Neutral Citation Number: [2019] EWHC 172 (Ch)

Case Nos 2118 and 2662 of 2018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)

Date: 1st February 2019

Before His Honour Judge Halliwell (sitting as a Judge of the High Court)

IN THE MATTER OF MOORCOURT HOLDINGS LIMITED (CRN:03225974) (IN MEMBERS VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N:

STEVEN JOHN CURRIE

Applicant

AND

(1) PETER THORNLEY
(2) ALAN MOSS

Respondents

Ian Tucker (instructed by Freeths LLP) for the Applicant
Stephen Schaw Miller (instructed by Causeway Law) for the Respondents

Hearing dates: 4-6th December 2018

APPROVED JUDGMENT

1. These consolidated proceedings arise from the liquidation of Moorcourt Holdings Limited ("the Company"). The Applicant, as liquidator, seeks the payment of £1,410,902.67 together with other amounts allegedly due from the Company to HMRC and an indemnity in respect of the Company's liabilities under a deed of indemnity dated 11th December 2012 ("the Deed"). The Respondents were directors and shareholders of the Company. They are also covenantors and signatories to the Deed.

2. The trial took place before me on 4-6th December 2018. Mr Tucker, of counsel, appeared on behalf of the Applicant and Mr Stephen Schaw Miller, of counsel, appeared on behalf of the Respondents. The Second Respondent, Mr Moss, gave evidence at trial but I am advised he sadly passed away on 18th December 2018, some 12 days later. In his written submissions dated 10th January 2019, Mr Schaw Miller advised me that Mr Moss left a will nominating the First Respondent, Mr Thornley, as one of his three executors. At that stage, Mr Thornley was considering whether he was willing to be appointed to represent Mr

Moss's estate in these proceedings. However, I am not advised that there has been any change of circumstances. The other executors are unwilling to be appointed. I have directed that the claim should proceed in the absence of a person representing Mr Moss's estate under the provisions of *CPR 19.8(1).* When referring collectively to Mr Thornley and the late Mr Moss but not otherwise, I shall refer to them as the Respondents. All relevant causes of action against Mr Moss will have survived against his estate under the provisions of *Section 1(1)* of the *Law Reform (Miscellaneous Provisions) Act 1934.* References to his liabilities should thus be treated as a reference to the liabilities of his estate.

(1) Factual sequence

3. In February 2007 and November 2008, the Respondents set up employee benefits trusts ("EBTs") for the Company utilising a tax avoidance scheme developed by Mercury Tax Group ("Mercury"). It appears they transferred sums in the region of £2,000,000 and £800,000 to the trusts before the same were wound up in November 2008 and April 2010. Whilst Mercury provided the Respondents with advice in connection with the operation of the trusts, the Respondents relied, more generally, upon the advice of their accountant, Mr Chris Kane ("Mr Kane") of DPC Accountants ("DPC"), Stoke-on-Trent, with whom they had a long and well established professional relationship. DPC were also the Company's accountants.

4. During 2008, HMRC opened an inquiry in relation to the Company's tax affairs, particularly in relation to the 2007 EBT. In May 2010, they advised the Company that the scheme was ineffective in avoiding the Company's liability for Class 1 NIC and PAYE. On behalf of the Company, the Respondents instructed DPC to challenge HMRC's conclusions.

5. The Company had once carried on the business of a care home at its property, Moor Court Hall in Staffordshire. When the business closed down, active consideration was given to the possibility of converting the Hall into flats. However, on 7th September 2010, a meeting was held at the offices of Begbies Traynor to discuss, more widely, the options available to the Company. The meeting was attended by the Respondents together with Mr Kane and Ms Valerie Wood ("Ms Wood") of DPC and Mr Robert Young ("Mr Young") of Begbies Traynor. A decision was taken to place the Company in members voluntary liquidation on the understanding that the Company's properties would be transferred *in*

specie to the Respondents or their nominee. For this purpose, they formed a limited liability partnership, TSMM LLP ("TSMM").

6. Following the meeting, the Respondents made a declaration of solvency. On 12th October 2010, the Company was placed in members voluntary liquidation; the Applicant and Mr Young were appointed as liquidators. On the same day, the Respondents entered into a deed of indemnity ("the 2010 Deed") with the Applicant and Mr Young under which they covenanted to pay the liquidators an amount equal to the Company's liability for taxation and to indemnify them in respect of tax liabilities.

7. On 3rd March 2011, HMRC issued determinations or decisions under *Regulation 80* of the *Income Tax (Pay as you earn) Regulations 2003* and *Section 8* of the *Social Security Contributions (Transfer of Functions) Act 1999* in respect of the Company's liability for PAYE and Class 1 National Insurance Contributions for the tax years 2006-7 and 2007-8 with an aggregate liability of some £999,934.94. Apparently, these were promptly appealed and remain under appeal.

8. On 14th March 2011 and, again, on 28th July 2011, HMRC submitted to the liquidators interim proofs of debt in the sum of £1,407,740.67. Having reviewed the matter with DPC, the liquidators rejected the proofs.

9. By letter dated 18th April 2012, the Applicant advised the Respondents that he was willing to transfer the Company's properties subject to provision for extension of his indemnity so as to cover "any potential claims HMRC may instigate against the liquidators in any capacity as a result of the assets being transferred". The Respondents instructed Mr Rajesh Shah, of Upright Solicitors Limited, to act for them in connection with the transaction and attend to the conveyancing on behalf of TSMM. The liquidators instructed Mr Lewis Griffiths of Messrs Hacking Ashton.

10. At the liquidators' request, a draft deed was prepared. The draft was upon essentially the same terms as the 2010 Deed save that the scope of the indemnity for costs and expenses was enlarged to encompass claims instigated by the Taxation Authority (6.1.4), and it was expressly provided that the agreement would remain effective until the Taxation Authority had completed its enquiries and the current tax assessments had been closed (Clause 8.1). Mr Shah arranged for the Respondents to sign the draft deed. Having done so, he sent Mr Griffiths his clients' part executed copy in anticipation of completion.

11. After some delay, the deed ("the 2012 Deed") was completed on 11th December 2012. At that stage, Mr Shah was working for RJS Solicitors, Stoke-on-Trent. By an email dated 18th January 2013, Mr Shah advised Mr Griffiths that he had attended to the relevant conveyancing formalities.

12. On 17th April 2013 and 17th January 2016, HMRC submitted proofs for £1,408,040.67 and £1,410,902.67. It is common ground that the Company's liability to make to make payment was postponed pending appeal. However, on 2nd May 2017, HMRC issued four accelerated payment notices ("APNs"), under the provisions of *Section 219* of the *Finance Act 2019*, in the sums of £291,223 and £594,000 in respect of PAYE and £114,711.34 and £374,840.45 in respect of National Insurance for the years ending on 5th April 2007 and 2008. These APNs were for an aggregate sum of £1,374,774.79.

13. By this stage, Mr Young had retired from office and the Applicant was sole liquidator. However, as early as 28th April 2015, the liquidators had appointed DPC as their accountants in connection with the Company's tax affairs. By letter dated 31st July 2017, DPC made representations to HMRC in which they sought to challenge the APNs on the Company's behalf. HMRC's response was contained in a letter dated 14th December 2017 in which they revised the amount for National Insurance in the year ending 5th April 2007 to £105,271.19 but otherwise re-confirmed the amounts set out in their previous notices. The aggregate amount was thus reduced to £1,365,335.24, which thus became due no later than 30 days after notification.

14. Some six months before the Company became liable to make accelerated payment under *Section 223* of the *2014 Act*, the Applicant had already elected to demand from the Respondents the sum of £1,410,902.67 based on the amount in HMRCs' proof dated 17th January 2016. This demand was contained in letters dated 14th July 2017 ("the July 2017 Letters").

15. By the present proceedings, first issued on 8th February 2018, the Applicant seeks payment of the sum of £1,410,902.67 or an indemnity in that amount. He has not yet sought permission to amend his Claim Form or Points of Claim to revise the amount claimed. However, by letters dated 4th May 2018 ("the May 2018 Letters"), he demanded the sum of £1,630,058.11 on the basis that this was now "the total tax liability claimed" by HMRC.

16. As part of the Respondents' case at trial, Mr Schaw Miller submitted that the demands in the July 2017 and May 2018 Letters did not satisfy the formalities in the 2012 Deed.

Following trial, the Applicant made further demands under the APNs by letters dated 7th December 2018 ("the 7th December 2018 Letter") and ("the 13th December 2018 Letter"), first in the sum of £1,374,774.79 and then in the revised sum of £1,365,335.24. It follows that the Applicant has now made four sets of demands under the 2012 Deed, two of which were made after trial but before judgment.

17. By his written submissions dated 14th December 2018, Mr Schaw Miller submitted that the Applicant should not be permitted to rely on the 7th and 13th December 2018 Letters since to do so would enable the Applicant to rely, after the closure of his case, on a cause of action not properly pleaded and for which there was no supportive evidence. Mr Schaw Miller accepts that, since the CPR came into force, it has been open to a party to rely on causes of action which accrue after commencement of proceedings and there is no procedural bar on amendment for that purpose, *Maridive & Oil Services (SAE) v CNA Insurance Company (Europe) Limited [2002] EWCA Civ 369*. His submissions were essentially based on the laws of evidence and procedural fairness.

18. On these issues, Mr Schaw Miller's objections were not without foundation. However, I have decided to admit the December 2018 Letters, as evidence.

    18.1. Firstly, so far as possible, it is important for all the relevant issues to be disposed of now in the interests of finality so as to avoid the un-necessary uncertainty, time and expense that will be incurred if it becomes necessary to re-litigate unresolved aspects of the case in the future. I have taken into consideration Mr Moss's death and the complications the claim will have in connection with the administration of Mr Moss's estate. These lend a measure of support to Mr Schaw Miller's objections. However, if the underlying claim is left unresolved, the uncertainty will remain.

    18.2. Secondly, the December 2018 Letters raise discrete issues which arise separately from the evidential issues in relation to the rest of the case and there is no good reason to preclude me from admitting them in evidence if satisfied, as I am, that it is fair to do so. The Applicant has made a witness statement dated 19th December 2018 confirming that he sent the December 2018 Letters to the Respondents by pre-paid first class post at the addresses specified in the 2012 Deed. The Respondents, through counsel, have been given the opportunity to cross examine the Applicant in relation to the issue but have declined to do so. I have decided to admit, in evidence,

the relevant witness statement on the basis that it will not be causative of material prejudice to the Respondents which cannot be compensated for in costs.

18.3. Thirdly, I am satisfied it is appropriate to permit the Applicant to amend the Points of Claim to enable him to rely on the December 2018 Letters as notices demanding payment under Clause 4.1 of the 2012 Deed.

(2) Witnesses

19. On behalf of the Applicant, I heard evidence from Mr Young and the Applicant himself. The Respondents gave evidence in response. I am satisfied that all four witnesses gave their oral evidence to the best of their recollection. Save for the evidence of Mr Moss, their evidence as a whole was generally reliable. Unfortunately, however, when Mr Moss was cross examined, it became apparent that a substantial part of his second witness statement (Paragraphs 40-71) had simply been collated from the documents. Some of these paragraphs amounted to little more than a commentary. In any event, these paragraphs were apparently incorporated in his statement without any regard for the principles outlined in J*D Wetherspoon plc v Harris (Practice Note) [2013] EWHC 1088* and Mr Moss was unable to confirm their veracity or pertinence. They were thus of negligible, if any, evidential value.

20. More generally, the evidence of all four witnesses was of limited assistance only to me in determining the critical issues relating to the interpretation and effect of the 2012 Deed and the validity of the Applicant's demands for payment.

(3) The 2012 Deed

21. In his closing submissions, Mr Tucker conceded that the 2012 Deed operated to extinguish, by necessary implication, the 2010 Deed. In my judgment, he was correct to do so. The 2012 Deed was plainly intended to supercede the 2010 Deed as a whole. Moreover, as Mr Schaw Miller submitted in argument, there could be no commercial logic in the termination provisions in the 2012 Deed if the parties' contractual obligations in the 2010 Deed were to survive them. Viewed objectively, the 2012 Deed was made with the intention that it would take effect in substitution for the 2010 Deed and thus operated to extinguish the latter in accordance with the principles described in *Chitty on Contracts (2018) Vol 1 Paragraphs 22-025 to 22-031*.

22. The relevant provisions of the 2012 Deed were as follows.

22.1. "Liability for Taxation: any liability (whether actual or contingent or otherwise) of the Company…to make a payment in respect of Tax…" (1.1)

22.2. "Tax: all forms of taxation and statutory, governmental, state, federal, provincial, local or municipal charges, duties, imposts, contributions, levies, withholdings or liabilities wherever chargeable and whether of the UK or any other jurisdiction, and any penalty, fine, surcharge, interest, charges or costs relating thereto, and Taxation shall have the same meaning" (1.1).

22.3. "The Shareholders covenant with the liquidators that the Shareholders shall be jointly and severally liable to pay to the Liquidators an amount equal to any…Liability for Taxation resulting from or by reference to any event occurring at any time before, on or after the date of this Deed or in respect of any gross receipts, income, profit or gains earned, accrued or received by the Company or a Subsidiary at any time before, on or after the date of this Deed (2.1).

22.4. "The Shareholders hereby warrant, represent and confirm that there are no sums due or owing and no sums will become due and owing from the Company or a Subsidiary to any Taxation Authority" (3.1).

22.5. "The Shareholders hereby jointly and severally agree to indemnify and keep indemnified the Liquidators in full and on demand from and against all and any losses, costs, claims, liabilities, damages, demands and expenses suffered or incurred by the Liquidators arising out of, or in connection with, any breach of the warranty in clause 3.1" (3.2).

22.6. "Where the Shareholders are liable to make any payment under clause 2 or clause 3, the due date for the making of that payment (Due Date) shall be the date falling seven days after the Liquidators have served a notice on the Shareholders demanding that payment" (4.1).

22.7. "Every notice, request, demand or other communication under this Deed shall be

(1) in writing, delivered personally or sent by pre-paid first-class letter; and

(2) sent to the addresses set out at the beginning of this Deed;

or to such substitute address notified by one party to the other in accordance with Clause 13" (13.1).

23. At one point, the Applicant sought an order rectifying the 2012 Deed so as to enlarge the indemnity by encompassing losses incurred by the Company itself. However, the conceptual and evidential basis for this part of the Applicant's case was unsound and, during his closing submissions, Mr Tucker wisely abandoned it.

(4) Liability

24. The claim is based on Clause 2.1 and, in the alternative, Clauses 3.1 and 3.2 of the Deed. The Applicant maintains that, by virtue of Clause 2.1, the Respondents owes him the sum of £1,410,902.67 as an amount equal to the Company's Liability for Taxation. Alternatively, he claims an indemnity in that amount as losses or liabilities incurred by the Liquidator so as to attract a claim under Clause 3.2.

25. The sum of £1,410,902.67 is, of course, the amount specified in HMRC's proof dated 17th January 2016. However, the claim before me was advanced, at trial, on the footing that the Company's Liability for Taxation was in the sum of £1,374,775.39 as the aggregate amount of the APNs served on the Company in May 2017. The aggregate amount was subsequently reduced to £1,365,335.24 when, in December 2017, HMRC revised the Company's liability to £105,271.19 for the year ending 5th April 2007.

    25.1. The accelerated payment notices were served under *Section 219* of the *Finance Act 2014* which provides a scheme for early payment pending tax enquiries or appeals. If the liability to pay tax is postponed pending appeal, a valid notice now operates to terminate the postponement under *Section 55(8D)* of the *Taxes Management Act 1970.* Taxpayers have a right to make written representations to HMRC under *Section 222* of the *2014 Act* following which HMRC may confirm the notice (with or without amendment) or withdraw it. In the event that the notice is confirmed, payment must be made within 90 days of the original determination or 30 days of HMRC's decision in relation to the representations, whichever is later (*FA 2014 s224(11)(b).*

    25.2. In the present case, the Company exercised its right to make written representations. Having considered the representations, HMRC amended one notice and confirmed the remaining three notices without amendment. By their letter dated 14th December 2017, they required payment no later than 19th January 2018.

26. In his submissions on behalf of the Respondents, Mr Schaw Miller observed that the Deed was made well before the new statutory regime in the *Finance Act 2014* was enacted or, indeed, contemplated and it is thus not surprising that it failed to engage with the new

statutory regime. He maintained that the Company's liability to make payment under the APNs is not a "Liability for Taxation" within the extended definitions of "Liability for Taxation" and "Tax" in Clause 1.1 of the 2012 Deed. Since the definition of "Tax" refers to "liabilities wherever chargeable", he submitted that a charge to tax is required. In the present case, HMRC's original determinations remain under appeal and they do not, in themselves, amount to a tax charge or liability. Consistently with this, he submitted that the APNs were not demands for tax that had been charged or established to be payable; they were no more than an adjustment determined, under *FA 2014 s220(4)(b),* by the designated HMRC officer so as to deny advantage under the tax avoidance scheme. In substance, they were merely demands for a payment that would be held on account until the appeals have been resolved. He thus submitted that there has been no determination of or in respect of tax so as to attract liability under Clause 2.1 of the Deed.

27. On this issue, Mr Schaw Miller's submissions were skilfully presented. However, I am not persuaded by them. In my judgment, the Respondents' covenant, in Clause 2.1 of the 2012 Deed, to pay an amount equal to their Liability for Taxation was apt to include payment under the APNs.

    27.1. The 2012 Deed is to be construed in the context of the factual matrix at the time it was made. When the Company was first placed in members voluntary liquidation, the directors made a declaration of solvency. The parties are to be taken to have entered into the 2010 and 2012 Deeds in contemplation that the liquidators would dispose of the assets of the Company without need for recourse to such assets so as to meet the Company's liabilities. From the outset, the liquidators were aware that HMRC had intimated a claim against the Company and, by the time the parties entered into the 2012 Deed, HMRC had submitted interim proofs of debt. I am satisfied, on the evidence, that Mr Kane advised the Respondents and, indeed, the liquidators that the Company had good prospects of successfully defending any HMRC claim. However, the matter was obviously not free from risk and the liquidators were mindful of such risk when they entered into the 2012 Deed. The liquidators thus required the Respondents to enter into the 2012 Deed to ensure that, once the assets were disposed of, they would have a personal remedy against the Respondents to meet any potential liability to HMRC and, in doing so, the Applicant was alive to the importance of the Respondents obtaining independent legal advice. Consistently with this, the

Company's liabilities to HMRC were defined in wide terms in the 2012 Deed itself and are to be construed as such.

27.2. It is true, as Mr Schaw Miller maintained, that the statutory APN scheme cannot have been in the contemplation of the parties to the 2012 Deed. Moreover, the parties will have been aware that taxation isn't generally imposed retrospectively. However, they can also be taken to have been aware this is not an absolute rule. Moreover, in seeking to meet all potential liabilities to HMRC, it would have been natural for the parties to cater for all taxes, tax devices and analogous charges created after the Deed regardless of whether they related to the activities of the Company and its directors prior to the Deed itself. It is at least conceivable that part of the reason for defining "Liability for Taxation" and "Tax" in such wide terms was to encompass new measures devised with a view to collecting public revenue.

27.3. "Liability for Taxation" was defined, in the 2012 Deed, so as to encompass payments "of or in respect of Tax" and "Tax" included "all forms of taxation" together with "statutory, governmental…charges …contributions…or liabilities wherever chargeable…and any penalty…charges or costs relating thereto". In my judgment, payments "in respect of tax" includes payments in advance, on account of or in support of a tax determination provided that there is a liability to make payment. If there is any doubt as to whether they are attributable to "a form of taxation", there can be little doubt that they are attributable to "statutory…liabilities" so as to fall within the contractual definition of "Tax".

27.4. In any event, Mr Tucker submitted that the APNs impose a liability, in principle, to make a payment of tax rather than a payment on account of tax if, as in the present case, it is made in respect of "the understated tax" pending a tax appeal. This is on the basis that *Section 55(8D)* of the *1970 Act*, as amended, simply operates to terminate postponement of a tax liability. It is to be contrasted with *Section 223(3)* which provides, in terms, that accelerated payment is treated as a payment on account where the APN is served pending a tax enquiry rather than a tax appeal. In my judgment, it makes no material difference whether the payment is characterised or treated as a payment of tax or a payment on account of tax. However, Mr Tucker's submissions illuminate the anomalies inherent in the distinction upon which Mr Schaw Miller seeks to rely.

28. The Claims under Clause 3.1 and 3.2 of the Deed are based on the propositions that the Respondents committed breaches of their warranty that there were no sums due from the Company to any Taxation Authority (Clause 3.1) and their covenant to indemnify the liquidators in respect of liabilities incurred by the liquidators "arising out of or in connection with any breach of the warranty contained in clause 3.1" (Clause 3.2).

29. In my judgment, the Respondents at least committed *prima facie* breaches of warranty under Clause 3.1 on the basis that the Company's liabilities to HMRC under the APNs, as amended, are for sums that have "become due and owing from the Company…to [a] Tax Authority" within the contractual definitions in Clause 1.1. However, the liquidators entered into the 2012 Deed in their personal capacity, not as agents for the Company and the Company was not joined as a party to the Deed. Moreover, the indemnity in Clause 3.2 was limited to "losses, costs, claims, liabilities, damages, demands and expenses suffered or incurred by the Liquidators", not by the Company itself.

30. There was no evidence before me that the Applicant has yet incurred any losses personally as a result of the Respondents' breaches of warranty nor is there evidence that he has personally suffered or incurred any "losses, costs, claims, liabilities, damages, demands and expenses" in connection with the breach of warranty. The APNs are in the nature of a demand but they are directed to the Company. No doubt, the Applicant is exposed to future claims in connection with his office as liquidator. If and when such claims are advanced, it is certainly conceivable that he will be entitled to an indemnity under the provisions of Clause 3.2. However, that stage has not yet been reached.

31. Mr Schaw Miller submits that, if the Respondents are liable to make payment under Clause 2 or 3, the "Due Date" for payment had not occurred because the Applicant has not yet made a demand for payment in accordance with Clause 4.1 and 13.1 of the Deed.

    31.1. By the July 2017 and May 2018 Letters to the Respondents, the Applicant respectively demanded the sums of £1,410,902.67 and £1,630,058.11 as "payment of the total tax liability claimed by HM Revenue and Customs" being £1,630,058.11". It was not submitted that the letters fail to comply with the contractual notice requirements in Clause 13.1. They were in writing and they were apparently sent to the Respondents at their addresses specified at the beginning of the 2002 Deed. However, Mr Schaw Miller submitted that they are invalid and of no effect because

they do not reflect the APNs, they are un-particularised and they do not identify the clause under which notice was given nor why it might apply.

31.2. By the 7th December 2018 and 13th December 2018 Letters, the Applicant respectively demanded the sums of £1,374,774.79 and £1,365,335.24. Mr Schaw Miller submits that these Letters are also invalid, this time on the grounds that, in view of the multiplicity of notices, it is unclear on what Letter the Applicant relies, what amount is due and when the same became payable. He submits that 7th and 13th December Letters are also invalid on the basis they were sent by the Applicant "for and on behalf of Moorcourt Holdings Limited" rather than on his own behalf.

32. When considering these submissions, it is first necessary to ask whether the Letters demanded payments of sums for which there was a defined liability in the 2012 Deed and, if so, whether they contained the information required by Clause 4.1. However, these are essentially questions of construction to be addressed in the same way as a reasonable recipient with the Defendants' knowledge in accordance with the principles stated by the House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749.*

32.1. Clause 4.1 provided, in simple terms, for the liquidators to demand a payment. The payment was to be in respect of the Respondents' liability under Clause 2 or Clause 3. It did not expressly provide that the liquidators must specify the amount of the payment. However, it referred, in terms, to Clause 2 in which the covenanted liability was to pay a quantified amount. Moreover Clause 4.2 provided for the payment of interest on any sums required to be paid. At least in the case of a valid notice under Clause 2, I am thus of the opinion it was implicit that the notice would state the amounts due or provide information that would enable the recipient to calculate the amount due.

32.2. By the July 2017 and May 2018 Letters, the liquidator demanded payment "of the total tax liability claimed by HM Revenue and Customs". They are for the amount *claimed* by HMRC rather than the amounts for which the Company is under an established *liability*. They do not make any reference to the APNs. The July 2017 Letters were for the amounts specified in HMRC's proof dated 17th February 2016. The May 2018 Letters specified a total settlement amount of £1,630,058.11, apparently made up of amounts in respect of PAYE on earnings, Court fees, IHT and interest on

PAYE and NIC. The Letters were plainly not calculated with reference to the amounts demanded in the APNs (the July 2017 Letters were based on a proof submitted more than 12 months prior to the APNs) nor, indeed, did they incorporate such amounts or their methodology. In these circumstances, I am satisfied that the July 2017 and May 2018 Letters were not made in respect of the APNs and they cannot be construed as a demand for payment under the APNs. Since the original tax assessments are under appeal, the July 2017 and May 2018 Letters did not contain a demand in respect of a liability under Clause 2 or 3 of the Deed. It follows that they did not operate to fix the date for payment under Clause 4.1.

32.3. By the 7th December 2018 Letter, the Applicant demanded the aggregate sum of £1,374,774.79 and, by the 13th December 2018 Letter, he demanded the revised amount of £1,365,335.24 so as to reflect HMRC's re-calculation of the Company's liability in respect of National Insurance for the year ending on 5.4.07.

32.4. In contrast to the May 2018 Letters, the 7th December 2018 Letters expressly contained a request for payment under Clause 4.1 of the 2012 Deed "of £1,374,775.39 being the amount required to be paid by the Company to HMRC on account pursuant to Accelerated Payment Notices dated 2 May 2017" with copies expressed to be attached. In my judgment, the 7th December 2018 Letters plainly contained a demand for the Company's Liability for Taxation under the APNs and would be construed as such by a reasonable recipient. They did not refer to the HMRC's letter dated 14th December 2017 revising the amount for National Insurance in the year ending 5th April 2007 to £105,271.19 so as to reduce the aggregate amount due to £1,365,335.24. However, on receipt, the Respondents and their legal advisers would have been aware of HMRC's letter dated 14th December 2017 and could reasonably have inferred that the demand in the December 2018 was for the reduced amount in accordance with the principle in the *Mannai* case (above). The 7th December 2018 Letters thus operated to fix the Due Date under Clause 4.1. If they did not do so, the 13th December Letters eliminated any doubt by incorporating, in terms, a demand for the reduced sum of £1,365,335.24 following HMRC's letter dated 14th December 2017.

32.5. In his written submissions dated 10th January 2019, Mr Schaw Miller submitted that the December 2018 Letters were invalid and thus of no effect on the grounds that "it is unclear which letter the applicant relies on, how much the applicant is really asking for and when exactly the payment falls due". He also submitted that they were

and are invalid on the ground that, whilst signed by the Applicant, he did so "for and on behalf of Moorcourt Holdings Limited", the Company. I have concluded that these submissions are without foundation. Firstly, the Applicant's case is logically founded on the proposition that the first valid and effective Letter operated to fix the "Due Date" and that the Letters served subsequently did not retrospectively invalidate the previous Letters. It thus follows that the claim is for the amount due under the first valid letter. Consistently with these propositions, I am of the view that the first valid letter is the 7th December 2018 Letter and the amount due under it is £1,365,335.24 notwithstanding the error in the Letter itself as to the amount due. If not, the first valid letter is the 13th December 2018 Letter. The "Due Date" fell seven days after service in accordance with Clause 4.1 and 13.1. Secondly, whilst the December 2018 Letters were expressed to be signed for and on behalf of the Company, they were signed by the Applicant himself. Applying the *Mannai* test, it would have been obvious to a reasonable recipient that they were intended to take effect as his demands for payment, as covenantee, under the provisions of Clause 2.1 of the 2012 Deed.

33. On the opening day of the trial I gave the Respondents permission to amend their Points of Defence so as to contend that, on the true construction of the 2012 Deed or by necessary implication, demand would only be made "in respect of proven claims" and "claims remaining after challenge had been pursued" ("the Putative Terms"). The Putative Terms were then deployed so as to found a case based on the propositions that the Applicant has committed repudiatory breaches of contract by making demands in the absence of a proven claim or challenge to HMRC's claims and by failing to pursue such a challenge. As part of their amended case, the Respondents contend that they have accepted the repudiatory breaches and thus terminated the 2012 Deed.

34. However, in my judgment, these issues do not furnish the Respondents with a good defence to the claim.

35. Firstly, the Putative Terms cannot be discerned in the natural and ordinary meaning of the words in the 2012 Deed and it is not possible to incorporate them without impermissibly adding to or qualifying the specific provisions of the Deed.

    35.1. The 2012 Deed is to be construed by identifying the intentions of the parties with reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them by using

the language in the contract to mean", *Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, Para 14.* However, it does so by focussing on the meaning of the words used, *Arnold v Britton [2015] AC 1619, Para 15.* Where, as in the present case, the contract is of a sophisticated nature having been negotiated and prepared with the assistance of skilled professionals, there is good reason for the Court to use "textual analysis" as its principal tool, *Wood v Capita [2017] AC 1173, Para 13.*

35.2. In attending to the 2012 Deed, Messrs Hacking Ashton, for the liquidators, drew heavily upon the 2010 Deed. Mr Shah approved the draft with minor amendments. They could be open to a measure of criticism, for example the first recital mirrored the recital to the 2010 Deed in referring to an *intention* on the part of the Respondents to place the Company in members voluntary liquidation. Moreover the 2012 Deed did not properly address the Applicant's concern, canvassed in his letter dated 16th April 2012, about the scope of the indemnity. However, the 2012 Deed was professionally prepared and it was comprehensive in scope.

35.3. Clause 4.1 provided for the Company to serve a notice demanding payment if the Respondents were liable to make such a payment under Clause 2 or Clause 3. However, the obligation under Clause 2 was to pay an amount equal to the Company's "Liability for Taxation," as defined, not claims nor proven claims. The obligation under Clause 3.2 included an indemnity in respect of claims. The indemnity was widely drawn up so as also to include losses, costs, liabilities, damages, demands and expenses. However, it was only applicable if arising out of or in connection with a breach of the warranty in respect of sums due or owing under Clause 3.1.

35.4. To put a gloss on the contractual language by importing additional words that do not appear in the Deed itself would alter the scope of the parties' rights and obligations in a manner that is un-necessary and impermissible. Clauses 2 and 3 each comprehended "liabilities" and, whilst "Liability for Taxation" was defined so as to encompass "any liability (whether actual or contingent or otherwise)", "liability" or "liabilities" connote legal liabilities which must thus be proved to the satisfaction of the Court as part of the judicial process. However, it is idle to superimpose any other requirements, such as the successful submission of a proof in the liquidation, particularly in the case of a members voluntary liquidation where creditors are not required to submit a proof unless the liquidator requires it (*Insolvency Rules 2016 Para 14.3(1)(b)*).

35.5. Secondly, in my judgment it is also un-necessary and thus inappropriate to imply the Putative Terms. It has now been re-established that the process of implication is generally separate from the process of construction, *Marks and Spencer plc v BNP Paribas Security Services [2016] AC 742, Para 28.* "In order to imply a term into an ordinary business contract such as this, the term must be necessary to give business efficacy to the contract; it must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract", *Hallman Holdings Limited v Webster [2016] UKPC 3, Para 14.* This is a rigorous test founded on necessity rather than reasonableness.

35.6. In my view the Putative Terms do not satisfy these tests. Clause 4.1 provides for the liquidators to demand payment for the amounts to which they are contractually entitled, under the Clause 2 and 3, in clearly defined terms. It is not necessary nor is it obvious that additional terms should be superimposed. Had the liquidators been asked to incorporate the Putative Terms, there is every possibility that they would have refused to do so mindful of the fact that the Putative Terms would restrict and unduly complicate their rights of recovery.

35.7. Moreover, in the hypothetical event that the Respondents were able to establish that the Putative Terms should be implied and the Applicant is thus in breach of such terms, the latter have been defined in such a way as to qualify the Respondents' payment obligations rather than as freestanding obligations leading to a right of rescission.

35.8. However, if it were possible to characterise the Putative Terms as freestanding obligations and identify material breaches, there was and is nothing in the conduct of the Applicant or, indeed either liquidator, from which the Respondents could reasonably infer an intention to abandon the 2012 Deed. In *Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 at Para 61,* Etherton LJ (as he was) emphasised that, whilst this is to be assessed from the perspective of the innocent party, the assessment must be of an objective nature. In the present case, it is inherently unlikely that the Applicant has ever had such an intention given that, for the most part, the Deed encompassed obligations unilaterally assumed by the Respondents. To establish otherwise would thus require cogent evidence. By these proceedings, the Applicant is taking positive action to enforce the 2012 Deed and no evidence has been

adduced consistent with the proposition that he might ever have been minded to abandon it.

(5) Conclusion

36. I shall thus give judgment for the Applicant in the reduced sum of £1,365,335.24. However, I shall hear further submissions from counsel in relation to consequential directions and costs. The parties will be mindful that the Respondents were furnished with a good defence to the claim until the expiry of the notices in the 7th December 2018 Letters.