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English Court Confirms International Jurisdiction to Set Aside Transactions Defrauding Creditors

Section 423 of the Insolvency Act 1986 continues to be a useful tool available to creditors for challenging transactions at an undervalue.

Section 423 gives the English court the power to set aside a transaction (most notably an asset disposal or a dividend) entered into by a debtor if the value of the consideration received by that debtor is significantly less than the value of the consideration the debtor provides to the other party to the transaction. Creditors ought to bear in mind this power when scrutinising a debtor's previous actions.

Under section 423, the claimant does not need to be an insolvency practitioner or have a proprietary interest in the asset that was the subject of the disposal. The court must be satisfied that the transaction was entered into for the purpose of putting assets beyond the reach of those who may have a claim against them or in order to prejudice the claimant's interests. However, a claimant does not need to demonstrate that the entity was insolvent (or the subject of insolvency proceedings) at the time of making the transaction, the transaction was in breach of the directors' duties, the transaction was made in fraudulent circumstances, or that other unlawful elements were at play.

A foreign company is not outside the reach of section 423 and, in *Orexim Trading Limited v. Mahavir Port and Terminal Private*,[1] Lord Justice Lewison in the Court of Appeal confirmed the jurisdiction of the English courts to exercise its discretion to permit service outside of England and Wales of a claim under section 423. The court refused the application on the facts because, amongst other things, there was no "*sufficient connection*" between the dispute and England and Wales. It indicated that the following factors are relevant when determining whether a sufficient connection exists:

- The place of incorporation and any business activities of the parties
- The location of any assets
- The location in which loss would be suffered
- The timing of the impugned transactions and the location in which they were made
- The governing law of the transactions
- The existence of proceedings in the English court at the time of the relevant transaction

Background

The case concerned a dispute between the applicant, a Maltese company, Orexim Trading Limited (**Orexim**), who sought to use section 423 in order to set aside the sale of a ship by an Indian company, Mahavir Port and Terminal Private Limited (**MPT**). Litigation was already on foot before the English courts with regards to a settlement agreement that had been entered into by the parties after the impugned transaction and which was governed by English law. Whilst MPT did not dispute Orexim's application for permission to serve a claim under section 423, two further foreign parties involved in the dispute over the settlement agreement argued that such an application should be denied on the basis that the court should not accept jurisdiction.

Judgment

When will the court exercise its international jurisdiction?

Section 423's extra-territorial effect is by now well-established. Indeed, Lewison LJ commented:

> *"In days gone by the assertion of extra-territorial jurisdiction was described as 'exorbitant'. But following the globalisation (and digitalisation) of the world economy that attitude can now be seen as out of date".*

However, in *Orexim*, the court clarified that it will only exercise its jurisdiction to make such an order if the matter has a sufficient connection with England and Wales. The court also confirmed that this issue ought properly to be considered when considering whether to permit service out of the jurisdiction under Part 6.37 of the Civil Procedure Rules (CPR). This means that a claimant must in essence satisfy three conditions before the court will permit service out of the jurisdiction of a claim pursuant to section 423:

- Under CPR Part 6.37(1), the claimant must satisfy the court that the claim has a reasonable prospect of success.
- Under CPR Part 6.37(3) the court must be satisfied that England and Wales is "*the proper place*" to bring the claim.
- The court must be satisfied that there is a sufficient connection between the dispute and England and Wales.

Is the dispute closely connected with England and Wales?

In *Orexim*, the court refused the application on the facts because, amongst other things, there was no sufficient connection between the dispute and England and Wales. Lewison LJ had regard to a number of factors when coming to this conclusion including the following:

- None of the parties to the dispute were incorporated in England and Wales, nor did business in the jurisdiction.
- There was no evidence of assets being held in England and Wales, or that the ship had ever entered territorial waters.
- There was no evidence that loss would be suffered in the jurisdiction.
- The impugned transactions took place outside of the jurisdiction and were governed by the law of Singapore.

Indeed, the only connection to England and Wales was that the settlement agreement was governed by English law and had an exclusive English jurisdiction clause. The agreement however, was entered into

before the impugned transactions took place which led Lewison LJ to conclude that this meant the underlying governing law did not form the basis of a sufficient connection to England and Wales:

> *"Although it is true to say that section 423 can apply even if there is no particular creditor in contemplation, the timing of the transactions fatally undermines …[the] argument that the purpose of the transactions was to frustrate a judgment of an English court. At the time when the transactions took place there was no connection with England and Wales at all".*

As mentioned above, litigation with regards to a settlement agreement was already on foot in the English courts and the defendant raised the fact that existing proceedings in the English courts was a factor taken into account by the judge when deciding whether or not there was a sufficient connection in *Dornoch Ltd v. Westminster International BV*[2]*.* However, Lewisham J distinguished that case on the basis that:

> "*the sale took place after the owners had been served with proceedings in England and had been notified of an application for an injunction to stop any disposal of the vessel… [*t]*he facts of that case could well be viewed as an attempt to frustrate any award of an English court arising out of a dispute that was already before the court*".

Accordingly, if proceedings have commenced in the English court and the transaction is seen as an attempt to frustrate those proceedings, the court may be more likely to grant permission to serve a claim under section 423 but this could not have been the case in *Orexim* given that the impugned transactions occurred *prior* to the date of the settlement agreement and the commencement of the corresponding English court proceedings.

The future of section 423

Section 423 is likely to be of increasing interest to creditors, whether existing, prospective or contingent. The forthcoming judgment of the Court of Appeal in the dispute between Sequana Capital and British American Tobacco Industries (*BAT Industries plc v. Sequana SA and another*[3]) will provide further useful guidance on the remedies available to the court as a result of a successful section 423 claim and, hence, the strength of this "tool" in a creditor's armory.

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Endnotes

[1] [2018] EWCA Civ 1660.

[2] [2009] EWHC 1782 (Admlty) [2009] 2 CLC 226.

[3] [2017] EWHC 211 (Ch).