



# COMMISSIONERS OF HMRC V PURITY LTD

## [2024] EWHC 2965 (Ch)

### KEY TAKEAWAYS:

1. Public law defences can be raised by companies in respect of a s85 Finance Act 2022 petition.
2. The court hearing the petition (the Companies Court) will deal with all matters raised, including public law defences, before determining whether to make a winding up order.
3. s85 Finance Act 2022 and s124A Insolvency Act 1986 petitions should be treated similarly.
4. No comparison can be made between public interest petitions and creditors petitions.

### ISSUE

Whether public law defences could be raised by a company in the Companies Court in the context of a s85 FA 2022 petition.

### FACTUAL BACKGROUND

Purity Ltd promoted a scheme whereby their employees were paid a salary, the balance of which was provided by way of an 'advance'. Purity Ltd claimed this was a loan and, therefore, that no payroll taxes were payable on the bulk of the 'salary'.

HMRC asserted that the scheme operated at the cost of the general body of taxpayers. They issued a 'stop notice' to the company on the assertion that it was a tax avoidance scheme. Purity Ltd appealed this stop notice to the First-Tier Tribunal and HMRC has applied to strike out that appeal notice.

A petition was issued by HMRC against Purity Ltd pursuant to s85 Finance Act 2022 and the Insolvency Act 1986 seeking the winding up of the company on the grounds of public interest. Purity Ltd subsequently issued an application in the Administrative Court challenging the decisions made by HMRC to issue and prosecute the petition and seeking a stay.

### GROUND OF THE JUDICIAL REVIEW

#### GROUND 1

Failure by the designated officer to consult the company prior to reaching a decision under s85 FA 2022 in breach of natural justice.

#### GROUND 2

Error of law in the interpretation and application of s85(1) FA 2022 as to the meaning of "relevant body" and failure to give adequate reasons, and/or failure to make relevant enquiry into the facts to support HMRC's conclusion.

#### GROUND 3

Failure to meet the requirement that a sole designated officer of HMRC determines whether to exercise the power provided by s85(1) FA 2022.

#### GROUND 4

The decision to exercise the power under s85 FA 2022 is unreasonable (taking into account irrelevant considerations and failing to take into account relevant considerations).

# CAN DEFENDANT COMPANIES RAISE PUBLIC LAW DEFENCES IN SECTION 85 FINANCE ACT 2022 PROCEEDINGS?

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## SECTION 85 FINANCE ACT 2022

(1) Subsection (2) applies where it appears to an officer of Revenue and Customs that it is **expedient in the public interest**, for the purposes of protecting the public revenue, that a relevant body should be wound up.

(2) The officer may present a **petition** to the court for the winding up of the body.

(3) On such a petition, the court may wind up the body if the court is of the opinion that it is **just and equitable** that it should be wound up.

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## PURPOSE OF STATUTORY SCHEME CREATED BY s85 FA 2022

To enable courts to make orders winding up companies on the **grounds of public interest**.

**Serious consequences** lend themselves to the court ensuring that the company is able to defend itself and challenge the grounds put forward by the respective government body in support of its petition.

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## DOES THE COURT HAVE THE JURISDICTION TO HEAR ALL THE ARGUMENTS RAISED BY THE COMPANY?

Purity Ltd argued that the **Administrative Court** was the proper and only forum for dealing with a public law challenge.

HMRC's position was that the **Companies Court** the jurisdiction to hear all arguments raised, including public law defences.

It was clear to the Court that petitions under **s85 Finance Act 2022** (as set out on the left) are to be treated in the same way as public interest petitions pursuant to **s124A Insolvency Act 1986**. This resulted from the language and the tests applied being identical in many respects, including the language of '**just and equitable**'.

The difference between the two public interest petitions recognised by the court is as follows:

**s124A Insolvency Act 1986** requires the **Secretary of State** to determine that it is expedient in the public interest that a company should be wound up

**s85 Finance Act 2022** states that **HMRC** determines that it is expedient in the public interest for the purposes of protecting the public revenue that the company should be wound up.

Despite this difference, the court felt that the wealth of case law, practice and procedure relating to s124A Insolvency Act 1986 are **useful in understanding** s85 Finance Act 2022.

Ultimately, it was held that **the court hearing the petition will deal with all matters** raised by the respondent company in its defence before determining whether to make a winding up order.

In other words, **the Companies Court does have the jurisdiction** to hear all arguments raised, including public law defences.

## CAN PUBLIC LAW CHALLENGES IN RESPECT OF THESE PROVISIONS BE MADE BY WAY OF DEFENCE IN PETITION PROCEEDINGS?

The Court recognised that the power given to HMRC in s85 Finance Act 2022 was **wide**.

However, the Court held that there is **nothing that provides any support for there being some restriction** as to what a company can seek to argue in its defence to a s85 Finance Act 2022 petition.

Such a restriction does **not** appear from the language of the provision or from the purpose and approach of the courts in relation to s124A IA 1986, which are applicable to s85 FA 2022.

The court adopted the following approach:

BEADLE v HMRC [2020] EWCA 562

Simler LJ at paras 44, 45 and 47

'Where a public body brings enforcement action against a person in a court or tribunal (including a court or tribunal whose only jurisdiction is statutory) the **promotion of the rule of law and fairness** means, in general, that person may defend themselves by challenging the validity of the enforcement decision or some antecedent decision on **public law grounds**, save where the scope for challenging alleged unlawful conduct has been circumscribed by the relevant statutory scheme, which excludes such a challenge.

The question accordingly is **whether the statutory scheme in question excludes the ability to raise a public law defence** in civil (or criminal) proceedings that are dependent on the validity of an underlying administrative act.

...

In my judgment **the express words used by a statutory scheme looked at in isolation may not be sufficient on their own** to restrict or exclude public law challenges, **BUT that may be the clear and necessary implication when the relevant statutory scheme is construed as a whole and in light of its context and purpose.**

...

In approaching the question of statutory construction **the nature and purpose of the statutory regime and the nature of the rights in issue are the STARTING POINT** for consideration.'

**ON THE WORDING OF s85 FINANCE ACT 2022 THERE IS NO EXPRESS OR IMPLIED RESTRICTION ON THE ABILITY OF THE COMPANY AS A DEFENDANT TO RAISE PUBLIC LAW DEFENCES.**

s85 Finance Act 2022 is **not an enforcement proceeding.**

Although this is unlike the penalty notice before the court in Beadle, this is **not essential for reliance on the approach** in that case (as set out on the left).

There is no requirement under s85 Finance Act 2022 for HMRC to have taken other action before issuing the petition.

Therefore, there is **no reasonable opportunity** in many of these cases to challenge the decision making of the public bodies before the petition is issued.

**NOTE: NO COMPARISON CAN BE MADE BETWEEN CREDITORS AND PUBLIC INTEREST PETITIONS**

#### PUBLIC INTEREST PETITIONS

Are ultimately dealt with a trial as the court hearing the petition make determinations on the evidence before it.

#### CREDITORS PETITIONS

Require the court to be satisfied that there is a debt which is not disputed on substantial grounds.

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