Neutral Citation Number: [2021] EWHC 235 (Comm)

Case No: CL-2019-000760

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2021

Before :

THE HONOURABLE MR JUSTICE BUTCHER

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Between :

GORDIAN HOLDINGS LIMITED	**Claimant**
- and -	
(1) YIANNAKIS SOFRONIOU **(2) CHERYL LOUISE REID**	**Defendants**

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Robert Amey (instructed by **Stephenson Harwood LLP**) for the **Claimant**
Victor Steinmetz (instructed by **Seddons Law LLP**) for the **Defendants**

Hearing date: 5th February 2021

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Approved Judgment

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THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher :

1. This is an application by the Defendants to strike out paragraphs 32-40 of the Particulars of Claim, together with paragraphs (4) and (5) of the prayer for relief and paragraphs 11-14 of the Reply, alternatively for 'reverse' summary judgment in relation to the claim in those paragraphs.

Background

2. The relevant background, which is agreed or assumed to be true for the purposes of this application, is as follows.

3. The Bank of Cyprus entered into two facility agreements with Sofroniou & Maria Developers Ltd in 2004 and 2010 respectively. The First Defendant ('Mr Sofroniou') was a guarantor in respect of the loan facilities. In 2012 the Bank of Cyprus issued proceedings against Mr Sofroniou and others in Cyprus, demanding repayment of the amounts outstanding under the 2010 facility agreement. On 31 January 2017 the Cypriot Court entered judgment in favour of the Bank of Cyprus, holding that Mr Sofroniou was jointly and severally liable, with Sofroniou & Maria Developers Ltd and Maria Sofroniou, for €708,721.49 plus interest and costs.

4. On 1 May 2017, Mr Sofroniou transferred his entire shareholding, consisting of one single share ('the Share'), in Central London Car & Taxi Hire Ltd ('the Company') to his wife, the Second Defendant ('Ms Reid'). This has been called, and I will refer to it as, 'the Share Transfer'.

5. In May or June 2017, the Cypriot judgment was registered in England. On 13 October 2017, Mr Sofroniou made an application to stay the enforcement of the Cypriot judgment until the determination of an appeal to the Cypriot Supreme Court. On 17 November 2017, Master Fontaine granted the application for a stay.

6. On 10 August 2018, Ms Reid returned the Share to Mr Sofroniou. This has been called, and I will refer to it as, 'the Share Return'.

7. On 30 May 2019 the Bank of Cyprus's rights relating to the claim in respect of the facility agreement were, on the Claimant's case, transferred to it. On 9 December 2019 the Claimant commenced these proceedings. In those proceedings, amongst other things, the Claimant claims a declaration that the Share Transfer was a transaction defrauding creditors within s. 423 Insolvency Act 1986 ('IA 1986') and there is a prayer for such relief as the Court thinks fit for restoring the position to what it would have been if the Share Transfer had not been made, and for protecting the victims of the Share Transfer. A Defence and a Reply have been served in the proceedings.

8. Two other matters should be referred to at this stage. The first is that it is not, for the purposes of this application, disputed by the Defendants that the Share Transfer was a transaction falling within s. 423(1) and (3) IA 1986, namely that it was a transaction at an undervalue, and was entered into by Mr Sofroniou with the purpose of putting assets beyond the reach of a person who was making or who at some time might make a claim against him, or of otherwise prejudicing the interests of such a person.

9. The second is, as pleaded in the Reply, that the financial statements for the Company, signed by Mr Sofroniou as director, show, in the balance sheet as at 30 April 2017, a figure for capital and reserves of £1,000,012; but the balance sheet as at 30 April 2018 shows a figure for capital and reserves of £775,344. In the latter balance sheet, the figures for the prior year, ie 2017, are different from those which had appeared the balance sheet as at 30 April 2017.

Legal Framework: Striking out and Summary judgment

10. The grounds for striking out under CPR r. 3.4 include where the court is satisfied that the statement of case (1) discloses no reasonable grounds for bringing or defending the claim, or (2) is 'an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings'.

11. The court will not strike out a claim or part thereof on the first ground unless it is certain that the clam is bound to fail: Hughes v Richards [2004] EWCA Civ 266 at [22].

12. One form of abuse of the process which can justify striking out on the second ground is where the litigation is pointless and wasteful. This may be the case if the benefit attainable by the claimant is of such limited value that 'the game is not worth the candle', and the costs of the litigation would be out of all proportion to the benefit to be achieved: Jameel v Dow Jones and Co [2005] QB 946. But the mere fact that a claim is small does not mean that it should be struck out. It would only be where a claim could not be adjudicated in any proportionate manner that that course might be justified: see White Book 2020, 3.4.3.4.

13. The principles for summary judgment were helpfully summarised in the well-known decision of Lewison J in EasyAir Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]. In essence, the court must consider whether the claimant has a realistic as opposed to a fanciful prospect of success. In reaching that conclusion the court must not conduct a mini-trial. Principles (v) to (vii) identified by Lewison J are worth setting out in more detail:

'v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial …
vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case …
vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law,

he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. …'

Legal Framework: ss. 423-425 Insolvency Act

14. The relevant claim is one under s. 423 IA 1986. The relevant provisions of that and the succeeding section are as follows:

423 Transactions defrauding creditors.

(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; …

(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.

(4) In this section "the court" means the High Court …

(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".

424 Those who may apply for an order under s. 423.

(1) An application for an order under section 423 shall not be made in relation to a transaction except—

(a) in a case where the debtor has been made bankrupt or is a body corporate which is being wound up or is in administration, by the official receiver, by the trustee of the bankrupt's estate or the liquidator or adminstrator of the body corporate or (with the leave of the court) by a victim of the transaction;

(b) in a case where a victim of the transaction is bound by a voluntary arrangement approved under Part I or Part VIII of this Act, by the supervisor of the voluntary arrangement or by any person who (whether or not so bound) is such a victim; or

(c) in any other case, by a victim of the transaction.

(2) An application made under any of the paragraphs of subsection (1) is to be treated as made on behalf of every victim of the transaction.

15. I was referred to a number of cases in relation to s. 423 IA 1986, and in particular to Hill v Spread Trustee Co Ltd [2007] 1 WLR 2404, Giles v Rhind (No. 2) [2009] Ch 191, and Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP [2013] 1 All ER (Comm) 973, as well as to McPherson's Law of Company Liquidation (4th ed) para. 11.118.

16. From these authorities can be derived the following points which have some bearing on the present application:

    (1) Sections 423-425 are drafted in wide terms, and apply to transactions defrauding creditors whether or not the person effecting the transaction has become insolvent.
    (2) The concept of a 'victim' is a deliberately wide one. It extends beyond creditors with present or actual debts. Whether a person is a 'victim' turns on actual or potential prejudice suffered.
    (3) The class of 'victims' is not limited to those who were within the compass of the debtor's purpose when entering into the impugned transaction; indeed the person entering into the transaction may have been unaware of the victim's existence.
    (4) It is not necessary to approach s. 423 as if a test of causation is to be applied. That is to say, it is not necessary to ask whether the entry into the impugned transaction itself caused the prejudice.

The Defendants' argument

17. The argument for the Defendants which was attractively presented by Mr Steinmetz was simple. He submitted that because of the Share Return, the Claimant had no claim under s. 423 IA 1986 for relief in relation to the Share Transfer. He put this in this in essentially two ways. In the first place, he submitted that, given that the Share had been returned, and had, indeed, been returned by the date of the commencement of the present proceedings, the Claimant was not a 'victim' for the purposes of ss. 423-424 IA 1986 and had no standing to pursue the claim. Secondly, he submitted that, in any event, given that the Share Return had taken place, there was no relief which the court could grant which would achieve more than had already occurred, by the Share Return, to restore the position to what it would have been had the Share Transfer not been entered into. The claim was therefore not worth the candle and was an abuse of the process of the court.

Discussion and Conclusion

18. I do not accept that either argument provides a basis for striking out or summary judgment. I will take them in turn.

19. The first argument is that, unless the claimant is, as at the date of the commencement of proceedings, a person who is or is capable of being prejudiced by the impugned transaction, then (s)he does not fall within the meaning of 'victim', does not fall within s. 424(1)(c), and cannot bring a claim under s. 423. Thus, even if the claimant's interests were prejudiced by the transaction at the time it was entered into, if the person who entered into the transaction has taken effective steps to undo it, the claimant ceases to be a 'victim' who can bring a claim for relief under s. 423.

20. I consider, however, that if a person's interests are, or may be prejudiced by the transaction at the time it takes place, that person is a 'victim', within s. 423(5). The definition in that sub-section is in terms of whether, 'in relation to a transaction at an undervalue', a person is, or is capable of being prejudiced by that transaction. If a person's interests are prejudiced (or capable of being prejudiced) by the transaction as soon as it occurs, that person then comes within the statutory definition of a 'victim': (s)he 'is or is capable of being' prejudiced by it. There is nothing in the relevant sections to suggest that (s)he loses that status by reason of something else which may subsequently be unilaterally done by the debtor. Furthermore, the status of a 'victim' is not made to depend on whether the victim has suffered quantifiable loss as a result of the transaction. Of course subsequent actions by the debtor may affect whether a claim by a 'victim' is one worth pursuing, and whether the court can and will grant any relief, but they do not mean that the person ceases to be a 'victim' within the statutory definition.

21. While Mr Steinmetz submitted that paragraph [13] of Giles v Rhind (No. 2) indicated that the question of whether a person was a 'victim' had to be tested by whether he was 'a victim at the time of his application', and that this supported his case, I do not consider that that paragraph addresses the present question. It is true that a person may become a 'victim' at some point after the transaction is entered into, and does not need to be a person who was within the purpose of the person entering into the transaction at the time that it was entered into. Unless such a person has become someone whose interests are or may be prejudiced by the transaction by the time that an application is made to court, then (s)he will not count as a 'victim'. But that is not to say that a person whose interests were immediately prejudiced (or capable of being prejudiced) by the transaction can lose the status of 'victim' by reason of subsequent unilateral actions by the debtor, such that (s)he cannot bring a claim.

22. In the present case, on the basis of the assumptions made on this application, it seems plain that the Bank of Cyprus, as an existing judgment creditor, was a 'victim' of the Share Transfer. There is the additional complication that the Claimant then succeeded to the Bank of Cyprus's rights in respect of the facility agreement and the judgment relating to it. This aspect was one which Mr Steinmetz did not emphasise. I consider that it is certainly arguable, with at least a degree of conviction, that this feature makes no difference. This would be either because the Claimant can be said to have succeeded to the Bank of Cyprus's position as 'victim'; or because, when the transfer of rights was made from the Bank of Cyprus to the Claimant, the Claimant then became a person whose interests were, or potentially were, adversely affected by the

Share Transfer, and that in looking at that, one does not take into account subsequent unilateral actions by the debtor.

23. Mr Steinmetz's second argument was that the Share Transfer had constituted the remedy that a court would order under s. 423(2) if it were to find that there had been a transaction at an undervalue. Any remedy would be restitutionary and would require the court, if liability were established, to set aside the transaction in question. That would involve, here, restoring the Company to the position it would have been in had the Share Transfer not occurred. But as the Share had been returned, no relief could or would be granted. Mr Steinmetz argued that there was no question of the Court awarding a further sum to reflect the difference in the value of the Share as indicated by the 2017 and 2018 accounts. Being a private company, whose Share is not publicly traded, the Share Transfer could not have had any effect on the value of the Company (or the Share). Accordingly any difference in the Company's capital and reserves between 2017 and 2018 could not have been caused by the Share Transfer but must have represented a change in the value of the underlying business. The Court would not make an award of that difference, which was unrelated to the impugned transaction, and if awarded would constitute a windfall to the Claimant. On this basis, the claim for s. 423 relief was a pointless waste of time and costs, and should be struck out.

24. While the Share Return will clearly have to be taken into account in determining whether any and if any what relief might be granted under s. 423, I do not accept that it is sufficiently clear that no relief will or could be granted to justify striking out the claim or giving summary judgment. I am not satisfied that it is certain to fail for the purposes of CPR r. 3.4, and I consider that the claim has a more than fanciful prospect of success for the purposes of the test in relation to the grant of summary judgment. In particular I consider that there is more than a fanciful prospect that the court may order the payment of a sum under s. 425(1)(d), notwithstanding the Share Return.

25. Specifically, as Mr Amey submits, there are real questions as to the apparent diminution of the value of the Share as between the 2017 and 2018 accounts, which on their face indicate that the Share when subject to the Share Transfer was worth about £1 million, and when subject to the Share Return was worth about £775,000. As he further submitted, it is by no means certain that the value of the Share could not have been affected by the Share Transfer and what happened to the Company after the Share Transfer: it might, for example, have been possible that the Company was able to incur borrowings when the Share was in the hands of Ms Reid which it could not have incurred when in the hands of Mr Sofroniou. Furthermore, the difference in the 2017 and 2018 accounts opens the possibility that the Share Transfer might have permitted or facilitated the use of Company monies to pay off the Defendants' personal debts or to purchase assets for the benefit of the Defendants.

26. These matters mean that I am not certain that the claim for relief will fail; and further that I consider that this is a case where there are reasonable grounds to believe that the fuller investigation into the facts which will be possible after disclosure may add to the evidence which is before the court and affect the outcome of the case.

27. For those reasons the application fails and is dismissed.