

## Transactions in Fraud of Creditors: The Foreign Element

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### Introduction

For as long as law has existed people have not been paying their debts. In some cases the debtors go to considerable lengths to ensure that not only will a debt not be paid but also that they no longer have the assets with which to pay that debt. Section 423 of the Insolvency Act 1986<sup>1</sup> is a statutory jurisdiction which concerns transactions entered into at an undervalue for the purpose of prejudicing creditors. Its historical roots can be traced back to a statute of Elizabeth I, 13 Eliz. I c. 5, which was replaced momentarily in the Law of Property Amendment Act 1924, Sch 3 Pt II, para 31, and then s. 172 of the Law of Property Act 1925.<sup>2</sup> Under these sections a transfer subject to attack under the statute gave the transferee a defeasible title, good unless and until avoided through the proceedings brought to avoid it under the statute.<sup>3</sup> Section 423 was introduced following the Cork Report (1982, Cmnd 8558, paras 1210–1220 and 1283–1284). Its regime provides for a form of class action on behalf of all the 'victims' of the transaction. These are any person who is or is capable of being prejudiced by it (s. 423(5)). The section provides for the court to operate a discretionary jurisdiction to undo the consequences for the victims which would otherwise arise from the transaction caught by the statute. An order under s. 423 may be to undo the transaction itself, avoiding it, or it may leave the transaction unaffected, with the transferee or his successors in title retaining good title to the transferred asset, and be some other order of which the consequences are to restore the original financial position of the victims.

A very important aspect of jurisdiction under s. 423 is the protection afforded to third parties who have acquired an asset in good faith and for value. Under s. 425(2) a broad protection is accorded to third parties who were not parties to the transaction caught

by the statute, and who have acquired an interest in the property, or who benefit from that transaction, in good faith for value and without notice 'of the relevant circumstances'. The statute draws a distinction between such a third party, and a person who through being a party to the relevant transaction itself has directly benefited from it, for example through transfer of an asset to him at an undervalue. Even so the jurisdiction remains discretionary, and therefore, depending on the circumstances, the court may still allow a party to the impugned transaction to keep part of the benefit of it or even make no order against him.

The avoidance of transactions which have been entered into to defraud creditors has been a constant source of litigation both in England and abroad. It can be tempting for a debtor to take steps to render himself judgment proof against his creditors and it is human to give in to temptation. In England the jurisdiction under s. 423 has become all the more important with the decision of the Court of Appeal in *IRC v Hashmi* [2002] 2 BCLC 11 that to establish the relevant purpose for s. 423 to apply it is not necessary to show that prejudicing a creditor or a person who might make a claim against him was the 'dominant' purpose of the debtor; it suffices if this was a 'substantial' purpose. This is to be contrasted with the jurisdiction in Australia under section 121 Bankruptcy Act 1966 (Commonwealth) where the requirement is that the transferor's 'main purpose' in making the transfer was:

- (1) to prevent the transferred property from becoming divisible among the transferor's creditors; or,
- (2) to hinder or delay the process of making property available for division among the transferor's creditors.

The jurisdiction under s. 423 and how it is exercised has been considered in numerous cases.<sup>4</sup> The purpose

### Notes

1 All references to sections are references to the Insolvency Act 1986 (as amended).

2 Section 37A Conveyancing Act 1919 (NSW) is the corresponding provision still in force in New South Wales.

3 *Green v Sneller* [2002] NSWSC 671 (31st July 2002) at paras 25–27, which refer to earlier authorities both in England and Australia.

4 See generally Commercial Injunctions (5th edition) By Steven Gee QC at paras 13.018–13.029.

of the present article is to consider s. 423 when there is a foreign element.

### Sections 238 (transactions at an undervalue) and 239 (preferences)

There are some similarities between the jurisdiction under s. 423 and the restorative jurisdictions of an insolvency court in respect of transactions entered into by the now insolvent debtor at an undervalue or unfair preferences. In the case of an insolvent company which is in administration or liquidation, s. 238 enables the office holder to apply to the court for an order restoring the position to what it would have been had the transaction at an undervalue not taken place, and there is under s. 239 jurisdiction in respect of preferences given by the company. Transactions at an undervalue include transfers from a company to a third party for no consideration or for an inadequate one. A creditor may find himself prejudiced by such a transfer because the asset is no longer held by the company.

The jurisdictions under s. 238 and s. 239 are invoked by the office holder and are important aspects of the court's insolvency jurisdiction. The jurisdiction to make Rules in s. 411 applies, *inter alia*, to Part VI of the Insolvency Act 1986 in which s. 238 and s. 239 are to be found. A consequence of this is that an application made under these sections can be served out of the jurisdiction with leave of the court under rule 12.12 of the Insolvency Rules 1986. This is because such an application is itself an insolvency proceeding within rule 13.7 of the Insolvency Rules 1986 being proceedings 'under the Act'<sup>5</sup>. Council Regulation (EC) No 44/2001 (the Judgments Regulation) does not apply because Article I(b) excludes from its scope 'bankruptcy, proceedings relating to the winding up of insolvent companies ... and analogous proceedings.'

There are important differences between the jurisdictions under s. 423 and those in ss. 238 and 239:

- (1) Transactions falling within s. 423 can be impugned regardless of how long ago they took place. In contrast the jurisdictions under ss. 238 and 239 only enable the court to go back a short period in time.
- (2) Section 423 does not require the existence of any form of insolvency proceedings. Often, but not necessarily, proceedings will be brought after a

judgment has been obtained by a creditor in order to bring about a situation in which that judgment can be enforced. Where insolvency proceedings in respect of the debtor exist it will usually be the office holder who makes the application and if a 'victim' is to apply he will need to obtain the leave of the court. The court may impose terms for the purpose of ensuring that if the application is pursued the interests of all the creditors are properly protected.

- (3) The proceedings under s. 423 are on behalf of each 'victim' (s. 424 (2)). This is unique to s. 423. As an example of the type of order which might be made, s. 425(1)(a) identifies an order providing for property transferred as part of a transaction to be vested in someone so as to give the benefit of it to the victims. In contrast s. 241(1) gives as an example of an order which may be made under ss. 238(3) and 239(3) an order vesting property in the company. Thus these sections focus upon providing a benefit to the company, or relieving it of a disadvantage, which can in turn be passed on to the creditors through the insolvency proceedings. But this difference in focus does not necessarily mean that on a particular set of facts the sections will benefit different persons. Thus for example if a company has entered into a transaction caught by s. 423 and then goes into insolvency, the unpaid creditors may each be a 'victim' of that transaction, and it may be the same people who stand to benefit from an order whether made under ss. 238 or 239, or under s. 423.
- (4) Where no insolvency proceedings are in being and an application is to be made under s. 423, if the proposed defendant is outside of the jurisdiction service of the originating process out of the jurisdiction will be governed by CPR 6.19 or 6.20 (permission to serve out of the jurisdiction). This is because the application will be civil proceedings regulated by the CPR, and, the Brussels–Lugano regime will apply. In such circumstances rule 12.12 of the Insolvency Rules 1986 does not apply. Paragraph 4 of Schedule 8 of the Insolvency Act 1986 which applies to the rule making power under s. 411<sup>6</sup> also permits provision to be made in the rules for service of an application made under statute or subordinate legislation '... relating to, or to matters connected with or arising out of, the insolvency or winding

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<sup>5</sup> *Re Paramount Airways Limited* [1993] Ch 223 at p. 241 C–D referring to rule 13.7.

<sup>6</sup> s. 411(2)(a).

up of companies', but unless and until there are insolvency proceedings CPR part 6 will apply to service of proceedings out of the jurisdiction.<sup>7</sup> In contrast applications under ss. 238 and 239 can only be in the context of insolvency proceedings and service out of the jurisdiction is governed by rule 12.12.<sup>8</sup>

## The EC Insolvency Regulation

Council Regulation (EC) No 1346/2000 of 29th May 2000 on insolvency ('the Insolvency Regulation') provides a measure of uniformity in cross border insolvency proceedings. By article 1 it applies to 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator' and these include winding up proceedings, administration and bankruptcy. Article 4.2(m) provides for the law of the State of the opening of proceedings to determine '... the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors'. This is the law which is to be applied to those insolvency proceedings. Transactions at an undervalue under s. 238 and preferences under s. 239 come within article 4.2(m). In effect where the opening of the insolvency proceedings is in England then the effect of the Regulation is that English judgments in the insolvency proceedings will be recognized by the other Member States. Article 4.2(m) relates to an important part of the insolvency process. Further provisions in the Regulation preserve the right to pursue an action within article 4.2(m) (articles 5.3 (Third Parties Rights in rem), 6.2 (Set Off), 7.3 (Reservation of Title) and 9.2 (Payment Systems and Financial Markets)). Article 13 provides protection to a person who benefited from an act detrimental to all creditors when that act is subject to the law of another Member State and that law does not allow the act to be challenged 'in the relevant case'. Article 13 operates so as to allow an immunity in favour of third parties based on that foreign law, against what is in substance a personal claim against them.

So for example if what was a transaction at an undervalue within s. 238 took place in another Member State and subject to that State's law, and there was no means of challenging the transaction under the law of that State, article 13 would disapply article

4.2(m). An example would be where the law of the other Member State only permits a transaction to be set aside where dishonesty of the transferor is proved, and the applicant does not allege dishonesty. The precise ambit of article 13 is yet to be clarified by the ECJ, but it is respectfully suggested that article 13 should be construed narrowly. Paragraph 90 of the *Virgos Schmidt Report on the Convention on Insolvency Proceedings* states as follows: 'The law of the State of the opening of proceedings determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned.' Paragraphs 136–138 make it clear that the article 13 defence must be claimed and proved by the relevant party who must show that 'the act should not be capable of being challenged in fact i.e. after taking into account all the concrete circumstances of the case.'

It is important not to underestimate the wide-ranging effect of article 4. Thirteen specific matters are, under article 4, to be determined by the law of the state of opening of proceedings. That law is determined by article 3.

Article 3 provides that 'the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ...'. The lack of guidance within the Regulation as to the important issue of how the centre of main interests (COMI) is to be determined has been commented on elsewhere.<sup>9</sup> Given the thirteen matters that pursuant to article 4 are governed by the law of the territory of the debtor's COMI, determination of the COMI is of paramount importance when considering the effect of the Regulation in any particular case.<sup>10</sup> Some assistance has recently been provided by the English courts in three cases.

In *Re BRAC Rent-A-Car International Inc* [2003] BCC 248, Lloyd J held that the Regulation was not limited to debtors based within the EU, such that if the COMI of a legal person incorporated outside the EU was within the EU, the Regulation applied. It is respectfully suggested that Lloyd J was correct in taking this view. As a matter of principle the efficacy of the Regulation would be diminished if non-EU companies could conduct business within the EU but be immune from the jurisdiction provisions of the Regulation. In

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7 *TSB Bank plc v Katz* [1997] BPIR 147; *Jyske Bank (Gibraltar) Limited v Spjeldnaes* [1999] 2 BCLC 101 at p. 124A; *Re Banco Nacional de Cuba* [2001] 1 WLR 2039 at p. 2048 D–E.

8 *Re Paramount Airways Limited* [1993] Ch 223.

9 See for example: *Annotated Guide to the Insolvency Legislation*, Sealy & Milman (seventh edition) at pp. 613–614; *The EC Regulation on Insolvency Proceedings*, Moss, Fletcher and Isaacs (first edition) at paragraph 3.10; *The Law of Insolvency*, Fletcher (third edition) at paragraph 31-025, *Cross-Border Insolvency and Vulnerable Transactions*, Frisby, in *Vulnerable Transactions in Corporate Insolvency*, Armour & Bennett (2003) at p. 469 paragraph 10.117.

10 See commentary in *The Law of Insolvency*, Fletcher (third edition) at paragraph 31-033.

*Skjevesland v Gevevan Trading Co Ltd* [2003] BCC 391, HHJ Howarth sitting in the High Court had to consider, on appeal, how the COMI of a natural person should be established. Unlike for companies for whom article 3 provides a rebuttable presumption of the COMI being in the place of the registered office, there is no similar presumption or indeed any guidance for natural persons. HHJ Howarth considered that the COMI of a natural person ought to be where he could be contacted. For non-professionals this meant the place of habitual residence, and for professionals this meant that place of professional domicile. The matters relevant for determining such places included place of home, place where business was conducted, where a person's emotional ties were and what time he spent in various places.<sup>11</sup> Finally, in *Re Daisyteks ISA Ltd* [2003] BCC 562, HHJ McGonigal sitting in the High Court emphasized that pursuant to recital 13 of the Regulation the COMI should correspond with the place where the debtor conducted the administration of its interests on a regular basis such that the COMI is ascertainable by third parties.<sup>12</sup> The learned judge further stated that potential creditors were the most important third party referred to in recital 13, that for a trading company the most important potential creditors would be likely to be financiers and trade suppliers, and that the relevant criterion was the percentage of potential creditors by value who knew where the important functions of the company in question were carried out.<sup>13</sup>

These latter two cases illustrate the difficulties that can arise in determining the COMI in any particular case, and even where guidelines such as those offered by HHJ Howarth are borne in mind, the application of those guidelines to the complex sets of facts practitioners are often faced with will seldom be straightforward. It is to be hoped that the ECJ is given the opportunity in the near future to offer more comprehensive general guidance on determination of COMI, but in the absence of more detailed rules set out in the Regulation itself, this can only be on a piecemeal basis as and when specific problems arise in the national courts of the Member States.

Article 26 provides as follows: 'Any Member State may refuse to recognize insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such pro-

ceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.' Article 26 thus provides an exception to the principles of recognition (article 16) and effect of recognition (article 17) of a judgment opening insolvency proceedings handed down by the courts of a Member State. The recent decision of the Supreme Court of Ireland in *The Matter of Eurofoods IFSC Ltd* [2004] IESC 47 provides an illustration of the potential practical importance of article 26. The Supreme Court referred a number of important questions to the European Court of Justice pursuant to article 234 of the Treaty of Rome. One of those questions relates to recognition: 'Where it is manifestly contrary to the public policy of a Member State to permit a judicial or administrative decision to have legal effect in relation to persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision, is that Member State bound, by virtue of article 17 of the said Regulation, to give recognition to a decision of the courts of another Member State purporting to open insolvency proceedings in respect of a company, in a situation where the court of the first Member State is satisfied that the decision in question has been made in disregard of those principles ...'

It is perhaps not surprising that the Supreme Court thought it necessary to refer this question. The facts of the case before it, which involved the insolvency of a company which was part of the Parmalat Group of companies, were slightly unusual. The company in question was incorporated in Dublin where it carried out business providing finance facilities for other Parmalat Group companies and where it held its board meetings. A creditor presented a winding-up petition to the High Court on 27 January 2004, and in its supporting evidence expressed a concern that an attempt would be made to move the COMI from Ireland to Italy. Insolvency proceedings were opened in Italy and a judgment was given on 20 February 2004, notwithstanding the presentation of the petition in Ireland, though a judgment on the Irish petition was not given until 23 March 2004. The Supreme Court of Ireland decided that the failure of the Italian administrator to give proper notice and papers to the creditors of the Irish company amounted

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11 See paragraph 60 of judgment.

12 See paragraph 15 of judgment. HHJ McGonigal referred to the judgment of Registrar Jacques at first instance in *Gevevan Trading Co Ltd v Skjevesland* [2003] BCC 209 in which at p. 223A Registrar Jacques stated that 'it is the need for third parties to ascertain the centre of a debtor's main interests that is paramount, because, if there are to be insolvency proceedings, the creditors need to know where to go to contact the debtor.' HHJ McGonigal also made reference to paragraph 75 of the Virgos-Schmidt Report (on the Convention on Insolvency Proceedings) which stated the importance of international jurisdiction being based on a place known to the debtor's potential creditors such that legal risks could properly be calculated.

13 See paragraph 16 of judgment.

to such a lack of due process that the Irish court should refuse to give recognition to the decision of the Italian court.<sup>14</sup>

The decision of the ECJ will be eagerly awaited in many quarters: as a piece of legislation seeking to harmonize matters of jurisdiction the Regulation will only be effective if the decisions of courts which involve infringements on international standards of due process are not binding on the courts of other Member States. Whilst it is acknowledged that the threshold required in order to rely upon article 26 is high ('the effect of recognition or enforcement must be manifestly contrary to that State's public policy'), equally it must be correct that where such a threshold can be met, some redress is available. Some support can be derived for this analysis from paragraphs 204 and 206 of the *Virgos-Schmidt Report*. The former provides that 'the public policy exception ought only to operate in exceptional cases. For this reason article 26 requires recognition or enforcement of the foreign judgment to be manifestly contrary to public policy.' The latter provides that 'public policy may thus protect participants or persons concerned by the proceedings against failures to observe due process. Public policy does not involve a general control of the correctness of the procedure followed in another Contracting State, but rather of essential procedural guarantees such as the adequate opportunity to be heard and the rights of participation in the proceedings. Rights of participation and non-discrimination play a special role in the case of plans to reorganize businesses or compositions, in relation to creditors whose participation is hindered or who are the subject of unfounded discrimination.'

### Service of an application under s. 423 on a foreigner outside of the jurisdiction

Section 423 relates to a 'transaction' which by s. 436 '... includes a gift, agreement or arrangement ...'. s. 425 sets out examples of orders which may be made. An order made under s. 423 can be a purely personal order against a transferee which does not bind or affect the particular property which had been transferred. An illustration of this would be where the court ordered a transferee to make a payment to the 'victims' based on the value of the transferred asset (s. 425(1)(d)). Another example would be where the

company had released security given to it in respect of a debt owed to it, and the court ordered replacement security to be provided (s. 425(1)(f)).

On the other hand the order may require the transfer back to the transferor of particular property which has been stripped out from the company. The order may require that property to be re-vested back in the company, or it might require the property to be vested in someone for the benefit of the 'victims' (s. 425(1)(a)). With this type of order the effect is to convey back ownership of the asset. Even in this category, the cause of action does not depend upon the claimant having any title to or ownership of an interest in the asset prior to the commencement of the proceedings. The cause of action is not based upon assertion of ownership in the asset. It is in the nature of a remedial order made personally against the transferee or his successor, the consequence of which is the transfer of ownership.<sup>15</sup>

The *lex situs* rule would apply had the cause of action been based on ownership of the property. That rule would apply so as to work out who owned or had a proprietary or possessory interest in the foreign asset. Arguably the *lex situs* rule would also apply when the real issue to be resolved by the English court is to be analysed as one of priorities of interests in the asset,<sup>16</sup> which is situated abroad. But where the issue before the English court is as between the victims and the transferee of an asset, whether to set aside a transaction caught by s. 423 or reverse its effects, it is considered that the English Court will apply s. 423 as part of the *lex fori* on the basis that the statute applies so as to provide a cause of action for the benefit of the victims, regardless of where the transaction has taken place, whether the parties to the transaction are foreigners, whether the transferee is a foreigner, and irrespective of where the assets were located at the time of the transaction or are now located.<sup>17</sup> This conclusion is simply the result of interpretation of the statute. The beneficial effects of s. 423, which was enacted to carry into effect an English public policy rule in relation to fraudulent conveyances and the like, cannot be circumvented by, for example, the transferor carrying out an impugned transaction abroad or the transferor and the transferee agreeing to subject the transfer transaction to some foreign law. The section still leaves it open for the court to achieve a just result for the foreigner who might otherwise be unfairly prejudiced through the application of the

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14 This decision of course is founded on the basis that the Irish proceedings were opened first by the presentation of the petition on 27 January 2004, which conclusion is itself the subject of the first question referred to the ECJ.

15 For this reason the ECJ in C115/88 *Reichert v Dresdner Bank (No. 1)* [1990] ECR I-2 at I-42 (para.11) declined to regard the action brought by the bank in respect of real property in Antibes as coming within the scope what is now article 22(1) of the Judgments Regulation.

16 *Macmillan Inc v Bishopsgate Trust (No 3)* [1996] 1 WLR 387 at p. 409 and p. 411.

17 *Re Paramount Airways Limited* [1993] Ch 223.

section to him, because the jurisdiction is discretionary and the foreign element in the case may make it inappropriate for any order to be made.<sup>18</sup>

In *Jyske Bank (Gibraltar) Limited v Spjeldnaes* [1999] 2 BCLC 101, the company (Falstaff) had had the benefit of a contract for the purchase of land situated in the Republic of Ireland. Another company (Eccleston) took the benefit of that contract and acquired the land. The judge held that the land was held by Eccleston on constructive trust for Falstaff which was the judgment debtor. It was argued that there was a direct cause of action available to the judgment creditor of Falstaff as against Eccleston based on an analogy sought to be drawn from cases such as *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366 where a judgment creditor of a husband was able to obtain an injunction against the wife. But in that case the injunction was justified as being ancillary to the cause of action against the husband, because it preserved assets which might be legally required to be applied in discharge of that judgment debt. Similarly there could have been an injunction granted under s. 25 of the Civil Jurisdiction and Judgments Act 1982 against Eccleston to preserve the land pending enforcement proceedings in Ireland against Eccleston and Falstaff in respect of the land. The reasoning of Hoffmann LJ in *Aiyela* did not have the consequence that there was a free-standing cause of action for substantive relief against the wife in that case. Therefore Evans-Lombe J held that the judgment creditor had no direct cause of action against the transferee unless it was by way of application under s. 423. It is considered that Evans-Lombe J was correct in this conclusion.

The judgment debtor was not the subject of insolvency proceedings and so service out of the jurisdiction of the application under s. 423 was governed by RSC Order 11. The judge held that service could be effected outside the jurisdiction on Eccleston and granted relief under s. 423.

The fact that the land was in the Republic of Ireland meant that any execution of a judgment on the land was assigned by the Brussels Convention to the exclusive jurisdiction of the Irish court. However the pursuit of an application against Eccleston under s. 423 for relief undoing the transaction under which Eccleston had obtained from Falstaff the benefit of the contract of purchase of the land was not execution of the judgment under what was article 16.5 of the Brussels Convention and is now article 22(5) of the Judgments Regulation. This is because the purpose of

the proceedings was not to realize the land and satisfy the judgment but was to undo the transaction between Falstaff and Eccleston.<sup>19</sup> However the judge's conclusion that article 6(1) of the Brussels Convention (co-defendants) applied is doubtful. Article 6(1) envisages a real substantive claim against D1 and the justification for joining in the action the substantive claim against D2 is the risk that otherwise the court would proceed against D1 and there might be an inconsistent judgment given by another court on the claim against D2. It must be expedient to hear the substantive claims together to avoid the risk of inconsistent judgments resulting from separate proceedings.<sup>20</sup> The primary defendant to the application under s. 423 was Eccleston which was the company which held the land. Falstaff already had a judgment against it based on the bank's substantive claims. As against Falstaff all that remained was to secure execution of the judgment against it. Execution over the land in Ireland was a matter exclusively for the Irish court. As for the involvement of Falstaff in the s. 423 application, no s. 423 application could have proceeded against Falstaff alone, and Falstaff was not in any real sense a defendant to a substantive claim being made under s. 423. Its presence on the s. 423 application would have been no more than ancillary to the claim against Eccleston. It is considered that the learned judge should have held that article 6(1) of the Brussels Convention was inapplicable.

The other basis on which the learned judge found jurisdiction under RSC Order 11 was RSC Order 11 rule 1(2)(b) ('a claim which by virtue of any other enactment the High Court has power to hear ...') but then the authorization of the assertion of jurisdiction over the foreigner must itself come from that other enactment (in this case notionally s. 423). It was not enough that s. 423 was not limited in its ambit to persons present within the jurisdiction. That was consistent with jurisdiction still having to be grounded under the Brussels-Lugano regime, or under RSC Order 11. It is considered that Lightman J in *Re Banco Nacional de Cuba* [2001] 1 WLR 2039 was correct not to follow this part of the decision of Evans-Lombe J.

In *Re Banco Nacional de Cuba* the claimant Italian bank sought to commence proceedings under s. 423 against Banco Nacional de Cuba (Nacional) and Banco Central de Cuba (Central). The Italian bank was a creditor of Nacional which nearly four years before the commencement of the proceedings had sold and transferred to Central shares in a subsidiary

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18 *Re Paramount Airways Limited* [1993] Ch 223.

19 The opinion of Evans-Lombe J to this effect is supported by *C261/90 Reichert v Dresdner Bank (No. 2)* [1992] ECR I-2149.

20 The authorities are discussed in *European Civil Practice*, Layton and Mercer, (2nd edition) Vol 1 at paras 15.125 to 15.130.

company incorporated in England, and which had its share registry in England. There were no insolvency proceedings in respect of Nacional. Accordingly service out of the jurisdiction on Nacional and Central was governed by CPR part 6. Although CPR 6.20(10) was satisfied because the whole subject of the claim were shares which were within the jurisdiction, Lightman J declined to permit service out of the jurisdiction both on the ground that there was no serious issue to be tried and as a matter of discretion. Where a foreign element is involved the court may decline as a matter of discretion to exercise jurisdiction to entertain the application as in *Re Banco Nacional de Cuba* or may as a matter of discretion under s. 423(2) decline to grant the relief, as contemplated by Sir Donald Nicholls V-C in *Re Paramount Airways Limited* [1993] Ch 223 at p. 239F–240G, drawing a parallel with the court's unlimited jurisdiction under s. 221 to wind up overseas companies, and judicial restraint in doing so because of the foreign element.

The Regulation can only apply where there are insolvency proceedings and then only in relation to those insolvency proceedings. There can be situations in which the liquidator of an insolvent company seeks relief under s. 423 to set aside a transaction entered into by the company to the prejudice of its creditors and for the property to be transferred to the company, when ss. 238 and 239 are inapplicable because of the time limits. That situation is covered by article 4.2(m) of the Regulation. As set out above, in certain cases there may well be practical difficulties in convincing the English court that the relevant debtor's COMI is in England. Assuming that this practical hurdle could be overcome, s. 423 could be applied by the English court when it has opened insolvency proceedings and subject to articles 4.2(m) and 13 it could proceed to make an order under that section albeit bearing in mind the foreign element when considering how to exercise the relevant discretion.

It will be relevant when exercising the discretion to bear in mind whether a relevant foreign court would be bound to recognize and give effect to an order under the Regulation. The policy underlying the Regulation is to provide a lead jurisdiction whose orders will be recognized and enforced by other Member States. If the relevant foreign court is bound by the Regulation to recognize and give effect to an order of the English court made under s. 423 then the English court should take this into account in deciding

whether to make an order affecting a foreigner. What might otherwise look like a misguided attempt to persuade the English court to exercise an altogether exorbitant jurisdiction in respect of a foreigner, assets abroad and a transaction abroad, may, through the Regulation, be properly regarded as the exercise of jurisdiction in insolvency proceedings which have been opened by the English court under article 3.1. A careful eye still needs to be kept on article 26, and this includes making sure that the foreigner is served with the proceedings and is given an opportunity of being heard on the merits.

## Conclusions

Section 423 exhibits a chameleon nature. This is both in European terms and under English domestic law. It may be part of civil proceedings unrelated to insolvency or it may be part of insolvency proceedings themselves. Whether the application is made in insolvency proceedings or not has potentially important consequences. Thus s. 423 applications can be civil matters governed by the Brussels–Lugano regime in which case jurisdiction will be governed by the Judgments Regulation including the heads of special jurisdiction where applicable,<sup>21</sup> or such an application may be part of insolvency proceedings when brought by an office holder, or a person on behalf of the victims, whose objective is to get in assets of the insolvent debtor for the benefit of the creditors. In English domestic law, where there are insolvency proceedings on foot, s. 423 may be invoked within those proceedings. For example, where property has been subjected by the insolvent company to a lien or other security interest pursuant to a transaction caught by s. 423, then an application in those proceedings for the property to be given up to the liquidator and for the lien or security interest to be set aside under s. 423 could be served out of the jurisdiction under rule 12.12 of the Insolvency Rules. An illustration of this would be when the company had given a guarantee of an overdraft granted to a third party and had deposited company property as security in support of the guarantee. Where s. 423 is invoked in insolvency proceedings article 13 of the Regulation is available to provide a defence based on foreign law but this substantive defence will not apply when s. 423 is relied upon otherwise than in insolvency proceedings.

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21 In C115/88 *Reichert v Dresdner Bank (No. 1)* [1990] ECR I-27; C261/90 *Reichert v Dresdner Bank (No. 2)* [1992] ECR I-2149, the ECJ considered the *action paulienne* under article 1167 of the French Civil Code, and rejected a number of suggested special heads of jurisdiction under the Brussels Convention put forward by the Bank in an attempt to justify French jurisdiction when the asset in respect of which the action was brought was a flat in Antibes.