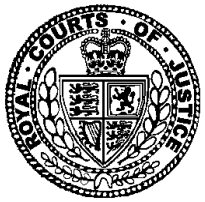

Neutral Citation Number: [2024] EWHC 1884 (Ch)

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: 22 July 2024

Before :

MR DAVID HALPERN KC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

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**

- -

- -

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 date: **19 July 2024**

- -

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 22 July 2024

Mr David Halpern KC:

1. On 19 July 2024 I gave judgment dismissing the winding-up petition presented by HMRC. This is my judgment in relation to the consequential matters which have not been agreed between the parties in the light of my judgment. I am giving this judgment without circulating a draft in advance, so that it is available in case it become necessary to refer to it at the Court of Appeal hearing due to start tomorrow.

The discharge of the PL

2. Rule 7.38 of the Insolvency Rules 2016 provides, so far as relevant, as follows (with my underlining):

> "(*3*) *Without prejudice to any order the court may make as to costs, the remuneration of the provisional liquidator … must be paid to the provisional liquidator, and the amount of any expenses incurred by the provisional liquidator … reimbursed–*
>
> *(a) if a winding-up order is not made, out of the property of the company …*
>
> *(4) Unless the court otherwise directs, where a winding up order is not made, the provisional liquidator may retain out of the company's property such sums or property as are or may be required for meeting the remuneration and expenses of the provisional liquidator*."

3. Mr Brockman (for the Provisional Liquidators ("**PL**")) submitted (and I accept) that Rule 7.38(3) draws a distinction between costs on the one hand and remuneration and expenses on the other. The remuneration and expenses "must" be paid out of the Company's property, but the court "may" make an order for costs which has the effect of determining who is ultimately out of pocket.

4. Mr Harry (for the director, Mr Ajibola) referred to *Re UOC Corporation* [1998] BCC 191 at 196H-197A, where Carnwath J (as he then was) recorded the view of Harman J (in a case to which I was not taken) that Rule 4.30 of the 1986 Rules (which is substantially the same form as Rule 7.38(3)) was directory and not mandatory. I am not satisfied that the word "must" in Rule 7.38(3) is directory, given the contrast with the word "may" in Rule 7.38(4), but if I have a discretion I am not prepared to exercise it in this case, for the same reason as I give in relation to Rule 7.38(4).

5. Turning to Rule 7.38(4), neither Mr Harry nor Mr Parfitt (for HMRC) was aware of any authority on how the court should exercise the discretion in para 7.38(4), save for *Re Secure & Provide plc* [1992] BCC 405 at 414H-415B. In that case Hoffmann J (as he then was) made the following order: "*Petition dismissed with costs. The provisional liquidator not to retain the company's property to meet his remuneration and expenses; these costs to be borne by the Secretary of State as costs of the petition*". In the final paragraph of his judgment Hoffmann J criticised the Secretary of State as petitioner for having applied without notice to appoint a provisional liquidator, saying that there was insufficient material to justify the appointment,

which does not, of course, require a cross-undertaking in damages from the Secretary of State."

6. In *Secure & Provide* it was clear that, as between the petitioner and the company, the petitioner was to blame for the costs, but there was nothing to indicate, as between the company and the provisional liquidators, that the latter were at fault. The only clue to the reasoning is the proposition that the petitioner was not required to give a cross-undertaking in damages. This proposition is the one which is the subject of the appeal to the Court of Appeal tomorrow.

7. I go back to the wording of Rule 7.38(4), which says that the PL are entitled to retain such property as may be required for meeting their remuneration and expenses, "*unless the court otherwise directs*". In my judgment this puts the burden on the party asking the court to depart from the default position. There has been no suggestion that the PL have acted improperly and I see no reason why the court should exercise its discretion against them.

8. It is common ground that the PL should deliver up to the Company the assets specified in Schedule 1 to the draft Order and the login and password details for the Company's email and electronic material. However, Mr Ajibola also seeks five further orders.

9. The first and second are that the PL should deliver up the keys to the Company's premises and should make payment of all Company moneys, save for a sum in respect of the expenditure properly incurred by the PL. Mr Brockman objects to these orders because they would deprive the PL of their right of retention under para 7.38(4). For the reason given above, the PL are entitled to this right and accordingly I refuse to make the orders sought at this stage. This is hotly contested litigation with very large amounts being spent on costs. Mr Ajibola is requesting the PL to take a number of steps to remedy all the prejudice which he claims to have suffered as a result of their appointment. The costs of that exercise are properly a matter between him and HMRC; I see no reason why the PL should be deprived of their right of retention of assets.

10. Thirdly, Mr Ajibola seeks an order that the PL deliver up documents created in the course of the provisional liquidation. Mr Brockman has two objections. His narrower objection is that this includes documents in which privilege or confidentiality belongs to the PL. Mr Harry says that this could be met by an appropriate carve-out.

11. Mr Brockman's wider objection is that this raises issues of fact and law which are inappropriate to deal with at a consequentials hearing. I agree with that submission. I wondered about giving liberty to apply. However, given that the PL are not parties to the Petition, it is probably more sensible for the Company to issue its own separate application in due course, if it wishes to pursue this issue.

12. Fourthly, Mr Ajibola seeks an order that the PL write to all persons to whom they have written in the course of their appointment, informing them they have been discharged. I am told that there are many thousands of persons to whom they have written. Mr Harry was unable to point me to any authority which indicates that it is normal practice for such an order to be made, and I am not prepared to make it.

13. Fifthly, he seeks an order that the PL provide reasonable assistance to the Company in obtaining access to property and information. Once again, Mr Harry was unable to point me to any authority which shows that it is normal practice for such an order to be made, and I am not prepared to make it, in circumstances where there is no suggestion that the PL have acted improperly.

Costs

14. Mr Parfitt accepts that HMRC should pay Mr Ajibola's costs of the Petition on the standard basis, but he submits that the order should run from the date when Mr Ajibola made his Application on 22 January 2024, because until that point HMRC had been entitled to rely on the fraudulent documents which the Company had created. In response Mr Elliott took me to correspondence showing that Mr Ajibola's solicitors explained their client's position in detail, as soon as they became aware of the order appointing the PL without notice. In these circumstances I see no reason to depart from the usual principle that the losing party should pay all the costs on the standard basis.

15. I order an interim assessment in the sum of £186,000, which is approximately 50% of the amount in Mr Ajibola's costs summary. The reason for not awarding a higher amount on account is that the costs appear to me to be larger than I would have expected. Mr Ajibola will need to satisfy a Costs Judge that they are proportionate as well as reasonable.

16. As noted above, Rule 7.38(3) gives the court a discretion to order that the PLs' remuneration and expenses do not ultimately fall on the Company. I was referred to *Titan Petrochemicals Group Ltd v Sino Charm International Ltd* [2023] CA (Bd) 4 Civ, a decision of the Bermudan Court of Appeal. At para [63] the President, Sir Christopher Clarke, helpfully sets out four options:

> *"(i) order that those fees and costs be paid by the Company, without any right of recovery from [the petitioner]; or*
>
> *(ii) order that they should be paid by the Company on the basis that the Company may recover the amount thereof from [the petitioner]; or*
>
> *(iii) order that they should be paid by [the petitioner];*
>
> *(iv) make no order now and postpone consideration of the question as to who should pay the costs until after the determination of [related] proceedings*."

17. Mr Parfitt realistically does not press for (i), but does seek an order in terms of (ii) or (iv). As regards (ii), his submission is that the question of payment by HMRC should depend on whether the Court of Appeal allows HMRC's appeal against the imposition of an undertaking in damages. It is not clear to me that this is what Sir Christopher Clarke had in mind when setting out option (ii), but it nevertheless raises an issue which needs to be considered.

18. As regards (iv), he submits that the determination of the incidence of costs should await the outcome of the Company's proposed appeal to the FTT. I am told that the appeal to the FTT (if the FTT accept the appeal out of time) is likely to take many

months, and perhaps more than a year. I do not think it appropriate to leave the question of costs in limbo for that period. In any event, I am not satisfied that the FTT's decision will be sufficiently related to the current proceedings to throw much light on whether this Petition should have been presented. I therefore reject option (iv).

19. Mr Harry argues for option (iii). He refers to *Secure & Provide* in which Hoffmann J ordered the petitioner to pay the costs. However, as I have noted, in that case it was accepted that there was no undertaking in damages. If the Court of Appeal upholds Mr Gasztowicz KC's decision that HMRC is required to give an undertaking in damages, it will then be open to Mr Ajibola to apply in the usual way for compensation which may include the remuneration and expenses of the PL.

20. If, on the other hand, the Court of Appeal allows the appeal and sets aside the undertaking in damages, in my judgment it would be inappropriate for HMRC to have to bear the costs of the PLs' remuneration and expenses, which are one of the most significant consequences of their appointment.

21. I therefore order that the remuneration and expenses of the PL should be treated as part of the loss in respect of which compensation may be sought under the undertaking in damages, in the event of the Court of Appeal dismissing HMRC's appeal.

Permission to appeal

22. HMRC seeks permission to appeal on both grounds of my decision. In relation to each ground of appeal, I am not satisfied that there is a real prospect of HMRC satisfying the court that there is no bona fide dispute. I therefore refuse permission to HMRC to appeal.

23. The first ground of my decision was that there is a bona fide dispute as to whether the Workers were actually employed by the Company. Ms Dhanoa (for HMRC) submits that the agreement between the Company and the Workers was partly oral and partly written, and that it is the oral terms which make it a contract of employment. I do not believe that the argument was framed in this way before me. But in any event, there is a bona fide dispute as to what (if anything) was orally agreed between the Company and the Workers; unlike *Mainpay*, there has not been a full trial with oral evidence.

24. I should add that I did not decide the case on the primary basis that the contract had to be a sham: I merely considered that as a possible fallback position for HMRC.

25. The second ground of my decision was that there was a bona fide dispute as to whether HMRC had established that the Fraud Exception applied. I held that there was both a procedural and a substantive hurdle.

26. As regards the procedural hurdle, I am satisfied that there is a bona fide dispute as to whether the Decision Notice required payment of ErNIC on the ground that the Workers were deemed employees by virtue of the Fraud Exception. Mr Parfitt submits that the concession which I recorded at para 51 of my principal judgment is merely a concession as to what HMRC thought, not what it said. That is not the way I

understood the concession at the time, and I note that he did not seek to correct my draft judgment in this respect.

27. As regards the substantive hurdle, Mr Parfitt submits that the Company claims to have no knowledge of the terms on which the Workers performed their duties vis-à-vis the NHS Trusts and is therefore unable to discharge the burden of proving that the Workers do not fall within para 2 of Column (B) of Sched 1 to the 1978 Regulations (set out in para 43 of my principal judgment). However, at this stage the burden of proving no bona fide dispute is on HMRC, which has also produced no evidence on this point. Given that the point was raised only two days before the hearing, I am not prepared to draw any adverse inference from Mr Ajibola's failure to gainsay it. I therefore conclude that there was insufficient information before the court to enable it to be said that there was no bona fide dispute.

28. Mr Parfitt also seeks a stay. He realistically recognises that it would be difficult to seek a stay pending the substantive hearing of the appeal if I refuse permission to appeal. In that event, he seeks a more limited stay pending determination of the question by the Court of Appeal as to whether there should be a stay pending the appeal. He undertakes to ask the Court of Appeal to expedite the decision whether to continue the stay. I am prepared to grant a stay on that limited basis, so as to give HMRC the opportunity to ask the Court of Appeal to continue it.

29. Mr Harry also seeks permission to appeal against my decision in paragraph above. I refuse permission on the basis that this is a decision within the wide ambit of my discretion in relation to costs.