CO/4867/2016

Neutral Citation Number: [2016] EWHC 2926 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 13 October 2016

B e f o r e:
MR PETER MARQUAND
(Sitting as a Deputy High Court Judge)
Between:
(1) BIFFIN LTD
(2) Mr ERIC TAYLOR
(3) Mr ROBERT McFARLANE

Claimants

v

HER MAJESTY'S COMMISSIONERS FOR REVENUE AND CUSTOMS

Defendant

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(Official Shorthand Writers to the Court)

Mr Ben Elliott (instructed by PricewaterhouseCoopers) appeared on behalf of the **Claimants**
Mr M Paulin (instructed by the Government Legal Department) appeared on behalf of the **Defendant**

J U D G M E N T
(Approved)

1. MR PETER MARQUAND: This is an application by the Claimants for an interim injunction prohibiting Her Majesty's Commissioners for Revenue and Customs, "HMRC", from commencing enforcement action against the three Claimants in respect of alleged tax liabilities that are the subject of appeal and postponement applications before the Tax Tribunal. This application has been made on notice filed and served on 29 September 2016 and I heard the parties' submissions on 5 October 2016.

2. Mr Taylor and Mr McFarlane are the directors and ultimate owners of Biffin Ltd. These three Claimants have been subject to an HMRC enquiry since 2007 and those enquiries are not yet concluded. The centre of the dispute concerns the tax consequences of the purchase and sale of land in Lancashire. The sums in dispute are substantial and amount to £10,900,000.

3. The Claimants have brought proceedings by way of judicial review in England and in Scotland. In the proceedings in London before me, the Claimants challenge the following decisions of the Defendant:

1. An amendment of Biffin Ltd's corporation tax return for the year ending 31 December 2008 by issuing amendment notices on 23 June 2016.

2. An amendment to Mr Taylor and Mr McFarlane's tax returns over the years ended 5 April 2005 and 2010 by notices dated 29 June 2016, which are known as "jeopardy amendments".

3. A refusal to agree postponement of tax demanded under the jeopardy amendments and certain discovery assessments (“the postponement decisions”). Those refusals were issued on 29 June 2016 and 13 July 2016 in relation to Biffin Ltd and 29 June and 14 July in relation to Mr McFarlane and Mr Taylor.

4. To commence insolvency proceedings against Biffin Ltd as communicated in a warning letter of 5 July 2016.

5. To commence enforcement proceedings against Mr McFarlane and Mr Taylor following warning notices dated 13 and 14 September 2016.

4. To summarise the position, the Defendant in the course of its investigation, decided that the three Claimants have underpaid tax. A demand has been made for that tax and now enforcement proceedings have been threatened. I am not concerned with the application for permission to apply for judicial review, which will follow in due course. Nor am I dealing with the substantive matter, but only with the question of whether or not I should exercise my discretion and order interim relief to prevent the enforcement proceedings from taking place for the time being.

5. On the morning of the hearing on 5 October 2016, the Defendant raised the issue of whether a High Court in London had jurisdiction as, on the Defendant's case, the decisions being challenged had been made in Scotland. Therefore, there are two broad issues to be decided. First, does the court in London have jurisdiction and, secondly, if it does, the question of interim relief sought. I have had the benefit of skeleton arguments from Mr Ben Elliott on behalf of the Claimants and Mr Michael Paulin on behalf of the Defendant. I have also considered the judicial review claim form, the Claimants' statement of grounds and the witness statements of Mr Eric Taylor, one of the Claimants, dated 4 October 2016 and Jonathan Preshaw dated 23 September 2016. Mr Preshaw is a tax director in the practice of PricewaterhouseCoopers ("PwC") who was acting on behalf of the Claimants in relation to the issues with the Defendant. The statement runs to 68 paragraphs and deals mainly with the substantive dispute between the parties. I have also had a statement dated 5 October 2016 from Mr George Mason, an officer of the Defendant.

6. Background facts

7. According to Mr Taylor's statement, both and he Mr McFarlane are domiciled in Scotland and have their primary residences in that country. Although their business activities are carried out throughout the United Kingdom, he states that "the vast majority of mine and Robert's (that is Mr McFarlane's) business interests are in England." Mr Taylor and Mr McFarlane are the ultimate owners of Biffin Ltd.

8. Biffin was incorporated in Jersey in 2003 and is based in Jersey and has its registered office there, but has been a UK tax resident since 2006. Biffin's principal place of business is in Manchester, although it has leased offices in Glasgow.

9. Biffin is the owner of land at Preesall in Lancashire and it is Biffin's only physical asset. This land was acquired in March 2003 from a subsidiary of ICI plc. The land was heavily contaminated and the purchaser was required to assume responsibility for all environmental obligations on site. Biffin entered into an options agreement to sell part of the land, and this option was exercised in October 2004 by Canatxx, a Canadian energy company.

10. The Defendant commenced enquiries into the Claimants' tax affairs in 2007, which remain ongoing. I do not need to go into the details of the outstanding dispute between the Claimants and the Defendant on the tax liabilities. However, they arise out of the sale of the land to Canatxx and the proper accounting treatment of the funds received. In addition, there are enquiries in respect of directors' loans and potential income tax and Class 1A liabilities.

11. There have been various people dealing with the Defendant's enquiries, but currently the matter is being dealt with by Mr George Mason, one of the Defendant's officers in HMRC's Fraud Investigation Service based in Edinburgh.

12. On 29 March 2016, the Defendant issued discovery assessments to Mr McFarlane and Mr Taylor for the years 2010/11 and 2011/12. A discovery assessment was issued to Biffin Ltd on 23 June 2016. The Claimants have disputed the basis upon which the assessments were made and also the underlying tax and have appealed against the assessment and requested postponement of the tax assessed.

13. On 23 June 2016 and 29 June 2016, the Defendant made "jeopardy amendments" to the Claimants' tax returns under the relevant legislation. The Claimants challenge the basis upon which those decisions were made and also dispute the underlying tax and have appealed against the amendments and requested postponement of the tax due.

14. By letters dated 29 and 30 June 2016, the Defendant refused postponement of the tax due from Mr McFarlane and Mr Taylor and, by letter dated 14 July 2016, the tax due from Biffin Ltd. The Claimants have referred their postponement applications to the Tax Tribunal. I am told that the Defendant's statement of case is due in November 2016. All of the correspondence was signed by Mr Mason on the Defendant's headed paper with its address at a PO Box in Bootle. In his witness statement, Mr Mason says that all <u>his</u> material decisions about which the Claimants complain were made in Scotland from his office in Edinburgh. He says that letters have a return address of Bootle as it is the preferred return address for correspondence and it is merely an administrative matter.

15. On 5 July 2016, a letter was sent to Biffin Ltd at its address in Glasgow making a demand for unpaid debts of £1,845,633.98. The letter states that if the debt is not paid in full within seven days, a petition to wind the company up will be presented to the Sheriff Court or the Court of Session without further warning. This letter is signed by Karthik Kolisetti, collector, and the Defendant's address is set out as Elgin House in Edinburgh.

16. On 13 September 2016, Mr Taylor received a letter from the Defendant seeking an unpaid debt of £4,539,953.49 and Mr McFarlane received a similar letter demanding a payment of £4,501,505.04. Both letters are from Mrs Kaur, debt collector, and entitled "Notice warning of legal proceedings". They state that if the payment is not made in full "now", proceedings will be started in the local Sheriff Court. Both letters are addressed to Mr McFarlane and Mr Taylor at addresses in Glasgow. Both of those letters have a postcode of BX5 5AB for the Defendant, although I have not been told the area to which the postcode relates.

17. Mr Preshaw, on behalf of the Claimants, wrote to the Defendant by letter dated 2 August 2016 objecting to the letter of 5 July 2016 [that is the letter addressed to Biffin

Ltd] claiming that it was an abuse of process and complaining about the way the enquiry was being handled. That complaint was rejected by Mr Branigan on behalf of the Defendant and he indicated that enforcement proceedings would continue, stating: "It makes no logical sense not to seek payment". Mr Branigan describes himself as having operational responsibility for the case. The address given for the Defendant in this letter is in Newcastle.

18. By letter dated 21 September 2016, Maclay Murray and Spens LLP from their office in Glasgow wrote to Mr Mason at the Bootle address. The letter states that they are acting for Mr Taylor and Mr McFarlane and their correspondence is in relation to the letters of 13 and 14 September 2016 from Mrs Kaur. The letter refers to the appeals before the Tax Tribunal and also that the basis of the underlying debt is in dispute. It contains the following:

    i. "In addition, we understand that PwC's attempts to discuss matters with your debt collection team have been deliberately blocked - the debt collector having advised PwC that they were specifically instructed by you not to discuss the cases and would provide no information on the timing of action despite being told earlier in a telephone conversation there was a temporary hold on any action until instructed by you (this despite the invitation in the Notices [ie the letters of 13 and 14 September] to contact HMRC to discuss matters should our clients have reason to believe that further action should not be taken).

    ii. In light of the above, unless written confirmation is provided **by close of business on 22 September 2016** that the Notices have been withdrawn, and that no further recovery proceedings will be pursued pending the outcome of our clients' appeals in respect of applications for postponement, our clients will have no choice but to proceed with applications for judicial review (including applications for interim interdict) to prevent further action being taken by HMRC."

19. In response to the letter dated 21 September and the threat of judicial review, the Defendant in an email dated 22 September timed at 12.53 from Mairi Gibson, solicitor based in Edinburgh, confirmed that the Defendant had been instructed to pause further recovery action for a period of three weeks (which would be until

13 October 2016).

20. In the event, the Claimants decided to issue an application for judicial review on 23 September 2016 in London and included an application for urgent interim relief in the form of an injunction. That relief was granted by Jay J on that day, but was limited in time to 4.00 pm on 5 October 2016, the day of the hearing before me. At the conclusion of the hearing, I extended the order until 4.00 pm on the day that I deliver this judgment.

21. Mr Matthew Greene of PwC Legal LLP, acting on behalf of the Claimants, emailed a letter to the Defendant on 27 September 2016 asking the Defendant to confirm whether or not it would take any point about the territorial scope of Jay J's order and asking for an undertaking or agreement to an order that no steps would be taken to enforce, in any jurisdiction, the payment of the disputed tax until the relevant Tax Tribunal appeal/applications had been determined.

22. On 28 September, Frances Fenton from the Defendant's solicitor's office emailed a letter in response confirming that the Defendant would comply with the order of 23 September 2016 and included the following:

    i. "HMRC are mindful that this application has not provided your client any more protection than the undertaking given by email of Ms Mairi Gibson (Office of the Advocate General) on behalf of HMRC on 22 September 2016. Whilst this exchange did not include the Claimant Biffin Limited there is no reason to suggest that it would not also have had the benefit of the three week period, had this been subject of a request to HMRC. It was therefore a disproportionate and unreasonable action to have taken, and for these reasons HMRC will strongly oppose any application for costs of the interim injunction."

23. At 19.15hrs on 28 September, Mr Greene emailed Ms Fenton noting that she, Ms Fenton, thought Ms Gibson's email of 22 September constituted an undertaking and asked two questions. First, could she confirm that the undertaking now extended to Biffin Ltd? Secondly, asking for confirmation that, given she considered that the order for interim relief provided no further protection than the email of the 22 September, whether she would agree to a consent order to extend interim relief until 13 October. Ms Fenton responded on 29 September by email timed at 13.43 stating:

    i. "HMRC will comply with the interim ordered granted on 23 September 2016 by Mr Justice Jay. In answer to Mr Greene's

specific questions, the answer to both is no."

24. In response Ms Yeo, a solicitor with PwC Legal LLP, in an email timed at 09.31hrs on 30 September asked Ms Fenton to explain why HMRC were not willing to consent to an extension of the interim relief. Ms Fenton responded on the same day by email timed at 11.10hrs stating that it would assist HMRC if there was an intention to withdraw the proceedings in London now the proceedings in Edinburgh had been filed. This request was repeated at 12.16hrs. At 14.47hrs Ms Yeo responded as follows:

    i. "...We can confirm that:

2) We do not intend for both the judicial review proceedings to proceed to hearing and the issue of proceedings in both jurisdictions was protective given the multi-jurisdictional nature of this matter;

3) If HMRC are willing to extend the interim relief until the determination of the Tribunal appeals then there will be no need to proceed to hearing on either set of proceedings and the proceedings can either be withdrawn or stayed pending the determination of the appeals. In those circumstances, we have no preference whether the relief is ordered by the High Court or the Court of Session;

4) Until interim relief has been agreed it would be premature to withdraw either the English proceedings or the Scottish proceedings.

    i. Frankly we are surprised that the agreement of the interim relief requires any consideration. HMRC are well aware that it is an abuse of process to commence enforcement or insolvency proceedings in respect of the debt that is disputed. In the present case the tax is both the subject of appeal and an ongoing enquiry and is clearly disputed. It is irrelevant to the issue of interim relief whether the proceedings are continued in England or Scotland; if HMRC consent to relief being granted on the terms proposed then

we are content to submit a consent order to either the Court of Session or the High Court.

ii. As previously stated, the Claimants are keen to engage with HMRC in relation to this issue. Please could you let us know your position and, if interim relief cannot be agreed, the reasons."

25. There was no response to this email and the Defendant's skeleton argument was provided to the Claimants on 5 October by email timed at 09.35hrs.

26. Jurisdiction

27. As can be seen from the background described above, the Defendant raised the issue of jurisdiction less than one hour before the hearing on 5 October. The Defendant's submissions were that it was not clear why proceedings had been brought in both jurisdictions and that as all the Claimants reside in Scotland and Mr Mason took his decisions in Scotland, the correct jurisdiction was in the Scottish courts. The Claimants' submissions were the Defendant was a body operating throughout the United Kingdom and that the Scottish and English courts have concurrent jurisdiction. In particular, reliance was placed on the Civil Jurisdiction and Judgments Act 1982.

28. The parties agreed that for the purposes of the Civil Jurisdiction and Judgments Act that, first, the Defendant was part of the Crown and, secondly, that an application for judicial review was civil proceedings within the meaning of the Act. Section 16(1) applies the provisions set out in Schedule 4 to determine which particular court has jurisdiction for each part of the United Kingdom. Section 46 provides that the Crown has its seat in every part of, and every place in, the United Kingdom. Schedule 4 paragraph 1 provides: "that persons domiciled in part of the United Kingdom shall be sued in the courts of that part". Schedule 4 paragraph 16 states:

i. "Application may be made to the courts of a part of the United Kingdom for such provisional, including protective, measures as may be available under the law of that part, even if, under this Schedule, the courts of another part of United Kingdom have jurisdiction as to the substance of the matter."

29. I was referred to the case of Tehrani v the Secretary of State for the Home Department [2006] UKHL 47. Mr Tehrani claimed asylum at London City Airport and was given temporary admission and provided with accommodation in Glasgow. His claim was rejected and he appealed under the relevant legislation. The adjudicator of his appeal was located in Durham and he dismissed the appeal, as did the Immigration Appeal Tribunal sitting in London. Mr Tehrani petitioned the Court of Session in Edinburgh for judicial review. The Secretary of State claimed the court did not have jurisdiction and this was initially upheld. The case came before the House of Lords and it was held that under the common law the Court of Session in Edinburgh did have jurisdiction, but the arguments on the basis of the Civil Jurisdiction and Judgments Act made by the Claimant were rejected as that Act specifically excluded appeals from tribunals.

30. Mr Paulin relied in particular on R v Secretary of State for Scotland, ex parte Greenpeace Limited (unreported) [1995] Lexis Citation 2332, a decision of Popplewell J of 24 May 1995. In this case, Greenpeace Limited with offices in London challenged a decision to allow Shell UK Ltd to dispose of a large buoy by sinking it in Scottish waters. The judge decided the Scottish courts had jurisdiction, because notwithstanding the fact that the Secretary of State for Scotland was domiciled in both England and Scotland, it was a decision of the Scottish administration. Mr Paulin said that on the basis of R v Greater Manchester Corner, ex p Tal [1985] QB 67 and Willers v Joyce (No 2) [2016] 3 WLR 534 I must follow the decision of Popplewell J. On page 81 paragraph A of Tal, Goff LJ states:

    i. "...the principle applicable in the case of a judge of first instance exercising the jurisdiction of the High Court, viz., that he will follow a decision of another judge of first instance, unless he is convinced that that judgment is wrong, as a matter of judicial comity."

31. I was also referred to the Union with Scotland Act 1706 and in particular Article XIX. That article provides:

    i. "... and that no Causes in Scotland be cognisable by the Courts of Chancery, Queen's Bench, Common Pleas or any other Court in Westminster Hall; and that the said Courts, or any other of the like nature, after the Union, shall have no power to cognosce, review or alter the Acts or Sentences of the Judicatures within Scotland, or stop the Execution of the same."

32. In other words, the courts in England must not interfere with cases dealt with by a Scottish court and causes of action in Scotland should be dealt with in Scotland.

33. In my judgment, the courts of England do have jurisdiction in this matter for the following reasons:

1. Unlike in Tehrani, this is a case to be decided under the Civil Jurisdiction and Judgments Act 1982 and not the common law. For the purposes of the Civil Jurisdiction and Judgments Act 1982, the Defendant is domiciled throughout the United Kingdom and, therefore, it may be sued in any of the jurisdictions.

2. I do not believe that Popplewell J's decision in Greenpeace was convincingly wrong, but it was clearly based on very particular facts where the decision was one of the Scottish administration. In this case, it is not a decision of the Scottish administration, but rather a decision of a United Kingdom-wide body. Although Mr Mason is based in Scotland and he took some of the key decisions in this case, I do not have evidence that he took every decision. I do not know where Mr Branigan is located or where he took his decision (although the letter from him to the Claimants came from Newcastle) and in fact, I do not believe that the location of any particular member of staff of the decision-maker is the determining factor. The majority of the correspondence came from England and I do not think that it is necessary for a litigant to make enquiries of where the member of staff of the decision-maker was actually located at the time the decision was taken in order to determine in which jurisdiction he or she should commence proceedings.

34. As has been said, in some of the cases that I have been referred to, the person making the decision could have reached a conclusion on a train travelling between London and Edinburgh and the precise location of the person who makes the decision on behalf of an organisation should not be determinative of jurisdiction. The decision is one made by the Defendant organisation in any case. Where it decides to locate its officers and staff cannot determine the jurisdiction of the court.

3. This conclusion does not breach the Union with Scotland Act 1706 as there was no interference with the decision of the Scottish court and the Defendant is a United Kingdom-wide body and so there is no particular Scottish connection as there was in the Greenpeace case.

35. Mr Elliott submitted that even if such a conclusion concerning jurisdiction for the final determination of the matter was wrong, then paragraph 16 of Schedule 4, to which I have already referred, permitted the courts in England to grant an interim injunction even where the substantive hearing would take place in a different jurisdiction. Mr Paulin did not agree with that submission. In essence, he said there had to be a jurisdiction to make

a final determination in order to make an interim one. Given the conclusion I have reached above, I do not need to decide this point. However, I do not accept Mr Paulin's submission as if it were correct. I do not think that paragraph 16 would have any effect. The meaning seems obvious in my judgment; even if a court in another part of the United Kingdom has jurisdiction over the substance of the matter, an application for interim measures may be made in another jurisdiction within the United Kingdom. Therefore, even if the courts in England and Wales do not have jurisdiction to deal with the substance of this case, they do have jurisdiction to make an interim injunction. I was not referred to the Civil Procedure Rules but Rule 25 deals with this situation. I was also not referred to a particular part of Tehrani, but Lord Nicholls of Birkenhead (at paragraph 13) refers to the case of Rutherford v Lord Advocate [1931] SLT 405. A taxpayer living in Scotland was assessed to tax in respect of fees he earned as a director of a company carrying on business in England and that assessment was confirmed by commissioners for the English county. The tax was not paid and execution was levied on the taxpayer's furniture in Scotland. The Court of Session said it could not set aside the determination of the commissioners, but it was competent for the taxpayer to invoke "the preventive jurisdiction to stop the diligence of which he complained".

36. Forum conveniens

37. Despite my conclusions on jurisdiction, it is necessary for me to deal with whether London is the appropriate forum for a trial of this case. Mr Elliott says the appropriate forum for the trial of this case is London. He says so on the basis of the case of Tehrani but also on the facts. Mr Elliott says the Claimants' preference is for the matter to be tried in London, although they would be content for the case to be tried in Scotland. Mr Paulin relies on the fact that Mr Taylor and Mr McFarlane are domiciled in Scotland, that the decisions were made in Scotland by a tax officer whose office is located in Scotland and the fact that proceedings have been issued in Scotland.

38. I have been referred to Spiliada Maritime Corp v Cansulex Ltd [1987] 1 AC at page 447 paragraph E onwards where Lord Goff refers to the Latin tag "forum conveniens" and states, "it is wiser to refer to this as the appropriate forum". Lord Goff considered how the principles were applied in cases where a stay of proceedings was sought, in other words an application that a particular jurisdiction was not the appropriate forum, which is the submission made by Mr Paulin on behalf of the Defendant.

39. At page 476 paragraph C Lord Goff states that a stay will only be granted where the court is satisfied there is some other forum where "… the case may be tried more suitably for the interests of all the parties and ends of justice" and this is described as "the basic principle".

40. Lord Goff identifies other points, summarising the law as follows:

1. If the court is satisfied there is another available forum which is prima facie the appropriate forum, the burden will shift to the Claimant to show there are special circumstances by reason of which justice requires the trial should nevertheless take place in this country (i.e. England);

2. The burden on the Defendant is not just to show that England is not the natural appropriate forum for the trial, but establish there is another available forum which is clearly or distinctly more appropriate;

3. The natural forum is that with which the action has the most real and substantial connection;

4. If there is no other available forum which is clearly more appropriate for the trial of the action, the court will ordinarily refuse the stay;

5. If the court concludes there is some other available forum which is prima facie clearly more appropriate, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that the stay nevertheless not be granted. The courts will consider all the circumstances of the case, including the circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor will be the fact that the Claimant will not obtain justice in the following jurisdiction. With such an enquiry, the burden of proof shifts to the Claimant.

41. In my judgment, the Claimant has established that the appropriate forum for this case is the High Court in London. My reasons for reaching this conclusion are as follows:

1. There is nothing in this case that makes it particularly Scottish. Whilst it is correct that two of the Claimants are domiciled in Scotland, their business interests in general are mainly in England. Biffin Ltd is registered in Jersey and has its business address in England and the physical assets of the company are also in England. Although Mr Mason, the Defendant's employee, is located in Scotland, it seems to me that is merely a matter of administrative convenience, as in reality the decisions of the Defendant cover the entirety of the United Kingdom and there is no evidence that anything pertains in particular to Scotland. For the avoidance of doubt, when considering the appropriate forum, I think the location of the staff of the decision-maker has more weight than in the question of jurisdiction, which I have dealt with already above, because issues of convenience of the witnesses should be taken into account. I have taken that into account but, nevertheless, in combination with the other reasons I have identified and the Claimants' express preference, I do not find that it is determinative of the appropriate forum. The Defendant has not discharged the burden of proof on this

issue that England is not the natural forum or that Scotland is clearly or distinctly more appropriate;

2. In my judgment, on the facts of this case, when considering the issue at the centre of the dispute, namely the disposal of the land in England by Biffin Ltd, a company with a business address in England and treated as subject to UK tax laws and the treatment of loans to its directors, the most real and substantial connection is with England. Although Scotland is another available forum, I do not believe that it is more appropriate for the trial of the action;

3. I do not consider that there are any circumstances by reason of which justice requires the matter should be tried in Scotland, notwithstanding the conclusion that I have otherwise reached about the appropriate forum. For example, I have not been given any evidence of a procedural advantage to either party for the matter to proceed in Scotland rather than in England. I do not believe that a trial in Scotland is more suitable for the interests of all the parties and the ends of justice in this case.

42. The American Cyanamid principles

43. The court has the power to grant an injunction in all cases where it appears to it to be just or convenient to do so. It is a matter of the court's discretion. Guidelines were set down in American Cyanamid Co v Ethicon Ltd [1975] AC 396 by Lord Diplock. These may be summarised as follows:

1. The Claimant is to show there is a serious case to be tried and, having done so, the question is whether it is just or convenient to grant an injunction.

2. If damages are an adequate remedy for the Claimant, then that would normally preclude the grant of an injunction. If that is not the case, then it should be considered whether, if an injunction is granted against the Defendant, damages would be an adequate remedy if at the conclusion of the case the Defendant is successful. If it is, then there is no reason on this ground to refuse granting the interim injunction.

3. Where there is doubt as to the adequacy of the respective relatives in damages referred to above, then it is necessary to consider “the balance of convenience” which will consider all the circumstances of the case. Lord Diplock stated that it would not be wise to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone the weight to be attached to them. These will vary from case to case.

44. Is there a serious issue to be tried?

45. On behalf of the Defendant, Mr Paulin submits that the Claimants' application for judicial review is misconceived, because of the manifest availability of alternative remedies revealed in the Claimants' statement of grounds. He also submits that the Claimants' case is totally without merit. Accordingly, there can be no serious issue to be tried.

46. It is important I think that I note again that I am not in this application determining whether or not to give permission to apply for judicial review. I have not had the benefit of an Acknowledgement of Service from the Defendant setting out summary grounds for contesting the claim. In fact, Mr Paulin was careful to point out that he did not wish to make such submissions or trespass into this area. On the basis of the materials before me, I have to decide whether there is a serious issue to be tried.

47. The Claimants' statement of grounds challenged the decision made by the Defendant on the basis that:

1. The jeopardy amendments are unlawful and/or unreasonable on the basis that there was no reasonable basis upon which HMRC could have reached the genuine and substantiated conclusion that there was a real and imminent risk of a loss of tax if amendments were not made immediately;

2. HMRC's decision refusing the Claimants' payment applications are unreasonable and unlawful as the decision letters are unreasoned and it cannot rationally be contended that the Claimants do not have reasonable grounds for contesting the alleged liabilities;

3. HMRC's decision to commence enforcement proceedings against the three taxpayers in respect of sums that are both the subject of appeal and the subject of active postponement applications are irrational and an abuse of process.

48. It is correct, as Mr Paulin states, that there are mechanisms within the tax legislation for individuals (the Taxes Management Act 1970) and companies (the Finance Act 1998) to challenge the decisions that have been made by the Defendant. However, those mechanisms do not enable the Defendant to challenge the decision-making process on the grounds of rationality, reasonableness or unlawfulness as the Tax Tribunal does not have the jurisdiction to deal with such challenges. Furthermore, the appeal against jeopardy payments cannot be heard until the enquiry is complete and there is no evidence before me of when that might be.

49. The appeals against the postponement decisions have been referred to the Tax Tribunal, but the Defendant's statement of case is not due until November. The Claimants face the prospect of enforcement proceedings before any of the appeals have been heard by

the Tax Tribunal. The Claimants' challenges are precisely those public law issues and it seems to me, that without deciding the question of permission to apply for judicial review, taking the case as a whole, there is a serious issue to be tried.

50. In particular, I note that it would be an abuse of process to proceed to petition to wind up a company (Mann v Goldstein [1968] 1 WLR 1091) where there is a genuine dispute over the debt. Mr Paulin relied upon Revenue and Customs Commissioners v Changtel Solutions UK Ltd [2015] EWCA Civ 29 as authority for the proposition that the Companies Court retains its inherent jurisdiction to determine a winding up petition on its own merits, notwithstanding the jurisdiction of the Tax Tribunal to determine an underlying tax dispute. In other words, the Defendant could proceed to recover its debt, notwithstanding the ongoing Tax Tribunal proceedings.

51. However, in that case at paragraph 44 Vos LJ stated:

    i. "... It has been repeatedly said in the cases to which I have already referred that the winding-up procedure is not ordinarily the forum in which to determine issues relating to disputed debts, always provided that these debts are disputed in good faith on substantial grounds. Winding-up petitions are not to be used to put improper pressure on alleged debtors."

52. The Defendant in this case has not provided any evidence to suggest anything other than the Claimants' disputes are in good faith and on substantial grounds. In Changtel the issue was whether the Companies Court was required to defer to the findings of the Tax Tribunal and that is not relevant in this case. Mr Paulin also relies upon R(Watch Tower Bible & Tract Society of Britain and others) v The Charity Commission [2016] EWCA Civ 154 at paragraph 19 the Master of the Rolls, Lord Dyson, summarised the principles concerning alternative remedies to judicial review and stated:

    i. "It is only in a most exceptional case that a court will entertain an application for judicial review if other means of redress are conveniently and effectively available."

53. As I have indicated above, I do not believe that the mechanisms within the tax legislation provide the Claimants with such a means of redress as the challenges they make are outside the mechanisms provided within those pieces of legislation. There is no need, therefore, to show the case is “exceptional”. I do not view the Claimants' claims on the

materials before me as totally without merit. I do therefore conclude that I am satisfied there is a serious issue to be tried, for the purpose of this interim relief application.

54. Are damages an adequate remedy?

55. In the event that the Defendant takes steps to enforce the unpaid tax said to be due through the Sheriffs Court, in my judgment, damages would not be an adequate remedy because of the impact of such judgments against the Claimants. The effects are set out in paragraph 63 of Mr Preshaw's witness statement and were not challenged by the Defendant. In summary, a winding-up petition in relation to Biffin Ltd would have an adverse effect upon its ability to trade and an impact upon third parties' confidence in the company. It would also be likely to have an impact upon the reputations of Mr McFarlane and Mr Taylor. Proceedings against them as individuals would also be likely to impact upon third parties' confidence in them as individuals. Mr Preshaw also identifies potential impacts on other projects and other people employed by Mr Taylor and Mr McFarlane.

56. However, the impact upon the Defendant of an injunction would be to keep it (and therefore the public purse) out of any tax that may be due. Any delay in payment could be compensated for by way of interest and/or penalties and would be an adequate remedy. There is no reason on this ground not to grant an injunction.

57. The balance of convenience

58. Mr Paulin submits that the balance of convenience is against granting the injunction sought. He relies upon Tower MCashback LLP 1 and another v Revenue and Customs Commissioners [2011] 3 ALL ER 171, in particular at paragraph 15 where Lord Walker held:

    i. "There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the Commissioners in exercise of their statutory functions to have regard to that public interest."

59. In addition, he relied on R v Secretary of State for Transport, ex p Factortame Ltd (No 2) [1991] 1 AC 603, which sets out the principle that where a party seeks an interim injunction against a public body, based on a ground that a relevant law is invalid,

the court will be concerned not only to balance the interests of the parties before the court, but will also be concerned to take into account the wider public interest. Mr Paulin submits the wider public interest is the discharge of the Defendant's statutory functions. In my judgment, the issue between the parties, outside the application for judicial review, is precisely: what is the correct amount of tax to be paid? I do not believe that Factortame is relevant to the case before me in the way Mr Paulin seeks to argue. In that case, the challenge being brought was to the legislation itself. Mr Elliott confirmed there was no such challenge in this case and I agree. There is a challenge to the exercise of statutory functions, not to those statutory functions themselves.

60. The disadvantage for the Defendant is that, in the event that they successfully rebut this application for judicial review, there will have been a delay in recovering tax. As I have indicated above, this can be remedied by interest and any penalties. However, the disadvantage for the Claimants is in my view far more significant, as I have indicated already. There are consequences that cannot be put right after the event and in my view, when all the circumstances of the case are considered, the balance of convenience is in favour of granting the injunction and maintaining the status quo.

61. Cross-undertaking and damages

62. In the Civil Procedural Rules, Practice Direction 25A at paragraph 5 states at 5.1:

    i. "Any order for an injunction, unless the court orders otherwise, must contain:

        (1) subject to paragraph 5.1B, an undertaking by the applicant to the court to pay any damages which the respondent sustains which the court considers the applicant should pay."

63. Paragraph 5.1A states:

    i. "Subject to paragraph 5.1B, when the court makes an order for an injunction, it should consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or any other person who may suffer loss as a consequences of

the order."

64. Paragraph 5.1B is not relevant. During the hearing Mr Elliott offered an undertaking on behalf of all the Claimants. Mr Paulin said that was not good enough and referred to part of the commentary in the White Book CPR 25.1.25.10 which states:

    i. "... The cross-undertaking should usually be offered in the affidavit in support, which should contain evidence in the applicant's ability to meet the cross-undertaking if called upon to do so..."

65. Mr Paulin states there is no such cross undertaking or evidence of the Claimants' ability to pay. There has been no challenge put forward by the Defendant to the Claimants' assertion that the Defendants hold £2.5 million on account. The statement of Mr Taylor also records that he and Mr McFarlane have land worth around £150 million. There is no evidence the Claimants are attempting to dissipate funds or are not otherwise able to meet the sums due. In this case, bearing in mind that the loss for the delay caused by the injunction is likely to be interest and penalties that are, it seems to me, likely to be lower than the tax claimed, this evidence is sufficient to meet the requirement I have quoted above.

66. Conclusion

67. In conclusion, in my judgment, the High Court in London does have jurisdiction in this case and it is the appropriate forum. I will exercise my discretion to grant the injunction, although I will hear any further submissions on its precise terms, although the order should contain the undertaking to the court offered by Mr Elliott. I will also deal with any other consequential matters.

68. MR PAULIN: My Lord, thank you for your reasoned judgment on this issue. If I may address you first on terms. The application for interim relief, as I have perhaps laboured in my submissions, supervenes upon the underlying claim, which in this case is an application for judicial review, my Lord.

69. MR PETER MARQUAND: Yes.

70. MR PAULIN: Therefore, it seems right and appropriate that the terms of any injunction ought to be until the judicial review proceedings have been determined. That is until

permission has been determined and/or the judicial review proceedings as a whole have been concluded.

71. MR PETER MARQUAND: Yes.

72. MR PAULIN: Thank you, my Lord.

73. MR ELLIOTT: My Lord, in my submission, we do not know what the decision of the court on a substantive hearing would be. In addition, the matter will be before the court. There are two options. Either you could attempt to define when the interim relief will end, which would potentially require a further application, or you could simply leave it on the terms that it is, because obviously the High Court judge, say dismissing it at permission stage, would also dismiss the interim relief order or, equally, at the substantive matter, if the decision was decided, my learned friend would stand up and say and also we would like the interim relief order dismissed. That was the case, for example, in the order I handed up as an example in the hearing.

74. I would submit when we do not know exactly what the decision will be, and it is possible the case could go on appeal, for example, my submission would be actually to leave the order silent on that point. Alternatively, the order should be the earlier of the words requested, i.e. until the Tax Tribunal, or when the matter is finally determined, at which point a permanent injunction might be granted of course.

75. MR PAULIN: My Lord, there is a matter of basic process. Any juncture has to have an end-stop date. Of course my learned friend is right that any future judge who may determine the application can take a view on the appropriateness or otherwise of the injunction itself at the relevant stage, but of course that depends upon the proceedings and, my Lord, in this case those proceedings are an application for permission to bring judicial review. Therefore, I have carefully said that any injunction should last until permission has been determined and/or the judicial review proceedings have themselves been determined.

76. To deal with my learned friend's last point, the possibility of any appeal if the Defendant obtains permission, my Lord, or does not but decides to appeal, then of course an application would be made in the appropriate way for the injunction to be extended as a consequence and that is the procedurally correct way to approach matters. Not in a vague and unspecified way. Indeed, the rules are clear that where injunctions are concerned particularity is the key factor so that certainty is achieved as a matter of justice.

77. My Lord, in my respectful submission, that would be the correct approach. I would also respectfully submit that that approach causes no prejudice to the Defendant in any sense.

78. MR PETER MARQUAND: The current wording I think on the application is "the earlier", so if the tax appeals were determined earlier then this would automatically fall away. Do you say that is not even applicable?

79. MR PAULIN: The point about the Tax Tribunal proceedings concerns matters that, as you set out in the judgment, do not concern the public law principles that are the basis for the court decision. In that sense, my Lord, it confuses more than it clarifies.

80. Of course it is right that if the Tax Tribunal proceedings were determined prior to the application for judicial review then, as it were, the application and the injunction would simply evaporate, because there would be not be one and indeed the parties would apply. I would respectfully submit that there is a clause in the order that says the parties are at liberty to apply to vary the order. That is the appropriate approach.

81. MR ELLIOTT: My Lord, just a very short point. The overall principle, my Lord, in my submission should be this debt can only be enforced when it has come as an undisputed debt, because that would be the only time at which enforcement would not be an abuse of process. That is why, in my submission, that wording would be appropriate on the basis of the order.

82. MR PETER MARQUAND: I am not deciding that point and so my decision is that it should not refer to the Tax Tribunal proceedings. It should simply refer to 28 days after the final determination of the claim for judicial review.

83. MR PAULIN: Precisely. Of course, my Lord, just briefly this, one has to take care not to prejudice the determination of the judicial review proceedings by virtue of the interim order that is made today, which after all has to be an interim order. That is the point.

84. Finally, my Lord, since I am on my feet, as it were, we would respectfully submit that costs ought to be reserved for the purposes of the determination proceedings as a whole, when no doubt the parties can make the relevant applications and/or negotiate between themselves, subject to the decision that is made on the proceedings as a whole. In my respectful submission, that would be entirely the appropriate course in circumstances where while interim relief has been granted, there is of course the decision on the substantive underlying merits of the application.

85. MR PETER MARQUAND: Mr Elliott.

86. MR ELLIOTT: My Lord, I sense we are on costs now. I am not sure if the appropriate order would be if my learned friend wants to ask for permission to appeal first. Do you? I do not mind which order we do things, my Lord.

87. MR PETER MARQUAND: It is up to you. I do not mind. You have started costs.

88. MR PAULIN: The point I make on costs is simply that in these circumstances where, as I have submitted, the order ought to be that the interim injunction pertains to the point that I have said it ought to that the straightforward course is costs reserved and then the parties can make the relevant applications at that point and/or negotiate between themselves. That, in my respectful submission, would be the appropriate course.

89. MR ELLIOTT: The first problem with that, my Lord, is that during the hearing my learned friend asked that the costs of this application be assessed separately. In my submission, this is quite clearly a separate procedure in which costs ought to be awarded. You have not made a decision on the ultimate judicial review and those costs will have to be determined separately, but this is a case in which the Claimants, in my submission very reasonably, attempted to negotiate this matter and avoid a contested application and a contested hearing.

90. You have already been taken through the correspondence. They asked for agreement, which was not given, and asked for agreement on a much lesser order as well, my Lord, only an extension until yesterday, which was not given even though the Revenue had actually said that "if you ask you will get it".

91. My Lord, in those circumstances, the costs of this application should be awarded to the Claimant. It is a separate application. I would also, my Lord, submit that it is appropriate to take into account the Revenue's conduct in the approach to this application. My Lord, you have been through the correspondence. I dwell in particular upon the refusal to extend, having had a short extension of this application, because of course that could have left the parties more time to negotiate, a refusal to explain their position, silence for five days after repeated requests for their position to be made clear and then, as you have indicated, the position only being raised at 9.30 am.

92. In particular, my Lord, the jurisdiction issue which has taken an immense amount of time before you, about half the hearing on my rough calculation, only being raised on the morning could have been avoided potentially if the Revenue had raised it much earlier.

93. Unless I can be of any further assistance.

94. MR PAULIN: My Lord, I have three short points, if I may. May I take you to CPR 44.2.

95. MR PETER MARQUAND: Yes.

96. MR PAULIN: I am grateful, my Lord. My Lord, if we turn over the page to paragraph 5 where, as you will see, is the fact that this is a question of the court's inherent discretion, my Lord.

97. MR PETER MARQUAND: Yes.

98. MR PAULIN: Really, my Lord, I make three short points. The first is that there was an offer of three weeks, which was made in good faith. That offer was made against the context of the letter which you carefully set out from the Claimants, which was essentially a letter before action for the purposes of Scottish proceedings then into an interim interdict. The Defendant has been put to substantial costs, because there have been two separate processes, two separate offices of this large government department, and yet an application was made to Jay J and there was subsequent discussion between the parties.

99. My Lord, just to address the point on conduct. We have not had, for the purposes of these judicial review proceedings, a pre-action protocol letter for the purposes of the proceedings in England and Wales. My Lord, I would respectfully submit, there is no real sensible excuse for that. The Claimants are not litigants in person. They are represented by a law firm. Therefore -- I want to make this point lightly, my Lord -- my respectful submission is that 5A is in issue there; namely, the question of whether any relevant pre-action protocol was followed. I make that point, my Lord, lightly, as I say, because of course that would be the sort of point that would be taken for the purposes of the grounds of opposition.

100. My Lord, that takes us to the third point, which is that, as you will know from the application notice for this application, that the application was the injunction to range over decisions of the Tax Tribunal, despite the fact that it can only sensibly relate to the underlying application for judicial review. As I have said, the order ought to reflect the fact that the claim that is in issue here is this claim for judicial review.

101. In those circumstances, my Lord, we are actually in a situation where the Defendant has not been successful in terms of the totality of the way its application notice was framed. You will remember I took you to the way that was drafted. The Defendant has not been successful on that point. The Defendant has been far less successful, mainly that proceedings can be brought in England and as I have submitted the order would relate to the determination of those judicial review proceedings, because of course those would decide the substantive points which you have alluded to in your judgment.

102. My Lord, in light of that different reality that we are in, the appropriate course is for neither party to be penalised on costs at this stage, because the proceedings have not been determined, and instead for costs to be reserved until the proceeding, namely the judicial review proceedings, have been concluded. I would respectfully submit that that is entirely uncontroversial.

103. The final point, my Lord, just to support that, if you would consider paragraph 5B and C, my Lord, it is for the Claimant in bringing an application to address themselves on

these questions and where they consider they ought to file a claim, where they consider the courts ought to determine that claim and what they consider the appropriate terms of any order to be. My respectful submission is that it is not for the Defendant to guide a litigant on those core issues. That is something that falls squarely within the Defendant's realm of responsibility.

104. In light of your Lordship's clear ruling on the question of jurisdiction, the point is made that of course proceedings could have been brought in England and Wales and that is where we find ourselves. My Lord, in light of the fact that that train is in motion, to pick up on the metaphor used by my learned friend in his submissions, given that that is a train is in motion, I would respectfully submit in this new reality, namely one where the Claimant has not in fact been successful in the totality of the terms of its application as it was drafted and filed with the court, the uncontroversial and appropriate course would be to err on the side of caution and simply allow costs to be reserved in the event. Of course one does not know what that event may be. So, again, the Defendant suffers no prejudice in that regard.

105. It also, my Lord, in my respectful submission, opens up the overriding objective, namely the possibility that the parties may perhaps negotiate with slightly more forensic zeal during the course of these proceedings as they are underway and potentially resolve such matters in any event. One does not know if that is going to be the case, but in my respectful submission it is part of the overriding objective. The court reserves costs to allow that to occur where appropriate. In my submission, for the reason I have given, that would be appropriate.

106. MR ELLIOTT: My Lord, some very short points.

107. MR PETER MARQUAND: I do not need you to.

108. I am going to order that the Claimants have their costs on the standard basis. The reasons for that decision are that the Defendant did not respond to correspondence and did not seem to make any serious attempts to try and resolve this application. The Defendant's position in not confirming or not responding to points such as which jurisdiction was appropriate or considering agreeing an undertaking contributed to this application. Although it is up to Claimant to make up their minds on jurisdiction and application, the Defendant has essentially made this application happen by their lack of response and co-operation. Therefore, as they have lost on this application, they ought to pay the costs of it. I think that in addition, stating that the email of 22 September is enough for the Claimant to make this application unnecessary and then responding saying that the Defendant is not going to extend any agreement to Biffin, having previously indicated that it would, is another reason why I think the Defendant should pay the Claimants' costs. They “forced” the Claimants into this application by their conduct.

109. A further reason is the very late point on jurisdiction being taken. That might have been capable of being resolved if it had been brought up even a few days earlier. For those reasons, I am going to the order that the Defendant pays the Claimants' costs.

110. MR ELLIOTT: My Lord, there are costs schedules if I might invite you to summarily assess.

111. MR PETER MARQUAND: I will do that. Have you had an opportunity to consider them together?

112. MR ELLIOTT: My learned friend has had it, admittedly not a huge amount of time before the hearing, but he has had a copy of it.

113. MR PAULIN: May I confer with my instructing solicitors?

114. MR PETER MARQUAND: Of course.

115. MR ELLIOTT: My Lord, just two short points. Might the order be that the costs be paid forthwith, just for clarification.

116. The second point, my Lord, might I ask the court to take into account that some of the costs incurred here are obviously resultant upon the fact that the Claimants did not know the Defendant's position until the morning of the hearing.

117. It is, and I say this from very personal experience, immensely difficult to prepare a hearing when you have no idea what arguments might be taken. In particular, my Lord, immense amounts of work have gone in to justifying and understanding the tax disputes in advance of this hearing, when in actual fact the point was never taken. There was not any tax in dispute. That arises, my Lord, directly in consequence of the Revenue's late point. The tax point is an example of the points researched in the days leading up to the hearing. That is the only point I would make, my Lord.

118. MR PAULIN: My Lord, I am grateful. Your Lordship's decision is to assess costs summarily on the standard basis, as I understand your approach?

119. MR PETER MARQUAND: Yes.

120. MR PAULIN: I am grateful, my Lord. I was handed the costs schedule this morning. I have had a chance to have a look at it. The hours spent by those instructing my learned friend are set out in detail and one can understand the basis for that. My Lord, if you have a look at our cost schedule, if I could just cross-refer you to that.

121. MR PETER MARQUAND: Yes.

122. MR PAULIN: I am grateful, my Lord. You will see that in our costs schedule similarly all the hours are set out therein. Your Lordship will see that much in similar format the hours spent are there. The hours used on the application are therein set out. My Lord, we also have a schedule of work done on documents, which is one of the requirements with the CPR. Then we have my invoice for the work done as Attorney General Crown Counsel just at the very end, my Lord. If you turn over, you will see my chambers' invoice.

123. In the case of the Claimants' cost schedule, we have the hours spent set out therein, which is sufficient for there to be a cost schedule. Indeed, it uses the appropriate form. In the case of my learned friend's costs, my Lord, forgive me, if you just look at the last page there is also a schedule of work done on documents, which is entirely appropriate in the circumstances. You will see that is £753. That is the last page.

124. Then, my Lord, if you just turn back, you will see that counsel's fees for Mr Elliott, who is 2012 call, are therein set out as £11,850. We do not have the invoice or any breakdown of the basis for those fees. I am not being unduly critical in any sense of my learned friend, but, my Lord, I am making the point, which I think is a fair one, I hope in your Lordship's estimation it is, that the question of proportionality naturally arises, my Lord, in circumstances of standard assessment. What we do not have is a basis for how those fees were incurred or in which way, shape or form.

125. I appreciate of course that those who have the privilege, my Lord, of being on the Attorney General's panel perhaps are in a slightly different situation with regard to financial privilege or otherwise, so I am not suggesting that that would carry over, but, my Lord, if I might take to you my invoice just as an example of particularisation therein, you will see the hours are all therein set out and of course, whatever my learned friend's hourly rate may be, one would expect that to be set out in order to assess proportionality.

126. What I would therefore invite your Lordship to do, given that this is a summary assessment on a standard basis, is assess in exactly that way, according to the principle of proportionality, in circumstances where, my Lord, as you will be aware, the Defendant is a public body and has faced concurrent proceedings in two separate jurisdictions, notwithstanding the judgments that you have made.

127. The final point I make is that of course one appreciates the fairness of my learned friend's point concerning the notice that was not otherwise provided in relation to the point therein, but of course this is not an application of costs on indemnity basis, my Lord, and, unfortunate though those circumstances may have been, I think it is fair to say that my learned friend was able to deal with the points ably in the way that he did. Indeed, your Lordship was guided as a consequence and, therefore, I think it is fair to say that the Defendant suffered no prejudice in that regard.

128. Therefore, my respectful submission would simply be that your Lordship assesses costs summarily based upon what your Lordship considers to be proportionality having the requisite application.

129. MR ELLIOTT: My Lord, before I go on to the embarrassing submission of my costs, the first point is that actually you will note that solicitors' costs, actually the Revenue's costs, are substantially higher, which is surprising considering that the rates are lower because they do not use commercial rates. The main difference in my submission between the parties --

130. MR PETER MARQUAND: Higher than your solicitors.

131. MR ELLIOTT: Yes, my Lord. Their fees come to -- I think I have that right.

132. MR PETER MARQUAND: Theirs are £7,600 and yours are £9,700.

133. MR ELLIOTT: I apologise, my Lord.

134. MR PETER MARQUAND: I think.

135. MR PAULIN: Yes. The work on the documents is £7,600.

136. MR ELLIOTT: That is only work on the documents, my Lord. The total for the Revenue is £15,000, less my learned friend's fee of £2000 is £13,000. So actually it is quite a bit higher.

137. MR PAULIN: Of course we take no issue with my learned friend's instructing solicitors' costs.

138. MR PETER MARQUAND: I see.

139. MR ELLIOTT: In my submission, the solicitor's costs are clearly reasonable. Obviously, the lower the proportion of the work done by solicitors there is more burden on counsel. You will appreciate, my Lord, that counsel's fee is not necessarily a matter of hours. That is the way the Revenue deal with matters, but it is not the way that ordinarily matters are dealt with with brief fees. They are not ordinarily worked out on a minute by minute basis. Solicitors are entitled to chose counsel of their choice.

140. I am in a difficult position of trying to justify my own fee, my Lord, but I will jump on my learned friend's submission that I dealt with the matters ably. My Lord, obviously also the point is my learned friend's counsel fee is obviously lower, because he only received instructions the day before. Whereas of course counsel in this case was working on the matter for many days. I am grateful, my Lord.

141. MR PETER MARQUAND: Thank you.

142. Obviously, summary assessment is a broad brush approach. I note what Mr Paulin says that he does not actually dispute the solicitors' costs in this case, but he submits that counsel's fees for Mr Elliott's are essentially too high and I should deal with that in a matter of proportionality.

143. I think generally speaking as a rule of thumb, if this came to detailed assessment, one would expect something in the region of 80 per cent to be recovered. I will order £19,800 including VAT. I think that is 20 per cent deduction, unless someone wants to correct me.

144. MR ELLIOTT: My Lord, we will just double-check. I am sure it is right, but your order is 80 per cent.

145. MR PETER MARQUAND: 80 per cent of the grand total. You want it forthwith.

146. MR PAULIN: My Lord, I think we are going to need some time. It may not surprise you.

147. MR ELLIOTT: Seven or fourteen days, my Lord. Not at the end of the proceedings is the only point, my Lord.

148. MR PAULIN: Could we have 21 days? We have to process this.

149. MR PETER MARQUAND: I understand.

150. MR PAULIN: That is simply the way matters work.

151. MR PETER MARQUAND: Mr Elliott, the proposal is 21 days. Are you happy with that?

152. MR ELLIOTT: We are, my Lord.

153. MR PETER MARQUAND: Twenty-one days then.

154. MR ELLIOTT: My Lord, I understand that £19,800 is almost exactly 80 per cent.

155. MR PETER MARQUAND: £19,800 then will be the sum.

156. MR PAULIN: I am sure your Lordship is going to come to it. There are the terms of your order, which, as I understand it, I do not think your Lordship ruled yet will be until the judicial review proceedings have been determined.

157. MR PETER MARQUAND: Until 28 days after. Essentially, what I am intending to order, because you have addressed me on those points already, is that the order will reflect the draft order attached to the application, but it will have deleted from it the words "the earlier of" and "or the determination and/or final resolution of the Claimants' tax appeals." It should just say, "Until 28 days after the final determination of the claim for judicial review, the Defendants be prohibited..." and then as it appears in the draft order, but you need to add to that the Claimants' undertaking to the court and specify the costs.

158. MR PAULIN: My Lord, I apologise we did not do submissions on the undertaking. I apologise.

159. MR ELLIOTT: My Lord, my submission was going to be that unless my learned friend can help me, I cannot envisage how any damages could possibly arise.

160. MR PETER MARQUAND: I have decided that they should. I have decided that.

161. MR PAULIN: That was my understanding, my Lord.

162. MR PETER MARQUAND: I did decide at the end that you should give the undertaking that was in the conclusion so that the undertaking should be included in the order and it is an undertaking to the court. Obviously, the costs need to be specified in the order.

163. Mr Elliott, will you amend that and agree it and then send it to the associate please?

164. MR ELLIOTT: My Lord, I will.

165. MR PETER MARQUAND: Is there anything else?

166. MR ELLIOTT: No, my Lord. I am most grateful.

167. MR PETER MARQUAND: Thank you.