

Pathania v Tashie-Lewis and another

[\[2021\] EWHC 526 \(Ch\)](#), [\[2021\] All ER \(D\) 47 \(Mar\)](#)

Insolvency – Transaction at undervalue. In a claim for relief under s 423 of the Insolvency Act 1986, the Chancery Division held that the claimant had failed to meet the burden of proof on him in that there was no documentary evidence to show that there had been a sale at an undervalue, as alleged. The court held that the circumstances, the collusive sale and the other facts, combined with the unreliable witness testimony, could not tip the evidential burden in the claimant's favour.

Catchwords

Insolvency — Transaction at undervalue — Claimant alleging sale of property at undervalue

Background

The proceedings concerned a claim for relief under s 423 of the Insolvency Act 1986 (IA 1986).

In 2007 or 2008, the first defendant owned a property (number 36) in Essex. He was then a mortgage broker or introducer working from the same premises as the claimant, from whom he rented office space at another address in London where the claimant and with his wife ran a solicitor's practice. The first defendant referred conveyancing transactions to the claimant, and they were friends.

The first defendant decided to demolish number 36 and build two new properties, known as 36 and 36A. He needed funds and the claimant agreed to provide them. The properties had separate registered titles.

The claimant was, subsequently, adjudged bankrupt. He became aware that 36A was sold to Ms O and he contended that that sale had been at an undervalue and should be set aside under s 423. A judge held that the sale had been at an undervalue, but that it had resulted in no loss. The claimant successfully appealed.

The first defendant sold number 36 to the second defendant for £195,000. That sale price was agreed as representing the then market value. The claimant claimed against the second defendant, pursuant to s 423, to the extent of the undervalue which he originally said was £48,750, plus interest of about £40,000. Essentially, the claimant contended that the £48,750 had only been superficially paid by, or on behalf of, the second defendant and that that sum had been repaid to the first defendant. The second defendant denied that and contended that the sale had been entirely legitimate and above board.

No relief was sought against the first defendant and he played no part in the proceedings, save that he made a witness statement a few months after the proceedings had been commenced.

Issues and decisions

Whether there had been a transaction at an undervalue.

The court considered IA 1986 s 423(1)(c), which described a transaction at an undervalue as being one: '... 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.'

Overall, on the balance of probabilities and on the facts, the second defendant had to have known of the linked sales of 36 and 36A. They had, therefore been collusive sales. However, that did not, by itself, establish or prove that the sales had been at an undervalue for the purposes of IA 1986 s 423. The court had to consider who had provided the purchase monies, and on what basis (see [44], [45] of the judgment).

The burden of proof lay, at first, on the claimant. If the second defendant advanced a positive alternative case, the burden shifted to him. In the present case, it was rightly accepted that the second defendant had paid a total from his own accounts of £14,587 to H&H (his solicitors) (see [46] of the judgment).

The balance of the cash to complete had been the £38,000 provided by Mahmood Properties. The claimant had to establish that £38,000 had been paid first '... by or on [the first defendant's] behalf' and second, that it had been '... returned to him'. Such a series of transfers had, therefore, to include one from the first defendant to Mahmood Properties, directly or indirectly, and then to H&H, and from them to J Bon (the first defendant's solicitors) for the first defendant to pay to Mahmood Properties or else to Mahmood Properties directly, at the instruction of the first defendant (see [47] of the judgment).

The second defendant's purchase had been very different to that of Ms O, as it was agreed that he had personally provided £14,587 towards the sum needed to complete, including H&H's fees and disbursements. The balance (excluding the mortgage advanced in the second defendant's name) had been £38,000 from Mahmood Properties. The second defendant said that that had been a gift (see [61] of the judgment).

On the facts, the full purchase price had been paid over to the first defendant's solicitors. The claimant had to establish, on his first case, that the £38,000 had been paid by, or on behalf of, the first defendant towards that purchase price, and later returned to the first defendant. The burden of proof had been on the claimant. However, no evidence at all was before the court of the first defendant's involvement in that payment. The chain of unevidenced assertions was not accepted. Among other things, the claimant had also said that payment of £36,541.93 could not genuinely have been to the first defendant, contrary to his pleaded case at [11] of the amended particulars of claim. He had adduced no documentary evidence of that, and the allegation could not be accepted. It followed that the claimant's alternative position that payment back to Mahmood Properties had occurred was not accepted, and the court expressly could not see how, even if that had happened, it also amounted to a sale at an undervalue (see [62]-[67] of the judgment).

In all the circumstances, the claimant had failed to meet the burden of proof on him in that there was no documentary evidence to show that it had been a sale at an undervalue in respect of the amount advanced by Mahmood Properties. The circumstances, the collusive sale and the other facts set out, combined with the unreliable witness testimony, could not tip the evidential burden in the claimant's favour (see [68] of the judgment).

Carla Dougan-Bacchus, Barrister.

Judgment date

8 March 2021

Judge

Deputy Master Linwood

Representation

Alexander Hill-Smith (instructed by direct access) for the claimant.

Robert Parkin (instructed by Addison & Khan Solicitors) for the second defendant.

The first defendant did not appear and he was not represented.

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