Briefing

BURGES SALMON

Corporate Turnaround and Insolvency

Transactions defrauding creditors and intention

In Williams Trustee in *Bankruptcy of Jonathan James Taylor v Taylor* 23/10/2012, a trustee in bankruptcy failed in a s.423 action as he was unable to prove the existence of an intent on the part of the debtor to put assets beyond the reach of creditors. The case shows that the existence of such intent can be difficult to prove, even where there are fairly persuasive factors which point towards it being present.

The facts

Mr Taylor had been a director and guarantor of a family company. In 2002 he invested £120k into the company. This money was lent to him by his wife. The Company was put into creditors' voluntary liquidation in April 2003. 20 days after the liquidation, Mr Taylor executed a transfer of a property held in his name into the joint names of himself and his wife as tenants in common in equal shares. No consideration was stated to be given for the transfer.

A month later, Mr and Mrs Taylor executed a declaration of trust which recited that Mrs Taylor had made contributions of £120k towards improving the property and that she had made a loan to Mr Tayor of £120k. The declaration of trust also stated that Mr Taylor was solvent and that a mortgage on the property, which had been obtained to discharge Mr Taylor's prior liabilities, was to be discharged from his interest in the property prior to being discharged from Mrs Taylor's interest.

The property was later sold and half the sale proceeds were used to discharge the mortgage. The remainder was used to buy another property free of charge in Mrs Taylor's sole name. In 2009 Mr Taylor was made bankrupt and Mr Williams was appointed as his trustee in bankruptcy. The trustee applied to set aside the transfer of the property into joint names and sought to recover the new property bought by Mrs Taylor.

What did the court decide?

At first instance, the judge decided that the real and substantial purpose of the transfer was to give effect to an earlier agreement that Mr Taylor had made with his wife and that escaping his liabilities had not been part of Mr Taylor's purpose.

On appeal, the court upheld that judgment. Although the transaction was at an undervalue for the purposes of s.423(1) because the consideration provided by Mrs Taylor to Mr Taylor was indirect and represented only 50 per cent of the value of the original property, the judge had been entitled to find that it had not been Mr Taylor's intention to put assets beyond the reach of creditors. Although there were *objective* factors which pointed towards the transaction being intended to defraud creditors, the judge could still consider the evidence of Mr and Mrs Taylor that this was not the case.

What does this mean for practitioners?

The appeal underlines the importance of ensuring that before proceedings are taken pursuant to s.423, the claimant establishes that there is good evidence supporting the existence of intent to put assets beyond the reach of creditors. In particular, it will be important to analyse whether there is another reason for the transaction in question – such as to give effect to an arrangement made at an earlier point in time, as was the case here.

Despite the seemingly suspicious timing of the transfer of the property (soon after the liquidation of the family company) and the lack of consideration stated in the transfer instrument, the judge was persuaded by the oral evidence of Mr and Mrs Taylor and by the recitals to the trust instrument that the true purpose of the transaction was legitimate. Seemingly the court had sufficient objective evidence to draw the opposite conclusion, but decided not to in the circumstances.

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