Judgments

JSC BTA Bank v Ablyazov and another

[2018] EWCA Civ 1176

Court of Appeal, Civil Division

Gloster VP, Leggatt and Coulson LJJ

22 May 2018

Judgment

Mr Philip Jones QC, Mr Tim Akkouh and Mr Caley Wright (instructed by **Hogan Lovells International LLP**) for the **Appellant**

Mr Peter Knox QC and Mr James Sheehan (instructed by **Kingsley Napley LLP**) for the **2nd Respondent**

Hearing date: 12 April 2018

- -

Approved Judgment

Lord Justice Leggatt:

Introduction

1. The main question on this appeal is whether the trial judge made an error of law in rejecting a claim that a payment of money made by the first defendant as a gift to his son (the second defendant) was made for the purpose of putting assets beyond the reach of the claimant and was therefore liable to be set aside under section 423 of the Insolvency Act 1986. A second question raised by a respondent's notice is whether the judge should have rejected the claim in any event on the ground that it is time-barred.

Background

2. The claimant (and appellant) in this case is a bank in Kazakhstan which was, until early 2009, controlled by the first defendant, Mr Mukhtar **Ablyazov**. While he controlled the bank,

> Mr **Ablyazov** is said to have embezzled from it vast sums of money. In 2008 the bank got into financial difficulties and was investigated by the Kazakh regulator. On 30 January 2009 the bank informed the regulator that it could not meet its liabilities. On 2 February 2009 the Kazakh sovereign wealth fund acquired a majority stake in the bank and Mr **Ablyazov** was removed as chairman of its board of directors. He fled to London. In August 2009 the bank commenced proceedings against him in this country and obtained a worldwide freezing order.

Like Mr **Ablyazov**'s fraud, the subsequent litigation has been on an industrial scale. There are reported on Bailii no fewer than 34 judgments in the proceedings given by judges in the Commercial Court, one in the Chancery Division, one in the Queen's Bench Division, ten judgments (not including this one) given by the Court of Appeal and two by the Supreme Court. During the early stages of the litigation, in connection with the worldwide freezing order the bank pressed Mr **Ablyazov** for disclosure of his assets. He was cross-examined about his assets on oath. Teare J later found that in the course of that cross-examination Mr **Ablyazov** lied in order to hide his interest in various assets which he beneficially owned. That finding together with findings of deliberate breaches of the worldwide freezing order ultimately led Teare J on 16 February 2012 to sentence Mr **Ablyazov** to prison for 22 months for contempt of court. However, Mr **Ablyazov** avoided prison by fleeing the jurisdiction when he saw the court's judgment in draft. On 29 February 2012 the court made an order that, unless Mr **Ablyazov** gave full disclosure of his assets and surrendered to the tipstaff, his defence would be struck out. Mr **Ablyazov** appealed against that order but his appeal was unsuccessful. He did not comply with the order and his defence was therefore struck out. The bank has since obtained judgments against Mr **Ablyazov** for a total sum in excess of US$5 billion (including interest) but only a small proportion of the judgment debt has been satisfied, and none of it voluntarily.

> 3. The present claim represents an attempt by the bank to recover the proceeds of a sum of £1.1m which was transferred on 26 February 2009 from a Swiss bank account in the joint names of Mr **Ablyazov** and his son, Madiyar, to a bank account in London in the sole name of Madiyar. At the time of the transfer, Madiyar was 17 years old and at school in England, present in the UK on a student visa. The money paid to Madiyar was invested in UK gilts. Having funds of more than £1 million invested in the UK enabled Madiyar to obtain a Tier 1 investor visa, which was granted in May 2009. In September 2013 he was given indefinite leave to remain in the UK and in December 2014 he became a British citizen. When the present action was commenced in December 2015, the remaining balance of the funds which had been paid into Madiyar's account was about £1.025 million and this was paid into court.
>
> 4. In this action the bank claimed (1) that the money was held on trust for Mr **Ablyazov**, or alternatively (2) that the transfer should be set aside under section 423 of the Insolvency Act 1986 as a transaction defrauding creditors. Following a trial in which Madiyar took part though Mr **Ablyazov** did not, Mr Laurence Rabinowitz QC, sitting as a deputy High Court Judge, dismissed both claims. For reasons given in a judgment dated 9 December 2016, the judge found that the money paid by Mr **Ablyazov** to Madiyar was a gift (rather than remaining beneficially owned by Mr **Ablyazov**, as the bank had contended). That finding is not now disputed. The judge further concluded that the transfer was not made for the purpose of putting the funds beyond the reach of the bank and was therefore not caught by section 423. On this appeal the bank challenges that conclusion. In addition, by a respondent's notice, Madiyar contends that the judge ought to have dismissed the claim for a different reason – that it was brought after the limitation period had expired.

Section 423 of the Insolvency Act

> 5. Section 423, headed “Transactions defrauding creditors”, provides in relevant part as follows:
>
> “(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;

…

(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.

(4) …

(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'."

6. It was not disputed at the trial that the payment made by Mr **Ablyazov** to Madiyar was a transaction entered into at an undervalue (being made for no consideration). It was also not disputed that the bank was a "victim" of the transaction. The issue was whether the transaction was entered into for the purpose specified in section 423(3) (the "prohibited purpose").

The test of purpose

7. As counsel for the bank pointed out, whenever a person makes a gift, it can always be said that the gift was made for the purpose of conferring a benefit on the donee. But as section 423 expressly applies to gifts, it would defeat the object of the legislation if the fact that the transaction was entered into for that purpose precluded a finding that the transaction was entered into for the prohibited purpose specified in subsection (3). When the 1986 Act came into force, the test applicable in 'dual purpose' cases was initially the subject of some uncertainty and inconsistent authority. But greater clarity was achieved by the decision of the Court of Appeal in *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981; [2002] 2 BCLC 489.

8. At least at first sight, the facts of the *Hashmi* case bear a striking similarity to the facts of the present case. The transaction in the *Hashmi* case was a transfer from the defendant by way of gift to his 16-year old son of the premises at which he carried on a restaurant business. The defendant had for a number of years been persistently under-declaring the profits of the business to the Inland Revenue. The trial judge (Hart J) found that this conduct was deliberate and dishonest and that at the time of transferring the property the defendant must have known that, should his dishonesty ever be uncovered, he would become liable to pay very substantial sums in tax, interest and penalties. The judge accepted evidence that the defendant was a caring father who wanted to secure his son's future and that this was a purpose of transferring

the ownership of the property to him. But the judge also found that the defendant transferred the property when he did "because he could not be sure, given the inherently risky way in which his taxation affairs were conducted, that he would be able to make the provision at a later date", and that in these circumstances the transaction was also entered into for the prohibited purpose: see [2002] 2 BCLC 489, 495. These findings raised the question of law whether, to fall within section 423, the prohibited purpose had to be the dominant purpose of the transaction. The judge was of the view that it did not and that view was endorsed by the Court of Appeal.

9. Each member of the Court of Appeal gave a judgment (it appears, *ex tempore*) explaining the relevant legal test in slightly different terms. Arden LJ, who gave the lead judgment, said (at para 23):

"It is sufficient if the statutory purpose can properly be described as a purpose and not merely as a consequence, rather than something which was indeed positively intended."

Arden LJ went on to give some examples involving a person who goes on a walk with her dog during which she also posts a letter to illustrate the distinction between "a real substantial purpose" and "something which is a by-product of the transaction under consideration … or an element which made no contribution of importance to the debtor's purpose of carrying out the transaction" (see para 25). She also expressed her agreement with a point made by Laws LJ in argument that "trivial purposes must be excluded".

10. Laws LJ agreed with the judgment of Arden LJ. He also said (at para 33):

"There may be cases in which, even absent the statutory purpose, the transaction would or might have been entered into anyway. That would not necessarily negate the section's application; but the fact-finding judge on an application made to him under section 423 must be alert to see that he is satisfied that the statutory purpose has in truth substantially motivated the donor if he is to find that the section bites."

The third member of the court, Simon Brown LJ, rejected as the "wrong approach" a test whereby a transaction could not properly be said to have been made for the prohibited purpose unless the transaction would not have been entered into but for the debtor's wish to put his assets beyond reach. Simon Brown LJ concluded (at para 39):

"The test cannot be refined beyond saying that in each case the question to be asked is: can the court be satisfied that a substantial purpose of the debtor's transaction was (putting it in shorthand) to escape his liabilities?"

He nevertheless continued (at para 40):

"I would, however, add this. If in fact the judge were to find in any given case that the transaction is one which the debtor might well have entered into in any event, he should not then too readily infer that the debtor also had the substantial purpose of escaping his liabilities."

11. As mentioned, the *Hashmi* case establishes that, where the transaction was entered into by the debtor for more than one purpose, the court does not have to be satisfied that the prohibited purpose was the dominant purpose, let alone the sole purpose, of the transaction. In a passage quoted above Arden LJ (with whom Laws LJ agreed) held that it is sufficient if the statutory purpose can properly be described as "a purpose" (my emphasis) of the transaction; but she later referred to "a real substantial purpose" and the term "substantial" was also used by the other members of the court. The significance of this epithet is not immediately clear. The word "substantial" is capable of bearing a wide range of meanings. In *Re Brabon* [2000] BCC 1171 Jonathan Parker J confessed to finding it difficult to distinguish between a "substan-

tial" purpose and a "dominant"' purpose. If on the other hand the contrast is between a "substantial" purpose and a "trivial" purpose, it is not easy to understand when it would make sense to regard putting assets beyond the reach of creditors as a "trivial" purpose for entering into a transaction at an undervalue.

12. The description of the requisite purpose as a "substantial" purpose was not necessary to the decision of the Court of Appeal in the *Hashmi* case and to my mind it risks causing confusion. The word "substantial" is not used in section 423 and I can see no necessity or warrant for reading this (or any other) adjective into the wording of the section. At best it introduces unnecessary complication and at worst introduces an additional requirement which makes the test stricter than Parliament intended. I agree with the point made in McPherson's *Law of Company Liquidation* (4th Edn, 2017), para 11-116, that there is no need to put a potentially confusing gloss on the statutory language. 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.

13. Arden LJ made this very point in the *Hashmi* case when she said (at para 23) that "there is no epithet in the section and thus no warrant for reading one in". When later in her judgment she referred (at para 25) to a "real substantial" purpose, it is apparent from the context that the reason for using those adjectives at that point was to underline the distinction between a purpose and a consequence of the relevant transaction. As Arden LJ emphasised, it is not enough to bring a transaction at an undervalue within section 423 that the transaction had the consequence of putting assets of the debtor beyond the reach of creditors. That is so even if the consequence was foreseeable or was actually foreseen by the debtor at the time of entering into the transaction. Evidence that the debtor believed that the transaction would result in putting assets beyond the reach of creditors may support an inference that the transaction was entered into for the purpose of doing so, but the two things are not the same. To illustrate the distinction using a less homely example than that given by Arden LJ, a commander may order a missile strike on a military target knowing that it will almost certainly cause some civilian casualties. But this does not mean that the missile strike is being carried out for the purpose of causing such casualties.

14. When judging a person's intentions, we are generally more inclined to accept that an action was not done for the purpose of bringing about a particular consequence, even if the consequence was foreseen, if there is reason to believe that the consequence was something which the actor wished to avoid or at least had no wish to bring about. Hence, in the example just given, where the missile strike had a clear strategic purpose, we may readily accept that it was not ordered for the purpose of causing civilian casualties – particularly if, for example, there is evidence that the commander gave anxious consideration to how many civilians were likely to be in the target area and planned the strike for a time when the number was expected to be low. By contrast, a consequence is more likely to be perceived as positively intended if there is reason to think that it is something which the actor desired. Thus, evidence that a person who has entered into a transaction at an undervalue foresaw that the result would be to put assets out of reach of creditors and desired that result might lead the court to infer that the transaction was entered into for that purpose. But such a conclusion is not a logical or legal necessity. It is a judgment which has to be based on an evaluation of all the relevant facts of the particular case.

The judge's findings

15. Subject to the bank's arguments which I will come to shortly, it is common ground in the present case that the judge identified the correct legal test. After pointing out that it was "at least an outcome" of the transfer of funds made by Mr **Ablyazov** to Madiyar that the funds were

put beyond the reach of the bank as a person who was making or might make a claim against Mr **Ablyazov**, the judge said (at para 130):

"What I therefore have to determine is whether this was also a purpose of Mr **Ablyazov** in making the Transfer. That depends … on whether Mr **Ablyazov** positively intended that outcome."

As discussed above, this was the correct question to ask.

16. In answering this question, the judge expressly accepted and took into account (at paras 135-6) the following points on which the bank relied:

(1) The fact that the transfer was effected after Mr **Ablyazov** had fled Kazakhstan and after the Kazakh regulator had uncovered his fraudulent misappropriation of billions of dollars of the bank's assets;

(2) The fact that, as the judge found, at the time of the transfer Mr **Ablyazov** knew that he would be facing claims against himself and his assets in this jurisdiction; and

(3) The fact that, as the judge also accepted, Mr **Ablyazov** is a person who "time and again has shown that he will do all he can to prevent [the bank] from being able to preserve and enforce against his assets".

17. However, the judge also made and took into account the following factual findings:

(1) There were advantages of an investor visa compared to a student visa as it allowed Madiyar to remain in the UK without any of the restrictions imposed on those with only a student visa such as the need for a student sponsor and the need to find a job on graduation with an employer willing to sponsor a general visa (para 94).

(2) Mr **Ablyazov** had initiated the process which led to Madiyar applying for an investor visa when he instructed a firm of immigration solicitors in January 2008 (paras 36-37). This was long before any fraud was uncovered, albeit that "even at that early time Mr **Ablyazov** is very likely to have appreciated that he had been involved in serious wrongdoing against [the bank] for which he might get sued" (para 131).

(3) There was no lapse in the process, which continued from when it was initiated in January 2008 until the investor visa was obtained (paras 97, 132).

(4) It is likely that Mr **Ablyazov** would have made the transfer to enable Madiyar to pursue the investor visa application even if he was not at risk of a claim being made against him by the bank (para 132).

18. Given this last finding (that Mr **Ablyazov** would have made the transfer in any event), the judge said that he was "unwilling too readily to infer" from the matters relied on by the bank that the transfer was made for the prohibited purpose and that "[i]n my judgment, more is required before I conclude this to be the case" (para 137). Two additional factors which he regarded as relevant were as follows:

(1) Although the sum of £1.1 million is a great deal of money for most people, for Mr **Ablyazov** who on the bank's case had successfully embezzled more than US$6 billion, the judge considered that "the amount would have been almost *de minimis*". In these circumstances he thought it unlikely that Mr **Ablyazov** "would go to the lengths he did, including specifically setting up a London bank account in Madiyar's name, having to produce a quantity of

personal documents, and applying for a visa with all the attendant legal fees, for such a small benefit" (para 139).

(2) The £1.1 million paid to Madiyar was sourced from a company incorporated in the British Virgin Islands called Sunstone Ventures Limited, in relation to which Mr **Ablyazov**'s ownership and control was, at least in February 2009, far from transparent. The judge thought that, if Mr **Ablyazov**'s motivation was to keep money away from his creditors, he could very easily just have left it with Sunstone and that "it is not easy to see why Mr **Ablyazov** would have regarded that objective as being well-served by moving the money out of Sunstone in the BVI and into the account held in London in his son's name by way of a transfer from an account … in his own name" (para 140).

19. Having regard to these and all the other matters set out in his judgment, the judge concluded that, "whilst Mr **Ablyazov** may perhaps have been conscious that a by-product of the Transfer would be (as it was) that the Fund would be placed out of the hands of potential creditors including [the bank], this was not a substantial purpose of his making the transfer." He accordingly held that the bank's claim under section 423 failed.

The appeal

20. The bank sought permission to appeal from this decision on five grounds. Permission to appeal was granted on three of the grounds but refused for the other two. Importantly, the bank was refused permission to appeal against the judge's finding that Mr **Ablyazov** would have made the transfer of £1.1 million to Madiyar even if there was no possibility of any claims being made against him. The bank was also refused permission to argue that the judge was wrong to place reliance on the two factors referred to at paragraph 20 above and to argue that the judge was wrong to find that the advantages of obtaining an investor visa for Madiyar compared to a student visa were significant and not merely marginal.

21. I will consider in turn the three grounds on which the bank was given permission to appeal.

Alleged error of law in approach to dual purpose

22. The argument put at the forefront of the bank's submissions is that the judge erred in law by approaching the case on the basis that, given his conclusion that Mr **Ablyazov** would have made the transfer to Madiyar anyway, he should not too readily infer that the transaction was entered into for the prohibited purpose. It was submitted by Mr Philip Jones QC for the bank that the judge should instead have approached the case on the basis that, in circumstances where at the time of the transaction Mr **Ablyazov** was aware that claims were likely to be made against him which would wipe him out financially, it should readily be inferred that the gift to Madiyar was made for the purpose of putting the money beyond the reach of creditors. Mr Jones submitted that there was an "evidential burden" on Mr **Ablyazov** to show that this was not the case.

23. In saying that he was unwilling "too readily to infer" that in making the transfer Mr **Ablyazov** had the prohibited purpose, the judge undoubtedly had in mind the observation of Simon Brown LJ in the *Hashmi* case quoted at paragraph 12 above. In making that observation, I think it clear that Simon Brown LJ was not stating or purporting to state a proposition of law. A rule of law may take the form that, if X is established, Y may (or may not) as a matter of law be inferred, but not that, if X is established, a judge should not "too readily" infer Y. To demonstrate this, one need only ask: how readily is "too readily", and when should an inference be drawn without drawing it "too readily"? It is plain that a warning that a judge should not infer something "too readily" is no more than a way of urging caution. All that Simon Brown LJ

was doing, as I see it, was emphasising that, if a judge finds in a given case that the transaction is one which the debtor might well have entered into in any event, then that is a matter which tells against concluding that the debtor had the prohibited purpose. Whether such an inference should nevertheless be drawn must depend on all the relevant circumstances.

24. I do not read the judgment of the trial judge in the present case as attaching any different or greater significance to the *dictum* of Simon Brown LJ than that which I have just indicated. As I read what he said in para 137 (referred to at paragraph 20 above), the judge was not stating or purporting to state any proposition of law. All that he was saying was that on the facts of this case, given his conclusion that Mr **Ablyazov** would have made the transfer in any event, he was not willing too readily to infer from the facts that Mr **Ablyazov** knew when he made the transfer that he would be facing claims and has done all he can to prevent enforcement against his assets that the transfer was made for the prohibited purpose. It is impossible to say that there was any error of law in that approach.

25. Nor can it be said that the judge made any error of law in not adopting a starting point that, in circumstances where Mr **Ablyazov** knew that he would be facing claims, it should readily be inferred that he entered into the transaction for the prohibited purpose – or that there was an "evidential burden" on Mr **Ablyazov** to rebut such an inference. The expression "evidential burden" is ambiguous. When used strictly, it refers to a legal requirement to adduce sufficient evidence to raise an issue for the court to consider. For example, in a criminal trial the prosecution bears the evidential burden of adducing evidence which is sufficient to justify leaving the case to the jury. However, the expression "evidential burden" is also often used in a second, looser sense to signify merely that, if a party does not adduce evidence or further evidence on a particular issue, he or she runs the risk of losing on that issue. The two senses are not always distinguished but they are clearly distinct. When the expression is used in the second sense, saying that a party is under an "evidential burden" does not express any proposition of law but merely a tactical evaluation of how an issue is likely to be decided on the evidence as it currently stands and unless further evidence is adduced. To avoid confusion, this kind of "evidential burden" is often and more clearly referred to as a "tactical" or "provisional" burden: see e.g. *Cross & Tapper on Evidence* (12th Edn) p126; AT Denning, "Presumptions and Burdens" (1945) 61 LQR 379.

At most, any burden on Mr **Ablyazov** or Madiyar in this case to adduce evidence to rebut any inference that the transfer was made for the prohibited purpose was purely tactical and not a true evidential burden. It is clear that there is no rule of law to the effect that, if the debtor knew at the time of entering into the transaction that he was facing claims, the judge must find that the transaction was entered into for the prohibited purpose unless the debtor adduces evidence to show otherwise. Had it wished to do so, Parliament could readily have created a rule of this kind – either generally or applicable in cases where the transaction is entered into with a person associated with the debtor. Section 423 can be contrasted in this respect with sections 239(6) and 340(5) of the Insolvency Act 1986, which deal with preferences. Section 340(5), for example, provides that an individual who has given a preference to a person who was an "associate" is presumed, unless the contrary is shown, to have been influenced in deciding to give it by a desire to put that person into a better position in the event of the individual's bankruptcy. The definition of an "associate" includes a relative: see section 435. No such presumption has been incorporated in section 423.

26. When Parliament has not seen fit to enact any relevant legal presumption, there is no reason for the courts to invent one. Thus, it was for the judge to decide in what order to consider the various relevant factors and what inferences he thought it right to draw from the evidence as a whole. The argument that the judge made an error of law in his approach to assessing whether the transfer was made for the prohibited purpose must therefore be rejected.

Alleged failure to draw appropriate adverse inferences from lies

27. It was, secondly, argued by the bank that the judge made an error of law in not drawing adverse inferences from findings that Mr **Ablyazov** gave false evidence on matters relevant to the section 423 claim.

28. Mr **Ablyazov** did not give oral evidence at the trial. At the time of the trial he was in prison in France awaiting the outcome of extradition proceedings. He made a witness statement which was relied on by Madiyar as hearsay evidence. Some four months before the trial, Madiyar's solicitors contacted the French authorities to ask about the possibility of taking oral evidence from Mr **Ablyazov**, for example by video link, and were told that they would need to make an application under article 4 of Council Regulation (EC) No 1206/2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters. However, no such application was made.

29. In his witness statement Mr **Ablyazov** described the arrangements made to transfer the sum of £1.1 million to a bank account in London in the name of Madiyar and said that the reason why a further £100,000 was paid in addition to the £1 million required to apply for an investor visa was that he decided to give Madiyar a further £100,000 for university fees and living expenses. Madiyar, who testified at the trial, gave similar evidence. The judge rejected their evidence. He found that the additional £100,000 was paid to cover the dealing costs involved in acquiring the requisite investments and that it had nothing whatever to do with providing for university fees or other living expenses.

30. Mr **Ablyazov** also said in his witness statement that he did not become aware that the bank might sue him until about June or July 2009. He did not comment on a letter from Clyde & Co dated 1 June 2011 which stated that Mr **Ablyazov** had instructed them in February 2009 and sought advice about various matters "including civil claims which might be brought in the UK" and the possibility of freezing orders and search and seizure orders being granted against him and persons associated with him. The judge found, partly on the basis of this letter, that Mr **Ablyazov** had in contemplation in and from February 2009 a strategy of concealment and deceit in relation to his assets. The judge also found, as already mentioned, that at the time of the transfer Mr **Ablyazov** was well aware that he would be facing claims against himself and his assets in this jurisdiction.

31. Having found the evidence of Mr **Ablyazov** and Madiyar regarding the purpose of the additional £100,000 to be untruthful, the judge said that he had taken the approach of treating their evidence "with great caution save where it is corroborated by contemporaneous documentary evidence or where what they say seemed to me in the circumstances to be in any event probable" (para 81). In substance, the judge treated Mr **Ablyazov**'s evidence as having no weight at all.

32. For the bank, Mr Jones QC submitted that the judge should have gone further and found, first, that Mr **Ablyazov** had deliberately lied about the date when he became aware that he was likely to be sued by the bank and, second, that the reason why he lied about this was to try to hide the fact that, when he made the transfer, he had the prohibited purpose. Mr Jones submitted that a similar inference should have been drawn from the failure of Mr **Ablyazov** to comment on the letter from Clyde & Co.

33. The judge was plainly entitled to regard Mr **Ablyazov**'s witness statement as effectively worthless and to give no weight to his evidence. But to treat the fact that Mr **Ablyazov** had told lies in his statement as a reason to infer that the transfer was made for the prohibited purpose would have been a questionable thing to do. It is by no means unknown for a party to proceedings who gives evidence to tell lies which he thinks will improve his case even though, when the facts are found, it turns out that he had a good case anyway. Mr **Ablyazov** might well have perceived that his gift to Madiyar was more likely to be set aside if the court were to find that, at the time when the money was transferred, Mr **Ablyazov** was aware that he would

soon be facing a claim from the bank and that his assets were likely to be frozen. If so, that would have been a rational perception which might have led him – as the dishonest person which he has repeatedly shown himself to be – to lie about his state of knowledge whether or not the transfer was in fact made for the purpose of putting the money beyond the bank's reach. Thus, it seems to me that the judge would have been potentially vulnerable to criticism if he had sought to draw from the fact that Mr **Ablyazov** lied in his evidence any inference which was not already justified by the facts which Mr **Ablyazov** tried to conceal. That applies all the more to the fact that Mr **Ablyazov** did not say anything in his witness statement about the Clyde & Co letter.

34. At all events, it cannot possibly be said that the judge was obliged as a matter of law to draw adverse inferences from those matters. What significance, if any, should be attached to the fact that a witness has lied or has not addressed a particular point in his evidence falls squarely within the province of the judge whose role it is to find the relevant facts. The bank's argument on this ground of appeal must also therefore be rejected.

Alleged failure to give appropriate weight to the judge's own findings

35. The third ground of appeal which the bank was given permission to argue is that the judge failed to give appropriate weight to his findings summarised at paragraph 18 above. It was submitted that, had the judge done so, he would have concluded that the gift to Madiyar was made for the prohibited purpose.

36. At times in the course of his oral submissions Mr Jones QC came close to suggesting that if a person (1) knows that he has liabilities which he does not have sufficient assets to discharge and (2) with that knowledge makes a gift which he believes will have the effect of reducing the assets available to satisfy his creditors, then the court is bound as a matter of law to infer that the gift was made for the prohibited purpose (as well as for the purpose of benefiting the recipient). Mr Jones rightly, however, drew back from asserting such an absolute proposition, accepting that the question is one of fact. In my view, he was plainly right to do so. As discussed earlier, it does not automatically follow from the fact that a gift was made in the knowledge that it would reduce the assets available to satisfy creditors of the donor that the gift was made for the purpose of putting the money beyond their reach. A finding of such knowledge may support an inference that the transaction was entered into by the debtor for the prohibited purpose. But whether or not that inference should be drawn is a matter of fact which depends on all the circumstances of the case.

37. It is convenient to distinguish – although the difference is really one of degree – between findings of primary fact and factual findings which involve evaluating and drawing inferences from such primary facts. The reasons for the reluctance of appellate courts to interfere with findings of fact made following a trial apply in both cases: indeed, the reasons for restraint are often stronger where the finding involves an evaluation of primary facts.

38. Those reasons are by no means limited to the advantage enjoyed by the trial judge in a case in which oral testimony plays a significant part of having seen and heard the witnesses give evidence. The reasons also include recognition that the judge who presides over the trial is immersed in the evidence in a way that an appeal court cannot replicate. As it was put in the majority judgment of the Supreme Court of Canada in *Housen v Nikolaisen* 2002 SCC 33; [2002] 2 SCR 235, para 14 (quoted by Lord Reed JSC in *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 at para 33): “appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole.” In elaborating this point, the Canadian Supreme Court adopted the observations of a commentator that:

“The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for

several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged."

See *Housen v Nikolaisen* 2002 SCC 33; [2002] 2 SCR 235, para 14 (quoted in *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 at para 4). Furthermore, not every detail of the relevant evidence need or can be captured in the reasons given by the judge. As Lord Hoffmann said in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372:

"[The judge's] expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

39. Even where it could in principle be done, for an appellate court in a case involving a substantial body of evidence to attempt to acquire the same absorption in the detail of the case as the judge of first instance would be a disproportionate use of judicial resources and would hugely increase the length, cost and delay of litigation in return for little likely improvement in decision-making. Unlike conclusions of law, findings of fact have no status as precedent in future cases and are therefore only capable of affecting the result of the case at hand. Considerations not only of efficiency in time and cost but also of fairness dictate that the judge's conclusions on such points should generally be treated as final. In the words of White J giving the opinion of the United States Supreme Court in *Anderson v City of Bessemer* [1985] 470 US 564, 575 (quoted with approval by the UK Supreme Court in the *McGraddie* case at para 3):

"… the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be "the 'main event' … rather than a 'tryout on the road'"…"

The same point has been made using a different metaphor by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, para 114(ii), when he said:

"The trial is not a dress rehearsal. It is the first and last night of the show."

40. For these reasons the principle is firmly established that an appellate court should only interfere with a finding of fact made by the trial judge if satisfied that the conclusion is "plainly wrong": see e.g. *McGraddie v McGraddie*, [2013] UKSC 58; [2013] 1 WLR 2477; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600. As Lord Reed explained in the latter case, what this amounts to is that it must either be possible to identify a material error in the judge's process of reasoning – such as "a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence" (para 67); or, if there is no such identifiable error and the question is simply one of judgment as to the appropriate weight to be given to the relevant evidence, the appellate court must be satisfied that the judge's conclusion "cannot reasonably be explained or justified" (ibid). As Lord Reed also stated in the *Henderson* case (at para 62):

"It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge would have reached."

Another formulation of the test, which has also been approved at the highest level, is that the appellate court ought not to interfere "unless it is satisfied that the judge's conclusion lay out-

side the bounds within which reasonable disagreement is possible": *Todd v Adams & Chope (trading as Trelawney Fishing Co)* [2002] 2 Lloyd's Rep 293, para 129 (Mance LJ) approved in *Assicurazioni Generali SvA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1 WLR 577, para 17 (Clarke LJ) and by the House of Lords in *Datec Electronics Holdings Ltd v UPS Ltd* [2007] UKHL 23; [2007] 1 WLR 1325, para 46.

41. In the present case no challenge is or can now be made to the findings of primary fact on which the judge based his assessment of the purpose for which the transfer of money from Mr **Ablyazov** to his son was made. Nor can the bank point to any demonstrable error in the judge's process of reasoning. I have rejected the bank's arguments that the judge erred in law in his approach to assessing the evidence and in not drawing adverse inferences from the fact that Mr **Ablyazov** had lied. It is not suggested that the judge took account of irrelevant matters or that he misunderstood or failed to consider relevant evidence. The facts mentioned at paragraph 18 above on which the bank particularly relied at the trial and on which it relies in support of this ground of appeal are matters which the judge expressly accepted and took into account in reaching his conclusion. The argument made on this ground of appeal is that the judge should have given greater weight to those matters. But, as indicated, such an argument can only succeed if this court is persuaded that the conclusion reached by the judge lies outside the bounds within which reasonable disagreement is possible and is thus one that no reasonable judge could have reached.

42. The bank's argument focused on Mr **Ablyazov**'s state of knowledge at the time when the transfer of £1.1 million to Madiyar was made in February 2009. In view of the judge's finding, however, that the process of seeking an investor visa had already been set in motion in January 2008, it is hard to see how the fact that Mr **Ablyazov** knew in February 2009 that he would be facing claims can be decisive. Of potentially greater significance, as it seems to me, is the judge's finding (referred to in paragraph 19(2) above) that, even in January 2008, Mr **Ablyazov** is very likely to have appreciated that he had been involved in serious wrongdoing against the bank for which he might get sued. Given that finding and the benefits afforded by an investor visa of being allowed to remain in the UK without any of the restrictions of a student visa (as identified by the judge at para 94 of his judgment), it does seem to me that the inference might have been drawn that the transaction was entered into for the purpose of ensuring that Madiyar would be able to obtain the right to remain in the UK and would have funds available to him even if Mr **Ablyazov** were to become unable to support him because of claims made by his creditors. That in turn could have led a less charitable fact-finder to conclude that the transaction was entered into for the purpose prohibited by section 423(3). To say, however, that a different view could have been taken falls far short of the test which must be met to justify interference by an appellate court. In any case I remind myself that my impression is based on a telescopic view and that the judge was much better placed to make the necessary evaluation based on his closer consideration of the evidence and ability to view the facts as a whole. The judge gave reasons justifying his conclusion that the transfer was not made for the prohibited purpose, and it is impossible to say that those reasons are misconceived or to regard his conclusion as one that no reasonable judge could have reached.

43. I would accordingly reject this last ground of appeal and hold that the judge was entitled to reject the bank's claim to set aside the transfer under section 423 of the Insolvency Act 1986.

The limitation issue

44. By his respondent's notice, Madiyar has argued that the judge should in any event have dismissed the bank's claim under section 423 of the Insolvency Act on the ground that the claim was barred by limitation. On the conclusion I have reached above – with which I understand that the Vice-President and Coulson LJ agree – it is not necessary to decide this issue. But as we have had the benefit of detailed written submissions on the point, I will explain why in my opinion the judge decided it correctly.

45. The judge held – and it is not in issue on this appeal – that the claim under section 423 was an action for a sum recoverable by statute falling within section 9(1) of the Limitation Act 1980, which prescribes a six year limitation period. Accordingly, as this action was begun in December 2015, more than six years after the transfer was made on 26 February 2009, the claim was *prima facie* time-barred. The bank relied, however, on section 32 of the Limitation Act, which provides for the postponement of the limitation period in certain cases of fraud, concealment or mistake until the claimant has discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it. In cases of fraud or deliberate concealment, the fraud or concealment must be that of the defendant, but section 32(1) provides that references in that subsection to the defendant include references to "any person through whom the defendant claims".

46. It was common ground at the trial that the bank's claim was based on fraud or deliberate concealment by Mr **Ablyazov**. It was not alleged that there was fraud or deliberate concealment by Madiyar. The issue was whether the limitation period was postponed in relation to Madiyar on the basis that he was "claiming through" his father. The judge held that he was. The judge also rejected an argument that the bank could with reasonable diligence have discovered Mr **Ablyazov**'s fraud or concealment more than six years before the action was begun. The judge therefore concluded that, if the claim under section 423 had otherwise been well-founded, it would not have been time-barred.

47. On this appeal the argument pursued by Mr Peter Knox QC and Mr James Sheehan on behalf of Madiyar is that the judge was wrong as a matter of law to conclude that Madiyar was claiming the fund of £1.1 million through Mr **Ablyazov** for the purposes of section 32.

"Claiming through"

48. Section 38(5) provides that:

"… a person shall be treated as claiming through another person if he became entitled by, through, under or by the act of that other person to the right claimed …"

The judge took the view that this provision covers the present case because the right claimed by Madiyar to the money paid into his bank account is a right to which he became entitled by the act of Mr **Ablyazov** in causing the funds to be paid into the account.

49. Counsel for Madiyar have criticised that reasoning by arguing that a person (A) is to be treated as "claiming through" another person (B) only if the right claimed by A is a right to which A became entitled by reason of a transfer of property from B. They pointed out that no transfer of property takes place when money is transferred from one bank account to another bank account. Thus, when the sum of £1.1 million was transferred from the Swiss bank account controlled by Mr **Ablyazov** to Madiyar's bank account in London, no property was transferred from Mr **Ablyazov** to Madiyar. Counsel for Madiyar submitted that in these circumstances the right claimed by Madiyar to the money in his London bank account is not a right which he is "claiming through" Mr **Ablyazov**.

50. Counsel for Madiyar are undoubtedly correct that as a matter of law, when money is remitted from one bank account to another bank account, no property is transferred. The relationship between a bank and a customer who holds an account with the bank is that of debtor and creditor. When the account is in credit, the bank is indebted to its customer. The debt is a form of property, a chose in action, belonging to the customer. When money is "transferred" to the bank account of another person, the legal analysis is that the indebtedness of the payor's bank to its customer is discharged or reduced by the relevant amount and a new debt in an equivalent amount is created, owed by the payee's bank to its customer: see e.g. *R v Preddy*

[1996] AC 815, 834. The new debt is a different chose in action from the original debt and is therefore not property which was transferred to the payee from the payor.

51. As a matter of law, therefore, no property was transferred from Mr **Ablyazov** to Madiyar when the sum of £1.1 million was paid into Madiyar's bank account. But it is not obvious why this should matter. There is nothing in the wording of section 38(5) which says that, for A to be treated as claiming through B, the right claimed by A must be to property which has been transferred from B. The only requirement is that A became entitled "by, through, under or by the act of" B to the right claimed (emphasis added). On a plain reading of the statutory provision, that requirement is met where (as in this case) the right to the chose in action constituted by money credited to the bank account of the payee was acquired through or by the act of the payor in causing the payment to be made.

52. This plain reading of the statute is supported by authority. In *GL Baker Ltd v Medway Buildings and Suppliers Ltd* [1958] 1 WLR 1216 the auditor of the plaintiff company (Mr Titley) received money on its behalf which he paid into his own bank account. He subsequently drew two cheques on his bank payable to the defendant company, of which he was a director. The cheques were paid into the defendant's bank account and the plaintiff sought to recover the money from the defendant. The defendant raised a limitation defence. In response, the plaintiff relied on section 26 of the Limitation Act 1939, which was in materially similar terms to what is now section 32 of the Limitation Act 1980. One of the issues was whether the action was based on the fraud of a person (Mr Titley) through whom the defendant claimed. Danckwerts J held that it was. He said (at 1223):

"There has been no fraud in this case by the defendant company. They are in a way the innocent victims of Titley, in the same way as the plaintiffs have been defrauded by him of the moneys in question. Do they claim, however, in regard to the subject-matter of the action, through Titley? In my view, the answer is plainly that they do. How did they come to have the moneys? By means of cheques which were handed to them by Titley in respect of which they were not holders for value in due course, and they received the moneys by cashing those cheques. It seems to me that their claim to the moneys must be through Titley and through nobody else, and therefore it seems to me that they are plainly within the provisions of section 26(a), that is to say, 'the action is based upon the fraud of the defendant or of any person through whom he claims.'"

There was an appeal in the *Baker* case but it was not on this point and the Court of Appeal did not consider the limitation issue. The decision of Danckwerts J on this issue was, however, referred to with apparent approval by the Court of Appeal in the later case of *Eddis v Chichester Constable* [1969] 2 Ch 345, which I will mention shortly.

53. Counsel for Madiyar submitted that in the *Baker* case there was a transfer of property when the cheques were handed over by Mr Titley to the defendant's bankers. Accordingly, they argued, the right claimed by the defendant in the *Baker* case was a right to which the defendant became entitled through a transfer of property – in contrast to the present case. If this analysis of the *Baker* case were correct, it would in my view merely confirm that the question whether the recipient of money is "claiming through" the payor cannot rationally depend on whether the payment involves a transfer of property from the payor to the payee, as it would be arbitrary and illogical if the answer to the question were to differ according to whether the transfer of funds from one bank account to the other was effected by electronic transfer or by presentation of a cheque. But it is in any case clear that, for reasons pointed out by counsel for the bank, there is no transfer of property in either case. As explained by Lord Goff in *R v Preddy* [1996] AC 815 at 835-6, when a cheque is in the possession of the drawer, it is simply a piece of paper and there is no chose in action represented by the cheque. When the cheque is delivered to the payee, it then constitutes a chose in action of the payee, which can be enforced against the drawer; and when the cheque is presented for payment, the payor's bank

account is debited and the payee's account is credited, thereby creating a new chose in action. Just as in the case of an electronic transfer, therefore, the right to property claimed by the payee is not a right to property which has been transferred from the payor, but is a right to different property.

The argument for symmetry with the proviso

54. Although I have indicated cogent objections to it, I have not yet stated the argument advanced by counsel for Madiyar for giving section 38(5) a restrictive interpretation which confines the circumstances in which A is to be treated as "claiming through" B to cases in which the right claimed by B is a right to property which was acquired from A. Their argument was based on the proviso to section 32 of the Limitation Act 1980 contained in subsection (3). This states:

"… nothing in this section shall enable any action –

(a) to recover, or to recover the value of, any property; or

(b) to enforce any charge against, or set aside any transaction affecting, any property;

to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment … took place…"

55. Counsel for Madiyar submitted that the circumstances in which one person is to be treated as "claiming through" another person as defined in section 38(5) should be construed as limited to cases covered by the proviso. As I understand the argument, it can be stated as follows:

(1) The proviso applies only where there has been a transfer of property and not where there has been a payment of money which does not involve a transfer of property from the payor to the payee.

(2) It would be irrational if the benefit of the proviso were available to an innocent purchaser of property but not (for example) to an innocent recipient of money who has given valuable consideration.

(3) To avoid that consequence, the definition in section 38(5) of when one person is to be treated as claiming through another person, should be construed as applying only in cases where there has been a transfer of property.

56. For present purposes I am prepared to accept the second premise of this argument. The proviso can be seen as a statutory expression or reflection, in the context of limitation, of the equitable defence of *bona fide* purchase. Such a defence is available not only to a claim asserting title to property, but also to defeat a claim to recover the traceable proceeds of property or a personal claim in unjust enrichment: see *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. This is an argument, however, for adopting a broad interpretation of the proviso. It is not an argument for manipulating the interpretation of section 38(5) so as to avoid the need to invoke the proviso in a situation where it ought to apply if it is to mirror the equitable defence but does not. This point can be illustrated by taking a hypothetical case in which, instead of paying Madiyar £1.1 million, Mr **Ablyazov** had purchased from Madiyar for £1.1 million a painting which had a value of £800,000. If Madiyar entered into the transaction in good faith and without notice of any third party right to the money used to pay for the painting, it would be anomalous if he could not rely on the proviso as he plainly could in the converse case where he purchased for £1.1 million a painting worth £800,000. Such an anomaly can be avoided by

adopting the sensible interpretation of the proviso proposed by counsel for the bank, which construes an action “to recover, or recover the value of, any property” in section 32(3)(a) as encompassing a claim to recover the traceable proceeds of property. If that interpretation is adopted, then even if section 32(1) were no broader in scope than the proviso, this would be enough for the bank's purposes, as the money credited to Madiyar's bank account in this case was clearly the traceable proceeds of property belonging to Mr **Ablyazov**.

57. The perceived mischief would not in any case be cured by adopting a restrictive interpretation of the definition of “claiming through” in section 38(5). That would simply produce greater absurdities. It would mean that section 32(1) would apply where Madiyar bought a painting from Mr **Ablyazov** at an undervalue (subject to the proviso) but not where Madiyar sold a painting to Mr **Ablyazov** for more than it was worth. In addition, section 32(1) would apply (again subject to the proviso) if Mr **Ablyazov** made a gift to Madiyar of a valuable painting or a bag of gold coins but not where, as in the actual case, Mr **Ablyazov** made a gift of money by transferring it to Madiyar's bank account. These are irrational distinctions and I can see no justification for interpreting section 38(5) in a way which introduces them, all the more so when such an interpretation is contrary to the natural meaning of that provision and the decision in the *Baker* case.

58. The decision of the Court of Appeal in *Eddis v Chichester Constable* [1969] 2 Ch 345, on which counsel for Madiyar sought to rely, in my view does not support their argument. On the facts assumed in that case, a brigadier sold to the defendant art consortium a painting which was a family heirloom in fraud of the trustees who owned the painting. When many years later the trustees found out about the sale, they sued the art consortium in conversion. To overcome a limitation defence the trustees relied on section 26 of the Limitation Act 1939 (the predecessor provision to section 32). The Court of Appeal held that they were entitled to do so as the defendants claimed their right to the painting through the brigadier. The court rejected the defendants' argument that claims through another person were confined to claims to recover property acquired from that person and did not include a claim for damages for conversion of property.

59. It was argued that such an interpretation was necessary to avoid inconsistency with the proviso – which at that time applied only to an action “to recover… any property” and did not include, as it now does, the words “or recover the value of” any property. Lord Denning MR thought that the answer to this point was to read the proviso as impliedly containing the words which have since been expressly added to it (see 357-8). Winn LJ did not think it necessary to express any view about the scope of the proviso but considered that the words “any person through whom he claims” had a wide meaning and “must be held to comprise any person from whom the property or any right asserted or challenged has been received or derived” (see 362G). The third member of the Court of Appeal, Fenton Atkinson LJ, took the view that on the plain meaning of the statutory language the words “person through whom he claims” applied to an action for damages for conversion and that, if it was thought necessary to avoid absurdity, the proviso should be construed in the way proposed by Lord Denning (see 364).

60. I agree with counsel for the bank that this decision provides no support for the proposition that section 32(1) and section 38(5) must be given a restrictive interpretation so as to achieve symmetry with the proviso in section 32(3). At most, the *Eddis* case supports giving a wide interpretation to the proviso to avoid anomalies that would otherwise arise as a result of the broad scope of the “claiming through” provisions.

61. For these reasons, I consider that the argument raised by the respondent's notice has no merit and that the judge was right to conclude that Madiyar was a person “claiming through” Mr **Ablyazov** within the meaning of section 32(1) and section 38(5) such that the bank could rely on section 32 as extending the period of limitation.

Conclusion

62. I agree with the judge that, had the claim under section 423 of the Insolvency Act 1986 succeeded, it would not have been time-barred. But, as discussed earlier, the claim failed because the judge found that the transfer was not made for the prohibited purpose. As the bank cannot in my view challenge that factual finding, I would dismiss the appeal.

Lord Justice Coulson:

63. I agree with Leggatt LJ that, for the reasons he gives, this appeal must be dismissed.

64. There was no error of law on the part of the judge. On the contrary, he followed carefully the guidance given by all three members of the Court of Appeal in *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981. The deputy judge's adverse findings on the second respondent's credibility do not provide any legal basis for the presumption contended for, nor any other modification to the ordinary burden of proof.

65. I accept that it was open to the deputy judge to conclude that s.423 was engaged; indeed, such a result would have been unsurprising. But he carefully considered all the evidence, including oral evidence and a wide range of documentation which has not been provided to us, before he reached his conclusions. In accordance with the principles set out by Lord Reed in *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 and *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600, it cannot be said that the judge's conclusions on the facts were plainly wrong, and they are therefore not susceptible of interference by this court.

Lady Justice Gloster:

66. I also agree.