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Case No: CR-2023-006028

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY & COMPANIES LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 July 2024

Before :

MR DAVID HALPERN KC SITTING AS A DEPUTY HIGH COURT JUDGE

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IN THE MATTER OF PAYROLL & PENSION SERVICES (PPS UMBRELLA COMPANY) LTD
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE & CUSTOMS	**Petitioners**
- and -	
PAYROLL & PENSION SERVICES (PPS UMBRELLA COMPANY) LTD	**Respondent**

And between

DAVID-AJIBOLA ADEOLA OLABODE	**Applicant**
- and -	
(1) THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE & CUSTOMS **(2) MICHAEL PALLOTT** **(3) NATASHA BRODIE** **(THE 2ND AND 3RD RESPONDENTS AS JOINT PROVISIONAL LIQUIDATORS)**	**Respondents**

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Matthew Parfitt and Dilpreet Dhanoa (instructed by **HMRC Solicitors**) for the **Petitioners**
Timothy Harry and Ben Elliott (instructed by **Noble Solicitors**) for the **Applicant**
Christopher Brockman (instructed by **Wedlake Bell LLP**) for the **Provisional Liquidators**

Hearing dates: **19-21 June 2024**
Circulation of draft judgment: **4 July 2024**

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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.
This judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 2 pm on 19 July 2024

Mr David Halpern KC:

1. This is my judgment following the final hearing of:

   i) A petition (the "**Petition**") presented by the Commissioners for HM Revenue & Customs ("**HMRC**") to wind up Payroll & Pension Services (PPS Umbrella Company) Ltd (the "**Company**") for alleged unpaid debts of some £7.3m comprising Employers' National Insurance Contribution ("**ErNIC**"); and

   ii) An application (the "**Application**") by David-Ajibola Adeola Olabode ("**Mr Ajibola**"), the director of the Company, to dismiss the Petition and to discharge the Provisional Liquidators ("**PL**"), Michael Pallott and Natasha Brodie.

The evidence

2. Although the hearing bundles exceed 5,000 pages, I confine my review of the evidence to that which is necessary for my decision. Given the conclusions I have reached, I have sought to avoid expressing conclusions on matters which it is unnecessary for me to decide.

3. The Company was incorporated on 27 March 2017 with Mr Ajibola as the sole director and shareholder. He is a certified accountant and is also the controlling shareholder and a director of Tarfs Accountants (Tax Auditing and Financials Solutions Accountants) Ltd ("**Tarfs**").

4. The Company provides payroll services in respect of both employed and self-employed persons (I shall refer to them neutrally as "**Workers**"), including over 3,000 who are engaged through recruitment agencies to work as locums within NHS Trusts ("**NHS Trusts**"). (I shall refer to the 11 recruitment agencies who are relevant to the Petition as the "**Agencies**".)

5. According to Mr Ajibola's first witness statement dated 22 January 2024:

   i) The Agencies recruit Workers to work as locums within NHS Trusts and refer the Workers to the Company which provides payroll services.

   ii) The NHS Trust pays the relevant Agency for the work done by the Workers. The Agency deducts its own fee and pays the balance to the Company.

   iii) When a Worker is registered with the Company, he or she is initially treated as employed by the Company. He explained that the reason for this is to enable HMRC to have a record of the Worker, but he admitted that "*on reflection, this was not strictly necessary but we felt this provided transparency and a safeguard for the Company*". In respect of the first month's pay, the Company deducts PAYE and employee's NIC, as well as ErNIC.

   iv) However, the Company asks each Worker whether he or she wishes to be treated as employed or self-employed. Some 2% of the 3,000 or so

Workers have chosen to be employed by the Company; the other 98% have chosen to be self-employed.

v) If a Worker chooses to be self-employed, the Company simply deducts its own fee from the amounts subsequently paid by the Agency and pays the balance to the Worker, leaving the Worker to account for income tax and NIC. Mr Ajibola says that Tarfs acts as accountant for about 25% of the Workers; hence he is able to confirm that these Workers all have unique taxpayer references ("**UTRs**"), as required in the case of any person who is self-employed, and all submit tax returns in order to account for income tax and NIC.

6. HMRC's primary case is that the Company has committed a major fraud on HMRC by pretending that the Workers were self-employed when in truth they were employed by the Company. HMRC has confined the Petition to ErNIC which it says should have been paid by the Company between 2017 and 2023 in respect of Workers recruited through the 11 Agencies. The amount due is said to be £7,390,282.54.

7. HMRC relies on four sources of evidence. The first source is answers given by the Company to questionnaires sent by each Agency at the outset of the relationship. By way of example, Altrix Technology Ltd asked the following questions.

i) "*Does [the Company] treat all income earned by the temporary worker as taxable earnings subject to PAYE tax and NICs in accordance with UK tax law and HMRC guidance?*". The Company responded: "*Yes, we can confirm*".

ii) Altrix asked to see payslips showing deductions of PAYE and NICs and showing that ErNIC had been paid. The response was: "*Sample attached*".

iii) Altrix asked for a detailed summary of all the "*solutions*" offered to Workers. The answer was: "*PAYE Umbrella – public sector worker; self-employed – private sector worker; CIS umbrella – construction worker*." I take this to be a representation that none of the Workers who acted as locums for NHS Trusts (i.e. in the public sector) was self-employed.

iv) "*Does the [Company] directly employ all workers placed by [Altrix] through its PAYE solution?*" The answer was "*yes*".

These answers were signed by Mr Ajibola on 22 March 2019 and included a promise to inform Altrix if the position changed.

8. HMRC's second source of evidence is the contracts between the Company and the Agencies. By way of example, the contract with ID Medical Group Ltd, signed by Mr Ajibola on behalf of the Company on 13 October 2017, includes an undertaking in clause 5.1 that the Company "*engages Workers on contracts of employment*" and that "*it will comply at all times with ITEPA and [NIC*

legislation], including in particular in relation to the deduction of the appropriate PAYE and national insurance contributions and the payment of the appropriate employer's national insurance contributions in respect of each Worker and in relation to payments made to the Worker". Clause 5.2 contains an indemnity from the Company to ID Medical in the event of the Company being unable to comply with the undertaking. I have seen the contracts between eight other Agencies and the Company, which are in similar terms to this contract, and I have seen evidence of contracts with the remaining Agencies which are also in similar terms.

9. HMRC's third source of evidence is 55 sample payslips obtained from the Agencies. These purport to show deduction of PAYE tax and employee's NIC. They also show ErNIC, which would not normally appear on a payslip; HMRC says this shows that they are obvious forgeries. HMRC compared the ErNIC actually paid by the Company in respect of each of these 55 Workers with the amount stated in the Company's RTI. (The RTI is a Real Time Information Report which all employers are obliged to lodge with HMRC on a weekly basis.) There are nine cases in which the figures tally, 26 in which there appears to be a shortfall, and 20 for which there are no RTIs.

10. In addition to the fake payslips, HMRC also relies on the PL's Report of 31 May 2024, which refers to examples of fake bank statements and fake RTIs. An example of a fake RTI relates to Ms Ruth Njeri Mwangi, who was recruited by Bleep 360 (this is not one of the 11 Agencies and accordingly any ErNIC due in respect of her does not form part of the subject matter of the Petition). The Company produced a sheet showing that it received £1,450.12 from Bleep 360, and that the Company deducted its fee of £30 and paid her £1,420.12. This, I was told, reflects the sum actually paid to her. However, the payslip sent to Bleep 360 purports to show deductions of £261.80 for PAYE, £92.85 for NIC, £17 for the "*Company margin*" and £149.64 for ErNIC, leaving Ms Mwangi with net pay of £928.83. The papers sent to Bleep 360 also include a copy RTI purporting to show Ms Mwangi's PAYE and NIC liability as set out above. The PL also attach the genuine RTI, which appears to be in the same form as the fake one, save that it makes no reference to Ms Mwangi.

11. The example of a fake bank statement relates to Ms Marcelita Cabanatan. The PL attach documents purporting to be payslips for her in December 2020 and a document headed "*Transactions*", bearing the Barclays logo, which purports to show payments to Ms Cabanata (spelled differently) and tallies with the payslips. However, the PL also attach evidence for the amounts actually paid to her and the genuine Barclays Transactions sheet, which correlates with the amounts actually paid.

12. HMRC also note that the Company did not issue P45s to Workers who moved from employment to self-employment.

13. In his first witness statement dated 22 January 2024, Mr Ajibola said that he would provide payslips when requested by the Agencies and that he made it

clear to the Agencies that these were not to be submitted to HMRC or the Workers, but were "*just for the agency to pass its audit*". (However, HMRC point to an email from the Company dated 7 May 2021 which describes the payslips as "*simulations to guide the candidates*" (i.e. the Workers), which suggests that the payslips were sometimes sent to the Workers.) Mr Ajibola added that the Company was required to submit an Intermediary Report to HMRC every three months and did so, giving full details of each Worker who was self-employed. The information included the name, address and National Insurance number of each Worker, the Agency through which they had been recruited, the UTR number where available and the amount paid. (In some cases the UTR number is shown as "*1122334455*": he explained that this was because the number was not yet available, but HMRC would have been able to trace the Worker through their NI number.)

14. In his second witness statement dated 21 May 2024, Mr Ajibola expanded on his earlier statement by saying that it was made clear to the Agencies that the payslips which the Company provided "*were for ticking boxes*". He added:

> "*There was a clear understanding by all relevant parties, the agency, the candidate and the Company that the services were being provided on a self-employed basis and given this understanding there was no ulterior motive to supplying these payslips and it was a matter for the agency as to why they were required and what they did with them*."

15. HMRC's fourth source of evidence is the responses given by eight of the Agencies to the enquiries made by HMRC, which confirmed that they were not aware that PAYE and NIC were not being deducted.

16. Mr Ajibola exhibited to his second witness statement a document headed "*Terms and Condtions* (sic)*: Contract of Service*", which he said was used for Workers who chose to be self-employed. This includes the following:

> "*<u>Background of Our Company</u>*
>
> *As an umbrella company, [the Company] collects payments from intermediaries/recruitment agencies on behalf of temporary workers/contractors. … [W]e provide payroll/payment services … and other administrative functions …*
>
> *<u>Main Key Points.</u>*
>
> *[The Company] will act as payment intermediary to the agency worker/contractor, usually through a recruitment agency; the recruitment agency will issue a contract to the agency worker …*
>
> *This is a 3 way relationship: the agency worker, the umbrella Company and the client (recruitment agency). …*
>
> *<u>Charge/Rate</u>*
>
> *Ou charge/rate is 4%/invoice or maximum £30/week.*
>
> *<u>Engagement status</u>*

> *The status of this engagement is that, our contractors/agency workers are classified as self employed, therefore, they source and determine their shifts, the time/hours they work and relative income they realize each week.*
>
> *Pension*
>
> *There are no pension arrangements applicable to this contract.*
>
> *Sick and holiday pay*
>
> *There are no sick and holiday pay arrangements applicable to this contract.*
>
> *Enrolment criteria*
>
> *You will have our own personal UTR number. …*
>
> *Agree to file your Self Assessment at the end of the relevant Tax Year.*
>
> *You will be responsible to file and pay your tax. …*
>
> *Agree to pay the Tax and NI contributions due from your Self Assessment filing. …*"

17. HMRC notes that Mr Ajibola has exhibited 170 signature pages but only one complete specimen contract. However, there is no evidence to suggest that (i) that any of the 170 contracts are in any different form or (ii) that any of the remaining Workers had no contract or a different written contract.

18. 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 (see paragraph 14 above). 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.

The Petition and the Application

19. The Petition was presented by HMRC on 30 October 2023 and HMRC applied without notice for the appointment of provisional liquidators. That application was initially heard by Mr Steven Gasztowicz KC sitting as a deputy judge on 2 November 2023. As he explains in his judgment, he adjourned the application because the Petition wrongly stated that HMRC had applied for payment of the ErNIC, when in fact no such application had yet been made. The Petition was amended to state simply that the Company was indebted in the sum of

£7,390,282.54, and the deputy judge then made the order appointing the PL on 9 November.

20. There is a decision notice under s.8 of the Social Security Contributions (Transfer of Functions etc) Act 1999 dated 3 November 2023 (the "**Decision Notice**"). I am told by HMRC that this was shown to the Judge at the first hearing but was forward-dated, so as not to give notice to the Company, and that it was not in fact issued until after the adjourned hearing on 9 November 2023. It states that the Company is liable to pay secondary Class 1 contributions (i.e. ErNIC) in the sum of £7,997,998.44, less £607,715,90 paid. (I was told that the latter figure is the total amount paid by the Company by way of ErNIC in respect of all its Workers, not just those recruited through the 11 Agencies.) The covering letter says:

> "*This has been issued because HMRC's view is you have made payments of earnings to employees, which under section 6 of the Social Security Contributions and Benefits Act 1992, are liable to Class 1 National Insurance Contributions.*"

21. On 22 January 2024 Mr Ajibola issued the Application seeking to discharge the appointment of the PL and to dismiss the petition. On 1 February 2024 a consent order was made which provided for the Petition and the Application to be listed together for a two-day hearing, including half a day's pre-reading, with the Application to be heard on the first day and the Petition on the second day.

The hearing before me

22. The allotted time proved to be inadequate to deal with all the issues raised, but fortunately the court was able to sit for a further day.

23. Mr Matthew Parfitt appeared with Ms Dilpreet Dhanoa for HMRC. They submitted that the court had a binary choice: either to wind up the Company or to dismiss the Petition. Either way, Mr Ajibola's challenge to the appointment of the PL would become academic and would fall away. I indicated at the outset that I was minded to accept this approach, provided that this did not prejudice Mr Ajibola.

24. Mr Timothy Harry appeared with Mr Ben Elliott for Mr Ajibola. They submitted that the appointment of the PL had caused serious hardship and that HMRC had not made full and frank disclosure to the court when applying for the appointment. However, I decided as a matter of case management that, notwithstanding the terms of the consent order, I would not hear Mr Ajibola's Application for the following reasons:

    i) Given that I was being asked to make a final order on the Petition, the appointment of the PL would be of no ongoing relevance, unless and until an application was made to enforce HMRC's undertaking in damages. No such application was before me.

ii) In any event, HMRC has an outstanding appeal to the Court of Appeal to vary the order appointing the PL by removing the undertaking in damages. If that were to succeed, there could be no application to enforce the undertaking in damages.

iii) It would add considerably to the length and complexity of the hearing to decide whether or not there had been full and frank disclosure. A decision on the point would be of no practical relevance unless an application were later made to enforce the undertaking in damages, but in any event the court dealing with that application would have to consider further issues, such as causation and quantum.

25. I need to mention one further procedural point at this stage. Mr Parfitt sought to rely on the PL's report, dated 31 May 2024, and the documents referred to in that report. Mr Harry objected on two grounds.:

i) He submitted that HMRC had specifically sought and obtained permission from the court to file evidence in answer to Mr Ajibola's third witness statement, but had not sought permission to rely on the PL's report. Mr Parfitt submitted (and I accept) that the court would normally receive a report from the PL, as an officer of the court, without the need for a specific order, and would do so even if it was produced shortly before the hearing. By way of example he referred me to *HMRC v Total Site Projects Ltd* [2019] EHWC 586 (Ch), where HH Judge Davis-White KC accepted in evidence a progress report submitted by provisional liquidators only two working days before the hearing. Further, the only documents attached to the PL's report were (i) an Opinion from Rupert Baldry KC which had been forwarded to Mr Ajibola in February 2024 and (ii) the Company's own documents or material derived from them, including a case study.

ii) Secondly Mr Harry submitted that Mr Ajibola was prejudiced because he had not had long to consider that report and that he had been unable to access the Company's documents because of the appointment of the PL. However, Mr Brockman, who appeared for the PL, submitted that the PL had complied promptly with all requests made by Mr Ajibola and that no access to documents had been requested since 31 May. Mr Harry accepted that Mr Ajibola had had the PL's report since 31 May and had not requested access to the Company's documents since that date.

I ruled that I would admit the PL's report, but would take Mr Harry's submissions into account in deciding what weight to give it.

HMRC's primary case: the Workers were employed by the Company

26. The legal test was not disputed before me. It is summarised in a number of well-known cases, including *Mann v Goldstein* [1968] 1 WLR 1091, where Ungoed-Thomas J held that it is not the usual practice of the Companies Court

to make a winding-up order on the basis of an alleged debt which is disputed in good faith on substantial grounds. Mr Parfitt rightly accepted that this placed the burden of proof squarely on HMRC as petitioner.

27. Mr Elliott, on behalf of Mr Ajibola, raised a large number of objections to HMRC's primary case, but in my judgment one of these is determinative. He submitted that, in order for the court to be satisfied that there was no bona fide dispute, it must be satisfied that the Workers were employed by the Company, despite the contracts which show them to be self-employed.

28. I was taken to a number of authorities as to the common-law test for deciding whether a contract creates an employment relationship, including *HMRC v Atholl House Productions Ltd* [2022] 4 All ER 461. In that case Sir David Richards, with whose judgment Arnold and Peter Jackson LJJ agreed, reviewed the authorities and reached the following conclusions at [122-123]:

    i) It is a necessary pre-condition to a finding of employment that there be mutuality of obligations, i.e. the provision of services by the employee in return for remuneration.

    ii) It is also a necessary pre-condition that the employer should have the right to exercise a sufficient degree of control over how the services are performed.

    iii) If both pre-conditions are satisfied, it is then necessary to construe the contract as a whole in the light of its factual matrix, using the ordinary principles of construction of contracts.

29. The starting point must be the contracts between the Company and the Workers. The only contract which I have seen is the specimen contract which contains the provisions set out in paragraph 16 above. It is not particularly well-drafted, but I agree with Mr Elliott that, if one takes it at face value, it does not amount to an employment contract. To the contrary:

    i) The only services stipulated in the contract are provided by the Company to the Worker (viz. payroll services) and the only payment is by the Worker to the Company (the fee for those services); and

    ii) The Company has no control over what services are provided by the Worker to the NHS Trust (and, indeed, is likely to be unaware of what those services are).

    The argument that there is a contract of employment therefore fails to satisfy both the first and the second pre-conditions. The only pointer in the opposite direction is the heading "*Contract of Service*", but this label is not sufficient to turn it into an employment contract.

30. HMRC submitted, and I agree, that the factual matrix includes the contract between the Company and the relevant Agency, as well as the representations made by the Company to the Agency, i.e. HMRC's four sources of evidence summarised in paragraphs 7 to 15 above. I was referred to *Arnold v Britton* [2015] AC 1619 and I have also reminded myself of the judgments in *Rainy*

Sky SA v Kookmin Bank [2011] 1 WLR 2900 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173. These decisions are so well-known that I need not lengthen this judgment by setting out all the relevant passages, but I will refer to the observation in *Rainy Sky* at [23]: "*Where the parties have used unambiguous language, the court must apply it*". In my judgment HMRC will have an uphill struggle in seeking to persuade me that the factual matrix is capable of overriding the unambiguous wording of the specimen contract.

31. HMRC submitted that the change in the status of 98% of the Workers at the end of the first month did not alter the position, but HMRC did not explain why. In the light of my conclusion above, it seems to be implicit in HMRC's case that the specimen contract must be a sham. Neither party addressed the court as to the legal definition of sham, but I will apply the test set out by Arden LJ in *Hitch v Stone* [2001] EWCA Civ 63:

> "*63. The particular type of sham transaction with which we are concerned is that described by Diplock LJ in Snook v. London & West Riding Investments Ltd, above. It is of the essence of this type of sham transaction that the parties to a transaction intend to create one set of rights and obligations but do acts or enter into documents which they intend should give third parties, in this case the Revenue, or the court, the appearance of creating different rights and obligations. ...*
>
> *64. An inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities.*
>
> *65. First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.*
>
> *66. Second, as the passage from Snook makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.*
>
> *67. Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.*
>
> *68. Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they*

agreed to vary their agreement and that they have become bound by the agreement as varied ….

69. Fifth, the intention must be a common intention: see Snook's case, above. …"

32. In order to be a sham, both the Company and the Worker should intend to create a set of rights and obligations which are different from those contained in the document. I am satisfied there is prima facie evidence of some kind of fraud on the part of the Company, but it is not clear, on the evidence I have seen, whether the true position is that (i) the Company employed the Workers and hence the contract signed by the Workers was a sham or (ii) the Workers were self-employed but the Company made untrue representations to the Agencies (whether with, or without, the connivance of the Agencies).

33. 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:

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.

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.

iii) On the present evidence I am unable to reach a concluded view that the specimen contract is a sham.

iv) Mr Ajibola 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.

34. Before leaving HMRC's primary case, I need to refer to s.117A of the Social Security Administration Act 1992, which states (so far as relevant):

"*(1) This section applies to proceedings before a court …*

(c) for the recovery of any sums due to the Inland Revenue or the National Insurance Fund.

(2) A decision of an officer of the Inland Revenue which—

(a) falls within section 8(1) of the Social Security Contributions (Transfer of Functions, etc.) Act 1999; and

(b) relates to or affects an issue arising in the proceedings,

shall be conclusive for the purposes of the proceedings. …

> *(4) Subsection (2) above does not apply where, in relation to the decision—*
>
> *(a) an appeal has been brought but not determined;*
>
> *(b) an appeal has not been brought (or, as the case may be, an application for leave to appeal has not been made) but the time for doing so has not yet expired ….*
>
> *(5) In a case falling within subsection (4) above the court shall adjourn the proceedings until such time as the final decision is known; and that decision shall be conclusive for the purposes of the proceedings.*"

35. The facts relevant to s.117A are as follows:

i) On 30 November 2024 the PL wrote to HMRC saying: "*please treat this letter as the Company's appeal which is intended to protect the Company's position pending the [PLs'] receiving advice which is anticipated in the near future*."

ii) The PL received tax advice from Mr Rupert Baldry KC, which they forwarded to Mr Ajibola, and decided not to pursue the appeal.

iii) On 21 February 2024 Mr Ajibola's solicitors wrote to the First-tier Tax Tribunal ("**FTT**") stating that he wished to appeal the Decision Notice on behalf of the Company.

iv) On 22 February 2024 the PL's solicitors wrote to the FTT: "*The [PL] did seek review from HMRC to give them time to obtain the tax opinion from leading counsel and, having done so, have taken the decision on behalf of the Company not to appeal the assessments. The director has no locus on behalf of the Company to gainsay that decision.*"

v) On 20 March 2024 HMRC wrote to Mr Ajibola's solicitors:

> "*In the event that the FTT declines to issue the Appeal and your client is successful in its application to set aside the appointment of [the PL], your client can apply to the FTT for permission to make the Appeal out of time;*
>
> *If the above circumstances arise, HMRC will not object to your client applying to the FTT to make the Appeal out of time, on the provision that the Appeal is brought within 28 days of the Court's order to set aside the appointment of the Provisional Liquidators*."

vi) On 8 April 2024 the FTT judge, Ms Jane Bailey, wrote saying that Mr Ajibola did not have standing to file an appeal in the name of the Company and that the FTT file was accordingly closed.

36. If the FTT is correct in so holding, does s.117(2) operate to make the Decision Notice conclusive, even though I have held that there is a triable issue as to whether the Workers were employees of the Company? If so, this would give rise to a Catch-22 situation, in which (i) Mr Ajibola was unable to challenge the Decision Notice whilst the PL was in office, (ii) s.117A had the effect of

making the Decision Notice conclusive, and (iii) the result was that the Company would be wound up and Mr Ajibola would never be able to challenge the Decision Notice.

37. HMRC's skeleton argument refers to *HMRC v Changtel Solutions UK Ltd (formerly Enta Technologies Ltd)* [2015] STC 931, which it says prevents Mr Ajibola from being "*trapped in a Kafkaesque situation*". In that case HMRC petitioned for the winding-up of a company for unpaid VAT, notwithstanding that there was an outstanding appeal to the FTT against the assessment to VAT. The case is authority for the proposition that, although the decision of the FTT is likely to be a compelling factor in the Companies Court's exercise of its discretion to make a winding-up order, the court is not obliged to defer to the decision of the FTT if satisfied that the debt is not bona fide disputed. In that case the court held that the Companies Court could make its own mind up without awaiting a final decision from the FTT. By contrast, the present case is the converse, in that there is a final decision for the purpose of s.117A. Hence I am not convinced that *Enta* provides the answer.

38. Basic justice clearly requires that Mr Ajibola should not be prevented from having a proper opportunity to appeal the Decision Notice in circumstances where (i) it is at least arguable that the Workers were not employees of the Company and (ii) HMRC has represented that it will not object to an appeal out of time, if the PL is discharged. S.122(1) of the Insolvency Act 1986 ("*A company <u>may</u> be wound up by the court…*") gives the court a discretion. In these unusual circumstances I have concluded that I should exercise my discretion by not winding up the Company on HMRC's primary case. This makes it unnecessary for me to decide whether the FTT is correct in saying that Mr Ajibola has no standing to bring the appeal.

HMRC's alternative case: the Company is the deemed employer

39. HMRC's alternative case is that the Company is deemed to be the employer. This argument first emerged in HMRC's skeleton argument on 17 June 2024, which referred to s.44 of the Income Tax (Earnings and Pensions) Act 2003 ("**ITEPA s.44**") and submitted that the Company was deemed to be the employer of the Workers for the purpose of ErNIC.

40. As Mr Elliott pointed out, HMRC has referred to the wrong legislation. ITEPA s.44 applies in respect of PAYE and employee's NIC, but the relevant legislation in respect of ErNIC is the Social Security (Categorisation of Earners) Regulations 1978, SI 1978/1689 (the "**1978 Regulations**") Reg. 5 and Sched. 3, which are in similar, but not identical, form to ITEPA s.44. In the course of her oral submissions Ms Dhanoa accepted for the first time that the 1978 Regulations might be the relevant provision. Given the similarity between the two sets of provisions, I am prepared to approach HMRC's argument as if it had referred to the 1978 Regulations instead of ITEPA s.44.

41. Reg 5(1) states:

> *"For the purposes of section 4 of the Act (Class 1 contributions), in relation to any payment of earnings to or for the benefit of an employed earner in any employment described in any paragraph in column (A) of Schedule 3 to these regulations, the person specified in the corresponding paragraph in column (B) of that Schedule shall be treated as the secondary Class 1 contributor in relation to that employed earner*."

42. Column (A) of Sched 5 provides, so far as relevant, as follows:

> "*2. Employment (not being an employment described in paragraph 2 of column (B) of Schedule 1 to these regulations …) where–*
>
> *(a) the worker personally provides services to the end client;*
>
> *(b) there is a contract between the end client and a UK agency under or in consequence of which—*
>
> *(i) the services are provided, or*
>
> *(ii) the end client pays, or otherwise provides consideration for the services, and*
>
> *(c) remuneration is receivable by the worker (from any person) in consequence of providing the services*."

43. The words in parentheses refer to para 2 of Column (B) of Sched 1. This provides that a worker is not to be treated as an employee (inter alia):

> "*c) where it is shown that the manner in which the worker provides the services is not subject to (or to the right of) supervision, direction or control by any person*".

This broadly replicates the common-law test for employment. The effect is to reverse the burden of proof, so that it is up to the Agency (or the Company, as the case may be) to prove that the Worker was not self-employed. However, as Mr Elliott observed, in relation to the Petition the burden of proof is on HMRC to show that there is no bona fide dispute in this regard.

44. Column (B) of Sched 5 provides, so far as relevant, as follows:

> "*2. The UK agency who is a party to the contract with the end client; or …*
>
> *(b) where, at any time, a person (other the end client) who is resident in Great Britain and who has a contractual relationship with the UK agency provides to the UK agency fraudulent documents in connection with the purported deduction or payment of contributions in connection with the employed person, the person who provides the fraudulent documents.*"

(I shall refer to this as the "**Fraud Exception**".)

45. The effect of these provisions is that a Worker who provides services to an NHS Trust via an Agency is deemed to be an employee of the Agency if all the conditions in para 2 of Columns (A) and (B) of Sched 5 are satisfied, unless the Fraud Exception applies. Mr Elliott submitted that HMRC had real difficulties in surmounting each of these hurdles. However, it is unnecessary

for me to reach any conclusion on those submissions. If HMRC were able to surmount all the hurdles, this would establish that the Agencies were deemed to be the employers for the purpose of ErNIC, but that would not get HMRC home. HMRC needs to establish the Fraud Exception in order to make the Company liable for ErNIC in substitution for the Agencies.

46. I confine this judgment to what I regard as the two most serious hurdles which HMRC needs to surmount in respect of the Fraud Exception, one procedural and the other substantive.

HMRC's procedural hurdle

47. The procedural hurdle is that the Decision Notice refers to the Workers as "*employees*", which I take to mean actual employees and not deemed employees by virtue of the Fraud Exception. This interpretation is reinforced by the covering letter alleging that the Company is the actual employer of the Workers and by the first witness statement of Desmond Michael English, made on 27 October 2023 in support of HMRC's application for a provisional liquidator. He said at paras 245-246 that the Company had committed a significant fraud in under-declaring PAYE, employee's NIC and ErNIC, which were being deducted from wages but not appropriately declared and paid to HMRC. HMRC's entire case has proceeded on the basis that the Company was the actual employer. Its skeleton argument opens by saying: *HMRC's case is that the Company employed its workers and has failed to account for [ErNIC]*". It was only in its skeleton argument, lodged two days before the hearing, that HMRC for the first time ran the alternative case that the Company was the deemed employer of the Workers by virtue of the Fraud Exception, albeit referring to the wrong legislation.

48. Mr Elliott referred to *Whitney v Commissions of Inland Revenue* [1926] AC 37 at 52, where Lord Dunedin said:

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

49. This dictum remains good law, as can be seen from the dictum of the Court of Appeal in *Hoey v HMRC* [2022] 1 WLR 4113 at [31]:

> "*The tax system has been described as involving three stages: stage 1 is liability, stage 2 is assessment and stage 3 is methods of recovery (see Whitney v Inland Revenue Comrs [1926] AC 37, 52 (Lord Dunedin). The term "liability" has a potentially wide meaning and can refer both to the charge to tax and the obligation to pay. It has at times been used*

interchangeably by the Claimants. We use it in its strict (Whitney stage 1) tax sense to mean "liability to pay tax"."

50. It was common ground that stage two of Lord Dunedin's three stages (the assessment) was constituted in the present case by the Decision Notice, but Counsel were not aware of any authority which decides whether a Decision Notice (or other step constituting the assessment) is necessary before HMRC could present a Petition as a creditor (within the meaning of s.123(1)(a) of the Insolvency Act 1986). HMRC urged me not to decide this question in the present case. It follows that I have to proceed on the assumption that it is at least arguable that a Decision Notice is required in order to turn any liability for ErNIC into a debt.

51. In *Tower MCashback LLP v HMRC* [2011] 2 AC 457 at [15] to [18] Lord Walker explained that, whilst it was necessary for HMRC to set out its conclusions in an assessment, it was not necessary to set out the reasoning which led to that conclusion. There is clearly scope for argument as to where to draw the line between the reasoning and the conclusion, but Mr Parfitt fairly accepted that the Decision Notice in the present case assessed the Company as an actual employer, not a deemed employer who was liable solely by virtue of the Fraud Exception. Accordingly, HMRC has not satisfied stage two of *Whitney* by issuing a Decision Notice that the Company is liable to pay by virtue of the Fraud Exception.

HMRC's substantive hurdle

52. The substantive hurdle is whether HMRC can satisfy the court that the Company falls within the Fraud Exception. I am satisfied:

    i) That the Workers provided services to the NHS Trusts;

    ii) That this must have been pursuant to contracts between the NHS Trust and the Agencies (albeit that I have not seen any such contract);

    iii) That there was a contract between the Company and each of the Agencies; and

    iv) That the Company provided to the Agencies the documents which Mr Parfitt described as his first, second and third sources of evidence), that these documents were provided "*in connection with the purported deduction or payment of contributions in connection with*" the Workers and that there is strong prima facie evidence (i) that the sample documents which I have seen are fraudulent and (ii) that they point to a pattern of fraud in relation to all the Workers who elected to be self-employed.

53. However, this leaves three questions:

    i) Has HMRC established that the Company will fail to show that the Workers were self-employed (as defined in para 2 of Column (B) of Sched 1)?

ii) If the answer to (i) is "yes", is it necessary, as a matter of law, that the fraud should be a fraud on (and not with) the Agencies?

iii) If the answer to (ii) is yes, has a fraud on the Agencies been established?

54. As I have said, the exception for Workers who are genuinely self-employed is one which needs to be established by the entity which is sought to be made liable for ErNIC by the 1978 Regulations; however, for present purposes the burden is on HMRC as petitioner and there is a bona fide dispute as to whether HMRC can discharge this burden.

55. As for the second question, Counsel's researches has not revealed any case which has decided whether the Fraud Exception is satisfied where the Agent colluded with the Company in the fraud. Mr Elliott took me to HMRC's own Manual at para ESM2044, dealing with the similarly worded exception in ITEPA s.44. This says that the Agency is deemed to be the employer for the purpose of PAYE unless (inter alia) there was a fraudulent document "*and the [Agency] has been unaware that the document was fraudulent and it has acted upon the document in good faith*."

56. HMRC's Manual accords with what I consider to be the likely purpose behind the 1978 Regulations, i.e. they place the burden on the Agency to pay ErNIC, save where the Agency has been deliberately misled by another entity, which then becomes liable in place of the Agency. It is difficult to discern any good reason why the 1978 Regulations would have transferred the entirety of the burden of ErNIC onto an entity which conspired with the Agency, where the Agency was also at fault. I therefore conclude that the Fraud Exception requires HMRC to establish that the Company committed a fraud on the Agencies.

57. Mr Parfitt's fourth source of evidence shows that the Agencies (or, at least, the ones who responded) all claim to have relied on the false representations made by the Company. But, adapting the words of Mandy Rice-Davies, "*they would say that, wouldn't they!*" The point was raised for the first time two days before the hearing, and Mr Ajibola has not had an opportunity to put in evidence in answer.

58. HMRC's skeleton argument says that "*the court will not be able to resolve the dispute about how much the customers knew. The court does not need to. … HMRC's view is that the weight of the evidence is against the Company's position. However the court can remain agnostic on the issue.*" This was said on the basis that the Fraud Exception did not require proof that the Agencies were defrauded. However, in my judgment HMRC does need to establish this and has failed to do so.

59. I therefore conclude that, on the current evidence, HMRC has not satisfied the substantive hurdle of showing (i) that the Workers were not genuinely self-employed and (ii) that the Agencies were defrauded by the Company's representations that the Workers were employed by the Company.

Permission to amend the Petition?

60. Mr Parfitt submitted in his reply that both the procedural and the substantive hurdles could be overcome by giving him permission to amend the Petition in order to rely on the liability for ErNIC as a contingent debt. I was not addressed on the question whether a liability to HMRC, which has not yet been assessed, is capable of constituting a contingent debt. But, assuming that it is, I must consider whether it is just to allow HMRC to make that amendment, which has not yet been formulated. I am satisfied that this would not be just. It is not a mere technical amendment, but involves a fundamental shift in the nature of the case. It is not the case which Mr Ajibola came to meet. It is true that HMRC's case has always depended on showing that the Company defrauded HMRC by failing to account for ErNIC as the Workers' actual employer, but the new case involves a different fraud, viz. defrauding the Agencies by deceiving them into believing that the Company was the employer of the Workers. In my judgment it would be unjust to allow this fraud to be pleaded for the first time at the close of submissions.

61. As a fallback, Mr Parfitt invited me to adjourn the Petition in order to enable HMRC to amend and in order to give time for further evidence. I expressed my concern to Mr Harry that, if the Petition were simply dismissed, the PL would cease to hold office and there would be nothing to prevent fraud by the Company whilst HMRC got its house in order. Mr Harry reminded me that the court has power under s.125 of the Insolvency Act 1986 to make "*any other order that it thinks fit*". He wisely offered an undertaking in broadly similar terms to a freezing order, with exceptions for (i) transactions in the Company's ordinary course of business, (ii) payment of director's salary and (iii) reasonable legal expenses, and with an obligation to provide information regularly to HMRC. This goes some way to meeting my concerns.

62. My reasons for refusing an adjournment, subject to the giving of this undertaking, are as follows:

    i) HMRC has had many months within which to gets its house in order. It says that it was initially misled by Mr Ajibola's evidence into thinking that he accepted that the Workers were employees. However, by the end of January it had his first witness statement which made it clear that his case was that the Workers were self-employed.

    ii) At the commencement of the hearing Mr Parfitt's position was that I had a binary choice: either to wind up the Company or to dismiss the petition. On this basis I put it to the parties at the outset that there was no need to consider the application to discharge the PL. The hearing proceeded on this basis. Accordingly, with HMRC's approval, Mr Ajibola was not given the opportunity to makes submissions as to why the PL should be discharged. If I were to adjourn the petition, the PL would remain in office.

Disposal

63. I accept the undertaking offered by Mr Ajibola on behalf of the Company and I dismiss the Petition. I will hear the parties as to the form of the Order.