Neutral Citation Number: [2021] EWHC 142 (Ch)

CR-2018-010778

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF ETHOS SOLUTIONS LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 04/02/2021

Before :

ICC JUDGE BARBER

- -

Between :

MICHAELA JOY HALL
(As Liquidator of Ethos Solutions Limited)

Applicant

- and –

MUHAMMAD NASIM & 62 OTHERS

Respondents

- -

Hugh Sims QC and Simon Passfield (instructed by Clarke Willmott LLP) for the **Applicant**
Setu Kamal for the **Ethos Respondents**

Hearing dates: 3-4 November 2020

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.30 a.m on 4 February 2021

.....

ICC Judge Barber

1. On 13 December 2018, Ms Michaela Hall ('the Liquidator'), the liquidator of Ethos Solutions Limited ('the Company') issued an application ('the Main Application') pursuant to s.423 of the Insolvency Act 1986 ('IA') seeking to challenge payments in the total sum of approximately £9 million alleged to have been made by the Company to R1 to R62 via a business benefit trust ('the Trust') of which R63 ('the Trustee') was the trustee company.

2. The Liquidator's claim is set out in her Points of Claim dated 13 December 2018 ('the POC').

3. Forty-one of the Respondents ('the Ethos Respondents') have filed and served Points of Defence in materially identical terms ('the Ethos Defences'), settled with the assistance of Mr Setu Kamal, a specialist tax barrister.

4. By Application Notice dated 27 November 2019 (since amended on 4 March 2020), the Ethos Respondents applied under CPR 3.4(2)(a) and CPR 3.4(2)(b) to strike out the Main Application and/or for summary judgment under CPR 24.2 ('the Ethos Respondents' Strike out Application').

5. By Application Notice dated 18 February 2020, the Liquidator applied under CPR 3.4(2)(a) to strike out paragraphs 21, 25 and 46 to 49 of the Ethos Defences and/or for summary judgment under CPR 24.2 ('the Liquidator's Strike Out Application').

6. At the outset of the hearing before me, I directed that the Ethos Respondents' Application should be treated as a strikeout application only. I did so because the Ethos Respondents had not complied with CPR 24PD.2(3) and had not filed any evidence in support of their summary judgment application, notwithstanding prior warnings that they should do so.

7. This judgment sets out my conclusions on the Ethos Respondents' Strike out Application.

Background

8. The Company was incorporated on 24 September 2008 for the purpose of operating a scheme ('the Scheme') designed to enable individuals who provided professional services to end users on a consultancy basis to receive payment for those services via a trust ('The Trust') established on 27 February 2009.

9. At the time that it was incorporated, the tax treatment of such arrangements was governed by Sempra Metals Ltd v Revenue and Customs Comrs [2008] STC (SCD) 1062.

10. On 9 December 2010, the Government announced that it was introducing legislation to change the tax treatment of such arrangements. In response to that announcement, the Company modified the Scheme for the year ended 31 December 2011. The modifications included the introduction to the Scheme of a business registered in Jersey known as Scope Self Employment Jersey ('Scope'). The Ethos Respondents maintain (inter alia) that following the introduction of Scope, the Company ceased to

be 'employer'. The Liquidator maintains that the Company remained employer notwithstanding Scope's introduction.

11. The Liquidator alleges that between 4 March 2009 and 26 March 2012, the Company made payments to the Trust or to Scope in the total sum of £9,032,925.77. The Liquidator further alleges that those monies were subsequently transferred to sub-trusts for the benefit of R1-R62.

12. On 4 December 2012, HMRC issued determinations against the Company under Regulation 80 of the Income Tax (Pay As You Earn) Regulations for the tax years 2008/09 and 2009/10 in which it assessed that the Company was liable to pay income tax and NIC in the total sum of £2,328,057.72 in respect of payments made to the Trust. HMRC did not issue a Regulation 80 determination for the tax year 2010/11 or for the year ending 31 December 2011.

13. On 18 December 2012, the Company entered creditors' voluntary liquidation. Mr Ian Mark Defty was initially appointed as liquidator of the Company but was replaced by Ms Hall, the current liquidator, by order of the court dated 4 April 2014. According to the estimated statement of affairs dated 18 December 2012, the estimated deficiency as regards creditors stood at £2,487,949.25; creditors comprising (1) two 'Trade and Expense' creditors, totalling £4,242.66 (2) HMRC–Tax: £2,328,057.72 (3) HMRC-VAT: £191,195.13: Total £2,523,495.51. Consistently with the first Annual Progress Report dated 4 February 2014, the most recent Annual Progress Report dated 20 April 2020 continues to confirm claims from four creditors totalling £2,730,841.

14. In 2017, the Supreme Court in RFC 2012 plc (in liquidation) (formerly The Rangers Football Club plc) v Advocate General for Scotland [2017] UKSC 45 ('the Rangers case') overruled Sempra Metals Ltd v Revenue and Customs Comrs [2008] STC (SCD) 1062. As summarised by Lord Hodge JSC (giving the judgment of the court) at [58]:

    (1) income tax on emoluments or earnings is due on money paid as a reward or remuneration for the exertions of the employee;

    (2) the governing primary legislation does not require the employee himself or herself to have received the remuneration for income tax to be chargeable;

    (3) references in the PAYE Regulations to making a relevant payment to an employee or other payee fall to be construed as payment either to the employee or to the person to whom the payment is made with the agreement or acquiescence of the employee or as arranged by the employee.

15. It was following this ruling that the Main Application was issued. The Main Application is based solely upon s.423 of the Insolvency Act 1986.

Section 423 of the Insolvency Act 1986

16. So far as material, s.423 IA 1986 provides as follows:

    '423 Transactions defrauding creditors

> (1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if-
>
> (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
>
> (b) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; or
>
> c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.
>
> (2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for –
>
> (a) restoring the position to what it would have been if the transaction had not been entered into, and
>
> (b) protecting the interests of persons who are victims of the transaction.
>
> (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose
>
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
>
> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make….
>
> (5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as 'the debtor.'

17. Section 424 sets out those who may make an application under s.423. In a case where the debtor is in liquidation, these include the liquidator.

18. Section 425(1) sets out a non-exhaustive list of orders which the court may make with respect to a transaction falling within s.423.

19. Section 425(2) and (3) continue:

> (2) An order under section 423 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor entered into the transaction; but such an order –
>
> (a) shall not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and
>
> (b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.
>
> (3) For the purposes of this section the relevant circumstances in relation to a transaction are the circumstances by virtue of which an order under section 423 may be made in respect of the transaction.'

Strike Out Applications: Legal Principles

20. CPR 3.4(2) (so far as material) provides that the court may strike out a statement of case if it appears to the court

'(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings…'

21. The parties were largely agreed on the legal principles at play in determining a strike out application. In this regard I was referred to the summary of caselaw set out at 3.4 of Volume 1 of the 2020 White Book, as addressed below.

CPR 3.4(2)(a): No reasonable grounds

22. It was common ground that whether or not a statement of case should be struck out under CPR 3.4(2)(a) should be judged on the face of the statement of case itself and not on the evidence.

23. On behalf of the Liquidator, Mr Sims referred me to the case of Oysterware Ltd v Intentor Ltd and Others [2018] EWHC 611 per Ms Joanna Smith QC, sitting as a Deputy Judge of the High Court, at [40]:

> '[40] It is clear from the authorities (which are well established and need not be cited in detail) that I can only strike out a statement of case or part of a statement of case under CPR 3.4(2)(a) where I am satisfied that it discloses on its face no reasonable grounds for bringing the claim … and that it is only

> a remedy to which the court should resort in plain and obvious cases where the court can be certain that the claim is bound to fail (Hughes v Colin Richards & Co [2004] EWCA Civ 266 per Peter Gibson LJ at [22]). In considering this question I must have regard to the overriding objective of dealing with the case justly (Three Rivers District Council v Bank of England (No 3) [2001] UKHL 16, per Lord Hope at [94])'.

24. Paragraph 1.4 of the Practice Direction (Striking Out a Statement of Case) gives examples of cases where the court may conclude that particulars of claim disclose no reasonable grounds for bringing the claim. These claims include those which set out no facts indicating what the claim is about, those claims which are incoherent and make no sense; and those claims which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.

25. Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit and would waste resources on both sides: Harris v Bolt Burdon [2000] C.P. Rep.70 [2000] CPLR 9.

26. It is generally not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact: Farah v British Airways, The Times, 26 January 2000 CA referring to Barrett v Enfield BC [1989] 3 WLR 83, HL [1999] 3 All ER 193.

27. Similarly, a statement of case is generally not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence.

28. Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend: In Soo Kim v Youg [2011] EWHC 1781.

CPR 3.4(2)(b): abuse of process or otherwise likely to obstruct the just disposal of the proceedings

29. The court has power to strike out a prima facie valid claim where there is abuse of process. It does not follow, however, that in all cases of abuse the correct response is to strike out the claim. In a strikeout application, the proportionality of the sanction is very much in issue: Walsham Chalet Park Ltd v Tallington Lakes Ltd [2014] EWCA Civ 1607. The striking out of a valid claim should be the last option. If the abuse can be addressed by a less draconian course, it should be.

30. The categories of abuse of process are many and are not closed. They include attempts to re-litigate issues which were raised, or should have been raised, in previous proceedings and collateral attacks upon earlier decisions. It is also an abuse of process to pursue a claim for an improper collateral purpose. However, what is an improper collateral purpose is not easy to define and few cases have been struck out

solely on this basis: see Goldsmith v Sperrings Ltd 1977 1 WLR 478 CA per Bridge LJ.

31. It is an abuse of process to bring by an ordinary claim proceedings which should normally be brought by judicial review in order to take advantage of the longer limitation period in ordinary claims: Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988 CA obiter; see too Carter Commercial Developments v Bedford BC [2001] EWHC Admin 669.

32. It is also an abuse of process to issue a claim form in the absence of knowledge of any valid basis for a claim and any ability to formulate the claim at the time of issue. One such example (summarised at paragraph 3.4.3.7 of Volume 1 of the White Book) is Nomura International Plc v Granada Group Ltd [2008] Bus. L.R. 1 (Cooke J). In Nomura, the judge struck out such a claim. The claimants had issued the claim form to protect its position on limitation in the context of a potential claim against it by a third party. The judge found that the claimant, at the time of issuing its claim form, was not in a position to do the minimum necessary to set out the nature of the claim (as required by CPR16.2(1)) and was seeking an illegitimate benefit, namely the prevention of further time running under the Limitation Act for a claim it could not properly identify or plead. Given that the very commencement of proceedings was an abuse of process, the judge held that striking out was the only proper sanction.

33. The court may also strike out, as an abuse of process, particulars of claim which are unreasonably vague or incoherent (Towler v Wills [2010] EWHC 1209 (Comm); Oysterware (loc cit) at [43]), or which are so badly drafted that they fail to reveal to the defendant, or to the court, the case the defendant can expect to meet at trial. The remedy should however be proportionate to the abuse. Ordinarily the court should not strike out the particulars without first giving the claimant an opportunity to amend: see In Soo Kim v Youg [2011] EWHC 1781 (QB).

34. The term 'obstruct' in r.3.4(2)(b) means 'impede to a high extent'. The court will not strike out a statement of case merely because it raises some irrelevant issues or otherwise generates some untidiness in the pleadings: Atos Consulting Ltd v Avis Europe Plc [2005] EWHC 982, TCC.

The Points of Claim

35. The Points of Claim in this case comprise 27 paragraphs and 5 schedules. As they are relatively short, I shall take the unusual step of quoting them in full.

> '(1) The Applicant ('the Liquidator') is the Liquidator of Ethos Solutions Limited ('the Company'), having been appointed with effect from 4 April 2014.
>
> (2) The Company was incorporated on 24 September 2008 and carried on business as an umbrella company providing tax planning services to individuals. The Company entered creditors' voluntary liquidation on 18 December 2012.
>
> (3) The First to Sixtieth Respondents ('the Employee Respondents') are individuals to whom the Company provided

tax planning services. The Employee Respondents provided professional services to end users on a consultancy basis. As further particularised below, the Company operated a scheme which was designed to enable the Employee Respondents to avoid liability to pay tax on the money paid by end users for their services ('the Scheme'). Pursuant to the Scheme, the Employee Respondents entered into contracts of employment with the Company in respect of the services which they provided to end users and received payment for those services via the Ethos Solutions Limited Business Bonus Trust No. 2 ('the Trust'), a business benefit trust created by the Company.

(4) The Sixty-First Respondent, Justin Webster ('Mr Webster') was the sole registered director of the Company between its incorporation (on 24 September 2008) and 9 October 2008. As further particularised below, Mr Webster was at all material times responsible for the Company's implementation and operation of the Scheme. Between 9 June 2009 and 10 November 2011 Mr Webster received payments from the Trust in the total sum of £486,409.76.

(5) The Sixty-Second Respondent, Clive Merifield ('Mr Merifield') contracted with the Company to introduce individuals to the Scheme in return for the payment of a commission. Between 15 June 2009 and 25 January 2012, Mr Merifield received payments from the Trust in the total sum of £77,474.51.

(6) The Sixty-Third Respondent ('Nautilus') is a company which was registered in Jersey on 9 June 2000 as Nautilus Trustees Limited and changed its name to First Names (NTC) Trustees Limited on 28 November 2016. As further particularised below, at all material times from 2009, Nautilus was and is the trustee of the Trust.

The Scheme

(7) The Company was set up by Mr Webster and Jeremy Clark ('Mr Clark'). On incorporation, Mr Webster was the sole registered director and shareholder. Mr Webster resigned as a director of the Company on 9 October 2008 but remained the sole shareholder until 24 September 2011, when he transferred his shares to Mr Clark. Mr Clark was the sole registered director of the Company from 9 February 2009.

(8) Prior to the incorporation of the Company, Mr Webster had entered into a professional services agreement with Montpelier Tax Consultants (Isle of man) Limited ('Montpelier') pursuant to which Montpelier provided taxation advice to Mr Webster in

relation to a proposed tax avoidance scheme involving the use of a business benefit trust.

(9) On 24 September 2008, the Company was incorporated as a vehicle for the implementation of the Scheme. The Company engaged interim consultants whose job was to identify individuals who provided services to end users on a consultancy basis and who wished to avoid paying tax on their income. The Company offered to assist those individuals to avoid tax by facilitating them to participate in the Scheme. In return, the Company was entitled to the payment of an administration fee, which was calculated as a percentage, and deducted from, the monies paid by the end users.

(10) At all material times until 31 December 2010, the Scheme operated as follows:

a. the Employee Respondents entered into contracts of employment with the Company which provided for the Company to pay them a nominal salary based on the number of hours worked (which salary was intended to be below the threshold at which the individual would be liable to pay income tax);

b. the Company entered into a consultancy agreement with either: (i) the end user; or (ii) the Employee Respondent's personal services company/employments agent (which in turn entered into a consultancy agreement with the end user), by which the Company agreed to provide the Employee Respondent's services to the end user/personal services company/employment agent in return for the payment of a consultancy fee (which significantly exceeded the nominal salary payable by the Company to the Employee Respondent);

c. the Company established the Trust for the benefit of the Employee Respondents and their dependents and appointed Nautilus as trustee of the Trust;

d. When the Company received payment of the consultancy fee from the end user /personal services company/employment agent, it: (i) retained an agreed proportion of the monies by way of 'administration fee'; (ii) applied the balance to the payment of the Employee Respondent's nominal salary payable under the contract of employment; and (iii) transferred the remainder to the Trust;

e. Nautilus then transferred the monies paid to the Trust into a sub-trust set up in the name of the Employee Respondent and those monies were subsequently transferred from the sub-trust to the Employee Respondent. The said payments were

purportedly made by way of discretionary loans. In fact, it was never intended that the Employee Respondent would repay the monies to the Trust.

(11) The Scheme operated on the assumption that the Company would not be required to deduct income tax and national insurance contributions ('NIC') from the monies paid to the Trust and pay them to HM Revenue and Customs ('HMRC') under the 'pay as you earn' ('PAYE') regime.

(12) In fact, the payment of monies into the Trust by the Company constituted a taxable emolument or earnings subject to deductions in respect of PAYE and NIC irrespective of whether the said monies were paid to the Company's employees directly or in accordance with the Scheme.

The Trust

(13) On 27 February 2009, the Trust was created by a trust deed which was prepared by Cripps Harries Hall LLP solicitors and executed by the Company and Nautilus ('the Trust Deed').

(14) The Company's accounts for the years ended 31 December 2009 and 31 December 2010 (which were prepared by Magee Gammon Chartered Accountants ('Magee Gammon') and approved by the director(s) on 21 June 2010 and 29 September 2011 respectively) record that in those periods the Company made payments to the Trust in the total sum of £6,870,496 (of which, £2,110,911 was paid in the year ended 31 December 2009 and £4,759,858 was paid in the year ended 31 December 2010). The said payments were treated in the said accounts as 'other staff costs'.

(15) The Company did not declare the income tax and NIC payable on those payments in its tax returns for the tax years 2008/09 and 2009/10.

(16) On 4 December 2012, HMRC issued determinations against the Company under regulation 80 of the Income tax (Pay as You Earn) Regulations 2003 for the tax years 2008/09 and 2009/10 in which it assessed that the Company was liable to pay income tax and NIC in the total sum of £2,328,057.72 in respect of the payments made to the Trust.

Scope

(17) On 9 December 2010, the Government announced that it was introducing legislation to tackle tax avoidance schemes involving the use of employee benefit trusts and that anti-forestalling provisions applied to any sums paid between 9 December 2010 and 5 April 2011 which would be caught by

the legislation if paid after 6 April 2011. This legislative development was foreshadowed in the budget delivered by the Chancellor on 22 June 2010 and was widely publicised.

(18) In these circumstances, by 31 December 2010, Mr Webster and Mr Clark would have been aware that:

a. the Company was liable to pay income tax and NIC to HMRC in respect of any payments which it made to the Trust after 9 December 2010 (notwithstanding that the Company had already been liable to pay income tax and NIC to HMRC in respect of the payments which it made to the Trust before that date); and

b. accordingly, the Scheme (as it had operated prior to that date) would no longer be effective to facilitate the avoidance of tax (notwithstanding that the Scheme had never been effective to facilitate the avoidance of tax).

(19) In consequence, Mr Webster and Mr Clark sought to modify the Scheme for the year ended 31 December 2011. This involved the following steps:

a. the Company instructed BBA Limited (a company registered in Jersey) to correspond with the Comptroller of Income Tax's Office to obtain clearance for a tax scheme. It appears that this application was successful. On 7 February 2011, BBA Limited raised an invoice in the sum of £643.50 and this was paid by the Company on 17 February 2011;

b. on 14 January 2011, Mr Webster's cousin, Graham Webster applied to the Jersey Financial Services Commission to register the business name Scope Self Employment Jersey ('Scope') pursuant to the Regulation of Business Names (Jersey) Law 1956. In the application, the general nature of Scope's business was stated to be 'supply of services contracted out to Ethos Solutions Limited (UK)'. The application was successful, and a certificate of registration was issued on 25 January 2011;

c. on 19 January 2011, Tina Jehan of Nautilus emailed Careagh O'Toole (who was in charge of the Company's payroll) requesting that the Company transfer the sum of £100 into Nautilus's client account 'for the initial settled funds for the new trust' and payment was duly made by the Company on 20 January 2011;

d. On 20 January 2011, Mr Webster instructed Ms O'Toole to set up regular monthly payments from the Company to Graham Webster, stating:

"Graham came on board for his services on Jersey his fee is 1000GBP per month +20% which covers his tax. Graham will also require funding for his out-of-pocket exs therefore this month he will need an extra 100GBP for his mobile phone bill"

e. from 31 January 2011 onwards, Scope submitted monthly invoices to the Company as follows:

i. for the period January to June 2011, invoices in the sum of £1,096.88 with the description 'admin duties';

ii. invoices for the services provided by the Employee Respondents, calculated by reference to the payments made to the Trust each month;

iii. invoices for the monthly trust fee payable to Nautilus.

f. until 31 May 2011, the Company continued to make payments directly to the Trust (and the recipient of the monies was described in the Company's bank statements as 'Nautilus re Scope') but from 3 June 2011 onwards, the Company instead paid the monies to Scope, which then transferred those monies onto the Trust;

g. in or around September 2012, Magee Gammon prepared the Company's draft financial statements for the year ended 31 December 2011 in which the payments which the Company made to the Trust or Scope during that financial year (which total £6,373,799) were treated as 'purchases' (rather than 'other staff costs' as previously).

(20) The Liquidator estimates that the Company is liable to pay income tax and NIC in respect of the payments made to the Trust or Scope in the year ended 31 December 2011 in the total sum of at least £2,791,723.96.

Payments to the Respondents

(21) Between 4 March 2009 and 26 March 2012, the Employee Respondents received the payments from the Trust particularised in schedule 2 hereto, Mr Webster received the payments from the Trust particularised in schedule 3 hereto and Mr Merifield received the payments from the Trust particularised in schedule 4 hereto.

PART II- THE CLAIMS

s.423- transactions defrauding creditors

(22) Each payment by the Company to the Trust (whether directly or via Scope) (as particularised in schedule 1 hereto),

the corresponding transfer of the monies to a sub- trust and the onward payment of the monies to the beneficiary of the sub-trust purportedly by way of loan (as particularised in schedules 2,3 and 4 hereto) constituted one composite transaction for the purposes of s.423 of the Insolvency Act 1986 ('IA').

(23) Each said composite transaction was entered into by the Company at an undervalue, in that

a. the Company did not receive any consideration for the payments which it made to the Trust (whether directly or via Scope). The said payments were purportedly made by the Company to its employees by way of bonuses in respect of the services which they provided to the Company. However, the Company and its employees had already agreed the remuneration payable for those services (as set out in the relevant contracts of employment) and that remuneration was paid by the Company. In the premises, the employees did not have any entitlement to any additional payments from the Company in respect of those services, whether made via the Trust in accordance with the Scheme or otherwise. Accordingly, each composite transaction was a transaction at an undervalue within the meaning of s.423(1)(a) IA; or

b. If (which is denied) the Company did receive consideration for the said payments in the form of the services provided to the Company by the employees (beyond the value which the Company and the employees had agreed to place on those services recorded in the relevant contracts of employment), the value, in money or money's worth, of those services was significantly less than that of the payments which the Company made to the Trust (whether directly or via Scope) because the Company was required to deduct income tax and NIC from the sums which it paid to its employees, whereas the Company paid the gross sums to the Trust (either directly or via Scope) without making such deductions. Accordingly, each composite transaction was a transaction at an undervalue within the meaning of s423(1)(c) IA.

(24) The Company entered into each transaction for the purpose of putting assets beyond the reach of HMRC and/or of prejudicing the interests of HMRC in relation to its entitlement to payment of income tax and NIC in respect of the payments made to the Trust (whether directly or via Scope).

(25) Alternatively:

a. Each of the payments made by the Company to the Trust (whether directly or via Scope) (as particularised in Schedule 1

hereto) constituted a transaction for the purposes of s.423 IA 1986; and

b. Each said transaction was entered into by the Company at an undervalue (for the reasons set out in paragraph 23 above) and for the purpose set out in paragraph 24 above; and

c. the Employee Respondents, Mr Webster and Mr Merifield received benefits from those transactions, in that the monies paid by the Company to the Trust (whether directly or via Scope) were subsequently paid to them (as particularised in schedules 2,3 and 4 hereto); and

d. the Employee Respondents, Mr Webster and Mr Merifield did not receive the said benefits in good faith, for value and without notice of the relevant circumstances.

(26) In consequence, the Liquidator seeks orders pursuant to s.423(2) IA:

a. An order requiring each of the Employee Respondents, Mr Webster and Mr Merifield to repay to the Company the sum identified against their name in schedule 5 hereto;

b. alternatively, such other orders as the court thinks fit for restoring the position to what it would have been if the transactions had not been entered into and protecting the interests of persons who are victims of the transactions.

Interest

(27) The Applicants claim interest on any sums found payable by the Respondents pursuant to s.35A of the Senior Courts Act 1981 for such period and at such rate as the court thinks fit.

AND the Applicant claims:

(1) A declaration that the payments by the Company to the Trust (whether directly or via Scope) particularised in schedule 1 hereto (either individually or taken together with the payments to the Respondents particularised in schedules 2,3 and 4 hereto) constituted transactions at an undervalue (within the meaning of s.423(1) IA) entered into by the Company for the purpose of putting assets beyond the reach of HMRC and/or prejudicing the interests of HMRC in respect of the Company's tax liability).

(2) In consequence, an order pursuant to s.423(2) IA that each Respondent do repay to the Company the sum identified in schedule 5 hereto.

> (3) Alternatively, such other orders as the court thinks fit for restoring the position to what it would have been if the transactions had not been entered into and protecting the interests of persons who are victims of the transactions.
>
> (4) Interest
>
> (5) Further or other relief
>
> (6) Costs'

36. It will be seen that the POC cover 3 distinct periods:

    (1) Phase 1: 2 February 2009 (the date of the creation of the Trust) to 31 December 2010: POC, para 10. At this stage the Company made payments to the Trust in its own right.

    (2) Phase 2: January 2011 to 31 May 2011: POC para 19f. In this phase, the Company made payments to the Trust marked 'Nautilus re Scope'.

    (3) Phase 3: 3 June 2011 onwards: POC para 19f. During this phase, the Company made payments to Scope, which then made payments to the Trust.

37. It will also be noted that the POC make reference to schedules. The schedules to the POC are as follows:

    (1) Schedule 1: This lists payments by the Company to Nautilus (Trustee of the Trust) and Scope from 4 March 2009 to 26 March 2012 in respect of the Employee Respondents chronologically by date and amount. No sub-totals for each Employee Respondent are given.

    (2) Schedule 2: This lists payments from the Trust to each of the Employee Respondents respectively, from March 2009 to January 2012, by date and amount. Sub-totals for each Employee Respondent are given.

    (3) Schedule 3: This lists payments from the Trust to Justin Webster over the period June 2009 to November 2011 by date and amount.

    (4) Schedule 4: This lists payments from the Trust to Clive Merifield over the period June 2009 to January 2012 by date and amount.

38. Schedule 5 deserves closer consideration. This lists the total sum claimed against each of the Respondents on two alternative bases described as 'paragraph 23(a)' and 'paragraph 23(b)'. I shall take the First Respondent, Muhammad Nasim, as an example. In Schedule 5, against Mr Nasim's name, appear two columns. In a column headed 'sum claimed pursuant to paragraph 23(a)', a figure of £116,296.86 appears. In a column headed 'sum claimed pursuant to paragraph 23(b)' a figure of £53,734.74 appears.

39. There is no analysis or breakdown of either figure.

40. The figure £116,296.86, claimed in respect of Mr Nasim pursuant to paragraph 23(a) (ie on the basis that 'the Company did not receive any consideration for the payments which it made to the Trust'), tallies with the total sum which, according to Schedule 2, was allegedly paid by the Trust to Mr Nasim. Somewhat unhelpfully, Schedule 1 (which sets out the sums allegedly paid by the Company to Scope or the Trust) does not contain sub-totals for each employee.

41. The alternative figure of £53,734.74, claimed in Schedule 5 against Mr Nasim under paragraph 23(b) of the POC, is less easy to follow. It appears to be an attempt to represent the PAYE and NIC which, on the Liquidator's case, should have been deducted by the Company from the £116,296.86 paid via the Trust to Mr Nasim. No breakdown is given however (whether in Schedule 5 itself or anywhere else in the pleading or its Schedules). As the circumstances of each individual taxpayer are different, it is difficult to see how the Liquidator has arrived at this calculation. In Mr Nasim's case, it appears from Schedule 2 that all of the payments allegedly made by the Trust to Mr Nasim post-date the tax years 2008/09 and 2009/10 in respect of which, according to paragraph 16 POC, HMRC has issued determinations against the Company under regulation 80 of the 2003 Regulations. The calculation, therefore, is not based on any determination by HMRC.

42. The same pattern (that is to say, two alternative figures, under para 23(a) and 23(b) respectively, with no breakdown of the calculation of the para 23(b) figure) is followed in Schedule 5 for each of the Respondents. As with Mr Nasim, the paragraph 23(b) figure given in Schedule 5 for a number of the other Respondents appears (from Schedule 2) to be based on payments post-dating the tax years 2008/09 and 2009/10 in respect of which HMRC has raised an assessment.

The Ethos Respondent Strike-Out application

43. On behalf of the Ethos Respondents, Mr Kamal raised numerous criticisms with regard to the manner in which the Liquidator's claim had been pleaded. A number of the points raised related to the lack of particularisation; such as the failure to plead the legislative provisions relied upon in support of the contention that the contributions to the Trust and to Scope, in each of the three relevant years, were alleged to have given rise to a tax liability and the failure, in quantum terms, to demonstrate how the alleged tax liability in each of the three relevant years was calculated. In the interests of brevity, I do not propose to list all such criticisms. Suffice it to state that, whilst a number of criticisms regarding lack of particularisation were entirely justified, lack of particularisation of itself is not a ground for striking out the Liquidator's claim.

44. For the purposes of this judgment, I shall focus upon four strike out points developed in argument. These were as follows.

(1) That the 'no consideration' allegation at paragraph 23(a) (and paragraph 25) was (i) patently inconsistent with the POC when read as a whole and (ii) ultimately self-defeating;

(2) That the 'undervalue' allegation at paragraph 23(b) (and paragraph 25) was untenable, as (i) caselaw demonstrates that the courts do not take into account tax liabilities when comparing incoming and outgoing values for the purposes of ss238

and 423; (ii) even if the court did decide to take tax liabilities into account when comparing incoming and outgoing values for such purposes, it could not take into account the tax liability of one party to the transaction without also taking into account the tax liability of the other party to the transaction, when both tax liabilities related to the same payment, and (iii) in this case the two tax liabilities would cancel each other out;

(3) That in the absence of any pleaded return, assessment, proof of debt or intimation of a claim by HMRC for PAYE/NIC in respect of alleged PAYE/NIC liability for the year ended 31 December 2011, the POC disclosed no reasonable grounds for including a claim in respect of such alleged liability for that year and/or it was an abuse of process to include such a claim;

(4) That to employ s.423 as a means of circumventing tax law processes was an abuse of process under CPR 3.4(2)(b).

The 'No Consideration' allegation: Para 23(a)

45. Mr Sims maintained that it was the Liquidator's primary case that the payments to the Trust could not be treated as part of the Respondents' remuneration for the services which they provided to the Company because such payments were not provided for in their contracts of employment with the Company. As this was a strike out application, unsupported by evidence, the case of the Liquidator had to be assessed on the basis of the pleading.

46. He argued that, when assessing incoming value, it was open to the court to look at the contractually agreed amount or to look beyond the contract. Judges could differ in their approach. In this regard reference was made to Phillips v Brewin Dolphin [2001] 1 WLR 143 at paras 20 and 21. In that case, one of the issues considered by the Supreme Court was whether Evans Lombe J and the Court of Appeal had been right in declining to allow PCG's covenant in a sublease to be taken into account in assessing the value of the consideration for which AJB entered into the share sale agreement. The Supreme Court held that the courts below had been wrong to exclude it. At para 20, having noted that section 238(4)(b) 'does not stipulate by what person or persons the consideration is to be provided', directing attention instead to the 'consideration for which the company has entered into the transaction', Lord Scott continued:

> 'The identification of this "consideration" is in my opinion, a question of fact. It may also involve an issue of law, for example, as to the construction of some document. But if a company agrees to sell an asset to A on terms that B agrees to enter into some collateral agreement with the company, the consideration for the asset will, in my opinion, be the combination of the consideration, if any, expressed in the agreement with A and the value of the agreement with B.'

47. Mr Sims submitted that identification of consideration was a question of fact which was not amenable to strike out and that, whilst the court might look more broadly at what the consideration was (as occurred in Phillips v Brewin Dolphin), it was not for the court on a strike out to predict what the court might do at trial. He further submitted that an additional reason why the court should tread carefully on this issue is that there were Respondents other than the Ethos Respondents who took a differing view on what the transaction was. One example was the Merifield defence, he argued, which denied para 22.

48. Mr Kamal argued that the mere fact that the contributions went beyond the consideration expressed in the written employment contracts did not mean that the Employee Respondents provided no consideration for the contributions, citing Phillips v Brewin Dolphin Bell Lawrie Ltd [2001] 1 WLR 143; Fullerton v Provincial Bank of Ireland [1903] AC 309, Re Kumar (a bankrupt) [1993] 2 All ER 700 and in Re Kiss Cards Limited [2016] EWHC 2176 (Ch) at [22] and [25]. As put at paragraph 40 of Mr Kamal's skeleton argument: 'What emerges from these cases is that something can be recognised as consideration given for a transaction even though it is not expressly or formally recorded as such and even if it is presented as having been given for something else'.

49. Mr Kamal went on to submit that, even if one were to leave aside the argument summarised at paragraph 48 above, the allegation at para 23(a) POC that 'the Company did not receive any consideration for the payments which it made to the Trust', was demonstrably inconsistent with the POC when read as a whole. It was also, as he put it, 'self-cancelling', for if the payments by the Company to the Trust were not for services by the employees, (i) no PAYE/NIC tax charges would arise (ii) HMRC would not be a 'victim'; and (iii) the Liquidator could not make out the second limb of s.423, that the Company 'entered into each transaction for the purpose of putting assets beyond the reach of HMRC and/or of prejudicing the interests of HMRC in relation to its entitlement to payment of income tax and NIC in respect of the payments made to the Trust': POC para 24.

Conclusions on Para 23(a)

50. In my judgment, the POC disclose no reasonable grounds for bringing a claim based on paragraph 23(a) POC.

51. I accept that the identification of consideration is a question of fact (or in some cases, a question of fact and law). I also accept that courts may take different views on what qualifies as consideration for the purposes of s.238 or 423 IA 1986. In this case, however, Mr Kamal's two arguments summarised at paragraph 49 above (with the exception of 49(iii)), raise more fundamental issues. Whilst I do not accept the point raised at Paragraph 49(iii) above, (there being a distinction between the effect of a transaction and its purpose), in my judgment, the allegation at para 23(a) POC, that 'the Company did not receive any consideration for the payments which it made to the Trust', is, as Mr Kamal submits, (1) demonstrably inconsistent with the POC when read as a whole and, for reasons which I shall come on to, (2) ultimately self-defeating. I shall deal with points (1) and (2) in turn.

52. With regard to point (1), that the allegation at paragraph 23(a) is demonstrably inconsistent with the pleadings read as a whole, I shall start with paragraph 3 POC. Paragraph 3 of the POC provides (with emphasis added), that

> 'the Employee Respondents entered into contracts of employment with the Company in respect of the services which they provided to end users and received payments *for those services* via the [Trust] … a business benefit trust created by the Company.'

53. The wording speaks for itself. By way of further example, see paragraph 9 POC ('in return' and 'deducted from'), paragraph 10 POC (which describes the Scheme as a whole and includes reference at paragraph 10(d)(i) to the Company having 'retained an agreed proportion') and paragraph 12 POC. Attempts in Paragraph 22 of the POC to define 'transaction' in a way which ignores the Scheme pleaded at Paragraphs 9 and 10, the payments coming in from end users and the use to which those monies were put, are entirely artificial when read in context, even if Paragraph 22 has been innocently admitted by some respondents; for the purposes of this strike-out, the focus is on the POC read as a whole and not the defences. After some discussion with Mr Sims on this issue on day one of the application, ultimately by day two, Mr Sims rightly accepted that, in identifying the transaction for the purposes of s.423, it was not possible to look simply at paragraph 22 POC and that paragraphs 9 and 10 POC are included in the transaction as well. Mr Sims further accepted that, for the purpose of analysing the transaction, the court would have to look at the 'whole circle and not just part of it'. He maintained however that, for the purposes of assessing consideration, only consideration passing between the Company and the employees qualified. This submission was entirely inconsistent with Phillips v Brewin Dolphin and I reject it. As confirmed by Lord Scott in Phillips (see paragraph 46 above), in relation to s238(4)(b) but equally applicable to s.423(1), the section 'does not stipulate by what person or persons the consideration is to be provided'. Moreover, in any event, the pleadings read as a whole make clear that the Employee Respondents did provide consideration to the Company; in addition to providing services by arrangement with the Company, it is clear from Paragraph 9 POC and the Scheme as described in Paragraph 10 POC that the Employee Respondents agreed to part of sums otherwise due to them from the end users being paid as an 'administration fee' to the Company instead.

54. I turn next to point (2): that the allegation at para 23(a) POC is ultimately self-defeating.

55. Read as a whole, the pleading is premised on the Company's payments to the Trust forming part of the remuneration of the Respondents for services provided. It is on the basis that payments to the Trust (or Scope) formed part of the remuneration of the Respondents for services provided that PAYE/NIC is said to be due on those payments. As put by Lord Hodge in the Rangers case (with emphasis added) at [35]:

> 'Income tax on emoluments or earnings is, principally but not exclusively, a tax on the payment of money by an employer to an employee *as a reward for his or her work as an employee.'*

56. At paragraph [41] Lord Hodge continues:

> 'As a general rule, therefore, the charge to tax on employment income extends to money that the employee is entitled to have paid as his or her remuneration….'

57. Similarly, at paragraph [58], with emphasis added,

> 'income tax on emoluments or earnings is due on money paid *as a reward or remuneration for the exertions of the employee*'

58. As a final example, at paragraph [64], with emphasis added:

> 'The relevant provisions for the taxation of emoluments or earnings were and are drafted in deliberately wide terms to bring within the tax charge money paid *as a reward for an employee's work*.'

59. In this regard it will be recalled that paragraph 12 of the POC states, in terms:

> 'In fact, the payment of monies into the Trust by the Company constituted a taxable emolument or earnings subject to deductions in respect of PAYE and NIC irrespective of whether the said monies were paid to the Company's employees directly or in accordance with the Scheme'.

60. It will also be noted that in relation to the years 2008/09 and 2009/10, the Liquidator at paragraph 16 POC expressly relies upon determinations issued by HMRC against the Company under Regulation 80 of the Income Tax (Pay as You Earn) Regulations. It is not pleaded that Liquidator has made any attempt to *challenge* those determinations, or to invite HMRC to *withdraw* them, on the footing that the payments made by the Company to the Trust were *not* emoluments or earnings subject to PAYE/NIC; quite the contrary: by paragraph 12 of the POC, the Liquidator states that they *were*.

61. In my judgment, Mr Kamal is right to submit that the Liquidator cannot have it both ways. The Liquidator cannot consistently maintain that the contributions by the Company to the Trust and/or Scope were made in return for services and that they were not. It is fundamental to the Liquidator's case that the contributions were part of a remuneration strategy entered into between an employer and its employees; it is for this reason that the contributions are said to give rise to tax in the first place. It is on the basis that payments to the Trust (or Scope) formed part of the remuneration of the respondents for services provided that PAYE/NIC is said to be due on those payments. That tax liability is the bedrock of the Liquidator's claim. Without it, the s.423 claim (insofar as it is based on the 'no consideration' case set out at para 23(a)) cannot succeed in any real sense; it achieves nothing. HMRC is the only 'victim' referred to in the POC (para 24 and prayer for relief, para 1); there are no other victims identified in the pleadings. In some cases, that deficiency alone might be cured by amendment. In the present case, however, HMRC is the only meaningful creditor in the liquidation; according to the statement of affairs, trade creditors at the date of liquidation stood at less than £5,000 and realisable assets comfortably exceeded that figure. Even if one were to leave to one side, therefore, the obvious difficulties posed by the pleaded case in clearing the 'purpose' threshold of s.423,

given the clear wording of paragraph 11 POC (considered against the backdrop of the law at the time that the Company was set up, Sempra Metals), in my judgment the pleadings fail to demonstrate any basis at all on which, on the 'no consideration' case pleaded at paragraph 23(a), even assuming for the sake of argument that the 'purpose' threshold was cleared, the Court could be persuaded to grant any relief under s.423. No victims other than HMRC are identified in the pleadings and on the facts as pleaded it is inconceivable that the court would 'restore the position to what it would have been if the transactions had not been entered into'. The Liquidator's case, insofar as it is based on para 23(a), is in my judgment 'unwinnable' or bound to fail. To summarise my conclusions on paragraph 23(a):

(1) It is entirely inconsistent with the POC, when read as a whole, for the Liquidator to maintain that no consideration was provided for the Company's payments to the Trust. On the pleadings as they stand, this assertion is in my judgment untenable.

(2) The claim that no consideration was provided for the Company's payments to the Trust is ultimately self-defeating: if the payments to the Trust were not for services, no PAYE/NIC would be due on the same in the manner pleaded at paragraph 12 POC and the Liquidator's case (which is based solely on section 423) would, for the reasons I have given, fail.

(3) The POC disclose no reasonable grounds for bringing a s.423 claim based on the 'no consideration' case pleaded at paragraph 23(a). I would add that there is no possible benefit in allowing the 'no consideration' case to proceed and that to do so would simply waste resources on both sides.

62. I take into account that striking out is a remedy of last resort and that the court should lean against striking out claims in an area of developing jurisprudence. I also take into account that there are other Respondents, not represented before me today, who will be affected by my decision. I have considered carefully whether the issues around paragraph 23(a) which I have highlighted can be cured by amendment and have decided that they cannot. They are too fundamental to lend themselves to correction by amendment in the context of this s.423 claim. The Liquidator would need to bring what would in effect be an entirely new and different claim, based on provisions other than s423, in order to make any sense of paragraph 23(a). Given that more than 8 years have now elapsed since the Company went into liquidation, any new claim proposed at this stage would raise serious limitation issues.

63. For all of these reasons, I have decided that Paragraph 23(a) (and, so far as it relies upon Paragraph 23(a), Paragraph 25), must be struck out pursuant to CPR 3.4(2) (a). I will hear from Counsel on the handing down of judgment on the consequential amendments which flow from this ruling.

The 'Undervalue' allegation: para 23(b)

64. Mr Kamal argued that the Liquidator had also failed by her pleadings to demonstrate reasonable grounds for her alternative case at paragraph 23(b) POC. This alternative case was that if the Company did receive consideration, the value of the services provided by the employees was significantly less than that of the payments made by the Company to the Trust, 'because the Company was required to deduct income tax

and NIC from the sums which it paid to its employees, whereas the Company paid the gross sums to the Trust… without making such deduction'.

65. Mr Kamal submitted that there was no authority to support the contention that tax liabilities should be factored in when determining whether a given transaction was at an undervalue, and several authorities which suggest that they should not, including Philips v Brewin Dolphin Bell Lawrie Ltd [2001] 1 WLR 143 (where tax deductible expenses for the parents of the buyer company were left out of account) and National Westminster Bank plc v Jones and others [2001] 1 BCLC 98 (which did not factor in the tax payable on the rent). He also submitted that, as a matter of policy, the courts should not take tax liabilities into account when determining incoming and outgoing values for the purposes of s.238 and 423 IA 1986.

66. Mr Kamal further argued that even if, on the authorities as they stand, there remained scope for debate on whether tax liabilities could be taken into account when determining whether a given transaction was at an undervalue, it was untenable to suggest that for such purposes the court could properly take the tax liability of one party to the relevant transaction, without also taking into account the tax liability of the other party to that transaction, particularly when both tax liabilities related to the same payment. In this regard he pointed out that where an employer does not account for PAYE and NIC, it is open to HMRC to look to the employee for payment under Regulations 72 or 81 of the Income Tax (PAYE) Regulations 2003 SI 2003/2682 and Regulation 86(1)(a)(ii) of the Social Security (Contributions) Regulations 2001. In the current context therefore, when weighing up the value given and the value received, any actual or prospective PAYE/NIC liabilities to which the Company and each employee may have been subject would simply cancel each other out, even if they could be taken into account for these purposes.

67. Mr Kamal also noted that it was no part of the Liquidator's pleaded case that HMRC could *not* have acted in reliance on regulations 72 and 81 of the PAYE regulations 2003 (which switch the liability to an employee) and 84 (which allows for the recovery of interest) or other provisions which give rise to a liability upon intermediaries. In relation to NICs, he continued, it was no part of the Liquidator's pleaded case that HMRC could *not* have acted in reliance on regulation 86 (1)(a)(ii) of the Social Security (contributions) Regulations 2001. The threshold set by these regulations, he submitted, is low. In the case of Stephen West [2018] UKUT 0100 (TCC), for example, the Upper Tribunal held that as long as the employee was aware of the particular steps, then the employee will have received the payment with sufficient knowledge. This is notwithstanding that the employee had reasonable cause to believe that a tax deduction was not necessary.

68. Mr Kamal went on to point out that it was no part of the Liquidator's pleaded case that the Company contracted to deliver to an employee a specific amount *net* of tax or that the Company undertook to *indemnify* an employee in respect of any tax arising in respect of payments made to an employee; it merely undertook to operate the Scheme, without indemnifying an employee in respect of any tax arising.

69. Mr Sims responded that there was no suggestion in the legislation or caselaw that there was any restriction on the court taking into account tax liability when considering consideration. He submitted that there was limited value in picking out

aspects of earlier cases which were not directly addressed in argument and did not represent the ratio. The point raised by Mr Kamal in relation to National Westminster Bank v Jones (tax payable on the rent), for example, was simply not argued. If the point was novel, he continued, the court should lean against striking it out.

70. I accept that that if a point is novel, the court should lean against striking it out.

71. Mr Sims went on to remind me that section 423 required the court to make a comparison between the value obtained by the company for the transaction ('the incoming value') and the value of consideration provided by the company ('the outgoing value'). Both values must be measurable in money or money's worth and both must be considered from the company's point of view: Re MC Bacon Ltd [1990] BCLC 324 at 340. As put at paragraph 37 of Mr Sims's skeleton argument, it is the Liquidator's case that 'the value to the Company of any services provided to it by the Ethos Respondents would be the net value of those services, because the Company would incur a liability to pay tax on the gross sum, as the Company paid the gross sum over to the Ethos Respondents without deducting that tax, the outgoing value significantly exceeded the incoming value'.

72. I have considerable reservations about this argument. It completely ignores the fact that the Ethos Respondents are also potentially liable for any PAYE/NIC due in respect of the payments made to them; to take one tax liability into account when comparing values, without taking into account the other tax liability, appears perverse, particularly given that both tax liabilities relate the same payment.

73. Mr Sims relied upon Paragraphs 15 and 16 of the West case, which summarise an employer's liability to deduct PAYE. These provide as follows:

> "(15) Under the PAYE system, the employer is liable to deduct tax in accordance with regulation 21 (1) of the PAYE Regulations:
>
> 'On making a relevant payment to an employee during a tax year, an employer must deduct or repay tax in accordance with these Regulations by reference to the employees code, if the employer has one for the employee '
>
> (16) The employer is then liable to account to HMRC for those deducted amounts (regulation 68 of the PAYE Regulations).'"

74. Looking at the transaction in this case, Mr Sims argued, upon the Scheme being implemented, liability arose under Regulation 21. The employee, he argued, 'got a gratuity' of 40%, representing the liability imposed by Regulation 21. Analogous arguments, he submitted, applied in relation to NIC.

75. Regulations 21 and 68 of the PAYE Regulations (and their NIC equivalents) cannot, however, be looked at in vacuo.

76. As explored more fully in West at [20] to [24], the personal tax return of an individual is required, by section 9 of the Taxes Management Act 1970 ('TMA') to include a self-assessment, including an assessment of the amount the individual is chargeable to

income tax for the year of assessment. Payments on account of income tax are credited by section 59B(1) TMA. With regard to PAYE, provision for adjusting the total net tax deducted, and thus the amount of the credit, is made by regulation 185 of the PAYE regulations. The creditable tax under Section 59B(1) TMA generally includes PAYE tax which the employer was liable to deduct under the PAYE regulations whether or not the employer has in fact deducted that tax. But this is subject to a number of exceptions for certain amounts of PAYE, collectively referred to as 'direction tax'. One such exception is that which HMRC applied in the case of West, namely, regulation 72 of the PAYE regulations. If a valid direction is given under regulation 72, under the self-assessment system, the employee will not be entitled to credit for the amount which should have been, but was not, deducted by the employer. The employee will accordingly be liable for income tax on the taxable earnings without the benefit of that tax credit. The employee has two rights of appeal in this respect. The first is by regulation 72C of the PAYE regulations and the second is under section 31/50 TMA.

77. There are analogous provisions for NICs. Again, as helpfully summarised in West at [25] to [30], Class 1 NICs are divided into primary Class 1 contributions and secondary Class 1 contributions (section 1 of the Social Security Contributions and Benefits Act 1992 ('SSCBA'). In both cases such contributions are payable when, in any tax week, earnings are paid to or for the benefit of an earner in respect of an employment of his (section 6(1) SSCBA). Primary contributions are the liability of the earner (section 6(4)(a) SSCBA) but that is subject to paragraph 3 of Schedule 1 SSCBA, under which the secondary contributor, normally the employer, is liable in the first instance to pay the earner's primary contribution, and the liability of the earner is excluded. Paragraph 3(1) of Schedule 1 SSCBA does not, however, apply and the earner's liability for primary Class 1 contributions is consequently not excluded, if regulation 86 of the NIC Regulations applies. Where there has been no deduction from earnings, and the conditions in paragraph 86 of the NIC Regulations are met, the earner will be liable to pay the primary Class 1 contributions. Again, the earner has a right of appeal against a decision of HMRC in this respect. The decision is one to which section 8(1)(c) SSC(TF)A applies, and the right of appeal arises by virtue of section 11 of that Act.

78. As demonstrated on the facts of West, the bar for engaging these provisions which impose liability on the employee for PAYE and NIC is very low: see West at [62] to [66].

79. Mr Sims argued that in assessing consideration, the overall transaction must be looked at 'in the round': Phillips v Brewin Dolphin Bell Lawrie Ltd [2001] 1 WLR 143. Viewed 'commercially', he argued, 'there was obviously a substantial difference in consideration.' In this regard reference was made to Feakins v DEFRA 2005 EWCA Civ 1513, in which the concept of 'transaction' was applied flexibly to include any arrangement whether it be a formal agreement or informal understanding. The court also adopted a 'commercial' view when determining any differential in consideration exchanged between the parties as part of the transaction.

80. In this case, Mr Sims argued, the 'commercial reality' was that the Scheme was set up in a way that resulted in the incoming consideration, at the date services were provided, being 'fixed with liability' under the PAYE regime; the benefit came

impressed with that burden. Tax liability, he argued, was 'an inherent part of the Scheme' (a proposition which, I note, does not sit entirely comfortably with paragraph 11 POC).

81. Mr Sims further maintained (at paragraph 37c of his skeleton argument) that:

> 'one only needs to stand back and ask [why] the Company has ended up in an insolvent liquidation owing £millions to HMRC to see that the holistic approach is wholly destructive of any merit in the argument sought to be advanced by [the Ethos Respondents]'.

82. I do not find this argument particularly persuasive. The reason why the Company has ended up in an insolvent liquidation and is said to owe HMRC '£millions', as Mr Sims puts it, is that, so far at least, HMRC has chosen to pursue the Company in respect of the alleged tax liabilities rather than any of the Ethos Respondents individually. It does not detract from the fact that, to the extent that PAYE and NIC are payable at all in respect of the payments in issue, both the Company and the individual Ethos Respondents are potentially liable for the same. Whilst there are time bars for bringing claims against individual employees in such cases, in certain circumstances these may be extended to 20 years.

Conclusions on Paragraph 23(b)

83. I have considerable reservations about the manner in which the Liquidator puts her 'undervalue' case at Paragraph 23(b) POC. I accept that the mere fact that no case has yet decided that tax liabilities may be taken into account in assessing incoming and outgoing values for the purposes of ss238 and 423 IA 1986 is not of itself a ground for striking out an undervalue claim calculated by reference to such liabilities; quite the contrary, if a novel point arises, unless plainly untenable it should be determined on the basis of actual findings of fact at trial. That said, there is considerable force in Mr Kamal's submission that in comparing incoming and outgoing values for such purposes, it would be perverse for the court to take into account the tax liability of one party to the relevant transaction, without also taking into account the tax liability of the other party to that transaction, when both tax liabilities related to the same payment, particularly given the points flagged at Paragraphs 67 and 68 above.

84. I remind myself however that it is not appropriate to strike out a claim raising a novel point in an area of developing jurisprudence: unless the point in question is plainly untenable, a decision on it should be based on actual findings of fact: Farah v British Airways, The Times, 26 January 2000 (CA). I also remind myself that when hearing a strike out application, the court should always consider whether any defect might be cured by amendment and, if it might be, should refrain from striking it out without first giving the party concerned an opportunity to amend: In Soo Kim v Youg [2011] EWHC 1781. In this case I have concluded that the Liquidator should be given an opportunity to seek permission to amend the POC to set out her grounds for the alleged undervalue pleaded at paragraph 23(b). Whilst I do not propose to prescribe comprehensively the amendments required, clearly they should include all facts and matters relied upon in support of the contention that, when determining incoming and

outgoing values in this case, the alleged tax liability of the Company should be taken into account and the corresponding alleged tax liability of the employees (and for that matter, of the Trust) should not. The Respondents are entitled to know the case they have to meet. There were times during the course of Mr Sims' submissions, for example, when he could readily be taken to imply that the *plan all along* was to leave the Company saddled with any tax debts and for the employees to skip free; if that is the Liquidator's case, she should seek permission to amend and plead it out. On the POC as it stands, it is far from clear why, when determining incoming and outgoing values, the Company's tax liability should be taken into account and the tax liability of the employees (and the Trust) should not.

Year ended 31 December 2011: para 20 POC

85. I turn next to consider the Liquidator's case insofar as it is based on the year ended 31 December 2011. In his submissions as developed before me, Mr Kamal maintained that in the absence of any pleaded return, assessment, proof of debt or intimation of a claim by HMRC for PAYE/NIC in respect of alleged PAYE/NIC liability for the year ended 31 December 2011, the POC disclosed no reasonable grounds for including a claim in respect of such alleged liability for that year and/or that it was an abuse of process to include such a claim.

86. Mr Kamal contended that, whilst the Liquidator appeared to rely on Regulation 80 determinations by HMRC for the tax years 2008/09 and 2009/10 which together totalled £2,328,057.72, she had pleaded no basis at all for her later bald 'estimate', at paragraph 20 POC, of 'at least £2,791,723.96' in respect of the Company's alleged liability for income tax and NIC in the 'year ended 31 December 2011'. It was no part of the pleaded case that this 'estimate' was based on a return lodged by the Company or an assessment raised by HMRC.

87. Mr Kamal's primary position was that it was only open to HMRC to seek payment of PAYE/NIC if the PAYE/NIC in question was based on a return or an assessment (assessment in this context to be read as including any formal determination of PAYE or NIC by HMRC pursuant to its statutory powers). In relation to the year ended 31 December 2011, neither a return nor an assessment was relied upon. Mr Kamal maintained that the Liquidator could not issue proceedings on the back of a non-existent claim.

88. Mr Sims contended that such arguments failed to take into account the impact of liquidation, reminding me that under rule 14.2(1) IR 2016, all claims are provable as debts, 'whether they are present or future, certain or contingent, ascertained or sounding only in damages'. He also referred me to Re Portsmouth City Football Club Ltd [2010] EWHC 2013(Ch) and HMRC v Maxwell [2011] Bus LR [2010] EWCA Civ 1379, two 'voting' cases in each of which HMRC was treated for voting purposes as having an unliquidated or unascertained debt ahead of issuing assessments for the debts in question. He relied in particular upon paragraph 88 of the judgment of Mann J in Re Portsmouth City Football Club, in which, Mann J had stated:

'I am prepared to assume that there is an underlying liability on an employer who fails to account for PAYE and NIC before any formal claim is made by HMRC and before any formal assessment.'

89. These arguments only take Mr Sims so far, however. It is one thing to allow HMRC to *vote* in respect of an unliquidated or unascertained debt ahead of the raising of an assessment; it is quite another to issue proceedings on the basis of a claim HMRC might never bring. In both Re Portsmouth City Football Club and HMRC v Maxwell, HMRC had lodged proofs in respect of the relevant debts. They also raised statutory assessments in respect of the relevant debts, albeit after the relevant date for voting purposes. In this case, at no time prior to issue of proceedings (or indeed thereafter) has HMRC raised an assessment in respect of the year ending 31 December 2011, lodged a proof in respect of that year, or even (as confirmed in submissions) *intimated an intention* to make a claim in the liquidation in respect of that year.

90. Mr Sims submitted that once a company is in liquidation, HMRC need not go to the trouble of raising an assessment; it could simply lodge a proof and agree the amount due with the Liquidator. I am not persuaded that this is correct as a matter of law. It is a fundamental principle enshrined in the Bill of Rights (1688) that taxes should not be levied without the authority of Parliament: Woolwich Equitable Building Society v IRC [1993] AC 70. I am not persuaded that this represents 'standard practice' either. HMRC's own Internal Compliance Handbook envisages the issue of an assessment in such circumstances: see CH282100.

91. Even if Mr Sims is right however, and HMRC *can* lodge a proof in respect of a claimed tax liability without ever backing the proof with a formal assessment, in this case it has not lodged a proof in respect of the year ended 31 December 2011, or even intimated an intention to pursue a claim in the liquidation in respect of unpaid PAYE/NIC for that year.

92. When pressed in submission, Mr Sims maintained that until HMRC knew if there would be a recovery, there was 'no need' for it to 'do any work' in respect of the year ended 31 December 2011, and 'no need' for the Liquidator to do any more work on that year either. He argued that the question whether HMRC was owed any sum over the £2.3 m claimed by way of assessment in respect of the years 2008/9 and 2009/10 was 'academic' until such time as a realistic prospect of recovering that was established. I do not accept these submissions. Absent these proceedings, liability for PAYE/NIC in respect of the year ended 31 December 2011 may well be 'academic' pending distribution. In this case however, the Liquidator has issued proceedings based on that liability.

93. Mr Sims went on to argue that the question whether reasonable grounds existed for including in the Main Proceedings an alleged liability in respect of the year ended 31 December 2011 did not rest on an assessment having been raised or a proof having been lodged. He maintained that if the court took the view that the POC should contain a breakdown of how the Liquidator's estimate had been arrived at, then a breakdown could be provided. He submitted that the Liquidator had reasonable grounds for her estimate, confirming that it had been based on the Rangers case and not Part 7A IPTA. All that was required, he argued, was 'a' rational basis for pleading PAYE/NIC liability for the year ended 31 December 2011. He said that paragraphs 12, 16, 20 and 23 provided that rational basis.

94. I disagree. In my judgment, it is not for a Liquidator to attempt to 'second-guess' what HMRC might or might not seek to prove for in the liquidation, and then launch a

claim on the back of that. It cannot simply be assumed that HMRC will prove in relation to the year ended 31 December 2011, or if it did, that it would base its claim on the Rangers case rather than Part 7A.

95. HMRC proved at the outset for voting purposes and did not include a claim in respect of the year ended 31 December 2011, notwithstanding that it was obviously fully aware of the Scheme by then. Eight years have passed since the Company went into liquidation and HMRC has not even intimated a claim in respect of the year ended 31 December 2011.

96. The inclusion of a claim in respect of the year ended 31 December 2011 is not a matter of logical deduction from past years covered by assessment. The issues arising in respect of the year ended 31 December 2011 are not on all fours with previous years. The year ended 31 December 2011 spanned stages 2 and 3 of the Scheme, whilst the years 2008/9 and 2009/10 represented stage 1. Mr Sims accepted in submission that in relation to the period following January 2011, (ie stages 2 and 3), there was 'more of an argument to be had as to whether Rangers should apply'. There is an issue as to whether the Company qualified as 'employer' in stages 2 and 3. The view taken by HMRC on this issue would impact on how, *if* it should wish to pursue a claim in the liquidation of the Company PAYE/NIC for the year ended 31 December 2011 at all, it would formulate and quantify that claim.

97. Moreover, in principle HMRC has more than one target if it wishes to pursue unpaid PAYE/NIC for the year ended 31 December 2011; in the light of the added complexities posed by Phases 2 and 3, it may decide to seek recovery of such sums (if due) from the Respondent Employees themselves. As previously stated, whilst there are time bars for bringing claims against individual employees in such cases, in certain circumstances these may be extended to up to 20 years.

Conclusion

98. In my judgment the POC do not disclose reasonable grounds for including a claim in respect of unpaid PAYE and NIC for the year ended 31 December 2011. Paragraph 20 POC simply contains the Liquidator's bare unparticularised estimate. For the reasons given, the inclusion of a claim in respect of the year ended 31 December 2011 is not a matter of logical deduction from past years covered by assessment.

99. In the circumstances of this case, I am further satisfied that it was an abuse of process for the Liquidator to issue a claim in respect of unpaid PAYE and NIC for the year ended 31 December 2011. In this regard I remind myself that it is an abuse of process to issue a claim form in the absence of knowledge of any valid basis for a claim and any ability to formulate the claim at the time of issue: Nomura International Plc v Granada Group Ltd [2008] Bus. L.R. 1 (Cooke J). This is particularly so where, as in Nomura, a claim is issued to protect the claimant's position on limitation. At the time of issuing these proceedings, shortly before the sixth anniversary of the Company entering into liquidation, no return or assessment in respect of the year ended 31 December 2011 existed and there had been no intimation by HMRC, whether by proof or otherwise, of a claim in respect of that year, still less confirmation from HMRC as to how it would go about formulating any such claim. It was not for the

Liquidator to second-guess how HMRC might proceed. That is not the proper basis for a claim.

100. For all of these reasons, I propose to order that the claim in respect of the year ending 31 December 2011 be struck out. I base my decision on both CPR 3.4(2)(a) and (b). I take into account that striking out is a remedy of last resort and that the court should lean against striking out claims in an area of developing jurisprudence. I also take into account that there are other Respondents, not represented before me today, who will be affected by my decision. In my judgment, however, whilst a lack of particulars taken alone might have been salvageable, the issue of proceedings based on PAYE/NIC liability in respect of the year ending 31 December 2011 without, at the very least, seeking confirmation from HMRC that it intended to pursue an appropriately formalised claim in the liquidation in respect of that liability and confirmation from HMRC as to how it proposed to formulate and quantify such a claim, in this highly technical area, was an abuse of process which should not be indulged. It cannot and should not be cured by amendment.

Circumventing tax processes: abuse of process under CPR 3.4(2)(b).

101. Mr Kamal further sought to strike out the proceedings in their entirety under CPR 3.4(2)(b), on the ground that s.423 should not be used as an instrument of tax law. He argued that the Liquidator's case had the effect of circumventing tax law processes and denying the employee respondents the right to appeal any assessments made through the usual route, that is to say, the tax tribunals.

102. In support of these contentions, Mr Kamal relied upon Autologic Holdings Plc v Inland Revenue Commissioners [2005] UKHL 54, which confirmed the exclusive nature of the Appeal Commissioners' jurisdiction to decide certain types of dispute arising in the administration of this country's tax system. He further referred me to the case of Knibbs v Revenue and Customs Commissioners [2019] EWCA Civ 1719, in which Lord Justice David Richards confirmed at [17]:

> 'It is well established that if Parliament has laid down a statutory appeal process against a decision of HMRC, a person aggrieved by the decision and wishing to appeal it must use the statutory process. It is an abuse of the court's process to seek to do so through proceedings in the High Court or the County Court.'

103. Mr Sims argued that this submission ignores the effect of liquidation; and that in any event individual respondents would have no locus to appeal any assessments or determinations issued by HMRC against the Company; it would be for the Company to appeal.

104. In my judgment there is considerable force in the submission that the pursuit of individual taxpayers via s423 for sums assessed on a company which has chosen not to appeal the assessment has the practical effect of denying individual taxpayers the rights which they would otherwise have, if targeted direct by HMRC, to challenge the sums allegedly due via the statutory appeal process. In cases involving employee benefit trusts, where HMRC is the only creditor of any significance, I can see that

there is an appreciable risk of the usual statutory appeal processes open to individual taxpayers being sidestepped completely if HMRC can simply issue an assessment against an insolvent corporate employer and then collect in sums from individual taxpayers via the liquidation. Having considered the matter with some care, however, I have concluded that this is not a matter suitable for summary disposal by way of a strike-out under CPR 3.4(2)(b). The argument is of sufficient complexity and significance to warrant full submissions and examination at trial.

Paragraph 25

105. In the light of my decision to strike out Paragraph 23(a) POC, the scope of Paragraph 25 stands narrowed accordingly. Before concluding however, for the sake of completeness, I should briefly address a separate argument raised in respect of Paragraph 25. Mr Kamal submitted that the alternative case set out at Paragraph 25 was untenable and should be struck out in its entirety. Whilst I consider it highly unlikely that the court will wish to analyse the payments made by the Company pursuant to the Scheme in the manner proposed by Paragraph 25 POC, in my judgment it cannot be said that the statement of case discloses no reasonable grounds for this alternative formulation. For this reason I decline to strike out Paragraph 25 in its entirety. Paragraph 25 (narrowed by reason of the deletion of Paragraph 23(a)), shall therefore remain.

Conclusions

106. For the reasons which I have given, I shall grant an order striking out Paragraphs 20 and 23(a) POC and directing that all necessary consequential amendments be made.

107. I shall give the Liquidator an opportunity to seek permission to amend Paragraph 23(b) to provide fuller particulars of her case on undervalue. Paragraph 12 POC should also be fully particularised; the Ethos Respondents are entitled to know the case they have to meet. I shall hear from Counsel on the handing down of judgment on any further directions required.

ICC Judge Barber

4 February 2021