by transactions which have no real world purpose of any kind is inconsistent with that fundamental characteristic." Accordingly, as Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454, para 35, where schemes involve intermediate transactions inserted for the sole purpose of tax avoidance, it is quite likely that a purposive interpretation will

result in such steps being disregarded for fiscal purposes. But not always.

65. As was noted in *Barclays Mercantile* [2005] 1 AC 684, para 35, there have been a number of cases since *Ramsay* in which it was decided that elements inserted into a transaction without any business or commercial purpose did not prevent the composite transaction from falling within a charge to tax, or bring it within an exemption from tax, as the case might be. Examples include *Inland Revenue Comrs v Burmah Oil Co Ltd* 1982 SC (HL) 114, *Furniss v Dawson* [1984] AC 474, *Carreras Group Ltd v Stamp Comrs* [2004] STC 1377, *Inland Revenue Comrs v Scottish Provident Institution* [2004] 1 WLR 3172 and *Tower MCashback LLP 1 v Revenue and Customs Comrs* [2011] 2 AC 457. In each case the court considered the overall effect of the composite transaction, and concluded that, on the true construction of the relevant statute, the elements which had been inserted without any purpose other than tax avoidance were of no significance. But it all depends on the construction of the provision in question. Some enactments, properly construed, confer relief from taxation even where the transaction in question forms part of a wider arrangement undertaken solely for the purpose of obtaining the relief. The point is illustrated by the decisions in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311 and *Barclays Mercantile* itself.

66. The position was summarised by Ribeiro PJ in *Arrowtown Assets* 6 ITLR 454, para 35, in a passage cited in *Barclays Mercantile* [2005] 1 AC 684, para 36: "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

67. References to "reality" should not, however, be misunderstood. In the first place, the approach described in *Barclays Mercantile* and the earlier cases in this line of authority has nothing to do with the concept of a sham, as explained in *Snook* [1967] 2 QB 786. On the contrary, as Lord Steyn observed in *McGuckian* [1997] 1 WLR 991, 1001, tax avoidance is the spur to executing genuine documents and entering into genuine arrangements.

68. Secondly, it might be said that transactions must always be viewed realistically, if the alternative is to view them unrealistically. The point is that the facts must be analysed in the light of the statutory provision being applied. If a fact is of no relevance to the application of the statute, then it can be disregarded for that purpose. If, as in *Ramsay*, the relevant fact is the overall economic outcome of a series of commercially linked transactions, then that is the fact upon which it is necessary to focus. If, on the other hand, the legislation requires the court to focus on a specific transaction, as in *MacNiven* and

> *Barclays Mercantile*, then other transactions, although related, are unlikely to have any bearing on its application."

63. The facts in the *UBS* case, and in the linked appeal by a company in the Deutsche Bank group, DB Group Services (UK) Limited, were complex, but in general terms each bank entered into complex arrangements which were in substance designed to enable bonuses to be paid to senior employees in the form of "restricted securities" within the meaning of Chapter 2 of Part 7 of the Income Tax (Earnings and Pensions) Act 2003, which as substituted and in force at the material time provided an exemption from income tax both on the grant of remuneration to an employee in the form of restricted securities and when the relevant restrictions subsequently ceased to apply. The restrictions in question were purely artificial in nature, and framed in such a way that they were highly unlikely to materialise; in the *UBS* case, the scheme also included a hedging provision which would protect the employee even if the relevant contingency were to materialise. Once the restrictions had been lifted, the shares were redeemable by the employees for cash.

64. HMRC's primary attack on the schemes, which succeeded before the First-tier Tribunal, was that the schemes viewed as a whole were merely complex machinery for the delivery of cash bonuses to the employees, and that they should be treated as such by a broad application of the *Ramsay* principle. It is important to note, however, that this broad *Ramsay* argument was decisively rejected by the Upper Tribunal, the Court of Appeal and the Supreme Court: see the judgment of Lord Reed at [90] to [95]. The ground upon which HMRC ultimately succeeded in the Supreme Court was a narrower version of the *Ramsay* argument, which HMRC ran for the first time in the Court of Appeal. It was to the effect that the restrictions attached to the shares fell to be disregarded for the purpose of ascertaining whether they were "restricted securities" within the meaning of the relevant statutory scheme: see Lord Reed's judgment at [86] to [89]. Because the restrictions had no business or commercial purpose, and existed solely to bring the securities within the scope of the relevant definition, the Supreme Court held that they could be disregarded, and the employees were properly to be taxed upon receipt of their shares in accordance with ordinary taxation principles, on the basis of the actual value of the shares at the date of acquisition.

Discussion

65. In the light of these principles, I will begin, as did Lord Reed in *UBS* at [72], "with the interpretation of the legislation, and the fundamental question whether it can be given a purposive interpretation going beyond its literal terms: that is to say, whether a "*Ramsay*" approach is possible at all, and if so the purposive construction on which it is to be based." I will consider the question, in the first instance, with reference to Wigan Council's appeal and the leases entered into between Property Alliance Group Limited ("PAGL") and the SPV companies incorporated for the purposes of the PAG schemes. These are the cases, it will be recalled, in which the SPV company went into members' voluntary liquidation within a matter of days after the grant of the relevant lease. If the *Ramsay* principle can have no application to schemes of this stark simplicity, it is clear that it will be incapable of applying to the more loosely structured Hurstwood schemes which are in issue on Rossendale Borough Council's appeal,

where the leases typically subsisted for a period of at least one year, and sometimes considerably longer, before the SPV company was struck off the register.

66. The basic statutory scheme is straightforward. Section 45(1) of the Local Government Finance Act 1988, contained in Part III of the Act which deals with "Non-Domestic Rating", imposes liability on the ratepayer for NDR in respect of an unoccupied hereditament on a daily basis in respect of a chargeable financial year if the following four conditions are fulfilled in respect of any day in the year:

> "(a) on the day none of the hereditament is occupied,
>
> (b) on the day the ratepayer is the owner of the whole of the hereditament,
>
> (c) the hereditament is shown for the day in a local non-domestic rating list enforced for the year, and
>
> (d) on the day the hereditament falls within a class prescribed by the Secretary of State by regulations."

If the above conditions are fulfilled, subsection (2) then provides that the ratepayer shall be liable to pay an amount calculated by finding the chargeable amount for each chargeable day and aggregating those amounts. A "chargeable day" is defined by subsection (3) as "one which falls within the financial year and in respect of which the conditions mentioned in subsection (1) above are fulfilled."

67. Section 65 of the 1988 Act deals with interpretation of Part III, and section 65(1) states that:

> "The owner of a hereditament or land is the person entitled to possession of it."

As Mr Mathew rightly accepted in oral argument, this is clearly an exhaustive definition which leaves no room for other criteria by reference to which the owner of a hereditament may be identified for the purposes of Part III. Thus the second of the conditions which have to be fulfilled under section 45(1) must be read as meaning:

> "(b) on the day the ratepayer is *the person entitled to possession* of the whole of the hereditament."

68. There is no dispute about the interpretation of the phrase "the person entitled to possession of" a hereditament or land in section 65(1). In *Brown v City of London Corporation* [1996] 1 WLR 1070, the issue was whether administrative receivers of unoccupied commercial property, appointed under debentures to act as agents of the corporate mortgagors, were liable to NDR under section 65(1) of the 1988 Act. Arden J (as she then was) held that they were not. The first question which the judge had to consider was whether the receivers were persons "entitled to the possession of" the properties for the purposes of section 65(1). At 1080 D-H, Arden J recorded the submissions of Elizabeth Gloster QC (as she then was) for the receivers on this question, which included the following:

> "(ii) 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, albeit that such person ex hypothesi will not be in actual physical occupation of the property. In contrast with the word "occupation", the word "possession" conveys the notion of exclusive entitlement to occupy. Possession could not be vested in the receivers and the companies jointly: see *Westminster City Council v Haymarket Publishing Ltd* [1981] 1 WLR 677, and see *Refuge Assurance Co Ltd v Pearlberg* [1938] Ch 687 where the Court of Appeal, at p. 692, described a possible conclusion that a mortgagee in possession and a receiver appointed by it were both in possession at the same time as "quite fantastic."
>
> (iii) Thus in the present case (a) prior to 21 November 1993 B.P. was the "owner", because as tenant it had the immediate right to actual physical possession, notwithstanding that it was not in actual physical occupation; (b) from 21 November 1993, after B.P.'s surrender of its lease to its landlords, the freehold registered proprietors of the properties, viz. the companies, were the owners, because they had the immediate right to physical possession; (c) the receivers were not the owners because under the debentures they acted as agents of the owners, the companies."

Arden J accepted the submissions which I have set out above in full: see her judgment at 1083B.

69. In the present case, the judge referred at [8] to the passage from *Brown* which I have cited, and quoted the key passage at 1080F which says that section 65(1) "requires one to identify the person who has the immediate legal right to actual physical possession". The judge continued, at [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."

Subject to the *Ramsay* argument, no challenge has been made by the claimants to the correctness in law of the propositions accepted by Arden J in *Brown*, and for my part I see no reason to question them.

70. Returning to the legislation with which we are concerned, it only remains to note the fourth of the specified conditions in section 45(1), namely that the hereditament falls within a class prescribed in regulations. As David Richards LJ has already explained at [11] above, the 2008 Regulations provide that the relevant class consists of "all relevant non-domestic hereditaments other than those described in regulation 4". The particular exception in regulation 4 which the PAG schemes were designed to engage when the SPV companies went into members' voluntary liquidation is that in paragraph (k), which applies to 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*" (my emphasis).

71. The critical point to emerge from this statutory scheme, in my judgment, is that liability to NDR in respect of an unoccupied property may only be imposed on a person who is the *owner* of the whole of the relevant hereditament, in the sense of being the person entitled to possession of it. The meaning of entitlement to possession in this context is as stated in *Brown*, that is to say one has to identify "the person who has the immediate legal right to actual physical possession of the property". The concept is one that inevitably focuses on the *legal* right to possession, because the property is by definition unoccupied, so the question cannot be answered by reference to the position on the ground and the rights of those in actual physical occupation. It must also follow, in my opinion, that once the person who has the immediate legal right to possession of the property has been identified, there is no other person upon whom liability for the NDR may simultaneously be imposed. Again, I did not understand this proposition to be disputed by Mr Mathew, who accepted in oral argument that if liability to NDR remained with the defendants, notwithstanding the execution of the leases to the SPV companies, then the tenants could not simultaneously be liable for the rates.

72. The next step in the analysis, therefore, is to ask whether the execution of each lease by PAGL to an SPV company had the effect in law of transferring the immediate legal right to possession from PAGL to the lessee company. In my view there can be only one answer to this question. Since it now has to be accepted that the leases were valid, and not sham, the effect in law of their execution was to grant the immediate legal right to possession of the property to the tenant: see *Street v Mountford* [1985] AC 809, where Lord Templeman's analysis of the authorities demonstrates that a tenancy can only exist in law if the occupier enjoys exclusive possession of the property for a fixed or periodic term. At the conclusion of his analysis on p 827, Lord Templeman expressly adopted the logic and the language of Windeyer J in the High Court of Australia in *Radaich v Smith* (1959) 101 C.L.R. 209, 222, where he said:

> "What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second. A right of exclusive possession is secured by the right of a lessee to maintain ejectment and, after his entry, trespass. A reservation to the landlord, either by contract or statute, of a limited right of entry, as for example to view or repair, is, of course, not inconsistent with the grant of exclusive possession. Subject to

> such reservations, a tenant for a term or from year to year or for a life or lives can exclude his landlord as well as strangers from the demised premises…"

73. It follows from these basic propositions of land law that, once each scheme lease was executed, the right to legal possession of the property passed from PAGL to the lessee. Accordingly, the liability to NDR in respect of the property also passed from PAGL to the lessee, because from the day the lease was granted it was the lessee, and not PAGL, which satisfied the ownership condition in section 45(1)(b) of the 1988 Act. For the purposes of the statutory scheme, that is the relevant condition which had to be satisfied, and as a matter of law the transfer of ownership took effect immediately upon the execution of the lease, regardless of the motivation of the parties in entering into it. Moreover, since the lease was not sham, it validly conveyed a legal estate in land to the lessee in the form of a term of years absolute, with all the necessary incidents of such a term, including the right to exclusive possession. None of this can be altered by the fact that the lease may have omitted some usual provisions, or that the intention of the parties was for the lessee to divest itself of its own liability to NDR by quickly entering into members' voluntary liquidation. Those factors help to explain the structure and motivation of the scheme, but for the purposes of section 45 the only relevant concept is whether ownership of the property has passed from the lessor to the lessee. On the agreed facts in the cases with which we are concerned, that condition was unquestionably satisfied, and I cannot see any scope for giving to the concept of ownership in this context, as defined in section 65(1), anything other than its normal legal meaning. The legislation is therefore not amenable to a wider, purposive construction which could allow scope for the *Ramsay* principle to operate. Conceptually, the case is of the same general type as *MacNiven* or *BMBF*, or indeed the wider *Ramsay* argument which the Supreme Court rejected in the *UBS* case.

74. Counsel for the claimants sought to persuade us, in their written and oral submissions, that there was at least arguably still scope for the *Ramsay* principle to operate, with the consequence that the actions should not be struck out and there should be a full investigation of the facts at trial after the parties had fully pleaded their respective cases and disclosure had taken place. In their written argument, they submitted that "the notion of an owner of a hereditament as a person entitled to possession has to be interpreted purposively as an owner with a *real* entitlement to possession, such that an SPV whose only reason for existence was to accept a lease, with no commercial purpose other than to avoid the liability to pay [national non-domestic rates], is not the owner of a hereditament." The fundamental problem with this submission, however, is that it elides the steps which have to be followed in deciding whether a *Ramsay* approach is possible. One step must always be to construe the relevant legislation, to see whether it admits of a *Ramsay* approach. For that purpose, it is not enough (as cases like *MacNiven* and *BMBF* show) merely to point to the tax-avoidance motive of the ratepayer, or the pre-ordained nature of the transactions which are undertaken, or to aver that the SPV company's entitlement to possession is "unreal" where it has been brought into existence for the sole purpose of taking the lease. As I have sought to explain, the concept of entitlement to possession in section 65(1) of the 1988 Act is an intrinsically legal one, which is satisfied the moment that a valid lease to the SPV company has been executed. Where the relevant concept is of such a nature, the tax avoidance motivation of the parties and the artificiality of the arrangements become irrelevant, because they have nothing to do with the relevant legal concept.

75. Mr Trompeter helpfully referred us in this context to the decision of Mann J in *Westbrook Dolphin Square Ltd v Friends Life Ltd (No2)* [2014] EWHC 2433 (Ch), [2015] 1 WLR 1713, where the defendant was the freeholder of a large complex of 1,229 flats, most of which were let to occupational tenants, and in order to facilitate a claim to collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993 the claimant granted sub-underleases of the flats to a large number of SPV companies, each holding not more than two leases. This was combined with the introduction of an elaborate corporate structure designed to ensure that the SPV companies would not be "associated companies" for the purposes of the definition of "qualifying tenants" in section 5 of the 1993 Act, which (in short) provided that a person could not be a qualifying tenant if he was actually the tenant of three or more flats, and that "associated companies" were to be treated as one person for these purposes: see the judgment of Mann J at [30].

76. In challenging these arrangements, the freeholder relied on a *Ramsay* argument which has some generic similarity to that advanced by the claimants in the present case. The argument was rejected by the judge, who emphasised at [130] that the argument was one of statutory interpretation, with the consequence that:

> "One is therefore looking for words which have to be interpreted. One is not looking to a general sort of "Parliament cannot have intended to allow this sort of thing" approach. It is a tighter approach than that."

To similar effect, Mann J said at [135]:

> "In my view this exposes the argument for what it is, which is 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."

With respect to the claimants, it seems to me that their *Ramsay* argument is open to essentially the same objection.

77. In his oral submissions, Mr Mathew argued in various ways that the lessees' entitlement to possession was (at least arguably) illusory or artificial, because (for example) no rent was ever collected from them, some provisions which one would normally expect to find in a commercial lease were absent, and they never put the premises to any commercial or business use. Thus, said Mr Mathew, even if in purely legal terms the lessees had a right to possession, it could not realistically be said that the condition in section 145(1)(b) was satisfied. Although not a sham, each lease was no more than an artifice contrived to satisfy the ownership condition, with no intention that it should have any business or commercial reality.

78. Again, however, these arguments seem to me no more than variants of the submissions which I have already rejected. As a matter of construction, the ownership condition is in my judgment concerned with the immediate entitlement to legal possession, and as a matter of law that condition was satisfied the moment that a valid lease was granted. In this connection, Mr Mathew was rightly constrained to accept that, when the leases were executed, the parties must have intended to enter into legal relations. Indeed, as

is the case with most honest tax avoidance schemes, the intention of the parties was to enter into transactions which are valid and have their purported effect.

79. For all these reasons, which largely reflect Mr Trompeter's clear and able submissions, I am satisfied that the *Ramsay* principle can have no application to the PAG schemes. If that conclusion is right, the same must also be true, a fortiori, of the Hurstwood schemes. Accordingly, the judge was in my view right to conclude that the *Ramsay* claims could not succeed.

Lord Justice Baker:

80. I agree with both judgments.