

# UK Insolvency Act 1986: Dividends Liable to Challenge as Transactions Defrauding Creditors?

Article By:

Cathryn Williams

Jonathan Dunkley

---

In the recent case of ***BTI 2014 LLC v. Sequana SA & others* [2016] EWHC 1686**, the ***UK High Court*** has held for the first time that a dividend can be challenged as a transaction entered into at an undervalue within the meaning of section 423(1) of the ***Insolvency Act 1986 (the “IA”)***.

## The Facts

The facts of the case are long and complex but for present purposes the pertinent facts are as follows.



Arjo Wiggins Appleton Limited (now Windward Prospects Limited) (“AWA”) was a wholly owned subsidiary of Sequana SA (“SSA”).

Through a series of corporate acquisitions and asset transfers since the 1950s, BAT Industries PLC (“BAT”), the claimant in this case, became liable to pay for part of the costs of an environmental clean-up relating to the pollution of the Lower Fox River in Wisconsin, USA (the “Lower Fox River Liability”). AWA was liable to indemnify BAT for part of the monies BAT so paid (the “Indemnity”).

In December 2008, AWA’s directors resolved to reduce the company’s capital and pay an interim dividend to SSA (the “December Dividend”). In May 2009, it was resolved the AWA would be sold to a third party and its directors resolved to pay a further interim dividend to SSA (the “May Dividend”). Payment of both dividends was effected by setting off a substantial amount of intra-group debt due from SSA to AWA.

BAT subsequently brought proceedings against AWA and SSA, asserting that the dividends declared by AWA were transactions defrauding creditors in contravention of section 423 of the IA. SSA in response claimed that it had changed its position as a result of the payment of the dividends and that this constituted a defence to the claim under section 425(2) of the IA.

## The Law

The relevant provisions of the IA to be considered were as follows:

### **'423**

- *This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—*
  - *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;*
  - *...*
  - *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.*
- *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—*
  - *restoring the position to what it would have been if the transaction had not been entered into, and*
  - *protecting the interests of persons who are victims of the transaction.*
- *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—*
  - *of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or*
  - *of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.'*

### **'425**

- *An order under section 423 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor entered into the transaction; but such an order—*
  - *shall not prejudice any interest in property which was acquired from a person other*

---

*than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and*

- *shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.'*

## The Decision

The decision turned around three questions:

- Can the payment of a dividend ever be a transaction between the shareholder and the company on terms that provide for the company to receive no consideration to bring the transaction within section 423(1) of the IA?
- Did the directors of AWA intend to put assets beyond the reach of a potential claimant or otherwise prejudice the interests of such a person (the "Section 423 Purpose"), in paying the December Dividend or the May Dividend?
- Did Sequana have a defence that it changed its position in reliance on the transaction?

It was held that:

- Section 423 was sufficiently widely drafted to include the payment of a dividend
- The December Dividend did not satisfy the Section 423 Purpose as at the time it was paid there was no settled intention of selling AWA to someone outside the SSA group. There was, accordingly, no intention to put the company's assets beyond the reach of BAT.
- The payment of the May Dividend did, however, satisfy the Section 423 Purpose. There was evidence to show that the intention of AWA, through its directors, in declaring the May Dividend was to remove from the SSA group the risk that the indemnity liability to BAT would exceed the amount available to meet such liability.
- SSA could not avail itself of the defence set out on section 425(2) of the IA. The court relied on the leading case on the scope of the court's powers under section 425 (*4Eng Ltd v Harper* [2009] EWHC) and particular emphasis was placed on the comments of Sales J that:

'the nature of any order and the extent of the relief granted by the court under s.423(2) and s.425 should take into account the mental state of the transferee of property under a relevant transaction (or of any other person against whom an order is sought) and the degree of their involvement in the fraudulent scheme of the debtor/transferor to put assets out of the reach of his creditors.'

and

‘In choosing what relief is appropriate in a given case, a great deal will depend upon the particular facts. One of the reasons the court is given such a wide jurisdiction as to remedy under this regime is to allow it flexibility in fashioning relief which is carefully tailored to the justice of the particular case. Helpful analogies may be drawn with other areas of the law to guide the court in reaching its conclusion, but given the wide range of situations which the statutory regime is intended to deal with it would be wrong to be unduly prescriptive in trying to lay down hard and fast rules for the application of these provisions.’

As such, whilst SSA’s change of position was relevant to the relief to be granted it did not provide a complete defence to a claim under section 423. In any event the *4Eng* case was distinguishable on its facts as SSA’s position was very different from the position of the transferee in *4Eng*. SSA had fully shared the Section 423 Purpose of AWA declaring the May Dividend and, in fact, was the intended beneficiary of that purpose, since it was SSA which no longer bore the risk under the Indemnity. There was therefore no significant detriment on which SSA could rely.

## Commentary

This case provides a good summary of the issues a court will take into consideration when faced with a section 423 claim and is the first case to hold that dividends may be liable to challenge as transactions defrauding creditors. Going forward it will be of interest to see in what circumstances a recipient of a dividend may rely upon the defence set out in section 425(2) of the IA as this appears to have been accepted by the High Court in principle.

© Copyright 2025 Squire Patton Boggs (US) LLP

---

National Law Review, Volume VI, Number 238

Source URL: <https://natlawreview.com/article/uk-insolvency-act-1986-dividends-liable-to-challenge-transactions-defrauding>