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INSOLVENCY LAW FIRM

UPDATE

November 2016

Welcome to a special CRI Insolvency Law Update on the specialist area of non domestic rates (“NNDR”)

Avoiding National Non-Domestic Rate and the Insolvency Process

Property Alliance Group Limited (“PAG”) was a property developer and an investor in asset management with a property portfolio worth about £190,000,000 spread throughout the UK. Until April 2008 owners of non-domestic property were entitled to benefit by way of relief against NNDR in relation to empty commercial and industrial properties. However, from 1st April 2008 that relief was removed.

What followed was the world financial crisis, after which PAG was faced with increasing numbers of empty properties and a general fall in rental yield. In April 2008 approximately 25% of its commercial and industrial property portfolio was wholly or partially empty. In anticipation of the removal of the relief in respect of NNDR PAG began to operate what it called “a NNDR Mitigation Scheme”.

Under this initial Scheme PAG set up a company “Newco” which entered into a lease with PAG to occupy the vacant property at a nominal rent. Newco assumed liability for the unoccupied business rates and pursuant to the terms of the lease PAG waived any entitlement to rent. Shortly thereafter Newco

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passed a special resolution to place itself into Members' Voluntary Liquidation. Although in Members' Voluntary Liquidation, no Liquidator would be appointed and accordingly no one was in office who would disclaim the lease which would simply continue until its three year term expired. If a bona fide third party tenant came along who wished to take a genuine commercial lease then PAG would exercise a right of termination in the lease making it available for an in-coming tenant.

This scheme was initially confined to properties of which PAG was a freeholder or head leaseholder. In about May 2009 the initial scheme was developed to include other Landlords who in return for being allowed to participate in the scheme would pay PAG a fee representing a proportion (generally 30% to 40%) of the amounts of NNDR saved by using the scheme. In all 13 Newcos were established which saved PAG and its scheme users approximately £8.9 million in NNDR.

On 31st May 2011 the Secretary of State for Business Enterprises Innovation and Skills presented petitions against each of the 13 companies for their winding up on public interest grounds. PAG decided not to oppose the petitions and winding up orders were made on 27th July 2011. PAG itself was not subject to a petition.

In March 2012 the Insolvency Service in its (Dear IP) Newsletter referred to the winding up of the original PAG Newcos in July 2011 in which it stated that if the service became aware of Insolvency Practitioners participating in these types of arrangements, it would consider reporting the matter to his or her recognised professional body.

On 24th August 2011 PAG Management was incorporated for the purpose of managing and coordinating the operation of a revised scheme.

That revised scheme was almost identical to the initial scheme, save for the fact that a Liquidator was appointed as soon as the new company entered Members' Voluntary Liquidation. In the revised scheme a Mr Muff was hired to become a director of each Newco, his employment was for the sole purpose of signing the documents necessary to put Newco into Members' Voluntary Liquidation and the lease documentation.

Each Lease was a standard form document granted for a term of three years at a rent of £1.00 per annum. There were covenants in respect of alterations to the property and a covenant not to assign, charge or underlet without permission. Crucially Newco covenanted to pay non-domestic rates as is required by law.

The revised scheme was advertised and clients solicited and a significant number of landlords took advantage of this scheme. PAG Management's fees appear to have totalled approximately £12 million suggesting that a sum of approximately £30 million NNDR was not paid.

It is an important part of the MVL process that the director of a company signs a declaration of solvency. Attached to that declaration is a statement of the assets and liabilities of the company. In these cases the assets were simply stated to be leases estimated to realise £1.00. There were no liabilities.

The revised scheme came to the attention of the Insolvency Service who in December 2013 presented a petition on public interest grounds seeking that PAG Management be wound up. That petition came for trial in March 2015.

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The Judge wound the company up finding it to be an abuse of the insolvency legislation.

Interestingly, the Judge was not interested in claims that the leases entered into were simply a sham designed to allow the scheme to proceed. The Judge commented that there are many companies and partnerships that offer tax mitigation schemes, some of which are of the highest repute. The promotion of tax mitigation schemes is not an inherently objectionable activity.

PAG is appealing that case to the Court of Appeal in December 2016.

PAG are now offering a third scheme which they believe will allow them to promote the scheme to landlords in its further revised form, even if the Court of Appeal decides that the PAG appeal should be dismissed. The Insolvency Practitioners who have taken appointments as Liquidators in the latest scheme, have taken advice from their regulatory bodies who have approved the appointment.

The difference between Scheme 2 and Scheme 3 is that a more elaborate Statement of Affairs is produced showing the Newco to have been trading and to have cash in its account to pay creditors and the Liquidator's fees.

There is therefore evidence to believe that these schemes or schemes similar to them will continue to the benefit of landlords as tax mitigation schemes and to the detriment of local authorities as revenue collectors.

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The contents of this Update provide only a brief overview of the more important cases and reports. If you should require any detailed advice concerning these changes then please do not hesitate to contact us.