Neutral Citation Number: [2025] EWCA Civ 268

Case No: CA-2024-001319

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
Mr Justice Rajah
[2024] EWHC 1081 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2025

Before:

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE JEREMY BAKER

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Between:

CHRISTOPHER PURKISS **(as Liquidator of Ethos Solutions Limited)**	**Applicant/ Appellant**
- and -	
(4) TIM KENNEDY **(12) KENNETH JARRARD** **(14) PAUL MURRAY** **(17) RUPERT DAVID POTTER** **(20) BALAJI DASARATHY** **(24) ROBERT ENGLEDOW** **(27) RICHARD APPLEYARD** **(29) PHILLIP HARRIS** **(30) GRAEME HUNT** **(32) SIMON LOFTING** **(34) COSTAS LEMONIDES** **(35) ORITSTIMEYIN OMAYEMI OKORO** **(36) DAVID JOHN PECK** **(38) DAVID ADEYINKA** **(40) GITA PATHMANATHAN** **(41) PAUL MANKU** **(42) PERRY OFFER** **(43) SUKURU YILDIZ** **(47) PIERS WEBSTER** **(48) JOHN REIVERS** **(50) FATIMA MANKU/CHOUDHARY** **(54) JAMAL ALMANSOOR** **(56) ARVIND SABHARWAL**	**Respondents**

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Hugh Sims KC and Simon Passfield KC (instructed by **Clarke Willmott LLP**) for the **Appellant**
Daniel Bayfield KC, Jon Colclough and Luke Tucker Harrison (instructed by **Keidan Harrison LLP**) for the **Respondents**

Hearing date: 6 March 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This appeal, from a decision of Mr Justice Rajah ("the Judge") dated 8 May 2024, raises issues as to the application of section 423 of the Insolvency Act 1986 ("the 1986 Act") where transactions have been entered into with a view to avoiding tax liabilities.

2. At the conclusion of the hearing before us, the parties were informed that the appeal would be dismissed for reasons to be given later. These are my reasons for joining in that decision.

Basic facts

3. Ethos Solutions Limited ("the Company") was incorporated on 24 September 2008. At first, Mr Justin Webster was the Company's only director and shareholder. However, Mr Webster resigned as a director on 9 October 2008 and from 9 February 2009 the Company's sole director was Mr Jeremy Clark. On 24 September 2011, Mr Clark also became the owner of the Company's 100 issued shares.

4. The Company was formed to give effect to advice which Mr Webster had received from Montpelier Tax Consultants (Isle of Man) Limited. It operated a tax avoidance scheme designed to enable self-employed individuals to reduce the income tax and national insurance contributions payable on their remuneration.

5. Those participating in the scheme would enter into contracts of employment with the Company under which they were to be paid no more than a modest salary (for example, basic remuneration at £6.75 per hour, up to a maximum of 37.5 hours a week). The Company would in turn enter into consultancy agreements with end users or, alternatively, participants' personal service companies or employment agencies (who would themselves contract with the end users) pursuant to which the Company agreed to supply the individuals' services in return for fees significantly in excess of the salaries payable by the Company. When the Company received such fees, it would (i) retain (and account to HM Revenue and Customs ("HMRC") for) any applicable value added tax, (ii) retain an "administration fee" averaging about 13.4%, (iii) pay what was due under the relevant contracts of employment and (iv) transfer the balance, without any deduction for income tax or national insurance contributions, to the Ethos Solutions Ltd Business Bonus Trust ("the Trust"), which it had established for the benefit of employees and their dependants. The trustee of the Trust, a Jersey company called Nautilus Trustees Limited ("Nautilus") to which the Company had agreed to pay a fee of 2% on all payments made into the Trust, would put the net sums into sub-trusts in the names of the participants and, on request, transfer the money to those participants in the form of discretionary loans.

6. The Judge explained in paragraph 10 of his judgment ("the Judgment") that he had been shown, by way of worked example, a manuscript note relating to one participant, Dr Mazhar Mirza. The Judge said this about the note:

> "This shows that the Company received consultancy fees of £9,240 based on two invoices for services provided by Dr Mirza to an end user as an employee of the Company. After deducting £1016.40 for the administration fee, £8223.60 or 89% of Dr Mirza's earnings was left over. Out of this, two payments of

> £253.16 and £1028.46 were made to Dr Mirza as payroll. This left £6941.98 to be paid to the Trust (plus the trust fee at 2% of this sum, of £138.84). Any PAYE and NIC due on the payroll payments – as well as the 2% trust fee – were borne by the Company out of its administration fee, such that the payroll payments to individuals were essentially 'grossed up'."

Dr Mirza thus "received apparently net of all tax c.89% of the remuneration for his services", with "75% of that remuneration [being] channelled to the Trust, not treated by the Company as subject to tax, and passed on to Dr Mirza as loans": see paragraph 11 of the Judgment.

7. The position was summarised as follows in the skeleton argument of Mr Daniel Bayfield KC, Mr Jon Colclough and Mr Luke Tucker Harrison on behalf of the respondents:

> "Thus, the Company made (or at least thought it made) a profit of c.10% (the 13.4% fee less payment of 2% to the trustee less payment of tax on the nominal remuneration) of the amounts that the workers were earning. The Company did not do anything beyond marketing and administering the scheme."

8. An introductory letter from Mr Clark stated that "[o]nce you are a beneficiary of the Business Bonus Trust you may ask for a loan at any time" and that "[t]he loans you receive will not be reported to HMR&C and are not a taxable benefit of your employment". An "FAQs" document explained:

> "… Q. What other benefits are there?
>
> A. A fund has been established for the employees of Ethos Umbrella the fund is called a Business Bonus Trust ('BBT'). The fund is managed in Jersey. Discretionary loans are available from the fund. The loans are NOT commercial loans and are therefore NOT interest bearing. All loans are recallable.
>
> Q. Will HMR&C be informed that I have taken out loans?
>
> A. No. You do not have to inform HMR&C of the loans.
>
> …
>
> Q. Will I have to pay benefit in kind tax?
>
> A. No, the loans are not subject to any taxation.
>
> Q. Is this legal?
>
> A. Advice has been taken from Senior tax Counsel. Our accountants will support you with any HMR&C investigation.

> Q. Is this structure an Employee Benefit Trust?
>
> A. No but it has similarities. Over the years EBTs have been challenged and have proved resistant to challenges. The variations that are included in this planning make the structure both resistant and compliant.
>
> Q. Is this planning registered with HMR&C?
>
> A. Yes the planning itself is registered but your involvement will NOT be notified to HMR&C.
>
> Q. Have Ethos taken legal advice on this tax planning
>
> A. Yes. Senior tax counsel has advised in relation to this planning. But we can offer no guarantees that legislation will not change."

9. It can be seen from the Company's 2010 accounts that it paid £2,110,911 to the Trust in 2009 and £4,759,858 in 2010. These payments were made without any deduction for income tax or national insurance contributions.

10. The Judge observed in paragraph 2 of the Judgment that "[i]t was the Company's intention, based no doubt on the then prevailing decisions in *Dextra Accessories Ltd v HM Inspector of Taxes* … and *Sempra Metals Ltd v HMRC* … , that no liability would fall on it to deduct income tax from the payments it made to the employee benefit trust". Soon after the Company began trading, however, HMRC started to publish statements that it considered arrangements such as the Company had adopted to be ineffective to avoid tax. In August 2009, in "Spotlight 5", a digital publication, HMRC referred to the use of employee benefit trusts and said that they were "actively challenging examples of such arrangements and considering legislative options to end further usage of these schemes". In the following year, on 9 December, the Government published draft legislation designed to tackle tax avoidance schemes involving the use of employee benefit trusts and a written ministerial statement warned that the new regime would be applied to any payments made after 9 December 2010. The Finance Act 2011 subsequently introduced, by its schedule 2, what have become known as the "disguised remuneration" rules.

11. In response to what became the Finance Act 2011, the Company sought to modify its scheme by contracting with a Jersey business known as "Scope Self Employment Jersey" ("Scope") for the supply of the respondents' services rather employing them itself.

12. On 4 December 2012, HMRC issued determinations assessing the Company as liable for income tax and national insurance contributions totalling £2,328,057.72 in respect of payments made to the Trust in the tax years 2008-2009 and 2009-2010. On 18 December 2012, the Company went into creditors' voluntary liquidation without either making any payment to HMRC or seeking to appeal. On 9 January 2013, HMRC submitted a proof of debt in the sum of £2,533,753.10.

13. HMRC's view of the law was vindicated in *RFC 2012 plc v Advocate General for Scotland* [2017] UKSC 45, [2017] 1 WLR 2767. *Sempra Metals Ltd v Revenue and Customs Comrs* [2008] STC (SCD) 1062 and *Dextra Accessories Ltd v MacDonald* [2002] STC (SCD) 413 were there held to have been wrongly decided: see paragraphs 55 to 58. Lord Hodge (with whom Lord Neuberger, Baroness Hale, Lord Reed and Lord Carnwath agreed) commented in paragraph 59:

> "Parliament in enacting legislation for the taxation of emoluments or earnings from employment has sought to tax remuneration paid in money or money's worth. No persuasive rationale has been advanced for excluding from the scope of this tax charge remuneration in the form of money which the employee agrees should be paid to a third party, or where he arranges or acquiesces in a transaction to that effect."

14. The present proceedings were issued on 13 December 2018. By them, the Company's then liquidator, Ms Michaela Hall, sought orders under section 423 of the 1986 Act. The trial before the Judge related to the claims against 23 of the original respondents. By then, Mr Christopher Purkiss ("the Liquidator") had succeeded Ms Hall as liquidator of the Company. In essence, it was the Liquidator's case that each of the respondents should be ordered to repay to the Company a sum equal to the income tax and national insurance contributions which should have been deducted from the money paid to the Trust in respect of that respondent. The relevant period ran from 4 March 2009 (when a payment of £5,383.48 was made to the Trust in respect of the forty-second respondent, Mr Perry Offer) to 1 April 2010 (when the Trust was paid £3,076.05 in respect of the thirty-second respondent, Mr Simon Lofting).

15. The Judge dismissed the claim, but the Liquidator now challenges that decision in this Court.

The statutory framework

16. Section 423 of the 1986 Act, which is headed "Transactions defrauding creditors", provides so far as material 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;
>
> (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.
>
> …
>
> (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'."

17. By section 424 of the 1986 Act, an application for an order under section 423 can be made by, among others, a liquidator of "the debtor" or "a victim of the transaction".

18. Case law establishes the following propositions as regards section 423 of the 1986 Act:

    i) In construing section 423, the Court must look at the relevant wording "in the context in which it appears in the section and in the Act as a whole, bearing in mind the purpose for which it was enacted: see *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, paras 29 to 31": *El-Husseiny v Invest Bank PSC* [2025] UKSC 4, [2025] 2 WLR 320 ("*El-Husseiny*"), at paragraph 32, per Lady Rose and Lord Richards;

    ii) It is "unquestionably the debtor's subjective purpose that must be established": *El-Husseiny*, at paragraph 28, per Lady Rose and Lord Richards. The Judge has to be satisfied that the debtor "actually had the purpose, not that a reasonable person in his position would have it": *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542, [2007] 1 WLR 2404 ("*Hill*"), at paragraph 86, per Arden LJ. "There can be no doubt but that section 423(3) requires the person entering into

the transaction to have a particular purpose" and "[i]t is not enough that the transaction has a particular result": *Hill*, at paragraph 130, per Arden LJ;

iii) Section 423 will apply "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": *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981, [2002] BCC 943, at paragraph 23, per Arden LJ. Thus, "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": *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176, [2019] BCC 96 ("*Ablyazov*"), at paragraph 13, per Leggatt LJ. "It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose" and, "[i]f it was, then the transaction falls within s.423(3), even if it was also entered into for one or more other purposes": *Ablyazov*, at paragraph 14, per Leggatt LJ. In paragraph 17 of his judgment in *Ablyazov*, Leggatt LJ said that the first instance judge had been "correct" to ask whether the debtor had "positively intended" to put funds beyond the reach of a creditor;

iv) "The fact that lawyers may have advised that the transaction is proper or can be carried into effect does not by itself mean that the purpose of the transaction was not the [section 423(3)] purpose": *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd (No. 2)* [1990] BCC 636, at 644, per Scott J. See also *National Westminster Bank plc v Jones* [2001] 1 BCLC 98, at paragraph 107, per Neuberger J;

v) For the purposes of section 423(3)(b), "[t]he 'interests' of a person are wider than his rights": *Hill*, at paragraph 101, per Arden LJ;

vi) The transaction at issue need not have been directed at the "victim" making the claim. In *Hill*, Arden LJ explained in paragraph 101:

> "For a person to be a 'victim' there is no need to show that the person who effected the transaction intended to put assets beyond his reach or prejudice his interests. Put another way, a person may be a victim, and thus a person whose interests the court thinks fit to protect by making an order under section 423, but he may not have been the person within the purpose of the person entering into the transaction. That person may indeed have been unaware of the victim's existence"; and

vii) The fact that the debtor denies having had a section 423(3) purpose need not bar the Court from inferring that he had such a purpose: see *Hill*, at paragraph 86, per Arden LJ.

The Judge's decision

19. As the Judge explained in paragraph 32 of the Judgment, it was common ground before him that, for the purposes of section 423 of the 1986 Act, there had been in respect of each respondent a composite transaction with the following elements:

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

20. The Judge was satisfied that each such transaction was "at an undervalue" within the meaning of section 423 of the 1986 Act. The Company, he said in paragraph 36 of the Judgment, "was in a worse position as a result of entering into each Transaction than it would have been in had it not entered into that Transaction in the first place". The Judge had accepted in paragraph 33 that the Company had been liable to "(i) deduct income tax and NIC from the monies which it received from the end user and paid to the Trust; and (ii) pay those monies to HMRC in accordance with regs.21 and 68 of the Income Tax (Pay As You Earn) Regulations 2003 and para.3(1) of Schedule 1 to the Social Security Contributions and Benefits Act 1992". The Judge went on in paragraph 34:

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

21. The Judge was not, however, persuaded that the Company had entered into the transactions for a "prohibited purpose", viz. one specified in section 423(3) of the 1986 Act. The Judge noted that the Liquidator's primary case was that "the Company had a prohibited purpose because the Company entered into the Transaction in the mistaken belief that the Respondents could thereby avoid a liability to income tax and NIC from the remuneration for their services to end users" and that it had been argued on behalf of the Liquidator that "an intention to prevent a tax liability arising is an intention to prejudice the interests of HMRC in respect of the hypothetical claim for the tax liability

which is avoided": see paragraphs 39 and 40 of the Judgment. The Judge rejected that submission. His core reasoning is to be found in paragraph 46, in which he said:

> "I am satisfied that [counsel for the Liquidator's] submission is flawed.
>
> a. Section 423(3)(a) is concerned with a prohibited purpose of putting assets out of the reach of 'a person who is making [a claim], or may at some time make, a claim'. That clearly contemplates a current claim or a future claim. Section 423(3)(b) makes it a prohibited purpose to otherwise prejudice 'such a person in relation to the claim which he is making or may make.' The words 'may make' in s.423(3)(b) are a reference to the claim in s.423(3)(a) that a person 'may at some time make'. The 'claim' which both ss. 423(3) (a) and (b) are concerned with are claims which a person is presently making or one which a person may make in the future.
>
> b. The tax avoidance purpose on which [counsel for the Liquidator] relies is that the scheme would secure that no income tax and NIC liability arose in relation to the remuneration received in respect of the Respondents' services. The purpose was therefore that HMRC would have no claim which it could make and not to prejudice a claim which it was making at the time of the Transaction or might make in the future.
>
> c. I do not consider there to be ambiguity as to what s.423(3) means. If there were, it is important to remember that the policy behind s.423 is that debts are paid before gifts are made. That policy is not undermined by a transaction which prevents a debt arising; it is consistent with it."

22. The Liquidator had advanced an alternative case that the Court should infer that the Company had entered into each transaction for the purpose of placing assets beyond the reach of HMRC. What had to be shown, the Judge said in paragraph 52 of the Judgment, was that "a purpose of the Company in setting up the scheme was that, if it failed, its implementation would nevertheless impede HMRC from recovering tax due to HMRC". The Judge did not accept that this had been established. When refusing permission to appeal, he expressed the view that this case "was not remotely satisfied on the evidence".

The appeal

23. The Liquidator now challenges the Judge's conclusions on both his primary case and his alternative case. The Liquidator contends, first, that the Judge was wrong to hold that the purpose of preventing HMRC from making a claim against the Company was not a prohibited purpose and, secondly, that the Judge ought to have concluded that the

Company had the purpose of making it more difficult for HMRC to recover tax in the event that the scheme which it was using was ineffective to avoid a liability arising.

24. By a respondent's notice, the respondents support the Judge's decision not only on the grounds which he gave but on the basis that (a) he was mistaken in deciding that the Company had entered into transactions at an undervalue and (b) relief should anyway be refused as a matter of discretion.

The Liquidator's primary case

25. The Liquidator notes in paragraph 19 of his skeleton argument for this appeal that the Judge correctly identified that the primary case before him was that "by seeking to avoid incurring a liability to deduct and pay tax on the monies which it paid to the Respondents, the Company sought to prejudice the interests of HMRC in relation to the claim it may (otherwise) make against the Company". The Liquidator's primary case before this Court proceeds on the same basis. As is explained in paragraph 34 of his skeleton argument, the Liquidator contends as follows:

> "The Company entered into the Composite Transaction in the hope that it would prevent HMRC from being able to make a claim in respect of the tax element of those monies. Thus, the Company's clear purpose was to prejudice the interests of HMRC in respect of the claim which (but for the Scheme, if effective) it might (and would) make."

26. The question therefore arises whether an intention to *prevent a liability arising at all* can amount to a section 423(3) purpose. For section 423(3) to be satisfied, the relevant transaction must have been entered into 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". Is that condition met if the aim is to stop any liability accruing?

27. The Judge observed in paragraph 42 of the Judgment that the Liquidator's submissions, if correct, would mean that "any steps taken with the intention of minimising tax, and all legitimate tax avoidance, would be a prohibited purpose", and he expressed the view that that would be a "remarkable outcome". Taking issue with whether the outcome would be "remarkable", Mr Hugh Sims KC, who appeared for the Liquidator with Mr Simon Passfield KC, pointed out that relief would be granted under section 423 only if the relevant transaction had been entered into at an undervalue as well as with a section 423(3) purpose and, further, the Court considered it appropriate to make an order in the exercise of its discretion under section 423(2). Mr Sims also drew a distinction between "tax mitigation" and "cases of unacceptable tax avoidance", citing a passage from *Ensign Tankers (Leasing) Ltd v Stokes* [1992] 1 AC 655 ("*Ensign Tankers*"), at 681, in which Lord Goff said:

> "I approach this case on the basis that there is a fundamental difference between tax mitigation and unacceptable tax avoidance. Examples of the former have been given in the speech of my noble and learned friend. These are cases in which the taxpayer takes advantage of the law to plan his affairs so as

> to minimise the incidence of tax. Unacceptable tax avoidance typically involves the creation of complex artificial structures by which, as though by the wave of a magic wand, the taxpayer conjures out of the air a loss, or a gain, or expenditure, or whatever it may be, which otherwise would never have existed. These structures are designed to achieve an adventitious tax benefit for the taxpayer, and in truth are no more than raids on the public funds at the expense of the general body of taxpayers, and as such are unacceptable."

The present case, Mr Sims argued, involved "unacceptable tax avoidance" rather than "tax mitigation": the Company, he said, sought to "disguise" payments of remuneration to its employees in a "wholly artificial" arrangement.

28. I have not, however, been persuaded that it is relevant to distinguish between "tax mitigation" and "unacceptable tax avoidance" in the context of the Liquidator's primary case. That case, if well-founded, would surely affect both. The purpose is the same in both cases: namely to prevent a liability to tax from arising. The difference between the two is not the purpose, but the means by which that purpose is put into effect. Were it correct that preventing a liability to a person arising could constitute "prejudicing the interests of a person [who is making, or may at some time make, a claim] in relation to the claim which he is making or may make" (within the meaning of section 423(3)(b)), that could apply to "tax mitigation" of a commonplace kind. Suppose, for example, that, someone paying higher rate tax made a gift to a child who was at university in part because the recipient, having no other income, would not be liable for tax on returns from the property. On the Liquidator's primary case, the donor would have entered into the transaction "for the purpose … of prejudicing the interests of [HMRC as 'a person who is making, or may at some time make, a claim against him'] in relation to the claim which he is making or may make" since HMRC would have been denied tax which would otherwise have become due.

29. Parliament is, I think, unlikely to have intended section 423 to extend to such "tax mitigation". After all, "tax mitigation" of the kind to which Lord Goff referred in *Ensign Tankers* is not generally considered to be objectionable. In *IRC v Duke of Westminster* [1936] AC 1, Lord Tomlin said at 19, "Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be". In *IRC v Brebner* [1967] 2 AC 18, Lord Upjohn commented at 30 that "[n]o commercial man in his senses is going to carry out a commercial transaction except upon the footing of paying the smallest amount of tax that he can". In *Hill*, at paragraph 87, Arden LJ spoke of section 423 "not prevent[ing] a person from acting on legitimate tax avoidance advice".

30. Further, I do not think the philosophy underlying section 423 requires an intention to prevent a liability accruing to be seen as a section 423(3) purpose. In a passage quoted by Lady Rose and Lord Richards in *El-Husseiny*, at paragraph 23, the report of the committee chaired by Sir Kenneth Cork on *Insolvency Law and Practice* (Cmnd 8558) (1982), at paragraph 1202, described predecessors of section 423 of the 1986 Act as having proceeded on the basis that "debts must be paid before gifts can be made". That principle does not seem to me to be offended where a person acts to stop a debt coming into existence. If the objective is achieved, there will be no debt to be paid ahead of a gift.

31. Nor, crucially, do the terms of section 423 appear to me to support the Liquidator's primary case. The Judge said in paragraph 46(b) of the Judgment that the Company's purpose was "that HMRC would have no claim which it could make and not to prejudice a claim which it was making at the time of the Transaction or might make in the future". I agree. Where a person succeeds in preventing a tax liability from arising, there will simply not be a person who "is making or may make" a claim with "interests" to be prejudiced. As the extract from paragraph 19 of his skeleton argument quoted in paragraph 25 above suggests, the Liquidator is in effect seeking to construe section 423(3)(b) as if it included the word "otherwise" and so referred to prejudicing the interests of a person in relation to a claim "which he is making or may *otherwise* make". That is not, however, what section 423(3)(b) says.

32. In short, it seems to me that entering into a transaction in order to ensure that a liability does not accrue does not involve a section 423(3) purpose. The Liquidator's primary case therefore fails.

The Liquidator's alternative case

33. The Liquidator's other ground of appeal is to the effect that the Judge ought to have accepted his alternative case: that the Company's purpose in entering into each composite transaction was to make it more difficult for HMRC to recover tax in the event that the scheme was ineffective to avoid a liability to tax arising.

34. As Mr Sims recognised, this ground of appeal involves a challenge to the Judge's factual conclusions. The circumstances in which an appellate Court is justified in interfering with a finding of fact made by a trial judge are, of course, limited. Thus, in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600, Lord Reed (with whom Lords Kerr, Sumption, Carnwath and Toulson agreed) said at paragraph 67:

> "in the absence of some other identifiable error, such as (without attempting an exhaustive account) 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, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

35. In *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48, at paragraph 2, Lewison LJ (with whom Males and Snowden LJJ agreed), took the following principles to be "well-settled":

> "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would

> have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

36. Lewison LJ had earlier, in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] ETMR 26, said at paragraph 114:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."

37. In rejecting the Liquidator's alternative case, the Judge made these points:

    i) There was no evidence from Mr Webster, Mr Clark or any respondent: see paragraph 52 of the Judgment;

    ii) There was no documentary evidence "recording, or even hinting at", the alleged intention. The "closest Mr Sims can point to", the Judge said, "is the fact that the Company advised the Respondents that they need not disclose the loans they were receiving from the Trust to HMRC", but that was "consistent with a belief that the Scheme worked": see paragraph 52 of the Judgment;

    iii) An exchange of correspondence between the Company and HMRC which was said to show that "the Company had deliberately failed to provide information to HMRC" did not justify the inference: see paragraph 53 of the Judgment. The Judge was "not prepared to accept" that the correspondence demonstrated "a

deliberate refusal to provide information which the Company had and could provide from its bank statements, as opposed to an inadvertent error": see paragraph 55. In any event, the Judge said, "this is simply not sufficient to justify an inference that from the outset the Company's purpose was to impede HMRC": see paragraph 55; and

iv) The Company "openly identified in its filed accounts the total of the payments it had made to the Trust": see paragraph 55 of the Judgment.

38. For his part, Mr Sims pointed out that Mr Clark had died by time of the trial. He also said that the Liquidator could not reasonably have been expected to have called Mr Webster, who had originally been a respondent and was the subject of criticism by the Liquidator. He further argued that those behind the Company will have been aware that there was a risk that HMRC would challenge its scheme; that the Company's issued share capital (viz. £100) was inevitably going to be inadequate to allow it to meet its obligations to HMRC if the scheme did not work; that an offshore trust was used, bringing opacity; that, with the passing of the Finance Act 2011, the Company did not just abandon its scheme but sought to modify it by contracting with "Scope", another offshore entity; and that, contrary to the Judge's view, it can be seen from the Company's correspondence with HMRC that it deliberately failed to provide information which HMRC had requested.

39. There is some force in the last of these points. On 26 September 2011, HMRC wrote to the Company requiring it to answer, among others, the following questions:

> "6. Has any director or employee of [the Company] received any payment, loan, benefit or other award from the [Trust] either directly or indirectly?
>
> 7. If the answer to question 6 is 'yes', what are the dates, amounts and nature of such awards?
>
> 8. If the answer to question 6 is yes, have PAYE and NICs been deducted from such payments? If not, why not?
>
> 9. What are the dates on which the payments, or transfer of other assets, were made by [the Company] to the [Trust]. In what form and where are these assets held. (Bank account details, etc)"

40. The Company replied to these questions as follows in a letter dated 8 November 2011 which was signed by Mr Clark:

> "6. Yes
>
> 7. The amounts and nature of any award or benefit was considered by the trustees who are Nautilus Trust. We do not have access.
>
> 8. We understand that some employees of [the Company] have sought fully commercial loans from the [Trust].

> 9. This information is in the sole possession of Nautilus Trust."

41. These responses were plainly unsatisfactory. Although the Company's answer to question 8 referred to employees having sought "fully commercial loans" from the Trust, the "FAQs" document quoted in paragraph 8 above specifically said that loans from the Trust were "NOT commercial loans and are therefore NOT interest bearing". Further, whether or not the Company had access to information held by Nautilus, it did not need it to reply much more fully. The Company should have had no difficulty detailing its payments to the Trust from its own records, as required by question 9. Again, with regard to questions 6 to 8, Mr Clark (who was the Company's director during the relevant period) would not have had to ask Nautilus to discover if he had himself received any payment for the Trust.

42. On the other hand, while the absence of evidence from Mr Clark, Mr Webster and the respondents was explicable, the fact remains that there was no such evidence. Further, I do not see that any adverse inference can be drawn from the fact that the Company did not have a larger issued capital, and its shift to contracting with Scope could be said to show no more than that it was seeking to comply with the law as it had been revised. While, moreover, it seems highly probable that Mr Clark and Mr Webster were aware that there was a chance that HMRC would seek to challenge the Company's scheme, it does not automatically follow from either that or the use of an offshore trust that the scheme was structured as it was in order to make it more difficult for HMRC to recover tax should the scheme prove ineffective.

43. The upshot, in my view, is that there is no question of the Judge's conclusions on the Liquidator's alternative case having been "rationally insupportable" (to use the words of Lewison LJ in *Volpi v Volpi*). Nor do I consider that those conclusions are open to challenge on any other basis. It is quite possible that a different judge would have made different findings, but that does not matter.

The respondent's notice

44. My conclusions in relation to the Liquidator's appeal make it unnecessary for me to address the respondent's notice.

Conclusion

45. The appeal falls to be dismissed.

Lord Justice Jeremy Baker:

46. I agree.

Lord Justice Lewison:

47. I also agree.