CREDIT SUISSE & ANOR V SOFTBANK & ORS

[2025] EWHC 2631 (Ch)

KEY TAKEAWAYS:

1. Although there was a transaction at an undervalue under s423 Insolvency Act 1986 the court, exceptionally, declined to grant relief.
2. The court has a broad statutory discretion as to remedy and should take account of all of the circumstances including, in this case, the fact that the value of an asset transferred fell to nothing through no fault of the transferee.
3. The statutory purpose of relief is restorative and protective and relief should only be granted accordingly.

ISSUE

Whether there was a transaction at an undervalue under s423 Insolvency Act 1986 and, if so, whether the court should exercise their discretion to grant relief.

FACTUAL BACKGROUND

The first claimant invested through its Credit Suisse (Lux) Supply Chain Finance Fund ("the SCF Subfund") in securitised notes that were originated and administered by Greensill Capital (UK) Limited ("GCUK") under a programme known as the Fairymead Multi-Obligor Programme ("the Fairymead Note Programme"). The intended security for the programme consisted of certain rights ("the Participations") granted under a Participation Agreement by a special purpose vehicle, Greensill Limited ("GL"), to its immediate parent company, GCUK. The Participations related to receivables sold, or purportedly sold, to GL pursuant to a Receivables Purchase Agreement ("the RPA") by companies in the Katerra Group. The SCF Subfund held the beneficial interests in outstanding notes ("the Fairymead Notes") purchased under the Fairymead Note Programme with an aggregate principal face value of circa $440 million. All of the Fairymead Notes defaulted when they matured and/or otherwise fell due for payment in March 2021. On 30 December 2020, certain transactions ("the Impugned Transactions"), comprising a Contribution and Exchange Agreement ("the CEA") and a Share Transfer Agreement ("the TA"), were entered into by GL. The claimant claimed that the Impugned Transactions rendered the intended security for the Fairymead Notes valueless, leaving GL with effectively no assets and resulting in its liquidation in July 2021.

SECTION 423 INSOLVENCY ACT 1986

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;

(b) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; 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 the 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.

DETERMINATION OF THE ELEMENTS OF THE CLAIM

"The Transaction"

The claimants alleged that the CEA and TA taken together constituted the relevant transaction for the purposes of the claim under s423. The defendants alleged that the relevant transaction (the "Greensill/Katerra Transaction") comprised fifteen agreements or arrangements including the understanding that the Greensill Group would apply the $440 million in purchasing or redeeming the Fairymead Notes.

The court concluded that the claimant's position was to be preferred, namely that the relevant "transaction" for the purposes of the claim was limited to the Impugned Transactions and did not include the various other agreements or understandings pleaded by the defendants.
This was the case as (i) the Impugned Transactions were the only agreements to which GL was a party or under which it acquired any rights or liabilities; (ii) the agreements were entered into over a period of some two months; (iii) the various agreements had different purposes; (iv) GL did not "enter into" any of the agreements other than the Impugned Transactions; and (v) GL was a special purpose vehicle and the securitisation structure was set up to ensure the Noteholders would be protected in the event of insolvency of the Greensill Group.

"Undervalue"

The claimants contended that the transaction was at an undervalue as, by entering the CEA, GL gave up its rights against Katerra under the RPA. The defendants argued that the release of the obligations under the RPA had the consequence that GL was released from any obligations to pay equivalent amounts to GCUK. Hence, the release of Katerra's RPA obligations effected by the CEA had no impact on GL's net position.
Miles LJ was unable to accept the defendants' position as consideration must be assessed objectively by what the debtor receives, must enure to the benefit of the debtor and must be capable of being measured in money or money's worth. Even on the wider view of the scope of the "transaction", the payment of $440 million under the CLN was not a payment to GL and did not enure to its benefit.
The court was also unable to accept the argument that the alleged arrangement that the $440 million payment would be used to buy or redeem the Fairymead Notes itself constituted consideration to GL. Therefore, there was no evidence that GL obtained value in money or money's worth from the payment of $440 million under the CLN.

The court was also unable to accept the contention that GL was in no worse position by release of the RPA as s423 requires a comparison to be made between the value obtained by the debtor for the transaction and the value of consideration provided by the debtor. The issue is not whether the debtor was left worse off.

Under the CEA, GL gave up substantial assets under the RPA, the value of which would otherwise have passed to the victims of the transaction. It would undermine the statutory purpose of s423 to conclude that GL obtained "valuable consideration" under the transaction.

In addition, the court found that any putative benefit to GL from being factually relieved of its obligations to pay Participation Obligations would have been off-set by a liability of GL to GCUK under the Participation Agreement.

"Purpose"

Miles LJ concluded that GL did have a relevant purpose in entering into the CEA and TA on 30 December 2020. The CEA only had one function, namely to release the RPA. This brought down the securitisation structure and wrote off GL's only asset, thereby prejudicing the interest of the claimants.

Given Mr Greensill's understanding of the role of the RPA in the securitisation structure, he knew that by giving up the RPA, the structure would be brought down to the prejudice of the claimants.

The court found that the purpose of what was done was to remove assets from the reach of the claimants or otherwise prejudice them.

Miles LJ accepted that Mr Greensill did not positively wish to prejudice the creditors of GL but, nonetheless, was satisfied that his aim or intention in entering the CEA was to prejudice their interest.

It was enough that at least one of Mr Greensill's purposes was to bring about precisely what the CEA and TA achieved, it did not have to be his only or dominant purpose.

"Relief"

Despite finding that there had been a transaction at an undervalue, Miles LJ did not consider that the court should make an order for relief.

Miles LJ recognised that the court in BTI 2014 LLC v Sequana SA [2017] EWHC 211 (Ch) expressed that it is likely to be an exceptional case where relief will not be ordered.

However, he found that there were a number of reasons why on the particular facts of this case an order against the defendants would not be appropriate under the court's restorative jurisdiction:

The transaction in this case was not the usual one of a transfer of an asset by a debtor for no or inadequate consideration. The obvious order the court would make to reverse the effects of a debtor-release transaction falling within s423 was not practically available;

Decisions under s423 are highly fact-specific. In this case the supervening bankruptcy of Katerra amounted, on an analogy of market fluctuations, to the extreme case of the value of an asset falling to nil. Such cases, where the value of an asset transferred as part of a transaction at an undervalue falls to nothing through no fault or action of the transferee, are likely to be unusual;

There was no independent basis for seeking relief against the defendants; and

Contributory negligence does not apply to ss 423 or 425, the defence would have failed on the facts and the claimants were not negligent or at fault.

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