
INSOLVENCY BULLETIN

Volume 4, Issue 10

August 2023

A WIDENING OF THE SCOPE OF SECTION 423

The Court of Appeal has clarified the position regarding the actions of debtors through companies they control and regarding transactions to dispose of assets not beneficially owned by them.

Section 423 of the Insolvency Act 1986 allows the Court to set aside a transaction at an undervalue if satisfied that the purpose was (1) to put assets beyond the reach of creditor/s or (2) to otherwise prejudice the interests of such creditor/s. No time limit for avoidance is required. This is in stark contrast to sections 238 and 339 of the Insolvency Act 1986 which require the TUV to have occurred within a “relevant time”. Nor does a TUV claim under section 423 require that the debtor was or became insolvent when the TUV was actioned. It is also not necessary to prove criminal fraud or dishonest intent but that the “dominant” or “substantial” purpose of the transaction was to put assets beyond the reach of creditor/s. Evidence will therefore need to be shown that this was the intended purpose of the transaction even if it was one of several intentions. Where direct evidence of intention may prove difficult, the Court can still draw inferences from the timing and circumstances of the transaction being attacked. This makes the application of section 423 potentially far-reaching and wide.

In the recent appeal case of *Invest Bank PSC V El-Husseini & Ors [2023] EWCA Civ 555*, a United Arab Emirates based bank (“the Bank”) had brought various claims against a Lebanese based businessman (“Ahmad”). Ahmad had given the Bank personal guarantees for credit facilities provided to two UAE based companies amounting to approximately £20 million.

The Bank alleged that in 2017 Ahmad took steps to place various assets (“the Claim Assets”) beyond the reach of his creditors. The Claim Assets comprised two expensive properties in central London, the proceeds of sale from a third company, UK based shares and a US\$15 million cash sum said to be held by a Lebanese company owned and controlled by Ahmad.

The lower Court in a judgment given last year held that section 423 did not apply to the TUV of an asset owned by a company which was in turn owned and controlled by the debtor, with the intention of prejudicing his creditors, unless the debtor acted in a “personal capacity” and not only as the instrument by which the company acted.

There were two issues in the appeal:

1. whether it was possible for a debtor to enter into a transaction with a third party within the meaning of section 423 if his acts are to be regarded in law as “the acts of the company”; and
2. whether a TUV under section 423 can be entered into if the assets are not beneficially owned by the debtor.

The Bank argued that section 423 was wide ranging, unconstrained by concepts of insolvency law and that its purposive approach would be frustrated if “*sophisticated debtors*” could strip the assets of a company owned by them.

The Court of Appeal agreed. Whilst the separate legal personality of a company should be respected, it did not follow that a director who causes a company (which he controls) to enter into a particular transaction had done nothing at all. The lower Court was therefore incorrect in assuming that “*because the company can only act through a human person, and because in law the act is treated as the act of the company, it could not also have some legal significance when it comes to the individual debtor*”. The Court of Appeal further held that a TUV could apply to an asset not beneficially owned by the debtor.

Editor’s Note

This decision by the Court of Appeal is to be welcomed and extends the scope of claims against debtors under section 423 to the deliberate removal by them of company assets over companies which they own and control.



Insolvency and Corporate Recovery Team Jane Gollidge Grant Rechnic Mark Silvester (Editor) Arthur Fernandes Michael Segen Georgina Kyriacou Henry Harris Priscilla Oronsaye

SBP LAW SOLICITORS

Glade House, 52–54 Carter Lane, London EC4V 5EF
Tel: +44 (0)20 7332 2222 • Fax: +44 (0)20 7236 2112 • DX: 1030 LDE

The information and any commentary on the law contained in this Bulletin is provided free of charge for information purposes only. No responsibility for its accuracy and correctness, or for any consequences of relying on it, is assumed by SBP Law Solicitors. The information and commentary does not, and is not intended to, amount to legal advice and is not intended to be relied upon. You are strongly advised to obtain specific, personal advice from a lawyer
