Neutral Citation Number: [2023] EWCA Civ 555

Case No: CA-2022-001893

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
KING'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Andrew Baker
[2022] EWHC 894 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 May 2023

Before :

LORD JUSTICE SINGH
LORD JUSTICE MALES
and
LORD JUSTICE POPPLEWELL

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Between :

INVEST BANK PSC	**Claimant/ Appellant**
- and –	
(1) AHMAD MOHAMMAD EL-HUSSEINI **(2) MOHAMMED AHMAD EL-HUSSEINY** **(3) ALEXANDER AHMAD EL-HUSSEINY** **(4) ZIAD AHMAD EL-HUSSEINY** **(5) RAMZY AHMAD EL-HUSSEINY** **(6) JOAN EVA HENRY** **(7) VIRTUE TRUSTEES (SWITZERLAND) A.G.** **(8) GLOBAL GREEN DEVELOPMENT LIMITED**	**Defendants/ Respondents**

CA-2022-001871
CA-2022-001912

(1) ALEXANDER AHMAD EL-HUSSEINY **(2) ZIAD AHMAD EL-HUSSEINY**	**Appellants**
-and-	
(1) INVEST BANK PSC **(2) MOHAMMED AHMAD EL-HUSSEINY**	**Respondents**

(3) RAMZY AHMAD EL-HUSSEINY
(4) JOAN EVA HENRY
(5) VIRTUE TRUSTEES (SWITZERLAND) AG
(6) GLOBAL GREEN DEVELOPMENT LIMITED
(7) AHMAD MOHAMMAD EL-HUSSEINI

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Paul McGrath KC and Marc Delehanty (instructed by **PCB Byrne LLP**) for the **Claimant**
Daniel Warents (instructed by **Longmores Solicitors LLP**) for the **3rd and 4th Defendants**

Hearing dates: 3 & 4 May 2023

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Approved Judgment

This judgment was handed down remotely at 2 p.m. on 19 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. There are two appeals before this Court which arise from the same proceedings in the High Court. The first appeal, brought by the Claimant, Invest Bank PSC ("the Bank") with the permission of Males LJ, concerns the question whether it is possible for a debtor to enter into a transaction with another person (a third party) within the meaning of section 423 of the Insolvency Act 1986 ("the 1986 Act") if his acts are to be regarded in law as the acts of a company.

2. In a judgment given on 13 May 2022 Andrew Baker J ("the Judge") held that, in respect of a transfer to a third party of an asset owned by a company which is owned and controlled by a debtor, at an undervalue, where the transfer is caused by the debtor (acting with the relevant statutory purpose of prejudicing his creditors), section 423 is not applicable unless the debtor acted separately in a personal capacity and not only as the instrument by which his company acted. The Bank appeals on the ground that he was wrong to do so.

3. The second appeal, which is brought by the Third and Fourth Defendants (or simply "the Defendants") with the permission of the Judge himself, raises the question whether a "transaction" can be entered into within the meaning of section 423 of the 1986 Act if the assets are not beneficially owned by the debtor. In his judgment of 13 May 2022 the Judge held that it could. The Defendants submit that he was wrong to do so. They also submit that the Bank's appeal only arises if their own appeal is dismissed. Although that is logically right, I will address the two appeals in the order in which they were presented before this Court.

Factual background

4. The Bank is a public shareholding company established in Sharjah, United Arab Emirates ("UAE") and listed on the Abu Dhabi Securities Exchange, with retail and corporate banking activities in the UAE and Lebanon. The First Defendant (referred to in these proceedings as "Ahmad") is a Lebanese businessman against whom the Bank says it has judgment debts from proceedings brought by it in Abu Dhabi. The claims in those proceedings were made on what the Bank says were personal guarantees given by Ahmad in connection with credit facilities granted to two UAE companies. The total said to be due under the judgments is c.AED 96 million (equivalent to c.£20 million).

5. The Second to Fifth Defendants ("Mohammed", "Alexander", "Ziad" and "Ramzy", collectively "the Sons") are Ahmad's sons by his marriage to the Sixth Defendant ("Joan"). Ahmad and Joan say they divorced in 2017. Further to its suspicions about Ahmad's dealings with his assets at that time, and by reference to certain evidence which is arguably inconsistent with the claimed divorce, the Bank does not admit that Ahmad and Joan are not still married (or at least not managing their financial affairs as if still married).

The proceedings in the High Court

6. In the High Court proceedings the Bank sought to pursue:

(1) primary debt claims against Ahmad, suing on the UAE judgments, alternatively on the underlying alleged guarantees; and

(2) secondary claims, which variously involve the other defendants, for relief relating to assets ("the Claim Assets") against which, directly or indirectly, the Bank wishes to assert an entitlement to enforce Ahmad's liability to it (if any).

7. At para. 3(2) of his judgment, the Judge said that the Bank sought to pursue the following Claim Assets:

> "(a) two London properties, 9 Hyde Park Garden Mews ('9HP') and 32 Hyde Park Garden Mews ('32HP'), the latter of which is a corner property also referred to as 43 Sussex Place;
>
> (b) the proceeds of sale ('the Proceeds') of a third London property, 18 Hyde Park Square ('18HP'), as to which the basic facts are that 18HP was transferred to the seventh defendant ('Virtue Trustees'), a Swiss entity operated by Kendris AG ('Kendris'), a professional services company, as trustee of a trust known as the Spring Blossom Trust, established by Ahmad as settlor on 4 April 2017, the beneficiaries being Joan and the Sons, and Virtue Trustees sold the property some months later at a fair market price, to a buyer unconnected to Ahmad or his family, and transferred almost all of the net proceeds of sale to Joan;
>
> (c) shares ('the UK Shares') in the eighth defendant ('Commodore UK'), previously named Commodore Contracting Company Limited, a company incorporated in this jurisdiction; and
>
> (d) US$15 million in cash ('the US$15m') said to have been held by Medstar Holdings SAL ('Medstar'), a Lebanese company that appears to have been owned and controlled by Ahmad at all material times."

8. At para. 6 the Judge stated that:

> "The Bank alleges that Ahmad took steps in relation to the Claim Assets in 2017 by which to disguise his (beneficial) ownership of them or to cause them to be transferred within his family with a view to putting them beyond the reach of, or otherwise prejudicing the interests of, his creditors."

9. The factual background to this is outlined at paras. 4-5 of the judgment:

> "4. Prior to the events upon which the secondary claims focus, legal title to 9HP and 18HP was held by Marquee Holdings Ltd ('Marquee'), a Jersey company that has since been dissolved. It was not in dispute that there is a serious issue to be tried on the Bank's claim that Marquee was ultimately wholly owned and controlled by Ahmad, albeit (as to control) the Bank acknowledges that Marquee's directors were individuals from Kendris. The Bank asserted that Marquee held that title for and on behalf of Ahmad as beneficial owner of the properties. The defendants disputed that there is a serious issue as to that, i.e. they said it was fanciful to suggest that Marquee was not the beneficial owner.
>
> 5. It was common ground, in contrast, that Ahmad was legal and beneficial owner of 32HP before the events of 2017."

10. As the Judge said at para. 7, the Bank seeks to claim:

(1) declarations that Ahmad holds the beneficial interest in 9HP, 32HP and the UK Shares, legal title to which is now held variously by the Sons (the Bank no longer pursues any claim for a declaration that the UK Shares are held on trust for Ahmad by the Sons); and

(2) relief under section 423 of the 1986 Act as regards all of the Claim Assets (but in the alternative as regards 9HP, 32HP and the UK Shares), on the basis that the steps allegedly taken by Ahmad in 2017 relating to each of the Claim Assets involved a transaction at an undervalue entered into by him for the purpose of putting assets beyond the reach of or otherwise prejudicing the interests of his creditors.

11. No trial has yet taken place. The proceedings are at a preliminary stage.

12. As the Judge said at para. 8, he had before him:

(1) the Bank's application to amend its Particulars of Claim in certain respects to add certain claims;

(2) applications by Ahmad and the Third and Fourth Defendants to set aside permission to serve the claim on them outside the jurisdiction in certain respects;

(3) an application by Mohammed challenging jurisdiction in respect of the claims pleaded against him concerning his UK Shares; or seeking a stay of those claims; and an alternative application by him for reverse summary judgment dismissing those claims.

13. The points argued before the Judge all concerned the substantive merits of the proposed claims and the arguments proceeded on the basis that there was no material difference between: (a) the need for there to be a serious issue to be tried as a pre-requisite for the grant of permission to serve proceedings out of the jurisdiction; (b)

the need for there to be a real as opposed to a fanciful prospect of success so as to defeat an application for reverse summary judgment; and (c) the need for a claim proposed to be introduced by amendment to have arguable merits sufficient for it to be appropriate to grant permission to amend in the face of resistance: see para. 9 of the judgment.

14. As the Judge said at para. 10, so far as matters of fact were concerned it was agreed that the facts as pleaded by the Bank should be assumed to be true for the purpose of these preliminary applications unless it could be shown on a summary argument that they were demonstrably untrue or unsupportable.

15. In the course of dealing with the various applications before him, the Judge had to address two issues of law. I have outlined his conclusions on those issues at paras. 2-3 above. It is those two issues which now come before this Court on these appeals. I will return to the Judge's reasoning in more detail when I address each appeal.

Material legislation

16. Part XVI of the 1986 Act has the title 'Provisions Against Debt Avoidance …'. The key provision which lies at the heart of these appeals is section 423, which has the sidenote 'Transactions defrauding creditors'.

17. Section 423, so far as material, provides:

> "(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if –
>
> > (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
> >
> > …
> >
> > (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth of the consideration provided by himself.
>
> (2) Where a person has entered into such a transaction, the Court may, if satisfied under the next subsection, make such order as it thinks fit for –
>
> > (a) restoring the position to what it would have been if the transaction had not been entered into, and
> >
> > (b) protecting the interests of persons who are victims of the transaction.

> (3) In the case of a person entering into such a transaction, an order shall only be made if the Court is satisfied that it was entered into by him for the purpose –
>
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
>
> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.
>
> …
>
> (5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as 'the debtor'."

18. Section 424(1)(a) of the 1986 Act provides that an application for an order under section 423 can be made by, amongst others, a "victim of the transaction". Section 425 sets out broad powers which the court may exercise under section 423. For example, para. (a) provides that the order may require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made. Subsection (2)(a) makes it clear that, while an order under section 423 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor entered into the transaction, such an order shall not prejudice the interest in property which was acquired from a person other than the debtor in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest.

19. Section 423 of the 1986 Act applies generally and is not confined to insolvency situations but, in the light of submissions made to this Court, it is also necessary to refer to other parts of the 1986 Act, which are concerned with corporate insolvency and individual bankruptcy.

20. Section 238 of the 1986 Act, which concerns corporate insolvency, provides as follows:

> "Transactions at an undervalue (England and Wales)
>
> (1) This section applies in the case of a company where–
>
> (a) the company enters administration, or
>
> (b) the company goes into liquidation;

> and 'the office-holder' means the administrator or the liquidator, as the case may be.
>
> (2) Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.
>
> (3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.
>
> (4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if–
>
> > (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or
> >
> > (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.
>
> (5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied–
>
> > (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
> >
> > (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company."

21. The "relevant time" is then specified by section 240. Subsection (1)(a) provides that, in the case of a transaction at an undervalue, this is the period of two years ending with the onset of insolvency.

22. Section 249 provides that, for the purposes of any provision in this Group of Parts, a person is "connected with a company" if (a) he is a director or shadow director of the company or an associate of such a director or shadow director; or (b) he is an associate of the company. "Associate" has the meaning given by section 435 of the 1986 Act.

23. Section 435(7) provides that a company is an associate of another person if that person has control of it or if that person and persons who are his associates together have control of it. Subsection (10) provides that, for the purposes of this section, a

person is to be taken as having control of a company if (among other situations) (a) the directors of the company are accustomed to act in accordance with his directions or instructions; or (b) he is entitled to exercise, or control the exercise of, one-third or more of the voting power at any general meeting of the company or of another company which has control of it.

24. Section 339 of the 1986 Act, which concerns individual bankruptcy, provides as follows:

> "Transactions at an undervalue
>
> (1) Subject as follows in this section and sections 341 and 342, where an individual is [made] bankrupt and he has at a relevant time (defined in section 341) entered into a transaction with any person at an undervalue, the trustee of the bankrupt's estate may apply to the court for an order under this section.
>
> (2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction.
>
> (3) For the purposes of this section and sections 341 and 342, an individual enters into a transaction with a person at an undervalue if–
>
> (a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration,
>
> …
>
> (c) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual."

25. Section 341 sets out the definition of the "relevant time" for the purpose of section 339. In particular it is a period of five years ending with the day of the making of the bankruptcy application or the presentation of the bankruptcy petition: see subsection (1)(a).

26. Section 341(2) provides as follows:

> "Where an individual enters into a transaction at an undervalue or gives a preference at a time mentioned in paragraph (a), (b) or (c) of subsection (1) (not being, in the case of a transaction at an undervalue, a time less than 2 years before the end of the period mentioned in paragraph (a)), that time is not a relevant

> time for the purposes of sections 339 and 340 unless the individual–
>
> (a) is insolvent at that time, or
>
> (b) becomes insolvent in consequence of the transaction or preference;
>
> but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by an individual with a person who is an associate of his (otherwise than by reason only of being his employee)."

27. Chapter II of the 1986 Act, 'Protection of Bankrupt's Estate and Investigation of his Affairs', includes section 283, with the sidenote 'Definition of Bankrupt's Estate'. This provides that:

> "(1) Subject as follows, a bankrupt's estate for the purposes of any of this Group of Parts comprises–
>
> (a) all property belonging to or vested in the bankrupt at commencement of the bankruptcy, and
>
> (b) any property which by virtue of any of the following provisions of this Part is comprised in that estate or is treated as falling within the preceding paragraph."

28. Subsection (1) does not apply to, for example, such clothing, bedding, furniture, household equipment and provisions that are necessary for satisfying the basic domestic needs of the bankrupt and his family: see subsection (2)(b).

29. Section 283(4) provides that references in any of this Group of Parts to property, in relation to a bankrupt, include references to any power exercisable by him over or in respect of property except insofar the power is exercisable over or in respect of property not for the time being comprised in the bankrupt's estate; it is unnecessary for present purposes to set out the rest of the definition.

The modern approach to statutory interpretation

30. There are two issues of law which arise on these appeals. Ultimately the answer to both questions depends upon the true construction of section 423 of the 1986 Act.

31. There was no dispute between the parties as to the correct approach to statutory interpretation, which has been set out by the Supreme Court in a number of recent

cases, e.g. *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, at paras. 29-31 (Lord Hodge DPSC):

> "29. The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.' (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'
>
> 30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. …
>
> 31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a

> body would be seeking to convey in using the statutory words which are being considered. …"

The Bank's appeal

The judgment of the High Court

32. The relevant issue as identified by the Judge at para. 18(3) was as follows:

> "This question may therefore arise, namely: where an asset transferred at an undervalue is held by a company and an individual by whom it acts in respect of the transfer does so by virtue of his sole ownership or control of the company, is there, without more, and on the proper construction of s.423(1), a transaction entered into by the individual, either with his company or with the transferee (or both)?"

33. The Judge accepted the basic argument advanced on behalf of the Defendants by Mr Warents, as formulated at para. 20 of his judgment:

> "That is because, Mr Warents argued, when the individual in question so acts, i.e. does no more than act as the instrument by which his company acts, he is not treating with his company, or directing or instructing it to act, he *is* his company. There is thus no transaction to which the individual, as distinct from the company, is privy." (Emphasis in original)

34. The Judge described the contrary notion as the "self-dealing fallacy", that is to say "the false notion that where an individual does no more than act as the instrument by which his company acts the individual enters into a transaction with the company, or with the party with whom, thus acting by the individual, the company deals."

35. I would observe that what the Judge called the "self-dealing fallacy" in fact covered two types of situation: (1) where the individual, typically a director, enters into a transaction with the company; and (2) where the company (acting by that individual) deals with a third party. I would not myself describe the latter situation as amounting to "self-dealing". At the hearing before this Court Mr McGrath made it clear that he was not relying on any notion of "self-dealing" in the first sense.

The Bank's submissions

36. Mr McGrath's argument is summarised as follows at para. 3 of the Bank's skeleton argument:

> "(a) S.423 is a wide-ranging statutory provision, unconstrained by concepts of insolvency or company law, which should be given a purposive interpretation. Its plain protective purpose is frustrated by an interpretation which countenances sophisticated debtors stripping their holding companies of assets without their creditors having recourse to the remedial powers of s.423.
>
> (b) The expression 'enters into' has been construed very widely such that the relevant person need only to have "tak[en] some step or act of participation" which does not require the person to have made the transfer but only to "in some other way be party to or involved in the transaction in issue", per Kitchin LJ in *Hunt v Hosking* [2014] 1 BCLC 291 at [32]. Thus, the analysis of whether a person has entered a transaction for s.423 purposes is far removed from the kind of rigid analysis applicable when considering whether a person is party to a contract. The debtor need not be privy to the formal act of asset transfer if it can be shown he took some step or act of participation or involvement in the transaction.
>
> (c) A proper analysis of the caselaw concerning personal liability of acts done on behalf of a company demonstrates that the analytical focus is on whether the person's acts (and intentions) satisfy the requirements for that person to incur the relevant liability. Whether they do or not is in no way dependent on derogating from the well-established principle of separate legal personality of a company. Indeed, the answer does not differ whether the relevant conduct involves a corporate entity or an individual principal. The personal liability of directors for fraudulent misrepresentations made on behalf of a company is a powerful example of this."

The Defendants' submissions

37. At the hearing before this Court Mr Warents relied upon, but did not develop, what he had submitted in the Defendants' skeleton argument. He maintained that the Bank's appeal simply should not arise because he ought to succeed in the Defendants' appeal on the beneficial ownership issue, which I will address below. I will summarise what Mr Warents submitted in his skeleton argument.

38. Mr Warents accepts that the separate legal personality of a company is not an absolute rule but he submits that it is "the usual default position". He points out that, where it chooses to do so, Parliament can make and has made express provision to impose legal consequences on individuals even when acting as the organ of a company but no such express provision has been made in the present context.

39. Furthermore, Mr Warents submits that the question whether personal liability arises where a person is acting as the organ of a company will depend on the context. He

relies on what was said by Males LJ in *Barclay-Watt v Alpha Panareti* [2022] EWCA Civ 1169, at para. 75 (in the course of rejecting an argument that a director of a company should be held personally liable as an accessory to the company's tortious conduct):

> "Judges have … made clear that the question of personal liability can be a difficult (or 'elusive') question, requiring the balancing of competing principles. For that reason, judges addressing this question have been careful to make clear that statements of legal principle must be understood in the context in which they are made. That context necessarily includes the nature of the tort with which the courts have been concerned in any particular case. …"

I respectfully agree.

40. Further, Mr Warents submits that the Bank's arguments have "a monomaniacal focus on one type of scenario" and have an unduly narrow perspective. He submits that the provisions of section 423 need to be understood in the context of the equivalent wording in sections 238 and 339 of the 1986 Act (which are all "clawback provisions"). He goes on to illustrate the difficulties which he submits would be caused by the Bank's interpretation by reference to some worked examples of scenarios, which go beyond "one man" companies. He submits that it is important to appreciate that, if the Bank is right that a person acting as the organ of a company will always be treated as having personally entered into a transaction in which they were involved in some way in that capacity, then many activities which Parliament clearly intended to exclude from the scope of the clawback provisions in sections 238 and 339 would nonetheless come back within their scope.

41. The fundamental difficulty with that submission, in my view, is that it assumes that the wording of the three relevant provisions (sections 238, 339 and 423) must necessarily be interpreted in the same way. For reasons that I will explain when considering the Defendants' appeal that assumption is incorrect.

Analysis

42. Mr McGrath's fundamental submission to this Court is that, in an appropriate context, the words of section 423(1) – "a person enters into such a transaction with another person" – can and should be interpreted to include "a person who causes a company (which he controls) to enter into such a transaction with another person".

43. Before addressing that submission I should point out that, although the Judge accepted Mr Warents' basic submission on this issue, he rejected the further arguments which he had made: see paras. 22-23 of his judgment, where he said:

> "22. However, Mr Warents took the argument further, submitting in effect that if an asset, transferred with a view to defeating creditors, is an asset of a company owned or controlled by the debtor, and the transfer will be and is effected

> by the company, acting by the debtor, then as a matter of law there *cannot* be a transaction entered into by the debtor within the meaning of s.423(1), whatever the surrounding facts and circumstances. That conclusion does not follow from the basic principle invoked by Mr Warents, and from which the authorities he cited flow, that companies are separate legal persons.
>
> 23. His prior submissions are correct, leading me to answer the question I posed in the negative, because that question was whether, *without more*, the acts of the debtor which are the acts of the transferor company involve the debtor in entering into any transaction (see paragraph 18(3) above). If the debtor has taken steps going beyond those which amount to steps taken by his company under the doctrine invoked by Mr Warents, the character and legal effect of those other steps cannot be prescribed by that doctrine. That doctrine says that certain actions by the individual constitute the actions of his company, not dealing of any kind between the individual and the company or between the individual and the third party with whom, by those actions, the company deals. Whether *everything* the individual does that leads to or otherwise relates to a transfer of an asset at an undervalue by his company (acting by him) is an action of (the individual acting as) the company, under that doctrine, or whether, rather, some of it is action by the individual acting as such, on his own behalf and not as the company, must depend on the particular facts of any individual case." (The judge's emphasis)

44. I would emphasise that in that passage the Judge's decision on this first issue of law was concerned only with the situation where the debtor acts as the instrument of the transferor company "without more". If there is anything more, for example what Mr McGrath called before this Court the "kitchen table conversation", such as that described by the Judge hypothetically at para. 24 of his judgment, then the Judge held everything "must depend on the particular facts of any individual case." I agree with the Judge about that.

45. Where I respectfully differ from the Judge is that, in my view, he fell into the error of 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 Judge did not have the benefit of the detailed argument which this Court has had, in particular by Mr McGrath, who did not appear below.

46. The Judge relied, as he was invited to do on behalf of the Defendants, on the fundamental legal doctrine of the separate legal personality of a limited company: see *Salomon v Salomon & Co Ltd* [1897] AC 22. We were also reminded by Mr Warents that it is well-established in the authorities that the company's assets are not owned in

any sense by the shareholders. These propositions hold true even where there is a sole director and a sole shareholder.

47. Before this Court Mr McGrath made it clear that he does not quarrel with any of those fundamental propositions. He submits, however, that the analysis which was accepted by the Judge is wrong in law because it commits what has being called the "disattribution heresy": see Neil Campbell and John Armour, 'Demystifying the Civil Liability of Corporate Agents' [2003] Camb LJ 290, at 292. The authors of that article suggest that there is an important distinction which must be drawn between the "identification doctrine" (a technique for attributing an agent's acts to a company) and "disattribution" of those acts from the agent. They point out that the identification doctrine was originally developed as a means of attributing the acts or knowledge of senior management to a company. It served a useful purpose but they suggest that it was articulated in problematic terms. The doctrine asks whether the agent is acting "as the company", implying that it is possible for a person to "identify with" a corporate persona more completely than simply acting as an agent. They suggest that this language, coupled with the artificial nature of corporate personality, gives rise to a "metaphysical" notion in which an agent identified with the company is seen as "embodying" the company. They suggest that this "heretical" notion has been dispelled by the decision of the House of Lords in *Standard Chartered Bank v Pakistan National Shipping Corpn (Nos 2 and 4)* [2002] UKHL 43; [2003] 1 AC 959.

48. That analysis of the potential personal liability of company directors is also supported by <u>Bowstead and Reynolds on Agency</u> (22nd Edition), at para. 9-119. It is noted there that it was thought for a short period that the position of company directors was different from that of agents in general in relation to torts and other wrongs because they were to be identified with the company and not personally liable. Reference is made to the decision of this Court in *Standard Chartered Bank* but it is noted that this was reversed by the House of Lords. The authors continue:

> "Where tortious liability turns on an assumption of responsibility, it may be found that directors, like other agents, have not assumed any personal liability, but rather have acted solely on behalf of the company, their principal. Otherwise, directors can be liable in tort in the same way as anyone else."

49. To similar effect is the academic commentary of Peter Watts, 'The company's *alter ego* – an impostor in private law' (2000) 116 LQR 525.

50. As Lord Hoffmann made clear in *Standard Chartered Bank*, at para. 22, the director in that case was not being sued for the company's tort. He was being sued for his own tort and all the elements of that tort were proved against him. The tort relied upon was deceit. Lord Hoffmann went on to explain, at para. 23, that the doctrine in *Salomon*, and indeed company law generally, had nothing to do with the case. He analysed the earlier decision of the House of Lords in *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, which was about negligent mis-statement, as turning on whether the elements for that tort (in particular an assumption of responsibility by the agent) had been satisfied. As Lord Steyn had made clear in *Williams*, the decision had nothing to do with company law but turned on application of the law of principal

and agent to the requirement of assumption of responsibility. Lord Steyn said that it would have made no difference if Mr Williams' principal had been a natural person.

51. Applying that principle to the context of *Standard Chartered Bank*, Lord Hoffmann continued:

> "So one may test the matter by asking whether, if Mr Mehra had been acting as manager for the owner of the business who lived in the south of France and had made a fraudulent representation within the scope of his employment, he could escape personal liability by saying that it must have been perfectly clear that he was not being fraudulent on his own behalf but exclusively on behalf of his employer."

52. In my judgement, the correct legal position is that, while the separate legal personality of a company must be respected, and while the shareholders have no ownership of the company's assets, it does not follow that the director has not done anything at all. Clearly he has as a matter of fact. The question which then arises is whether those factual acts have any legal significance. Sometimes they will have significance because there may be a personal legal wrong committed by the director, which was not the case in *Williams* but was in *Standard Chartered Bank*. But, in my opinion, the significance of those factual acts may be that some other legal consequence is to be attached to the doing of those acts, depending on what the context is.

53. Here the context is whether the debtor's acts can fall within the terms of section 423 of the 1986 Act. In my judgement they are capable of doing so. The language is very broad. The Bank's interpretation would also better serve the purpose of the legislation, which could otherwise be easily frustrated through the use of a limited company to achieve the debtor's purpose of prejudicing the interests of his creditors.

54. Accordingly, I would allow the Bank's appeal. I would stress, however, that this is on a narrow issue of law. It amounts simply to saying that the Judge was wrong to prevent the Bank from pursuing its claim as pleaded on this issue. It amounts to no more than saying that such acts of a debtor are capable in law, without more, of falling within the terms of section 423 of the 1986 Act. Whether they do so, and whether there are other facts (as the Judge himself recognised there may be) which are more than simply the fact that the company acts through its director, would have to be established at a trial on the whole of the evidence. None of that is in issue before this Court at this preliminary stage.

<u>The Defendants' Appeal</u>

The Defendants' submissions

55. The Defendants submit that the Judge should have refused the Bank permission to amend and re-amend its Particulars of Claim in relation to the section 423 applications concerning 9HP, 18HP, the shares in Global Green and shares in

Commodore Netherlands. They submit that the Judge should have declared that the court had no jurisdiction in respect of those claims as against them because he erred in his ruling on the beneficial ownership issue.

56. The key issue of principle which arises is whether, on the proper interpretation of section 423, there can be a "transaction" even though the asset which is alleged to have been disposed of at an undervalue was not beneficially owned by the "debtor".

57. The way in which the Defendants' argument was summarised at para. 9 of their skeleton argument was as follows:

> "(1) *Clarkson v Clarkson* [1994] BCC 921 (CA) is binding authority in this Court for the proposition that a 'transaction' in this context must involve the giving away of property which would otherwise have formed part of the debtor's bankruptcy estate as defined in s.283 IA 1986.
>
> (2) Corporate assets belonging beneficially to a company do not belong beneficially to its shareholder and so would not fall within the scope of its shareholder's bankruptcy estate for the purposes of s.283 IA 1986. Nor are any powers that the shareholder may have (whether qua director or qua shareholder) capable of falling within the scope of s.283 IA 1986."

58. In his oral submissions Mr Warents put the argument more broadly. He submits that it cannot be said that a person "enters into a transaction" within the meaning of section 423(1)(a) of the 1986 Act unless the subject matter of the transaction is the transfer of assets which are beneficially owned by that person.

Analysis

59. I have reached the conclusion that the Defendants' interpretation of section 423 is wrong.

60. First, it requires reading words into section 423 which are not there. Parliament has not used the word "property". It does not even use the word "assets" until one gets to the purpose provision in subsection (3)(a). Even then limb (a) is an alternative to limb (b):

> "otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make."

That is very broad language and does not appear to require the transfer of any assets, let alone assets of which the debtor is the beneficial owner.

61. Secondly, the word "transaction" is defined broadly in the interpretation provision at section 436(1). There it is provided that "transaction" "includes a gift, agreement or

arrangement, and references to entering into a transaction shall be construed accordingly." Not only is that definition a non-exhaustive one on its face, the words "agreement or arrangement" are far broader than "gift". Even if Mr Warents is correct in his submission that the concept of a "gift" inherently requires that the donor must be the beneficial owner of the property which is the subject of the gift, there is no reason to give a restrictive meaning to the broad terms "agreement or arrangement".

62. Further, it is important to note that the opening words of section 436(1) are that the definitions set out there apply "except insofar as the context otherwise requires…". In the present context, I have reached the conclusion that section 423 does require that a broader interpretation should be given to the phrase "enters into a transaction" than might be the case under section 238 or section 339 of the 1986 Act. I will explain later why I do not accept Mr Warents' submission that the decision in *Clarkson*, which is a decision on section 339, is binding on this Court when interpreting section 423.

63. Thirdly, an important part of the context in which subsection (1) of section 423 must be construed is subsection (3). While it is correct that the purpose provision in subsection (3) cannot determine the issue, and there is a logically prior requirement which needs to be satisfied in subsection (1), that a person enters into a relevant transaction with another person at an undervalue, the purpose provision in subsection (3) is not irrelevant to the proper interpretation of subsection (1). It can inform that interpretation. In particular, this Court should not interpret subsection (1) in a way which would easily defeat the purpose of section 423 when read as a whole.

64. Fourthly, Mr Warents did not submit that there was any obvious policy reason why Parliament should have enacted legislation which would be as restrictive as he submits it is. He makes the simple submission that that is what Parliament has enacted and, if it is thought to be deficient in some respect, then it is a matter for Parliament to amend the legislation. But the fact that there is no good policy reason why the legislation should be interpreted in such a restrictive way, whereas there is a good policy reason why it should be interpreted in a way which would better give effect to the purpose of the provision, is a telling reason why the Judge's interpretation should be favoured.

65. Fifthly, the provisions of section 423 are to be found in Part XVI of the 1986 Act, which is headed 'Provisions Against Debt Avoidance'. This part of the 1986 Act is not in truth confined to insolvency at all, although it finds its place in an Act which is concerned with insolvency. The historical fact is that the predecessor to section 423 was to be found in section 172 of the Law of Property Act 1925 ("the 1925 Act"). That was not an Act concerned with bankruptcy or insolvency but was of broader reach. Before 1986 there were provisions which applied in an insolvency, in particular section 42 of the Bankruptcy Act 1914, which was the predecessor to section 339 of the 1986 Act. There was no equivalent to section 238: addressing that mischief was one of the recommendations made by the Cork Report, which was accepted by Parliament, to which I will return below. Section 238 applies to corporate insolvency as section 339 applies to individual bankruptcy.

66. Mr McGrath points out that the 1986 Act is structured in the following way. The "Second Group of Parts" is concerned with insolvency of individuals; bankruptcy. It

is in that group of provisions that section 283, the definition of a bankrupt's estate, is to be found. In contrast, sections 423-425 are to be found in the Third Group of Parts.

67. The important point for present purposes is that, although section 423 finds itself in the same Act as those provisions which are concerned with bankruptcy or corporate insolvency, its scope is wider. There is no need for there to be any insolvency. The unfortunate reality of life is that even very wealthy debtors are sometimes unwilling, rather than unable, to pay their debts. They may well make strenuous efforts to use various instruments, including a limited company, for the purpose of putting their assets beyond the reach of a person who is making, or may make, a claim against them; or otherwise prejudicing the interests of such a person.

Clarkson

68. Mr Warents' fundamental submission is a simple one. Since the language of sections 339(3)(a) and 423(1)(a) of the 1986 Act is materially identical, when it refers to a person who "enters into a transaction", he submits that this Court is bound by the way in which that language was interpreted in *Clarkson*.

69. It is well-established that this Court is generally bound by its own previous decisions, subject to well-known and limited exceptions (none of which are relevant in this case): see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, at 729-730 (Lord Greene MR). It is important, however, to understand when that doctrine will apply. At page 725, Lord Greene distinguished between four classes of case. It is only the first class with which the Court was then concerned and with which it is concerned in the present case. He described that class as follows:

> "… cases where this Court finds itself confronted with one or more decisions of its own … which cover the questions before it and there is no conflicting decision of this Court or of a court of co-ordinate jurisdiction."

70. The binding rule of law which is contained in an earlier decision has traditionally been described as its "*ratio decidendi*". The *ratio* is the legal principle which is necessary to explain the outcome of that earlier case on its facts: see e.g. *Jazztel plc v HMRC* [2022] EWCA Civ 232; [2022] Ch 403, para. 136 (Singh LJ). That this Court should be bound by its own previous decisions in that sense is important, not least because it serves the interests of certainty and stability in the law, but this Court is not bound by statements that have been made in earlier cases where they do not form part of the *ratio*.

71. Mr Warents submits that the way in which the relevant language was interpreted in *Clarkson* is that what was required was a beneficial interest in property on the part of the debtor. In particular, at page 930, Hoffmann LJ said:

> "… The power of appointment itself conferred upon the bankrupts no beneficial interest in any property at all. It was a

> power to deal with the fund which they held as trustees and it was vested in them in their capacity as trustees."

Hoffmann LJ went on to summarise the argument that was made by counsel in that case: that the power of appointment fell within the concept of property in section 283(4) of the 1986 Act. Hoffmann LJ rejected that submission for several reasons. The pertinent one for present purposes is that, even assuming that section 283(4) brought the power within the meaning of "property" for the purposes of section 283(1), it would be excluded from the definition by section 283(3)(a), which says that subsection (1) does not apply to property held by the bankrupt in trust for any other person. In *Clarkson* itself, Hoffmann LJ said, the powers were given to the trustees in their capacity as such and so they held them in trust for all the persons interested or potentially interested under the settlement just as much as they held the fund itself. He went on to say that the concept of such a power being a part of the bankrupt's estate, which he owes a duty to his creditors not to bargain away except for adequate consideration, seemed to him "bizarre."

72. In my view, it is clear that the decision in *Clarkson* turns upon the meaning of "property" in the context of a bankrupt in section 283 of the 1986 Act. That is what the "question" (to use Lord Greene's word in *Young*) was in *Clarkson*. That is not the question which is before this Court now. The fundamental reason for this is that section 423 of the 1986 Act is not concerned with insolvency at all. It is not therefore concerned with what is the relevant property which falls within a bankrupt person's estate. Those are simply not relevant questions which have to be decided in considering and applying section 423.

73. Accordingly, I reject the submission that this Court is bound by *Clarkson* to decide this appeal in favour of the Defendants.

The history of the legislation

74. In my view, the history of the 1986 Act lends some support to the interpretation of section 423 which I consider to be correct. That Act was enacted in response to the Report of the Committee on Insolvency Law and Practice, chaired by Sir Kenneth Cork GBE (Cmnd 8558), which was published in June 1982 ("the Cork Report").

75. Chapter 28 of the Cork Report dealt with 'Recovery of Assets Disposed of by the Debtor'. It set out the history, in particular the Fraudulent Conveyances Act 1571, usually referred to simply as the 'Statute of Elizabeth I'. That statute was repealed and replaced by section 172 of the 1925 Act. As the Report noted at para. 1202, the principle on which both of those pieces of legislation proceeded "is that persons must be just before they are generous and that debts must be paid before gifts can be made." The Cork Committee was well aware that the scope of section 172 of the 1925 Act was not confined to an insolvency situation but nevertheless it does appear to have thought that "the remedy is seldom if ever invoked unless the debtor has in fact become insolvent" (para. 1204). If that was the case in 1982, it certainly does not appear to have been the case in more recent times. One only has to look at many of the authorities which are reported in this area of law, indeed the facts of the present case as alleged in the pleadings.

76. Mr Warents submits that, where the Cork Committee wished to recommend that there should be express and specific provisions relating to the concept of "connected persons", it did so in terms: see in particular Chapter 21. It made recommendations, not all of which were accepted by Parliament in the 1986 Act as eventually enacted, but what both the Report and the subsequent Act did do was to set out in express terms those circumstances in which the acts of a company could be regarded as being so closely connected to a debtor that they should be within the scope of the relevant provisions.

77. The difficulty with that submission is that, while Parliament did do that in relation to insolvency, for example in section 240 of the 1986 Act, the Cork Report itself recognised that the statutory provisions dealing with insolvency situations are directed "at an altogether different objective from that at which section 172 … were directed": see para. 1209. The Report continued that the latter were designed to protect creditors from fraud, whereas the bankruptcy code is directed towards achieving a *pari passu* distribution of the bankrupt's estate among his creditors. The justification for setting aside a disposition of the bankrupt's assets made shortly before his bankruptcy is that, by depleting his estate, it unfairly prejudices his creditors; and even where the disposition is in satisfaction of a debt lawfully owing by the bankrupt, by altering the distribution of his estate it makes a *pari passu* distribution among all the creditors impossible. Those policy considerations simply do not apply in the same way to a situation which is outside the field of insolvency but where a creditor is seeking to defraud or prejudice his creditors.

Other authorities

78. Although *Clarkson* forms the mainstay of Mr Warents' submissions, he also relies on a large number of other authorities. In my view, none of them decides the question of law which arises on this appeal and none is binding on this Court. I hope that it will do justice to Mr Warents' argument if I refer only to the main authorities he cited.

79. First, he relies on the judgment of David Richards LJ in *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112; [2019] 2 All ER 784. Mr Warents is entitled to point out that that case, like this one, was about section 423 of the 1986 Act, although the facts and the issue were very different: it involved the interpretation of the word "gift" in section 436.

80. Mr Warents emphasises that, at para. 54, David Richards LJ made express reference to the decision of this Court in *Clarkson* with apparent approval. In particular, David Richards LJ observed that, like section 238, section 339 enables recovery to be made if the debtor or company has entered into a transaction at an undervalue within a specified period for the bankruptcy order at a time when the debtor was or thereby became insolvent. Mr Warents emphasises in particular the following sentence:

> "The test for a transaction at an undervalue is the same as in section 423."

Of course the language is materially the same but one always needs to be careful not to take statements made in a judgment out of context. One has to bear in mind what

the precise issue was, both factually and legally, which was being determined by a court on an earlier occasion.

81. Furthermore, the way in which David Richards LJ described the rationale of section 423 is consistent with the interpretation that I would give it: at para. 60, he described it as "the development of a remedy designed to deal with transactions deliberately designed by debtors to prejudice the interests of actual or potential creditors." In similar vein, at para. 29, he said that section 423 "is a wide-ranging provision designed to protect actual and potential creditors where a debtor takes steps falling within the section for the purpose of putting assets beyond their reach or otherwise prejudicing their interests."

82. Secondly, Mr Warents observes that the decision of this Court in *Agricultural Mortgage Corp plc v Woodward* [1994] BCC 688 also concerned section 423 of the 1986 Act but Sir Christopher Slade placed express reliance on the judgment of Millett J in *Re M C Bacon Ltd* [1990] BCC 78, even though that was a decision on section 238(4)(b). He points out that the lower judge in *Woodward* had sought to distinguish Millett J's judgment on the ground that he had to consider a different section of the 1986 Act but Sir Christopher Slade did not regard this as a valid reason for making that distinction: see page 695. Furthermore, Sir Christopher Slade observed that the relevant passage from Millett J's judgment in *M C Bacon* had been approved by this Court in *Menzies v National Bank of Kuwait* [1994] BCC 119, which held that "on the facts of that case" his analysis of section 238(4)(b) applied *mutatis mutandis* to section 423(1)(c) of the 1986 Act. I would emphasise the words "on the facts of that case."

83. Also at page 692, Sir Christopher Slade referred to Millett J's judgment in *M C Bacon* as containing "some helpful guidance". It is clear from page 692 that what that guidance consisted of was the following analysis given by Millett J (at page 92): the transaction must be (1) entered into by the company; (2) for a consideration; (3) the value of which measured in money or money's worth; (4) is significantly less than the value; (5) also measured in money or money's worth; (6) of the consideration provided by the company. As Millett J said, it requires a comparison to be made between the value obtained by the company for the transaction and the value of consideration provided by the company. Both values must be measurable in money or money's worth and both must be considered from the company's point of view.

84. I would accept that guidance is also helpful in the context of section 423 but it does not follow that the meaning of "transaction" and "enters into" which may have to be adopted under section 238 of the 1986 Act must necessarily be applied to section 423 irrespective of the facts.

85. Thirdly, Mr Warents places emphasis on what was said by Arden LJ in *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981; [2002] BCC 943, at paras. 21-23. In particular he emphasises that, at para. 22, Arden LJ described section 423(3) as "a carefully calibrated section forming part of a carefully calibrated group of sections." She also said that under section 423 "the stricter requirements of section 423(3) must be satisfied." In my view, there is only so far that such dicta can be taken. Again, I emphasise that the precise issue which this Court now has to decide was simply not before the Court in *Hashmi*. Furthermore, I note that, at para. 23,

Arden LJ observed that "it is not necessarily helpful to apply the construction placed on similar words in different provisions …".

86. I am fortified in this approach by the judgment of Trower J in *Re Fowlds (a bankrupt)* [2021] EWHC 2149 (Ch); [2022] 1 WLR 61, at para. 69, where he said that "some care has to be taken in transposing principles established by the cases on section 423 of the Act into the context of a statutory clawback claim under section 339 … of the Act."

87. There are at least the following differences between the structure of sections 238 and 339 on the one hand and section 423 on the other. First, the time limits in sections 238 and 339 do not apply in section 423. Secondly, as I have stressed earlier, the application in section 423 is not confined to an insolvency situation and therefore there is no need to be focussed on the precise meaning of "property" which falls within the bankrupt person's estate. Thirdly, defences may be available under section 238 and/or section 339 which are not available under section 423. Fourthly, the "purpose" provision in section 423(3) has no counterpart in sections 238 and 339. As I have said at para. 63 above, that provision is important in arriving at the true interpretation of section 423 read as a whole.

88. I am also fortified in that view by what was said by Jonathan Parker LJ in *Feakins v Department for the Environment, Food and Rural Affairs* [2005] EWCA Civ 1513; [2007] BCC 54, at para. 76, that "the wide definition of 'transaction' in the context of section 423 is entirely consistent with the statutory objective of remedying the avoidance of debts …"

89. At paras. 76-78 Jonathan Parker LJ also emphasised, as would I, that the meaning of "transaction" in section 436 is broad and includes any "arrangement". Furthermore, he did not find other decisions, such as *Woodward*, to be of assistance in identifying the relevant "transaction" in that case "since every case must turn on its own facts."

90. That broad interpretation of "transaction" was also emphasised by Kitchin LJ in *Re Ovenden Colbert Printers Ltd* [2013] EWCA Civ 140; [2014] 1 BCLC 291, at para. 32:

> "As I have explained, the term 'transaction' is widely defined in s 436 as including a gift or arrangement. If it were necessary for the purposes of this decision, I would therefore be disposed to find it is broad enough to encompass a payment made by a company or by an agent of the company acting within the scope of his authority. But to focus unduly on the term 'transaction' risks obscuring the need for the second and vital element, namely the requirement that the transaction be something that the company has 'entered into'. This expression connotes the taking of some step or act of participation by the company. Thus the composite requirement requires the company to make the gift or make the arrangement or in some other way be party to or involved in the transaction in issue so that it can properly be said to have entered into it, and of course it must have done so within the period prescribed by s 240."

91. Fourthly, Mr Warents relies upon the decision of this Court in *Lemos v Lemos* [2016] EWCA Civ 1181; [2017] BPIR 716, in particular at para. 24, where Longmore LJ said that the only issue was "whether he had any beneficial interest in the property of that time". In my view, however, Longmore LJ was not purporting to set out any general principle of law; he was simply identifying what the only issue was on the facts of that particular case.

92. Fifthly, Mr Warents places reliance on the decision of this Court in *Re Mathieson* [1927] 1 Ch 283, in particular at pages 295-296 in the judgment of Atkin LJ. But, as with the case of *Clarkson*, it seems to me that that decision is not on point in the present case. That case was concerned with section 42 of the Bankruptcy Act 1914. Again therefore it was concerned with the scope of the concept of "property". As I have already explained, the issue in the present appeals is different.

93. Sixthly, Mr Warents places particular reliance upon a passage in the judgment of Mummery LJ in *National Westminster Bank plc v Jones* [2001] EWCA Civ 1541; [2002] 1 BCLC 55, at para. 27:

> "The fact that the two transactions caused the shares in NGF to increase in value is irrelevant to the question as to what was the relevant transaction and what was the relevant consideration. The increase in the value of the shares was the consequence of the transactions, which increased the value of the assets of NGF."

However, in my view, that passage cannot be read out of context. The increase in the value of the shares was not relevant on the facts of that particular case. As Mummery LJ said at paras. 25-28, there are three questions which must be answered under section 423.

94. The first question is: what are the relevant transactions? The answer in that case was the tenancy agreement and the sale agreement.

95. The second question is: what is the consideration for the transaction? The consideration in that case did not include the issue of the shares in NGF to Mr and Mrs Jones.

96. The third question is: was the value of the consideration provided by the transferee "significantly less" than the value provided by the transferor?

97. In the present case, in contrast, Mr McGrath submits on behalf of the Bank that the relevant transaction was the diminution in the value of Ahmad's shares in the company. That was the whole point of the steps which were alleged to have been taken in order to put certain assets beyond the reach of creditors. In other words, the question in the present case is Mummery LJ's first question: what is the relevant "transaction"? As I have already emphasised, the meaning of "transaction" in section 436 is very broad and includes any "arrangement". In the present case, the steps that the debtor took to diminish the value of his shares in a company can be regarded as being such an arrangement.

Other legislation

98. Finally Mr Warents points out that, where Parliament wishes to do so, it has enacted express provisions which have the effect of lifting the veil of incorporation and treating the disposition of a company as being that of its shareholders: see e.g. section 94 and its associated provision in the Inheritance Tax Act 1984. In that context Parliament has also expressly defined what is a "close company" for the purposes of inheritance tax. Since Parliament has not enacted any equivalent express provisions in the present context, Mr Warents submits that this Court should not in effect fill the breach.

99. I reject that submission. I accept Mr McGrath's submission that tax law is materially different from the present context. A tax is inherently a confiscation of property. Accordingly, it is of very great importance that Parliament should spell out in terms in what circumstances a taxpayer is liable to be taxed. In contrast, sections 423-425 of the 1986 Act create a discretionary judicial regime. It is a broad and flexible jurisdiction but with judicial safeguards. What section 423(1) and (3) do is to set out the gateways which will enable that jurisdiction to exist. It does not follow, however, that the Court will be bound to exercise that jurisdiction, still less in what precise way it will do so. That will depend on the circumstances of a particular case.

Conclusion on the Defendants' appeal

100. In the present case the Judge followed the decision of Gwyneth Knowles J in *Akhmedova v Akhmedov* [2021] EWHC 545 (Fam); [2021] 4 WLR 88. This Court has had the benefit of fuller arguments on the beneficial ownership issue but, in essence, I agree with what Gwyneth Knowles J said in that case at paras. 79 and 329.

101. Accordingly, I would dismiss the Defendants' appeal.

Conclusion

102. For the reasons I have given I would allow the Bank's appeal but dismiss the Defendants' appeal.

Lord Justice Males:

103. I agree.

Lord Justice Popplewell:

104. I also agree.