JSC BTA Bank v Ablyazov and anr [2018] EWCA Civ 1176 (22.05.18)

Transaction defrauding creditors – section 423 of the Insolvency Act 1986 – proper test for statutory purpose –limitation

Practical implications

Where a transaction challenged under s 423 IA may be said to have had more than one purpose, there is no requirement that the prohibited statutory purpose (putting assets beyond the reach of claimants etc) must have been a 'substantial' purpose of the transaction before relief will be granted. The relevant enquiry is simply whether the transaction was entered into for the prohibited purpose.

There is no rule of law to the effect that, if a debtor knows at the time of entering into the relevant transaction he was facing claims, the court must find that the transaction was entered into for the prohibited purpose unless the debtor adduces evidence to show otherwise. The 1986 Act contains no presumption to that effect and there is no reason for the courts to invent one. At best, such knowledge on the part of the debtor may, depending on all the circumstances of the case, support an inference that the transaction was entered into for the prohibited purpose.

The proviso in section 32(3)(a) of the Limitation Act 1980 should be construed as encompassing a claim to recover the traceable proceeds of property; a restrictive interpretation of section 38(5) of the 1980 Act (relating to claims brought through another) was not justified and would produce absurdities.

Background

The first defendant (Mr Mukhtar Ablyazov ("MA")) previously controlled the claimant bank. During his period of control, MA was said to have embezzled from it, vast sums of money. Litigation initiated by the bank against MA ultimately led to judgments against MA for a total sum in excess of US$5 billion, of which only a small amount had been satisfied (and none of it voluntarily).

In the current proceedings, the bank sought recovery of the proceeds of a sum of £1.1 m which was transferred on 26 February 2009 from a Swiss bank account in the joint names of MA and his son, the second defendant, to a bank account in London in the sole name of the son. The bank's claim against MA was that the money was held on trust for him his son. The bank's alternative claim was that the transfer should be set aside under s 423 of the Insolvency Act 1986.

Judgment below

In the High Court, the deputy judge (Laurence Rabinowitz QC) dismissed both claims, finding that the transfer was a gift to the son (meaning that the claim against MA failed) but rejecting the claim under s 423 on the basis that the prohibited statutory purpose had not been made out.

The appeal

On the appeal to the Court of Appeal, the bank challenged only dismissal of the claim against the son under s 423 (contending that the judge ought to have concluded that the statutory purpose was made out). MA's son sought (by a respondent's notice) to contend that the judge ought to have dismissed the claim against him on the grounds it was statute barred.

The only reasoned judgment in the Court of Appeal was delivered by Leggatt LJ (with whom Gloster and Coulson LJJ agreed).

As to the test to be applied when considering whether or not the relevant transaction had been entered into for the prohibited statutory purpose, Leggatt LJ considered the judgments of the Court of Appeal in *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981; [2002] BCLC 489. That case

established that, where the impugned transaction was entered into by the debtor for more than one purpose, the court does not have to be satisfied that the prohibited purpose was a dominant purpose, let alone the sole purpose of the transaction. Passages in the judgments in *Hashmi* had referred to a "substantial" purpose but said, Leggatt LJ, the significance of that epithet is not immediately clear. He concluded (at [14]) that the description of the requisite purpose as a "substantial" purpose was not necessary to the Court of Appeal decision in Hashmi and to his mind it risks causing confusion. The word "substantial" was not used in section 423 and Leggatt LJ could see no necessity or warrant for reading it (or any other adjective) into the wording of the section. It was sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose, If it was, then the transaction falls within s 423(3), even if it was also entered into for one or more other purposes. The test was, he said, no more complicated than that.

The reason for the reference by Arden LJ in *Hashmi* to a "real substantial" purpose was, said Leggatt LJ, as appeared from the context, to underline the distinction between a purpose and a consequence of the relevant transaction. It is not enough, as Arden LJ emphasised in *Hashmi*, to bring a transaction within s 423 that the transaction had the consequence of putting the assets beyond the reach of creditors. That is so even if the consequence was foreseeable or was actually foreseen by the debtor at the time of entering into the transaction. Evidence that the debtor believed that the transaction would result in putting assets beyond the reach of creditors may support an inference that the transaction was entered into for the purpose of doing so, but the two things are not the same.

The language of Leggatt LJ at [16] suggests that to establish the prohibited purpose, the applicant for relief under s 423 will need to satisfy the court that the prohibited purpose was positively intended or desired by the debtor. Thus, he explains that when judging a person's intentions, we are generally more inclined to accept that an action was not done for the purpose of bringing about a particular consequence, even if the consequence was foreseen, if there is reason to believe that the consequence wished to avoid or at least had no wish to bring about. By contrast, a consequence is more likely to be perceived as positively intended if there is reason to think it is something which the actor desired.

As to whether the claim under s 423 was statute-barred, the deputy judge had held that the applicable limitation period was 6 years (the claim being a sum recoverable by statute and so within s 9(1) of the 1980 Act) which began to run from the date of the transfer (26 February 2009). As the claim was issued in December 2015 it was *prima facie* statute-barred. The bank, however, relied on s 32 of the 1980 Act (which provides for the postponement of the limitation period in certain cases of fraud, concealment or mistake). Although the bank's case at trial was that MA had been guilty of fraud or concealment, it was not alleged that his son was so guilty. The issue was, therefore, whether the limitation period was postponed as against the son on the basis he was "claiming through" MA. The deputy judge held that he was and that the claim (had it been well founded) would not have been time barred.

The Court of Appeal agreed and rejected the construction of s 38(5) of the 1980 Act (which provides a person shall be treated as claiming through another person if he became entitled by, through, under or by the act of that other person to the right claimed) advanced on behalf of MA's son.