Neutral Citation Number: [2024] EWHC 1081 (Ch)

Case No: CR-2018-010778

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 May 2024

Before :

THE HONOURABLE MR JUSTICE RAJAH

- -

Between :

CHRISTOPHER PURKISS **Applicant**
(as Liquidator of Ethos Solutions Limited)

- and –

(4) TIM KENNEDY **Respondents**

(12) KENNETH JARRARD

(14) PAUL MURRAY

(17) RUPERT DAVID POTTER

(20) BALAJI DASARATHY

(24) ROBERT ENGLEDOW

(27) RICHARD APPLEYARD

(29) PHILLIP HARRIS

(30) GRAEME HUNT

(32) SIMON LOFTING

(34) COSTAS LEMONIDES

(35) ORITSTIMEYIN OMAYEMI OKORO

(36) DAVID JOHN PECK

(37) NICHOLAS ANTHONY SHEERAN

(38) DAVID ADEYINKA

(40) GITA PATHMANATHAN

(41) PAUL MANKU

(42) PERRY OFFER

(43) SUKURU YILDIZ

(44) KYM SLAPE

(47) PIERS WEBSTER

(48) JOHN REIVERS

(50) FATIMA MANKU/CHOUDHARY

(54) JAMAL ALMANSOOR

(56) ARVIND SABHARWAL

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Hugh Sims KC and Simon Passfield KC (instructed by **Clarke Willmott LLP**) for the **Applicant**
Mr Setu Kamal for the **Respondents**

Hearing dates: 17 and 18 April 2024
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APPROVED JUDGMENT

Mr Justice Rajah:

Introduction

1. The Applicant is the third "Court appointed" liquidator of Ethos Solutions Limited ("**the Company**"). The Company was incorporated on 24 September 2008. It was an umbrella company which promoted and operated a tax avoidance scheme ("**the Scheme**") whose intended effect was that self-employed individuals who participated could avoid paying income tax and national insurance contributions ("**NICs**") on their remuneration. HMRC considered the scheme to be ineffective – a position which appears to have been vindicated by the decision of the Supreme Court in *RFC 2012 Plc v AG for Scotland* [2017] UKSC 45 ("***Rangers***").

2. The Scheme involved individuals, who provided their services on a consultancy or independent contractor basis to an end user, becoming employees of the Company, and providing their services to the end user through the Company. The bulk of the remuneration for their services was paid by the Company to an offshore employee benefit trust from which the individuals requested and received loans. It was the Company's intention, based no doubt on the then prevailing decisions in *Dextra Accessories Ltd v HM Inspector of Taxes* [2002] STC (SCD) 413 ("***Dextra***") and *Sempra Metals Ltd v HMRC* [2008] STC (SCD) 1062 ("***Sempra***"), that no liability would fall on it to deduct income tax from the payments it made to the employee benefit trust. Many years after the events in this case, the Supreme Court held in *Rangers* that *Dextra* and *Sempra* were wrongly decided. Income tax on emoluments or earnings is due on money paid as a reward or remuneration for the exertions of the employee, regardless of whether the payments are paid to the employee personally or redirected to a third party (such as the trustee of a trust).

3. On 4 December 2012, HMRC assessed the Company as being liable under the PAYE regime to pay income tax and NIC of £2,238,057.72 in respect of the tax years 2008/09 and 2009/10. The Company entered into creditor's voluntary liquidation ("**CVL**") on 18 December 2012, without making any payment, or seeking to appeal.

4. On 13 December 2018, these proceedings were commenced ("**the Application**") against 63 Respondents seeking orders under section 423 Insolvency Act 1986 ("**s.423**") against

62 of them. They were almost all individuals who had participated in the Scheme. The claims against many of the original respondents have been resolved by settlement, judgment or discontinuance or, some of the respondents having been debarred from defending for failure to file a defence, are awaiting an uncontested disposal hearing. This is the trial of the claims against the remaining 23 respondents who I will refer to as "**the Respondents**".

5. The Applicant's case in summary is that:
   a. the Scheme is a composite transaction at an undervalue (within the meaning of s.423(1)(c)) because the consideration the Company received was significantly less than the liabilities it accrued as part of it; in particular the Company incurred an income tax and NIC liability to HMRC which significantly exceeded the sum received by the Company for the transaction;

   b. the Company entered into each such transaction for the prohibited purpose in s.423(3), since the purpose of the arrangements, by which the Respondents received most of their earnings in the form of "loans" rather than salary, was the avoidance of income tax and NIC that would otherwise have arisen, so prejudicing the interests of HMRC, and recovery made more difficult through the use of an offshore trust;

   c. in consequence, the Court should exercise its discretion pursuant to s.423(2) to make orders against the Respondents requiring them to pay to the Company a sum equivalent to the income tax and NIC which should have been deducted from the sums paid to the Trust for their benefit (or such other orders as the court thinks fit).

6. The Respondents dispute every stage of the Applicant's case, save that it is accepted that the Scheme is a composite transaction.

Factual and procedural background

The Company and the Scheme

7. When the Company was incorporated on 24 September 2008, its first director and sole shareholder was Mr Justin Webster. He set up the Company as a vehicle to implement tax

planning advice concerning the creation of a 'Business Benefits Trust', which he had received pursuant to a professional services agreement with Montpelier Tax Consultants (Isle of Man) Limited. Mr Webster resigned as director on 9 October 2008 before any, or any significant trading had occurred, and was eventually succeeded by Mr Jeremy Clark, on 9 February 2009, who served as the Company's sole director during trading. On 24 September 2011, Mr Webster transferred his 100 per cent shareholding to Mr Clark.

8. On 27 February 2009, the Company created the Ethos Solutions Ltd Business Bonus Trust ("**the Trust**") for the benefit of the Company's employees and their dependents. The trustee was a Jersey company called Nautilus Trustees Ltd ("**Nautilus**"). The Company agreed to pay Nautilus a fee of 2% on all payments made into the Trust for its services.

9. The Scheme operated as follows:
   a. individuals who provided services to end users on a consultancy or independent contractor basis and wished to avoid paying tax on their income became an employee of the Company. They entered into contracts of employment with the Company which provided for the Company to pay them a nominal, or modest, salary (e.g, basic remuneration at £6.75 per hour, up to a maximum of 37.5 hours week, to be paid to the employee as payroll payments "*less tax and national insurance payments*");

   b. the Company entered into consultancy agreements with either: (i) the end users; or (ii) the individuals' personal services companies or employment agents (which in turn entered into consultancy agreements with the end users), by which the Company agreed to provide the individuals' services to the end users/personal services companies/employment agents in return for the payment of consultancy fees. These significantly exceeded the nominal, or modest, salaries payable by the Company to the individuals;

   c. when the Company received payment of the consultancy fees from the end users (or their personal services companies/employment agents), it: (i) retained any applicable VAT (and subsequently accounted to HMRC in respect thereof); (ii) retained an agreed proportion of the monies by way of payment for its services, what Mr Sims

KC called the "administration fee" (the average was about 13.4%); (iii) applied part of the balance to the payment of the individuals' nominal salaries payable under the contracts of employment; and (iv) transferred the remainder of the monies to the Trust (without deducting income tax and NIC on those monies and paying them to HMRC under the PAYE regime);

d. subsequently, the monies paid to the Trust were: (i) transferred by Nautilus into sub-trusts set up in the names of the individuals; and then (ii) transferred from the sub-trusts to the individuals in the form of discretionary loans, the individual having written to Nautilus' administrators making a loan request.

10. I was shown, by way of worked example, a manuscript note relating to one of the debarred respondents (Dr Mazhar Mirza). This shows that the Company received consultancy fees of £9,240 based on two invoices for services provided by Dr Mirza to an end user as an employee of the Company. After deducting £1016.40 for the administration fee, £8223.60 or 89% of Dr Mirza's earnings was left over. Out of this, two payments of £253.16 and £1028.46 were made to Dr Mirza as payroll. This left £6941.98 to be paid to the Trust (plus the trust fee at 2% of this sum, of £138.84). Any PAYE and NIC due on the payroll payments – as well as the 2% trust fee – were borne by the Company out of its administration fee, such that the payroll payments to individuals were essentially 'grossed up'.

11. Thus, through his participation in the Scheme, in Dr Mirza's example, he received apparently net of all tax c.89% of the remuneration for his services. 75% of that remuneration was channelled to the Trust, not treated by the Company as subject to tax, and passed on to Dr Mirza as loans.

12. The Company attracted its clients to the Scheme through 'introducers' –whose job it was to identify individuals who provided services to end users on a consultancy or independent contractor basis and who wished to avoid paying tax on their income. The Company's introductory material explained how the Scheme would work and made assurances as to its efficacy. So, an introductory letter from Mr Clark stated that "[o]*nce you are a beneficiary of the Business Bonus Trust you may ask for a loan at any time. The loans you receive will*

not be reported to HMR&C and are not a taxable benefit of your employment". Another "FAQ" document contained the following frequently asked questions:

> "… Q. What other benefits are there?
>
> A. A fund has been established for the employees of Ethos Umbrella the fund is called a Business Bonus Trust ("BBT"). The fund is managed in Jersey. Discretionary loans are available from the fund. The loans are NOT commercial loans and are therefore NOT interest bearing. All loans are recallable.
>
> Q. Will HMR&C be informed that I have taken out loans?
>
> A. No. You do not have to inform HMR&C of the loans.
>
> Q. When are loans available?
>
> A. Loans are available at anytime during working hours. Loans can be weekly or monthly and are available on request.
>
> Q. How do I apply for a loan?
>
> A. Simply contact the Trustees by telephone or email and ask. The trustees will contact you and inform you of your entitlements from the Business Benefit Trust.
>
> Q. Will I have to pay benefit in kind tax?
>
> A. No, the loans are not subject to any taxation.
>
> Q. Is this legal?
>
> A. Advice has been taken from Senior tax Counsel. Our accountants will support you with any HMR&C investigation.
>
> Q. Is this structure an Employee Benefit Trust?
>
> A. No but it has similarities. Over the years EBTs have been challenged and have proved resistant to challenges. The variations that are included in this planning make the structure both resistant and compliant.
>
> Q. Is this planning registered with HMR&C?
>
> A. Yes the planning itself is registered but your involvement will NOT be notified to HMR&C..
>
> Q. Have Ethos taken legal advice on this tax planning
>
> A. Yes. Senior tax counsel has advised in relation to this planning. But we can offer no guarantees that legislation will not change."

HMRC's response

13. Shortly after the Company commenced trading, HMRC began to publish statements that it considered arrangements such as the Scheme were ineffective to avoid tax. In August 2009 HMRC published "Spotlight 5", a digital publication in a series providing information about tax avoidance schemes HMRC believes are being used to avoid paying tax due. Spotlight 5 focused on arrangements by which companies sought to reward employees using employee benefit trusts; made clear HMRC's view that such arrangements illegitimately avoided the payment of PAYE and NIC; and stated that "*HMRC* [were] *actively challenging examples of such arrangements and considering legislative options to end further usage of these schemes.*"

14. On 9 December 2010, the Government published draft legislation designed to tackle tax avoidance schemes involving the use of employee benefit trusts, alongside a written ministerial statement, warning that anti-forestalling provisions would apply between 9 December 2010 and 5 April 2011 to any payments which would be caught by the legislation if paid after 6 April 2011. The Finance Act 2011 was enacted in July of that year, and by its Schedule 2 introduced what have become known as disguised remuneration rules, including in particular Part 7A of the Income Tax (Earning and Pensions) Act 2003.

15. In consequence, the Company sought to modify the Scheme for the year ended 31 December 2011, by contracting with a Jersey business known as "Scope Self Employment Jersey" for the supply of the respondents' services (rather than employing them directly). As discussed below, however, this "Scope" period of trading is not relevant to the Application.

16. The notes forming part of the Company's Financial Statements for the year ended 31 December 2010 record that in the year ended 31 December 2009, the Company made payments to the Trust in the total sum of £2,110,911 and in the year ended 31 December 2010, the Company made further payments to the Trust in the total sum of £4,759,858. The Company did not deduct or declare any income tax and NIC payable on the payments to the Trust during this period.

17. On 4 December 2012, whilst its enquiry was still ongoing, HMRC issued determinations under Regulation 80 of the Income Tax (Pay As You Earn) Regulations and a decision under Section 8 Social Security Contributions (Transfer of Functions, etc.) Act 1999 against the Company for the tax years 2008/09 and 2009/10, in which it assessed that the Company was liable to pay income tax and NIC in the total sum of £2,328,057.72 in respect of payments made to the Trust.

18. As noted above, on 18 December 2012 the Company entered CVL. Its creditors comprised (1) trade creditors of approximately £4,500 and (2) HMRC claiming c.£2.4m in line with its determinations. Mr Ian Defty of Kingston Smith & Partners LLP was appointed as liquidator on the vote of HMRC. Mr Defty was appointed within the 30-day period for appealing the determinations but did not appeal them. Mr Defty was replaced by Ms Hall as liquidator, who has since in turn been replaced by Mr Purkiss.

19. On 9 January 2013, HMRC submitted a final proof of debt in the sum of £2,533,753.10.

Applications before ICC Judge Barber

20. As originally framed, the Application was based primarily on s.423(1)(a) – alleging that the Company received no consideration for the payments it made to the Trust – and only alternatively was it alleged that, if it did receive any consideration (initially pleaded to be the services provided to the Company by the Respondents), this was worth significantly less than those payments, under s.423(1)(c).

21. The Application also initially included a claim in respect of unpaid PAYE and NIC for the tax year 2010/11, and up to the year ended 31 December 2011 – in respect of which HMRC had not issued any determinations, and which was based on an estimation of the Company's liability for PAYE and NIC for that period.

22. In a Judgment dated 4 February 2021 ([2021] EWHC 142 (Ch); [2021] BPIR 550) following an application by the Respondents, ICC Judge Barber struck out the 'no consideration' limb of the Applicant's claim and the claim in respect of unpaid PAYE and

NIC for any period after the 2009/10 tax year. As a result, the claims against the Respondents are only able to proceed on the basis of s.423(1)(c), for unpaid PAYE and NIC for the tax years 2008/9 and 2009/10. ICC Judge Barber invited the Applicant to seek permission to file and serve amended Points of Claim (which occurred, following the grant of permission, on 29 June 2021).

23. On 8 June 2022, the Applicant made a further application to amend the Points of Claim to include an alternative claim in restitution, which was dismissed by ICC Judge Barber in a Judgment dated 8 December 2022 ([2022] EWHC 3098 (Ch)).

Law

24. Part XVI of the Insolvency Act 1986 ("**IA 1986**") has the title "Provisions Against Debt Avoidance…" It contains s.423 which provides as follows (immaterial sections omitted):

> "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) […]; 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.

…

(5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as '*the debtor'.*"

25. Section 424 IA 1986 sets out those who may make an application under s.423; in a case where the debtor is a body corporate which is being wound up, as in this case, an application may be brought by the liquidator (s.424(1)(a)).

26. Section 425(1) IA 1986 sets out a non-exhaustive list of orders which the Court may make with respect to a transaction falling within s.423, which includes orders for payment.

27. Section 436 IA 1986 defines "transaction" for the purposes of Parts VII and XI of the IA, including s.423, in wide terms as "includes a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly".

28. For reasons which will become clear, the Application raises an issue as to the meaning and effect of s.423. The correct approach to statutory interpretation was set out by the Supreme Court in *R (O) v Secretary of State for the Home Department* [2023] AC 255, paragraphs 29-31 per Lord Hodge:

"29. The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v*

Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:

> 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.'

(*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact, as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the Court to identify not only the mischief which it addresses but also the purpose of the legislation. Thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal, the parties did not refer the Court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament

which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme*, 396, in an important passage stated:

> 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.'

29. The history of s.423 was reviewed in *Invest Bank PSC v El-Husseini* [2024] KB 49 by the Court of Appeal at paragraphs 74-75. After noting that the 1986 Act was enacted in response to the Report of the Committee on Insolvency Law and Practice, chaired by Sir Kenneth Cork GBE (Cmnd 8558), which was published in June 1982 ("**the Cork Report**") Singh LJ went on:

> "Chapter 28 of the Cork Report dealt with 'Recovery of Assets Disposed of by the Debtor'. It set out the history, in particular the Fraudulent Conveyances Act 1571, usually referred to simply as the 'Statute of Elizabeth I'. That statute was repealed and replaced by section 172 of the [Law of Property Act 1925]. As the Report noted at para. 1202, the principle on which both of those pieces of legislation proceeded "is that persons must be just before they are generous and that debts must be paid before gifts can be made."

Transaction at an undervalue

30. By s.423(1)(c), a company enters into a transaction at an undervalue with another person if it enters into a transaction with that person 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 the company.

31. This requires a comparison to be made between the value obtained by the company for the transaction ('the incoming value') and the value of consideration provided by the company ('the outgoing value'). Both values must be measurable in money or money's worth and both must be considered from the company's point of view (see *Re M C Bacon Ltd* [1990] BCLC 324 at 340).

32. It is common ground that the Scheme was the transaction for the purposes of s.423. In respect of each Respondent, it was a composite transaction ("**the Transaction**") with the following elements:

    a. the provision by the Respondent of services to an end user on the Company's behalf;
    b. the payment by the end user to the Company (whether directly or via a personal services company/employment agent) for those services;
    c. the allocation of the monies paid to the Company by the end user as follows: (i) the retention by the Company of any VAT and its "administration fee"; (ii) the payment of the Respondent's contractual salary; (iii) and the payment by the Company of the balance to the Trust;
    d. the corresponding transfer of the monies paid to the Trust to a sub-trust for the benefit of the Respondent; and
    e. the loan of all or part of the sub-trust funds to the Respondent by the Trustee.

33. HMRC raised assessments on the Company on the basis that it was liable to (but did not): (i) deduct income tax and NIC from the monies which it received from the end user and paid to the Trust; and (ii) pay those monies to HMRC in accordance with regs.21 and 68 of the Income Tax (Pay As You Earn) Regulations 2003 and para.3(1) of Schedule 1 to the

Social Security Contributions and Benefits Act 1992. The Applicant says that in light of the decision in *Rangers*, HMRC's assessments were clearly correct. Whilst in their original defence the Respondents denied this, they removed that line of defence from their amended defence which no longer maintains any such denial. No positive case is raised that the Company was not in fact liable to HMRC for PAYE and NIC, and for the purposes of this Application as it affects the Respondents, I accept that the Company was so liable.

34. This tax liability affects the question of whether the incoming value to the Company was worth less than the outgoing value. The main incoming value to the Company from the transaction was the "administration fee" of on average 13.4% and from which various bills needed to be paid (introducer's commission, 2% trust fees, PAYE and NIC on payroll element of Respondents' benefits). The consideration the Company provided was the operation of the scheme, thereby becoming liable for PAYE and NIC. The outgoing value was therefore significantly greater, than the incoming value in money or money's worth. This is why the Company is insolvent.

35. Mr Kamal ran a series of arguments against this conclusion which did not persuade me.

    a. Mr Kamal submitted that, as a matter of principle, the Court should not take the tax liabilities incurred by the Company into account, when assessing the equivalence of the consideration given to and received by the Company for each Transaction. No authority was advanced for this alleged principle. It may be that in many cases the transaction is one where incidental taxation is not properly to be regarded as the part of the consideration for the transaction. Here, however, it is at the heart of the arrangement that the Company would secure the payment of an agreed proportion of the remuneration received and would discharge all other liabilities including income tax and NIC. The latter liabilities were mistakenly underestimated.

    b. Mr Kamal asserted that the Court should not take those liabilities into account, because at the time of the Transactions the decisions in *Dextra Accessories Ltd v Macdonald* [2002] STC (SCD) 413 and *Sempra Metals Ltd v Revenue and Customs Commissioners* [2008] STC (SCD) 1062), meant that no liability was

thought to arise. Those decision were not overturned by the Supreme Court until 2017. It is well established that under the declaratory theory of judicial decisions, when Judges state what the law is, their decisions have a retrospective effect (see *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 at 378G–H, per Lord Goff). Accordingly, it is clear that at the time of the Transactions, the Company had a statutory obligation to deduct income tax and NIC from the monies which it paid to the Trust on the Respondents' behalf irrespective of whether or not that was understood on the basis of the existing jurisprudence at that time.

c. Next, Mr Kamal asserts that the Court should not take those liabilities into account because if the Company had appealed the Assessment *"it is likely to have been successful in light of the law as it was at the time."* His point is that had the Company appealed it would have obtained a decision before the *Rangers* decision. That argument operates on the false premise that the Courts dealing with the appeal, which might have gone to the Supreme Court, would not have realised that *Dextra* and *Sempra* decisions were wrong. The fact is there was no appeal, and the possibility that a hypothetical appeal would have reached the wrong decision (in light of the decision in *Rangers)* cannot affect the valuation of the consideration for the Transactions. In light of the decision in *Rangers* the Company was liable for the tax.

d. Mr Kamal asserts that if the Court can take into account the tax liabilities incurred by the Company on their behalf (which, for the reasons set out above, it can), it must also take into account the fact that HMRC has (or had) the power to make the Respondents liable to pay the tax to HMRC instead of the Company by giving a direction under regs.72 and/or 81 of the Income Tax (Pay As You Earn) Regulations 2003 and reg.86(1)(a)(ii) of the Social Security (Contributions) Regulations 2001. HMRC has given no such direction so it does not seem to me that the hypothetical possibility that HMRC could relieve the Company of liability for PAYE and NIC, moves the dial very much on valuation of the consideration given and received.

e. Mr Kamal submitted that it was for the Applicant to prove that the Trust or the Respondents had not agreed at the outset to be responsible for any tax liability which might arise if the Scheme failed. By entering into each Transaction, the Company incurred a statutory liability to deduct and pay income tax and NIC to HMRC on the Respondents' behalf. If and insofar as it is the Respondents' case that some other person has agreed to discharge that liability on the Company's behalf, it is for them to plead and prove the same. They have not done so. There is no evidence that any consideration at all was given to the incidence of tax if the Scheme failed. Nor has either the Trust or the Respondents come forward to pay the tax liability as one might expect they would if they had agreed to do so.

f. A related submission is that the Respondents are liable at common law to indemnify the Company for any payments which it might make to HMRC on their behalf (see *McCarthy v McCarthy & Stone Plc* [2007] EWCA Civ 664 at [34]). However, that depends upon the nature of the agreement between the Company and the Respondents in each Transaction and which side took the risk of tax becoming payable under the Scheme. The arrangement appears to have been that the Company would secure the payment of an agreed proportion of the remuneration received and would discharge all other liabilities including income tax and NIC. In any event, no payments were made or proffered to HMRC by the Company, and this is a necessary precondition to any such claim. No significant value can be placed on this purported right to an indemnity from the Respondents given that the Company was never going to be in a position to meet the precondition to an indemnity by paying tax if the Scheme failed and the Respondents have not shown any willingness to indemnify it.

36. In the premises, I am satisfied that s.423(1)(c) is made out and each Transaction was at an undervalue: the Company was in a worse position as a result of entering into each Transaction than it would have been in had it not entered into that Transaction in the first place.

A prohibited purpose

37. The Applicant says the Company had the purpose stipulated in s.423(3) ("**a prohibited purpose**"). This requires the Company to have entered into the Transaction for the purpose of putting assets out of the reach of a person who is making, or may in the future make, a claim against the Company in relation to that claim, or of prejudicing the interests of such a person in relation to the claim they are making or may make. The Applicant says the "person" is HMRC.

38. Leggatt LJ made clear in *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176, that there is no need for a gloss on the statutory language of s.423(3) as to the purpose which engages the section:

> "It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls within section 423(3), even if it was also entered into for one or more other purposes. The test is no more complicated than that."

Primary case – tax avoidance is a prohibited purpose

39. The Applicant's primary case is that 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 users. There is no dispute that this was the *raison d'être* of the Scheme and that it sought to avoid a tax liability which might otherwise have arisen.

40. Mr Sims submits that as the Scheme was intended to avoid a tax liability arising in respect of the Respondents' remuneration, it thereby prejudiced the interests of HMRC in relation to a claim HMRC would have had in respect of such tax. Mr Sims' submission therefore relies on the Company's belief that the Scheme would work and would be lawful. Mr Sims submits 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.

41. Mr Sims says that the hypothetical claim is one which HMRC "may make" for the purposes of s.423(3)(b). He correctly points out that the Courts have eschewed placing glosses or

restrictions on the wording of s.423 and its related provisions. The Court of Appeal has repeatedly said that the right approach is simply to construe and apply the statutory wording: see *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542 at [102] and *Invest Bank PSC v El Husseini* [2024] KB 49. Whilst the section is headed "Transactions defrauding creditors", none of its sections require fraud or dishonesty to be proven: see Scott J in *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd (No 2)* [1990] BCC 636 at 644B-C. It is not necessary for the person intended to be prejudiced for the purposes of s.423(3) to be the victim of the transaction for the purposes of ss.423(2) and (5) because the wording of the section does not require that; see *Spread Trustee*. Nor does the section require the transaction itself to have achieved the prejudice intended or for the intended purpose to be even capable of achieving the intended prejudice; *Spread Trustee*. There is no need for the claim postulated in s.423 (3) to have merit, because the section does not require that either; *Morina v McAleavey & others* [2023] EWHC 1234.

42. I note that the consequences of Mr Sims' submissions, if correct, are that any steps taken with the intention of minimising tax, and all legitimate tax avoidance, would be a prohibited purpose. That would be a remarkable outcome. Lord Tomlin famously said in *IRC v Duke of Westminster* [1936] 19 TC 490:

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

43. Mr Sims says that there is nevertheless nothing wrong with a legitimate tax avoidance purpose being a prohibited purpose because protection is conferred by the fact that s.423 also requires there to be a transaction at an undervalue. That is not protection because there is nothing inherently invidious about a transaction at an undervalue. All gifts are transactions at an undervalue and they may be made for the most altruistic or charitable of purposes. It is the combination of a transaction at an undervalue and the prohibited purpose which provides the factual matrix in which the policy of the law, that debts be paid before gifts are made, is engaged.

44. It seems to me that the consequences of Mr Sims' submissions, if correct, actually go much wider than simply affecting legitimate tax avoidance. Arguably, any transaction by A whose purpose is to benefit B in circumstances where C thereby does not benefit would fall within

s.423(3)(b). Let us suppose that A, who co owns property with C as beneficial joint tenants, makes a lifetime gift of his interest to B shortly before A's death, thereby severing the joint tenancy. A's purpose is that B should have his share, thereby depriving C of a claim to the whole property on A's death by reason of the doctrine of survivorship. If Mr Sims' submissions that hypothetical claims which are prevented from arising are correct, this is a transaction by A which would appear to fall within s.423.

45. I note also that if Mr Sims' submission is correct, then at least two decisions – *Re Marylebone Warwick Balfour Management* [2022] EWHC 784 and *Asertis Ltd v Heathcote* [2022] EWHC 2498 which I refer to below at paragraph 51 – were wrongly decided. In both cases it was assumed that a legitimate tax avoidance purpose was not a prohibited purpose.

46. I am satisfied that Mr Sims' submission is flawed.

a. Section 423(3)(a) is concerned with a prohibited purpose of putting assets out of the reach of "a person who is making [a claim], or *may at some time make*, a claim". That clearly contemplates a current claim or a future claim. Section 423(3)(b) makes it a prohibited purpose to otherwise prejudice "such a person in relation to the claim which he is making or may make." The words "may make" in s.423(3)(b) are a reference to the claim in s.423(3)(a) that a person "may at some time make". The "claim" which both ss. 423(3) (a) and (b) are concerned with are claims which a person is presently making or one which a person may make in the future.

b. The tax avoidance purpose on which Mr Sims relies is that the scheme would secure that no income tax and NIC liability arose in relation to the remuneration received in respect of the Respondents' services. The purpose was therefore that HMRC would have no claim which it could make and not to prejudice a claim which it was making at the time of the Transaction or might make in the future.

c. I do not consider there to be ambiguity as to what s.423(3) means. If there were, it is important to remember that the policy behind s.423 is that debts are paid

before gifts are made. That policy is not undermined by a transaction which prevents a debt arising; it is consistent with it.

47. I have brushed over the fact that there was no clarity as to what the hypothetical claim was. For most of the oral submissions it seemed that the hypothetical claim was based on a scenario whereby the Scheme had not been implemented and the Respondents had provided their services to end users in the two relevant tax years in some way which rendered themselves liable to income tax and NIC, apparently as self-employed taxpayers. That gives rise to other problems for the Applicant.

    a. Such a hypothetical claim is premised on an assumption that each of the Respondents would have provided exactly the same services and received exactly the same remuneration if they had not entered into the Scheme. There is no evidence before me on this issue. It is at least possible that some of the Respondents would have chosen not to provide the services they in fact provided to end users. They might have retired. They might have gone to work abroad. They might only have decided to provide their services to end users because they had entered into the Scheme. There is therefore an evidential hurdle to overcome in respect of each Respondent, as to whether there really was a hypothetical claim for tax that might be made. No attempt has been made to clear that hurdle.

    b. The statute requires that the prohibited purpose of the Company in entering into the Transaction is to prejudice a claim which may be made against *the Company*, whereas the hypothetical claim being prejudiced is a claim HMRC may have made against *the Respondents* (for the tax they would have paid if they had not entered into the Scheme).

48. In the Applicant's skeleton argument it was said that the intention of the Company was that the Company would not be liable to income tax and NIC on the payments that it made to the Trust and therefore it intended to prejudice the interests of HMRC in respect of a claim it may make against *the Company* for tax and NIC on those contributions. So, the submission here is that the claim intended to be prejudiced by the Transaction is the claim

for the liability which has actually arisen by reason of the Transaction. For the reasons given in paragraph 46 above, a transaction which is entered into with the intention that no tax liability should thereby arise, is not an intention to prejudice a claim for that tax liability for the purposes of s.423(3)(b).

49. HMRC undoubtedly has a duty to collect tax which is due, but I question whether it can have "interests" for the purposes of s.423(3)(b) which are affected by arrangements which lawfully reduce or prevent tax arising.

The secondary case – putting assets out of the reach of HMRC

50. The Applicant's secondary case is that the Court should infer that the Company entered into each Transaction for the purpose in s.423(3)(a) – that is, placing assets beyond the reach of HMRC.

51. Mr Sims relies on the fact that by transferring the full balance of the monies received from end users to the Trust (without deducting income tax and NIC on those monies), the Company was left with insufficient funds to meet the tax liabilities which would (and did) fall upon it in the event (as transpired) that the Scheme was ineffective. There is, however, a difference between a consequence of the scheme and its purpose. This is clearly demonstrated by the decisions in *Re Marylebone Warwick Balfour Management* [2022] EWHC 784 and *Asertis Ltd v Heathcote* [2022] EWHC 2498. In both these cases, applications for relief under s.423 were made by the liquidators of companies which had entered into a tax avoidance scheme which had failed leaving the companies insolvent, and HMRC unpaid in respect of the tax which was due. In both of these cases, the applications failed because, while the consequences of the failed scheme was that HMRC was prejudiced, and assets placed out of HMRC's reach, the companies did not have a prohibited purpose having entered into the tax avoidance scheme with a genuine belief that it was tax effective.

52. What must be shown by the Applicant is 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. I observe that there was no clarity as to whether it was being said that it was the interposition of the offshore trust which was intended to impede

HMRC or whether it was being said that the intention was that the liability would be the Company's liability, and not the Respondents' or the Trust's, and the Company would take the fall. There is, in any event, no evidence of any such intention. There is no evidence from Mr Webster or Mr Clark who set up the Company and operated the scheme. None of the Respondents gave evidence. There is no documentary evidence recording, or even hinting, at such an intention. The closest Mr Sims can point to is the fact that the Company advised the Respondents that they need not disclose the loans they were receiving from the Trust to HMRC – but that is consistent with a belief that the Scheme worked.

53. Mr Sims also points to one exchange after HMRC's enquiry began in which he said the Company had deliberately failed to provide information to HMRC before the Company entered liquidation. If true, this might shed some (but not much) light on what was intended at the time of each Transaction. I do not, however, consider the exchange of correspondence relied upon as justifying that inference.

54. HMRC's letter of 26 September 2011, enclosed a schedule which made over 50 separate requests for information and documentation. Mr Clark responded on behalf of the Company on 8 November 2011 responding to those requests. The tenor of the response is that most of HMRC's requests have already been satisfied with the previous provision of information and documentation. The response confirmed that directors and employees had received loans from the Trust and that the Company did not have access to the Trust records. The Company was therefore unable to provide details of the loans made. This seems to have been correct. Nautilus did not share trust information with the Company, who was not entitled to it. Apart from some haphazard emails between some Respondents and Nautilus in relation to a loan, where the Company was copied in, the liquidator has not found any records as to what loans were made to the Respondents from the Trust.

55. Mr Sims says that the response fails to answer a request to identify dates on which payments had been made by the Company to the Trust, but the request is poorly worded and combined with a request for information which was trust information. The Company's response has responded correctly that only Nautilus has trust information. I am not prepared to accept that this was a deliberate refusal to provide information which the Company had and could provide from its bank statements, as opposed to an inadvertent

error. Nor am I able to conclude on the evidence I have, that such information was not included in the information the Company had already provided HMRC. In any event, this is simply not sufficient to justify an inference that from the outset the Company's purpose was to impede HMRC. On the contrary, I note that the Company openly identified in its filed accounts the total of the payments it had made to the Trust and that was the basis on which HMRC raised the assessments which it did.

56. The Applicant has failed to show that s.423(3) is satisfied.

Concluding remarks

57. I indicated at the hearing that if it was necessary to consider the exercise of discretion to grant relief then that would be the subject of a separate hearing. Both sides therefore curtailed their submissions on those issues. In light of my decision on the absence of the requisite purpose for s.423, these issues do not arise, and I do not address them here. I will simply say that there were a number of issues which concerned me.

58. The Application is dismissed.