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Of Covinous Designs...

South Square's Glen Davis QC[1] and Scott Aspinall of Ground Floor Wentworth Chambers in Sydney consider some of the similarities and some of the differences in English and Australian approaches to Transactions Defrauding Creditors, derived from a common root.

There always were, always will be, *'feigned, covinous[2] and fraudulent feoffmentes[3], gifts, grants, alienations... devised and contrived of malice, fraud, covin, collusion or guile to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, etc...'.*

The language and the style of drafting may have changed in the 550 years since the preamble to the *Statute of Elizabeth*[4] from which those words are taken, but both the vice which was identified and the paradigm statutory solution – a broad discretionary power vested in the court to remedy the situation – have endured and stood the test of time. They were carried around the globe with the merchants and colonial administrators of the eighteenth and nineteenth centuries, and nowadays form the common root of legislation in many jurisdictions. There are myriad examples: §548 of the US Bankruptcy Code and the fraudulent conveyance laws of individual States of the USA, section 237 of Bermuda's Companies Act 1981, section 31 of South Africa's Insolvency Act 24 of 1936, section 60 of Hong Kong's Conveyancing and Property Ordinance, to name just a few.

There are differences, of course, as different legislatures have made different choices reflecting different local circumstances or policies, and as local courts have come to interpret the local wording, but sometimes those choices and differences can themselvesbe illuminating.

1. With grateful acknowledgement of the assistance of Matthew Abraham and Annabel Wang of South Square in discussing the English provisions.

2. A useful word, *'covinous'*, now according to the Oxford English Dictionary, *'rare or obsolete'*. It carried the sense of a group of people colluding together to the prejudice of another by a secret plan or agreement, and so with the implication of being *'fraudulent'* in that sense. Originally from the latin, *convenire*, to convene. It deserves to be revived.

3. A feoffment was the act of putting a person in legal possession of property, rents, etc under the feudal system.

In this article we are addressing the current manifestation of provisions which empower a court to make orders in this context in the insolvency laws of England and Wales[5] (sections 423 to 425 of the Insolvency Act 1986 (IA86): see Box 1, page 25) and the insolvency and property laws of Australia (e.g. section 37A of the New South Wales Conveyancing Act 1919[6]; section 121 of the Bankruptcy Act 19960 (Cth) and section 588FE(5) of the Corporations Act 2001 (Cth): see Box 2, page 31).

The underlying paradigm for these provisions is the same:

- There has been a *transaction* (in England, at an undervalue)
- The transaction has involved an *alienation* of the debtor's property
- The intention of the transaction was to *prejudice* a person (or class) who is (or may be or become) able to make a claim against the debtor

If the court is satisfied of those propositions (to the civil standard of balance of probabilities), the transaction is voidable (and the court has power to make a remedial order).

A third party will have a defence if they can establish that they are a purchaser in good faith of the property without notice of the circumstances. That proviso in favour of the innocent third party dates back to the Statute of Elizabeth[7], which exempted a conveyance for good consideration to a person who did not at the time of the conveyance have *'any manner of Notice or Knowledge of suche Covyne Fraud or Collusion'*. In *Glegg v Bromley*[8] in 1912, Parker J said *'it is quite clear that any person relying on the proviso must prove both good consideration and the fact that he had no notice of the illegal intent'*.

Before we go on to consider the specifics of the modern regimes in England and Australia, there are some general points to be made.

The first is that the temptation to put assets out of the reach of your creditors is not exclusive to insolvency, and insolvency is not the only context in which the jurisdiction can be invoked. That can be seen in Australia by the distribution of jurisdiction across insolvency and non-insolvency statutes, described above. Although the English provisions appear in the Insolvency Act, they are in their own Part of that Act[9]. Insolvency is not a pre-condition, and while the claim can be brought by an insolvency office-holder[10], it can also be brought by a victim of the transaction[11]. Where the debtor is in insolvency proceedings, this will require permission of the court[12]. Whoever brings the application, it will be treated as made on behalf of every victim of the impeached transaction[13].

For present purposes, we are particularly concerned with these transaction avoidance provisions as they arise for use in an insolvency. Where the debtor company or individual is the subject of formal insolvency proceedings, it will often be more convenient for a claim to reverse voidable transactions to be brought by the office-holder, not least for the practical reasons that they will have access to books and records, and may be able to use compulsory powers to investigate a transaction, which will not be available to a *'victim'*. Then too, where there is a class of victims who are creditors (or contingent creditors) of the debtor, reversal of an impeached transaction and distribution through the insolvency process will often be the obvious and most convenient route.

The English courts have gone as far as to say that *prima facie*, the proper plaintiff to recover property or obtain reimbursement for the benefit of a company in liquidation will be the company itself acting through its liquidator[14]. However that is not ubiquitously the case.

The English court will give permission for the claim to be brought by a victim rather than an office-holder in an appropriate case, although the applicant will need to show that there is a *'good reason'* why they should bring proceedings where the office-holder has not[15]. One such circumstance could be if there are no assets in the insolvent estate to fund the proceedings, or if the court is satisfied that there is sufficient substance in the allegations and, in the absence of proceedings by the office-holder, refusal of leave would in effect be to preclude investigation by the court[16].

Second, it has long been recognised that the policy of legislation in this area is to give Judges the tools to address and remedy *'fraud'* as a social and economic wrong, and that this requires a Court to give the provisions a liberal construction. That was recognised as long ago as *Twyne's Case*[17] in 1601, in which the Court of Star Chamber lamented that *'fraud and deceit abound in these days more than in former times'* and for that reason said that *'all statutes made against fraud should be liberally and beneficially expounded to supress the fraud'*. In 1776, Lord Mansfield said, *'These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud'*[18]. Modern

4. *Fraudulent Conveyances Act 1571* (13 Elizabeth 1, c 4 & 5); spelling has been modernised.

5. Although IA86 in general applies to Scotland, the law has always been different in Scotland, and relevant provision for *gratuitous alienations* is found in IA86, s242.

6. As amended by ss 2, 10 and Schedule of the *Conveyancing (Amendment) Act 1930* (NSW). The legislation of all the Australian States contains similar provisions: *Civil Law (Property Act) 2006* (ACT), s 239; *Law of Property Act 2000* (NT), s 208; *Property Law Act 1974* (Qld), s 228; *Law of Property Act 1936* (SA), s 86; *Conveyancing and Law of Property Act 1884* (Tas), s 40; *Property Law Act 1958* (Vic), s 172; *Property Law Act 1969* (WA), s 89.

7. Proviso V.

8. [1912] 3 KB 474 at 492.

9. One consequence of this is that the provisions apply in England and Wales, but (unlike other provisions of the Insolvency Act) not in Scotland. The Statute of Elizabeth predates the Act of Union and was not part of the law of Scotland.

10. An administrator or liquidator of a corporate insolvent, the official receiver, or a trustee of a bankrupt's estate: see IA86 s424(1)(a).

11. IA86 s424(1)(c); where the victim is the subject of a voluntary arrangement, the supervisor of that arrangement also has standing under s424(1)(b).

12. IA86 s424(1)(a).

13. IA86, s424(2).

14. *Menzies v National Bank of Kuwait SAK* [1994] BCC 119, per Sir Christopher Slade at 122 C–D.

15. Cf *Re Simon Carves Ltd* [2013] EWHC 685 (Ch), [2013] 2 BCLC 100 at [27]; Sir William Blackburne said that the applicant must also show they have a *'realistic prospect of establishing'* that the transaction comes within s423 and that they are a victim.

16. cf *Re Ayala Holdings Ltd* [1993] BCLC 256 at 266.

17. *Twyne's Case* (1601) 76 ER 809.

18. *Cadogan v Kennett* (1776) 2 Cowp 432 at 434; 98 ER 1171 at 1172.

support for the principle can be found in decisions of the English Court of Appeal[19] and of the High Courtof Australia[20].

Third, and without in any way detracting from the principle and approach described in the last paragraph, although the transactions impeached are referred to as *defrauding creditors*, and although the older cases refer to '*fraud*' and '*deceit*', the '*fraud*' here consists of the process of putting assets beyond the reach of those who may make a claim. There is no need to prove criminal conduct or intent, and proof is only required to the civil standard of balance of probabilities.

Fourth, and of particular importance for cross-border insolvencies, the English Court recognises that trade (and fraud) increasingly take place on an international basis, and that money is transferred quickly and easily[21]. For that reason, it is well-established in England that section 423 has extra-territorial effect, in that the legislation gives the court power to make an order against a person outside England and Wales[22]. However, the Court retains a discretion (which will fall to be exercised on an application to serve proceedings under section 423 out of the jurisdiction) and will only exercise the jurisdiction if it is satisfied that there is a 'close enough' connection with England and Wales[23]. In an appropriate case, the English Court will also grant injunctions, up to and including a world-wide freezing order, in support of a claim brought under section 423[24].

The English Court's willingness to act extra-territorially was recently underscored by the decision of the Family Court to make orders involving Cypriot, Panamanian and Liechtenstein companies and Bermuda and Liechtenstein trusts to reverse transactions put in place to evade enforcement of a £453 million divorce settlement[25].

In Australia, the approach to making worldwide orders has traditionally been more conservative. However the High Court has very recently affirmed the capacity of superior courts in Australia to make worldwide freezing orders in appropriate cases so long as the Court has jurisdiction over the person owning the asset. By analogy, so long as a transferee in a defrauding transaction is subject to the Court's jurisdiction there will be a basis to make orders in respect of transferred property irrespective of the asset's location.

The Position in England

Relationship with Transaction at an Undervalue provisions

Since 1986, the statutory regime for England and Wales has been found in IA86 which came into force in that year. There is something of an overlap with the provisions of IA86 which enable adjustment of prior transactions on grounds that they constitute a *transaction at an undervalue* (in the corporate context under section 238 1A86[27]). Where a company in administration or liquidation has entered into a transaction within the 2 year period before the onset of its insolvency[28], and was insolvent at the time of the transaction or becomes insolvent in consequence[29] (which will be presumed if the transaction is with a connected person), the office-holder can apply within the insolvency to reverse the transaction[30]. The Court has a discretion to fashion an order to restore the position to what it would have been if the company had not entered into the transaction. There will be a defence if it can be shown both that the company entered into the transaction in good faith and for the purpose of carrying on its business, and that there were reasonable grounds at the time of the transaction for believing that the transaction would *benefit* the company.

In many cases involving a transaction at an undervalue, it will be more straightforward for an administrator or liquidator to proceed under section 238, which only requires establishment of an arithmetical undervalue and does not require consideration of any mental element of the transaction. For that reason, applications under section 238 are far more common than those under section 423.

Section 423 comes into its own where the transaction took place outside the relevant 2-year period, or where insolvency cannot be shown, and of course outside insolvency or where the proceedings are to be brought by a 'victim' of the transaction rather than an office-holder.

Limitation

Because the cause of action is a statutory one (and so technically, an action on a *specialty*), the applicable limitation period within which the action must be commenced will be twelve years[31]. Whether or not the action is brought by an office-holder, time will start to run when the relevant person becomes a victim of the transaction[32]. The time limit will be apt to be extended if (as will often be the case) the circumstances have been concealed[33].

In *Giles v Rhind (No 2)*[34], the Court of Appeal confirmed that a transaction

19. *Giles v Rhind (No 2)* [2009] Ch 191 per Arden LJ at 199.

20. *Marcolongo v Chen* [2011] HCA 3 ("*Marcolongo*") at [20].

21. In *re Paramount Airways Ltd* [1993] Ch 223, per Sir Donald Nicholls V-C at 239.

22. *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] 1 WLR 4847 at [30].

23. *Orexim Trading per Lewison LJ* at [30]. The relevant 'gateway' is under para 3.1(2) of Practice Direction 6B of the English Civil Procedure Rules: *Orexim Trading* at [47].

24. For a recent example, see *Integral Petroleum SA v Petrogat FZE* [2021] EWHC 2092 (Comm), where the English Commercial Court was satisfied that transfers by the Defendant were arguably impugnable under section 423. Although the first Defendant was a UAE company and the other individual defendants were resident in UAE, Iran and Kazakhstan, there was sufficient connection with England and Wales because the underlying contract to purchase a cargo of oil was subject to English law, and a subsequent arbitration and judgment were in England. See also the *Akhmedova* litigation.

25. *Akhmedova v Akhmedov* [2021] 4 WLR 88.

26. *Deputy Commissioner of Taxation v Huang* [2021] HCA 43.

27. in personal bankruptcy, the equivalent is section 339 IA86.

28. IA86, s240(1)(a); or between an administration application and an order being made (s240(1)(c)) or between filing notice of intention to appoint an administrator out of court and the appointment being made (s240(1)(d)).

29. IA86, s240(2).

30. IA86, s238(3).

31. Limitation Act 1980, s8(1); in *Hill v Spread Trustee Ltd* [2007] 1 WLR 2404, the Court of Appeal left open the question of whether, if the form of relief was a claim for payment of a sum of money, the limitation period of 6 years under s9(1) of the Limitation Act may apply.

32. *Hill v Spread Trustee Ltd* at [128]; this is because there needs to be a victim for the cause of action under s423 to be complete (see at [126]). Arden LJ also pointed out at [125] that it may be that there is no person capable of being prejudiced until the debtor becomes insolvent. However, it appears that the appointment of an office-holder does not restart the limitation clock.

33. Limitation Act 1980, s1 and s32; *Giles v Rhind* [2008] 2 BCLC 1.

34. *Giles v Rhind (No 2)* [2009] Ch 191 per Arden LJ at [39].

defrauding creditors falling within section 423 of IA86 will involve a *'breach of duty'* which is treated as amounting to a deliberate concealment of the facts for limitation purposes[35]. This means that there is no separate need to prove concealment; the deliberate commission of such breach of duty is sufficient[36].

The Tasks for the Court

On an application under section 423, the Court is concerned to identify[37]:

i. What is (or are) the relevant transaction(s)?

ii. What was the consideration for that (or those) transaction(s)?

iii. Was the consideration provided by the transferee 'significantly less' than what was provided by the transferor?

iv. Was the identified transaction entered into for the specified improper purpose?

What is the Transaction?

The expression *'transaction'* is defined in the Insolvency Act, and so for the purposes of section 423, as including a *'gift, agreement or arrangement'*[38]. The English Court of Appeal has said that an *'arrangement'* is *'apt to include an agreement or understanding between the parties, whether formal or informal, oral or in writing'*[39].

As long as the subject matter of the *'gift, agreement or arrangement'* is a transfer of property, it is well-established that the English court will take a liberal approach to the expression in determining whether there is a transaction for the purposes of section 423[40]. To take one example which may not have seemed obvious, the payment of a dividend by directors of a company, although a unilateral act, is a transaction for no consideration which can be impeached under section 423[41].

Characterising what constitutes the transaction in question will depend on the circumstances of the particular case. For example, in *National Westminster Bank v Jones*[42], a husband and wife who were sheep and cattle farmers facing financial difficulties and bankruptcy proceedings had granted an agricultural tenancy and sold their farming assets to a company of which they were sole directors and shareholders. Both the Judge at first instance and the Court of Appeal had regard only to the tenancy agreement and sale agreement. It was those transactions which had been entered into for the admitted purpose of putting assets beyond the reach of the bank which was a secured creditor. A submission that the court should take into account the benefit the defendants had received from the increase in the value of their shareholding as a result of the transactions was rejected. The issue of shares in the company was not consideration for either transaction, and such benefit was to be ignored.

However, the proper scope of the Court's inquiry will always be fact-specific. Once the parameters of the transaction have been identified, the Court will view that transaction as a whole, and will be concerned to quantify the full benefits which pass either way. So in *Agricultural Mortgage Corp v Woodward*[43], where an insolvent farmer granted an agricultural mortgage to his wife, the Court of Appeal did not confine itself to the question of whether a full market rent was being charged, but also took into account the additional benefits obtained by the wife, in that the family home and business were safeguarded, the wife obtained a surrender value for the lease, and she would have a *'ransom'* power in that she would be able to stipulate a high compensation figure before the secured creditor could obtain vacant possession. On that basis, the secured creditor's appeal was allowed and the grant of the tenancy was set aside as a transaction defrauding creditors.

Is the Transaction at an Undervalue?

To be impeachable under section 423, the transaction must involve a gift or no consideration[44], or involve consideration the value of which in money or money's worth is significantly less than the consideration provided by the debtor[45]. Millett J famously observed of similar wording in section 238 in *Re MC Bacon Ltd*[46] that the latter formulation requires a comparison to be made between the value obtained by the company for the transaction and the value of consideration provided by the company. Both values must be measurable in money or money's worth and both must be considered from the company's point of view.

The onus will initially be on the claimant to characterise the transaction and establish that, on the balance of probabilities, that transaction was at an undervalue[47]. If it is established that consideration has been provided by the transferor, in the absence of explanation that consideration (or sufficient consideration) was received the onus will effectively switch to the recipient to satisfy the Court that consideration was provided[48].

35. Limitation Act 1980, s32(2): For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

36. *Giles v Rhind (No 2)* at [37].

37. See eg *National Westminster Bank v Jones* [2002] 1 BCLC 55 at [25]-[28].

38. IA86, s436.

39. *Feakins v DEFRA* [2006] BPIR 896 at [76].

40. cf *Re Simon Carves Ltd* [2013] 2 BCLC 100 at [24] where this was common ground.

41. *BAT Industries v Sequana* [2019] Bus LR 2178 at [50], [58], [63].

42. *National Westminster Bank v Jones* [2002] 1 BCLC 55.

43. *Agricultural Mortgage Corp v Woodward* [1995] 1 BCLC 1.

44. IA86, s423(1)(a).

45. IA86, s423(1)(c). For completeness, the transaction can also have been entered into in consideration of marriage or the formation of a civil partnership (s423(1)(b)), unlikely to arise in a commercial context.

46. *Re MC Bacon Ltd* [1990] BCC 78 at 92.

47. *National Westminster Bank v Jones* [2001] 1 BCLC 98, per Neuberger J at [75].

48. cf *Re Kiss Cards Ltd* [2017] BCC 489, a case under s238, at [7].

Valuation will always involve an objective evidential exercise which comes down to an arithmetical comparison, and cases on valuation from other contexts (particularly under section 238 of IA86) will be relevant. As Lord Scott pointed out in *Phillips v Brewin Dolphin*[49], identification of the relevant '*consideration*' is a question of fact, although it may also raise an issue of law, for example as to the construction of a document. The Court approaches the valuation exercise with the benefit of hindsight. Reality is given precedence over speculation; it would be unsatisfactory and unnecessary for the Court to wear blinkers and pretend that it does not know what has happened[50].

The Court will have regard to the valuation of the consideration received by the transferor taking the transaction(s) as a whole. Examples are *Agricultural Mortgage Corp v Woodward*, discussed above, and *Phillips v Brewin Dolphin*, in which, as Lord Scott put it: '*if a company agrees to sell an asset to A on terms that B agrees to enter into some collateral agreement with the company, the consideration for the asset will, in my opinion, be the combination of the consideration, if any, expressed in the agreement with A and the value of the agreement with B*'[51].

Was the transaction entered into for a specified improper purpose?

The Court will only have power to make a remedial order under section 423(2) if it is satisfied that the transaction was entered into for one of the specified (and related) improper purposes set out in section 423(3):

(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.

The person who is, or is capable of being, prejudiced is '*a victim of the transaction*'[52] who will have standing to bring a claim under section 423[53], and will be entitled to share in any recoveries[54]. The Court of Appeal has said that the term '*victim*' in this context should be construed broadly[55]. Significantly, the '*victim*' who is ultimately able to bring a claim does not need to have been in the transferor's contemplation at the time of the transaction, and may not even have had a relationship with the transferor at that time[56].

The threshold question of whether the transaction was entered into for the requisite purpose is a factual one, to be determined as at the date of the transaction(s) being impeached.

There is no requirement that the transferor was insolvent at that time, or became insolvent in consequence of the transaction[57].

In fact, there is no requirement that the transferor had *any* creditors at the time of the transaction, nor that there were yet any extant claims which might be frustrated by the transfer. That can be seen from old cases which set aside settlements made before setting out in some hazardous business venture: as Malins V-C said in 1872, a person who contemplates going into trade cannot on the eve of doing so take the bulk of his property out of the reach of those who may become his creditors in his trading operations[58]. The paradigm example, in days before professional limited liability, was often said to be the solicitor who, on being offered partnership in a law firm, put the family property in their spouse's name. The principle, established in pre-1986 cases, has continued to be applied more recently[59].

It is the entry into the transaction, rather than the transaction itself, which must have the necessary purpose . This has to be a '*real substantial purpose*'[61] (rather than a merely trivial one, or merely being a by-product or simply a result) but it has been settled since the Court of Appeal's decision in *IRC v Hashmi* in 2002 that the purpose identified does not need to be the *predominant* purpose of the transaction[62]. It need not even have been positively intended, as long as it can properly be described as a *purpose* and not merely a consequence[63].

In *Hill v Spread Trustee*, the Court of Appeal said that, while prejudice or potential prejudice is a condition for obtaining relief under section 423, the prejudice does not have to have been achieved by the purpose, and it is not even necessary that the purpose was capable of achieving prejudice[64].

The purpose of a person entering into a transaction is (or is equated to) the subjective intention of that person. As David Richards LJ put it in *BAT industries v Sequana*: what did they hope to achieve?[65]

Discerning '*purpose*' requires a factual inquiry into a subjective mental state (the state of a man's mind being, as the cliché holds, as much a fact as the state of his digestion[66]). The test is therefore a subjective test. The Court has to be satisfied that the transferor actually had the purpose, not that a reasonable person

49. *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] 1 WLR 143, another case under s238, at [20].

50. *Phillips v Brewin Dolphin* per Lord Scott at [26].

51. *Phillips v Brewin Dolphin* per Lord Scott at [20].

52. IA86, s423(5).

53. Requiring leave of the court if the debtor is bankrupt or is a body corporate which is being wound up or in administration.

54. IA86, s424(2).

55. *Hill v Spread Trustee Co Ltd* [2007] 1 WLR 2404 at [101].

56. ibid.

57. *BTI 2014 LLC v Sequana SA* [2017] 1 BCLC 453 at [494].

58. *Mackay v Douglas* (1872) 14 Eq 106 at 122.

59. Eg *Midland Bank plc v Wyatt* [1997] 1 BCLC 242.

60. *Hill v Spread Trustee Co Ltd* [2007] 1 WLR 2404 at [102].

61. *IRC v Hashmi* [2002] 2 BCLC 489 per Arden LJ at [25]. In JSC BTA Bank v Ablyazov [2019] BCC 96, Leggatt LJ deprecated introduction of the qualifier '*substantial*' which does not appear in the section, suggesting that it is unnecessary and that it is difficult to see when it would make sense to regard putting assets beyond the reach of creditors as a '*trivial*' purpose (see at [13]-[14]). Nonetheless, Judges continue to find the formulation a useful one: see eg In *re Burnden Holdings* (UK) Ltd *(in liquidation)* [2019] Bus LR 2878 per Zacaroli J at [404] '*The purpose must be a real substantial purpose (not merely a by-product of the transaction under consideration) but it does not need to be the sole or dominant purpose…*'.

62. *IRC v Hashmi*, at [23], [32], [36]; see also the Court of Appeal's decision in *BAT Industries v Sequana* at [66].

63. ibid.

64. *Hill v Spread Trustee* per Arden LJ at [101].

65. *BAT Industries v Sequana* [2019] Bus LR 2178 at [66].

66. a famous aphorism of Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483.

in his position would have it[67]. Direct evidence may well be rare, and it will often be in the interests of the transferor to deny the proposition. But the Court will be entitled to draw inferences from all the circumstances, and may disbelieve the transferor even in the face of denial[68].

In a corporate context, it will be necessary to identify the relevant mind (or minds) which are to be regarded as the mind of the company having the requisite purpose[69]. Often this will be the chief executive or a dominant individual. If the question is whether a board of directors had the purpose in question, it will be sufficient if the majority of the board acted with that purpose[70].

Remedies

If the statutory conditions for jurisdiction discussed above are satisfied, and there is at least one person with the standing under section 424(1) to bring an application[71], the Court may, and has a wide discretion to, make *'such order as it thinks fit'* for[72]:

(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.

Although, strictly, the Court will have a discretion both as to whether to grant relief at all and also as to the form of relief, if the criteria for jurisdiction are made out, the Court only has a narrow margin of discretion to refuse relief[73]. Cases where no relief is granted will be rare.

> "One of the reasons the court is given such a wide jurisdiction...is to allow it flexibility in fashioning relief which is carefully tailored to the justice of the particular case"

The order which the Court makes will be both *restorative* and *protective*. The Court has power to restore the position in such a way as protect the victims' interests[74] (which are wider than their 'rights' or existing claims)[75]. This is a collective rather than an individual remedy: whoever brings the application, it is always treated as made on behalf of every victim of the transaction[76].

Section 425 offers six examples of types of order which the Court can consider making in an appropriate case, but these are expressly said to be *'without prejudice to the generality'* of section 423. As a matter of statutory construction, therefore, it can be seen that Parliament wished to emphasise the *'general'* and potentially wide-ranging nature of the order which can be fashioned to address particular circumstances. In *4Eng Ltd v Harper*, Sales J said :

> *'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.'*

In short, there are no *'hard and fast'* rules: the Court will always be mindful of the need for the relief to be *'carefully tailored to the justice of the particular case'*[78].

67. *Hill v Spread Trustee* at [86].

68. ibid.

69. cf *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 170.

70. *BTI Industries plc v Sequana SA* [2017] Bus LR 82 at [404].

71. If the debtor (transferor) is the subject of insolvency proceedings, this will be the official receiver (a public official), a trustee in bankruptcy of an individual who is bankrupt, the liquidator of a body corporate which is being wound up, the administrator of a body corporate which is in administration (s424(1)(a) IA86); if a victim is bound by a voluntary arrangement under Part I or Part VIII of IA86, by the supervisor of the arrangement or any such victim (s424(1)(b) IA86); in any other case, a *victim of the transaction* (s424(1)(c) IA86).

72. IA86, s423(2).

73. *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd* [1990] BCC 636; *Chohan v Saggar* [1992] 750 (first instance), [1994] BCC 134 on appeal; *Bucknall v Wilson* [2021] BPIR 1404 per Trower J at [55].

74. *Chohan v Saggar* [1994] BCC 134 per Nourse LJ at 141C.

75. *Hill v Spread Trustee* per Arden LJ at [101]-[102].

76. IA 86, s424(2).

77. *4Eng Ltd v Harper* [2010] 1 BCLC 176 at [16].

78. see dicta of Rose J quoting *4Eng* in the remedies judgment in *BTI v Sequana* [2017] EWHC 2011 (Ch) at [39], quoted in turn by the Court of Appeal in *BAT Industries v Sequana* at [83] and this part of her judgment affirmed at [89].

In the most straightforward cases, of course, it is possible to identify a valuable asset which has been transferred out of the hands of the debtor and is still in the hands of the immediate transferee. The obvious order to be made will be an order that the asset should be returned[79] (or a sum of money paid representing its value, or its proceeds of sale[80]).

But the scope of the available remedies goes wider, and can extend beyond the person with whom the debtor entered into the transaction[81] or an immediate transferee, to third (or more remote) parties, and indeed to *any* person who received a benefit from the transaction[82]. A third party will have a good defence if they acquired property from a person other than the debtor[83], or received some other benefit from the transaction[84], and can show that they acquired the property or received the benefit '*in good faith, for value and without notice of the relevant circumstances'.*

The most relevant circumstance will of course be that the debtor transferred property for the specified improper purpose. These provisions will be sufficient to catch a third party which procured a transaction defrauding the debtor's creditors for their own benefit. A third party with notice of the improper purpose cannot argue that they have acted in good faith.

The specific *bona fide purchaser* defence available under section 425(2) will not protect a person who acquired the property from the debtor or was a party to the transaction. It has been suggested that the Court may, in the exercise of its discretion, consider whether there has been a '*good faith change of position'*[85], although the point is controversial[86]. Conversely, the transferee's own financial position and needs will be irrelevant[87].

There is no need positively to establish bad faith on the part of the respondent, in the sense of having engaged in sharp practice or recklessness, before the Court will consider it appropriate to fashion a remedy under section 425[88]. That is not to say that the mental state of the transferee or other person against whom an order is sought is entirely irrelevant. It will be material to consider their mental state, and '*the degree of their involvement in the fraudulent scheme of the debtor/transferor to put assets out of the reach of his creditors'* in the exercise of the Court's discretion (as is generally the case when the Court is considering the extent of recovery which should be ordered), because the Court is concerned to strike the correct balance at the time of its order between the interests of the victims and of the transferee (respondent)[89].

In an appropriate case, the Court will have regard to whether the respondent could be said to have shared the relevant section 423 purpose with the transferor, and in fact to have been the intended beneficiary of that purpose (as was found to be the position on the facts of *BTI v Sequana*[90]).

The remedy available under section 423 is not restricted to the value of the obligations of the transferor to the victims who are identified at the time of the order[91]. That would risk unfairness, and (at least in principle) the Court can have regard to changes in the relationships between relevant parties that may have been influenced by the fact that the impeached transaction has taken place.

Depending on the facts of the particular case, an order under section 423 may provide for assets to be transferred back (or sums of money to be paid) to the transferor, leaving the individual creditors to execute against that property in respect of obligations owed to them[92]. In an appropriate case, particularly if there is only one victim (particularly if the position as to execution is clear and additional costs of execution do not need to be incurred), an order may be made for the transferee to pay direct to the creditor[93]. If the debtor is the subject of insolvency proceedings, it may well be that those proceedings will be the appropriate forum and already offer the appropriate mechanisms to identify the relevant victims and their appropriate shares. Alternatively, some other mechanism may need to be put in place under the auspices of the Court to determine all the proper claimants and supervise distribution to them.

79. as contemplated in IA86, s425(1)(a).

80. as contemplated in IA86, s425(1)(b).

81. see IA86 s425(2).

82. see IA86 s425(2)(b).

83. IA86 s425(2)(a).

84. IA86 s425(2)(b).

85. see comments of Sales J in *4Eng* at [14(1)], by parity of reasoning with claims based on unjust enrichment as in *Lipkin Gorman v Karpnale* [1991] 2 AC 548, although change of position was not established in 4Eng. In *BTI v Sequana*, at [523], Rose J regarded the question of change of position as relevant to the exercise of the Court's discretion rather than providing a complete defence to a claim under s423.

86. In *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2020] AC 1111 the Privy Council rejected an argument that '*change of position'* was available as a defence to a statutory claim to set aside a voidable preference under Cayman Islands law. Lord Reed noted at [116] that the decision in *4Eng* had been criticised by Prof Sir Roy Goode in his *Principles of Corporate Insolvency* (para 13-144) and in an article by Simon Davenport QC in *Insolvency Intelligence* ((2011) 24 *Insolvency Intelligence* 91). He said that this was not the occasion to decide whether or not the reasoning in *4Eng* and in *Rose v AIB Group (UK) Plc* (which concerned s127 of IA86) was correct, but that there was nothing in those cases which led the Board to doubt the correctness of its conclusion in the case before it.

87. see per Sales J in *4Eng* at [92]. In *Bucknall v Wilson*, a personal insolvency case concerning a claim that a payment by a bankrupt to his stepdaughter was a preference under s340 IA86, Trower J said *obiter* at [126] that Sales J was not '*laying down some sort of blanket exclusion that personal needs could not be taken into account if the ends of justice so require'*, and that in his view they could be taken into account '*where the circumstances are sufficiently exceptional'.*

88. *BTI Industries plc v Sequana* at [523].

89. see per Sales J in 4Eng at [13].

90. *BTI Industries plc v Sequana* at [524].

91. see per Rose J in in the remedies judgment in *BTI v Sequana* [2017] EWHC 2011 (Ch) at [39].

92. *4Eng* at [9].

93. *4Eng*, ibid.

BOX 1
THE ENGLISH PROVISIONS

INSOLVENCY ACT 1986

424 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) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; 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.

(4.) In this section "the court" means the High Court or—

(a) if the person entering into the transaction is an individual, any other court which would have jurisdiction in relation to a bankruptcy petition relating to him;

(b) if that person is a body capable of being wound up under Part IV or V of this Act, any other court having jurisdiction to wind it up.

(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".

424 Transactions defrauding creditors.

(1.) An application for an order under section 423 shall not be made in relation to a transaction except—

(a) (a) in a case where the debtor has been made bankrupt or is a body corporate which is being wound up or is in administration, by the official receiver, by the trustee of the bankrupt's estate or the liquidator or adminstrator of the body corporate or (with the leave of the court) by a victim of the transaction;

(b) in a case where a victim of the transaction is bound by a voluntary arrangement approved under Part I or Part VIII of this Act, by the supervisor of the voluntary arrangement or by any person who (whether or not so bound) is such a victim; or

(c) in any other case, by a victim of the transaction.

(2.) An application made under any of the paragraphs of subsection (1) is to be treated as made on behalf of every victim of the transaction.

425 Provision which may be made by order under s. 423.

(1.) Without prejudice to the generality of section 423, an order made under that section with respect to a transaction may (subject as follows)—

(a) require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made;

(b) require any property to be so vested if it represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of the money so transferred;

(c) release or discharge (in whole or in part) any security given by the debtor;

(d) require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct;

(e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction to be under such new or revived obligations as the court thinks appropriate;

(f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for such security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction.

(2.) 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—

(a) 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

(b) 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.

(3.) For the purposes of this section the relevant circumstances in relation to a transaction are the circumstances by virtue of which an order under section 423 may be made in respect of the transaction.

(4.) In this section "security" means any mortgage, charge, lien or other security.

The Position in Australia

In Australia there are now three separate avenues whereby transactions to defeat creditors may be attacked depending upon the identity of the person mounting the attack. At State and Territory level, the provisions of the Statue of Elizabeth live on, albeit with updated language; and at the Federal level, the *Bankruptcy Act* 1966 (Cth) and *Corporations Act* (Cth) each contain anti-defrauding provisions available for use by trustees in bankruptcy and liquidators respectively, although the provision relating to liquidators is almost never used.

The Elizabethan equivalents

The Statue of Elizabeth remained in force in Australia from colonial times up until the 1930s. Following the repeal of the *Statue of Elizabeth* in the UK in 1925 and the transfer of modernised versions of its provisions into the *Law of Property Act*, the Australian States and Territories followed suit by adopted into their own property legislation provisions which closely essentially replicated the provisions on the 1925 UK provisions.

Despite the wording being modernised and simplified, in *Marcolongo v Chen* the High Court confirmed firstly, that *"defraud"* in the modern wording such be understood to incorporate *"delay, hinder or [otherwise] defraud"* from the original statute; and secondly, that the case law which had built up around the Elizabethan statute remained relevant to the interpretation of the revised provisions. The sentiments expressed in *Twyne's* case in Court of Star Chamber thus remain relevant to under Australian law.

Elements of a claim under the modernised Elizabethan equivalents

The Elizabethan equivalent in NSW is typical and is found in section 37A of the Conveyancing Act 1919 (NSW). It has three 3 main elements:

(a) there must have been an *alienation of property*;

(b) with the i*ntention to defraud creditors*; and

(c) the claim must be brought by a *person thereby prejudiced*.

As for the English provisions there is no requirement that the defendant be insolvent or bankruptcy at the time of the transaction or at all. Indeed in *Williams v. Lloyd*, all the members of the High Court treated the *"intent to defraud creditors"* in section 37A as capable of being established despite undoubted solvency at the time of the challenged alienation of property.[94]

Has there been an alienation of property?

The term *"alienation of property"* within the meaning of section 37A is said to have *"the widest possible application"* and *"encompasses every conceivable means whereby property might be removed from the reach of a person's creditors"*.[95] Further, the alienation in question need not occur solely by reason of the acts of the fraudulent debtor. If a person acts collusively with a fraudulent debtor in such a way as to cause ownership of property to move, or to remain away from an apparently passive debtor, there is an alienation of property for the purposes of the section. Nor does it matter that the *"alienation of property"* occurs via a complex series of steps rather than by a single disposition.[96]

Notwithstanding these sweeping statements the High Court has stated that for the purposes of section 37A, the concept of alienation must include a *"parting with property or some interest in property"*.[97] A declaration of trust in favour of a discretionary trust where the legal title does not move has been held not to be an alienation since there is no *"movement"* of the legal estate, and the beneficiaries of the trust obtain no subsisting equitable interest in the underlying property.[98]

What constitutes an "intention to defraud creditors"?

Prior to the 2011 decision of the High Court in *Marcolongo v Chen* there was significant doubt as to what a claimant needed to prove in terms of intention since earlier authority of the High Court had referred to proof of an *"actual"* or *"predominant"* fraudulent intent or purpose and a requirement that a

94. *Williams v Lloyd* [1934] HCA 1; (1934) 50 CLR 341.

95. *Hall v Poolman* (2007) 215 FLR 243; 65 ACSR 123 at [550]. Importantly the Elizabethan equivalents are able to unwind marital property settlements made by consent pursuant to section 79 of the Family Law Act 1975 (Cth).

96. *Caddy v McInnes* (1995) 131 ALR 277.

97. *Cardile v LED Builders Pty Ltd* [1999] HCA 18; (1999) 198 CLR 380 at [65] - [67].

98. *Deputy Commissioner of Taxation v Peter Sleiman Investments Pty Ltd as trustee for the Sleiman Family Trust* [2016] NSWSC 1657 at [62]; these features are sometimes termed *"the badges of fraud"*.

claimant prove an *"element of dishonesty"* in the mind of the transferor. Pleading and proving intention to that standard presented a significant barrier to success under the Elizabethan equivalents.

In *Marcolongo*, the High Court clarified that whilst there is a requirement to prove *"actual intent"* ordinarily that will be arrived at by way of inference. The intention to defraud can be inferred from the evidence as a question of fact and that it is not necessary to prove *"the actual content of the relevant person's mind"*. The relevant intention need not be a predominant or sole intention.[99]

As to the factors which might support such an inference the High Court noted the value of the consideration, if any, was highly relevant observing that it was *"easier to infer a dishonest intention if the conveyance were voluntary than if it were made for consideration"*, whilst noting that the fact that a conveyance was voluntary does not replace the requirement of proof of intent.

Subsequent case law has indicated that other factors will lead to the Court to move readily to the inference of an intention to defraud including where the alienation is made in favour of a family member; made in haste in proximity to events indicating financial stress on the disponer; or where the *"natural and probable consequences"* of the disposition is to defeat or delay of creditors.[100]

The critical time for the finding of an intention is the period leading up to the date of the transfer and the critical mind is that of the transferor,[101] although in the case of a corporation the critical mind is that of a person or persons controlling the company's actions in making the transfer.[102]

Who is a person prejudiced?

As a general proposition *"a person prejudiced"* by an alienation means any person who is entitled to rank as a creditor. In the context of the Elizabethan equivalents, the term *"creditor"* has been interpreted as "*wide enough to include any person who has a legal or equitable right or claim against the grantor or settlor by virtue of which he is or may be entitled to rank as a creditor of the latter*"[103]. It is also wide enough to include creditors who were at the time of the alienation only future creditors if they are ultimately prejudiced by the alienation. Importantly whilst there is no requirement that the transferor be insolvent to bring a claim, it has been held that a completed bankruptcy from which the transferor has been discharged will defeat a claim because property in question is not divisible between the creditors, meaning they are no longer prejudiced in the relevant sense.[104]

As a matter of practice, the bringing of a claim by a creditor without the benefit of the books and records of the transferor or the inquisitorial powers of a liquidator or trustee can present a significant hurdle to the commencement of any claim, and the use of preliminary discovery may be necessary to determine whether a claim is available.

The limitation periods for the bringing of such a claim are based upon the interpretation of the limitation laws of

99. *Marcolongo* at [57].

100. *Commissioner of Taxation v Oswal and Anor (No 6)* (2016) 339 ALR 560; [2016] FCA 762 29 at [66].

101. *Royal v El Ali* [2016] FCA 782.

102. *Marcolongo* at [64].

103. *R v Dunwoody* [2004] QCA 413 at [106].

104. *Griffiths v Falck* (2008) 200 FLR 278; [2008] NSWSC 998.

laws of the State or Territory in question. There is a dearth of case law on the issue. In New South Wales for example, actions to *"recover"* land (assuming that is what a claim under section 37A is properly described as) must be brought within 12 years from when the cause of action *"accrues"* to the plaintiff. Since, as discussed earlier, a creditor prejudiced need not be a creditor at the time of the transaction, and may not be "prejudiced" by the transaction until even later, the limitation period applicable will vary from case to case.

Defences

The modernised wording (insofar as 1924 can still be regarded as modern) provides a defence to the claim in that section 37A(3) provides that the other subsections of 37A do not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors. Whilst there was debate for some time as to whether the onus fell upon a claimant to prove that it does not apply – in other words to prove a lack of good faith or notice of the intention to defraud — recent caselaw has accepted that the onus of proving the "defence" lies upon the party asserting that it applies rather than the claimant.[105]

Remedies

A transaction impugned under the Elizabethan equivalents remains valid until reversed. Transactions are *"voidable"* rather an void, and only voidable to the extent necessary to ameliorate the prejudice which they cause to creditors. Depending upon the circumstances complex orders may need to be made dealing with trusts and the mortgage interests of financial institutions but as a general proposition the transferee will be ordered to do all things necessary to make the property available to satisfy claims of creditors. Orders under the section can be made against a transferee of Torrens title land requiring them to transfer the land as required.[106]

Section 121 of the *Bankruptcy Act 1966* (Cth)

Section 121 provides an avenue for a trustee in bankruptcy to recover property and is one of four types of voidable transaction under that Act. As with the English legislation, there is a separate provision (section 120) which makes an undervalued transactions voidable which may offer an alternative avenue. As to section 121 it differs from the Elizabethan equivalents in several important regards.

Firstly a claim may only be brought by the trustee and the transfer is only void against the trustee.

Secondly, section 121 requires the trustee to prove that the property would *"probably"* have become part of the transferor's estate or would *"probably"* have been available to creditors if it had not been transferred, which is not a requirement under the Elizabethan equivalents. *"Property"* in this context means real or personal property of every description, whether in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property,[107] but it is implicit within section 121 that the property in question must be in the hands of the transferor prior to the act taken to be the transfer.[108] As with the Elizabethan equivalents a transfer is void only to the extent necessary to satisfy the provable debts and costs of the bankrupt estate, and any surplus reverts to the transferee.[109]

Thirdly, since amendments in 1996, the trustee does not need to establish an *"intent to defraud creditors"*. Instead, the test is framed in terms of proving that transferor's *main* purpose in making the transfer was to prevent the property becoming divisible between creditors or hinder or delay that process. Whilst the Act does not limit the ways of establishing the transferor's main purpose, if a trustee can prove that it can be reasonably inferred that the transferor was insolvent or about to become insolvent at the time of the transfer then the main purpose of the transaction will be taken to be the relevant purpose. Importantly once established a finding as to the "*main purpose"* is determinative and the bankrupt cannot rebut it.[110] Trustees can be assisted in this regard by a rebuttable presumption that the bankrupt was insolvent at the relevant time if the bankrupt failed to keep appropriate records or has failed to preserve them.[111] If the trustee attacking the transaction cannot establish insolvency at the time, then the trustee will need to establish that the transferor's subjective purpose, although this can be inferred.[112] The leading authority on intention under section 121 remains the 1998 case of *Cannane v J Cannane Pty Ltd (in lid)* which arguably takes a stricter view of proving purpose then *Marcolongo* allows under the Elizabethan equivalents.

As with the Elizabethan statute, there is no temporal limitation on the status of creditors. In *Mathai v Nelson*, Tracey J said:

105. *Royal v El Ali* at [217].

106. Torrens title is a system of land title whereby the state maintains a register which is conclusive proof of title other than in very limited statutory exceptions. However, it has long been accepted however there remains the ability of a plaintiff to make a claim against a registered proprietor in personam, whereby the registered proprietor, notwithstanding registration, may be ordered to, for example, transfer the land (*Frazer v Walker* [1967] 1 AC 569 at 655). This issue was addressed in *Marcolongo* in respect to the Elizabethan equivalents.

107. *Bankruptcy Act* 1966 (Cth), section 5.

108. *Peldan v Anderson* [2006] HCA 48; 80 ALJR 1588; 229 ALR 432 at [41].

109. See, for example, *Ex parte McCullum* [1920] 1 KB 205.

110. *Re Jury; Ashton v Prentice* [1999] FCA 671, (1999) 92 FCR 68.

111. *Bankruptcy Act 1996* (Cth) section 121(4A).

112. *Prentice v Cummins* (No 5) [2002] FCA 1503 at [95], [2002] FCA 1503; (2002) 124 FCR 67 at 90.

"If the prescribed intention is present when the relevant transfer occurs, the transfer will be void against the trustee."

> *"If the prescribed intention is present when the relevant transfer occurs, the transfer will be void against the trustee. The intention may relate to persons who were, at that time, yet to become creditors. Such persons may or may not choose or be able to prove in the subsequent bankruptcy. It is, therefore, possible for a person to be a creditor for the purposes of s.121 even if that person never seeks to prove in the bankruptcy and was not foreseen as a future creditor at the time of the transfer."*[113]

In terms of limitations under section 127(4) an action under section 121 can be brought "at any time" meaning that, aside from the satisfaction of the elements of section 121 a claim can be brought in respect of transfers which occurred decades before. In one case in brought in 2012, properties purchased in 1978 and 1982 were ordered to be transferred to a trustee to meet the claims of creditors.[114] Due to the gravity of the allegation being made against the bankrupt it is now firmly accepted that whilst the civil standard balance of probabilities apply that this will be informed by the so-called *Bringinshaw* standard[115] – meaning that he circumstances appearing in the evidence must give rise to a reasonable and definite inference, not merely to conflicting inferences of equal degree of probability.[116]

As with the Elizabethan equivalents, there is protection for a purchaser for value without notice, however, under the Bankruptcy Act the requirements are more stringent. The consideration paid must have been "at least" market value. The Act excludes a variety of things from being regarded as contributing to the consideration include including "love and affection", a promise to marry, or the grant of a right to the transferor to live in the property transferred. To successfully make out the defence the transferee must also prove firstly that they did not know the transferor's main purpose for the transaction, and that they "could not reasonably have inferred" the main purpose and secondly, that they could not have reasonably inferred at the time of the transfer, that the transferor was, or was about to become, insolvent. These provisions provide powerful barriers to a spouse or family member successfully raising a purchaser for value without notice style defence.

The commencement of the bankruptcy and the availability of section 121 to the trustee has been held *not* to oust the availability of the Elizabethan equivalents to creditors, although they require leave to proceed against the bankrupt in the usual way and such leave is conditional upon any net fruits of the litigation be provided to the trustee to benefit creditors generally.[117]

The utility of section 121

Section 121 gives a trustee some potential benefits over a claimant under the Elizabethan equivalents since intention can be proven directly or it can be proven by showing the bankrupt was insolvent or about to become insolvent at the time of the transfer. A trustee also gets the benefit of the presumptions as to solvency from the absence of books and records and the information gathering powers provided elsewhere in the Bankruptcy Act. On the other hand, unlike a claimant under the Elizabethan equivalents, a trustee must prove the wrongful purpose was the *"main purpose"*, rather than merely a purpose.

113. *Mathai v Nelson* [2012] FCA 1148; 208 FCR 165.

114. ibid.

115. *Briginshaw v Bringshaw* [1938] HCA 34, 60 CLR 336: a divorce case in which adultery was alleged. Dixon J opined that where serious allegations such as adultery were made *"reasonable satisfaction"* should not be produced by inexact proofs, indefinite testimony, or indirect inferences" (at 362).

116. *Trustees of the Property of Cummins (A Bankrupt) v Cummins* [2006] HCA 6; (2006) 227 CLR 278 at [34].

117. *Zaravinos v Houvardas* [2004] NSWCA 421. at [40]; *Kattirtzis v Zaravinos* [2001] FCA 1158.

Notwithstanding some criticism of its drafting by the High Court, this section 121 is regularly used by trustees and has shown its utility over many years.[118]

Section 588FE(5) of the Corporations Act (Cth)

The final avenue, almost entirely unused, is found within Part 5.7B of the *Corporations Act* which deals with the recovery of property or compensation for the benefit of creditors of an insolvent company.

Section 588FE sets out a wide variety of types of voidable transactions in respect of which relief can be sought, and in respect of each type of transaction, it specifies a time limit for the look back period within which the transaction must have occurred (referable to so-called *"relation back day"* defined in section 91 of the Act and usually the date of filing of the winding up application). If a transaction can be shown to fall within one of the categories in section 588FE then, under section 588FG, the Court has wide discretion to make a variety of orders including orders for the payment of money or the return of property to the company.

Section 588FE(5) defines a category of transaction which includes a requirement for a liquidator to prove that the company entered into the transaction for the purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company. It was added to the Corporations Act in 1992 and it is the only category of transaction within section 588FE which requires the liquidator to prove the company's purpose.

Elements of a 588FE(5) claim

In order to satisfy the definition in section 588FE(5) the liquidator must make out four key elements.

The first is that there must be a *"transaction"* as defined in section 9 of the Act although the *"transaction"* can have a series of steps.

Second, the transaction must be an *"insolvent transaction"* in that it must be:

(a) an *"unfair preference"*: a transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, or more than the creditor would receive in a winding up of the company (s 588FA); and/or

(b) an *"uncommercial transaction"*: a transaction which it could be expected that a reasonable person in the company's circumstances would not have entered into (s 588FB); and

(c) at the time the transaction occurred the company must be been insolvent, or the transaction in question made it insolvent (s 588FC).

The third element is the *"purpose element"*. Proof of this element is similar to proving intention under the Elizabethan equivalents and does require proof of subjective intent by the company or its agents.[119] Unlike section 121 of the Bankruptcy Act, the purpose need not be a sole or main purpose merely *"a purpose"*.

Why would a liquidator use section 588FE(5)?

The only benefit to a liquidator using section 588FE(5) is that is permits a 10 year lookback period. By way of comparison the lookback period for uncommercial transaction which is an insolvent is two years; or four years if a related entity of the company was party to the transaction (s 588FE(4)).

An inutile provision?

Notwithstanding its detailed provisions, in the 30 years since becoming part of Australia's corporate law, section 588FE(5) has been invoked in only a handful of cases[120].

The key difference between the provisions in the Bankruptcy Act and the Corporations Act is that under the scheme of the Corporations Act there are a variety of categories of transactions which are voidable without proving purpose and so unless the transaction predates the lookback period otherwise applicable there is no utility in using section 588FE(5).

Second, unlike a trustee using section 121 of the *Bankruptcy Act*, a liquidator using section 588FE(5) must prove insolvency at the time of the transaction but that does not obviate the need to also prove purpose.

The requirement for a liquidator to prove both purpose and insolvency makes section 588FE(5) the most onerous avenue to reverse an defrauding transaction and gives the odd result that (assuming leave is granted) a creditor of the company bears a lighter burden to impugn a transaction of the company than its liquidator even though the liquidator represents the interests of the underlying creditors and is usually must better equipped in terms of access to information than a creditor. The combination of these factors mean section 588FE(5) is essentially otiose and a barrier to reversing transaction which might otherwise have been voidable were the Elizabethan equivalents available for use by liquidators.

The drawbacks of the Australian position

As can be seen, the Australian approach is fragmented and complicated. Differing tests, onuses and presumptions apply depending upon which provision is used by the party seeking relief. As a result distinct, though overlapping, case law has had to be developed to deal with each provision. The cause of the complexity is, at least to an extent, structural. The Elizabethan equivalents are State-based ligislation whereas the Bankruptcy and Corporation Acts are Federal statues. However, even within the Federal legislation there is no uniformity of approach to fraudulent transactions or the grounds on which they can be reversed. One is left to ponder whether attempts to create bespoke provisions at the Federal level have created anything but unnecessary complexity and confusion.

Overview

The different legislative choices which have been made in Australia and in England (and of course, in other jurisdictions) mean that, although they have each evolved from a common Elizabethan root, and although comparisons will often be helpful, particular care must be used when considering authority which will reflect the local circumstances. ■

118. *Peldan v Anderson* [2006] HCA 48; 80 ALJR 1588; 229 ALR 432.

119. *Ashala Model Agency Pty Ltd (in liq) & Anor v Featherstone & Anor* [2016] QSC.121.

120. *Re SolfirePty Ltd (in liq)*[1998] 2 Qd R 92; *Ashala Model Agency Pty Ltd (in liq) & Anor v Featherstone & Anor* [2016] QSC.121; On appeal: *Featherstone v Ashala Model Agency Pty Ltd (in liq)* [2017] QCA 260 (On appeal) are rare examples.

BOX 2
THE AUSTRALIAN PROVISIONS

CONVEYANCING ACT 1919 - SECT 37A
Voluntary alienation to defraud creditors voidable

37A Voluntary alienation to defraud creditors voidable

1. Save as provided in this section, every alienation of property, made whether before or after the commencement of the Conveyancing (Amendment) Act 1930, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.
2. This section does not affect the law of bankruptcy for the time being in force.
3. This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors.

BANKRUPTCY ACT 1966 - SECT 121
Transfers to defeat creditors

Transfers that are void

1. A transfer of property by a person who later becomes a bankrupt (the ***transferor***) to another person (the ***transferee***) is void against the trustee in the transferor's bankruptcy if:

   (a) the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and

   (b) the transferor's main purpose in making the transfer was:

   i. to prevent the transferred property from becoming divisible among the transferor's creditors; or

   ii. to hinder or delay the process of making property available for division among the transferor's creditors.

Note:

For the application of this section where consideration is given to a third party rather than the transferor, see section 121A.

Showing the transferor's main purpose in making a transfer

2. The transferor's main purpose in making the transfer is taken to be the purpose described in paragraph (1)(b) if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent.

Other ways of showing the transferor's main purpose in making a transfer

3. Subsection (2) does not limit the ways of establishing the transferor's main purpose in making a transfer.

Transfer not void if transferee acted in good faith

4. Despite subsection (1), a transfer of property is not void against the trustee if:

   (a) the consideration that the transferee gave for the transfer was at least as valuable as the market value of the property; and

   (b) the transferee did not know, and could not reasonably have inferred, that the transferor's main purpose in making the transfer was the purpose described in paragraph (1)(b); and

   (c) the transferee could not reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent.

Rebuttable presumption of insolvency

4A. For the purposes of this section, a rebuttable presumption arises that the transferor was, or was about to become, insolvent at the time of the transfer if it is established that the transferor:

   (a) had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor's business transactions and financial position; or

   (b) having kept such books, accounts and records, has not preserved them.

Refund of consideration

5. The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee.

What is not consideration

6. For the purposes of subsections (4) and (5), the following have no value as consideration:

   (a) the fact that the transferee is related to the transferor;

   (b) if the transferee is the spouse or de facto partner of the transferor--the transferee making a deed in favour of the transferor;

   (c) the transferee's promise to marry, or to become the de facto partner of, the transferor;

   (d) the transferee's love or affection for the transferor;

   (e) if the transferee is the spouse, or a former spouse, of the transferor--the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*;

   (f) if the transferee is a former de facto partner of the transferor--the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*.

Exemption of transfers of property under debt agreements

7. This section does not apply to a transfer of property under a debt agreement.

Protection of successors in title

8. This section does not affect the rights of a person who acquired property from the transferee in good faith and for at least the market value of the property.

Meaning of **transfer of property** and **market value**

9. For the purposes of this section:

   (a) ***transfer of property*** includes a payment of money; and

   (b) a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person; and

   (c) the ***market value*** of property transferred is its market value at the time of the transfer.

CORPORATIONS ACT 2001 - SECT 588FE

Voidable transactions

5. The transaction is voidable if:

   (a) it is an insolvent transaction of the company; and

   (b) the company became a party to the transaction for the purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company; and

   (c) the transaction was entered into, or an act done was for the purpose of giving effect to the transaction, during the 10 years ending on the relation-back day.