Neutral Citation Number: [2024] EWCA Civ 995

Case No: CA-2023-002357

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**INSOLVENCY AND COMPANIES LIST (ChD)**
**Steven Gasztowicz KC (sitting as a Deputy High Court Judge)**
**Case No: CR-2023-006028**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/08/2024

**Before:**

**LORD JUSTICE LEWISON**
**LORD JUSTICE NEWEY**
and
**LORD JUSTICE LEWIS**

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**Between:**

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| **THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS** | **Petitioners/ Appellants** |
| **- and -** | |
| **PAYROLL & PENSION SERVICES (PPS UMBRELLA COMPANY) LIMITED** | **Respondent** |

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**Matthew Parfitt** (instructed by **The General Counsel and Solicitor to HM Revenue and Customs**) for the **Appellants**
**Timothy Harry and Ben Elliott** (instructed by **Noble Solicitors**) for the **Respondent**

Hearing date: 23 July 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 23 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Lord Justice Newey:**

1. The question raised by this appeal was whether Mr Steven Gasztowicz KC ("the Judge"), sitting as a Deputy High Court Judge, was right to require the appellants, HM Revenue and Customs ("HMRC"), to give an unlimited cross-undertaking in damages when he acceded to HMRC's application for the appointment of provisional liquidators in respect of the respondent, Payroll & Pension Services (PPS Umbrella Company) Limited ("the Company").

2. At the conclusion of the hearing, we told the parties that the appeal would be dismissed. These are my reasons for joining in that decision.

## Facts

3. In November 2023, HMRC presented a petition for the winding-up of the Company on the basis that it was indebted to HMRC in the sum of £7,390,282.54 in respect of national insurance contributions ("NICs") for the years 2017-2018 to 2023-2024 and was unable to pay its debts. The petition was sealed on 6 November.

4. By then, HMRC had applied without notice for the appointment of provisional liquidators. The application was the subject of a hearing before the Judge on 2 and 9 November 2023.

5. HMRC's skeleton argument for the hearing before the Judge explained the nature of the Company's business in these terms:

> "The Company's business is as an 'umbrella company'. The Company acts as the employer for various agency staff placed by employment agencies. The Company charges the employment agencies, who are its customers. The Company administers the payroll functions for the employees and pays the employees their wages. The Company is liable to account for PAYE income tax and NIC contributions (both employer's and employees' NICs), and also to account to HMRC for the VAT it must charge on the payments it receives from its customers."

6. The skeleton argument went on to explain that the winding-up petition was founded on employer's NICs. This was said:

> "The Company appears to have committed 'labour supply fraud'. This is a relatively unsophisticated fraud, which involves charging sums to customers made up of the gross wages due to the Company's employees and the tax on those wages, but failing to pay the tax across to HMRC. The aim of the fraud is to remain undetected indefinitely, or at least long enough to obtain a significant amount of money at the expense of honest taxpayers."

It was argued that provisional liquidators should be appointed for "two main purposes: preserving the Company's assets and securing its books and records".

7. Giving judgment on 9 November 2023, the Judge explained that he was satisfied that the appointment of provisional liquidators was the appropriate course, subject to HMRC giving a cross-undertaking in damages. Mr Matthew Parfitt, who appeared for HMRC (as he also did before us), had submitted that HMRC should not be required to provide such an undertaking. The Judge, however, concluded that there should be such an undertaking and made the appointment of provisional liquidators conditional on one being given.

8. The Judge stated in paragraph 69 of his judgment ("the Judgment") that, "[w]hether the giving of [a cross-undertaking in damages] is the starting point or not, it is right in my judgment that [HMRC] should give it in the circumstances of this case". As, however, the Judge went on to explain, he in fact did "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": see paragraph 70. After discussing relevant authorities, the Judge said:

> "99. [A]ny 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.
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> 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.
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> 101. It is true that HMRC is a public authority charged with the responsibility of assessing people to tax and collecting tax due.
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> 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.
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> 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."

9. The Judge added in paragraph 111 of the Judgment:

> "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."

10. In the light of the Judgment, HMRC gave an unlimited cross-undertaking in damages and, by an order dated 9 November 2023, provisional liquidators were appointed. By the present appeal, however, HMRC challenged the Judge's decision to require the provision of a cross-undertaking.

11. The petition for the winding-up of the Company came on for hearing before Mr David Halpern KC, sitting as a Deputy High Court Judge, in June 2024. Giving judgment on 19 July, Mr Halpern held that the petition should be dismissed. It was the Company's case that most of those in respect of whom it provided payroll services were self-employed rather than employed and so that NICs were not due as HMRC alleged. Mr Halpern accepted that there was scope for argument on the point. He said in paragraph 33 of his judgment ([2024] EWHC 1861 (Ch)):

> "In conclusion, it is not necessary for me to reach a final decision as to whether the Workers were employees of the Company. The conclusion I have reached is that there is a bona fide dispute (or, more accurately, that HMRC have failed to satisfy me that there is no bona fide dispute), for the following reasons:
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> i) The specimen contract which I have seen between the Company and a Worker does not contain the provisions one would expect to find in a contract of employment.
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> ii) HMRC will have an uphill struggle in seeking to displace the natural meaning of the specimen contract. That exercise would require an examination of the factual matrix and might also require cross-examination.
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> iii) On the present evidence I am unable to reach a concluded view that the specimen contract is a sham.

> iv) Mr Ajibola [i.e. the Company's sole director and shareholder] says that the 98% of the Workers who elected to become self-employed did so on the terms of the specimen contract. I have seen no evidence to the contrary.
>
> I reach this conclusion with no great satisfaction, given my finding that there appears to have been a fraud of some sort in which the Company is involved."

12. With regard to Mr Halpern's reference to "a fraud of some sort", he had said this earlier in his judgment:

> "I am satisfied that the four sources of evidence relied on by HMRC are strong prima facie evidence of a fraud which was committed by the Company (acting by Mr Ajibola) or in which the Company at least participated. I am satisfied that the Company has produced documents which contradict one another and it does not appear that this was attributable to innocent error or mere incompetence. I do not accept Mr Ajibola's attempt to excuse the Company's conduct in producing these contradictory documents …. However, what is less clear is whether this was an apparent fraud by the Company alone or whether it was perpetrated in conjunction with the Workers and/or the Agencies. No Workers or Agencies are before the court and hence they have had no opportunity to explain themselves. Further, I would be reluctant to make a final finding of dishonesty without Mr Ajibola having the opportunity to give oral evidence."

13. The question whether the Company is liable for outstanding NICs will now, as I understand it, be the subject of an appeal to the First-tier Tribunal (Tax Chamber).

## The statutory framework

14. Section 135 of the Insolvency Act 1986 ("the 1986 Act") empowers the Court to appoint a provisional liquidator at any time after a winding-up petition has been presented.

15. Sections 122 to 124C of the 1986 Act explain who may present a winding-up petition and on what grounds. By sections 122 and 124, a creditor may present a petition on the ground that the company is unable to pay its debts and, by section 123, a company will be deemed to be unable to pay its debts if, among other things, the value of its assets is proved to be less than the amount of its liabilities. It is also possible for the Secretary of State to petition in some circumstances. In particular, section 124A provides that, where it appears to the Secretary of State from certain materials that it is expedient in the public interest that a company be wound up, he "may present a petition for it to be wound up if the court thinks it just and equitable for it to be so". HMRC, too, have recently acquired the ability to present a winding-up petition for public interest reasons, but only in the very limited circumstances specified in section 85 of the Finance Act 2022. That section applies where it appears to an officer of

HMRC that it is "expedient in the public interest, for the purposes of protecting the public revenue", that a promoter of tax avoidance schemes (or a body connected with one) should be wound up.

## Authorities

16. As a general rule, a petitioner seeking the appointment of a provisional liquidator is required to give a cross-undertaking in damages. The position is similar to that where a party seeks an interim injunction. In *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, [2016] 1 WLR 160 ("*Pugachev*"), Lewison LJ noted at paragraph 68 that the "default position is that an applicant for an interim injunction is required to give an unlimited cross-undertaking in damages", that being "regarded as the price for interfering with the defendant's freedom before he has been found liable for anything".

17. As, however, Lewison LJ observed in *Pugachev* later in paragraph 68, "[t]his price is not exacted when the applicant is a law enforcement agency simply enforcing the law in the public interest". That exception was the subject of analysis by the House of Lords in *F. Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 ("*Hoffmann-La Roche*"). In that case, a statutory instrument limiting the prices which could be charged for some drugs had been made following a report by the Monopolies Commission. Certain drug companies having indicated that they would not comply with the regulations, the Secretary of State sought an injunction prohibiting them from charging higher prices. The House of Lords held by a majority that the Secretary of State was entitled to the injunction without giving a cross-undertaking in damages. Lord Diplock drew a distinction between "law enforcement action" and claims relating to proprietary or contractual rights. He said at 362-363:

> "My Lords, now that the Crown no longer enjoys its former general immunity from legal liability for damages apart from those which were recoverable by and in accordance with the special procedure of petition of right, I see no reason why, when the Crown applies for an interlocutory injunction in an action brought against a subject to enforce or to protect its proprietary or contractual rights (jus privatum), the Crown should not be put upon the same terms as a subject as respects the usual undertaking as to damages.
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> The instant case, however, is not an action to enforce a jus privatum of the Crown. It falls into another category that has no counterpart in ordinary litigation between subject and subject. It is what may conveniently be called a 'law enforcement action,' in which civil proceedings are brought by the Crown to restrain a subject from breaking a law where the breach is harmful to the public or some section of it but does not necessarily affect any proprietary or contractual rights of the Crown. Its purpose is to enforce or to protect jus publicum."

At 364, Lord Diplock said:

> "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."

18. Lords Reid, Morris and Cross also considered that the Secretary of State should not be required to give a cross-undertaking in damages.

19. The "law enforcement action" exception was considered by the Supreme Court in *Financial Services Authority v Sinaloa Gold plc* [2013] UKSC 11, [2013] 2 AC 28 ("*Sinaloa*"). There, the Financial Services Authority ("the FSA") obtained a freezing injunction under section 380(3) of the Financial Services and Markets Act 2000 ("the 2000 Act") in proceedings in which it alleged that the defendants had been involved in the unauthorised sale of shares in breach of the 2000 Act. It was held that no cross-undertaking in damages need be given, Lord Mance (with whom Lord Neuberger, Baroness Hale, Lord Clarke and Lord Sumption agreed) considering that "there is no general rule that an authority like the FSA acting pursuant to a public duty should be required to give such an undertaking, and … there are no particular circumstances why it should be required to do so in the present case": see paragraph 1. Lord Mance said in paragraph 33:

> "Ultimately, there is a choice. Either the risk that public authorities might be deterred or burdened in the pursuit of claims in the public interest is accepted as a material consideration, or authorities acting in the public interest must be expected generally to back their legal actions with the public funds with which they are entrusted to undertake their functions. That latter approach could not be adopted without departing from the *Hoffmann-La Roche* case, and the *Hoffmann-La Roche* case draws a distinction between public and private claims which depends upon accepting the former approach. 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 …. I accept its general appropriateness."

As regards the position of the FSA, Lord Mance said in paragraph 36:

> "The present case resembles the *Hoffmann-La Roche* [1975] AC 295, *Kirklees* [*Metropolitan Borough Council v Wickes Building Supplies Ltd*] [1993] AC 227, [*Director General of Fair Trading v*] *Tobyward* [*Ltd*] [1989] 1 WLR 517 and [*Securities and Investment Board v*] *Lloyd-Wright* [1993] 4 All ER 210 cases. It is a case of a public authority seeking to enforce the law by the only means available under the governing statute. 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. It is necessary to consider the circumstances to determine whether a cross-undertaking should be required in this particular case."

20. Some years earlier, Neuberger J (as he then was) had discussed in *Customs and Excise Commissioners v Anchor Foods Ltd* [1999] 1 WLR 1139 whether the Commissioners of Customs and Excise, who had issued proceedings to recover sums alleged to be owed in respect of customs duties, should be required to give a cross-undertaking in damages where they were seeking injunctive relief restraining the defendant from disposing of its business. Neuberger J decided that a cross-undertaking should be given. He said at 1152:

> "As to the requirement of a cross-undertaking, it seems to me that, on the spectrum of types of case where the Crown seeks relief, this is neither at the law enforcement extreme (as in *In re Highfield Commodities Ltd.* [1985] 1 W.L.R. 149) nor is it at the other, proprietary right enforcement, extreme (to adopt the expressions of Lindsay J.); however, it is right to say that it is significantly nearer the former than the latter. I would accept that, in a more normal case than this where Customs are seeking an injunction to prevent an arguable dissipation of assets by a person who does or may owe duty or VAT, it would ordinarily not be right to require a cross-undertaking in damages from Customs. In principle Customs would be seeking to protect their ability to recover sums publicly due. However, on the unusual facts of this case, I consider that, in the absence of such a cross-undertaking in damages, it would be oppressive on A.F.L. if I were to grant the Mareva injunction. I have in mind the speculative nature of Customs' case, the openness and absence of improper motive on the part of A.F.L., the independent valuations obtained of A.F.L., the risk of substantial and otherwise uncompensatable potential damage to

> A.F.L. and the fact that the relief is ancillary to Customs' primary function."

21. Post-*Sinaloa*, first instance judges have expressed conflicting views as to whether HMRC should be required to give a cross-undertaking in damages in relation to the grant of interim relief. It suffices, I think, to refer to two of the decisions: *Re Parkwell Investments Ltd* [2014] EWHC 3381 (Ch), [2014] BCC 721 ("*Parkwell*") and *Abbey Forwarding Ltd v Revenue and Customs Commissioners* [2015] EWHC 225 (Ch) ("*Abbey Forwarding*").

22. In *Parkwell*, HMRC had presented a winding-up petition on the basis that the company owed VAT and had obtained the appointment of a provisional liquidator. Sir William Blackburne declined to make continuation of the provisional liquidation conditional on HMRC providing a cross-undertaking in damages. He identified the issue as follows in paragraph 96:

> "At the heart of the argument before me was whether it was appropriate to require a public body, such as HMRC, to give such an undertaking. The general rule of practice followed by the courts is that where in support of proceedings brought by a public body to secure enforcement of the law or in pursuance of a public duty interim relief is granted against another, for example a freezing injunction, that body will not normally be required to provide an undertaking in damages. This stands in contrast to a private litigant pursuing his private interest where the almost invariable practice is to require such an undertaking. The rationale behind this is that whereas a private litigant has a choice (guided no doubt by what he regards as being in his own best interests) whether to litigate and if so whether to apply for interim relief, a public body, discharging a public function or duty, does not. This practice, which is not absolute, is well established in the authorities. But, as the authorities show, the rule of practice is not cut and dried. The question here is whether it should apply to HMRC acting as collectors of the public revenue, and even if it otherwise should whether it should apply where the interim relief claimed is likely to have (and has had) such a terminal effect on the company's trading."

In paragraph 100, Sir William Blackburne said:

> "the main thrust of the argument which [counsel for the company] advanced was that HMRC should be treated like any private litigant petitioning for the winding-up of a company for non-payment of a debt and that other, lesser, interim remedies should have been considered. I do 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."

23. *Parkwell* can be contrasted with *Abbey Forwarding*. Differing from Sir William Blackburne, David Richards J (as he then was) said this:

> "166. I acknowledge the force of the points made and relied on by Sir William Blackburne. 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 *Revenue and Customs Comrs v Rochdale Drinks Distributors Ltd* [2012] STC 186 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.
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> 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 *Financial Services Authority v Sinaloa Gold plc* [2013] 2 AC 28. 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* [1975] AC 295. So far as relevant to applications for the appointment of a provisional liquidator, the decision in the *Sinaloa Gold* case adds little to the position existing before then save to re-assert the decision in the *Hoffmann La-Roche* case 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 the *Rochdale Drinks* case."

24. Earlier in his judgment, in paragraph 154, David Richards J had said this:

> "The position of HMRC, as the public authority charged with the responsibility for assessing persons to tax and collecting tax due, was not considered in *Financial Services Authority v Sinaloa Gold plc* [2013] 2 AC 28. They may be thought to occupy a middle ground between law enforcement action as discussed in that case and purely private litigation. The fact that the Crown is the claimant does not of course mean that it cannot bring what is essentially private litigation. If for example it brings proceedings for breach of contract and seeks a freezing order against the defendant on the grounds of a threat of dissipation of assets, it would I think be treated as in the same way as an ordinary private litigant, even though the contract may itself have been made pursuant to the exercise of public law functions. HMRC are in a different position, because when they bring proceedings they do so in order to collect tax, which is essentially a public function. However, HMRC do not do so as a public law enforcement agency. Assessments to tax, when notified to the taxpayer, are deemed to create debts which HMRC then collect as a creditor. It was in the capacity as a contingent or prospective creditor that HMRC presented the winding up petition in the present case. The bringing of proceedings which in ordinary litigation would require the giving of an undertaking in damages is not the only means open to HMRC to fulfil this function. They can enforce payment in the usual way, by serving the assessment on the taxpayer and, subject to an appeal to the First-tier Tribunal, exercise their statutory rights of enforcement and/or bring court proceedings either to obtain judgment or to wind up or make bankrupt the taxpayer."

## HMRC's case in outline

25. Mr Parfitt argued that in the circumstances of this case HMRC should be seen as within the "law enforcement action" category or sufficiently close to it that no cross-undertaking in damages should be required. He pointed out that HMRC are involuntary creditors and have statutory functions as regards tax. He accepted that, even so, routine collection of tax might be seen as akin to ordinary civil litigation, but he submitted that there is a public interest in pursuing companies which (as is the case with the Company) are believed to be fraudulently abusing the tax system. Obliging HMRC to give a cross-undertaking in such a case, Mr Parfitt said, would tend to deter HMRC from taking steps to stop the fraud and to recover lost tax. That would be especially so since HMRC would have to make provision for any potential liability on a cross-undertaking, however unlikely it might be that one would materialise, in circumstances where their resources are finite. Mr Parfitt stressed that HMRC do not have first claim on the tax they collect but a budget like any other Government department. Further, Mr Parfitt suggested that in *Abbey Forwarding* David Richards J had attached too much weight to the *form of originating process* (viz. a creditor's petition) as opposed to the substance of what HMRC were seeking to achieve.

## Discussion

26. HMRC are charged by statute with the collection and management of both a variety of taxes and NICs: see section 1 of the Taxes Management Act 1970 and section 3 of the Social Security Contributions (Transfer of Functions, etc) Act 1999. The mere fact, however, that HMRC have been given responsibility for collecting tax and NICs cannot of itself absolve them from giving cross-undertakings in damages. If it were otherwise, HMRC would not be obliged to provide a cross-undertaking even where there is no question of fraudulent abuse of the tax system.

27. Nor can the fact that HMRC are acting with a view to achieving public benefit necessarily mean that no cross-undertaking should be required. A Government department which brings proceedings to vindicate proprietary rights or to assert a contractual claim will normally be seeking to improve the financial position of the public purse, and so to be acting for the benefit of the public, but it may be asked to provide a cross-undertaking in the same way as any other litigant. As Lord Diplock said in *Hoffmann-La Roche*, there is "no reason why, when the Crown applies for an interlocutory injunction in an action brought against a subject to enforce or to protect its proprietary or contractual rights (jus privatum), the Crown should not be put upon the same terms as a subject as respects the usual undertaking as to damages". Public bodies such as HMRC can be expected to seek to advance the public interest. It does not follow, however, that all legal proceedings they initiate represent "law enforcement action" in respect of which no cross-undertaking in damages is needed.

28. It is true that, whereas the Crown has a choice as to whether to enter into a contract, HMRC are involuntary creditors: they have no say in whether a person conducts himself in such a way as to incur a tax liability. Someone to whom money is owed as a result of a tort might also, however, be classed as an involuntary creditor, yet a grant of interim relief in his favour will commonly be conditional on the provision of a cross-undertaking in damages.

29. As David Richards J observed in *Abbey Forwarding*, at paragraph 166, HMRC's position cannot be equated with that of "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". In *Sinaloa*, the FSA had been given an express power to seek injunctive relief and was acting in fulfilment of public duties "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". In contrast, aside from the ability to present a public interest petition in particular circumstances recently conferred by section 85 of the Finance Act 2022, HMRC have not been given any special power to present a winding-up petition, to apply for the appointment of a provisional liquidator or (unlike the FSA) to seek injunctive relief. HMRC have the same remedies available to them as other creditors and there is in their case nothing comparable to the "regulatory objectives" which applied to the FSA under sections 2 to 6 of the 2000 Act.

30. Doubtless, HMRC hoped that, by presenting a winding-up petition against the Company and applying for the appointment of provisional liquidators, they would bring to an end the fraudulent abuse of the tax system that they perceived. However, they brought the proceedings in the capacity of creditors and applied for provisional

liquidators for the purposes of "preserving … assets and securing … books and records" rather than to shut down the business. The petition was avowedly presented by HMRC as creditors, not as a "law enforcement agency". Nor is this merely a matter of form. On any view, HMRC were acting to recover, or to limit the extent to which they might lose, money. Unlike those at issue in, say, *Hoffmann-La Roche*, *Sinaloa* or *Re Highfield Commodities Ltd* [1985] 1 W.L.R. 149 (which concerned a petition presented by the Secretary of State on public interest grounds), the present proceedings were not aimed at preventing breaches of the law which could cause the public loss or damage independently of any suffered by an emanation of Government. In *Hoffmann-La Roche*, 90% of the relevant sales were to the National Health Service and so the Department of Health and Social Security had a substantial financial interest (see Lord Wilberforce at 356), but, even so, enforcement of the price limits for which the statutory instrument provided did not affect just the Government: Lord Diplock observed at 370 that the "sum involved in sales to private patients" could not be "brushed aside as de minimis" and Lord Cross spoke at 372 of "the special interest which the 10 per cent. of private purchasers have in seeing that this order is enforced".

31. On top of that, winding-up proceedings were not the only option open to HMRC in the present case. They could, if they had wished, have issued an ordinary civil claim.

32. In short, I agree with the Judge that this 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*, and they are not public law enforcement proceedings". In the circumstances, the Judge was right to insist on the provision of a cross-undertaking in damages.

33. I also agree with the Judge that it was not appropriate to cap HMRC's potential liability under their cross-undertaking. HMRC would plainly have the means to meet any award pursuant to the cross-undertaking. If the exposure under such an undertaking gives rise to budgetary issues for HMRC, that is essentially the consequence of internal Government accounting. It does not provide a good reason for limiting the extent to which a company put into provisional liquidation should be able to obtain compensation for loss it has suffered.

## Conclusion

34. It was for these reasons that I concluded that the appeal should be dismissed.

**Lord Justice Lewis:**

35. I agree with both judgments and I agree that this appeal should be dismissed for the reasons given by Lewison and Newey LJJ.

**Lord Justice Lewison:**

36. I agree with the judgment of Newey LJ which reflects the reasons why I joined the decision to dismiss the appeal. But in view of the importance of the issue, I add a judgment of my own.

## Background

37. The liability on which HMRC rely is a liability to pay earnings related National Insurance contributions. The contributions payable by an employer become due by the 19th day of the month: Social Security (Contributions) Regulations 2001 Sched 4 para 10. If the contributions are not paid, HMRC have the same remedies for their recovery as they have for the recovery of unpaid tax: 2001 Regulations Sched 4 para 16.

38. Those remedies include an action in debt either in the county court (Taxes Management Act 1970 s 66) or the High Court (1970 Act s 68) or distraint (1970 Act s 61); although the last of these is now the taking of control of goods under the procedure laid down by the Tribunals and Enforcement Act 2007.

39. HMRC also, of course, have the remedies given by the general law to creditors. They include the presentation of a winding up petition in its capacity as creditor and the application for the appointment of a provisional liquidator. It is those remedies that they have chosen to deploy.

40. There is power under section 124A of the Insolvency Act 1986, in certain circumstances, to petition for winding up on the ground that it is "expedient in the public interest". But that is a power that Parliament has given only to the Secretary of State. It is not one available to HMRC. HMRC does have a power under section 85 of the Finance Act 2022 to present a winding up petition on the ground of public interest. But that power is limited to a "relevant body" (which in effect means a company that promotes tax avoidance schemes).

## Public authorities in proceedings

41. The modern cases on which HMRC rely all concern the question whether a cross-undertaking ought to be given by a public authority bringing "law enforcement actions" on the grant of an interlocutory injunction in the course of such proceedings. It will be necessary to examine exactly what they decide.

42. As a general proposition, however, a public authority does not have a protected status in litigation. The question arose in the context of costs in *Competition and Markets Authority v Flynn Pharma Ltd* [2022] UKSC 14, [2022] 1 WLR 2972. That was a case in which the Authority had unsuccessfully defended an appeal against a fine imposed by the Authority for contravention of competition law. There is no doubt that in so doing the Authority was acting in what it perceived to be the public interest. The Supreme Court held that the Competition Appeal Tribunal was entitled to take the view that costs followed the event. What is of interest for this case, however, are Lady Rose's more general observations. At [97] she said:

> "In my judgment, there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest."

43. At [132] she approved the decision of this court in *Re Southbourne Sheet Metal Co Ltd* [1993] 1 WLR 244 (a directors' disqualification case) and in particular the

judgment of Beldam LJ. Beldam LJ referred to the decision in *Re Highfield Commodities Ltd* [1985] 1 WLR 149 (which was a case of a public interest petition to wind up) and said:

> "Sir Robert Megarry V-C drew a distinction valid in that case between the position of the Crown pursuing litigation for a proprietary claim and litigation pursued in the performance of a statutory duty to bring proceedings in the public interest. The distinction was valid in that case, but it appears unfortunately to have given rise to the convenient phrase "public interest litigation" which has then been uncritically extended to provide an entirely unwarranted public interest immunity for the consequences of unjustified initiation of such proceedings which, it must be assumed, is also to be regarded as in the public interest. I can think of no practice less in the public interest or more calculated to encourage indiscriminate initiation of proceedings at the unjustifiable expense of an individual."

44. Lady Rose continued at [133]:

> "The High Court has regarded the prospect of an adverse costs order as beneficial on the basis that it will encourage better decision-making within government, a more realistic appraisal by the respondent department of the merits of defending any particular application and the efficient and proportionate conduct of proceedings. It is also considered just that a person wronged by the actions of a public body should be reimbursed his or her costs. Thus, Lord Neuberger MR said in *R (M) v Croydon London Borough Council* [2012] 1 WLR 2607, para 52, that the costs follow the event rule applied in the Administrative Court just as much as to other parts of the civil justice system and it made no difference that a defendant was a public body:
>
> "The court's duty to protect individuals from being wronged by the state, whether national or local government, is every bit as vital as its duty to enable them to vindicate their private law rights. And the fact that the defendants are public bodies should make no difference, as Pill LJ explained in the *Bahta* case [2011] 5 Costs LR 857, para 60.""

45. The importance of the court's duty to prevent individuals from being wronged by the state is echoed in *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] 1 AC 853. That was a case in which a registration authority had revoked a licence for a registered care home under the Registered Homes Act 1984. The revocation was undoubtedly (as far as the authority were concerned) in the public interest. The revocation followed a without notice application to a magistrate for cancellation of the licence. No notice was given to the owners of the care home. The result was the immediate shut down of the business. The owners successfully appealed the decision, but the appeal was not heard until over four months later by which time their business

had been ruined. The question for the House of Lords was whether they had a cause of action in tort. Although the House of Lords said "no", they were very concerned about the lack of procedural safeguards. At [16] Lord Scott placed particular importance on the practice in the High Court of requiring a cross-undertaking in damages (which was not available to the magistrate). Having concluded that the authority owed no duty of care to the owners, he said at [37]:

> ".. there is, in my opinion, as I hope I have made clear, a lamentable lack in the statutory procedures prescribed for section 30 applications of reasonable safeguards for the absent respondents against whom these applications, *ex parte* and without notice, can be made. …The remedy lies, surely, in the amendment of the procedures so as to incorporate safeguards on the lines of those that attend applications in the High Court for *ex parte* orders. My opinion that the role of the magistrate is, by itself, an inadequate safeguard against injustice to absent respondents is not based on any adverse opinion of the quality of magistrates but rather on the inability of any judge hearing an *ex parte* application in the absence of the respondent to guard against potential injustice. A judge, or magistrate, may often be sceptical as to whether assertions of imminent risk of disaster made by an applicant for an *ex parte* order are well founded but, lacking any means of testing them and faced with the possibility that they may be well founded, has often no real alternative but to accept them at their face value and to make the order sought.
>
> [38] The remedy for this does not, in my opinion, lie in the creation and imposition on the registered authority of an inappropriate duty of care owed to the proprietors of the nursing homes in question. It lies in the formulation and application of procedural safeguards comparable to those attendant upon *ex parte* applications in the High Court. The Secretary of State has power, under section 9(2) of the Protection of Children Act 1999, by regulations to "make provision about the proceedings of the tribunal" before which now, under the Care Standards Act 2000, appeals against orders made by magistrates under section 20 of that Act, replacing section 30 of the 1984 Act, must be brought. It is doubtful whether this power would permit the Secretary of State to make a regulation enabling the tribunal to grant a stay of a magistrate's order pending the hearing of an appeal. But procedure for an expedited appeal could surely be provided. As to the proceedings in the magistrates' court, a discretionary power for magistrates to require cross-undertakings in damages to be given by applicants for *ex parte* orders, coupled with means of enforcement, would be an obvious and important procedural safeguard."

46. It is quite clear, to my mind, that he saw no impediment to requiring a cross-undertaking in damages from an authority purporting to act in the public interest.

## The injunction cases

47. I turn then to the injunction cases. The first is *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295. Following a report by the Monopolies Commission Parliament approved a statutory instrument requiring pharmaceutical companies to reduce the price of certain drugs. The companies challenged the legality of the order and, in the meantime, refused to comply with it. The Secretary of State applied for an injunction restraining the companies from charging more than the limits contained in the order. The application was made under section 11 of the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 which provided:

> "… compliance with any such order shall be enforceable by civil proceedings by the Crown for an injunction or for any other appropriate relief."

48. The House of Lords held that since the passing of the Crown Proceedings Act 1947 there could be no blanket rule precluding the exaction of a cross-undertaking in damages from the Crown as the price of an interlocutory injunction. Lord Reid (at 341D), Lord Morris (at 352 A-D) and Lord Diplock (at 364 A-E) all laid stress on the fact that enforcement by injunction was expressly provided for in the statute. Lord Diplock distinguished between proceedings to enforce what he called "jus privatum" and what he called "jus publicum". The former was concerned with vindicating the Crown's "proprietary or contractual rights" (363 A). As to the latter he said (363 B):

> "The instant case, however, is not an action to enforce a jus privatum of the Crown. It falls into another category that has no counterpart in ordinary litigation between subject and subject. It is what may conveniently be called a "law enforcement action," in which civil proceedings are brought by the Crown to restrain a subject from breaking a law where the breach is harmful to the public or some section of it but does not necessarily affect any proprietary or contractual rights of the Crown. Its purpose is to enforce or to protect jus publicum."

49. It is important, in my view, to see that Lord Diplock said that the action in that case had no counterpart in ordinary litigation between subject and subject. That is not the case where HMRC, as creditor, apply for the appointment of a provisional liquidator. That remedy is equally available to a private entity.

50. In *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227 local authorities brought proceedings for injunctions to restrain breaches of the Sunday trading laws imposed by the Shops Act 1950. Section 7 of the Act imposed on the local authorities a duty to enforce the Act within their district; and section 222 of the Local Government Act 1972 empowered them to bring proceedings by way of injunction. Lord Goff considered *Hoffmann-La Roche* and held that it applied not only to the Crown but also to "other public authorities when exercising the function of law enforcer in the public interest". One of the arguments that he rejected was that

proceeding by injunction was not the only method of enforcement. But the reason why alternative methods (i.e. by prosecution) were not persuasive was because "no other proceedings will be effective to enforce the law" (at 274-5).

51. The final case at the highest level *is Financial Services Authority v Sinaloa Gold plc* [2013] UKSC 11, [2013] 2 AC 28. Under section 380 (3) of the Financial Services and Markets Act 2000, Parliament enacted a specific power which enabled the court to grant a freezing order on the application of the FSA. At [30] and [31] Lord Mance distinguished between private litigation and public law enforcement action. He described the latter at [31] in the following terms:

> "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."

52. Importantly, however, as he recorded at [32] that distinction was not in issue. The only question for the court was whether the same reasoning applied to a cross-undertaking designed to protect third parties. The court held that it did. Lord Mance explained at [33]:

> "For reasons indicated in para 31 above, there is in my view a more general distinction between public and private claims. Ultimately, there is a choice. Either the risk that public authorities might be deterred or burdened in the pursuit of claims in the public interest is accepted as a material consideration, or authorities acting in the public interest must be expected generally to back their legal actions with the public funds with which they are entrusted to undertake their functions. That latter approach could not be adopted without departing from the *Hoffmann-La Roche* case, and the *Hoffmann-La Roche* case draws a distinction between public and private claims which depends upon accepting the former approach. 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."

53. The potential for deterrence is plainly of importance here. That potential (sometimes called "the chilling effect") was a factor that the Supreme Court considered in the *Flynn Pharma* case. It was in that context that Lady Rose made the observations I have quoted.

54. We are of course bound by the decision in the *FSA* case, even though it has been the subject of criticism: Zuckerman on Civil Procedure (4th ed) paras 10.162 to 10.173; Spry on Equitable Remedies (9th ed) p 502; Varuhas and Turner *Injunctions, undertakings in damages and the public-private divide* (2014) LQR 33. But I do not think that we should be keen to extend the ambit of that decision.

## The appointment of a provisional liquidator

55. The appointment of a provisional liquidator is, in my view, qualitatively different from the grant of an interim injunction. The grant of the latter is designed to hold the ring while the underlying dispute is determined. The grant of the former is almost invariably the instant death of a trading company. The drastic nature of the appointment of a provisional liquidator was highlighted by this court in *HMRC v Rochdale Drinks Distributors Ltd* [2011] EWCA Civ 1116, [2013] BCC 419. At the time when *Rochdale Drinks* was decided it was the practice of HMRC to offer a cross-undertaking on the appointment of a provisional liquidator. The court plainly considered that such a cross-undertaking was rightly offered.

56. Mr Parfitt submitted that HMRC consider carefully whether to apply for the appointment of a provisional liquidator, and do so only where they suspect tax fraud. I am willing to accept that submission, but it does not answer the question. The cross-undertaking in damages will not be enforced if HMRC's suspicions are well-founded. The problem arises precisely in cases where they are not. In *Rochdale Drinks* this court held that in order to apply for the appointment of a provisional liquidator it is not enough to show a good prima facie case that a winding up order would be made. It is necessary to show that it is likely that such an order would be made. But even the raising of the bar to an appointment does not solve the problem. HMRC will be able to show that a winding up order is likely to be made simply on the basis that unpaid tax is owed, even without wider allegations of tax fraud.

57. Since the decision of the Supreme Court in the *FSA* case, a difference of view has emerged. In *Re Parkwell Investments Ltd* [2014] EWHC 3381 (Ch), [2014] BCC 721 a provisional liquidator was appointed on the application of HMRC without requiring a cross-undertaking. On an application to discharge the provisional liquidators Sir William Blackburne declined to require a cross-undertaking to be given. Although he acknowledged at [95] that that was the course usually followed, he concluded at [100]:

> "In any event, the main thrust of the argument which Mr Lilly advanced was that HMRC should be treated like any private litigant petitioning for the winding-up of a company for non-

> payment of a debt and that other, lesser, interim remedies should have been considered. I do 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."

58. I do not agree. In the case of insolvency proceedings Parliament has clearly considered who ought to be able to present petitions in the public interest. That person is primarily the Secretary of State. HMRC has a similar power, but only in tightly defined circumstances. Since Parliament has limited the circumstances in which a petition may be presented on public interest grounds, I do not consider that the scope of those grounds should be extended by the courts. The remedies which Parliament has given to HMRC are those of any ordinary creditor. Even if HMRC were suing on an express contract, any debt or damages collected would be held for public benefit. So the mere fact that the fruits of litigation augment the public purse cannot justify the immunity of HMRC from giving the cross-undertaking. Nor, in my view does a broad appeal to the public interest. As Zuckerman on Civil Procedure (4th ed) points out at para 10.167 if the town hall has been occupied by squatters, the local authority cannot abandon the premises. It has a public duty to recover possession of the town hall for the benefit of the public. So to conclude would sweep away the distinction drawn between private law proceedings and public law enforcement mandated by *Hoffmann-La Roche*. It would give HMRC an immunity which other litigants do not enjoy. It is, of course, true that liability to pay tax (or social security contributions) does not arise out of an obligation freely undertaken. But nevertheless, Parliament has chosen to categorise that liability as, or as analogous to, a debt.

59. By contrast, in *Hoffmann-La Roche*, *Kirklees* and *FSA* the claimants were each exercising a specific statutory power to seek an injunction for the purpose of enforcing the law. Those powers were not available to a private entity. These cases also concerned the grant of an interim injunction; not the appointment of a provisional liquidator. The appointment of a provisional liquidator is, as I have said, qualitatively different from the grant of in interim injunction. The appointment of a provisional liquidator in most cases amounts to the instant and irreversible death of the company.

60. David Richards J considered *Parkwell* in *Abbey Forwarding Ltd v HMRC* [2015] EWHC 225 (Ch), [2015] Bus LR 882. At [101] he, too, rejected the analogy between the appointment of a provisional liquidator and the grant of an interim injunction. The former was "sui generis". At [105] he said that there were two separate elements in HMRC's case for the appointment of a provisional liquidator. On the one hand there was their claim to be a creditor. On the other, there were the allegations of fraud. At [154] he considered HMRC's capacity in bringing the claim. He said:

> "The position of HMRC, as the public authority charged with the responsibility for assessing persons to tax and collecting tax due, was not considered in *Financial Services Authority v Sinaloa Gold plc* [2013] 2 AC 28. They may be thought to occupy a middle ground between law enforcement action as discussed in that case and purely private litigation. The fact that

> the Crown is the claimant does not of course mean that it cannot bring what is essentially private litigation. If for example it brings proceedings for breach of contract and seeks a freezing order against the defendant on the grounds of a threat of dissipation of assets, it would I think be treated as in the same way as an ordinary private litigant, even though the contract may itself have been made pursuant to the exercise of public law functions. HMRC are in a different position, because when they bring proceedings they do so in order to collect tax, which is essentially a public function. However, HMRC do not do so as a public law enforcement agency. Assessments to tax, when notified to the taxpayer, are deemed to create debts which HMRC then collect as a creditor. It was in the capacity as a contingent or prospective creditor that HMRC presented the winding up petition in the present case. The bringing of proceedings which in ordinary litigation would require the giving of an undertaking in damages is not the only means open to HMRC to fulfil this function. They can enforce payment in the usual way, by serving the assessment on the taxpayer and, subject to an appeal to the First-tier Tribunal, exercise their statutory rights of enforcement and/or bring court proceedings either to obtain judgment or to wind up or make bankrupt the taxpayer."

61. He then turned to consider *Parkwell*. Having set out Sir William's reasoning at some length he declined to follow it. As he explained at [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 *Financial Services Authority v Sinaloa Gold plc* [2013] 2 AC 28. 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* [1975] AC 295. So far as relevant to applications for the appointment of a provisional liquidator, the decision in the *Sinaloa Gold* case adds little to the position existing before then save to re-assert the decision in the *Hoffmann La-Roche* case 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 the *Rochdale Drinks* case. 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."

62. I entirely agree. Departure from the well-established practice of requiring a cross-undertaking in damages on the appointment of a provisional liquidator where the applicant is HMRC seeking to recover unpaid tax would, in the words of Beldam LJ, confer on HMRC an entirely unwarranted public interest immunity for the consequences of unjustified initiation of such proceedings; and would encourage indiscriminate initiation of proceedings at the unjustifiable expense of an individual.

**A limited cross-undertaking?**

63. Mr Parfitt did suggest that if HMRC were to be required to give a cross-undertaking as the price for the appointment of a provisional liquidator, it should be subject to a financial limit. A limited cross-undertaking is sometimes accepted from an office holder (e.g. a liquidator or trustee in bankruptcy) seeking an interim injunction to protect the insolvent estate. The office holder has no personal interest in the case and is bringing the action on behalf of others. But even in such a case that is by no means an invariable practice where there are substantial creditors who could be expected to stand behind the office holder: see *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, [2016] 1 WLR 160 at [68] to [86].

64. One major problem for HMRC in the present case is that there was no evidence addressed to this question. Although Mr Parfitt made some submissions about the relationship between HMRC and HM Treasury, there was no material before the court on which those submissions were based. Nor could Mr Parfitt identify what the cap should be.

65. He did at one stage suggest that the cap should be the aggregate of (a) the value of the company over which the provisional liquidator was appointed and (b) the costs and expenses of the provisional liquidator. That was a figure that HMRC could estimate in advance. But in most cases that is likely to be the measure of loss recoverable under the cross-undertaking anyway, so HMRC would have at least a broad outline of their potential exposure. And in cases where the loss turned out to be greater, I cannot see that protecting HMRC trumps fairness to the company.

66. I would reject this argument.

**Result**

67. It was for these reasons, as well as those given by Newey LJ, that I joined in the decision to dismiss the appeal.