Neutral Citation Number: [2023] EWHC 1188 (Ch)

Case No: HC-2015-002989

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Chancery Division

Rolls Building
Fetter Lane
London, EC4A 1NL

Date:19 May 2023

Before :

MR NICHOLAS THOMPSELL

Sitting as a Deputy Judge of the High Court

- -

Between :

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Claimant/ Respondent**
- and -	
PARUL KESHAVLAL MALDE	**Defendant/ Applicant**

- -
- -

Mr Christopher Brockman and Mr Ben Hayhurst (instructed by The Commissioners for His Majesty's Revenue & Customs) for the Claimant/ Respondent

Mr Howard Watkinson and Mr Simon Gurney (instructed by Freeths LLP) for the Defendant/Applicant

Hearing dates: 3-4 April 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR NICHOLAS THOMPSELL
sitting as a Deputy Judge of the High Court

MR NICHOLAS THOMPSELL:

1. INTRODUCTION

1. This hearing relates to a substantial and long-running claim made against the Defendant, Mr Malde, by the Claimant, the Commissioners for His Majesty's Revenue and Customs ("**HMRC**"). The claim is based on Personal Liability Notices ("**PLNs**") and a Director's Liability Notice ("**DLN**") that were issued to him in respect of the activities of two entities: Sintra SA and Sintra Global.

2. HMRC alleges that these entities were engaged in alcohol diversion fraud; the entities were liable to pay VAT and excise duty on goods owned by them which were said to have been smuggled into the UK; and that Mr Malde was the controlling mind behind each entity. HMRC assessed both entities for VAT and excise duty and consequent penalties and sought to make Mr. Malde personally liable for penalties in a claim amounting to some £22,500,000.

3. Mr Malde successfully appealed the assessments in the First Tier Tribunal (**FTT**), with the result that currently there are no outstanding assessments against him.

4. Since July 2015 Mr Malde has been subject to a freezing injunction made by this court preventing him from dealing with his assets.

5. On 15 December 2022, I first heard Mr Malde's application, made by notice dated 21 November 2022, to lift the stay on proceedings, dismiss the claim made against him by HMRC and to discharge the freezing injunction. HMRC had objected to this on the grounds that it is appealing the FTT decision. I learned on the day of that hearing that it had been given permission to do so. HMRC argued that, as a result, the matter is not yet finally determined and the freezing injunction remained necessary to prevent a real risk of dissipation of Mr Malde's assets so that he would be unable to meet the assessments against him if HMRC is successful in its appeal.

6. At that hearing, in an *ex tempore* judgment (see *HMRC v Malde* [2022] EWHC 3430 (Ch)), I determined that (i) a previous stay on proceedings should be lifted for the purposes of hearing this application; (ii) Mr. Malde's application to dismiss the proceedings (on the grounds that, the original claim supporting the FI were the PLNs and DLN and that the result of the FTT decision was that these notices were no longer valid after the FTT's decision) be refused; and (iii) Mr. Malde's application to discharge the freezing injunction be adjourned to a two-day hearing; and I gave directions for that hearing.

7. In deciding whether the order should be discharged or extended in such circumstances it was, and remains, common ground that I should apply the test outlined in *Novartis AG v Hospira* (UK) Ltd [2014] 1 W.L.R. 1264. In that case Floyd LJ summarised as follows the principles which apply to the grant of an interim injunction pending appeal where the claimant has lost at first instance:

   (1) The court must be satisfied that the appeal has a real prospect of success.

   (2) If the court is satisfied that there is a real prospect of success on appeal, it will not usually be useful to attempt to form a view as to how much stronger the prospects of appeal are, or to attempt to give weight to that view in assessing the balance of convenience.

(3) It does not follow automatically from the fact that an interim injunction has or would have been granted pre-trial that an injunction pending appeal should be granted. The court must assess all the relevant circumstances following judgment, including the period of time before any appeal is likely to be heard and the balance of hardship to each party if an injunction is refused or granted.

(4) The grant of an injunction is not limited to the case where its refusal would render an appeal nugatory. Such a case merely represents the extreme end of a spectrum of possible factual situations in which the injustice to one side is balanced against the injustice to the other.

(5) As in the case of the stay of a permanent injunction which would otherwise be granted to a successful claimant, the court should endeavour to arrange matters so that the Court of Appeal is best able to do justice between the parties once the appeal has been heard.

8. HMRC had applied for, and had received permission, to appeal to the Upper Tribunal on six grounds of appeal and I considered, and still consider, it appropriate to treat this appeal as equivalent to an appeal in these courts and to apply the *Novartis* test accordingly.

9. At the short hearing in December I considered that I did not have the time to determine for the purposes of the first of the *Novartis* principles whether the appeal had a real prospect of success. Also, whilst I was able to determine that, in the absence of the freezing injunction, there remained a real risk of dissipation, I did not consider that there was time or evidence to consider properly the balance of convenience or the issue as to whether the circumstances justified a departure from the starting point established in *Financial Services Authority v Sinaloa Gold Plc* [2013] 2 A.C. 28. (***Sinaloa***) that where a claimant is a public body such as HMRC performing its public functions, that the body should not be required to provide a cross-undertaking in damages as the price for a freezing injunction.

10. I considered that there would need to be an adjournment for this to be dealt with in a two-day hearing. That hearing is the subject of this judgment.

11. The hearing was heard remotely over two days, although the first morning was needed for me to read into the voluminous bundles and authorities provided to me. I was greatly assisted in the hearing by counsel. It is a testament to the extent and complexity of the issues that each side was represented by two counsel. Mr Howard Watkinson and Mr Simon Gurney represented Mr Malde (with the latter taking the lead in relation to explaining Mr Malde's case before the Upper Tribunal, and the former dealing with other areas of law). Mr Christopher Brockman and Mr Ben Hayhurst represented HMRC (with Mr Hayhurst taking the lead in relation to explaining HMRC's case before the Upper Tribunal, and Mr Brockman dealing with other areas of law). I am grateful to all counsel for their helpful skeleton arguments and for their ability to condense detailed and subtle arguments within the short time allowed by the hearing.

2. MR MALDE'S CASE

12. As set out in his counsels' very helpful and detailed skeleton argument, Mr. Malde submits, in summary, that the freezing injunction should be discharged because:

(1) HMRC’s Grounds of Appeal to the Upper Tribunal do not have a real prospect of success;

(2) in any event the balance of hardship falls in Mr. Malde's favour;

(3) in any event:

(i) the freezing injunction continuing to July 2024 and beyond breaches the reasonable time guarantee in Article 6 of the European Convention on Human Rights (**ECHR**);

(ii) the Court is bound to avoid such a breach and so it would be unlawful for the Court to extend the freezing injunction; or

(iii) if the Court concludes that it could extend the freezing injunction without itself acting unlawfully that there must in any event be an effective remedy for such a breach, and the only effective remedy for the breach here is to discharge the freezing injunction.

(4) In the alternative, if the court determined that the freezing injunction should continue, Mr. Malde's submission was that it should only be permitted to continue:

(i) to the date of the hand down of the Upper Tribunal decision; and

(ii) if a cross-undertaking in damages is provided by HMRC, backdated to the date of the original freezing injunction; and

(iii) with a significant variation to increase Mr. Malde's monthly allowance being permitted, reflected in a yearly allowance instead, to significantly mitigate both the ongoing harshness of the order and recent rampant inflation, and to afford him some flexibility in expenditure.

13. As the Article 6 ECHR point goes straight to the heart of the question whether I should be considering extending the freezing injunction at all, I will deal with that point first before considering the elements of the *Novartis* test.

3. MR MALDE'S ARTICLE 6 RIGHTS

(A) APPLICATION OF ARTICLE 6

14. It was common ground that the PLNs and DLNs amount to criminal charges for the purposes of Article 6 ECHR. *Customs and Excise Commissioners v. Han & Yau*; [2001] EWCA Civ 1048, [2001] 4 All ER 687 was correctly cited as authority for this proposition.

15. As was found in *Lloyd v Bow Street Magistrates Court* [2003] EWHC 2294 (Admin) at [14], Article 6(1) applies to all stages of criminal proceedings. In that case it was extended to apply to confiscation proceedings. I accept that it applies to the freezing injunction in this case.

16. Mr Malde submits that even if the court concludes that (i) HMRC's Grounds of Appeal have a real prospect of success, and (ii) the balance of hardship falls in HMRC's favour, the freezing injunction should be discharged because its continuance breaches the reasonable time requirement in Art.6(1) ECHR:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time…".

17. An accused in criminal proceedings should be entitled to have his case conducted with special diligence and Article 6 is, in respect of criminal matters, designed to avoid a situation in which a person charged should remain too long in a state of uncertainty about his fate (see for example *Cusko v. Latvia* [2017] ECHR 1109 at [44]).

18. Certainly, it is true that Mr Malde has been subject to these proceedings for a long time (so far, well over seven and a half years) and could be subject to them for a further substantial period.

19. HMRC's appeal to the Upper Tribunal is not due to be heard until July 2024. Thereafter time will be required for judgment. There may be a further appeal from the Upper Tribunal to the Court of Appeal. If HMRC succeeds in its appeal, bearing in mind the complaints it makes in its grounds of appeal about the treatment of the evidence, it seems likely that the matter will be remitted for a fresh determination at the FTT.

20. At the current rate of progress, it could then be something like a further 18 months before any FTT hands down a decision on a remitted appeal, and this may be appealed again by either party, and appealed onwards. If the freezing injunction is not discharged at some point in this odyssey, it is not beyond the realms of possibility that it could be in place for more than 12 years before matters are resolved. There is at the minimum a quantifiable delay until at least Autumn 2024 by which time, if the freezing injunction remained in place, it would have been in place for over nine years. If the freezing injunction were to be kept in place for the remainder of the possible proceedings that might ensue after that, there is a further unquantifiable delay that could conceivably result in a freezing injunction to have been in place for anything up to 14 or 15 years.

21. Mr Malde's argument is that the freezing injunction is ancillary to the criminal proceedings in the FTT and Upper Tribunal, albeit it has required the formal step of filing a claim in this Court to found the jurisdiction to make the freezing injunction. The actual final determination of Mr. Malde's civil rights and obligations under the freezing injunction is therefore currently tied, inextricably, to the criminal FTT and Upper Tribunal proceedings.

22. Mr Malde's counsel argue, and I agree, that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants (see, for example, *Bullen and Soneji v UK* [2009] ECHR 28).

23. Mr Malde's counsel produced an interesting academic comparison of the decisions of the European Court of Human Rights (**ECtHR)** up to 2012 in the *New Journal of European Criminal Law*, Vol. 5, Issue 1, 2014) (the **NJECL article**). In dealing with assessment of a reasonable length for proceedings, this article says (at section 3.2):

> "According to the ECtHR's constant case law which has been reaffirmed in the Grand Chamber judgements *McFarlane v Ireland*[1] and *Idalov v Russia*[2], the length of the proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: (1) what is at stake for the applicant, (2) the complexity of the case, (3) the conduct of the applicant and (4) the conduct of the relevant authorities ….

[1] *McFarlane v Ireland* (Grand Chamber), No. 3133/06, 10 September 2010, at [140]
[2] *Idalov v Russia* (Grand Chamber), No. 5826/03, 22 May 2012, at [186]

> Moreover, whilst not expressly mentioned as criteria *per se* by the Court, the number of domestic jurisdictions before which the proceedings have been pending is also taken into account …".

24. It seems to me that the complexities in this case certainly go towards justifying the length of the proceedings at least up to the present period.

25. First I am told that this is either the longest or second longest case to have been heard in the FTT and I accept that it is at the upper end of complexity in relation to such cases.

26. Mr Malde's counsel argue, citing *Beggs v UK* [2012] ECHR 1868 (***Beggs***), that complexity of a case, on its own, cannot justify the length of proceedings. In that case at [238] the court said

> "The complexity of the case, while an important factor in assessing the reasonableness of the length of the appeal proceedings, cannot of itself justify appeal proceedings which lasted for over 10 years. Of particular relevance in the present case is therefore the conduct of the parties."

27. The NJECL article (at 3.3.3) also deals with this point and acknowledges that the court usually states a position that the complexity of the case, on its own, cannot justify the length of proceedings. However it goes on to note that

> "Yet in *Breinesberger and Wenzelhuemer v Austria*[3], in which the Court examined quite surprisingly the reasonableness of the length of the proceedings under the 'not manifestly ill-founded' admissibility requirement (pursuant to Article 35(3)(a) ECHR), the Court concluded that the length of the proceedings (7 years and 5 months across three levels of jurisdiction) was reasonable, principally on the basis of the complexity of the case."

28. *Beggs* can be distinguished from the case before me on two grounds. First the defendant was remanded in custody during the period and in that case faced possible life imprisonment whereas Mr. Malde is at liberty and faces a financial penalty only (albeit potentially a very high one). Secondly, in *Beggs* the court was focussed on time-wasting by the authorities and the court (see [238] onwards) and I consider that it is the court's findings of unjustified delays on the part of the authorities that provide the context of the above remark. By contrast, I see little evidence of a dilatory approach either on the part of HMRC or His Majesty's Courts and Tribunals Service (**HMCTS**) in this case.

29. Certainly I do not agree that HMRC can be blamed for serious and significant delays on the part of HMRC as prosecutor of these penalty charges in the FTT or that HMCTS has been responsible for inordinate delay to date. Both parties produced detailed chronologies of the case to date. For me the salient facts arising out of these chronologies are that:

    (1) Something like 15 months of the delay (between 15 October 2015 and 16 January 2017) was occasioned by the Sintra companies' unsuccessful hardship appeal.

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[3] *Breinesberger and Wenzelhuemer v Austria* (decision), No. 46601/07, 27 November 2012, at paras 30–33

(2) HMRC suggested, in July 2019, a final hearing listing in the FTT in March 2020. This was put back to 14 September 2020 on the basis of the availability of Mr Malde's counsel.

(3) Owing to issues arising from the COVID pandemic, the parties jointly applied for that date to be vacated and relisted for 28 March 2022, Mr Malde having declined an earlier offered date of March to June 2021 on the basis of his counsels' availability.

30. It could be taken then that, in addition to the 15 months of delay caused by the hardship application, the two year delay between the first offered date for the FTT listing in March 2020 and the date on which the matter was finally heard by the FTT at the end of March 2022 was owing to a combination of COVID and Mr Malde's own requests based on the availability of his counsel.

31. Looking forward, it seems that the lengthy delay before the further appeal can be heard in the Upper Tribunal is mostly due to the restricted availability of Tribunal slots for a 5 day hearing and partly due to difficulties with the availability of counsel on both sides. Both sides joined in an application for expedition, but a slightly earlier date was not taken on the grounds of the availability of counsel. It is notable that Mr Malde has not yet pressed his Article 6(1) rights in relation to the timing of the Upper Tribunal hearing, and I agree with the argument advanced on behalf of HMRC that that is the more appropriate forum in which to air that argument.

32. Mr. Malde's counsel submit that it is quite obvious that to have a draconian freezing injunction in place for more than nine years is a breach of the reasonable time requirement in Article 6(1). I do not find this obvious. My view is that the delay up to the anticipated Upper Tribunal decision is not such to breach the reasonable time requirement under Article 6(1). In reaching this view I have taken account of the circumstances of the case; what is at stake for Mr Malde; the conduct of Mr Malde; and the conduct of HMRC and of HMCTS. I have had regard especially to the complexity of the case and, importantly, the fact that little of the delay up to now can be attributed to inaction on the part of HMRC or HMCTS, as well as the point that the case involves three jurisdictions (the FTT, the Upper Tribunal and the High Court).

33. This matter may require review again after the Upper Tribunal decision is known, but up to this point I consider that the reasonable time requirement under Article 6(1) is not breached, and therefore I do not need to deal with the consequences of such a breach.

34. I would add that if Mr Malde is concerned about the delay in having the Upper Tribunal hear HMRC's appeal, he should renew his application for expedition and ask HMCTS for the earliest possible date, irrespective of the convenience of counsel on any side mentioning his concerns that any further steps after that hearing may take the matter beyond the reasonable time requirement under Article 6(1). Both sides also should consider whether, if HMRC is successful in the Upper Tribunal, they should seek for the Upper Tribunal to resolve all matters rather than referring the matter back to the FTT.

3. DOES THE APPEAL HAVE REAL PROSPECTS OF SUCCESS?

35. Having rejected Mr Malde's case as regards Article 6(1), I turn to the first limb of the *Novartis* test: whether the appeal has real prospects of success.

36. The parties were at odds as to whether the test of "*real prospects of success*" in *Novartis* posed for a claimant wishing to retain a freezing injunction was already demonstrated to have been satisfied by the fact that an appeal to the Upper Tribunal had been allowed.

37. HMRC pointed out that an appeal to the Upper Tribunal from a decision of the FTT can only be made on a point of law (see section 11(1) Tribunals, Courts and Enforcement Act 2007). Permission to appeal may be given if the applicant identifies a point of law in the decision and it is arguable that the FTT made an error in relation to that point of law.

38. HMRC argued that this test for leave to appeal (that of an arguable case) was very similar to the test involved in the first limb of *Novartis* (that of a real prospect of success) and that in practice the FTT and the Upper Tribunal when deciding whether to give permission to appeal consider whether the applicant for permission has a real prospect of success. HMRC cited examples where this seemed to be the case. These included:

    (1) the FTT case of *HMRC v CCA Distribution Limited* (case number PTA/360/2013) where the FTT Chamber President had noted in another Permission to Appeal decision,

        > "In deciding whether to grant permission to appeal, I take account of the likely prospects of success…I would not grant permission if I were to consider that the appeal does not have a real prospect of success"

    (2) Lord Hodge's remarks in an immigration case (*AB Petitioner (AP) for judicial review of a decision by the Upper Tribunal (Immigration and Asylum Chamber)* dated 15 August 2011 [2011] CSOH 205 at, where he said at [13]:

        > "The Upper Tribunal when deciding whether to give permission to appeal considers whether the applicant for permission has a real prospect of success in his appeal as well as the materiality of the alleged error of law by the First-tier Tribunal."

39. HMRC invited me to conclude that, as permission to appeal had been given by the FTT at the first opportunity with respect to all grounds, I should accept that the first limb of Novartis has largely (if not entirely) been met, and that this approach would avoid the mischief noted in *Kazakhstan Kagazy Plc v Arip* [2014] 1 C.L.C. 451 at [23]:

    > "It is very important that applications to discharge freezing applications do not turn into mini-trials."

40. Despite this danger, I do not think I can accept HMRC's invitation to rely on the grant of permission to appeal by the FTT as demonstrating that the test of "*real prospect of success*" is satisfied, especially bearing in mind that the FTT had granted leave to appeal without seeing any argument from Mr Malde. Counsel for Mr Malde argued persuasively that the FTT test of "*arguable grounds*" was merely intended to filter out wholly unmeritorious appeals. There was ample case law arguing that "*a real prospect of success"* required something more than merely an arguable case - see for example *Ketchum plc v Group Public Relations Ltd* [1997] 1WLR 4 where Stuart-Smith LJ said:

    > "Moreover, I cannot see any reason in principle why the considerations which are applicable when the court is considering the grant of a Mareva injunction should not be applied in favour of a plaintiff, even if he has lost in the court

> below, though the question will not be "Does he have a good arguable case?" but "Does he have a good arguable appeal?" This is likely to be a more difficult test to satisfy, and, if the case turns upon questions of fact which the judge has resolved against the plaintiff, may well be insuperable. This threshold must be at least as high as that which has to be satisfied when the court considers whether or not to grant leave to appeal where that is required.

41. A "*good arguable appeal*" is clearly a higher standard than merely an "*arguable appeal*". I therefore considered that I must decline HMRC's invitation to rely on the FTT's decision to allow the appeal.

42. I therefore heard, with interest, a detailed exposition of the case that each party proposed making before the Upper Tribunal (which was also available to me in the form of HMRC's application for permission to appeal, Mr Malde's Respondent's Notice and an Appellant Reply served by HMRC – each lengthy and dense documents). Given that this exposition was provided over little more than the course of one court day and had to deal with arguments that are to be dealt with in a five-day appeal hearing before the Upper Tribunal, it was no surprise that this exposition was very rapid – one might say breathless.

43. The various grounds of appeal that HMRC is pursuing are considered below:

(A) GROUND 1: THAT THE TRIBUNAL WRONGLY APPLIED A BURDEN OF PROOF ON HMRC

44. The first ground of appeal is based on an assertion that the FTT erred in concluding "in general terms" that the burden of proof fell on HMRC to "*establish the allegations before it and the liabilities to penalties*". This issue was addressed at [593] – [596] of the FTT's decision.

45. Mr Watkinson and Mr Gurney for Mr Malde put up a strong argument that the FTT's approach to the burden of proof was correct, and indeed, as they put it, "*unimpeachable*".

46. Mr Gurney took me through Mr Malde's argument. He argued that it was plain that the FTT was correct to conclude that HMRC bore the burden of proof in an appeal concerning criminal penalties, liability for which depended upon proof of fraudulent conduct and where HMRC had specifically alleged fraudulent conduct. HMRC's case before the FTT had been that the two companies at the heart of these allegations, Sintra SA and Sintra Global, said to be controlled by Mr. Malde, had diverted alcohol into the UK. HMRC's Particulars of Claim had explicitly referred to fraud and dishonesty.

> "Mr Malde has set up a complex web of companies to perpetrate the alcohol diversion fraud. His involvement in the central pillars of these [sic] fraud namely Sintra [SA] and Sintra Global, Corkteck, Park Royal, Brunel Freight and Anpa reflects dishonesty on his part."

47. As has been noted in numerous decisions and notably by Lord Millett in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at [184]–[186], where fraud or dishonesty is alleged in civil proceedings, it must be pleaded, particularised and proved as a matter of both pleading and substance. Mr Gurney argued that the same rule applied in the FTT, citing Sir Geoffrey Vos, the

Chancellor of the High Court (as he then was) in *HM Revenue and Customs v Citibank* NA & Anor [2017] EWCA Civ. 1416, [2018] WLR 1524 at [90](iii).

48. Mr Gurney argued further that the appeals concerned liability to penalties. The criminal nature of such proceedings within the meaning of Article 6 ECHR is well-established and, as such, they engage the presumption of innocence. To establish liability for each of the penalties HMRC either had to prove dishonesty, or "*deliberate and concealed*" behaviour by Mr. Malde.

49. Mr Gurney took me through a whistle-stop tour of the authorities that demonstrate the proposition that HMRC bears the burden of proof in relation to dishonest evasion penalties and other tax penalties, including in particular *Euro Wines v HMRC* [2018] 1 WLR 3248i, at [7]; and *King v Walden* [2001] STC 822, at [71]. He pointed out that leading counsel for HMRC conceded as much in *General Transport SPA v HMRC* [2019] UKUT 0004, at [76]) and that HMRC's own manual (at EM4512 - *Penalties: Introduction: Any Formal Penalty Determination can be Appealed*) reflected this saying

> "Unlike a tax appeal, however, in any penalty appeal the onus of proof is on HMRC to establish the penalty, not on the taxpayer to displace it."

50. Mr Gurney partly based his argument on Article 6(2) of the European Convention on Human Rights ("**EHCR**"). Where a connection to fraud is specifically pleaded and forms an essential element of the way the assessment has arisen, and therefore forms part of the basis for the penalty, he argued that the presumption of innocence in Article 6(2) (in addition to the dicta in some of the cases cited), justifies placing the burden of proof on HMRC. HMRC should in such cases bear the burden of proving the fact of evasion.

51. Mr Gurney acknowledged that the position is different for simple assessments to VAT or excise duty that are not penalties (and referred in this regard to *Awards Drinks Limited v HMRC* [2021] STC 1576; [2021] EWCA Civ 1235 at [28] – [40] (***Awards Drinks***) but argued that this principle did not apply to criminal penalties or wherever fraud is particularised.

52. He concluded, therefore, that HMRC is wrong in its suggestion that the FTT erred when it determined that the burden was on HMRC "generally" to prove the allegations of fraud, and that instead the FTT should have dealt with the issue of quantum separately on the basis that the burden of proof was on the taxpayer.

53. Mr Hayhurst, for HMRC, also took me through a rapid tour of the authorities but extracted slightly different principles from them. He placed reliance in particular upon *Khan (t/a Greyhound Cleaners) v HMRC* [2006] EWCA Civ 89, [2006] STC 1167 (***Khan***) as well as upon *Awards Drinks* at [28] to [40] which approved *Khan* on this point.

54. HMRC accepts that where a statute changes the burden of proof (as with section 60(7) Value Added Tax Act 1994) in relation to a penalty the statute will have effect. HMRC also accepts that where the fraud or dishonesty element is central to the nature of the offence (as opposed to the way the offence is said to be committed) as was the case in Missing Trader Intra-Community (**MTIC**) frauds as dealt with in *Kittel v Belgium; Belgium v Recolta Recycling* [2006] ECR I-6161, [2008] STC 1537, [2006] SWTI 1851, this also will shift the burden of proof. However, in all other cases, HMRC argues that the authority to be derived from the cases (and in particular *Khan* and *Awards Drinks*) is that in relation to displacing the tax assessment itself (and therefore the *calculation* of any penalty where this is related to the tax charged) the burden of proof remains with the

taxpayer: an allegation of fraud (even if particularised) is irrelevant to the taxpayer's burden of proof in challenging the underlying assessment. HMRC argues that *Awards Drinks* has made it clear that where fraud is pleaded, but not part of the legal test, the burden remains on the taxpayer and the tribunal should not allow itself to be distracted by asking itself whether HMRC has proved fraud.

55. HMRC also argues that the Upper Tribunal case of *HMRC v Zaman* [2022] UKUT 00252 (TCC) suggests this approach should apply also in relation to penalty cases. At [30] the Upper Tribunal (Upper Tribunal Judges Andrew Scott and Jennifer Dean) said in that case:

> "As we set out above, it is well-established law that it is for the taxpayer to prove, by evidence, that an assessment to VAT issued by HMRC is incorrect. HMRC do not have that evidential burden and that cannot sensibly be affected by the fact that the challenge to the assessment occurs in satellite litigation where, as in this case, a penalty charged on Mr Zaman is sought to be defended on the basis that the assessment to VAT on Zamco was wrong."

56. Taking stock of these opposing arguments, I will follow the guidance given in the second *Novartis* principle and so will not seek to conclude which party has the stronger case. It is enough to find, as I do, that HMRC were able to show a sufficiently well-reasoned and well-supported argument that I am satisfied that HMRC has a real prospect of success on appeal.

(B) GROUND 2: THAT THE TRIBUNAL ACTED WRONGLY IN COMPARTMENTALISING ISSUES

57. Whilst the FTT found that on balance Sintra SA was the owner of the alcohol that had been smuggled into the UK and therefore should have been registered for VAT, the FTT found no evidence that Sintra Global was the owner of the goods that were supplied in the United Kingdom, and so found against HMRC on this point, and therefore on the point whether Sintra Global was liable to register for VAT and duties.

58. The second ground of appeal was on the basis that in finding this the FTT erred in law in its approach to the issues and evidence, compartmentalising factors rather than examining the totality of the evidence in particular by refusing to rule on, or consider, the issue of control of the Sintra entities when considering the issue of place of supply. Assuming the FTT would have concluded that Mr Malde was also in control of Sintra Global as well as Sintra SA (as it had concluded), the FTT, thereby in effect closed its mind to a highly relevant factor with respect to the place of supply issue, namely that the person who was suggesting the supplies took place in the EU, and who would be in possession of the evidence to show this was the case if it were true, had chosen not to produce any evidence to support the assertion of the companies he controlled.

59. Mr Malde's case was that this argument was, in reality, a barely disguised attack on the FTT's factual conclusion in relation to the issue of place of supply as regards whether one of the companies alleged to have evaded tax, Sintra Global, had smuggled alcohol into the UK. The allegation that Sintra Global had smuggled alcohol, in Mr Malde's case, was an allegation of dishonesty that HMRC bore the burden of proving. This characterisation of the point was denied by HMRC.

60. Counsel for Mr Malde argued that this argument was based not on a mistake of law but on an erroneous finding of fact or unsupportable use of the FTT's discretion in case management. As such, the matter could only form the basis of an appeal if it can be shown that the finding was not one which, on the evidence, the Tribunal was entitled to make, following the well-established principle explained by Viscount Simonds in *Edwards (Inspector of Taxes) v Bairstow (1956) AC 14* (***Edwards v Bairstow***) when (at [29]) he said:

> "… though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence or on a view of the facts which could not reasonably be entertained."

61. Counsel for Mr Malde went on to argue that HMRC sought to do was the impermissible roving selection of evidence coupled with a general assertion that the Tribunal's conclusion was against the weight of the evidence and was therefore wrong. By way of authority that this approach was impermissible, they cited *Georgiou and Another (trading as Marios Chippery) v Customs & Excise Commissioners*(1996) STC 463 (***Georgiou*)** where (at page 476) Evans LJ said

> "It is right, in my judgment, to strike two cautionary notes at this stage. There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. ... It is all too easy for a so called question of law to become no more than a disguised attack on findings of fact which must be accepted by the Court. As this case demonstrates it is all too easy for the appeals procedure to the High Court to be misused in this way. Secondly the nature of the factual enquiry which an appellate court can and does undertake in a proper case is essentially different from the decision making process which is undertaken by the tribunal of fact. The question is not has the party on whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the Tribunal which was sufficient to support the finding which is made? In other words was the finding one which the Tribunal was entitled to make? Clearly if there was no evidence or the evidence was to the contrary effect, the Tribunal was not so entitled."
>
> "It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to the finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the Tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the Tribunal's conclusion was against weight of the evidence and was therefore wrong."

62. Whilst I fully accept Mr Malde's counsels' submissions on the applicable case law, I find that HMRC does have a real prospect of success on this point.

63. This point is inextricably bound up with the first ground of appeal relating to burden of proof. If HMRC were to win on that point, then HMRC may well be able to show that the FTT was, as a result, in error in treating Sintra Global as not being liable to register for tax and duty merely on the basis that there was no evidence on the point. If the FTT were to approach this on the basis that the burden of proof were to be on the taxpayer to disprove the assessment and the basis for the assessment, then I can see that HMRC would have a real prospect of success in challenging the FTT's approach to case management and to the evidence on this point.

64. As I have found that HMRC does have a real prospect of success on the burden of proof issue, I find that HMRC does have a real prospect of success on this point also.

(C) GROUND 3: THE TRIBUNAL'S CONCLUSION AT §643 THAT ADRENA "SUPPLIED" THE ALCOHOL IN THE UK IS DEMONSTRABLY INCONSISTENT WITH THE UNDERLYING EVIDENCE

65. HMRC's third ground of appeal reflects the fact that immediately before reaching its conclusion relating to Sintra Global not supplying goods in the UK, the FTT noted that "it appeared that" another party, called Adrena, owned the other goods seized in the UK, not Sintra Global. It was unclear on the wording of the FTT's decision whether this finding formed part of the basis of the FTT's conclusion on whether Sintra Global had been supplying goods. If it was, HMRC considered that it was not a good basis for such a conclusion.

66. This ground of appeal was to challenge the FTT's conclusion that Adrena, "supplied" the alcohol in the UK on the basis that this was demonstrably inconsistent with the underlying evidence, which, says HMRC, overwhelmingly demonstrated that Sintra Global supplied the alcohol.

67. Mr Malde had clearly accepted Sintra Global had supplied alcohol that was eventually slaughtered in the United Kingdom, the key question was the location of the sale, namely whether the alcohol was sold by Global in the EU or was it smuggled into the UK by Global and sold thereafter? HMRC argues that the FTT failed to answer this question, becoming distracted with who was named on the 'cover paperwork' and thus which entity 'stepped forward' as the owner of the goods when seized. They argued that save for a comparatively small quantity of alcohol used for the 'cover loads', there was no evidence Sintra Global sold alcohol to Adrena in the EU. Just because Adrena was used for the purposes of the cover paperwork used to challenge a seizure, it does not follow that it was responsible for diverting the millions of pounds of alcohol the subject of the mirror loads, or that it had purchased that mirror load stock from Sintra Global in the EU.

68. Mr Hayhurst explained to me what was meant by "cover load" and "mirror loads" in relation to this ground of appeal as follows. The type of fraud alleged here was to issue copies of the same paperwork to several lorry owners evidencing a genuine import transaction to a tax-registered trader on which tax would be paid, on the basis that most lorries would not be checked. The lorry checked could rely on the paperwork whilst other lorries would get through without being checked and could take the smuggled goods elsewhere. The load carried by the lorry that was checked was referred to as the "cover load". The loads carried by the other lorries that were not checked were referred to above as the "mirror loads". In this case Adrena was said to be the enabling tax-

registered trader sending the cover loads, and HMRC's argument was that it was not safe to conclude from the evidence that because this company showed ownership of some alcohol that it had also been the owner of the larger amounts of alcohol said to have been smuggled into the United Kingdom.

69. Mr Malde's response to this ground of appeal was to assert that the FTT's conclusion on this point is not "*demonstrably inconsistent with the underlying evidence*" and therefore must be seen as an *Edwards v Bairstow* challenge. In Mr Malde's submission, the FTT's conclusions were perfectly open to it on the facts. Adrena had claimed ownership of the goods. HMRC had failed to adduce evidence to prove Global supplied the goods in the UK. That was a reasonable basis for the FTT's conclusion. Mr Malde's counsel argue that it is not for HMRC to fail to produce sufficient evidence to prove its case and then to complain that the FTT was unable to reach a finding on the evidence before it. Ground 3, therefore, does not enjoy a real prospect of success.

70. I see some force in this argument, but I do not think that it necessarily means that Ground 3 does not enjoy a real prospect of success. If HMRC could show that the distinction between cover loads and mirror loads had not been understood by the FTT and the FTT assumed that merely because Adrena had been shown to own some of the alcohol when it came into the UK it must have owned all the alcohol supplied into the UK, I think such an argument does present a real prospect of success, even given the narrow scope allowed by an *Edwards v Bairstow* challenge.

71. Again, this point is inextricably bound up with the first ground of appeal relating to burden of proof. If HMRC were to win on that point, then HMRC may well be in a favourable position to mount further challenges to the FTT's approach to the evidence. This in my view provides a further reason why HMRC would have a real prospect of success in challenging the FTT's approach to the evidence on this point.

(D) GROUND 4: IT WAS AN ERROR OF LAW FOR THE TRIBUNAL TO CONCLUDE THERE WAS A BREACH OF THE "BEST OF THEIR JUDGEMENT" REQUIREMENT.

72. HMRC's fourth ground of appeal was based on the assertion that it was an error of law for the FTT to conclude there was a breach of the "best of their judgement" requirement. HMRC complains that the FTT failed to consider the thrust of HMRC's case, to the effect that there is no breach of best judgement principles in circumstances where an Officer deliberately closed his mind to needing to consider certain information (in this case, what was described as the "York Wines" bank statements) because that information, albeit relevant, could only be adverse to Mr Malde and/or could in no way have causatively lowered the quantum of the assessment.

73. The best of their judgement requirement was explained in *Van Boeckel v Customs and Excise Commissioners [1981] 2 All ER 505 [1981] STC 290* by Woolf J (as he then was). He said:

> "What the words "best of their judgment" envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is reasonable and not arbitrary as to the amount of tax which is due." As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."

74. This point, I consider is squarely within *Edwards v Bairstow* territory, and I agree with Mr Gurney that this is difficult ground for establishing a "real prospect of success" on appeal.

75. The FTT recorded the *Van Boeckel* principles and acknowledged that they applied and thereafter applied them to its findings of fact, that much is plain on the face of the decision. Having identified the relevant principles, the FTT rightly asked itself whether Officer Foster rejected material available to him on the basis that he had closed his mind to the possibility that it might be credible, or whether he fairly considered all material before him when making the assessments. The FTT concluded that Officer Foster had not looked at relevant bank statements and must have made a deliberate decision not to do so, and that his saying otherwise was yet another example of the combative, evasive and obstructive nature of how he gave evidence. The FTT also said that in any event Officer Foster simply did not "*fairly consider*" all the material in his possession no matter how relevant it was and did not even consider its credibility but, having reached a conclusion in relation to the assessment schedule decided to stick with it come what may. He deliberately closed his eyes to anything which did not fit his case and might undermine his assessment.

76. These were findings of fact, made on the basis of oral evidence. The criticisms of Officer Foster's approach were widespread and I accept Mr Malde's case that these were not limited to a failure to consider a set of bank statements. The conclusion that Officer Foster failed to apply *best judgment* seems reasonable and this does lead me to doubt whether HMRC has any real prospect of success on this point, taken by itself, although as I find that HMRC has a real prospect of success on other points, this will not affect my determination of the first *Novartis* principle.

77. Nevertheless, HMRC's assertion that the FTT failed to grapple with the simple fact that it was setting aside a £11.1 million DLN (arising from smuggling, which in the case of Sintra SA had been established) because HMRC, in quantifying the assessment, failed to consider a document (i.e. the York Wines bank statements) that could only have increased the quantum of the assessment has some force and may have some bearing on Ground 5 as discussed further below.

(E) GROUND 5: IT WAS AN ERROR OF LAW TO SET ASIDE THE WHOLE ASSESSMENT RATHER THAN CORRECTING IT

78. Ground 5 is pleaded in the alternative to Ground 4 and is argued on the basis that even if there had been a breach of the "best of their judgement" requirement in relation to some element of the assessment, it was an error of law to set aside the whole assessment rather than correcting the amount to a fair figure.

79. This is argued on the basis of the Court of Appeal decision in *Pegasus Birds v HMRC* [2004] STC 1509; [2004] EWCA Civ 1015 (***Pegasus Birds***). This case gave clear guidance at [23]-[29] that if there had been a breach of the "best of their judgement" requirement in relation to some element of the assessment, the Tribunal should not automatically set aside the whole assessment. HMRC argued that the defects identified by the Tribunal (Officer Foster closing his mind to the York Wines bank statements) would only have increased the quantum of the assessment had they been considered and cannot properly be regarded as being so serious or fundamental that justice required the whole assessment to be set aside. Justice could have been achieved by correcting the amount to that which the Tribunal considered to be a fair figure on the evidence before it.

80. Mr Malde's counsel argue that the FTT did not ignore the guidance from the Court of Appeal in *Pegasus Birds* and expressly referred to it and must be presumed to have had it in mind when it decided that it was necessary in the interests of justice, bearing in mind the seriousness of HMRC's failures, for the underlying assessment and the DLN based on it to be set aside. Far from it being an error of law, it was the appropriate course to take in the circumstances of this case. At its lowest, it was well within the bounds of what was reasonable. The FTT was wholly entitled to come to that conclusion on the evidence. It was impossible to characterise that decision as perverse, or wholly wrong and therefore the argument does not enjoy a real prospect of success.

81. Whilst I see the force of this argument, I nevertheless consider HMRC's arguments on this point to have a real prospect of success. In the light of the *Pegasus Birds* decision, and in the context that it may be questioned whether the shortfalls identified in Mr Foster's approach and evidence actually increased the tax assessment, an important question arises. The question is how a tribunal or court should balance an individual taxpayer's right to be dealt with fairly by HMRC against the interests of taxpayers in general to be protected against a fraud on the Exchequer. As counsel for HMRC reminded me, a fraud on the Exchequer has been determined against Sintra SA and Mr Malde: Sintra SA was found to be supplying alcohol into the UK without paying tax and Mr Malde was found to be its controlling mind.

82. In this case the FTT considered the correct balance was in effect to punish HMRC for the manifest unfairness in Officer Foster's general approach rather than to reopen the assessment. This might well be a correct approach and something open to them. The rights of a citizen to be dealt with fairly by the authorities is something that courts and tribunals should jealously uphold. Nevertheless, a superior tribunal or court might consider that this is the wrong balance and the FTT should have followed the clear guidance in *Pegasus Birds* that the taxpayer's remedy should be to reopen the assessment rather than to render it null. Given this real possibility, I consider that HMRC has met the standard of showing a real prospect of success on this point.

(F) GROUND 6: THE FTT ERRED IN LAW BY FAILING TO GIVE ADEQUATE REASONS

83. HMRC's final ground of appeal is based on the assertion that the FTT erred in law by failing to give adequate reasons in respect of a number of key matters. HMRC accept the Tribunal did not need to deal with every argument advanced, but argued that with respect to fundamental points such as those below the Judge "*must explain why he has reached his decision*" (*Flannery v Halifax Estate Agencies Ltd* [2000] 1 W.L.R. 377 at 381-382; [2000] C.P. Rep. 18 at page 5). See also *English v Emery Reimbold & Strick Ltd* [2002] 1 W.L.R. 2409; [2002] EWCA Civ 605 at [25] and *HMRC v CCA Distribution* [2015] UKUT 0513 at [104] to [108]. HMRC identified a number of issues where in its view the FTT had failed to give its reasoning for its evidential findings, generally relating to the matters which HMRC is challenging in the grounds already mentioned.

84. Mr Malde's counsel argue that the question of reasons is to be addressed by considering the judgment as a whole; that the requirement for reasons must not be set too high; and that judgments should not be subjected to narrow textual analysis. Rather, the essential requirement is that the terms of the judgment should enable the parties and the appellate tribunal readily to analyse the reasoning that was essential to the decision. In support of this they refer to *Aria Technology Ltd v HMRC* [2018] UKUT 3633 (TCC) at [33] – [36]. In their submission, the FTT's decision passes that essential requirement and HMRC can be in no doubt from the FTT's decision why it lost these appeals.

85. HMRC accepted that the Tribunal did not need to deal with every argument advanced but argued that the FTT had failed to explain why it had reached its decision with respect to certain fundamental points particularised in HMRC's Ground 6.

86. From my brief review of the issues I can see some force in HMRC's point that the reasoning behind some key findings of the FTT were not adequately explained. I therefore consider that HMRC has met the standard of showing a real prospect of success on this point.

4. BALANCE OF HARDSHIP

87. Having determined that HMRC does have a reasonable prospect of success on nearly all of its argument, I must turn to the third limb of *Novartis* and consider the balance of hardship.

88. As to this point, Mr Malde's counsels' argument is as follows. First attention should be given to the length of time during which Mr Malde has been and, unless the freezing injunction is to be discharged, is to remain subject to the freezing injunction, as is discussed in detail above. As we have seen, there is at the minimum a quantifiable delay until at least Autumn 2024 by which time, if the freezing injunction is to remain in place, it would have been in place for over nine years. If the freezing injunction were to be kept in place for the remainder of the possible proceedings that might ensue after that, there is a further unquantifiable delay that could conceivably result in a freezing injunction to have been in place for some further years. As the freezing injunction is one of the law's two "nuclear weapons" (per Donaldson, LJ. in *Bank Mellat v Nikpour* [1985] F.S.R. 87 at 92), defendants should be subject to it for the minimum amount of time necessary and not kept in limbo. They quote *Daisystar v Town & Country Building Society* [1989] WL 649700, CA which provides authority that:

> "… it is an abuse of the process of a Mareva injunction to obtain the injunction, then not get on with prosecuting the action, but then to desire to hold the injunction and start prosecuting the action afresh if it appears that there may be a prospect of getting security ahead of others through the use of the Mareva on assets which are not the subject of any charge in favour of the litigant who holds the Mareva."

89. That case in my view could be distinguished as there is not in my view much of a case that any delay in this case was caused by HMRC failing to prosecute the matter with appropriate due diligence.

90. Mr Malde's counsel invite me to conclude that there is plainly serious ongoing hardship to Mr. Malde if the freezing injunction is to be continued and that Mr Malde has no remedy against this unless HMRC provides a cross-undertaking to the Court.

91. The impact of the freezing injunction on Mr. Malde was described in Mr. Ellis' third witness statement. In summary Mr Ellis enumerated:

    (1) the control exerted by HMRC over Mr Malde's personal dealings, sometimes leading to his not being able to pay his legal fees and to conduct critical renovations to his family home when he wanted to, and then only if he provides information to HMRC on an ongoing basis in respect of these works and the associated costs, causing him continuing legal expenditure;

(2) the effect that Mr Malde had to be wary of decisions he might otherwise make as sole director and shareholder of a number of businesses for fear that HMRC would characterise this as a 'dealing' in breach of the freezing injunction;

(3) personal impact arising from his considering himself to be unable to provide for his family and deal with his assets to their benefit as he would like - this, together with the FTT proceedings, according to Mr Ellis, has placed significant strain upon Mr Malde, and contributed to Mr Malde collapsing whilst at the theatre with his wife during the course of the FTT proceedings; and

(4) significant personal and professional embarrassment due to the freezing injunction, having had to disclose the existence of the freezing injunction to those close to him and to those with whom he has wished to enter into business dealings over the previous seven years.

92. Mr. Malde's own witness statement deals with some of the above matters and adds further instances of hardship including:

(1) loss of reputation amongst those with whom he has business dealings;

(2) loss of confidence and an atmosphere of distrust arising between him and the dentists working in his "Simply Smile" dentistry business;

(3) inability to invest in new practices for Simply Smile, with the result that, Simply Smile's head office costs have remained at odds with the size of the group and to inject funds into the business following the Covid-19 pandemic, leading to the loss of two practices;

(4) inability to acquire properties for his lettings business;

(5) inability to make necessary investments in his haulage firm, named Brunel Freight Forwarding Limited;

(6) personal impact in reducing his ability to take family holidays, to surprise his wife with gifts of jewellery, or mark family milestones with large celebrations or to purchase cars for his sons or purchase meaningful presents;

(7) inability to fund his children's university education;

(8) effects on his family's health arising from his inability to extend his house;

(9) sleepless nights, anxiety and stress and a feeling of failure in being unable to support his family as he would wish;

(10) inability to purchase household items such as furniture on the scale he had done previously;

(11) effects on his relationships with friends and family.

93. The picture may be exaggerated in places and is ameliorated by the ability to approach HMRC to approve spending proposals. Furthermore, what counts as hardship for Mr Malde might be regarded as luxury for anyone on average wages (which provide a take-home pay after tax that is a fraction of the £7,000 per month spending allowed to Mr Malde by the injunction). Nevertheless, I have no doubt that the freezing injunction has caused, and if continued will continue to cause, loss and detriment and a real human impact on Mr. Malde and his family.

94. This loss and detriment needs to be balanced against the potential loss to the State if the freezing injunction is not discharged.

95. I have already found that if the freezing injunction is discharged there is a real risk of dissipation of the funds. Mr Malde's counsel seek to argue that this should weigh little with me as:

    (1) the State can claim no such hardship in the sense of a like human impact;

    (2) at most HMRC's risk is that it may not be able to collect in full what is, in effect, a criminal fine, rather than tax as such: if those fines are not paid this can hardly be characterised as an ordinary loss to the Exchequer;

    (3) the State enjoys wide civil recovery powers under Part.5 of the Proceeds of Crime Act 2002: if Mr. Malde has obtained his assets through unlawful conduct, theoretically they remain recoverable to the State by following them into the hands of whoever possesses them, unless they are equity's darling, in which case they will have paid value for them anyway which would theoretically be recoverable.

96. I find these arguments less than persuasive:

    (1) As to the first point, it would severely and overly restrict the use of freezing orders if the State or a corporate claimant could not be said to suffer hardship or if freezing injunctions were to be denied to a claimant merely because it had more money than the defendant.

    (2) As to the second point, I see no difference between collecting tax that is due and collecting a tax penalty that is due – both are losses to the Exchequer. If anything it could be argued that the State has a stronger interest in enforcing penalties than collecting tax as effective penalties are vital to enforcing the rule of law.

    (3) As to the third point, this point could be made whenever a state institution bases a claim on illegality and again it would severely and overly restrict the use of freezing orders if such an alternative means of redress were to feature in the balancing calculation.

97. The purpose of a freezing injunction is to hold the ring and to protect the claimant against the possibility that dissipation of assets will render nugatory any judgment awarded to the claimant. I have found a real risk of dissipation and that purpose holds good in this case. Bearing in mind the fourth and fifth limbs of *Novartis*, I have regard to the fact that discharging the injunction could, at the extreme, render any success that HMRC has in its appeal nugatory, and could have the effect of preventing the Upper Tribunal from being able to do justice between the parties. I must, therefore, decline to discharge the freezing injunction at this point.

98. However in view of the length for which this freezing injunction has been in place, and the criticisms made of HMRC in the FTT's decision, it is appropriate that I consider anew the terms of the freezing order and the extent to which the undoubted harm to Mr Malde may be ameliorated without doing violence to the central purpose of the freezing order to hold the ring so that the proceedings before the Upper Tribunal shall not be rendered nugatory.

5. APPROPRIATENESS OF A CROSS-UNDERTAKING IN DAMAGES

99. The first matter that needs to be considered anew is the question whether Mr Malde should have the usual benefit of a cross-undertaking. Without this, to the extent that he is being damaged by the injunction he has no recourse.

100. Where the claimant is a public body such as HMRC it is settled law following *Sinaloa* that the starting point is that HMRC will not be required to provide an undertaking in damages. This is for good reasons based partly on protection of the public purse but I think mainly on the basis that an authority should not be deterred or disincentivised from pursuing its statutory duties.

101. However this starting position can be departed from where some special circumstances of a case make it just and convenient to do so.

102. Mr. Malde submits that both the very lengthy time for which the freezing order has been in place and the FTT's trenchant criticism of HMRC's investigation and evidence, cited above, show that HMRC's conduct has been well beyond that which is ordinary and reasonable, and the latter point in particular should deny HMRC the argument that it should not have to provide a cross-undertaking for the freezing injunction because it has been upholding the law.

103. The FTT's criticisms show that HMRC was not upholding the law. In particular the assessment made against Sintra SA was itself found to be unlawful because it had not been made using best judgment. It was so unfair that the FTT considered it appropriate to set it aside completely.

104. I agree that the FTT's adoption of Mr. Malde's assessment of HMRC's conduct is damning:

> "…that suspicion generated a fixed view as to the involvement of Mr Malde and a determination to make him pay which blinded the officers to the defects in their analysis. A fixed view was arrived at, despite the difficulties with the evidence, and has been persisted with from relatively early in the investigation."

105. Despite the *Sinaloa* principle that I have explained, the courts accept that, where in the absence of such an undertaking to grant the freezing injunction would be oppressive, such an undertaking will be required. Counsel for Mr Malde referred me, as an example of this, to *Customs and Excise Commissioners v Anchor Foods Ltd* [1999] 1 W.L.R. 1139 at p.1152 B-E per Neuberger, J. as he then was.

106. Mr Brockman for HMRC took me to the decision in *HMRC v Rhino Television & Media Limited* [2020] EWHC 364 (Ch) (***Rhino***). This reached the same conclusion. Following *Sinaloa* the starting point is that HMRC will not be required to provide an undertaking in damages but this can be departed from if some special circumstances make it just and convenient to do so.

107. I agree that two features of this case - the length of time for which Mr Malde has been subject to this freezing injunction and the trenchant criticisms of HMRC's officers – as well as the examples I saw of HMRC not always being responsive when urgent requests were being made to allow dispositions of funds frozen by the injunction, do render continued imposition of the freezing order without a cross-undertaking in damages oppressive and make it just and convenient to require such a cross-undertaking in damages.

108. I will not however accede to Mr Malde's request that the cross-undertaking in damages be back-dated. Whilst the order originally made by Judge Hodge QC (as he then was) allowed for this, providing:

> "If at any future hearing the Court requires the Applicant to give a cross-undertaking as to damages (in relation to damage suffered by the Respondent and/or third parties), the Applicant will give such cross-undertaking from the making of the Order by His Honour Judge Hodge QC"

and this form of wording was carried forward when the freezing injunction was renewed, it is common ground that I am not obliged to do this and I do not think that I should.

109. Mr Brockman explained the genesis of this form of order which is referred to as a "half-way house" undertaking. The undertaking in this case was in a form developed following the *Sinaloa* decision. It was developed because undertakings cannot otherwise be backdated and was needed to preserve the ability of a respondent to argue that an undertaking was appropriate at a later point when what was then uncertainty about the extent of *Sinaloa* had been resolved. As is explained in *Rhino* at [45]-[50], the uncertainty arose from two conflicting High Court decisions relating to provisional liquidators, both reached after reasoned argument: In *Abbey Forwarding Ltd v HMRC* [2015] EWHC 225 (Ch) David Richards J had held that HMRC when petitioning for a provisional liquidation was not acting as a public law enforcement agency but rather as a creditor, no different to any other private creditor so that *Sinaloa* did not apply. This was contrary to the findings of Sir William Blackburne in *Re Parkwell Investments Ltd* [2014] BCC 721 who had held that an undertaking was not required from HMRC when it applied as a creditor of the company for the appointment of a provisional liquidator. The use of the half-way house undertaking was therefore continued until the conflict between the two decisions was decided. That happened with the decision in *Rhino* where the Deputy Judge reviewed the authorities and resolved the question in favour of HMRC. Since then the half-way house undertaking is no longer used or required by the court.

110. I consider that I should approach the question of backdating on its own merits and consider that backdating is not justified in this case. To backdate the order would have the effect warned against in *Sinaloa* of setting a precedent such that HMRC and other public bodies where a half-way house undertaking is in place would be deterred or disincentivised from pursuing their statutory duties by the prospect of such a backdated order being put in place years after they had been proceeding on the basis that they could rely on *Sinaloa*. Whilst the delay and conduct of HMRC referred to above are sufficient, in my opinion, to justify requiring a cross-undertaking in damages going forward, they do not, in my view justify imposing on HMRC a backdated liability that HMRC cannot have expected. The fact that Mr Malde has been found by the FTT to have been the controlling mind of a company (Sintra SA) that was bringing alcohol into the United Kingdom without registering for tax, fortifies me in the fairness of this decision.

6. OTHER VARIATIONS

111. For the reasons I have given above, it is appropriate that I consider anew the terms of the freezing order and the extent to which the undoubted harm to Mr Malde may be ameliorated without doing violence to the central purpose of the freezing order to hold the ring so that the proceedings before the Upper Tribunal shall not be rendered nugatory. In order to do this I direct that there should be a consequentials hearing following the handing down of this judgment at which I will hear the parties on a modified form of order for the freezing injunction which is less burdensome on Mr Malde. I consider that this may include:

(1) a forward-looking cross-undertaking in damages subject to a suitable cap which I will hear further argument on but which I provisionally consider might be set at £500,000;

(2) provisions for the freezing injunction to cease automatically a reasonable time, say 15 business days, after the handing down of the Upper Tribunal Decision unless renewed on a new application;

(3) a significant variation in the basis of Mr. Malde's monthly allowance to a quarterly allowance, to afford him some flexibility in his spending and at a higher overall level – again I will hear further from the parties on this but have in mind the figure of £30,000 a quarter;

(4) an enumeration of matters that Mr Malde may take which reasonably would not be expected to reduce the assets available to HMRC in the case of a successful appeal, such as bona fide investments in his companies, where Mr Malde may be permitted to undertake such matters upon notifying HMRC with full details but without requiring HMRC's prior permission.

112. I ask Mr Malde's counsel to produce a suitable form of order reflecting the principles set out in this judgment and to seek to agree it, as far as possible, with counsel for HMRC with a view to my approving it, or resolving any dispute on the terms of that order, at the consequentials hearing.

113. I will also on that occasion hear from the parties on costs and on any other related matter.