Neutral Citation Number: [2023] EWHC 3308 (Ch)

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

Case No.: CR-2023-006028

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 9 November 2023

Before:

MR STEVEN GASZTOWICZ KC

sitting as a Deputy High Court Judge

Between:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Petitioners/Applicants

-and-

PAYROLL & PENSION SERVICES (PPS UMBRELLA COMPANY) LTD

Respondent

Mr Matthew Parfitt (instructed by the **Solicitor for HMRC**)

Hearing dates: 2 and 9 November 2023

Approved Note of Judgment

(ex tempore)

Mr Steven Gasztowicz KC:

1. This is a without notice application by the Commissioners for His Majesty's Revenue and Customs (who I will refer to as 'the petitioners' or 'HMRC') for the appointment of provisional liquidators in respect of a company called Payroll and Pension Services (PPS Umbrella Company) Limited (the 'Company').

2. The application is made under section 135 of the Insolvency Act 1986, which provides as follows:

> "***135 Appointment and powers of provisional liquidator***
>
> *(1) Subject to the provisions of this section, the court may, at any time after the presentation of a winding-up petition, appoint a liquidator provisionally.*
> *(2) In England and Wales, the appointment of a provisional liquidator may be made at any time before the making of a winding-up order; and either the official receiver or any other fit person may be appointed.*
> *(3) In Scotland, such an appointment may be made at any time before the first appointment of liquidators.*
> *(4) The provisional liquidator shall carry out such functions as the court may confer on him.*
> *(5) When a liquidator is provisionally appointed by the court, his powers may be limited by the order appointing him.*"

3. A petition for the winding up of the Company has been prepared for issue at the request of HMRC and, if I decide the appointment is justified, will be issued before any order is made on this application. The persons willing and able to act as provisional liquidators of the Company have been identified.

4. The intended petition originally placed before the court alleged in paragraph 6 that "The petitioners have made application to the Company for payment of the sum of

£7,390,282.54", and in paragraph 7 that "Notwithstanding such application the Company has failed and neglected to pay or satisfy the balance or any part thereof".

5. I queried these statements at the hearing. Neither of them was in fact accurate in that HMRC have not made – and do not before the issue of the petition intend to make – application to the Company for the payment of the sum referred to or any part thereof, and the Company has not failed to pay "notwithstanding an application for payment".

6. The sum of £7,390,282.54 referred to is, however, HMRC's estimate of the employer's NI Class 1 contributions due from the Company on the basis of the material they have obtained. Their case is that such contributions are due to be paid by an employer without any application for payment being made, and after a period of at most 17 days after the end of the tax month, which is at the end of the 5th day of the calendar month, become a liability of the employer - in this case, the Company.

7. The unissued petition has now been amended to delete paragraphs 6 and 7 and to reflect the fact that no application for payment has been made.

8. The principles on which the Court should proceed on an application such as that now before the court, which I apply, were summarised by Norris J in *HMRC v Winnington Networks Ltd and Bartel Networks Ltd* [2014] EWHC 1259 (Ch), in paragraphs 3-9, as follows.

9. First, the appointment of a provisional liquidator is a most serious step and (as the Court of Appeal has indicated) should be the subject of most anxious consideration.

10. Second, where, as here, the application is being made without notice, it needs to be justified by exceptional circumstances. A judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the remedy, or there has been

literally no time to give notice. In this case, it is made without notice on the first of these grounds.

11. Third, this is not a trial of the petition itself and accordingly, the court is proceeding upon a provisional and interim basis.

12. Fourth, it is for the petitioners to show that they are likely to obtain a winding up order on the hearing of the petition.

13. Fifth, on a without notice application for a provisional liquidator, this assessment falls to be made without the company having had the chance to demonstrate that it does have a good arguable case in support of a dispute as to the debt. The court must therefore be assured that it has a fair picture of the circumstances in which the petition is presented and, in that regard, that the petitioner has given full and frank disclosure.

14. Sixth, the court must be satisfied that the appointment of a provisional liquidator is the right course to take in all the circumstances.

15. Seventh, material to a consideration of those circumstances is the need to protect assets and in that context, 'assets' is to be given a fairly broad interpretation.

16. In relation to the seventh point, Norris J noted that,

> *"As Lewison LJ pointed out in Rochdale [2011] EWCA Civ 1116 at para 97, in cases where there are real questions as to the integrity of a company's management and the quality of its accounting and record-keeping functions, it will be an important factor to ensure that an incoming liquidator obtains control of all of those records so that the necessary investigations can be undertaken. These investigations may well include bringing claims against the management and whether there ought to be a report to the Secretary of State possibly leading to disqualification proceedings. These causes of action and*

possible steps are to be regarded as part of the assets of the company for the purposes of assessment."

17. Beyond these seven principles, Norris J went on to add in the case before him an eighth point, which does not appear to have been the subject of argument before him, and in relation to which he did not examine the relevant authorities. This was to the effect that although interim relief was being sought, because it was being sought by a public body discharging a public function for the public good, a cross undertaking in damages was not generally to be required. I shall deal with this additional question in due course.

18. In relation the application before me, I take into account, and apply, each of the seven principles I have set out. In this, I keep at the forefront of my mind that the appointment of a provisional liquidator is a very serious step and that the application is without notice, and in circumstances where, in this case, the Company has not had any chance even outside the proceedings to respond to the allegations, of which it knows nothing.

19. That the application is without notice needs to be justified, as I have indicated, but whether that is so or not can only be determined by an examination of the evidence before the court, as can, even more obviously, the question of whether the interim relief sought ought on the without notice application to be granted.

20. The position appears on the petitioners' evidence to be as follows.

21. Employer's NI class 1 contributions appear, as they say, to be due to be paid by an employer without a demand, or application, for payment being made, and after a period of 14 days or, if payment is made by electronic means, 17 days, after the end of the tax month (a period which ends on the fifth day of the calendar month), become a liability of the employer (with similar provision made for quarterly payers). This is provided for in paragraphs 10 and 11 of Schedule 4 to the Social Security (Contribution) Regulations 2001 SI 2001/1004.

22. The Company was incorporated in March 2017. Its sole director and shareholder has since its incorporation been Mr Adeola Olabode David-Ajibola, a chartered accountant.

23. Mr David-Ajibola is also involved with other companies, most notably a company providing accounting services called Tarfs Accountants (Tax Auditing Risks and Financials Solutions Accountants) Ltd (which I shall refer to as 'Tarfs'). Tarfs are the accountants for the Company.

24. The petition debt is based on the Company acting as the employer of workers who are placed by employment agencies (the Company's customers) with their own customers. It is described as an "umbrella company", including in its title. Its turnover comes, on the evidence, from payments to it by the agencies.

25. The evidence shows the company to be paid by the agencies in respect of the employees, comprising their wages and no doubt a profit element, and to administer the payroll functions relating to them, paying them their wages and being liable to account to the petitioner for National Insurance contributions (both Employer's NICs and Employees' NICs), as well as for PAYE income tax on the wages of the employees. This was demonstrated before me by a combination of contract and other documents, including letters or e-mails from the agencies confirming the position.

26. The Company is also, of course, liable to account for the VAT it must charge as part of the payments it receives from its customers.

27. As a result of suspicions the petitioners had in relation to possible under payment of sums to them, they obtained orders from the First Tier Tribunal for disclosure by Barclays Bank of the Company's bank statements.

28. Having obtained these, between September 2022 and May 2023 the petitioners contacted a number of agents who, from the receipts into the account shown in the statements, appeared to be large customers of the Company.

29. The evidence shows all eleven of the customers who were contacted and responded have confirmed that the Company was acting as the employer of the workers under the arrangements made with them, and to be responsible for making payment to the petitioners of PAYE income tax and NI contributions.

30. It also shows the Company to have been filing returns for PAYE and NICs (and separately VAT returns), and paying the sums it declared due.

31. However, the first matter is that the Company's VAT returns indicate a much higher level of turnover than the PAYE returns would suggest. The petitioners drew attention to a substantial difference. Although the quarters do not quite line up with the PAYE year end (there is a five-day difference in the period), between 1 April 2020 and 31 March 2021, the Company's VAT records showed £17,352,033 of output VAT. Between 6 April 2020 – 5 April 2021 the Company's returns relating to tax and national insurance stated that just £851,604 had been paid to workers (the employing of which comprised its services to its agency customers on which VAT fell to be paid), a difference between outputs (being essentially payments received for the employment function) and payments recorded as made to the employees of £16,500,429. For the following year 1 April 2021 to 31 March 2022 the VAT returns showed £37,944,534 of trading, but payments to staff of just £1,642,525 were recorded, a difference of £36,302,009.

32. Although it is theoretically possible that a company could be receiving around £54 million from its customers in acting as the employer of individuals placed by the agencies but the wages of those staff only around £2.5m, this would be an enormous profit margin and would seem most unlikely.

33. Second, the petitioners asked the eleven largest customers of the Company for information, including sample payslips for the years 2022 and 2023.

34. Fifty five payslips were provided in total. A table was exhibited to the petitioners' evidence summarising this data. I raised questions about the different number of

payslips in the table. As a result, the petitioners filed a further witness statement exhibiting a revised table, including two additional payslips which were missing from the original table. However, it was apparent that there were four further missing payslips since the table showed payslips from eight agencies whereas more agencies had responded to HMRC. These four missing payslips were reproduced in the exhibit to Mr English's further witness statement, but it is not known whether the payments shown on these payslips were properly reported to HMRC on the Company's PAYE returns. On the assumption that these four payslips were all accurately reported, some 17% of the payslips seen by HMRC match information on the Company's PAYE returns, and 30% of the payslips relate to workers for whom there is no record at all in the Company's PAYE returns. I am satisfied that the inclusion of the four missing payslips makes no material difference to the basic point that a substantial number of the payslips contain deductions that were under-reported to HMRC and in a significant number of cases no reports of NICs or PAYE tax were made to HMRC at all. Taking the 55 payslips referred to in the witness statement of Mr English, £262,330 was shown as having been deducted by the Company from the employees' wages in respect of PAYE and NICs, whereas the amount declared to HMRC was only £12,310.

35. As the payslips and PAYE returns to the petitioners each came from the Company, this appears to be compelling evidence of under-declaration - and therefore under-payment - of NI contributions as well as, and aside from PAYE tax.

36. The petitioners have also carried out an analysis of the Company's bank account, which showed far more income than was stated on the filings with them.

37. Third, the petitioners' analysis of the Company's bank account show that the Company has been turning over far more than its returns to the petitioners would indicate.

38. Fourth, the Company has filed accounts as part of its corporation tax returns, copies of which are before the court. The accounts for the year ending 31 March 2022 show

'wages and salaries' as £72,904,774, but for NI and PAYE what was declared to the petitioners was just £1,345,854.

39. Using a threshold amount for the calculation of Employers' NICs, and deducting the amount of employer's NI contributions paid by the Company, between 6 November 2017 and 5 June 2023 the petitioners have calculated that £7,390,282 of employer's NI contributions was due. As I indicated at the start of this judgment, the Company has a liability to the petitioners, HMRC, without any demand being made.

40. This appears to amount to, as Mr Parfitt calls it, a "labour supply fraud", which is described as a fairly unsophisticated fraud, which involves charging sums to customers made up of the wages due to the Company's employees and employment taxes but failing to pay the taxes across to HMRC.

41. It appears on the evidence that a substantial debt is due as a result to the petitioners.

42. The next question that arises is whether the Company is able to pay that debt.

43. The net assets shown in its most recently filed accounts at Companies House are £682,662. The net assets shown in the accounts submitted with the Corporation Tax return (which are made up to the same date) are £1,321,791. No explanation for this discrepancy is apparent. Whichever is correct, these figures do not suggest that the Company is likely to be able to pay £7.3 million or anything like it.

44. The Company had only £329,012 in its bank account as at 31 May 2023.

45. It is also the case that the petitioners have produced other credible evidence to show substantial PAYE sums of several million pounds are likely to be due as at the date of the hearing of the petition, on the same basis of having been collected but not declared to them.

46. The petition debt is based solely on employer's NI contributions. The reason for this is that employer's NI contributions can be calculated with reasonable certainty, and

the liability to pay employer's NI contributions exists without the need for any assessment by HMRC.

47. The petitioners' analysis of the Company's bank account shows £48,254,584 to have been paid to Tarfs up to 14 July 2023. Of that, £24,820,267 was paid by Tarfs on the Company's behalf by way of VAT, and £17,567,875 was returned to the Company. There is a difference of over £5.8 million. This £5.8 million has, on the evidence, disappeared from Tarfs. Its last filed accounts show net assets of just £2,521. Bank statements show accounts containing less than £5.8m, even if all of Tarfs' money was the Company's.

48. In addition, £384,334 has been paid from the Company's bank account to Mr David-Ajibola direct, and further sums to his order, including £113,695 for school fees, £282,125 for "renovation/decoration" and £286,783 for "personal expenditure", and £246,677 to Adenike Adereti, who lives at his address and whose employment with the Company was reported to have ceased in 2018, prior to which she received income of under £8,000 over two tax years. In addition, payments of over £458,000 have been made to St James' Place, a wealth fund manager.

49. The total payments that fall outside the normal remit of the Company's trading have been calculated to amount to £1,481,606, leaving out of account the additional £458,000 paid to St James' Place. None of the payments are shown in the filed accounts (to 31 March 2022) or indeed the corporation tax balance sheet, which also appear to exclude any money which may be held on the Company's behalf by Tarfs.

50. I have also had regard to the evidence of Mr Daniel Khosla, the petitioners' accountant, on the question of the Company's solvency.

51. The evidence is somewhat pieced together, and overall I am satisfied, on a without notice basis, that the petitioners are entitled to present the petition, that a material part of the petition debt is not capable of dispute on substantial grounds, and that the Company is unable to pay its debts.

52. I consider the application being made without notice to have been justified given the evidence indicative of a fraud having been committed, that only a relatively small amount of the proceeds the Company has had from its activities appear likely now to be in the Company's hands, that sums appear to have been dissipated in the sense of having been paid to others, including its director, Mr David-Ajibola, and that it will be important for liquidators to have access to the Company's records in order, in particular, to identify where assets have gone and attempt to get them back.

53. I have carefully borne in mind in considering this aspect of the matter that, as shown by Mr English's evidence, the Company was, as a result of certain matters, on 8 September 2022 informed by letter from another part of HMRC that an enquiry had been opened into its VAT returns, PAYE, and employer records, albeit not the inquiry which led to the petition, asking for copies of documents in relation thereto, with a subsequent meeting being proposed. Also that the director of the Company responded on the company's behalf to HMRC with documentation, prior to the enquiry then being notified as being paused – because, unbeknown to him, another part of HMRC was investigating, which investigation was in an evidence gathering phase which it did not want to jeopardise.

54. This shows the Company was alerted to an enquiry taking place relating to tax and its employer records (which would also be relevant to payment of NI contributions), albeit that it was subsequently paused. This might indicate that proceeding without notice is not justified because the Company has already been put on notice of its records and payments being looked into, that it will likely have ceased any unlawful activity, and may already have taken necessary steps to dissipate assets if it wishes to or to destroy records HMRC might find of value.

55. However, the director was only put on notice of a routine enquiry and nothing appeared to come of it. The Company was not put on notice of the specific matters before the court and what has arisen since then, namely the obtaining and analysis of the Company's bank statements and the detailed inquiry and evidence gathering.

56. The point is made by HMRC that if the director realised the game was up, and fraud was being alleged and supported by evidence, there is a real risk that steps would be taken which would put assets at risk, with them being put beyond the reach of liquidators and unavailable to satisfy debts which are due. I have given this careful consideration. There is force in that point.

57. I also bear in mind that the sums received by the director have been used to purchase property, including in the UK, and investments have been made in Lagos. Such assets are not necessarily easy to realise. The UK assets remain in the name of the director. I am told HMRC put alerts in place with the Land Registry in September 2022 requiring notification of any dealings and they have not received notification of any change of position. The mortgage advances shown as secured on the properties could of course have been increased and the funds dissipated, but any disposal of assets to date makes the tracing of where they have gone the more important, without the loss of any evidence trail. Provisional liquidators would be able to apply for appropriate orders to prevent any further destruction of documentation relating thereto by Mr David-Ajibola (or, indeed, anyone else). The giving of notice of this application could frustrate that object.

58. Taking all of this into account, in my judgment giving notice of the application could frustrate its purpose. I am satisfied that this was a proper case to proceed without notice.

59. I have been assured that a fair picture has been presented to the court and full and frank disclosure has been given.

60. I have also carefully considered whether any form of interim relief short of the appointment of provisional liquidators, in particular a freezing order and order for preservation of documents would be appropriate. However, as explained in Mr Graham's first witness statement, this would not secure assets no longer held by the Company. Furthermore, in the case of *Revenue and Customs Commissioners v Egleton & Ors* [2006] EWHC 2313 (Ch) Briggs J (as he then was) at paragraph 48 gave

powerful reasons explaining why a freezing order should be obtained by a provisional liquidator, not by a creditor. I have had regard to, but will not read out, the reasons in that paragraph and also to paragraphs 49-50 of the judgment. The Judge's conclusion was that there would need to be cogent reasons why the ordinary course of a provisional liquidation application would not be appropriate.

61. I am satisfied that the appointment of provisional liquidators is in all the circumstances the appropriate course, subject to the next matter.

62. I turn now to the question of whether HMRC should be required to give an undertaking in damages in return for the grant of the relief they are seeking – on an interim, without notice, basis. Or, to put it another way, whether the relief sought should be granted without such an undertaking being given.

63. Notwithstanding that the evidence before the court appears to show the under payment of NI contributions, a substantial liability to the Revenue, and an inability to pay it, it remains the case that the court has heard only one side of this matter, and it does not know what evidence the Company or those connected with it may seek to produce, what points they may seek to make, or what arguments they may advance.

64. The appointment of provisional liquidators is a most serious step and may lead to the death of the Company. Indeed, as is conceded, it is very likely to do so.

65. A company should in fairness have the protection of a cross-undertaking by petitioners, to pay such damages as the court may award if it turns out that the order ought not to have been made, to offer at least such protection as that can offer, unless there is a compelling reason otherwise, in ordinary circumstances at least.

66. The dangers in the absence of such an undertaking are added to by the fact that the Company has had no chance to answer matters even outside the proceedings, let alone within them, as the matters relied on have never been put to it (albeit for understandable reasons on the petitioners' case). It is also the case that the petition

initially put before the court was not entirely accurate in certain respects and that there were some errors in the evidence, which, although they did not affect the overall position, needed correction or clarification.

67. Such a cross-undertaking in damages might come into play if the director was to challenge the appointment, or to successfully oppose the winding-up petition. Although the appointment generally revokes the director's authority in relation to the company in respect of which it is made, I have been told by the petitioners' counsel that it is generally understood that the directors retain a residual power to take such action, as appears to be confirmed by the cases of *Ashborder v Green Gas Power* [2005] EWHC 1031 (Ch) and *Re Mortgage Five Zero Ltd* [2023] EWHC 2654 (Ch) which support this proposition and I am satisfied that this power exists. It follows in any event from what the petitioners have said about this that they will not seek to suggest that the director would lack locus to challenge the appointment of the provisional liquidator or resist the making of the winding up order.

68. What is said against such an undertaking, designed to protect those affected by an interim order of this sort, is that the petitioners should not have to give what would otherwise be the normal undertaking offering such protection because they are the Inland Revenue.

69. Whether the giving of such an undertaking is the starting point or not, it is right in my judgment that they should give it in the circumstances of this case.

70. In fact, however, I do not consider HMRC on an application of the present sort to be outside the usual position that an undertaking in damages is required for the protection of the Company unless factors indicate otherwise. As this has been the subject of substantial discussion at the hearing, and I have been told there are conflicting authorities (with the petitioner suggesting those in its favour are the ones that correctly state the law) and practices, I will address this in some detail, as invited to do.

71. Where a private individual applies for interim relief, in advance of a final determination of the matters in issue in the case, the starting point is that the applicant will be required to give such an undertaking as a condition of being granted that for which it applies. This is reflected in CPR Part 25, which makes this the default position; that is to say, the position unless the court otherwise orders.

72. In *Hoffmann-la Roche (F) & Co A.G. v Secretary of State for Trade and Industry* [1975] AC 295 the House of Lords recognised that there was no continuing justification for the former *blanket practice* whereby the Crown was *not* required to give any such undertaking in any circumstances (even in cases where it was asserting proprietary or contractual rights which a private person could have enforced): see per Lord Reid at p341C and Lord Diplock at p362B-H.

73. However, it considered, by a majority, that the Crown remains in a position different to that of a private individual when it brings what Lord Diplock described as a law enforcement action: see p363B.

74. The majority comprised Lord Cross of Chelsea, Lord Diplock and Lord Morris of Borth-y-Gest.

75. Lord Cross accepted that it *might* be fair to require that the Crown give a cross-undertaking where the defendant's defence was that what he is doing or proposing to do was not prohibited by the order in question, but that, *where the defence was that what was "on the face of it the law of the land" was not in fact the law*, "exceptional circumstances" would be required before the court "should countenance the possibility" that the Crown might be deterred from applying for an interim injunction by the need to give a cross-undertaking: p 371.

76. The context of that case was that the injunction was being sought to restrain conduct that was prohibited by law.

77. Lord Morris also focused on the apparent unlawfulness of sales in excess of the (apparently indisputable) order prices which Hoffmann-La Roche was threatening.

78. Lord Diplock saw no reason, since the Crown Proceedings Act 1947, for "a rigid rule that the Crown itself should never be required to give the usual undertaking in damages" in a law enforcement action, but equally no basis for the converse proposition that "the court … ought always to require an undertaking". This was because, at p 364:

> *"When … a statute provides that compliance with its provisions shall be enforceable by civil proceedings by the Crown for an injunction, and particularly if this is the only method of enforcement for which it provides, the Crown does owe a duty to the public at large to initiate proceedings to secure that the law is not flouted …"*

Emphasis added by me.

79. Lord Diplock continued, at p 364:

> *"I agree therefore with all your Lordships that the practice of exacting an undertaking in damages from the Crown as a condition of the grant of an interlocutory injunction in this type of law enforcement action ought not to be applied as a matter of course, as it should be in actions between subject and subject, in relator actions, and in actions by the Crown to enforce or to protect its proprietary or contractual rights. On the contrary, the propriety of requiring such an undertaking from the Crown should be considered in the light of the particular circumstances of the case."*

80. In concluding that no cross-undertaking should be required, Lord Diplock repeated that the Crown was seeking to enforce the law by the only means available under the governing statute, and he, like Lord Morris and Lord Cross, stressed that Hoffmann-La Roche was threatening to breach an apparently valid order approved by each House of Parliament: pp 364–365. On this basis, he also said, at p 367:

> *"So in this type of law enforcement action if the only defence is an attack on the validity of the statutory instrument sought to be enforced the ordinary position of the parties as respects the grant of interim injunctions is reversed. The duty of the Crown to see that the law declared by the statutory instrument is obeyed is not suspended by the commencement of proceedings in which the validity of the instrument is challenged. Prima facie the Crown is entitled as of right to an interim injunction to enforce obedience to it. To displace this right or to fetter it by the imposition of conditions it is for the defendant to show a strong prima facie case that the statutory instrument is ultra vires."*

81. The summary I have just set out of the majority judgments in the *Hoffmann-La Roche* case is taken in essence from the judgment of Lord Mance JSC for the Supreme Court in the later case of *Financial Services Authority v Sinaloa Gold plc* [2013] 2 AC 28 at paragraphs 21-23, but with emphasis added.

82. In the *Sinaloa Gold* case, Lord Mance, in paragraph 26, noted that in *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227 the principle laid down in *Hoffmann-La Roche* had been extended beyond just the Crown itself, to other public authorities charged with the enforcement of the law (such as, in that case, a local authority which sought to prevent trading in its area that was statutorily prohibited on a Sunday).

83. He quoted Lord Goff of Chieveley at p274 that,

> *"The principle appears to be related not to the Crown as such but to the Crown when performing a particular function … the considerations which persuaded this House to hold that there was a discretion whether or not to require an undertaking in damages from the Crown in a law enforcement action are equally applicable to cases in which some other public authority is charged with the enforcement of the law: see eg Lord Reid at p341G, Lord Morris of Borth-y-Gest at p352C, and Lord Cross of Chelsea at p371B-G"*.

84. Lord Mance accepted (at para 39) that there were criticisms to be made of aspects of the *Hoffmann-La Roche* decision and the general importance of an undertaking in damages to protect parties subject to an interim order. However, in paras 30 and 31 he drew a distinction between private litigation and "public law enforcement actions", saying that

> *"Different considerations arise in relation to law enforcement action, where a public authority is seeking to enforce the law in the interests of the public generally, often in pursuance of a public duty to do so, and enjoys only the resources which have been assigned to it for its functions. Other than in cases of misfeasance in public office, which require malice, and cases of breach of the Convention rights within section 6(1) of the Human Rights Act 1998, it remains the case that English law does not confer a general remedy for loss suffered by administrative law action. That is so, even though it involves breach of a public law duty. In the present context, the fact that an injunction is discharged, or that the court concludes after hearing extended argument that it ought not in the first place to have been granted, by no means signifies that there was any breach of duty on the public authority's part in seeking it".*

85. In paragraph 33 of his judgment Lord Mance concluded that,

> *"The Hoffmann-La Roche case stands at least for the proposition that public authority claims brought in the public interest require separate consideration. Consistently with the speeches of Lord Reid and Lord Diplock (and probably also of Lord Cross), it indicates that no cross-undertaking should be exacted as a matter of course, or without considering what is fair in the particular circumstances of the particular case. A starting point along these lines does not appear to me to differ significantly from the practice subsequently adopted at first instance: see para 27 above. I accept its general appropriateness".*

86. Though there referring to "public authority claims brought in the public interest", the earlier passages make clear the importance of the *law enforcement* element, and turning to the facts of the *Sinaloa Gold* case itself, Lord Mance said (at para 36) that it resembled that in the *Hoffmann-La Roche*, *Kirklees*, *Tobyward* [1989] 1 WLR 517 and *Lloyd-Wright* [1993] 4 All ER 210 in being "a case of a public authority seeking to enforce the law by the only means available under the governing statute".

87. As he went on,

> *"36 The FSA was acting under its express power to seek injunctive relief conferred by section 380(3). It was acting in fulfilment of its public duties in sections 3 to 6 of the 2000 Act to protect the interests of the UK's financial system, to protect consumers and to reduce the extent to which it was possible for a business being carried on in contravention of the general prohibition being used for a purpose connected with financial crime. I therefore approach this appeal on the basis that there is no general rule that the FSA should be required to give a cross-undertaking, in respect of loss suffered either by the defendants or by third parties".*

88. He went on to say that it is necessary to consider the circumstances to determine whether a cross-undertaking should be required in the particular case.

89. As part of the circumstances there, he noted that the FSA had powers under the 2000 Act allowing it without any application to the court to freeze the assets of an authorised person, in a way which could equally cause loss to innocent third persons, and said,

> *"If the exercise of a Part IV freezing power should subsequently transpire to have been inappropriate, no basis exists upon which such third persons could claim to be indemnified in respect of such loss. Indeed paragraph 19 of Schedule 1 to the 2000 Act would again clearly exclude the FSA from any risk*

of liability: see para 12 above. There would be an apparent imbalance, if the FSA were required to accept potential liability under a cross-undertaking when it addresses the activities of unauthorised persons and has therefore to seek the court's endorsement of its stance in order for a freezing order to issue".

90. This sort of factor does not arise in the present case and the petition is not a public interest winding up petition presented by the Secretary of State.

91. However, HMRC seek, without notice, the appointment of provisional liquidators of the Company. They have declined to give a cross-undertaking in damages on the basis set out in in paragraphs 43(d) to (g) of their counsel's skeleton argument for the hearing before me, that HMRC is a 'public authority' performing a 'public function' to whom the 'normal *Sinaloa Gold* exception' applies, as referred to by Mr Simon Salzedo sitting as a deputy judge in *Revenue and Customs Commissioners v Rhino Television and Media Ltd* [2015] EWHC 225 (Ch) when dealing with an application for a freezing order, and that as pointed out by Lewison LJ in *HMRC v Rochdale Drinks Distributors Ltd* [2012] 1 BCLC 748 an undertaking is unlikely to provide adequate compensation and be of only limited comfort in a marginal case which this is not.

92. As is acknowleged in paragraph (f), the appointment of provisional liquidators is an even more serious course than a freezing order. The comments made in Lewison LJ's judgment in *Rochdale Drinks* [2012] 1 BCLC 748 at paragraphs 109 and 110 need to be considered in their context. In paragraph 109, after describing the very serious nature of the interim remedy of appointing a provisional liquidator at a time when the facts have not finally been found, Lewison LJ said that the matters which the court may take into account included "*the extent to which [the respondent] may be compensated by an award of damages or enforcement of the cross-undertaking and the likelihood of either party being able to satisfy such an award*".

93. He went on to say in paragraph 110 that:

> *"If a business is shut down wrongly, the cross-undertaking is unlikely to provide adequate compensation to the company concerned, let alone to the employees who will have lost their jobs and to whom no cross-undertaking will usually have been offered. In addition once a provisional liquidator has been appointed the company's books and records will pass into his control; and will no longer be accessible, as of right, to the company's directors. This latter consequence may hamper the company and its directors in defending allegations made in the petition."*

94. This was not an indication that there was no point in having a cross-undertaking because it is likely to be of limited comfort but that, *even with* such an undertaking, there would be unlikely to be adequate protection for everyone actually affected by the appointment of a provisional liquidator. Lewison LJ took it for granted that there would be such an undertaking, however (in referring in considering the applicable principles to "the enforcement of the undertaking" in any given case), as indeed was given there by HMRC.

95. It is said, so far as this latter point is concerned, that *Rochdale Drinks* was decided before the *Sinaloa Gold* decision of the Supreme Court, as an explanation of why HMRC had offered and given an undertaking there, and said that the case did not discuss whether it was appropriate to require such a cross-undertaking.

96. It is true that it was decided before the *Sinaloa Gold* case. However, I do not understand Lord Mance in *Sinaloa Gold* to have been intending to alter the law, in particular as decided in the 1975 *Hoffmann-La Roche* case, which he was plainly agreeing with and seeking to apply. Although it is true there was no discussion in *Rochdale Drinks* about the appropriateness of requiring a cross-undertaking, no-one, including HMRC, was suggesting it was inappropriate (so that understandably there was no discussion set out), but the Court was taking it for granted there would generally be an undertaking in damages and indicating that the extent to which it would provide a degree of protection was an important factor to take into account.

97. In *Re Parkwell Investments Ltd* [2014] BCC 721 Sir William Blackburne, sitting as an additional judge, considered that a cross-undertaking in damages had properly not been required to be given by HMRC in relation to the appointment of a provisional liquidator. He said, at paragraph 100, that he did "*not accept that when petitioning to recover unpaid tax HMRC should be treated like any private litigant. When suing to enforce a claim for unpaid tax HMRC are exercising a public function; they are a public authority bringing a claim in the public interest. Any recovery is for the public benefit since it goes to increase the general revenue without which the modern state cannot function. Nor, for the reasons explained earlier, is it the case that lesser remedies would have sufficed*".

98. Obviously, Sir William Blackburne's judgment is worthy of great consideration and weight, and I have carefully considered it.

99. However, any recovery of money, by way of debt or otherwise, by any public body will generally be for the public benefit. That in itself does not mean a cross-undertaking in damages should not be required of the body in order for the grant of an interim remedy. It is considered indisputably appropriate as a matter of course in contract actions, for example, where the contract and its enforcement are for the public good.

100. The appointment sought of a provisional liquidator pursuant to a winding up petition, and the winding up petition itself, is not "a case of a public authority seeking to enforce the law by the only means available under the governing statute", as referred to in paragraph 36 of Lord Mance's judgment in *Sinaloa Gold*, and they are not public law enforcement proceedings

101. It is true that HMRC is a public authority charged with the responsibility of assessing people to tax and collecting tax due.

102. However, as was pointed out by David Richards J (as he then was) in *Abbey Forwarding Limited (In Liquidation) v HMRC* [2015] EWHC 225 (Ch), at paragraph 28, assessments to tax when notified to the taxpayer are deemed to create debts which

HMRC then collect as a creditor. So too does the liability to pay NI contributions create a debt, in their case without notification.

103. That is the basis on which HMRC brings its winding up petition – for a debt. That is in contrast to what would generally be understood to be law enforcement action, of the type spoken about in the cases – for example by an injunction to prevent breach and protect the public.

104. An analogy may perhaps be drawn with a speeding situation. If a public body with responsibility to protect people in its area seeks an injunction to prevent speeding by a person that may be regarded as within the principle that comes from the cases so that the Crown is generally not required to give an undertaking. A penalty imposed for speeding, which if it amounts to a debt when unpaid, when sued for is not a law enforcement action but action to enforce a debt, and seeking an interim remedy such as an injunction in aid of a winding up petition in relation to such an alleged debt would not mean that no undertaking should ordinarily be required. In saying this, I do not know whether an out of court penalty for speeding would in any given case be a simple debt or not, as opposed to being characterised in some other way, but if it was to be, that seems to me an apposite analogy.

105. David Richards J in his judgment in *Abbey Forwarding Limited* considered the decision of Sir William Blackburne in *Parkwell*, and the earlier decision in that case of Hildyard J, and I respectfully adopt what was said by him in paragraphs 150 to 167. It would be difficult to set them all out here as part of an *ex tempore* judgment, as well as fairly pointless as they can be seen from the judgment itself.

106. It is appropriate, however, to set out the concluding paragraphs 166 and 167 of that judgment, which were as follows, and are part of the reasoning which I respectfully adopt:

> *"166. I acknowledge the force of the points made and relied on by Sir William Blackburne [in Parkwell]. As I earlier observed, plainly HMRC as collectors of*

tax are not in the same position as an ordinary private litigant. Nor, however, for the reasons which I have also given are they in the same position as a public law enforcement agency such as the FSA or the Secretary of State when presenting a petition in the public interest under section 124A of the Insolvency Act 1986 . The judgments of the Court of Appeal in HMRC v Rochdale Drinks Distributors Ltd spell out clearly not only the existence of a practice of requiring an undertaking in damages from HMRC on an application to appoint a provisional liquidator but also spell out the reasons for that practice.

167. The basis for departing from that practice relied on by Sir William Blackburne and apparently put before other judges of the Chancery Division has been the decision of the Supreme Court in FSA v Sinaloa Gold plc. However, that decision did not involve any departure from the existing practice that undertakings in damages were not required in public law enforcement proceedings, as established by the majority decision of the House of Lords in F. Hoffmann-La Roche Co AG v Secretary of State for Trade and Industry. So far as relevant to applications for the appointment of a provisional liquidator, the decision in FSA v Sinaloa Gold plc adds little to the position existing before then save to re-assert the decision in Hoffmann La-Roche and to make clear that undertakings in damages are also not required to protect the position of innocent third parties. In my judgment, it is not a decision which can justify the departure from the well established practice of this court on applications by HMRC for the appointment of provisional liquidators, the correctness of which was clearly affirmed by the Court of Appeal in HMRC v Rochdale Drinks Distributors Ltd. While it may be said that hard cases make bad law, it appears to me that the facts of the present case underline the importance of the requirement for an undertaking in damages."

107. All the circumstances of the case nonetheless fall to be considered, however. I consider HMRC to have a good case for the appointment of provisional liquidators

on the basis of what I have been told, but not one which is in the circumstances such as require the making of the order without at least this basic safeguard.

108. Of course, if they are so highly confident of their position as they contend, it may be thought HMRC will have little difficulty in giving that undertaking.

109. I should finally mention for completeness in relation to the authorities, the decision of Mr Simon Salzedo QC sitting as a Deputy High Court Judge in *Commissioners for HM Revenue and Customs v Rhino Television & Media Ltd* [2020] EWHC 364 (Ch). In a fairly short *ex tempore* judgment the Deputy Judge said, in paragraph 50, after briefly considering authorities, that, *"…it seems to me to be clear that the law is now settled that HMRC, when seeking to recover unpaid tax or protect by freezing order the prospect of such recovery, is in the position of a public authority, as that term is used in para.33 of Sinaloa"*. However, he also emphasised, in paragraph 49, that "*the appointment of provisional liquidators is, or at least may be, a different matter from the making of a freezing order. Nothing in this judgment should be taken as expressing any view on the proper approach to a case concerning the appointment of provisional liquidators*".

110. On my analysis of the authorities, the position in relation to the present case, which does concern such an appointment, is that such an undertaking should be required, for the reasons I have given.

111. It is also not appropriate in my judgment to limit the monetary extent of the undertaking, as was suggested by the petitioners as a fallback position. It is said that the Treasury will require HMRC to ring fence an amount from its budget to cover the cross-undertaking. However, that does not in my view override the need to protect those affected by the without notice interim order it has chosen to apply for here. The Government, and indeed HMRC, obviously has sufficient assets to satisfy any amount of damages that could conceivably be awarded, but if they need to do so, it will be for them to make an accurate assessment of what their potential liability may be, as well as the chances of the undertaking being called upon.

112. In all the circumstances, I decline to make the order sought unless an unlimited undertaking in damages is given.

Following judgment, I have been told that the winding-up petition had in fact already been issued prior to it, contrary to what I was told. Nothing turns on this, however.

[After a short break HMRC provided the unlimited cross-undertaking in damages and the order appointing provisional liquidators was made.]