Neutral Citation Number: [2021] EWHC 345 (Admin)

Case No: CO/2677/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LEEDS

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 19th February 2021

Before:

MR JUSTICE FORDHAM

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Between:

ISLE INVESTMENTS LIMITED	**Appellant**
- and -	
LEEDS CITY COUNCIL	**Respondent**

- -
- -

George Mackenzie (instructed by Town Legal LLP) for the **Appellant**
William Hanbury (instructed by Leeds Legal Services) for the **Respondent**

Hearing dates: 1 December 2020, 3 December 2020, 18 January 2021

Approved Judgment

Addendum Footnote (§62) added by the Judge on 2.3.21

MR JUSTICE FORDHAM:

Introduction

1. This is a case about a rates-avoidance arrangement in relation to office premises in Leeds. It features some snails in some crates. In legal terms, the case concerns the approach to identifying 'sham leases' in the context of avoiding non-domestic rates **("NDR")** in relation to unoccupied premises. In procedural terms, it is an appeal by way of case stated, arising from a determination of District Judge Holland **("the Judge")** at Leeds Magistrates' Court. By that determination the Judge made a liability order for NDR against the appellant **("Isle")** in the contested sum of £105,728.70 in respect of Units 2, 4 and 7 **("the Units")** within Airedale House in Beeston, Leeds for relevant periods between 24 May 2018 and 31 March 2020. The Judge gave a judgment dated 3 April 2020 **("the Judgment")**. Wishing to pursue an appeal to this Court, Isle asked the Judge to state a case, which she did by issuing a case stated document dated 30 June 2020 **("the Case Stated")** which said it contained *"an expanded version of the less detailed summary of the conclusions and findings provided in the judgment"*. The Case Stated identified the following question for this Court:

    > ***On the facts as I found them to be, was I right to conclude that the sole purpose of these leases was for [Isle] to seek to avoid the liability to pay business rates in circumstances where the tenant had no intention of paying the business rates, as opposed to a lease intended to provide exclusive possession to the tenants for the conduct of the tenants' businesses. In short, was I right to conclude that the leases were shams?***

    In order to help with clarity, consistency and flow I will use shorthand terms (as follows) for: the apparent nature of the relationship **("ANR")**; actual occupation **("AO")**; an exclusive entitlement to occupation **("EEO")**; newly created shelf companies **("NCSCs")**; and the true nature of the relationship **("TNR")**. I will use also a shorthand phrase (**"Effective-Avoidance Intent"**) to mean this: the position where an arrangement is intended to be effective in producing an outcome of effectively avoiding a person's statutory obligations (in this case, NDR liability).

2. This is my encapsulation of the background to this case. Isle had acquired the Units. Its objective was to avoid its liability to pay NDR in respect of them. It made contact with a company called Crusader. They entered an arrangement whereby Isle agreed to pay Crusader 20% of the NDRs applicable to the Units, in return for Crusader implementing a scheme designed to achieve Isle's NDR-avoidance objective. The upshot was a series of short (21-week) leases with Isle as stated 'landlord' and a series of NCSCs as the stated 'tenant' (or lessee). The Judge described eight leases as follows (giving date, unit and tenant): (1) 24.5.18 Unit 2 Property Alliance (9) Ltd; (2) 24.5.18 Unit 4 Property Alliance (9) Ltd; (3) 24.5.18 Unit 7 Property Alliance (9) Ltd; (4) 19.10.18 Unit 2 Property Alliance (10) Ltd; (5) 19.10.18 Unit 4 Property Alliance (10) Ltd; (6) 16.3.19 Unit 2 Property Alliance (12) Ltd; (7) 16.3.19 Unit 7 Property Alliance (12) Ltd; (8) 11.8.19 Unit 7 Property Alliance (14) Ltd. To these can be added two more – (9) 6.1.20 Unit 4 Property Alliance (18) Ltd; and (10) 6.1.20 Unit 7 Property Alliance (18) Ltd – on which no point of substance turns, so that references below to

the eight leases, the later leases and the NCSCs apply equally to these leases and 'tenants'. The Judge also described three visits by the Council's Ms Linsell, on: (i) 17.7.18; (ii) 15.1.19; (iii) 20.6.19. The issue for the Judge was whether the leases were genuine in which case Isle would have no NDR liability, or whether they were a sham in which case Isle would be liable for NDR.

3. The hearing of this appeal took place by a remote video hearing. Both Counsel were satisfied, as was I, that the mode of hearing involved no prejudice to the interests of their clients. The open justice principle was secured: the hearing and its start-time were published in the cause list, together with my clerk's email address, usable by any person – whether associated with the parties, a member of the press, or a member of the public – wanting to observe the hearing. A remote hearing eliminated any risk to any person from having to travel to or be present in a court room during the pandemic. I am satisfied that the mode of hearing was appropriate, necessary and proportionate.

The law in relation to sham

Authorities relating to sham

4. The parties drew to my attention a long line of authority relating to the concept of sham. In this judgment I will refer to cases by short-form names, accompanied by a full citation the first time they are mentioned. But first I will introduce the most noteworthy cases in date order, giving an indication of the subject-matter of each case. First, these cases in the period 1966 to 2011. (1) Snook was a decision of the Court of Appeal on 17.1.66 which decided that a refinancing arrangement relating to an MG car was not a sham: *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786. (2) Miles v Bull was a decision of Megarry J on 30.8.68 which refused summary judgment against a wife, sought by a third party who had entered an arrangement to buy the matrimonial home from the husband: *Miles v Bull* [1969] 1 QB 258. (3) Aldrington was a decision of the Court of Appeal on 7.7.78 which decided that a 'licence' arrangement in relation to a flat in Highgate was what it purported to be and not a tenancy: *Aldrington Garages Ltd v Fielder* (1983) 37 P & CR 461. (4) Ramsay was a decision of the House of Lords on 12.3.81 which decided that two schemes had failed to achieve their tax-avoidance purpose. (5) Street v Mountford was a decision of the House of Lords on 2.5.85 which decided that a 'licence' arrangement in respect of rooms in Bournemouth had the effect of creating a tenancy: *Street v Mountford* [1985] 1 AC 809. (6) Antoniades was a decision of the House of Lords on 10.11.88 which decided that separate agreements in respect of the two occupiers of a top floor flat in Upper Norwood disguised the arrangement's true character as a tenancy: *Antoniades v Villiers (AG Securities v Vaughan)* [1990] 1 AC 417. (7) Belvedere was a decision of the Court of Appeal on 24.10.95 which decided that the grant to an associated company of 56 leases in respect of a block of flats in Barnet were not a sham: *Belvedere Court Ltd v Frogmore Developments Ltd* [1997] QB 858. (8) Jones was a decision of Neuberger J on 22.6.00 that a tenancy and asset-sale to an off the shelf company, to protect a Welsh farming family's home and assets from action by a mortgagee bank, were not a sham: *National Westminster Bank Plc v Jones* [2001] 1 BCLC 98 (a conclusion untouched by the judgment of the Court of Appeal on other issues [2001] EWCA Civ 1541 at §39); (9)

Hitch was a decision of the Court of Appeal on 26.1.01 which decided that the Special Commissioners had reasonably concluded that an agreement for disposal of Wiltshire farmland, designed to avoid development land tax, was a sham (from which it followed that a related Deed was also a sham): *Hitch v Stone* [2001] EWCA Civ 63 [2001] STC 214. (10) A v A was a decision of Munby J on 29.1.07 which decided that a husband's family trusts holding shares in a chicken processing company were not shams: *A v A* [2007] EWHC 99 (Fam). (11) Autoclenz was a decision of the Supreme Court on 27.7.11 which decided that Derbyshire car valeters were workers entitled to minimum wage protection notwithstanding the 'contractor's services' agreements they had signed: *Autoclenz Ltd v Belcher* [2011] UKSC 41 [2011] ICR 1157.

5. Then, these cases in the period 2012 to 2016. (12) Makro was a decision of HHJ Jarman QC on 28.6.12 which decided that the storage of pallets of documents in a Coventry warehouse for short periods ought to have been found to be rateable occupation, meaning the NDR-avoidance purpose of the overall arrangement had been achieved: *R (Makro Properties Ltd) v Nuneaton & Bedworth Borough Council* [2012] EWHC 2250 (Admin). (13) Kenya Aid was a decision of the Divisional Court on 22.1.13 which decided that the rateable occupation by a charity of premises in Sheffield was 'wholly or mainly for charitable for purposes' to trigger a statutory 80% NDR reduction: *Sheffield City Council v Kenya Aid Programme* [2013] EWHC 54 (Admin) [2014] QB 62. (14) PAG (2015) was a decision of Norris J on 9.8.15 which decided that an NDR-avoidance arrangement in relation to unoccupied premises, involving 'leases' to special purpose vehicle companies (SPVs) immediately placed into voluntary liquidation, to trigger statutory NDR-exemption (a) were not shams (b) but made it appropriate to make winding-up orders against the corporate scheme operator (i) not as contrary to the public interest but (ii) for abuse of the insolvency legislation: *Secretary of State for Business, Innovation and Skills v PAG Management Services Ltd* [2015] EWHC 2404 (Ch) [2015] BCC 720. (15) South Kesteven was a decision of the Divisional Court on 27.1.16 which decided (applying Kenya Aid) that the rateable occupation by a charity of premises in Grantham was 'wholly or mainly for charitable for purposes' to trigger the statutory 80% NDR reduction: *South Kesteven District Council v Digital Pipeline Ltd* [2016] EWHC 101 (Admin) [2016] 1 WLR 2971.

6. Finally, these cases in the period 2017 to 2020. (16) Rossendale (2017) was a decision of HHJ Hodge QC on 30.11.17 which decided that local authority test case claims to recover NDR from the 'landlords' in the SPV-insolvency arrangements considered in PAG (2015) (a) should be struck out insofar as based on (i) sham and (ii) purposive statutory interpretation but (b) should go to trial insofar as based on 'piercing the corporate veil' (see Rossendale (CA)): *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2017] EWHC 3461 (Ch) [2018] RA 251. (17) Anami was a decision of the Divisional Court on 19.6.18 which decided that the production after the event of a 'strange lease document' involving a tenuous and dormant 'tenant' in relation to a unit in West Bromwich was a sham and the 'landlord' remained liable for NDR: *Anami Holdings Ltd v Sandwell Metropolitan Borough Council* [2018] EWHC 1913 (Admin). (18) Camelot was a decision of Butcher J on 31.7.18 which decided that a 'licence' for a property guardian to occupy business premises in Westminster was not a sham: *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB). (19)

Broxfield was a decision of Mostyn J on 2.7.19 which decided that a document produced after the event purporting to 'lease' Sheffield premises to a dormant off-the-shelf company was a sham (and no contract had been shown to have been entered into), so that the 'landlord' remained liable for NDR: *Broxfield Ltd v Sheffield City Council* [2019] EWHC 1946 (Admin). (20) Rossendale (CA) was a decision of the Court of Appeal on 2.7.19 on an appeal and cross-appeal from Rossendale (2017) which upheld HHJ Hodge QC on (a)(ii) (purposive interpretation), overturned him on (b) (piercing the corporate veil) and left intact (a)(i) (sham) on which permission to appeal was refused by Patten LJ (see §4): *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2019] EWCA Civ 364 [2019] 1 WLR 4567. (21) PAG (2019) was a decision of HHJ Stephen Davies on 30.10.19 which decided, in relation to the successor NDR-avoidance arrangement to the one in PAG (2015) (now with the added features of a determination premium and prompt appointments of liquidators in the SPV insolvencies), the leases not being challenged as shams (§4), that there was no basis for making a winding up order against the successor corporate scheme operator: *Re PAG Asset Preservation Ltd* [2019] EWHC 2890 (Ch) [2020] BCC 167. (22) PAG (2020) was a decision of the Court of Appeal on 31.7.20 which upheld PAG (2019): *Secretary of State for Business, Energy and Industrial Strategy v PAG Asset Preservation Ltd* [2020] EWCA Civ 1017 [2020] BCC 979. (23) Toorani was a decision of James Pickering QC on 23.12.20 which decided that a corporate party to an arrangement may have the requisite intention to support a conclusion of sham even if the individual signing the document on its behalf did not: *Toorani v Estate of Behrooz Abdul Rasool Toorani* [2020] EWHC 3477 (Ch).

Effective-Avoidance Intent does not connote unlawfulness/sham

7. As HHJ Jarman QC put it in Makro at §56: *"It has been recognised for a considerable amount of time that ratepayers or potential ratepayers can and do organise their affairs so as to avoid paying rates"*. As Henderson LJ explained in Rossendale (CA) at §74: if the *"intrinsically legal"* concept of EEO has validly been conferred, *"the tax avoidance motivation of the parties"* becomes *"irrelevant"*. An arrangement with an Effective-Avoidance Intent (§1 above) may or may not be sham. The Upper Norwood 'landlord' in Antoniades had an Effective-Avoidance Intent: that the arrangement would be effective in avoiding the application of the Rent Acts. The Wiltshire farming family in Hitch had an Effective-Avoidance Intent: that the arrangement would be effective in avoiding development land tax. The car valeting company in Autoclenz had an Effective-Avoidance Intent: that the 'services' arrangements would be effective in avoiding having to pay the minimum wage. But the 'landlords' in PAG (2015) and Rossendale (CA) (and all the related cases) also had an Effective-Avoidance Intent: that the arrangement would be effective in avoiding NDRs. So did the 'landlord' in Anami. As HHJ Stephen Davies explained in PAG (2019) at §117 the leases were not shams in those cases (see §4) although they had *"no purpose other than to enable the landlords to avoid paying business rates"*. The proposition that an Effective-Avoidance Intent does not of itself render a transaction a sham is a strong theme in the authorities: *"The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides"* (Lord Wilberforce in Ramsay at 323E); *"the mere fact that a tenancy, or any other contractual transaction, is entered into ... to avoid the*

contractual or statutory rights which a third party would otherwise enjoy, does not by any means of itself render the transaction a sham" (Neuberger J in Jones at §37). The whole point of the Sheffield lease in Kenya Aid was to avoid NDR liability: the property owner paid the charity a fee greater than 20% of full NDR liability, making the arrangement *"a match made in heaven"* (see §13) because the occupying charity received a 80% NDR discount (see too South Kesteven at §17).

Sham: a document intended to give a false impression as to the TNR

8. A sham is an arrangement involving an intentional mismatch between the ANR (apparent nature of the relationship) and the TNR (true nature of the relationship), so as to give a false impression to third parties or a Court. As Arden LJ explained in Hitch at §63, the *"essence"* is that *"the parties to [the] transaction intend to create one set of rights and obligations but do acts or enter into documents which they intend should give third parties ... or the court, the appearance of creating different rights and obligations"*. That means: *"The parties must have intended to create different rights and obligations from those appearing from (say) the relevant documents and in addition they must have intended to give a false impression of those rights and obligations to third parties"* (Hitch at §66). A document may be a sham in full or in part (Hitch at §§85-86). Sham has been called a *"very simple"* concept (Mostyn J in Broxfield at §23). A sham is where *"acts done or documents executed by the parties ... are intended by them to give to third parties or the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create"* (Lord Diplock in Snook at 802). Thus, the transactional relationship *"while professing to be one thing ... is in fact something different"* (Lord Fraser in Ramsay at 323; Broxfield at §21). A sham is *"simply a provision or agreement which the parties do not really intend to be effective, but have merely entered into for the purpose of leading the court or a third party to believe that it is to be effective"* (Neuberger J in Jones at §59). The mismatch between the ANR and the TNR has been described as the situation where *"the outward and visible form does not coincide with the inward and substantial truth"* (Megarry J in Miles v Bull at 264D-E; McCombe LJ in Anami at §§24-25). The cases show that it can be helpful to encapsulate a sham using descriptions such as the following: *"the parties were ... doing one thing and saying another"* (Sir Thomas Bingham MR in Belvedere at 876D); they did not *"intend the agreement to take effect according to its tenor"* but intended *"some other arrangement to bind them"* so that the *"agreement [was] not to bind their relationship"* (Arden LJ in Hitch at §67); *"the true bargain between the parties is other than which appears in the written document"* (Butcher J in Camelot at §19(5)); the documents *"were not intended to have their apparent effect"* (Norris J in PAG (2015) at §37); provisions *"were intended merely as 'dressing up' and not as provisions to which any effect would be given"* (Antoniades at 475F); *"the purported agreement is no more than a piece of paper which the parties have signed with no intention of its having any effect save that of deceiving a third party and/or the court into believing that the purported agreement is genuine"* (Neuberger J in Jones at §68); there is *"an air of total unreality about [the] documents"* (Lord Oliver in Antoniades at 467H; Camelot at §36); *"the lease document was nothing more than a mask to conceal the reality"* (McCombe LJ in Anami at §28).

A common intention; and a degree of dishonesty

9. As Diplock LJ put it in Snook at 802E: *"for acts or documents to be a 'sham' ... all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating"*. The same point was made by Arden LJ in Hitch at §§69, 85; and HHJ Hodge QC in Rossendale (2017) at §§51, 53. It can suffice if one party is recklessly indifferent: A v A at §§50, 52. The mismatch creating the false impression of the TNR is a *"pretence"* and a *"disguise"* (Lord Templeman in Antoniades at 462H and 463F-G). That being so, it is well-established that *"a sham transaction involves a degree of dishonesty"* (Jones at §39), at least *"ordinarily"* (Butcher J in Camelot at §§19(6), 32). This element has been expressed as the *"dishonest common intention that the transaction is not going to create the legal rights and obligations which it gives the appearance of creating"* (Rossendale (2017) at §§60(5), 61, 67).

A factual enquiry, discerning the TNR

10. As Arden LJ explained in Hitch at §64: *"An enquiry as to whether an act or document is a sham requires careful analysis of the facts"*. As Mostyn J has explained in Broxfield at §29: *"Whether an impugned arrangement is or is not a sham is ... a matter of fact"*, with which factual evaluation the court will interfere on an appeal by case stated only if *"there was no evidence to support a challenged finding of fact, or ... the ... judge's finding was one that no reasonable judge could have reached"*. In order to see whether there is a mismatch between them, it will be necessary to analyse the ANR and the TNR. The court will need to identify *"the true bargain between the parties"* (Camelot at §19(5)), *"find out what is the true nature of the transaction"* (Aldrington at 471; PAG (2020) at §55; Rossendale (CA) at §55). A 'careful analysis of the facts' is exemplified by cases like Jones (where there was no sham) and Hitch (where there was a sham). In that enquiry, the fact that a term is unused does not mean the document is a sham, nor does the fact that a provision was departed from (Camelot §33).

An "External Evidence Enquiry", including practicalities and conduct

11. As Arden LJ explained: *"in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties"* (Hitch at §65). This enquiry **("External Evidence Enquiry")** is *"perfectly proper"* (Jones at §42). So, *"the court must pay attention to the facts and surrounding circumstances and to what people do as well as what people say"* (Lord Templeman in Antoniades at 464A); and *"it is permissible to have regard not only to matters predating the conclusion of the agreement but also to how the arrangements were operated in practice afterwards"* (Camelot at §19(5)). It can be relevant to have in mind that conduct consistent with the ANR *"could have been undertaken in order to make a sham transaction look more convincing"* (Jones at §58). The factual enquiry can include questions of practical reality: in Antoniades Lord Templeman explained (at 463E) that *"[t]he facilities in the flat were not suitable for sharing between strangers"*, a point also recorded by Lord Oliver (at 469C-D) by reference to *"the physical lay-out and size of the premises"*.

Artificiality does not of itself mean sham; but it is relevant to sham, as is its denial

12. The fact that a contract such as a lease is *"an artificial device intended to circumvent a result the Act would otherwise have brought about"* does not mean it is a sham, and such artificiality does not *"entitle the court to ignore or override apparently effective transactions which on their face confer an interest in land"*, where there is *"no element of pretence"* and the *"parties were not doing one thing and saying another"* (Sir Thomas Bingham MR in Belvedere at 876D-F). As Lord Templeman said in Antoniades at 462H, it is better to speak of *"pretence"* than of *"artificial transaction"*. As Neuberger J said in Jones at §30: "*an artificial transaction is not the same as a sham transaction"*. As Norris J said in PAG (2015) (at §§39, 40): *"there is a difference between 'artifice' and 'sham'"* and *"artificial transactions are not necessarily sham transactions because they may be honest"*). The same point was made by Arden LJ in Hitch at §67 and by Asplin LJ in PAG (2020) at §57. However, the *"fact that a particular transaction is palpably artificial is a factor which can properly be taken into account when deciding whether it is a sham"* (Jones at §39). This is linked to the fact that one of the ways that sham can be encapsulated is where there is *"an air of total unreality about [the] documents"* (Lord Oliver in Antoniades at 467H; Camelot at §36). Moreover: *"If the court were to conclude that a transaction was artificial, in circumstances where the party relying on it was contending that it was not artificial, ... that might be a further reason (although certainly not a conclusive reason) for deciding that the transaction was a sham, given that a sham transaction involves a degree of dishonesty"* (Jones at §39).

Effective-Avoidance Intent is not inconsistent with sham

13. Effective-Avoidance Intent does not connote unlawfulness/sham (see §7 above) but nor is it inconsistent with sham. That is because there are, in the context of whether an arrangement is a sham, two distinct types of Effective-Avoidance Intent. One type involves intended effectiveness through the document being genuine and reflecting the TNR. That is the species present in *"most honest tax avoidance schemes"* where *"the intention of the parties was to enter into transactions which are valid and have their purported effect"* (Henderson LJ in Rossendale (CA) at §78). This species engages the *"strong presumption that parties to a transaction intend its terms, both as to rights and obligations, to be effective"* (Butcher J in Camelot at §38). The other type involves intended effectiveness through the document being successful in giving a false impression as to the TNR. This alternative type is why an Effective Avoidance-Intent does not of itself disprove the existence of a sham. In Jones, Counsel argued that the parties *"must have intended [the agreements] to be genuine"* because *"only if the agreements were genuine do they achieve ... the result ... intended"* (at §44). The flaw in that argument, identified by Neuberger J (at §45) is that: *"If it were right, then no arrangement could ever be held to be a sham"* for *"the whole point of a sham provision or agreement is that the parties intend to give the impression that they are agreeing that which is stated in the provision or agreement"*. So, the landlord in Antoniades had an Effective-Avoidance Intent – to avoid the Rent Acts – but the 'tenancy' was a sham.

The "Neuberger Formulation": 'no intention of honouring obligations or enjoying rights'

14. In Jones, Neuberger J said this: *"The whole point of a sham provision or agreement is that the parties intend to give the impression that they are agreeing that which is stated in the provision or agreement while in fact they have no intention of honouring their respective obligations or enjoying their respective rights under the provision or agreement"* (Jones at §45). He went on to speak of a presumption, in the case of *"what appear to be perfectly proper agreements on their face"*, that the parties *"intend to honour and enjoy their respective obligations and rights"* (at §46). This formulation ('no intention of honouring obligations or enjoying rights') **("the Neuberger Formulation")** featured in Rossendale (2017) at §49. It was applied in Camelot, where Butcher J described it as the *"justification"* for the External Evidence Enquiry (see §11 above) since *"such conduct may give rise to the inference that, at the time it was entered into, the agreement was a pretence"* (at §19(5)), later describing the Neuberger Formulation as *"what is involved in this investigation"* (at §31).

While the court is astute to detect shams, there is a 'strong presumption' of regularity

15. As Lord Templeman said in Street v Mountford at 825H: the court should be *"astute to detect and frustrate sham devices"*. However, as Neuberger J said in Jones at §46, *"there is a strong presumption, even in the case of an artificial transaction, that the parties to what appear to be perfectly proper agreements on their face intend them to be effective, and that they intend to honour and enjoy their respective obligations and rights"*. Having made both Lord Templeman's point and Neuberger J's point (at §§30-31), Butcher J went on to explain in Camelot (at §32) that since *"an allegation of sham carries with it a degree of dishonesty"*, *"the court will carefully consider whether [dishonesty] is made out, the onus being on the party which is alleging that an agreement or provision is a sham or pretence to make that out"*. It has therefore been said that: *"[t]he court is slow to find that an agreement is a sham"* (Rossendale (2015) at §§60(6) and 61); and *"[m]ere circumstances of suspicion do not by themselves establish a transaction as a sham"* (Miles v Bull at 264D-E). Ultimately, however, the question is whether *"the evidence satisfies the court that it is more likely than not that the arrangement was a sham"* (Mostyn J in Broxfield at §24) and, so far as dishonesty is concerned, the *"court has to consider on the admissible evidence whether the charge is more likely than not made out"* (at §25).

Sham in the context of NDR and unoccupied premises

NDR: occupied premises and AO

16. Before analysing the position in relation to unoccupied premises, it is worth starting with occupied premises. As David Richards LJ explained in Rossendale (CA) at §4: *"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 the Local Government Finance Act 1988 s.43. So, in 'occupied premises' cases a key question may be: who is in AO? Premises are occupied if there is AO (actual occupation) which is exclusive for the particular purpose of the possessor (Makro at §21). Kenya Aid and South Kesteven are good examples of occupied premises cases. In those cases it was common ground that the charity was in rateable occupation. The issue was whether that occupation was 'wholly or mainly for charitable purposes' so that the charity's NDR liability would

attract a statutory 80% discount. Premises may switch from being unoccupied to being occupied. In Makro the question was whether the premises had become occupied for a continuous 6 week period, before again being unoccupied, triggering a new statutory 6 month NDR exemption. In Anami the freehold owner of the West Bromwich unit contended that the lessee had become *"the occupying tenant"* (at §3). In Broxfield, Mostyn J spoke of *"rateable occupation"* when he concluded that there was no *"bona fide intention to pass rateable occupation to the man of straw"* (at §30).

NDR: unoccupied premises and the EEO

17. As David Richards LJ went on to explain in Rossendale (CA) at §§8 and 11, *"[d]ifferent provision is necessarily made for NDR on unoccupied premises"* pursuant to ss.45 and 65(1) of the 1988 Act, by reason of which: *"NDR are payable in respect of a property if ... on the day in question, the entirety of the property is unoccupied"*; and *"the person liable for the NDR must be 'the owner' of the whole of the property"* meaning *"the person entitled to possession of it"* where *"entitlement to possession connotes the exclusive entitlement to occupy the property"*. So, in 'unoccupied premises' cases a key question may be: who has the EEO? That is not the same as asking: who is in AO? It cannot be. When determining NDR liability in an 'unoccupied premises' case, nobody is in AO. The focus is thus *"inevitably ... on the legal right to possession, because the property is by definition unoccupied"* (Henderson LJ in Rossendale (CA) at §71).

Sham leases, NDR and unoccupied premises: focus on 'pretence' as to the EEO

18. In a case concerning 'unoccupied premises' and NDR liability, where a lease purports to confer an EEO on a tenant, the question can arise as to whether the lease is a sham. The ultimate focus will be on whether there was a 'pretence' as to the conferral of the EEO. Mr Mackenzie, rightly in my judgment, recognised that a lease of unoccupied premises intended to enable the landlord successfully to deny NDR liability can be a sham. He gave as one example the situation (cf. Anami at §18 and Broxfield at §11) where a lease document is 'cooked up after the event'. He gave as further examples situations where there is a bilateral arrangement – including one with payment of consideration to a corporate scheme operator and use of SPV 'lessees' (cf. PAG (2015) at §41; Rossendale (2017) at §§63, 67) – but where the 'landlord' (i) has made a statement inconsistent with the express terms (cf. Jones at §65) or (ii) has 'sublet' during the 'term' (cf. Broxfield at §14). The answer to the sham lease question cannot turn on whether the 'tenant' went into AO, or was expected to do so. These are unoccupied premises. The sham lease question arose in Rossendale (2017) (at §45), as it had in PAG (2015) (at §37). In each of those cases the Courts decided that the leases to the SPVs were not shams: PAG (2015) at §43 (*"the evidence does not justify my finding each lease to be a sham"*) and Rossendale (2017) at §68 (*"there is no arguable basis for saying that these were not genuine leases"*). In the latter case, Patten LJ refused permission to appeal to challenge that conclusion (Rossendale (CA) at §4) and the 'no-sham' conclusion loomed large in the appellate analysis of related issues (Rossendale (CA) at §§39, 72-73, 77). In PAG (2015) it was recognised that: *"nobody expected 'the tenant' to exercise any of the tenant's rights or to perform any of the tenant's obligations"* (at §22). In Rossendale (2017) the claim included that the SPVs

"undertook no activity whatsoever" and *"had no means to discharge"* the NDR liability (§29). The true focus needed to be not on 'pretence' as to what the 'tenant' would do in relation to rights and obligations, but on 'pretence' as to what rights and obligations it would have or, in terms of rights, what it could do. The point was spelled out very clearly by Norris J in PAG (2015) at §41 (what the 'tenant' would do) and §42 (what the 'tenant' would have/could do):

> ***41. … There is a prima facie case (ie. one that will succeed in the absence of an answer in evidence from each landlord) that neither party to any given lease (1) intended [the 'lessee'] (a) actually to go into occupation of the demised premises or (b) actually to comply with any positive covenant as to user or (c) actually to keep the premises in a reasonable state of repair and condition; or (2) intended that the landlord really should insure against loss of rent…***
> ***42. But there is a strong case that each party did intend (a) to create an estate in the land vested in [the 'lessee'] giving the lessee a right to occupy (b) to confer a right for the landlord to recall that estate at short notice and (c) to impose binding and effective covenants that the lessee would have the liability to pay the [NDR] and the obligation not to assign, sublet or share occupation of the demised premises without the consent of the landlord (even if the estate created was in fact unlikely to be the subject of assignment by reason of its nature). There would be no pretence about that. Those aspects of the transaction were genuine.***

19. So far as concerns 'pretence' and the degree of dishonesty (see §9 above), Norris J explained in PAG (2015) at §41 that: *"No landlord was a party to the present proceedings. To find each scheme user to be dishonest on the evidence of [the corporate scheme operator]'s witnesses alone would be a strong thing. The quality of the evidence does not justify that finding"*. On that same issue, HHJ Hodge QC in Rossendale (2017) agreed with the submission (at §§63, 67) that: *"Crucially ... the particulars of claim do not allege that the ['landlords'] and the relevant SPV entered into the scheme leases with a dishonest common intention of deceiving third parties"*; and *"There is nothing in the material in the particulars of claim that gives rise to any reasonable grounds"* for finding *"a dishonest common intention, that the transaction should not in fact create the legal rights and obligations which it gives the appearance of creating"*.

20. There is another point. A 'sham lease' will intend to give a false impression to third parties or a court as to the conferral of EEO, so that the 'tenant' is treated as liable for NDR. The 'genuine lease' will intend to confer EEO on the 'tenant' so that the 'tenant' is treated as liable for NDR. Thus, an Effective-Avoidance Intent whereby the 'tenant' is treated as liable for NDR does not, of itself, demonstrate (i) sham lease or (ii) genuine lease. This underlines that the true vice for a sham lease will be as to the TNR/ANR and the EEO: it will not be the primary liability, but the primary right, which will be the focus.

Key question: under the TNR, what could the 'tenant' and 'landlord' do as to AO?

21. For all these reasons, what will ultimately matter is whether the purportedly conferred EEO is a 'pretence'. The question is not: is the true intention of the parties that the 'tenant' will not go into AO? The question is, rather: is the true intention of the parties that, during the 'term' of the 'lease': (a) the 'tenant' could not go into AO (or place a third party into AO) and/or (b) the 'landlord' could go into AO (or place a third party into AO). Only if (a) or (b) is true is there a mismatch between the TNR and the

purported conferral of the EEO on the 'tenant'. Hence the significance of this passage in PAG (2015) at §20:

> ***… In evidence [the witness] explained … that a scheme user ['landlord'] would be told (a) that initially there would be no occupation; (b) that that might continue to be the case throughout the intended liquidation of [the 'tenant']; (c) but if a subsequently appointed liquidator … found someone to occupy the premises then the landlord could exercise the break clause, either to prevent occupation at all (if he did not like the proposed occupier) or to negotiate the grant of a direct new lease (if he did like the proposed new occupier).***

Here, Norris J was discussing evidence about the operation of the scheme which addressed the question of what, during the 'term' of the tenancy, could be done by a liquidator (stepping into the tenant's shoes, the SPV having gone into voluntary liquidation) and which the 'landlord' could prevent only by exercising a (7-day) 'break clause' under the 'lease', bringing the 'term' to an end.

Or: would it breach the TNR if the 'tenant' did go into AO?

22. In my judgment, there is this further way – in the context of unoccupied premises and NDR – neatly to test whether the lease's purported conferral of an EEO on the 'tenant' constitutes the TNR. One can ask this question: if the 'tenant' did go into AO (or place a third party into AO) would that breach the agreement constituting the TNR? If so, that supports a conclusion that there is a mismatch, and (if there is an Effective-Avoidance Intent) a 'pretence'. Seen in this way, the Neuberger Formulation (see §14 above) has an important role to play. Evidence that the parties have *"no intention"* of the 'tenant' *"enjoying the ... right[]"* (EEO) may, together with the other evidence in the case, support a conclusion that the tenant could not, consistently with the TNR, ever go into AO and if they did that would be a breach of the true agreement between the parties.

Change is for Parliament

23. So far as relevant to issues such as winding up, piercing the corporate veil and purposive statutory interpretation, public policy implications of the leases in PAG (2015) and Rossendale (2017) have had a ventilation in the Court of Appeal: in Rossendale (CA) and PAG (2020). HHJ Stephen Davies recorded in PAG (2019) at §21 that there had been proposals in Scotland and Wales to introduce new legislation to regulate artificial NDR-avoidance arrangements. As HHJ Hodge QC explained in Rossendale (2017) at §§60(4) & 61: *"The court has no power to fill a gap in a statute"*. In the context of sham leases, the court's duty is no more – though no less – than faithfully to identify and apply the law in relation to sham. As HHJ Jarman QC explained in Makro at §56 if, having done so, an *"outcome ... is seen as unacceptable then it is for the legislature to determine whether further reform is needed"*.

The Judge's Discussion of the Legal Principles

24. The Case Stated records (at §33) that the Judge had in mind the statutory provisions applicable in a case of unoccupied premises (§17 above): the 1988 Act ss.45 and 65. The parties' skeleton arguments before the Judge had made clear that the case was being approached on both sides on the basis that these were, at the material times, unoccupied premises. The Judge's identification of legal principles by reference to the

authorities was to be found in the Judgment at §§11, 64-66 and 79. Those passages read as follows:

> ***11. The Council accepts, and there is no issue, that it is lawful to create leases for the purpose of shifting liability for business rates. Makro Properties Ltd v Nuneaton and Bedworth Borough Council [2012] EWHC 2250 (Admin) confirms that rate mitigation schemes are perfectly permissible, provided the means chosen to achieve such an outcome is lawful.***
>
> ***…***
>
> ***LEGAL PRINCIPLES OF A SHAM***
>
> ***64. I have been directed to numerous authorities on the issue of sham. I have considered those, but do not need to set them all out here. Sham is succinctly defined in Snook v London & West Riding Investments Ltd [1967] 2QB 786. at p 802 "it means acts done or documents executed by the parties to the "sham" which are intended by them to give third parties or the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."***
>
> ***65. The test for a sham is set out in Hitch v Stone [2001] EWCA Civ 6***
>
>> ***"64 An Inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities.***
>>
>> ***65 First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.***
>>
>> ***66. Second, as the passage from Snook makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.***
>>
>> ***67. Third, the fact that the act or document is uncommercial, or even artificial does not mean that it is a sham. A distinction is to be drawn between the situation where the parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship."***
>>
>> ***68. Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied …***
>>
>> ***69. Fifth, the intention must be a common intention: see Snook's case, above."***
>
> ***66. Further consideration of the evidence of sham is found in National Westminster Bank v Jones [2001] 1 BCLC 98:***
>
>> ***"45 … the whole point of a sham provision or agreement is that the parties intend to give the impression that they are agreeing that which is stated in the provision or agreement, while in fact they have no intention of honouring with their respective obligations, or enjoying their respective rights, under the provision or agreement.***
>>
>> ***46 … of course, having made that point, one should not lose sight of the fact that there is obviously a strong presumption, even in the case of an artificial transaction, that the parties to what appear to be perfectly proper agreements on their face, intend them to be effective, and that they intend to honour and enjoy their respective obligations and rights. That that is so is supported by the fact that an allegation of sham carries with it a degree of dishonesty, and the court should be slow (but not naively or unrealistically slow) to find dishonesty.***
>>
>> ***68 … Both principle and the authorities indicate that the court is slow to find that an agreement is a sham and that before the court can reach such a conclusion it must be satisfied that the purported agreement is no more than a piece of paper which the parties have signed with no intention of its having any effect save that of deceiving a third party and/or the court into believing that the purported agreement is genuine."***
>
> ***…***
>
> ***79. A v A [2007] EWHC 99 (Fam) sets out at [52] "a party who goes along with a sham neither knowing or caring what he is signing (ie, who is reckless) is to be taken as having the necessary intention"…***

Mr Mackenzie does not criticise the Judge for the legal principles which she set out. He is right, in my judgment, not to do so. The Judge's self-direction in law accurately set out key passages containing the key principles. Indeed, Judgment §§11, 64 and 66 directly reflect passages in Mr Mackenzie's skeleton argument before the Judge (§§15-17).

Whether to Disregard Text in the Case Stated

Isle's application to amend the Case Stated

25. Isle issued an application to amend the Case Stated. Ultimately, what Isle asked this Court to do was to amend the Case Stated, without sending it back to the magistrates' court, so as to disregard the text underlined in the following passages:

> ***59. Having heard Mr Ainsworth-Jackson give evidence, I am satisfied he is closely involved in every aspect of the day to day running of his many business ventures. I found him to be dishonest and did not accept he was ignorant of the way in which the proposed scheme would operate. I am satisfied he entered into these agreements, knowing the leases were a sham, that they had the appearance of genuine leases, but in these circumstances, he knew they were not genuine. I am satisfied he knew his units would not be used by the purported tenants and there would be no exclusive possession. It was clear that the various guises of Property Alliance would never pay the rates owed and at the very least he deliberately and wilfully turned a blind eye to this.***
> ***60. I found that Mr Ainsworth-Jackson was at the very least recklessly going along with the sham and therefore had the necessary intent, which was a common intent.***
> ***61. I found, for the reasons set out above, that the sole purpose of the lease was to defeat any demand by the council for business rates for the premises, it did not grant exclusive occupation to the tenants. The only issue in relation to any of these leases is whether they are bona fide leases or they are sham leases. I found that in relation to that one issue in this case, each of these leases were shams and therefore each of the leases are void.***
> ***QUESTION***
> ***My question for the High Court is:-***
> ***On the facts as I found them to be, was I right to conclude that the sole purpose of these leases was for the claimant to seek to avoid the liability to pay business rates in circumstances where the tenant had no intention of paying the business rates, as opposed to a lease intended to provide exclusive possession to the tenants for the conduct of the tenants' businesses. In short, was I right to conclude that the leases were shams?***

26. The essence of Isle's case for disregarding the underlined text, as I saw it, came to this. (1) Parliament has given this Court an important power to amend a Case Stated (Senior Courts Act 1981 s.28A; CPR 52PDE §3.9) including by excluding content from the case stated document. The appropriate exercise of that power is illustrated by a Westlaw synopsis [2017] 2 WLUK 220 of a decision of Andrew Baker J (9.2.17) in JL, an appeal whose substantive judgment is *JL v Gloucestershire Magistrates' Court* [2017] EWHC 2841 (Admin). In JL the case stated document was revised (there, by remittal: substantive judgment §§2-3), Andrew Baker J having concluded that text belatedly introduced was a *"material shift"* in the basis for the magistrates' decision to convict the appellant, falling outside the magistrates' *"leeway ... to amplify their reasons"* and not constituting a *"fair and accurate record"*. (2) This Court should adopt the same approach in cases where a public authority seeks to introduce supplementary reasons in defending judicial review proceedings, exemplified by Ermakov (*R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302 at 315h-316c): recognising the difference between *"elucidation"* and *"fundamental alteration"*,

between *"confirmation"* and *"contradiction"*; where there is *"no warrant for receiving"* reasons *"wholly different from the stated reasons"*; and where there are *"good policy reasons"* not to permit *"wholesale amendment or reversal of the stated reasons"*. (3) Applying the approach in JL and in Ermakov the text here constitutes: an unfair, material shift, beyond the Judge's appropriate leeway; a fundamental alteration; a wholesale amendment. This is a material divergence: the Judge has introduced entirely new reasons (and posed an inappropriate question). The Judge introduced reasons whose prejudicial effect, after the event, is to make the decision *"harder to overturn"* on appeal. The Judge knew that Isle wished to appeal the Judgment, on the ground that her conclusion on sham was reached without asking the right question: whether there was a common intent that no EEO would be conferred on the tenants. There was *"absolutely nothing"* in the Judgment dealing with this (except, by *"luck"*, in the Judge's encapsulation of the Council's position) and her new reasons unfairly *"seek to cover off the points raised"* in Isle's draft grounds of appeal.

Process

27. A procedural question arose out of the application. It was common ground that it should be dealt with by me as the Judge due to hear the substantive appeal. Isle's position was that acceding to the application would mean disregarding the text rather than remitting to the magistrates (as in JL). It asked me to agree to hear argument on the point at a 2-hour hearing scheduled 2 days before the dated fixed for the substantive appeal hearing. I acceded to that invitation. In the event, Mr Mackenzie used nearly all of the 2 hours so that the application was part heard. I decided to continue with the argument at the start of the substantive hearing, which itself went part-heard. I declined the invitation to rule on the application as a preliminary issue, with reasons to follow in the substantive judgment, as they now do. In my judgment, the better course – one which involved no unfairness to either party – was to consider the arguments relating to the application alongside the substantive arguments on the appeal, as an integrated whole. In judicial review cases (like Ermakov itself) whether supplementary reasons are to be relied on or excluded is dealt with alongside the substantive arguments. The parties were well able to make their submissions on the substantive appeal, making clear their positions if the disputed text were included or excluded, as they did. The case had been prepared on that basis and a composite skeleton argument had been filed by Isle dealing with all issues. The substantive hearing was imminent. There were, in my judgment, real advantages in being able to see the question of amendment of the Case Stated alongside the substantive arguments, and consideration of the relevant authorities, in the round.

Substance

28. In my judgment, this is not a case in which it is appropriate for this Court to exercise the power to amend the Case Stated and exclude the text to which Isle objects. The application fails. My reasons start with the position in principle. (1) JL was a criminal conviction where text introduced into the final version of the case stated document was inconsistent with (i) the reasons expressed in the judgment (ii) the record of the proceedings and (iii) the original case stated document provided by the magistrates. (2) In judicial review, if the public authority defendant wishes to give further consideration to some matter, the appropriate course in general will be to withdraw the impugned

decision and issue a fresh decision. (3) The special structure of the statutory scheme for appeals by case stated recognises that the court whose decision is under appeal has a second function – acting with the judicial integrity of a court – namely the writing of the case stated document. (4) It is commonplace in an appeal by case stated that the court hearing with the appeal will have, as in this case, two detailed documentary sources: the judgment and the case stated: see eg. Makro at §30; Kenya Aid at §5; Autoclenz at §§10, 12; and Consolidated Goldfields (*Consolidated Goldfields Plc v Inland Revenue Commissioners* [1990] 2 All ER 398) at 403b and 404g. (5) Internal inconsistency or incoherence can be a basis for allowing an appeal, just as it would be where an internal inconsistency or incoherence arises on the face of a single determination or judgment. (6) The case stated document may address matters not found in the judgment. It may also set out the evidence on which findings are based: cf. *R (Friedman) v Snaresbrook Crown Court* [2019] EWHC 2209 (Admin) at §13. It may express further or more detailed findings of fact. (7) It is well-established that an aggrieved party may *"obtain more detailed reasons"* through a request to state a case, in response to which magistrates may give *"reasons at somewhat greater length"*: *McKerry v Teesdale and Wear Valley Justices* per Lord Bingham CJ at §23. That principle was applied in *R (McGowan) v Brent Justice* [2001] EWHC 814 (Admin) [2002] HLR 55 at §§13, 29 (where Ermakov was considered as to the function of reasons: see §18) and in Marshall (*Marshall v Crown Prosecution Service* [2015] EWHC 2333 (Admin) at §§26-27). (8) Marshall is a good example. There, the case stated document contained *"amplified reasons"* (§16) which were challenged as relating to matters which *"formed no part of the findings or reasons for the decision"* (§21) previously given (§15). The court held that the reasons were within the *"fair and reasonable limits"* of proper amplified reasons (§27) and rejected the contention that they were an *"ex post facto rationalisation of a decision reached at the time on a materially different basis"* (§20). The amplified reasons showed that the magistrates had directed their minds (§30) to a central issue on which reasons were said to be missing from their original decision. Marshall is a paradigm example where the further reasoning 'made it harder' for the appeal by case stated to succeed. (9) A case stated document – produced by the court acting with the judicial integrity of a court – may be the product of *further thinking* about an issue. On an appeal by case stated, where the appellant submits that the court below failed to deal with an issue raised before it, the matter can be remitted to the same court to deal with that issue by setting out its position in the case stated document. That happened in Broxfield, where Mostyn J *"required the case [stated document] to be ... amended to deal with an argument advanced at trial ... but on which the court had not ruled"* (at §1). Another example is Consolidated Goldfields where (at 400g) the court considered the power to send the case back for amendment and (at 402g) described the circumstances in which the appeal by case stated can be *"remitted for additional findings to be made or to be considered"*, which course is appropriate where the case stated document is already *"full and fair"* (§402g). In the light of this, there can be no good reason why the court whose decision is under appeal should not think about an issue with which it is being told it failed to deal, and deal with it (as in Marshall), to make sure the case stated document is *"full and fair"* when it arrives at the appeal court. There are policy reasons why the court stating the case should be able to do what the appeal court is able to

require of it. (10) Any court whose decision is the subject of a proposed appeal, and has the opportunity to state a case, will need to act with clarity and integrity. But where a point was fully argued before that court, and where it is being said that the court has not dealt or dealt adequately with the point, it is not inappropriate for the court to set out its genuinely-held views on the point, whatever they are.

29. My reasons continue by turning to the present case. (11) Here, there is no conflict or inconsistency with reasons given in the Judgment and the amplified reasons given in the first draft of the case stated document, including the text about which complaint is made. Indeed, the Judge was plainly, and contemporaneously, alive to the issue to which Isle refers. She recorded in the Judgment that the Council's *"case is that despite the appearance of the leases, there was never an intention to create leases where exclusive possession was given to the third party occupiers"*. That was not *"luck"*, but judgment: a deliberate, material part of the Judgment. The Judge also recorded as the governing legal principle (Judgment §64, citing Snook at 802) that a sham was a document *"intended ... to give third parties or the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create"*. So, as in Marshall (at §30), the Judge was demonstrably well aware of the question in issue and the impugned reasons are relevant to the question – on the substantive appeal – which concern whether and how she directed her mind to its application. The question whether the TNR involved the conferral of an entitlement to exclusive possession was reflected in both these passages. Whether the Judge made a sufficient and sustainable finding as to the TNR and non-conferral of an EEO are among the substantive grounds of appeal, and I will turn to them in due course. (12) In response to the Judgment, Isle submitted Grounds of Appeal which submitted: *"At no point in the judgment does the Judge address the question of whether the right to possession created by the leases was intended to be genuine, or whether it was intended to be a pretence or sham"*. Isle invited the Judge to pose this question in a case stated document: *"Was I entitled to find that the leases were shams without having found (a) that the parties to the leases did not mutually intend the leases to confer on the lessees an entitlement to occupy the Units or (b) that the parties to the leases were dishonest in relation to the clauses in the leases conferring the entitlement to occupy the Units on the lessees?"* The Judge issued a draft Case Stated containing much expansion (including many points on which Isle relies), included the text about which complaint is made, and declined to adopt the question as formulated by Isle (with its built-in premise). (13) The text to which objection is raised did not, in my judgment, involve: unfairness; *"fundamental alteration"*; *"contradiction"*; reasons *"wholly different"*; *"wholesale amendment"*; *"reversal"*; or *"material shift"*; or an *"ex post facto rationalisation of a decision reached at the time on a materially different basis"*. There is no reason to conclude that there is any, or any apparent, failure to act with integrity. The Judge has articulated her fuller reasoning, giving her thinking what she considers to be the appropriate clarity, transparency and comprehensiveness. It is inappropriate to 'carve out' the text about which Isle complains; and unnecessary to remit the Case Stated to the Judge. If the reasoning is flawed or inadequate or insupportable, Isle will succeed in its substantive appeal.

Snail Farming: illegality or practical impossibility?

30. It is appropriate to deal next with a question which arose as to how one passage in the Judge's reasoning is to be understood. In both the Judgment and the Case Stated the Judge described the express restriction **("Snail Farming Restriction")** on *"permitted use"* found in leases (1) to (5): limiting use by the 'tenant' to *"the purpose of heliciculture [ie. snail farming] by the Tenant of persons authorized by the Tenant"*. The Judgment described the Snail Farming Restriction as being *"of great assistance when considering the case ... as a whole"*. The Case Stated contained this (§42, emphasis added):

> ***I found the restrictive clause in the earlier leases to be of some evidential value when considering the purpose of all the leases. A genuine lease would have created an exclusive right of occupation, but the lessees had entered into this agreement, which <u>allowed no legitimate business to take place</u>. The units were offices, a snail farm did not and <u>could not have operated there</u>.***

Mr Mackenzie's position was that *"nothing in the Judge's Judgment or the Case Stated makes a finding of illegality as opposed to practical impossibility and illegitimacy"*. Both Counsel addressed me on the Town and Country Planning Act 1990 s.55(2)(e) (agricultural use not treated as a 'development') and helpfully checked their notebooks as to what the Council's witness Mr Mulheir was asked in cross-examination about the planning enforcement position. In my judgment, what the Judge was expressing in the words underlined above was *a finding of practical impossibility* rather than a *finding of illegality*. Snail farming was a *practical impossibility* in the Units and in that sense *"could not have operated there"*. A use other than snail farming would not have been *legitimate* because it would have breached the Snail Farming Restriction. Thus, the lease *"allowed no legitimate business to take place*".

The Judge's Description of the Parties' Positions

31. The Judge described the parties' positions in the following two sections in particular. In the Judgment at §§10-12:

> ***10. [Isle]'s case is that for the periods covered by the outstanding business rates in this case, its liability was displaced by the existence of leases to successive third party occupiers and they, not Isle …, were liable to pay the business rates. These leases were to a succession of companies, renting each unit for "a rent of £1 payable on demand". The tenant covenanted to "pay … all business rate liabilities in respect of the Premises for the duration of the Term."***
> ***11. The Council accepts, and there is no issue, that it is lawful to create leases for the purpose of shifting liability for business rates…***
> ***12. However, the Council does not accept that the means chosen in this case was lawful. Its case is that despite the appearance of the leases, there was never an intention to create leases where exclusive possession was given to the third party occupiers. It argues these were "sham" leases, which were in fact solely a method of rates avoidance.***

Then, in the Case Stated §§28-32:

> ***28. The [Council] accepted that although it is lawful to create leases for the purpose of shifting liability for payment of rates, in this case, the arrangements entered into by [Isle] were not lawful arrangements for rate mitigation, but were solely a method of rates avoidance.***
> ***29. The [Council] submitted that the leases were shams, executed solely for the purpose of shifting business rates and the lessees had no meaningful occupation of the units. As these***

purported leases were a sham, they were not genuine leases and did not transfer liability for the unpaid rates away from [Isle]. The [Council] therefore submitted the [Isle] was the correct rate payer.
30. [Isle] accepted that within the units there had been an unconvincing attempt to make it appear there was snail farming in progress. [Isle] argued this behaviour did not affect the validity of the leases, which had to be considered as a whole.
31. [Isle] submitted that the leases were genuine, their purpose was to implement a rate mitigation scheme and to transfer its liability for rates as owner to the tenant. In order to successfully achieve this outcome the leases had to create an entitlement to occupy the Units, which [Isle] asserted they did. It was accepted by [Isle] that the leases were not commercial leases and were artificial in the sense that they were part of a rate mitigation scheme rather than purely commercial leases.
32. [Isle] submitted there was no evidence of dishonesty or pretence in relation to the leases themselves, which granted the right of occupation to the lessees

The Judge's Assessment of the Case

32. It is unnecessary and inappropriate to set out the entirety of the Judge's reasoning. What follows is my encapsulation – derived from the Judgment and the Case Stated as I read them – of the Judge's analysis of the facts and evidence, on which she based her ultimate conclusion that the leases were 'shams'. All quotations are the Judge's words.

The NDR-Avoidance Scheme

33. Isle owned the Units. They were offices in an office complex. They were empty and it was anticipated that they would remain empty in the medium term. Facing a significant liability to pay NDR in respect of empty properties, Isle approached Crusader, a firm specialising in empty property rate mitigation. Isle *"paid 20% of [the] projected rate liability to create a scheme to avoid these rates"*. Crusader identified NCSCs (newly created shelf companies) – Property Alliance (9) Ltd, Property Alliance (10) Ltd, Property Alliance (12) Ltd and Property Alliance (14) Ltd – to be the tenants under the sequence of eight leases (to which, I interpose, can be added two leases involving Property Alliance (18) Ltd: see §2 above). Each was a short 21-week lease using a document prepared by Crusader's legal team. The rent was £1, which *"must have been far below the true market value"*. Under the terms of the leases, each NCSC agreed to pay *"all business rate liability"* in respect of the Unit. The leases were terminable on 7 days notice. The NCSCs were *"successor shelf company[ies] operated by the same Director"* whereby a Mr Ball *"the identical Director made [each] new lease agreement for the same units using a different company name"*. Leases (1) to (5) – with Property Alliance (9) Ltd and Property Alliance (10) Ltd – contained, as well as a provision conferring EEO, the Snail Farming Restriction (§30 above). In later leases (6) to (8) – for Property Alliance (12) Ltd and Property Alliance (14) Ltd the Snail Farming Restriction was replaced with a permitted use provision restricting permitted use to *"the purpose of property management/marketing and use by persons authorized by the Tenant"*. All eight leases *"on the face of it ... were capable of being valid leases"*. But the *"sole purpose of these leases"* was *"to enable [Isle] to deny liability for the business rates, and to generate a fee for the avoidance of that liability payable by [Isle] to Crusader"*; *"to defeat any demand by the Council for business rates for the premises"*; *"for [Isle] to seek to avoid the liability to pay business rates in circumstances where the tenant had no intention of paying the business rates"*.

The Sequence of NCSC Lessees

34. The use of a sequence of NCSCs meant that: *"If any [NDR were] demanded from the [NCSC], it will have ended its short tenancy and been replaced"* by *"a successor shelf company operated by the same Director"*. The *"reason new companies entered into each of the 21 week leases was because if a previous incarnation of the company was chased for business rates, it would have put it into administration"* to avoid a claim for NDR. The actions of the Directors of the NCSCs in forming *"new companies, with only a change in the bracketed number of the name"* was that *"if a previous incarnation of the company was chased for business rates, they would have put it into administration to avoid [the] claim in its entirety"*; *"They entered into leases knowing that the liability to pay rent was nominal, and with no intention of paying the business rates when demanded"*. Those actions by those Directors were *"dishonest"*. A letter dated 26 March 2019 from Property Alliance (9) Ltd to the Council – denying that *"we operate some sort of snail breeding or snail production scheme"*, stating *"we have absolutely no connection with snails in any capacity"* and, being *"a property letting company"*, *"we have not used or placed snail boxes in this or any other property that we are associated with"* – was a letter *"designed to be misleading"* and was *"a deliberately attempt to delay and confuse proceedings, no doubt designed to give time for the company to be placed into administration if necessary"*.

Paying the NDR: Honouring the Primary Obligation

35. In relation to all eight leases: *"There was never any prospect of the tenant paying the business rates"* and *"the tenant had no intention of honouring the primary obligation under the lease, to pay the business rate liability"*. *"There was no income being derived from the units"* and *"it would not have been commercially possible for the rates to have been paid"*. The *"lessees appeared to have no means of generating any income from which to pay the business rates when demanded"*.

Occupation: The 'Element of Occupation'

36. *"There was no caretaker or owner presence on site in relation to any of the units during the periods of the leases."* Under the scheme *"the units would remain empty"*. The *"lessees had entered into these agreements having no intention of genuinely occupying the Units"*. Ms Linsell's observation from her first visit (17.7.18) was that there was *"an element of occupation"*. There was *"no evidence of any occupation"* after March 2019 (when leases (7) and (8) were dated) and on the third visit (20.6.19) Units 4 and 7 were *"locked and apparently unoccupied"*. The *"element of occupation"* observed by Ms Linsell was the presence of 50 crates in Unit 4 (at 17.7.18 and 15.1.19), 40 crates in Unit 7 (at 17.7.18) and 10 crates in Unit 2 (at 20.6.19). The crates for delivery to Unit 2 had previously been observed left *"in the communal area on the ground floor"*. Crates opened (17.7.18) were found to contain *"a single snail with a covering of straw"*; another *"two snails, a small tub of soil, a small tub of bark and a small tub of dried grass"* but *"no evidence of water"*; another *"similar"* contents. *"There was no water in the boxes."* When the water supply to the Unit was checked (15.1.19) it was found to have been *"turned off"* (and there was no demand received for the water to be turned on). This *"was not a snail farm"*. There was *"no snail farm ... in*

fact in existence" and *"had never been snail farming in the offices"*. These were *"purported snail farms"*. To say *"that there was a snail farm in the units"* is a *"fiction"*. There was *"no meaningful business taking place in the offices at any time"*.

Keys

37. For Ms Linsell's scheduled visit on 17.7.18 she was met and let into Units 4 and 7 by a keyholder called Gordon. For her scheduled visit on 15.1.19 she was met and let into Units 2 and 4 by a keyholder called Melvyn. Gordon *"did not seem to know who he was representing"* and *"said he had simply been asked to get the keys and open the units"*. Melvyn's behaviour was *"the same"*. *"Despite being asked, neither keyholder gave information about ... who they were representing, beyond saying they had picked up the keys on instructions"*. Mr Ainsworth-Jackson was aware that Mr Dee (a fellow Director in another property investment company) had instructed Isle's estate agents to *"cut a set of keys for each of the units, for Crusader to collect"*. Isle did not adduce evidence to establish *"whether the keys were ever in fact given to the agent or picked up from the agent by anybody other than Gordon ... and Melvyn"* or *"who Gordon ... and Melvyn were"*. Mr Ainsworth-Jackson *"was unable to explain ... whether the keys were ever in fact given to the agent or picked up by the agent by anybody other than Gordon ... and Melvyn, or who [they] were"*.

Refurbishment

38. There were periods after leases (1) to (3) were signed in May 2018 when *"refurbishment works"* had taken place at Units 4 and 7 and *"during the periods when [Isle] was undertaking renovation works ... no leases"* – no *"rate mitigation scheme"* – *"were in place*. When leases (4) and (5) were signed on 19.10.18 for Units 2 and 4 no lease was signed for Unit 7 because Isle *"had decided to refurbish Unit 7"*. When leases (6) and (7) were signed on 16.3.19 for Units 2 and 7 no lease was signed for Unit 4 because Isle *"had decided to refurbish Unit 4"*. *"Once the renovation works had been completed, the rate mitigation scheme was again entered into"*.

Practical Impossibility of Sole Legitimate Use (Leases (1) to (5))

39. Whereas a *"genuine lease would have created an exclusive right of occupation"*, the Snail Farming Restriction meant leases (1) to (5) *"allowed no legitimate business to take place"*. That was because the Units were *"offices"* and *"a snail farm did not and could not"* – in the sense of practical impossibility – *"have operated there"*. Although the Snail Farming Restriction was not repeated in leases (6) to (8), it was *"of some evidential value when considering the purpose of all the leases"*.

Mr Ainsworth-Jackson's Knowledge

40. Jonathan Ainsworth-Jackson, the Director of Isle who gave written and oral evidence at the hearing before the Judge and was cross-examined, was a person *"closely involved in every aspect of the day to day running of his many business ventures"*. He knew *"the way in which the proposed scheme would operate"*. He *"knew the units would remain empty"*. He *"knew there would never be a snail farm"* in the Units. In his evidence *"he attempted to maintain the fiction that there was a snail farm in the units"*, but that was

"not being honest with the Court". He *"knew [the] Units would not be used by the purported tenants and there would be no exclusive possession"*. He had not *"believed there would be any meaningful occupation of the property"*. He knew *"why the identical Director made [each] new lease agreement for the same units using a different company name"* and was *"not being honest with the Court"* when in his evidence *"he said he did not know"* this. He also *"knew the various guises of Property Alliance would never pay the rates owed"* and *"at the very least he deliberately and wilfully turned a blind eye to this"*.

Enquiries

41. Mr Ainsworth-Jackson *"made no enquiries or investigations, of any sort, into the tenants or sub-tenants purporting to use the units"* and *"made no enquiries to see if the buildings were used at all"* or whether *"the permitted use clauses were lawful under planning or health or safety law"* and *"no enquiries to confirm any of the clauses in the leases were being complied with"*. He *"never made any enquiries into what was happening within the units during the periods of the leases"*. He *"made no visits to the premises and did not arrange for any to take place"*. He *"did not feel the need to make any of the usual checks the owner of a building would make in relation to the use to be made of the offices"*. That was because he *"knew there would never be a snail farm in his offices"*. He *"had not contact with any purported users of the properties"*. Despite being *"a professional landlord"*, he *"made no attempts during the period of the leases to ascertain that any sub-tenants were solvent or were using [the] premises lawfully"*. He *"did not seek legal advice in relation to the leases"* but *"simply the advice of Crusader"*. Apart from knowing that the NCSCs (and their registered addresses) were registered with Companies House, he *"made no other enquiries into these companies"* and *"carried out none of the basic due diligence checks on any of the tenants"*. Nor did he at any time *"see or ask to see any sub tenancies"*. He *"knew nothing about the tenants"* and *"made no checks to confirm their actions were lawful"*. Notwithstanding that Isle *"retained responsibility for the insurance of the valuable assets ... no efforts were made to confirm how the units were being used and that the tenants were not invalidating his insurance"*. That was *"because he knew there would be no material change in the use"* and he *"knew the units would remain empty"*. If he *"had believed there would be any meaningful occupation of the property, he would not simply have assumed that any tenant would abide by the terms of the lease, without making checks"*.

Dishonest Common Intent

42. Bearing in mind *"the caution set out"* by Neuberger J in Jones, *"that the Courts are slow to find a sham"* and *"there is a presumption of regularity"*, nevertheless *"there was dishonesty in this case"*. The *"actions"* of the directors of the NCSCs were *"dishonest"*. Mr Ainsworth-Jackson was *"dishonest"*, and was *"at the very least recklessly going along with the sham and therefore had the necessary intent, which was a common intent"*. He *"entered into these agreements, knowing ... that they had the appearance of genuine leases, but ... [that] they were not genuine"*.

The Role of the Appeal Court

43. The Judge had to conduct the factual enquiry (see §10 above). She had the advantage of oral evidence with cross-examination. My role is that of an appellate court. As CPR PD52E §1.1 explains: *"An appeal by case stated is an appeal to a superior court on the basis of a set of facts specified by the inferior court for the superior court to make a decision on the application of the law to those facts"*. Isle is questioning the Judge's determination *"on the ground that is wrong in law"* having asked her *"to state an opinion for the High Court on the question of law"* (Magistrates' Courts Act 1980 s.111(1)). The function of the High Court is to *"hear and determine the question arising on the case"* and ultimately to decide whether to *"reverse, affirm or amend the determination in respect of which the case has been stated"* or *"remit the matter to the magistrates' court ... with the opinion of the High Court"* making *"such other order in relation to the matter ... as it thinks fit"* (Senior Courts Act 1981 s.28A(3)). The High Court's decision is final (s.28A(4); Kenya Aid §46). As Mostyn J explained in Broxfield at §29 (*"the constraints on appeals against findings of fact"* require *"a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached"* (and see Hitch at §3). As Coulson LJ put it in *Kalma v African Minerals Ltd* [2020] EWCA Civ 144 at §48: *"unless a critical finding of fact has no basis in the evidence, or is based on a demonstrable misunderstanding of relevant evidence, or a failure to consider such evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified… This applies equally to findings of primary fact and any inferences to be drawn from them"*). CPR PD52E §3.9 provides that the appeal court *"may draw inferences of fact from the facts stated in the case"*. As Geoffrey Lane LJ explained in Aldrington (at 472): *"the proper inferences which are to be drawn from [the primary] facts ... are ... matters in which [the appeal] court is entitled – and, if it thinks proper, is bound – to differ from the [court below]"*. As Sedley J explained in Balchin (*R v Parliamentary Commissioner for Administration, ex p Balchin* [1996] EWHC 152 (Admin) [1998] 1 PLR 1) at §27: unreasonableness includes *"a decision which does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic"*. It is a legal error for the magistrates' court to take into account legally irrelevant matters (Kenya Aid at §§36-38, 60; South Kesteven at §27) and in such a case the High Court will remit the case to the magistrates for further determination unless *"sure that the decision would necessarily be the same*" (South Kesteven at §28) or in a position to form its own judgment *"as to where the evidence properly weighed takes [the] case"* (Kenya Aid at §62).

Isle's Six Grounds of Appeal

Ground (4): Whether the Judge elided artificiality and sham

44. It makes sense to start with this ground of appeal, which Isle formulated as follows: *"The Judge erred in treating the artificial elements of the leases and the rates avoidance schemes as being sufficient to justify a conclusion that the leases were shams. In so doing the Judge erroneously regarded artificial arrangements analogous to sham arrangements and failed to consider whether the arrangements were effective, despite being highly artificial, because the parties intended those artifices to be effective"*. The essence of Isle's argument in its support of this ground of appeal, as I

see it, comes to this. The case-law establishes (see §12 above) that artificiality does not of itself mean sham. The Judge plainly thought the scheme involved artificiality. She found artificiality, for example: in the use of NCSCs (§34 above); as to occupation and the presence of crates (§36 above); as to the idea of the NCSCs paying the NDRs (§35 above); as to the Snail Farming Restriction (§39 above); which artificiality she found Mr Ainsworth-Jackson unconvincingly defended (§40 above). However, artificiality begged, but could not answer, the question whether there was sham. The leases were certainly no more artificial than the SPV leases (with no intended AO and intention to place SPVs into liquidation) in PAG (2015) and Rossendale (2017), but those leases were not shams. In substance, the Judge equated sham with artificiality, and failed to look beyond artificiality and ask the legally correct questions. That was a material error of law and means the Judge's determination cannot stand.

45. I do not accept that the Judge treated artificiality as sufficient to find sham. That would have been surprising, not least since the Council's skeleton argument before her submitted: *"The companies concerned are not only artificial and created solely for the permitted purpose of avoiding rates, but in the circumstances described the transactions are shams in the legal sense"*. The Judge set out in the Judgment (§24 above: Judgment §§64-66) the *"legal principles of a sham"*, describing (Judgment §65) the *"test for a sham"* as being *"set out"* in Hitch, quoting §67 of Arden LJ's judgment in that case: *"the fact that the act or document is uncommercial, or even artificial does not mean that it is a sham. A distinction is to be drawn between the situation where the parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them"*. The Judge also cited Jones as relevant to *"the evidence of sham"* (§24 above: Judgment §66) including §46 of Neuberger J's judgment in Jones: *"one should not lose sight of the fact that there is obviously a strong presumption, even in the case of an artificial transaction, that the parties to what appear to be perfectly proper agreements on their face, intend them to be effective, and that they intend to honour and enjoy their respective obligations and rights"*. She referred to this *"presumption of regularity"* in her assessment of the facts within the Judgment, and again in the Case Stated where she said this: *"In order to decide the one issue in the case, whether the leases were shams or not, I bore in mind the caution set out in [Jones], that the Courts are slow to find a sham and there is a presumption of regularity"*. The Judge also recorded that Isle itself had *"accepted ... that the leases were not commercial leases and were artificial"* but she did not base her adverse conclusion on that acceptance. Artificiality was a relevant factor properly taken into account, as was the fact that Mr Ainsworth-Jackson denied the artificiality: Jones §39 (§12 above). But there was no misdirection in law. No passage in the Judgment nor in the Case Stated treated artificiality and sham as the same thing, nor did the substance of the reasoning do so. This ground fails.

Ground (5): Whether the Judge applied a 'meaningful business' or 'paradigm lease' gloss

46. This ground of appeal was formulated by Isle as follows: *"The Judge erred in concluding that (a) the SPVs' intention not to carry out any meaningful business activity in the Units and (b) the fact that no meaningful business activity ever did take place in the Units meant that the leases themselves were shams. In imposing the*

'meaningful business' test the judge placed an impermissible gloss on the ownership condition in s.45(1)(b) of the 1988 Act and/or the meaning of 'owner' in s.65(1) ... and/or applied an impermissibly high threshold for the intention a party to an arrangement must have before the arrangement can be regarded as valid rather than a sham". The essence of Isle's argument in support of this ground of appeal, as I see it, comes to this. In the context of NDR and sham leases – especially in relation to unoccupied premises – it is important not to fall into the trap of looking for 'meaningful business' or a 'paradigm lease'. The focus must be on the EEO not on AO (see §§17-18 above) for the reason given by Henderson LJ in Rossendale (CA) at §71: *"the property is by definition unoccupied"*. The Judge recorded the Council's case as including reliance on the fact that *"the lessees had no meaningful occupation of the units"* (§31 above: Case Stated §29). She emphasised that *"there was no meaningful business taking place in the offices at any time"* (§36 above) and she found that Mr Ainsworth-Jackson had not *"believed there would be any meaningful occupation of the property"* (§40 above). In relation to whether the NCSCs would pay the rates, the Judge emphasised the lack of *"income being derived from the units"*, that the tenants did not *"generate any income"*, with *"no evidence of any income being capable of being generated under the leases"* and *"no means of generating any income"* (§35 above). But the question was not whether there was *"meaningful business"* or *"meaningful occupation"*. The leases could be genuine leases effectively conferring the EEO, as the TNR, without being a 'paradigm lease' without a *"meaningful business"*. This is powerfully illustrated by the non-sham SPV leases in PAG (2015) and Rossendale (2017). The Judge treated a sham lease as one where there is no meaningful business occupation. That was a material error of law and means the Judge's determination cannot stand.

47. I do not accept that the Judge applied a 'meaningful business' or 'paradigm lease' gloss. She certainly had regard to the absence of any 'meaningful business'. That was a relevant aspect of artificiality, and Mr Ainsworth-Jackson's denial of artificiality, to both of which she was entitled to have regard, but she had well in mind that artificiality did not of itself mean sham (§45 above). The Judge asked herself whether the common intention of the TNR was that the NCSCs would never go into AO (enjoying the primary right purportedly conferred) and would never pay the NDRs (the *"primary obligation"* purportedly imposed), but that was the enquiry envisaged in the Neuberger Formulation from Jones (§14 above), which she quoted (§24 above: Judgment §66). Isle itself had commended that passage to her in its skeleton argument. These were all relevant factors properly taken into account. But there was no misdirection in law. No passage in the Judgment nor in the Case Stated treats a sham lease as one where there is no 'meaningful business' or no 'paradigm lease', nor does the substance of the Judge's reasoning do so. This ground fails.

Ground (1): Whether the Judge made no finding of a common intention not to confer an EEO

48. This ground of appeal was formulated by Isle as follows: *"The Judge erred in concluding that the leases were shams despite not having made a finding to the effect that Isle and the SPVs actually intended the leases to be ineffective and for Isle to retain an entitlement to excusive possession and to continue to be liable for business*

rates". There is a link between this point and Isle's application to disregard text in the Case Stated (§§25-26 above), which I have refused (§§28-29 above). The essence of Isle's argument in support of this ground of appeal, as I see it, comes to this. With or without the Judge's additional text (§25 above), the substance of her reasons really turned on two points: (i) the common intention that there would be no AO under or by virtue of the leases; and (ii) the common intention that there would be no discharge by the NCSCs of the obligation to pay the NDR. These points concern what the 'tenants' would do, but what matters is what rights and obligations they would have and in particular as to the EEO (see §§18-20 above). Nowhere did the Judge make any clear and explicit finding of a common intention not to confer the entitlement (EEO). It is wrong and unjustified to treat such a finding as implicit or to rewrite the Judge's language which, throughout, concerned AO (conduct) not EEO (entitlement). In the absence of a clear finding on this critical issue, the Judge's decision is erroneous in law and the reasoning legally inadequate, meaning the Judge's determination cannot stand.

49. In my judgment, the Judge did make a finding of a common intention not to confer an EEO. As I explained earlier, she was clearly alive to this issue (§29 above), recording the Council's key contention as follows (§31 above: Judgment §12): *"Its case is that despite the appearance of the leases, there was never an intention to create leases where exclusive possession was given to the third party occupiers"*. That encapsulation is unmistakeably concerned with the common intention to confer the EEO: *"exclusive possession"* is the entitlement purportedly conferred by the leases: it is what is *"given"* by the *"leases"* under their *"appearance"*. This was not *"luck"* (§§26, 29 above). Having recorded the Council's position, the Judge went on (§24 above: Judgment §§64, 66) to identify the Snook test (*"the appearance of creating ... legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create"*) and Jones §66 (*"The parties must have intended to create different rights and obligations from those appearing from ... the relevant document"*). Reading the Judgment fairly and as a whole, that was the test she was applying and that was the contention she was upholding when she reached the conclusion that the leases were a sham. In the Case Stated the Judge recorded Isle's contention that the leases created *"an entitlement to occupy the Units"* and *"granted the right of occupation to the lessees"* (§31 above: Case Stated §§31-32). Reading the Case Stated fairly and as a whole, that was a contention that the Judge was rejecting when she found sham. In the passage about snail farming and practical impossibility (§30 above), the Judge specifically distinguished the arrangements in this case with a *"genuine lease"* which *"would have created an exclusive right to occupation"*. She went on specifically to find that Mr Ainsworth-Jackson *"knew they were not genuine"* and *"knew there would be no exclusive possession"*. She found that the lease *"did not grant exclusive occupation to the tenants"*. That was the same *"exclusive occupation"* as in the purported entitlement and *"grant"* was the language used in Isle's contention, which she was rejecting. Finally, in posing the question for this Court (§1 above), the Judge made clear that she had rejected the contention that these leases were *"a lease intended to provide exclusive possession to the tenants"*. In my judgment, the language of *"give"* and *"create"* and *"grant"* and *"provide"* – in the context of exclusive possession or exclusive occupation – were straightforward descriptions of the entitlement (EEO), not

the facts on the ground (AO). Whether the Judge's underlying reasons and findings provided reasonable and logical support for her conclusion is ground (3).

Ground (2): Whether the Judge treated Effective-Avoidance Intent as establishing sham

50. This ground of appeal was formulated by Isle as follows: *"The Judge erred in finding that the leases were shams because they had been executed for the 'sole purpose' of enabling Isle to avoid paying business rates"*. The essence of Isle's argument in support of this ground of appeal, as I see it, comes to this. It is well-established that an Effective-Avoidance Intent is no basis for finding sham (see §7 above). As the Judge recorded, the Council argued that the leases were *"solely a method of rates avoidance"* and *"executed solely for the purpose of shifting liability for payment of rates"* (see §31 above: Judgment §12, Case Stated §§28-29). The Judge accepted that argument, relying expressly – in support of her finding of sham – on the fact that the *"sole purpose of these leases"* was *"to enable [Isle] to deny liability for the business rate"* (§33 above); the *"sole purpose ... to defeat any demand"* for NBR (§25 above) which she repeated in her formulation of the question for this Court (§25 above): *"was I right to conclude that the sole purpose of these leases was for [Isle] to seek to avoid the liability to pay business rates ..."* That was a material error of law and means the Judge's determination cannot stand.

51. I do not accept that there was any error of law by the Judge in relation to the Effective-Avoidance Intent and its significance. The Judge did not find sham on the basis that the leases had an Effective-Avoidance Intent: what HHJ Stephen Davies in <u>PAG (2019)</u> at §117 called *"no purpose other than to enable the landlords to avoid paying business rates"* (§7 above). The Judge focused on whether, and found, that there was a common intent not to confer an EEO (see ground (1) above). Her reasoning about *"sole purpose"* needs to be understood <u>in conjunction with</u> that finding: the two elements went together. This can be seen from the way in which the Judge recorded the Council's contention (see §31 above: Judgment §12) as including: (i) *"there was never an intention to create leases where exclusive possession was given to the third party occupiers"* and (ii) *"solely a method of rates avoidance"*. When linked in this way to the idea of 'no intention to confer EEO', what is meant by *"solely a method of rates avoidance"* is the idea that the lease is *"no more than a piece of paper which the parties have signed with no intention of its having any effect save that of deceiving a third party and/or the court into believing that the purported agreement is genuine"* (Jones §68) (§8 above). That was an idea which the Judge had in mind having cited that passage from <u>Jones</u> (§24 above: Case Stated §66). The idea of *"sole purpose"* when linked to 'no intention to confer EEO' can be seen reflected in the local authority's formulation of sham lease which McCombe LJ described in <u>Anami</u> at §9, in a passage which was plainly describing (and went on to refer to the statutory provisions governing) unoccupied premises: "*the lease was 'a sham, being a document executed by the parties with the sole intention of allowing [the 'landlord'] to avoid the payment of [NDR], rather than with any real intention to allow the purported tenant to occupy the property"*. The Judge's reasoning included both *"that the sole purpose of the lease was to defeat any demand"* and that *"it did not grant exclusive occupation to the tenants"* (§25 above: Case Stated §61). The Judge's question for this Court included

both *"that the sole purpose of the leases was for [Isle] to seek to avoid the liability to pay business rates"* and that they were *"not intended to provide exclusive possession to the tenants"* (§25 above). None of this involved treating Effective-Avoidance Intent as establishing sham. The Council's skeleton argument had submitted that: *"The companies concerned are not only ... created solely for the permitted purpose of avoiding rates, but in the circumstances described the transactions are shams in the legal sense"*. That skeleton argument also contained this passage: *"The Council accepts that if a ratepayer orders his affairs in such a manner as to fall within legitimate statutory exemptions so as to avoid liability for business rates or to avoid business rates altogether this is permissible even if that was the sole purpose of the transaction"*. That acceptance was expressly recorded by the Judge (§31 above: Case Stated §28). The very first point of substance which the Judge recorded (§24 above: Judgment §11) was an express recognition of the principle (§7 above) that Effective-Avoidance Intent does not of itself mean sham. In my judgment, she did not lose sight of that principle. She treated Effective-Avoidance Intent as consistent with sham, rightly (§13 above). This ground fails.

Ground (6): Whether the Judge made no finding of (dishonest) common intention to mislead

52. This ground of appeal was formulated by Isle as follows: *"The Judge erred in concluding that the leases were shams despite making no finding to the effect that Isle dishonestly created the leases with the intention of deceiving or misleading others about the true arrangement between the SPVs and Isle. The Judge's finding that Mr Ainsworth-Jackson was 'not being honest with the court' in two respects was insufficient to meet the test for a sham"*. The essence of Isle's argument in support of this ground of appeal, as I see it, comes to this. The Judge did not find that there was a common intention, still less a dishonest common intention, to mislead third parties or a court. Such a *"hoodwinking"* common intention was never part of the Council's case, as can be seen from the Judge's summary (§31 above: Judgment §§11-12, Case Stated §§28-29). The Judge failed to find that this feature was present, which is a necessary precondition to a finding of sham. As a consequence, her finding of sham involved an error of law, legally inadequate reasons and is legally unsustainable.

53. I do not accept that the Judge erred in law in the ways contended. The Judge rightly recorded (see §24 above) the applicable legal principle (§8 above) by reference to Hitch §66 (*"The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties"*), Jones §68 ("*the court ... must be satisfied that the purported agreement is no more than a piece of paper which the parties have signed with no intention of its having any effect save that of deceiving a third party and/or the court into believing that the purported agreement is genuine"*) and Jones §46 (*"an allegation of sham carries with it a degree of dishonesty, and the court should be slow (but not naively or unrealistically slow) to find dishonesty"*). The Judge expressly recorded Isle's contention (§31 above: Case Stated §32) that *"there was no evidence of dishonesty or pretence in relation to the leases themselves, which granted the right of occupation to the lessees"*. Giving a false impression to third parties or a court, as a common intention and with a degree of

dishonesty (§§8-9 above) were features which she therefore – rightly – recognised was a necessary element in deciding the 'sham leases' issue before her. In finding, in conjunction with her finding of a common intention not to confer an EEO (ground (1) above), that the leases were *"solely a method of rates avoidance"* (ground (2) above), the Judge was finding an intentional mismatch (as to the EEO) between the ANR and the TNR, for an Effective-Avoidance Intent, by giving a false impression. Reading her reasons fairly and as a whole, the Judge was finding a sham because she was satisfied that the formulations from Snook, Hitch and Jones which she had cited (§24 above) were satisfied. She was rejecting Isle's contention that there was *"no evidence or dishonesty or pretence in relation to the leases"* and rejecting the intimately linked contention that the leases *"granted the right of occupation to the lessees"*. The Judge did not lose sight of the *"degree of dishonesty"* (reflected in Jones §46 which she had cited) and I accept Mr Hanbury's submission that it was open to her to find that element satisfied, as in my judgment she did (§42 above). The Judge had in this case precisely what had been identified by Norris J as missing in in PAG (2015) at §41: the *"landlord"* as a *"party to the present proceedings"* to allow a *"quality of evidence"* to make a finding of dishonesty. Whether Mr Ainsworth-Jackson was 'honest with the court' was plainly relevant given that sham is a dishonest common intent to give a false impression to third parties or a court (§8 above). So far as concerned dishonesty, entry into the leases and Mr Ainsworth-Jackson, the Judge was ultimately satisfied that there was at least reckless disregard (§42 above), an approach which was open to her based on the authority of A v A (§9 above) an authority which she cited (§24 above: Judgment §79) precisely because she was addressing this issue. This ground fails.

Ground (3): Whether any finding of a common intention not to confer an EEO was unsustainable given the findings, reasoning and evidence.

54. Isle framed this ground of appeal as follows: *"The Judge erred in failing to have regard to the fact that it was a necessary implication of a number of her findings that both Isle and the SPVs did in fact intend for the leases to be effective. The Judge's conclusion that the leases were shams cannot therefore be explained or justified and accordingly was not rationally open to her"*. The essence of Isle's argument in support of this ground of appeal, as I see it, comes to this. Looking at the substance of the Judge's findings and reasoning in the Judgment and in the Case Stated, the points she made did not support a finding of sham, quite the contrary. Findings that there was no intention that the tenants go into AO or discharge the NDR liability did not support the finding of sham, for the reasons seen in PAG (2015) at §§41-42. These were unoccupied premises. Throughout the Judge's reasoning are findings which strongly support the conclusion that the leases were genuine, which conclusion is the necessary implication from the primary facts. There were formal lease documents. There was the payment of consideration by Isle to Crusader. They were intended to be effective in displacing Isle's NDR liability. Moreover: *"There was no caretaker or owner presence on site in relation to any of the units during the periods of the leases."* Isle's agents were instructed to *"cut a set of keys for each of the units, for Crusader to collect"* (§37 above). Importantly, there were the findings of refurbishment taking place only at times when no replacement lease was in place (§38 above). There was no finding of a common intention that Isle would *"keep the premises available for any third party who*

came along and was prepared to rent the premises on market terms", a phrase used by Mr Hanbury in a speaking note for this appeal. The Judge's findings of artificiality, including the *"fiction"* of the *"purported snail farm"* and Property Alliance (9) Ltd's *"misleading"* act of writing the letter of 26 March 2019 are entirely consistent with the NCSCs taking 'downstream' action to avoid or mitigate the liability for NDR, precisely because that liability had effectively been imposed under the leases. So, at its highest, what the evidence shows is that, having obtained the EEO, the lessees then went about their own rate-mitigation strategy. All of these matters were consistent with or supportive of Isle's position. They needed to be considered in the context of the 'presumption of regularity' and the need for the Court to be 'slow to find a sham', with the 'degree of dishonesty' it entails. A finding of sham could no more be justified in the present case than it could in PAG (2015) and Rossendale (2017), each effectively subsequently endorsed by the Court of Appeal in Rossendale (CA) and PAG (2020). The Judge's finding that these were sham leases was not reasonably and logically open to her, given her own findings of fact, her reasoning and the evidence.

55. I have not been persuaded by this argument. In my judgment, the Judge reached a conclusion on this factual enquiry (§10 above) which was reasonably – and logically – open to her on the evidence, in the light of her findings, and for which she gave legally adequate reasons. I have reached that conclusion for the following reasons. First, the Judge's analysis included an application of the Neuberger Formulation. In examining whether there was any intention of the primary right (EEO) being enjoyed (by any AO), and whether any intention of the primary obligation (NDR-liability) being discharged, the Judge clearly had in mind the Neuberger Formulation, which – as I have explained (§14 above) - featured in Rossendale (2017) and was applied in Camelot as the *"justification"* for, and *"what is involved in"*, the External Evidence Enquiry (§11 above), on the basis that *"such conduct may give rise to the inference that, at the time it was entered into, the agreement was a pretence"*. The Judge specifically quoted the Neuberger Formulation in her description of the legal principles of a sham (§24 above: Judgment §66). She also described it, correctly, as relevant to the approach to *"evidence of sham"*. The Judge, rightly, identified the primary obligation purportedly imposed by the leases as the obligation to pay NDR and found that there was no intention of the tenants honouring that obligation (or any other). The Judge, rightly, identified the primary right purportedly conferred by the leases as the EEO and found there was no intention of the tenants enjoying that right. It had been common ground before the Judge that the Neuberger Formulation pointed to a legally relevant enquiry. The Council's skeleton argument had submitted that: *"A sham transaction is one where the parties have no intention of honouring their respective obligations or enjoying their respective rights"*, citing Street v Mountford at 825-826. Isle's own skeleton argument contained a section on *"sham"* which relied on Jones at §§45-46 (where the Neuberger Formulation is found) and §68.

56. Secondly, the Neuberger Formulation reflects an exercise which is a relevant enquiry in considering whether the leases involved an intentional mismatch between the ANR and the TNR so as to give a false impression to third parties or a Court. It is true, as Norris J pointed out in PAG (2015) at §§41-42, that there is a distinction – which is especially important in the context of unoccupied premises – between (a) what the parties intend

to do and (b) what rights and obligations they intend to have (see §18 above). But Norris J did not say that the Neuberger Formulation – which focuses on (a) – is irrelevant to (b). On the contrary, Norris J went on to say (PAG (2015) at §43) that the artificiality and pretence of *"imposing obligations that it cannot have been thought would be performed"* was something which *"of itself might be an indicator of dishonesty"*. What the parties intend to do can be highly material in evaluating what rights and obligations they intend to have. This can be illustrated by considering the landlord in Antoniades, who purported through the documents to have *"the right to go into occupation or to nominate others to enjoy occupation"* of the Upper Norwood top flat *"jointly with Mr Villiers and Miss Bridger"* (Antoniades at 462C), it being significant that the landlord *"did not genuinely intend to exercise the powers"* (462E). It is right that in the ultimate analysis the focus has to be on whether the entitlement (EEO) purportedly conferred by the leases constituted the TNR (§§18-20). The quest for an answer can be tested by asking this question (§21 above): what if the relevant party did seek to exercise (or *"enjoy"*) the purportedly conferred entitlement? Or (§22 above) would that be inconsistent with – a departure from, and a breach of – the TNR? If it is emphatically the case that the parties clearly intended that the purported entitlement would never be exercised, that is highly material to the quest for an answer to whether the TNR was that it could not be exercised. And unless it could be exercised, it is not a true or genuine right or entitlement. As has been seen (§21 above) in PAG (2015) the point was explored in the evidence.

57. Thirdly, the Judge had well in mind the points which Isle emphasises. Points about keys (§37 above) and refurbishment (§38 above), the payment of consideration (§33 above), the absence of owner presence (§36 above), and so on, were relied on by Isle as features indicating that the leases and the EEO were genuine and represented the TNR. The Judge recorded these features and took them into account. She had to consider what to make of them, and the other features of the case, as part of the factual enquiry into the TNR (§§10-11 above). They did not necessarily mean that the leases were genuine. The nature of the exercise of evaluation is, in my judgment, well described in the submission of Counsel in Jones (recorded by Neuberger J in Jones at §58): a party's *"activities could have been undertaken in order to make a sham transaction more convincing"*, though *"the more that the parties ... have acted as if it was genuine, the more difficult it is to conclude that it was a sham"*. Here, the Judge's External Enquiry considered the conduct of the parties, including the features on which Isle did and does rely, recognising them and evaluating them as part of her detailed factual enquiry.

58. Fourthly, the Judge's reasoning in relation to snail farming and practical impossibility is highly significant. The Judge reasoned as follows (§39 above): *"A genuine lease would have created an exclusive right of occupation"* but the Snail Farming Restriction in leases (1) to (5) meant that each lessee *"had entered into this agreement, which allowed no legitimate business to take place"*. That was because the Units *"were offices"* and *"a snail farm did not and could not have operated there"*. I have accepted (see §30 above) that the Judge was there referring to practical impossibility. Isle's position is that, even if the Snail Farming Restriction was a 'pretence', it can be put to one side and does not support a conclusion that the purported conferral of EEO was a pretence. The Judge did not agree, and nor do I. In this part of her analysis the Judge

was plainly considering the all-important EEO (see §§18-20 above), purportedly conferred by the leases. What she found in the 'leases' was this: the 'lease' purportedly conferred an express EEO but at the same time expressly restricted use to snail farming. That was a restriction in relation to the purported EEO, just as the *"permitted use ... for subletting"* was a restriction in the 'lease' Broxfield at §9. In Broxfield there was an internal legal contradiction: the 'lease' itself elsewhere prohibited subletting (see §9). Here, the contradiction was with practical reality, based on suitability of the premises. In looking at suitability and practical reality the Judge was doing in respect of the Units precisely what the House of Lords did with the landlord's purported reserved right in relation to the Upper Norwood flat in Antoniades (see §11 above). She found on the evidence, in my judgment neither unreasonably nor illogically, that the sole purported *entitlement* was a practical impossibility in these premises. She then concluded, in my judgment neither unreasonably nor illogically, that this feature of leases (1) to (5) shed light on the transactional sequence as a whole (*"the case as a whole"*). The Judge was explicit that this point was about common intention and EEO as an entitlement. That is why she said: *"A genuine lease would have created an exclusive right of occupation but ..."* before going on to describe the practical impossibility of the restricted mode of occupation to which the purportedly conferred EEO related. This passage of the Judge's reasoning shows that her analysis did not turn solely on what the parties would do, but directly considered what they could do. The tenants could not enjoy the primary right (EEO) purportedly conferred, because the only mode which was allowed was one which was a practical impossibility. The Judge regarded that feature as a strong indication that these were not a *"genuine lease"* which *"would have created an exclusive right of occupation"*. That was, in my judgment, cogent reasoning and analysis.

59. Fifthly, there was a further important feature of the case, which weighed heavily with the Judge (§41 above). That was the fact, and implications, of the complete absence of any enquiries undertaken by Isle, and by Mr Ainsworth-Jackson with all his experience and day to day control. The Judge found that the absence of any enquiry was because Mr Ainsworth-Jackson did not *"believe[] there would be any meaningful occupation of the property"*. That is a point which illustrates in clear, practical terms the resonance which the 'what would they do' question (intended actual conduct) has for the 'what could they do' question (intended genuine entitlement) (§56 above). Mr Ainsworth-Jackson gave oral evidence and was cross-examined. The Judge concluded that he had not *"believed that there would be any meaningful occupation"*, otherwise he would have done *"the basic due diligence checks on ... the tenants"*. In my judgment, this was another powerful and cogent feature capable of supporting the Judge's conclusion that the entitlement (EEO) was not real. It was a short and permissible logical step from that factual picture described by the Judge to the conclusion that if a tenant did decide to 'enjoy' its purportedly conferred EEO, that would not have been consistent with the TNR, because this would never have been countenanced by Mr Ainsworth-Jackson without any due diligence enquiry. I am satisfied, reading the Judge's analysis as a whole, that this was what she concluded and that this was why she repeatedly emphasised the absence of enquiries (§41 above). This was a powerful point which, in my judgment, was open to the Judge and on which she was entitled to rely. In the light

of this and the other features of the evidence, it was in my judgment open to the Judge to find that there was in this case a common intention not to confer an EEO on the tenants. It was open to her to reach the conclusion that she did, notwithstanding the 'strong presumption' of regularity (§15 above), which she had well in mind (§24 above: Judgment §66). I do not accept that there was any misdirection of law, unreasonable or unsustainable finding of fact, legal inadequacy of reasoning, unsound inference from primary fact, or error of reasoning robbing the decision of logic. This ground also fails.

Conclusion, consequentials and order

60. The answer to the question posed by the Judge in the Case Stated (§1 above) is: *"yes – on the facts as you found them to be and which were open to you, and in the light of your reasoning which was legally adequate, and your conclusions which were lawful and reasonable, you were right to conclude that the leases were shams"*. There was no legal error, there is no basis and no need to remit the case, and the appeal is dismissed.

61. My judgment (§§1-60 above) was circulated in draft to the parties in the usual way and for the usual purposes. I have corrected typos and included reference to leases (9) and (10) and Property Alliance (18) Ltd. An important function of circulating a judgment in draft is to be able to elicit submissions on consequential matters, to be able to rule on any contested consequential matter and identify the appropriate form and wording for the Court's Order, as I will now do. I received emails from Mr Mackenzie which were attempts to 'critique the judgment' and persuade me to change 'the outcome'. These were unsuccessful and the kindest thing is to say nothing further, beyond referring to what is said in the reported Practice Notes in *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002 [2008] 1 WLR 1589 at §§49-51 (Smith LJ) and *In re I (Children)* [2019] EWCA Civ 898 [2019] 1 WLR 5822 at §41 (King LJ). The quantum of the Council's reasonable costs in this Court and below were agreed. It was also agreed that this Court should summarily assess the costs in this Court. I am satisfied that I can and should deal with the costs in this Court and below, and that Isle must pay those costs. I made the following Order: (1) The appeal is dismissed. (2) Isle is to pay, within 14 days of this Order: (a) the Council's costs of the appeal, which are summarily assessed in the agreed sum of £23,107.36 and (b) the Council's costs of the hearing before the Judge, in the agreed sum of £15,772.62. (3) The issuing of the liability orders is remitted to the Judge for dealing with by her or another judge or clerk of the Leeds Magistrates' Court.

Addendum Footnote

62. On 23 February 2021 solicitors Addleshaw Goddard LLP wrote to the Court asking that there be added to this Judgment a footnote stating *"that the companies referred to in the judgment and adopting the prefix 'Property Alliance' (together with Crusader and Mr Terence Ball) have no connection or association whatsoever to Property Alliance Group Limited (CRN: 04454378) or to any business or operations carried out by them or any of their associated companies and which were parties to the proceedings referred to in the judgment as Rossendale (2017), Rossendale (CA), PAG (2015), PAG (2019) and PAG (2020)"*. The request invoked CPR 40.9, whose application (*"person ... directly affected by [the] judgment"*) I doubt, but since the request was made and is

supported by both Isle and the Council, I am satisfied that it is proper (and sufficient) to record it.

Judgment (§§1-61) 19.2.21

Addendum Footnote (§62) 2.3.21