Neutral Citation Number: [2018] EWHC 3161 (QB)

Case No: HQ17XO3377

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 November 2018

Before :

MR JUSTICE BUTCHER

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Between :

(1) PAYROLLER LIMITED (IN LIQUIDATION)
(2) JAMES BERNARD STEPHEN
(3) SHANE MICHAEL CROOKS
(IN THEIR CAPACITY AS JOINT LIQUIDATORS OF PAYROLLER LIMITED) **Claimants**

- and -

(1) LITTLE PANDA CONSULTANTS LIMITED
(2) CHRISTIAN PAUL BURTON
(3) BLUDAY LIMITED
(4) KEITH ELLIS
(5) KELLCON CONSTRUCTION LIMITED
(6) LESLIE THOMPSON **Defendants**

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Matthew Cook (instructed by **Pinsent Masons LLP**) for the **Claimants**
William Buck (instructed by **Hallmark Solicitors**) for the **First and Second Defendants**

Hearing date: 6 November 2018

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Judgment Approved

Mr Justice Butcher:

1. This is an application by the Claimants for summary judgment against the First and Second Defendants, to whom I will refer as "Little Panda" and "Mr Burton" respectively. The First Claimant, to which I will refer as "Payroller", is a Scottish company in liquidation. The Second and Third Claimants were appointed as joint liquidators of Payroller on 1 March 2017.

2. Little Panda is a company of which Mr Burton is the sole director and shareholder. This is subject to the fact that currently Little Panda has been removed from the register for a failure to file accounts. An application to restore it has been made and I was told is likely to be a formality. A waiver letter has been provided by the Treasury

Solicitor. Neither side suggested that the status of Little Panda at present was a reason to delay hearing the Claimants' application.

3. That application is made on the basis that the Claimants contend that Little Panda and Mr Burton have no defence which stands a realistic prospect of success to their claim under section 423 Insolvency Act 1986 ("s. 423 IA") to recover certain payments made to each of them by Payroller.

4. The background to this claim is that Payroller was a company controlled by two individuals, Mr Martin Lang and Mr Graeme Cullen. Its liquidators have established, and this is not disputed by Little Panda or Mr Burton on this application, that Messrs Lang and Cullen used Payroller as a vehicle for the commission of a large-scale VAT fraud. While Payroller traded for less than a year, namely between February 2016 and December 2016, it charged its clients over £7.7 million as VAT, using a VAT number belonging to another company. It then retained this money, thus defrauding HMRC of this sum. HMRC discovered this fraud in early December 2016, and Payroller's bank accounts were frozen in that month.

5. What emerged from an investigation of Payroller was that, apart from the proceeds of the VAT fraud Payroller had had no significant net income. Further, a consideration of its bank accounts showed that the majority of the proceeds of the VAT fraud had already been paid out of Payroller by December 2016. The particular transfers which are relevant to the present application are a series of payments made between March and November 2016 from Payroller's bank account to Little Panda and to Mr Burton personally. As I understood it, the sum of £1,786,389.88 was paid to Little Panda, involving 45 separate transfers, while a sum of £450,000, involving 6 separate transfers from Payroller, was paid to Mr Burton via an agent.

6. Part of the sums received by Mr Burton was paid onwards to the Third Defendant, to which I will refer as "Bluday". In its Defence, Bluday did not dispute that it had no entitlement to the sums which it had received, indirectly, from Payroller, which it put at £322,239.88, and has returned that sum.

7. In the Particulars of Claim the Claimants have advanced a number of different types of claim against Little Panda and Mr Burton, including knowing receipt and knowing assistance, as well as a claim under s. 423 IA for the recovery of the amounts paid by Payroller to Little Panda and Mr Burton.

8. In their Defence, Little Panda and Mr Burton have contended that the payments which were made to them were "as a result of bona fide and legitimate commercial transactions conducted at arm's length and for valuable consideration", of which they identify the following:

   (1) Payments relating to the "Black Sea Plaza". Little Panda and Mr Burton say that Mr Burton intended to buy and redevelop a hotel in Bulgaria and then sell rights in it on a timeshare basis. This project has been referred to as the "Black Sea Plaza" project. What is alleged in the Defence is that Mr Cullen and Mr Lang each agreed to purchase a number of weeks of fractional ownership in various apartments of the Black Sea Plaza, and paid £1,625,150 to Little Panda in respect thereof. In addition, Mr Burton states in his witness statement in response to the present application that £99,000 was paid by Payroller to Little Panda on 30

August 2016 in relation to Mr Cullen's purchase of 99,000 Non-Voting Redeemable Preference shares in Black Sea Plaza Limited.

(2) Payments relating to the Guardian Companies. Payments totalling £450,000 were made to Mr Burton in August 2016. Mr Burton contends that these were made in relation to the sale of shares in two companies to Mr Cullen. Both those companies were called Guardian Corporate Consultants Limited and they were incorporated in UAE and Belize respectively.

(3) Payments relating to Maltese companies. Some £62,000 was paid to Little Panda, which Mr Burton states related to a 12-week retainer agreement with Mr Cullen pursuant to which Little Panda set up several companies in Malta.

9. For the purposes of the present application, the Claimants do not dispute the existence or bona fides of these transactions. They make it clear, however, that, if the present application is not successful, their case in the action will be that these were not bona fide transactions.

10. As I have already indicated, the Claimants make this application solely on the basis of their claim under s. 423 IA. It is convenient to refer to the terms of that section, and related sections, at this point. S. 423 IA provides in relevant part:

> '423. (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;
>
> (b) …; or
>
> (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.
>
> (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".'

11. Section 425 IA provides:

> "425 (1) Without prejudice to the generality of section 423, an order made under that section with respect to a transaction may (subject as follows) –
>
> (a) 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;
>
> (b) require any property to be so vested if it represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of money so transferred;
>
> (c) release or discharge (in whole or in part) any security given by the debtor;
>
> (d) require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct;
>
> (e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction to be under such new or revived obligations as the court thinks appropriate;
>
> (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for such security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction.
>
> (2) 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; but such an order –

> (a) shall not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and
>
> (b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.
>
> (3) For the purposes of this section the relevant circumstances in relation to a transaction are the circumstances by virtue of which an order under section 423 may be made in respect of the transaction.
>
> …"

12. It is also relevant to record the terms of the definition of "transaction", which appears in s. 436 IA, and is as follows:

> ' "transaction" includes a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly'

13. The Claimants make the present application on the following basis:

(1) First, they contend that the payments by Payroller to Mr Burton and to Little Panda were "transactions" for the purposes of s. 423(1) IA. Consistently with this, they contend that Payroller was "the debtor", and the "victims of the transaction" were, or included, Payroller's creditors, and in particular HMRC.

(2) Secondly, they contend that Payroller received no consideration for these payments, because any consideration provided by Mr Burton or Little Panda was provided to Mr Lang and/or Mr Cullen. The issue of whether value was provided for the transaction was to be considered from the point of view of the debtor: see Delaney v Chen [2010] EWCA Civ 1455 at [15]. They made an alternative case that, if Payroller had received any consideration, it was for a consideration which was significantly less than the amount of the payments. For a reason which I will state in due course, it was not necessary to consider this case.

(3) Thirdly, that the purpose of the making of the payments out of Payroller was to put assets beyond the reach of Payroller's creditors, or at least to prejudice their ability to recover those assets. In this regard, the Claimants pointed out that it was sufficient if this was a purpose of the transaction, even it was not the dominant or substantial purpose: JSC BTA Bank v Ablyazov [2018] EWCA Civ 1176 at [13]-[14], and that it was not necessary to establish a dishonest intent on the part of the debtor in carrying out the transaction in question: Arbuthnot Leasing v Havelet Leasing [1990] BCC 636 at 644B. They contended that it was clear that a purpose of the payments had been to put the assets beyond the reach of Payroller's creditors from, inter alia, the following: (a) the transactions in respect of which the

payments are alleged to have been made were entered into in the names of Messrs Lang and Cullen; (b) Payroller had no record of those transactions; and (c) Messrs Lang and Cullen refused to provide Payroller's liquidators with any substantive information in relation to the payments and informed them that Payroller had no assets other than a small sum in its bank account.

(4) Fourthly, that in the circumstances the order which the court should make was one which restored the position to what it would have been if the payments out of Payroller had not been made so that the restored assets were available for execution by its creditors: Chohan v Saggar [1994] BCC 134 at 141. It was not relevant for the purposes of deciding whether this order should be made to consider the state of mind of the recipients of the payments.

14. For their part, Mr Burton and Little Panda did not seek to suggest that the purpose of Messrs Cullen and Lang in procuring that the relevant payments were made out of Payroller was not to put assets beyond the reach of Payroller's creditors, or that there was a triable issue in this regard.

15. In addition, Mr Buck for Mr Burton and Little Panda stated that, if the payments made by Payroller were the relevant "transactions", then it was not disputed that they had been made for no consideration, because the consideration had not been provided to Payroller.

16. Mr Buck made, however, two core submissions. First, he submitted that there were no "transactions" for the purposes of s. 423 IA entered into by Payroller with Mr Burton or Little Panda. Simple payments out of Payroller did not qualify. Mr Buck submitted that there had been "transactions", but they were (i) between Mr Burton/Little Panda and Mr Cullen/Mr Lang, namely the Black Sea Plaza, Guardian Companies and Maltese companies transactions, and (ii) between Payroller and Mr Cullen/Mr Lang, in the form of directors' loans, dividends or gifts. Mr Buck submitted that the Claimants were in a position to seek s. 423 IA relief in respect of the transactions between Mr Burton/Little Panda and Mr Cullen/Mr Lang, on the basis that, even though not a party to those transactions, Payroller was a "victim" within the meaning of s. 423(5) and s 424(1)(c) IA, in that Messrs Cullen and Lang - who were "debtors" within s. 423(5) IA - had, on the Claimants' case, entered into the transactions to defraud their creditors (ie Payroller). However, as Mr Buck submitted, there were clearly triable issues as to whether the transactions between Mr Burton/Little Panda and Messrs Cullen and Lang were entered into for a consideration significantly less than that provided by Messrs Cullen and Lang to Mr Burton/Little Panda.

17. Secondly, Mr Buck contended that, even if the payments out of Payroller were "transactions" for the purposes of s. 423(1) IA, the Court should nevertheless not make an order under s. 423(2), because in making such an order the court needed to consider the state of mind of the recipients of the payments or assets, and the degree of their involvement in the fraudulent scheme, and these matters would have to be investigated at trial. In this connexion he relied on the decision of Sales J in 4ENG Ltd v Harper [2009] EWHC 2633 (Ch).

18. Thus the issues between the parties, on this application, resolved themselves into disputes in relation to points (1) and (4) of the Claimants' case as I have summarised it in paragraph 13 above. I will consider them in turn.

19. As to point (1), the issue here is whether the payments made by Payroller themselves counted as "transactions" which were "entered into" by Payroller.

20. Mr Buck's submission that they did not, on analysis, had two strands. The first was that they were not relevant transactions because they amounted to payments made to the recipient (here Mr Burton/Little Panda) to discharge what must be assumed to be a bona fide obligation of a third party (here Messrs Cullen and Lang) to the recipient. In Mr Buck's submission, this type of arrangement cannot be intended to be a relevant transaction for the purposes of s. 423 IA, because if it were, then a recipient (R) would always be liable to repay monies which were received from a person or entity (P), notwithstanding that they discharged a liability arising from an entirely bona fide and for value transaction between R and a third party (T), provided only that it could be established that P had made the payments for the s. 423(2) purpose. As Mr Buck submitted, it was the consequence of the Claimants' submissions that, in such a case, no consideration would have been provided to P, because that was judged simply from the "debtor's" point of view, and further the s. 425(2) IA defence would not be available because the money would have been received by R, which, *ex hypothesi*, was "a party to the transaction". Parliament could not have intended that recipients of funds or assets should be liable to restore them in such circumstances, because, he argued, the funds or assets were received, as far as such recipients were concerned, under a transaction with the third party, pursuant to which the recipient had given as much value as it received.

21. Mr Cook responded by saying that an arrangement whereby a debtor paid a recipient a sum to discharge the debt of a third party to the recipient was squarely within s. 423 IA. Mr Cook submitted that this was one of the means which a company or individual seeking to prejudice the interests of its/his creditors might well use. He gave the example of a debtor paying off his brother's mortgage. Furthermore he contended that, in this respect, the decision in Re Hampton Capital Ltd [2015] EWHC 1905 (Ch) was in his favour.

22. This is a point of considerable general importance, on which there appears to be little or no authority. I do not accept that Re Hampton Capital Ltd supports the Claimants' contentions on this point. On the contrary, this point appears to me to be the same as, or very similar to, the point which Mr Bompas QC, sitting as a Deputy High Court Judge in that case, deliberately left open and did not decide at paragraphs [74]-[78] of his judgment. I consider it to be an arguable point, and one on which Little Panda / Mr Burton have a more than a fanciful prospect of success. I accept that it is essentially a point of law. Nevertheless I have concluded that it is not suitable for resolution on this application. This is because I consider that it is not possible entirely to divorce this issue from the other two points which were argued, and which I will consider below. Specifically, if s. 423(1) IA is given a meaning wide enough to embrace transactions of this sort, that might be an argument in favour of recognising a wider discretion on the part of the Court to refuse relief under s. 423(2) IA, in order to prevent an "innocent" recipient, who has provided value to a third party, from being at risk of having to return the payment to the debtor as well.

23. The second strand in relation to Mr Buck's contention that the transfers from Payroller to Little Panda and Mr Burton did not involve relevant "transactions", was that simple payments, without some form of dealing between the paying company and the payee did not count as "transactions" for the purposes of s. 423(1) IA. Mr Buck relied on the decision in Re Hampton Capital Ltd, in particular at paragraph [38] where Mr Bompas QC said:

> "I am aware that s. 436 of the 1986 Act contains a definition of 'transaction' as including a 'gift, agreement or arrangement' and references to 'entering into a transaction are to be construed accordingly'. Nevertheless, I cannot accept that the mere transmission of money, the making of a payment, without any form of dealing between the paying company and the payee, can constitute the entering into of a transaction by the company with the payee (at any rate where the transaction is not a 'gift'). Without straining the language of the section, this must require some engagement, or at least communication, between the two parties and not merely a disposition of money which results in one party's money landing up in the bank account of the other without anything said or done by that other."

24. Mr Cook on behalf of the Claimants said that simple transmissions of money did fall within the broad definition of "transaction" in s. 436 IA and said that Mr Bompas QC had been wrong to decide otherwise. He relied upon a passage in the judgment of Kitchin LJ in Hunt (as liquidator of Ovenden Colbert Printers Ltd) v Hosking [2013] EWCA Civ 1498 at [32]. He particularly relied upon the first and second sentences of the paragraph, but it is convenient to quote the whole:

> "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."

25. As is apparent from this paragraph, it was not necessary for the decision of the Court of Appeal to decide whether payments by a company could constitute "transactions" for the purposes of s. 238 IA (which the parties agreed was, in relevant respects, identical to its meaning in s. 423 IA). This was because, in that case, the company had not been involved in the making of the payments at all: they had been misappropriated by someone who held them on trust. Mr Cook correctly said that

there was no equivalent of that issue in the present case: it was not in dispute that the payments were made by Payroller. Nevertheless, as I have said, it is apparent that the passage on which Mr Cook relied was *obiter*.

26. I consider that here again there is a triable issue. Whether Re Hampton Capital Ltd was correctly decided on this point, and whether, if any dealings between the payer and the payee are necessary for there to be a "transaction", what and how extensive such dealings need to be, are matters which should be resolved at trial.

27. As to point (4) in the summary I have given in paragraph 13 above, Mr Buck submits that the court, in deciding whether an order under s. 423(2) is appropriate, needs to consider and take into account the mental state of the recipient, and that the court should not grant relief under s. 423(2) if the position was that the recipient did not know that the purpose of the payer was to put assets beyond the reach of creditors, and had provided good consideration to a third party.

28. Mr Buck relied, in relation to the width of the matters that a court could take into account in deciding on whether to grant relief under s. 423(2), on the decision of Sales J in 4ENG Ltd v Harper, and in particular on paragraph [13] of the judgment in that case, where it is said:

> "In my judgment, the nature of any order and the extent of the relief grnated by the court under s. 423(2) and s. 425 should take into account the mental state of the transferee of property under a relevant transaction (or of any other person against whom an order is sought) and the degree of their involvement in the fraudulent scheme of the debtor/transferor to put assets out of the reach of his creditors. The principles in the application of this statutory regime should reflect in this respect general principles inherent in other areas of the law, which treat the mental state and degree of involvement of a defendant in wrongdoing as relevant to the extent of recovery available against him … Although the trigger conditions for liability to make restoration under s. 423 set out the basic balance to be struck between the interests of the creditors and of a transferee as established by Parliament, the making of an order under s. 423(2) and s. 425 necessarily requires some further balancing of the interests of the transferor's creditors and of the transferee to be determined by the court, since by the time the court has to take action events will have moved on from the transfer and the balance of the equities between creditors and transferee may well have been affected by changes in circumstances over time."

29. Mr Cook submitted that in 4ENG Ltd v Harper Sales J contemplated only limited circumstances in which the court might decline to grant relief if the "trigger conditions" applicable to s. 423 IA were met, and contended that they would not extend much if at all beyond defences analogous to those which might apply to claims in unjust enrichment, such as a defence of change of position, and subject to a restriction of any defence based on being a bona fide purchaser so that it did not extend beyond that afforded by s. 425(2) IA. In support of this submission, Mr Cook

referred to paragraph [93] of the judgment of Sales J. He submitted that no such relevant defence had been argued here.

30. The range of considerations which may lead a court to refuse relief under s. 423(2) IA has not been authoritatively determined. It was not in 4ENG Ltd v Harper or in any other case which I was shown. In my judgment it is arguable with "some degree of conviction" (to quote Easyair Ltd (t/a Openair v Opal Telecom Ltd [2009] EWHC 339 (Ch) para. 15(ii)) that where, as has to be assumed to be the case here for the purposes of the present application, the recipient has no knowledge of the intention of the payer, was not involved in the underlying fraud, and has provided consideration to a third party, there should be no order made under s. 423(2) IA. Whether relief should or should not be granted should be decided when all the facts can be established, and the court can decide whether to exercise its powers under s. 423(2) on the basis of all the relevant circumstances.

31. Mr Cook pressed on me the desirability of the court ordering summary judgment if possible, because otherwise, as he submitted, the funds remitted to Mr Burton / Little Panda by Payroller would be consumed in legal fees. This point cannot alter the test which I have to apply for the purposes of an application for summary judgment. I consider that there are arguable defences, which stand a realistic and more than a merely fanciful prospect of success, to the claim under s. 423 IA, which, alone, was the subject of the present application. In those circumstances, the Claimants' application is dismissed.