
# PURKISS V KENNEDY & ORS (RE ETHOS SOLUTIONS LTD)

[2025] EWCA Civ 268

## KEY TAKEAWAYS:

1. Entering into a transaction in order to ensure that a liability does not accrue does not involve a section 423(3) Insolvency Act 1986 "purpose".
2. Parliament is unlikely to have intended s423 to extend to commonplace "tax mitigation" which is not generally considered to be objectionable.
3. The circumstances in which an appellate court is justified in interfering with a finding of fact made by a trial judge are limited to when the court feels "compelled to do so" or where the judge's conclusions are "rationally insupportable".
4. The fact that it is quite possible that a different judge would have made different findings does not matter when considering the trial judge's conclusions.

## ISSUE

The application of section 423 of the Insolvency Act (IA) 1986 where transactions could have been entered into with a view to avoiding tax liabilities.

## FACTUAL BACKGROUND

Ethos Solutions Limited ("the Company") operated as a tax avoidance scheme designed to enable self-employed individuals to reduce the income tax and national insurance contributions payable on their remuneration. Soon after the Company began trading, however, HMRC started to publish statements that it considered arrangements such as the Company had adopted to be ineffective to avoid tax. HMRC issued determinations assessing the Company as liable for income tax and national insurance contributions and, subsequently, the Company went into creditors' voluntary liquidation without either making any payment to HMRC or seeking to appeal. This was followed by HMRC submitting a proof of debt. The Company's then liquidator sought orders under section 423 IA 1986. The Judge dismissed the claim and the subsequently appointed liquidator, Purkiss ("the Liquidator"), challenged the decision in the Court of Appeal.

## SECTION 423 IA 1986

### 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 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.

## FIRST INSTANCE DECISION

The Judge was satisfied that the transactions were "at an undervalue" within the meaning of section 423 IA 1986. The Company "was in a worse position as a result of entering into each Transaction than it would have been had it not entered into that Transaction in the first place".

The Judge was not, however, persuaded that the Company had entered into the transactions for a prohibited "purpose" as per s423(3) 1A 1986.

### THE LIQUIDATOR'S PRIMARY CASE

"The Company had a prohibited purpose because the Company entered into the Transaction in the mistaken belief that the Respondents could thereby avoid a liability to income tax and NIC from the remuneration for their services to end uses".

It had been argued on behalf of the Liquidator that "an intention to prevent a tax liability arising is an intention to prejudice the interests of HMRC in respect of the hypothetical claim for the tax liability which is avoided".

The Judge rejected this submission.

### THE LIQUIDATOR'S ALTERNATIVE CASE

The Court should infer that the Company had entered into each transaction for the purpose of placing assets beyond the reach of HMRC.

What had to be shown was that "a purpose of the Company in setting up the scheme was that, if it failed, its implementation would nevertheless impede HMRC from recovering tax due to HMRC".

The Judge did not accept that this had been established.

## APPEAL

The Liquidator challenged the Judge's conclusions on both his primary and alternative case.

## COURT OF APPEAL JUDGMENT

### THE LIQUIDATOR'S PRIMARY CASE FAILED

The Court of Appeal was not persuaded that it was relevant to distinguish between "tax mitigation" and "unacceptable tax avoidance".

The purpose is the same in both cases: namely to prevent a liability to tax from arising.

The difference between the two is not the purpose, but the means by which that purpose is put into effect.

Parliament is unlikely to have intended to extend s423 to commonplace "tax mitigation" which is not generally considered to be objectionable:

"Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be".

IRC v Duke of Westminster [1936] AC 1

The Court did not think that the philosophy underlying s423 requires an intention to prevent a liability accruing to be seen as a s423(3) purpose.

The terms of s423 do not appear to support the Liquidator's primary case as, where a person succeeds in preventing a tax liability from arising, there will simply not be a person who "is making or may make" a claim with "interests" to be prejudiced.

Entering into a transaction in order to ensure that a liability does not accrue does not involve a s423(3) purpose.

### THE LIQUIDATOR'S ALTERNATIVE CASE FAILED

This ground of appeal involved a challenge to the Judge's factual conclusions.

The Court recognised that the circumstances in which an appellate court is justified in interfering with a finding of fact made by a trial judge are limited.

"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."

Fage UK Ltd v Chibani UK Ltd [2014] EWCA Civ 5, [2014] ETMR 26, para 114

There was no question of the Judge's conclusions on the Liquidator's alternative case having been "rationally insupportable".

Volpi v Volpi [2022] EWCA Civ 464, [2022] 4 WLR 48, para 2

The Court held that the fact that it is quite possible that a different judge would have made different findings does not matter.



ALEXANDER'S PRACTICE ENCOMPASSES INSOLVENCY, ARBITRATION AND COMMERCIAL CHANCERY. THIS INCLUDES CONSIDERABLE CROSS-BORDER AND OFFSHORE EXPERIENCE.

alexanderheylin@enterprisechambers.com

london@enterprisechambers.com

Telephone: 020 7405 9471

LinkedIn: Alexander Heylin

Enterprise Chambers profile

Website: alexanderheylin.com