Neutral Citation Number: [2021] EWHC 474 (Comm)

Case No: CL-2017-000173

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/03/2021

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

XL INSURANCE COMPANY SE	**Claimant/ Applicant**
- and -	
(1) IPORS UNDERWRITING LIMITED **(2) PAUL ALAN CORCORAN** **(3) CHESHIRE PRESTIGIOUS CARS LIMITED**	**First to Third Defendants**
- and -	
(4) HER MAJESTY'S REVENUE AND CUSTOMS	**Proposed Fourth Defendant/ Respondent**

- -
- -

Joseph England (instructed by **XL Catlin Services SE**) for the **Claimant/Applicant**
Ajay Ratan (instructed by **HMRC Solicitor's Office**) for the **Proposed Fourth Defendant/Respondent**

Hearing dates: 04 February 2021
Draft sent to parties: 25 February 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE COCKERILL DBE

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 04 March 2021 at 10:00 am."

Mrs Justice Cockerill :

1. The Claimant insurer ("XL") pursues fraud-based clams for unpaid premiums of approximately £10 million principally against its former coverholder, the First Defendant ("IPORS") and IPORS' sole shareholder/director, the Second Defendant ("Mr Corcoran"). IPORS was, pursuant to binding authority agreements spanning March 2012 to November 2016, obliged to hold on trust for XL, in segregated trust accounts, premiums received from insureds. It was then obliged to remit those to XL. However, XL says these funds were misappropriated by Mr Corcoran, who had sole control over IPORS' accounts, to accounts held in his name and, to a lesser extent, to another company controlled by him, the Third Defendant.

2. XL obtained freezing and proprietary injunctions against the Defendants, all of which have been effectively ignored by the Defendants, who have not participated in the proceedings or the numerous interim applications within them since Mr Corcoran filed a handwritten Defence on behalf of IPORS in April 2017. In that document he disputed the claim and asserted that there were credits owing which more than outweighed the sums claimed.

3. The present application represents the latest chapter in XL's quest to recover what it claims are its misappropriated premium funds. That application is to join Her Majesty's Revenue and Customs ("HMRC") as a party to the present proceedings and amend its statements of case to make claims against HMRC.

4. In short, XL's case is that Mr Corcoran wrongfully declared taxable income to HMRC for the tax years 2014/2015 and 2015/2016. XL says (and has tendered evidence) that (a) this in fact constituted of XL's proprietary funds and not "income"; and (b) Mr Corcoran paid the tax allegedly due from these false declarations (totalling c.£1 million) to HMRC using XL's proprietary funds and could not otherwise have made those payments.

5. The application is brought under CPR 19.2 on the basis that:

> "The court may order a person to be added as a new party if (a) it is desirable to add the new party so that the court can resolve all matters in dispute in the proceedings; or (b) there is an issue involving the new party and the existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

6. XL submits that the Court should also have regard to the fraud-based and proprietary nature of XL's claims, and the need to resolve any tracing issues and bind the relevant parties in these proceedings. It has referred me to a number of authorities which emphasise the court's desire to help the victims of fraud to find out where their money has gone and to preserve funds so traced.

7. CPR 19.4(4A) states that: "*The Commissioners for HM Revenue and Customs may be added as a party to proceedings only if they consent in writing.*" But for the objection outlined below, HMRC would consent to the application.

8. However, HMRC takes a point of principle which means that it opposes joinder and the proposed amendments in paragraphs 4, 26-30, 35 and 43 of the Claimant's draft amended particulars of claim ("APOC"). The material parts of these amendments are as follows:

    i) A plea that the sums used to pay HMRC were the Claimant's proprietary premium funds;

    ii) A claim for a declaration that the sums paid are held by HMRC on constructive trust and for repayment;

    iii) A claim in unjust enrichment on the basis that HMRC has received no consideration for the payment in that it purported to satisfy a tax liability which did not exist;

    iv) A claim that the Claimant is entitled to be subrogated to or otherwise enjoy any rights held by Mr Corcoran against HMRC to claim a refund for overpayment.

9. The basis of the objection is that HMRC says that those claims have no real prospect of success as a matter of law, and so amendment and joinder would be pointless. There is no real opposition to the submission that the CPR 19.2 test is met – so long as the claims are arguable beyond the strike out standard.

10. It follows that the argument before me has been solely as to whether any of the claims advanced by the Claimant against HMRC is arguable.

11. The Claimant also seeks permission to make a number of other amendments which do not concern HMRC and are not opposed. There has been no response to this application by IPORS, Mr Corcoran or the Third Defendant since it was served on them in early August 2020. It follows that those amendments are not controversial and the only live point is as to the merits of the amendments to which HMRC objects.

12. It is common ground that the present application should be determined on the basis of the assumed facts set out in the APOC. That means I must assume that the allegations against the Defendants are made out, and that the funds paid to HMRC were XL's proprietary funds. Further it is certainly the case that quite apart from those assumptions, HMRC has not challenged (or provided any specific response to) the facts and figures supporting XL's proprietary/equitable claims against the existing Defendants and now HMRC.

Factual Background

13. The relevant alleged facts can be shortly stated: XL contends that Mr Corcoran has fraudulently misappropriated funds in which XL has an equitable interest. It also seeks to contend that he has incorrectly declared those sums as his own taxable income in his self-assessments for the tax years 2014/15 and 2015/16, and paid income tax to HMRC in accordance with those self-assessments using the misappropriated funds.

14. The sums involved were over £1.8 million, which Mr Corcoran declared as alleged dividends from UK companies in 2014-2015 and £2.3 million in 2015/6. Those figures closely reflected sums received by IPORS by way of premiums for XL under the

binding authority, which funds should have been ringfenced and then passed on to XL. Instead, transfers were made to Mr Corcoran's personal account and substantial payments were made purportedly in satisfaction of his tax liability to HMRC. XL does not allege that HMRC had any notice of the facts giving rise to XL's alleged equitable interest at the time that Mr Corcoran made his income tax payments to HMRC.

The Submissions in outline

15. As noted above, HMRC does not join issue on the criteria for joinder, but only on the merits of the claim against it. It says that both claims – in unjust enrichment and the proprietary claim – depend in one way or another on XL establishing that there was no obligation to pay HMRC. If the claim is a proprietary claim, it can be met with a defence of *bona fide* purchaser for value without notice if there was no such obligation. If the claim is one in unjust enrichment, the existence of a genuine liability would prevent the giving of a positive answer to at least one of Lord Steyn's four questions, enunciated in *Banque Financiere de la Cite v Parc (Battersea)* [1999] 1 AC 221.

16. HMRC thus says that the short and complete answer to the proposed claims is to be found in the workings of the Taxes Management Act 1970 ('TMA'). Briefly, it says the machinery of the TMA means that Mr Corcoran had a valid statutory obligation to pay income tax in accordance with his self-assessments, and his payments to HMRC were made in the discharge of the valid statutory debts created by those self-assessments. None of the statutory mechanisms in the TMA for amending or enquiring into the content of these self-assessments have been invoked. The statutory time limits for invoking these mechanisms have all expired. HMRC was legally entitled to receive these payments and gave good consideration in the form of the discharge of the statutory debt owed by Mr Corcoran.

17. It is therefore said that the proposed claims against HMRC effectively seek to go behind the final and conclusive self-assessments of Mr Corcoran's income tax liability. This is inconsistent with the express terms of the statutory self-assessment regime and also its objectives (which include the public interest of the general body of taxpayers and the Exchequer in finality in fiscal transactions). HMRC says that the payments were the discharge of a valid statutory obligation, and that it therefore is a *bona fide* purchaser; or that it is not unjust for it to have received the moneys.

18. XL tends to accept that the validity of the liability is key, accepting that if the underlying tax liability was a valid tax liability its argument would have difficulties. It accepts that the position would be different had tax (actually owed to HMRC) been paid by Mr Corcoran out of stolen funds. In those circumstances, HMRC may have a defence to the claim by XL on the basis it had given value (the discharge of the tax liability). However, XL says that on a correct analysis there is no real debt owed to HMRC and thus HMRC is seeking to retain the monies by operation of law and is essentially in the position of a squatter or trustee in bankruptcy: someone who has received a right but for no consideration.

19. As regards the statutory provisions relied on by HMRC, XL accepts these time limits have expired in relation to Mr Corcoran. However, it says that those provisions of the TMA are concerned with mechanism not liability, and the taxpayer and not third parties, and are thus neither here nor there. In support of the latter submission it points to the wording of section 9ZA(1) of the TMA, which says: "*A person may amend his return*

under section 8 or 8A of this Act by notice to an officer of the Board" and to HMRC's recognised power to extend time limits. It contends that Schedule 1AB is therefore a limit on the *taxpayer's* ability to reclaim tax paid, and has nothing to say about third parties.

The Legal Framework

20. The legal framework is not contentious. The TMA contains the statutory framework for self-assessment of income tax. There are two aspects of particular relevance:

    i) Self-assessments: taxpayers falling within the self-assessment scheme are obliged to submit a return (s.8 TMA) which contains an assessment of the amount of income tax payable by them (s.9 TMA). The TMA provides for a set of mechanisms by which the contents of the return may be amended or enquired into or the taxpayer may seek to recover tax which they believe has been overpaid.

    ii) Statutory debt: the self-assessment return gives rise to a statutory obligation on the part of the taxpayer to pay tax in accordance with their self-assessment (s.59B TMA). This is enforceable by HMRC as a debt in civil proceedings (s.66 & 68 TMA) and the statutory scheme also provides for interest on late payments (s.86 TMA) and penalties for non-payment (paragraph 3 of Schedule 56 to the Finance Act 2009).

Self-assessment

21. The obligation to make a self-assessment return is found in section 8 TMA which includes the following:

> "(1) For the purposes of establishing the amount in which a person is chargeable to income tax and capital gains tax for a year of assessment and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board –
>
> (a) to make and deliver to the officer […] a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be required."

22. Section 9 TMA (headed "*Returns to include self-assessment*") relevantly provides as follows:

> "(1) […] every return under section 8 […] of this Act shall include a self- assessment, that is to say –
>
> (a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and

> (b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source […]
>
> but nothing in this subsection shall enable a self-assessment to show as repayable any income tax treated as deducted or paid by virtue of [provisions not relevant to the present case]."

23. Thus, the taxpayer must not only submit a return (s.8 TMA) but also assess the amount that is "*payable by him by way of income tax*" (s.9(1)(b) TMA). If the taxpayer does not make the necessary assessment, HMRC is entitled to do so on their behalf based on the information set out in the return: see s.9(3) TMA.

24. The statutory scheme includes a set of mechanisms by which the contents of the self-assessment return may be amended or enquired into (or the taxpayer might seek to recover tax which they believe has been overpaid):

    i) Section 9ZA allows for a taxpayer to amend his return within 12 months of the filing date.

    ii) Section 9ZB allows for HMRC to correct the return within 9 months of the day on which it was delivered (or, if the correction is required in consequence of an amendment made by the taxpayer, within 9 months of the date of the amendment).

    iii) Section 9A allows HMRC to commence an enquiry into the return within 12 months of the date on which the return is received. After this date, HMRC cannot serve a notice of enquiry under s.9A and the return for the year is deemed final (subject only to the power in s.29 to make a further assessment where a loss of tax is discovered).

    iv) Section 33 and Schedule 1AB contain provision for claims to the recovery of overpaid income tax. Such claims may not be made more than 4 years after the end of the relevant tax year: see paragraph 3 of Schedule 1AB.

25. It is also common ground that none of these steps have been taken in respect of Mr Corcoran's self-assessments for the tax years 2014/15 and 2015/16 (i.e. the years which are the subject of the present claim).

Statutory debt

26. The taxpayer is statutorily obliged to pay income tax in accordance with their self-assessment. This obligation is contained in s.59B TMA.

27. Subsection 1 sets out the amount that "*shall be payable*" by the taxpayer. In summary, the taxpayer is required to pay the amount of income tax set out in their self-assessment, less any payments on account that they have already made in respect of the relevant tax year:

> "(1) Subject to subsection (2) below, the difference between—

> (a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and
>
> (b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,
>
> shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below."

28. Subsection 2 excludes from the amount payable any sums which have been deducted at source by the taxpayer's employer pursuant to the PAYE regulations.

29. Subsections 3 and 4 deal with the timing of payments. The applicable provision in this case is subsection 4, which provides that "*the difference shall be payable or repayable on or before the 31st January next following the year of assessment*".

30. Any income tax due under s.59B may be sued for and recovered by HMRC as a debt in civil proceedings in the County Court (s.66 TMA) or in the High Court (s.68 TMA). For example, s.68(1) TMA provides as follows:

> "Any tax may be sued for and recovered from the person charged therewith in the High Court as a debt due to the Crown, or by any other means whereby any debt of record or otherwise due to the Crown can, or may at any time, be sued for and recovered, as well as by the other means specially provided by this Act for levying the tax."

31. The statutory scheme further provides for the payment of interest on "*any income tax … which becomes due and payable in accordance with section 55 or 59B of this Act*" (s.86 TMA) and penalties for late payment (see paragraph 3 of Schedule 56 to the Finance Act 2009).

Discussion

32. Although I am very grateful for the full and detailed arguments which were addressed to me in writing and orally, I can decide this application fairly briefly. Despite the highly skilful submissions of Mr Ratan, I am satisfied that the Claimant has an arguable claim against HMRC and that I should order joinder.

33. The starting point, as Mr Ratan rightly pointed out, is the question of the obligation owed by Mr Corcoran, and whether XL can go behind that. This is because that issue forms a part of the analysis as regards both the proprietary claim and the equitable claim.

The obligation

34. On this point, it seems to me that HMRC's argument has somewhat of a "smoke and mirrors" character. HMRC looks to s.59B and says that this creates a real obligation, as real and as enforceable as any other.

35. I consider that it is well arguable that this is not the case, bearing in mind the statutory structure as applied to the rather unusual facts of this case. In particular, I accept the

submission that while the relevant provisions do create a statutory debt, s.59B does not itself create a liability, but rather deals with the mechanism by which tax becomes payable.

36. That reflects the distinction described by Lord Dunedin in *Whitney v Commissioners for the Inland Revenue* [1925] A.C. 37, p.52:

> "Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

37. That point has more recently been made by Lord Carnwath in *R (Derry) v HMRC* [2019] STC 926 at [20] (albeit in a case where the focus was on a different part of the TMA, Schedule 1B) "*The TMA, as its title implies, is concerned principally with the management of the tax rather than fixing liability*". The fact that *Whitney* was a very different case from the present (the point there being a submission that there was no liability to tax because of territorial limitations on the assessment machinery) is neither here nor there. What Lord Dunedin does, and Lord Carnwath does also, is to draw a distinction between the liability to tax and the mechanics of calculating the charge. That distinction is important here.

38. That point was in some respects not really in issue, in that it was accepted that the relevant provision which would have established a liability on the part of Mr Corcoran – that is, if there had been genuine dividends – was s.383 Income Tax (Trading and Other Income) Act 2005. That provides:

> "Charge to tax on dividends and other distributions
>
> (1) Income tax is charged on dividends and other distributions of a UK resident company.
>
> (2) For income tax purposes such dividends and other distributions are to be treated as income.
>
> (3) For the purposes of subsection (2), it does not matter that those dividends and other distributions are capital apart from that subsection."

39. As noted above, HMRC understandably made a number of points about the statutory scheme; for example that the argument advanced was inconsistent with the express terms of the statutory self-assessment regime and also its objectives (which include the public interest of the general body of taxpayers and the Exchequer in finality in fiscal transactions). It also cited the Court of Appeal in *Revenue and Customs Commissioners v Raftopoulou* [2018] EWCA Civ 818; [2019] 1 W.L.R. 1528 per David Richards LJ at [70]:

> "Parliament has set down in the self-assessment system carefully defined time limits for enquiries, assessments and claims which balance the need to

> give finality and certainty to taxpayers and the Exchequer, with the need to provide sufficient flexibility to ensure fairness in the system."

40. However these considerations generally proceed on the assumption that self-assessment sits on top of a genuine liability; it must be very rare, if not vanishingly so, for a person to declare in their self-assessment a liability which does not in reality exist.

41. In the rare situation where one does have an issue in relation to this first stage, the existence of any liability at all, that would seem to me arguably to logically undercut the structure which is then imposed on it, which structure only exists for the purposes of defining and quantifying the liability which in usual circumstances exists. Alternatively it is arguable that an issue as to the existence of the liability should do so when the issue arises not as between taxpayer and Revenue, but as between a third party and the Revenue. *Byrne v The Commissioners for Her Majesty's Revenue & Customs* [2017] UKFTT 0144 (TC) shows that difficulties may well arise for the taxpayer himself. In that case Mr Byrne sought belatedly to dispute income tax liability set out in his self-assessments on the asserted basis that the relevant income had in fact been received by a company that he beneficially owned and not by himself personally. His appeal was dismissed for a number of reasons, including that his self-assessment was conclusive of the matter (at [38]):

> "Mr Byrne was liable to pay the amounts shown on his self-assessment. It is irrelevant that he returned income that was not his own: the fact that he self-assessed himself to tax on that income means that the tax is payable."

42. Of course it makes perfect sense that there should be a tightly defined scheme as between the taxpayer and the authorities; but that scheme is predicated on the existence of a liability. The paradigm involves the existence of a liability which has to be determined and enforced. As Mr Ratan put it, the self-assessment provisions answer the question as to the amount of a liability owed. It would not, it seems to me, naturally come within the contemplation of the drafters that a taxpayer might for nefarious purposes declare a liability when there was none. Here, therefore, we are operating outside the paradigm upon which the self-assessment structure is predicated.

43. It must in my judgment be at least arguable that there can be no taxation, or that a *prima facie* liability to taxation can be unpicked, where there is no liability to tax. That is consistent with the decision in *Hillsdown Holdings plc and another v Inland Revenue Commissioners* [1999] STC 561 where Arden J held (at pp. 571-2), in the context of s.601 of the Income and Corporation Taxes Act 1988 and payments made where the recipient had not had a beneficial interest in the property received, that the law did not catch what was "*a fiction and not a fact*" and that "*they were not really payments at all in the eyes of the law*".

44. As in *Byrne* there may well be a reluctance to take this approach when the complaint is that of the taxpayer himself; one can see scope for reluctance to provide relief where a person has wittingly made a declaration in the context of the tightly circumscribed statutory scheme. But the logic underpinning it is sound.

45. While HMRC deprecated reference to certain foreign authorities, given the unusual facts of this case, I did find the reference to *Zobory v FCT* (1995) 129 ALR 484 helpful, as that was a case which bore something of a resemblance to the present case, at least

so far as the underlying facts are concerned. In that case Mr Zobory stole more than $1 million from his employer and invested it in interest-bearing accounts in his own name. He then filed income tax returns which showed interest earned on that money (his employer's money) as part of his own income. The question that arose was whether the income represented by the interest, although fully disgorged to the rightful owner of the moneys, was nevertheless taxable as the income of Mr Zobory, who had appealed his assessment. The Full Court of the Federal Court of Australia overturned the assessment. Speaking for the Court, Burchett J made reference to the "fundamental principle" that the Income Tax Assessment Act 1936 was "*directed to income to which a taxpayer is beneficially entitled.*"

46. Burchett J noted that the moneys taken from Mr Zobory's employer were held upon constructive trust of which the employer was the beneficiary and the income was thus that of the trust estate, and not Mr Zobory. For present purposes, of particular interest is the fact that the court also rejected a submission that since the applicant had purported to earn the income he must be taken to have derived it. Burchett J said:

> "I do not think the annual basis upon which the income of a taxpayer for a particular period is computed … requires the true facts to be ignored because not revealed until after the end of the year of income."

47. I acknowledge that the case, despite its factual similarities to the present one, concerned a rather different live issue. And to the extent the point in this case is considered it is not absolutely clear in XL's favour; the *Zobory* case alludes to problems where, as here, a constructive trustee asserts that assets are his own in his dealings with the revenue authorities. In the US it would appear that this has taken the form of arguments about a "claim of right". However at the very least this authority demonstrates that difficult issues can arise; that is consistent with the conclusion I reach as to the arguability of the point, based on the statutory structure here in the unusual circumstances.

48. Here I am faced with arguments raised by HMRC about the clear wording of the TMA in creating a statutory debt arising out of the self-assessment, which are then reinforced by the authorities. So, HMRC relied on the judgment of Fancourt J in *Goldsmith v Revenue and Customs Commissioners* [2019] UKUT 325 (TCC); [2019] S.T.C. 2512 noting that s.59B of the TMA "*establishes a debt in respect of tax contained in a person's self-assessment*".

49. However while I see Mr Ratan's point that on one level that case might seem a stronger case than the present for any argument impugning the debt, (because HMRC there knew the amount of the debt) there is an element of comparing apples and oranges. That was a case between taxpayer and HMRC where the issue arose in a different context, the issue being one about validity of notices, and the passages quoted are not close to being part of the ratio; they simply formed part of the unexamined backdrop to the actual issue. Similarly so in *Revenue and Customs Commissioners v Harris* [2011] EWHC 3094 (Ch), another case to which Mr Ratan referred me.

50. Overall it does seem to me to be arguable that – at least in circumstances where there was in truth no underlying liability, and where the challenge is brought not by the taxpayer but by the beneficial owner of the moneys in question – the Court may be prepared to unravel this structure by an appropriate means. Whether it will do so may

well turn on the more detailed facts, and there may be more than one route to arrive at the result; but these are issues which I view as clearly arguable.

51. This kind of nuanced approach can be seen, albeit in a rather different context, in certain of the bankruptcy cases. The Insolvency Act s.266(3) gives the court a discretion to dismiss a bankruptcy petition or to stay proceedings on the ground that there has been a contravention of the rules or for any other reason. As Fletcher, *Law of Insolvency* (5th ed), notes at paragraph 6-104, this enables the court to go behind judgments of other courts:

> "This court, although of course unable to quash the effects of a judgment emanating from some other court, is nevertheless able to exercise total control over the admissibility of such a judgment for bankruptcy purposes, and therefore may "go behind" the judgment, and inquire into the circumstances in which it was obtained, and if it so decides it may refuse to accept the judgment debt, or to make a bankruptcy order in respect of any petition founded on it."

52. One reason for the power is to evade collusive or bogus default judgments. In *Lam v Inland Revenue* [2005] EWHC 592 (Ch) Blackburne J specifically reserved the position as to whether the court might go behind an assessment which "*had been made in some fraudulent or collusive way, or there were some other glaring miscarriage of justice*". That approach was endorsed in *Vieira v Revenue and Customs Commissioners* [2017] EWHC 936 [2017] 4 WLR 86 at [84] by Arnold J. While this is not a case of collusion the artificiality of the debt relied upon provides a resonance here.

53. Also of interest is the case of *Autologic Holdings v Inland Revenue* [2005] UKHL 54, [2006] 1 AC 118 where Lord Nicholls said at [15]:

> "Lord Wilberforce's formulation indicates that, apart from cases of straightforward abuse, there is an area where the court has a discretion. In *Glaxo Group Ltd v Inland Revenue Comrs* [1995] STC 1075, 1083-1084, Robert Walker J put the matter this way:
>
> "It is not easy to discern any clear dividing-line between High Court proceedings which are, and those which are not, objectionable as attempts to circumvent the exclusive jurisdiction principle. Possibly the correct view is that there is an absolute exclusion of the High Court's jurisdiction only when the proceedings seek relief which is more or less co-extensive with adjudicating on an existing open assessment: but that the more closely the High Court proceedings approximate to that in their substantial effect, the more ready the High Court will be, as a matter of discretion, to decline jurisdiction."
>
> I respectfully agree with this approach, …"

While that case was a very considerable distance from this on the facts, being concerned with questions of the intersection of group tax relief and Community law, that dictum considers the question of discretion broadly and suggests at least the possibility of a nuanced approach in cases which are some very considerable distance from adjudicating between the parties on an existing open assessment.

54. One other possible route to saying that this distinction is permissible in this case – and one which is consistent with both the wording of the TMA and the approach in the cases such as *Byrne* where challenges have failed – is to say that the debt is created solely as between the taxpayer and the revenue. There is certainly some appearance of this in the wording of the relevant sections. So section 9ZA(1) of the TMA, says: "*A person may amend his return under section 8 or 8A of this Act by notice to an officer of the Board.*" Section 9ZA(2) then says: "*An amendment may not be made more than twelve months after the filing date.*" It thus deals with a specific procedure whereby the taxed individual can alter his assessment.

55. This finds an echo in the "taxpayer-focussed" approach of Mr William Trower QC (sitting as a Deputy High Court Judge) in *Revenue and Customs Commissioners v Harris*:

> "The taxpayer's obligation to pay the amount contained in the self-assessment is set out in sections 59A and 59B of TMA…
>
> The principle is applicable whatever the nature of the issue that is said to justify a conclusion that the debt ought not to have arisen. […] The underlying principle is a broad one: does the issue raised by the taxpayer amount in substance, whether or not in form, to an appeal against the assessment? If it does, the court will not inquire into the matter because that might lead to the negation of an assessment otherwise than in accordance with the statutory code"

56. There is of course an obvious tension in this argument, in that a key question both for the unjust enrichment claim and for the defence of *bona fide* purchaser, although raised from the point of view of XL versus HMRC remains: were Mr Corcoran's payments made pursuant to a valid legal obligation to pay? That of course is a question which focuses both on Mr Corcoran's position, and on the mechanism within the TMA, but it does so not at his own instance but at the instance of a third party who stands outside the mechanisms both of assessment and challenge.

57. Mr England rightly drew my attention to the decision in *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29. That was a case which involved a statutory scheme for the recovery of VAT. Section 80 of the Value Added Tax Act 1994 was held to create an exclusive regime for the recovery of overpaid VAT whether the supplier (i.e. the taxpayer) or the consumer (i.e. the third party affected) made the claim. However I am not persuaded that it offers anything of a road block to the argument here; that was a case where the legislation expressly made provision for the recovery of overpaid tax to a third party consumer; against that background the conclusion that there was an exclusive regime made perfect sense. As noted above, in the context of income tax paragraph 4 of Schedule 1AB expressly provides that tax paid by a taxpayer on behalf of a third party will not be recoverable by the taxpayer under Schedule 1AB.

58. As I have noted there therefore seems to me to be, purely analytically, space for challenge to the existence of a genuine obligation in the circumstances of this case, regardless of the statutory structure. That view is only reinforced when one returns to the "sense check" posed by XL. XL says that one way or another, the fallacy of HMRC's position can be seen if one makes just a small tweak to the facts. Suppose for

example, XL had a common law claim for conversion, where Mr Corcoran stole XL's car and left it in HMRC's car park and, as a payment in kind for tax, HMRC seized the car. In those premises, XL's claim would have nothing whatsoever to with Mr Corcoran's assessment. Why then should matters be different here?

59. While I accept entirely Mr Ratan's admonishment that results-based reasoning is to be deprecated (*inter alia* by reference to *ITC* at [39]) I conclude that the position as to whether there is a liability, or a liability which is relevant for the purposes of these claims, is one which is very much arguable, and that the bigger picture cross-check only serves to reinforce that view.

Unjust enrichment

60. Against this backdrop, I can take the arguments as to the unjust enrichment claim very quickly. HMRC submitted that the claim is flawed. It contends that the case law makes clear that: (1) a recipient of money is not enriched if the payment is made pursuant to a valid legal obligation to pay; and (2) in any event, the receipt of money in satisfaction of such an obligation is not unjust.

61. Particular reference was made to the decision of the Privy Council in *DD Growth Premium 2X Fund (in liquidation) v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36. That was a case where some investors in DD Growth decided to exercise rights to have their shares redeemed in the wake of the Lehman crisis. The money ran out before all the investors were paid and DD went into liquidation. The liquidators tried to reclaim the sums already paid out. The Privy Council, rejecting the attempt, said at [62]:

> "It is fundamental that a payment cannot amount to enrichment if it was made for full consideration; and that it cannot be unjust to receive or retain it if it was made in satisfaction of a legal right. As Professor Burrows has put it in his *Restatement of the English Law of Unjust Enrichment* (2012), para 3(6), "in general, an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid contractual, statutory or other legal obligation". The proposition is supported by more than a century and a half of authority […]"

62. However this is to an extent a bootstraps argument. It can be seen that this structure hinges on the first point – a valid legal obligation to pay, in that both enrichment and the question of injustice look back to that. If, as indicated above, the argument that there is a legal right which can stand against a third party is questionable, there is an argument as to enrichment. If there is arguably enrichment (i.e. if there was no legal right) that enrichment is at least arguably unjust.

63. I would add that while the decision in *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29 [2018] AC 275 was drawn to my attention by Mr England, and while I accept the point made by Mr Ratan that the issue there was not as to unjust enrichment but as to the sufficiency of the connection where there was an intervening transaction, I accept the submission that that case would seem to offer some marginal assistance to XL in its arguments as to causation; though that point was not separately solidly in issue.

The proprietary claim

64. HMRC's attack on the equitable proprietary claim was essentially similar. It contended that HMRC gave value because it received Mr Corcoran's income tax payments in discharge of his valid legal obligation to pay them. That argument relied on the authorities which say that the satisfaction of a debt constitutes good consideration for this purpose.

65. Mr Ratan referred me to *Thorndike v Hunt* (1859) 3 De G. & J. 563 per Knight Bruce LJ at 570 and *Taylor v Blakelock* (1886) 32 Ch. D. 560 per Cotton LJ at 568 and Bowen LJ at 570. These were cases where a trustee of two trusts effectively "robbed Peter to pay Paul" – using the money of Trust 2 to pay off Trust 1 when his abstractions from Trust 1 came to light. Both cases hold that Trust 2 cannot reclaim the money, because the beneficiaries of Trust 1 did give value in that they gave up a valuable right to sue the wrongdoer.

66. Reference was also made to the recent decision of the Privy Council in *Re Stanford International Bank Ltd (In Liquidation)* [2019] UKPC 45 at [69], where those authorities were cited with approval.

67. The submission made is one which plainly has some force. However those are cases which arose in very different circumstances. Further, to the extent that a broad proposition (i.e. one applicable to this self-created statutory debt) is said to be capable of being drawn from these authorities, I regard that proposition as highly questionable. Such a proposition is in tension with the passage in Snell's Equity (34th Edition) at [4-022] quoted by the Claimant. That passage on "purchaser for value" begins: "*[a] purchaser is a person who acquires an interest in property by grant rather than operation of law. Thus it does not include a squatter, a trustee in bankruptcy or an execution creditor.*"

68. I consider that there is greater force in the submission for the Claimant that HMRC's argument is not dissimilar to the squatter example given by Snell when illustrating a situation when the defence will not apply, i.e. a squatter who had previously been evicted from a premises until such time as he or she asserted his or her rights against the property owner. The passage of time might well convey certain rights upon the squatter, but this does not give rise to any claim that he or she is "a purchaser". I do not accept HMRC's submission that this is a "novel and distant" analogy.

69. So too is there a similarity to a situation where a benefit is conferred in exchange for a nominal consideration, which Snell also regards as falling outside the *bona fide* purchaser doctrine; a view echoed in *Grupo Torres v Al Sabah* [1999] CLC 1469 at 1674.

70. The Claimant gives the further example of a defaulting trustee who misappropriates £10 and uses this to pay off a bank overdraft of £5. While HMRC decries this as not a true analogy, its attack on it depends again on the underlying integrity of the debt, which I have already held is questionable in the absence of a genuine liability.

71. The reality of the situation is that, as the Claimant submitted, HMRC at least arguably does not have a real debt owed to it because the alleged tax is based on fictitious figures. It is thus seeking to retain the money as tax by bare operation of law, i.e. by praying in

aid the time bar applied to the mechanisms for adjusting tax returns in the TMA, which certainly appear primarily designed to draw a line as between taxpayer and Revenue.

72. I note in this connection that the *Thorndike* and *Taylor* cases on which HMRC relies have been doubted by at least one modern writer (the author of the passage in Mumford and Grant, *Civil Fraud* paragraph 23-029 describes them as "surprising").

73. An alternative way of approaching this (which reaches the same result) is, as the Claimant submits, to say that Mr Corcoran's liability under s.59B was "voluntarily created" and that the discharge of such liability should not therefore be regarded as good consideration for the purposes of the *bona fide* purchase defence. While HMRC contends that liability to pay income tax in accordance with a self-assessment under s.59B is not "voluntarily created" in any material sense and that Mr Corcoran was statutorily obliged to complete a self-assessment return and to include in that return an assessment of the income tax payable, that begs the question. Mr Corcoran could and should have returned a self-assessment which showed no liability to tax in relation to the sums he is said to have abstracted from the Claimant. He had no such liability. To the extent that he created a statutory debt in a greater sum, he was a volunteer. There is therefore a perfectly sound analogy with the voluntary execution of a deed.

74. Further, I do accept the submission that such cases as *Diplock v Wintle (and associated actions)* [1948] Ch 465 and *Menelaou v Bank of Cyprus UK Ltd* [2016] AC 176, which suggest that the court will be looking for true value being given in return for the creation of the obligation, align with this argument. In the first case, the defendant charities had received cheques from the executors of an estate pursuant to a testamentary bequest that was held to be invalid. The next-of-kin brought a number of claims against the charities to recover the sums paid. The Court of Appeal held that the defendant charities were volunteers and had not provided any consideration.

75. In *Menelaou* the defendant's parents sold their house and used part of the proceeds to purchase another property in the defendant's name. The defendant was nominally the purchaser of the second property, but the sale was arranged by her father and was in substance a gift from her parents. The claimant bank had a charge over the parents' home. The bank agreed to the release of their charge on the basis that they would acquire a new charge over the daughter's property. In the event, the bank released its charge over the parents' property but the new charge over the daughter's property proved to be defective. The bank therefore brought a claim against the daughter, asserting a charge over the daughter's property by way of subrogation.

76. The *bona fide* purchase defence does not appear to have been argued, and the enrichment in question was rather different. However the fact that Lord Clarke expressed the view at [36] that the defendant was not a *bona fide* purchaser for value because "*(s)he was a mere donee and, as such, can be in no better position than her parents as donors*" and that Lord Neuberger expressed the same view at [70] on the basis that the defendant "*received the freehold as a gift from her parents*" does, in my judgment, appear to demonstrate that the courts will conduct a search for value in this context (which seems logically correct).

77. For the reasons given above I accept the submission that the case advanced by the Claimant is arguable. I also note that in a context where a number of the decisions in question remain highly controversial (see for example Stevens *The Unjust Enrichment*

Disaster LQR 2018 574-601, which specifically takes issue with aspects of *ITC* and *Menelaou*), that conclusion is the less surprising.

Subrogation

78. So far as subrogation is concerned, I do consider that these submissions do not materially add to the arguments set out above regarding good consideration and *bona fide* purchase, because subrogation is a remedy, not a cause of action: see *Boscawen v Bajwa* [1996] 1 WLR 328 per Millett LJ at 335C.

79. I would also tend to accept the submission that the claim for subrogation does not sit within the recognised boundaries of the remedy, essentially for the reasons outlined in Mr Ratan's skeleton argument. However on the basis that I am granting permission to amend and that subrogation is part of the remedy spectrum which is potentially available, I am not minded to refuse permission to amend to seek subrogation, if on reflection the Claimant wishes to pursue this. It is a matter which will not add materially to the ambit of the trial.

Conclusion

80. Having concluded that, despite Mr Ratan’s best efforts, there is an arguable case as between the Claimant and HMRC, the question remains whether I should accede to the Claimant’s application and order joinder. That question was not seriously in issue, and rightly so.

81. The interesting and potentially difficult issues which arise are best suited to being determined with the full factual backdrop available – this is an area where it is possible that details as to the facts may have an impact on precisely where a line falls to be drawn. That full factual backdrop is best elucidated in this action. Further as the Claimant submitted, it is desirable to resolve any tracing issues and bind the relevant parties in these proceedings.