



Neutral Citation Number: [2023] EWHC 44 (Comm)

Case No: CL-2021-000287

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND & WALES
COMMERCIAL COURT (KBD)

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18/01/2023

Before :

DAVID EDWARDS, KC
SITTING AS A JUDGE OF THE HIGH COURT

Between :

INTEGRAL PETROLEUM S.A.

Claimant

- and -

(1) PETROGAT FZE
(2) MS MAHDIEH SANCHOULI
(3) MR HOSSEINALI SANCHOULI
(4) MR KANYBEK BEISENOV

Defendants

DAVID PETERS and **LORRAINE ABOAGYE** (instructed by **Seddons Law LLP**) for the
Claimant

CHRIS SMITH, KC (instructed by **Stephenson Harwood Middle East LLP**) for the **First to**
Fourth Defendants

Hearing date: 7 December 2022

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Wednesday 18 January 2023.

David Edwards, KC:

Introduction

1. The present application is an application by the Claimant, Integral Petroleum S.A. (“**Integral**”), for judgment on its claim under section 423 of the Insolvency Act 1986. Integral seeks a declaration that certain monetary transfers involving the First Defendant, Petrogat FZE (“**Petrogat**”), were transactions defrauding creditors and consequential relief.
2. Although not stated expressly in the Application Notice, as I had surmised and as was confirmed to me orally the application is made under CPR 3.5(5) in circumstances where, pursuant to an order made by Cockerill J on 21 March 2022, the Second to Fourth Defendants’ Defence has been struck out and they have been debarred from defending Integral’s claim.

The parties

3. Integral and Petrogat are both oil and petroleum trading companies, the former based in Geneva, Switzerland and the latter in the United Arab Emirates.
4. So far as Petrogat is concerned, as was admitted by the Defendants in their (struck out) Defence:
 - i) Petrogat is legally owned by the Fourth Defendant, Mr Kanybek Beisenov (“**Mr Beisenov**”). According to his first witness statement, which describes him as Petrogat’s “registered” owner, Mr Beisenov was Petrogat’s sole (*de iure*) director; and
 - ii) The Second Defendant, Ms Mahdieh Sanchouli (“**Ms Sanchouli**”), and her father, the Third Defendant, Mr Hosseinali Sanchouli (“**Mr Sanchouli**”), are both *de facto* directors of Petrogat. Ms Sanchouli exercised day-to-day control over Petrogat.

The Contract

5. On 16 September 2017 Integral, as buyer, and Petrogat, as seller, entered into a contract (“**the Contract**”) for the sale of quantities of medium and low sulphur fuel oil (“**the Cargo**”). Petrogat’s obligations were guaranteed by a German company, San Trade GmbH (“**San Trade**”), which Mr and Ms Sanchouli also operated. The Contract was governed by English law and provided for disputes to be resolved in London by LCIA arbitration.
6. On 12 January 2018, following a tip-off, Integral applied for an injunction to prevent the conversion by Petrogat and San Trade of part of the Cargo. An injunction was granted by Morgan J on 13 January 2018, which was continued by HHJ Waksman, QC on 26 January 2018. On 29 January 2018, in breach of the injunction, Petrogat and San Trade converted 37 railway tank cars (“**RTCs**”) of the Cargo by diverting them to Iran.

7. On 30 April 2018, Integral applied to commit Mr and Ms Sanchouli, as owners and/or principals and/or directors of Petrogat and San Trade, to prison for contempt of court for breaching the injunction. A challenge was made by them to the service of the committal application and to the jurisdiction of the English court, but this was dismissed by Moulder J in a judgment delivered on 17 October 2018.
8. On 12 March 2020 Foxton J found that, in their capacity as *de facto* directors of Petrogat, Mr and Ms Sanchouli had deliberately and consciously breached the injunction and that committal was appropriate. They were subsequently sentenced by Foxton J to terms of imprisonment of three months (Ms Sanchouli) and two months (Mr Sanchouli), in each case suspended for 12 months.

The arbitration

9. In parallel with the contempt proceedings, Integral pursued arbitration against Petrogat and San Trade seeking an injunction compelling them to deliver the 37 RTCs and/or damages for conversion, misappropriation or breach of contract in respect of their failure to deliver the converted RTCs and their alleged failure to deliver the balance of the Cargo.
10. The LCIA tribunal (“**the Tribunal**”), seated in London, issued three Partial Awards and a Final Award:
 - i) In its Partial Award dated 20 November 2018 the Tribunal determined that Petrogat and San Trade had converted the Cargo loaded in 26 RTCs. The Tribunal ordered them to pay Integral £135,351 in respect of the costs of the Commercial Court injunction proceedings, but it declined at that stage to deal with Integral’s claim for damages;
 - ii) On 21 January 2019 the Tribunal issued a further Partial Award determining applications that had been made by Integral in relation to the costs of the application for the first Partial Award and the costs of Integral’s claim in the arbitration in respect of the costs of the injunction proceedings;
 - iii) In its Partial Award dated 3 September 2019 the Tribunal held that Petrogat and San Trade were liable for damages, *inter alia*, for conversion and for non-delivery of parts of the Cargo. The total sum awarded to Integral (after taking into account certain small sums awarded in Petrogat and San Trade’s favour) was US\$439,448.37.
 - iv) In its Final Award dated 4 November 2019 the Tribunal ordered that Petrogat and San Trade should pay Integral (simple) interest on the amount awarded at a rate of 4.77% per annum from 31 January 2018 and that they should pay costs of CHF860,000 and £55,834.58 with interest on those amounts also running at 4.77% per annum.
11. On 22 November 2019, pursuant to sections 66(1) and (2) of the Arbitration Act 1996, Waksman J gave Integral leave to enforce the Tribunal’s 3 September 2019 and 4 November 2019 awards in the same manner as a judgment and entered judgment against Petrogat and San Trade in the amounts set out in those awards, on the same day appointing a receiver over their assets by way of equitable execution.

12. No part of the Tribunal’s awards or Waksman J’s judgment has been paid by Petrogat or San Trade. In an email sent by Stephenson Harwood Middle East LLP (“**Stephenson Harwood**”), solicitors for Petrogat and San Trade, on 7 November 2019, shortly after the issuance of the Tribunal’s Final Award and at a stage when the committal proceedings were ongoing, Stephenson Harwood said this:

We confirm that our clients will not be making payment of the sums awarded in the Partial Final Award [or] Final Award to Integral. Enforcement of those awards will not be fruitful.

Our clients fully intend to defend the committal proceedings as they have previously done. In reality, however, they have little concern regarding the result of those proceedings as they have no need to visit England & Wales. Given that any order for committal cannot be exported out of England & Wales it would therefore be a pyric [sic] victory even if Integral were successful in obtaining a prison sentence against these individuals (which in any event seems unlikely to us).

Calver J, in his 14 May 2021 judgment granting a worldwide freezing order, referred to below, described this as “an extremely contemptuous letter”.

The transfers out of Petrogat’s accounts

13. On 27 March 2020 Grant Thornton UK LLP, the receivers appointed by the court over Petrogat and San Trade’s assets, wrote to Mr and Ms Sanchouli seeking information as to the two companies’ affairs. Further requests were subsequently made by Grant Thornton and by Siassi McCunn Bussard Avocats & Solicitors, replacement receivers appointed by Foxton J on 19 August 2020 (“**the Replacement Receivers**”).
14. Following what it considered to be inadequate compliance with the receivers’ and the Replacement Receivers’ requests, on 19 October 2020 Integral issued an application against Petrogat, San Trade, Mr and Ms Sanchouli and Stephenson Harwood, in effect for a mandatory injunction requiring them to provide information about assets, in the case of Stephenson Harwood information about the source from which its bills had been paid.
15. In response to the application, and prior to any order being made by the court, a second affidavit was served by Ms Sanchouli dated 16 November 2020 in which she set out the current status of Petrogat, explaining why it did not have any assets capable of satisfying the Tribunal’s awards and the judgment, and what had happened to the cash balances which at an earlier stage had been identified as held by Petrogat in its bank accounts.
16. What Ms Sanchouli said in her second affidavit, in essence, was that, following the publication of Moulder J’s 17 October 2018 judgment, which had revealed that Mr and Ms Sanchouli were Iranian nationals, Petrogat’s UAE bankers, Abu Dhabi Islamic Bank (“**ADIB**”), had intimated that it wished to exit its relationship with Petrogat and had refused to process international transfers from Petrogat’s USD account.
17. Commenting on transfers made out of Petrogat’s USD and AED (Dirham) accounts from 27 November 2018 onwards (“**the Transfers**”) that had been disclosed in bank statements provided to the receivers, Ms Sanchouli explained that:

As soon as it became clear that Petrogat would be unable to use its USD bank account the remaining funds were transferred out of Petrogat's USD bank accounts on 6 December 2018.

...

On 2 January 2019 a payment for Stephenson Harwood's legal fees of AED 628,133.40 was returned by ADIB to the account. Again, the only option remaining was to withdraw the remaining funds from the AED accounts.

Petrogat's USD account with ADIB, she said, was closed on 31 December 2018 and the AED account was closed on 3 January 2019.

18. A table setting out the Transfers was annexed to the Particulars of Claim and also to the skeleton argument lodged by David Peters and Lorraine Aboagye of counsel, who appeared for Integral at the hearing before me. This showed that after 27 November 2018:
 - i) There had been two small withdrawals by cashed cheque from the AED account on 3 January 2019 totalling AED596,000.00 (equivalent to around US\$162,000);
 - ii) All the remaining AED and USD funds, amounting to around US\$2,700,000, had been transferred from Petrogat's accounts to accounts of another company, which was noted on Petrogat's bank statements to "have the same owner" as Petrogat.
19. The parties referred to the recipient of the Transfers mentioned in paragraph 18 ii) above as "Company A". As explained below, in breach of orders made by the court the Defendants have refused to identify Company A; they have, however, confirmed that, like Petrogat, Company A is incorporated in the UAE, that its principal business is in trading in oil and gas products, and that it is owned and/or controlled by Mr and Ms Sanchouli and Mr Beisenov.

The arbitration (revisited)

20. I interpose to explain what was happening in December 2018 and January 2019, at the time the Transfers were made and Petrogat's accounts were closed, in relation to the then ongoing arbitration.
21. On 10 April 2018, Petrogat and San Trade having advanced a counterclaim in the arbitration, Integral made an application for security for costs. Directions were given by the Tribunal on 20 November 2018 for its resolution, and on 5 December 2018 Stephenson Harwood filed written submissions on behalf of Petrogat and San Trade opposing the making of any order.
22. By that stage, as set out in paragraph 10 i) above, the Tribunal had issued its first Partial Award, finding that Petrogat and San Trade had converted part of the Cargo and ordering them to pay £135,351.20 in respect of the costs of the injunction proceedings, but declining to order an interim payment in relation to Integral's claim for damages on the basis that those were issues that were not capable of determination at that stage.

23. In the course of Stephenson Harwood’s 5 December 2018 submissions, and in support of Petrogat and San Trade’s case that no order for security for costs should be made against them, Stephenson Harwood submitted that Petrogat was still “an active trading company” and that:

[...] there can be no question that [Petrogat] is in a financial position to meet a costs award should it be unsuccessful on its counterclaim.

24. In support of the latter assertion, Stephenson Harwood exhibited Petrogat’s Auditor’s Report & Financial Statements for the year ended 31 December 2016, prepared on 30 September 2017. Stephenson Harwood said that it was not true, as Integral had suggested, that Petrogat’s financial position had deteriorated since the date these statements had been prepared:

[Petrogat’s] financial statements for 2017 have not been finalized so these cannot be provided, however, attached are redacted bank statement [sic] which establish that as at 3 November 2018 [Petrogat] had cash and balances with the bank of US\$1,252,809.64 (around £986,675.29) and AED7,153,353.57 (around £1,533,764.81). Together this amounts to around £2.5 million, substantially more than the amount set out in the Accounts and far more than the amount of the security applied for.

25. The date of the bank statements exhibited was 3 November 2018, but by the time the submissions were filed by Stephenson Harwood on 5 December 2018 significant sums had already been transferred from Petrogat’s accounts to Company A – two transfers totalling US\$500,000 were made on 27 and 28 November 2018 – and further sums were transferred in the following days.
26. In her first witness statement served on 11 June 2021 in support of an application to discharge the worldwide freezing order granted against the Defendants by Calver J, Ms Sanchouli said that:

It appeared inevitable that ADIB was going to close Petrogat’s bank accounts from 29 November 2018 onward.

27. By 3 January 2019, which was *before* the Tribunal made its decision on Integral’s application for security for costs, Petrogat’s accounts had been completely emptied, and indeed had been closed. This changed position was not disclosed to the Tribunal, nor were the submissions lodged on Petrogat’s behalf by Stephenson Harwood describing the cash balances in its accounts corrected.

This action and the worldwide freezing order

28. On 14 May 2021, based on the events described above and upon the information revealed in Ms Sanchouli’s second affidavit about the Transfers out of Petrogat’s accounts, Integral made an urgent, without notice application for a worldwide freezing order (“**WFO**”) against Petrogat, Mr and Ms Sanchouli and Mr Beisenov.
29. The application was made in support of a substantive claim by Integral (for which it sought permission to serve out of the jurisdiction and by alternative means) under section 423 of the Insolvency Act 1986. The terms of that section are set out in full

below, but in essence the section allows the court to make orders where transactions have been undertaken in defraud of creditors.

30. Calver J granted the application for a WFO. His order dated 14 May 2021 included disclosure orders requiring the Defendants, within 48 hours of service and to the best of their ability, to inform Integral’s solicitors of all their assets worldwide exceeding £10,000 in value and subsequently to swear and serve an affidavit setting out that information.
31. On 6 July 2021 Moulder J made an order by consent adjourning the return date to 12 July 2021 when the matter came before Sir Michael Burton GBE (sitting as a Judge of the High Court). Integral sought the continuance of the WFO and Petrogat and the other Defendants sought to have it discharged. In his order dated 29 July 2021 Sir Michael Burton GBE determined that the WFO, including the disclosure orders, should continue until further order of the court.
32. In support of the application to set aside the WFO, witness statements were served by Mark David Lakin, a partner in Stephenson Harwood, and by Mr and Ms Sanchouli and Mr Beisenov. In Ms Sanchouli’s first witness statement she refused to disclose the name of Company A because, she said, of concerns that Integral might pursue Company A, cause difficulties with its banking relationships, and generally disrupt its business.
33. As for the Transfers referred to in paragraph 18 above, Mr Lakin explained in paragraph 12 of his first witness statement that:

[...] the Respondents do not dispute that the transfers relied upon by Integral (“the Transfers”) were made or that they were made for no consideration.
34. Ms Sanchouli said the same in paragraph 4 of her first witness statement; the Transfers were made, she said in paragraph 5, in some cases to permit Company A to carry out its usual trading activities, and in other cases because ADIB had prevented Petrogat from making international, and ultimately any, external transfers. In paragraph 16 she said that:

The transfers between the companies were not made for consideration and never have been.
35. Particulars of Claim were served by Integral on 1 October 2021, seeking orders under section 423 of the Insolvency Act 1986, specifically:
 - i) An order requiring each of the Defendants to procure that Company A pay to the Replacement Receiver the lesser of (a) the aggregate value of the Transfers; and (b) the amount due to Integral under Waksman J’s 22 November 2019 judgment, plus interest payable under that judgment, and the costs of the Replacement Receiver;
 - ii) If and to the extent that the Defendants were unwilling or unable to procure Company A to pay the sums identified in paragraph i) above, then an order requiring them (on a joint and several basis) personally to pay those sums to the Replacement Receiver; and/or

- iii) Such further or other relief as the court considered to be necessary and/or appropriate to unwind the effect of the Transfers.

No order was sought and no proceedings were commenced by Integral against Company A because, of course, the Defendants had refused to identify it, which meant that this was impossible.

36. A Defence was served on 26 November 2021 in which the Defendants continued to refuse to identify Company A, saying that:

[...] the Defendants do not wish to identify Company A because they believe this will cause issues with Company A's bank accounts of the kind experienced by [Petrogat].

The claim for relief was generally denied, from which it is plain that the Defendants were unwilling or unable to procure Company A to pay the sums in question to the Replacement Receiver.

37. On 13 December 2021 Integral applied for an order providing that, unless Mr and Ms Sanchouli and Mr Beisenov complied in full with the disclosure obligations contained in the orders made by Calver J on 14 May 2021 and by Sir Michael Burton GBE on 29 July 2021 (and paid the costs awarded by Sir Michael Burton GBE) within 14 days, their Defence be struck out.

38. On 21 March 2022, following a contested application, Cockerill J made the following order:

1. Unless the WFO Defendants [Mr and Ms Sanchouli and Mr Beisenov] do, by 4pm on 1 April 2022, provide the information set out in the Schedule to this order, their Defence shall be struck out and they shall be debarred from defending the Claimants' claim.

The Schedule to the order required, *inter alia*, the identification of Company A, as well as its address and the historic and current value of its assets as well as details of Mr and Ms Sanchouli's and Mr Beisenov's bank accounts and assets.

39. There is no dispute that Mr and Ms Sanchouli and Mr Beisenov have failed to comply with Cockerill J's order, and that, as a result, their Defence has been struck out and they have been debarred from defending Integral's claim.

The present application

40. The present application, issued by Integral on 13 April 2022, is an application for orders, *inter alia*:

- i) Declaring that the Transfers identified in Annex 1 to the Particulars of Claim were transfers defrauding creditors within the meaning of section 423 of the Insolvency Act 1986; and
- ii) Requiring the Defendants (Petrogat, Mr and Ms Sanchouli and Mr Beisenov) to pay Integral the sum of US\$1,700,613.52 – effectively the sums outstanding

under the Tribunal's awards and Waksman J's judgment – plus interest, plus costs.

41. Although orders were facially sought against all the Defendants, Mr Peters confirmed to me orally that relief was, in fact, sought only against Mr and Ms Sanchouli and Mr Beisenov. Integral already has, of course, the Waksman J judgment which requires Petrogat to pay the sums awarded by the Tribunal; it has no need for a further judgment against Petrogat.
42. The Application Notice referred in its recitals to the fact that the Defendants' Defence – strictly, the Defence of Mr and Ms Sanchouli and Mr Beisenov; but those are the only parties against whom relief is sought – had been struck out and that they had been debarred from defending Integral's claim, but it did not identify the provision of the CPR pursuant to which the application was made.
43. As I explained in paragraph 2 above, however, I inferred from the recitals to the draft order, and it was confirmed to me orally by Mr Peters, that the application was made under CPR 3.5(5). This provides:

3.5 – Judgment without trial after striking out

- (1) This rule applies where –
 - (a) the court makes an order which includes a term that the statement of case of a party shall be struck out if the party does not comply with the order; and
 - (b) the party against whom the order was made does not comply with it.
- (2) A party may obtain judgment with costs by filing a request for judgment if –
 - (a) the order referred to in paragraph (1)(a) relates to the whole of a statement of case; and
 - (b) where the party wishing to obtain judgment is the claimant, the claim is for –
 - (i) a specified amount of money;
 - (ii) an amount of money to be decided by the court;
 - (iii) delivery of goods where the claim form gives the defendant the alternative of paying their value; or
 - (iv) any combination of these remedies.

...

- (5) A party must make an application in accordance with Part 23 if they wish to obtain judgment under this rule in a case to which paragraph (2) does not apply.

Participation by the Defendants

44. I mentioned in paragraph 18 above that Mr Peters and Ms Aboagye lodged a skeleton argument on behalf of Integral for the purposes of the hearing. A skeleton argument was also lodged by Chris Smith, KC who appeared before me on behalf of the Defendants.

45. Mr Smith, KC expressly acknowledged in paragraph 3 of his skeleton argument that:

The Defendants did not provide the necessary information and accept that, as a result, they have been debarred from defending the claim.

Notwithstanding that acceptance, Mr Smith, KC made written submissions in his skeleton argument on behalf of the Defendants, and he invited me to exercise my discretion to allow him to make limited oral submissions on their behalf along the same lines.

46. I dealt with this issue in an *ex tempore* judgment that I gave, following argument, at the start of the hearing. My judgment speaks for itself, but, in essence, applying the principles summarised by Edwin Johnson, QC (sitting as a Judge of the High Court) in *Times Travel (UK) Limited and another v Pakistan International Airlines Corp.* [2019] EWHC 3732 (Ch) at [55], I held that:

- i) The overwhelming part of Mr Smith, KC's written submissions were inconsistent with the debarring order that had been made, and I was not prepared to exercise my discretion to allow him to make oral submissions of the same kind;
- ii) Whilst it did not seem to me that there was likely to be an issue on which I would need Mr Smith, KC's assistance, if such an issue did arise during the hearing I would raise it with him and allow him to address me in relation to that particular issue (in the event no such issue arose);
- iii) I was prepared to allow Mr Smith, KC and his clients to participate to a limited extent after the hearing, for example, in pointing out any errors in any judgment I handed down, in relation to the form of order to be made, and (possibly – I will hear argument on this) in relation to costs.

47. Although Mr and Ms Sanchouli's and Mr Beisenov's Defence has been struck out, and although they have been debarred from defending the claim, which necessarily precludes them from adducing evidence and relying on their (struck out) Defence, *Times Travel* and the authorities cited in it make clear that the court may still have regard to those materials for limited purposes.

48. See, for example, the following passage from the judgment of Tomlinson LJ in *Theverajah v Riordan* [2015] EWCA Civ 41 at [33]:

I do not entirely understand the ambit of this approach but I do not agree with the notion that the defence had for all purposes ceased to exist. What had happened is that the respondents had been debarred from defending. To that extent the defence could not be relied upon by the respondents, but it would be absurd if the document could not be relied upon by the claimant as indicating the ambit of the dispute. Were that not the case, matters which were never in issue because of admissions in the pleadings would suddenly become contentious, with the extraordinary and perverse effect that the burden on the claimant at trial would be increased. The obverse would equally be true - a defendant may by virtue of being debarred from defending avoid the consequences of his admissions, thereby casting upon the claimant a burden which may, in reliance upon the admission, have become more difficult or even impossible to discharge. I agree with Mr Smith's happy observation that 'a defence will have left a lasting legacy on the statements of case as a whole'.

49. Where I refer in this judgment to passages in the Defence or in the affidavits or witness statements previously filed or served by the Defendants, for example in relation to their application to set aside the WFO, I do so for the purposes identified as legitimate in *Theverajah* and *Times Travel*.

Principles

50. Integral's claim is made under section 423 of the Insolvency Act 1986. In relevant part, the section provides as follows:

423 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;
 - ...
 - (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 an 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”.

51. Section 424 of the Insolvency Act 1986 identifies a number of persons who may apply for an order under section 423, which include a “victim of the transaction” as defined in section 423(5).
52. Section 425 provides a non-exhaustive list of orders that the court may make in circumstances where it has found that a transaction has been entered into at an undervalue:

425 Provisions 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 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 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.
- 53. The principles applicable to section 423 cases were recently summarised by ICC Judge Jones, drawing on earlier appellate and other authority, in *Re Dormco SICA Ltd (in liquidation)* [2021] EWHC 3209 (Ch), [2022] BCC 360 at [116], a case which concerned the sale of the goodwill component of an accountancy business, SICA, to a related company, SBL, for a value of £1.
- 54. The summary is lengthy, and I will not set it out in full, but it included the following:
 - 116. The following are the key legal tests/principles to be applied for the s. 423 case:
 - ...
 - c) When deciding whether SICA, acting by Mr Munn and/or Mr Rees, entered into the Asset Sale Agreement for the Prohibited Purpose:
 - i) It is the purpose of SICA which is to be addressed not that of the person who received the benefit (see *Moon v Franklin* [1996] B.P.I.R. 196).
 - ii) The question of whether the transaction was entered into by SICA for the Prohibited Purpose must be judged as a decision of fact based on an evaluation of all relevant facts. There may be more than one purpose. It is sufficient to prove that the Prohibited Purpose was a (not the) purpose positively intended rather than a consequence (see *Inland Revenue Commissioners v Hashimi*

[2002] EWCA Civ 981; [2002] B.C.C. 943 and *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176; [2019] B.C.C. 96 at [8-16]).

- iii) Insolvency is not a prerequisite, although the financial position may be evidence relevant to the decision of purpose and (depending on the facts) the absence of insolvency may make a Prohibited Purpose unlikely (see *Moon v Franklin* (same) at 198 and *BTI 2014 LLC v Sequana SA* [2016] EWHC 1686 (Ch); [2017] B.C.L.C. 453 at [494], upheld [2019] EWCA Civ 112; [2019] 1 B.C.L.C. 347).
- d) As to the relief which may be ordered:
 - i) The Court's very wide discretionary powers of relief are required by s. 423(2) to be exercised (a) to restore the position to what it would have been if the transaction had not been entered into and (b) to protect the interests of victims of the transaction (defined by s. 423(5) as "*a person who is, or is capable of being prejudiced by it*"). In other words, exercised to achieve restoration to the extent appropriate to protect the interests of creditors (see *Chohan v Saggat* [1994] B.C.L.C. 706 at 714).
 - ii) Although the purpose of the relief is expressed within s. 423 to be restoration, where the position cannot be restored in the literal sense, it can be appropriate to require payment of a sum to compensate for the transaction at an undervalue (see *New Media Distribution Co SEZC Ltd v Kagalovsky* [2018] EWHC 2876 (Ch)).
 - iii) Mr David Phillips Q.C., sitting as a Deputy Judge of the Chancery Division, decided in *Griffin v Awoderu* (23 January 2008) that those requirements for relief exclude the possibility of placing victims "*... in a better or more secured position than if the transaction had not been carried out*". In addition, the relief should not "*punish or otherwise prejudice those involved in carrying out the transaction any more than is a necessary and inevitable consequence of restoring the position and protecting victims*".
 - iv) In *4 Eng Ltd v Harper* [2009] EWHC 2633 (Ch); [2010] B.C.C. 746, Sales J., as he then was, pointed out that the objective of s. 423(2) can be achieved by the exercise of the Court's "*wide margin of judgment [when deciding] what order is appropriate*" having regard to the non-exhaustive list of relief within s. 425.
 - v) In *Akhmedova v Akhmedova* [2021] EWHC 545 (Fam) at [86-87], Gwynneth Knowles J citing *4 Eng Ltd v Harper* (above) emphasised that the relief "*carefully tailored to the justice of the particular case*" would depend greatly upon the particular facts and that it may be appropriate to consider whether a respondent still holds the relevant assets or has changed their position even

though that would not provide a defence. Such considerations, if relevant, would need to be addressed within the context of the mental state and degree of involvement of the respondent.

- vi) Mr Justice Trower in *Re Fowlds (a bankrupt), Bucknall and Roach (joint trustees) v Wilson* [2021] EWHC 2149 (Ch) identified three reasons why it may be appropriate to carry out a balancing act between the interests of the creditors or victims of the transferor on the one hand and the transferee on the other. First because although it is a class remedy, ss. 423 – 425 contemplate the potential for individual victims to claim and be compensated with the result that it may be appropriate to strike a balance between the victim and the innocent transferee. Second, the absence of a statutory clawback period. Third that the power to restore and protect is expressed in terms of “*may ... make such order as it thinks fit*” which is consistent with a balancing exercise.

Issues

55. Integral’s application for relief under section 423 of the Insolvency Act 1986 requires answers to the following three questions:
- i) Were the Transfers transactions at an undervalue within the meaning of section 423(1)?
 - ii) If so, were the Transfers made for one of the purposes set out in section 423(3) (“**a Prohibited Purpose**”), *i.e.*, for the purpose of putting Petrogat’s assets beyond the reach of Integral, which at the time was making a claim against Petrogat, or for the purpose of otherwise prejudicing the interests of Integral in relation to that claim?
 - iii) Was Integral a “victim” of the Transfers within the meaning of section 423(5) of the Insolvency Act 1986 so as to be entitled under section 424 to apply for the orders it does?
56. Assuming the answer to all three questions is “yes”, there is then a (fourth) question as to what, if any, order is it appropriate for the court to make under sections 423(2) and 425?

57. I take each of these matters in turn.

(1) Transactions at an undervalue

58. The statutory definition of a transaction at an undervalue is set out in section 423(1) of the Insolvency Act 1986, namely a gift, or a transaction entered into on terms that provide for no consideration or for a consideration significantly less in value in money or money’s worth than the value of the consideration provided by the person entering into the transaction.

59. I referred in paragraphs 33 and 34 above to the fact that, in the evidence served on behalf of the Defendants for the purposes of their application to set aside the WFO, both Mr Lakin and Ms Sanchouli did not dispute that the Transfers complained about by Integral were made for no consideration. That might be regarded as an end to this particular issue.
60. However, and although Mr and Ms Sanchouli and Mr Beisenov had been debarred from defending Integral's claim, Mr Peters addressed a number of the points that they had previously put forward in in their (struck out) Defence and/or in their evidence in relation to the Transfers. Specifically:
- i) Mr Peters noted that part of the sums was said to have been used by Company A to discharge liabilities of Petrogat. However, whether true or not, the only specific examples given involved sums of US\$100,000 and AED1,050,000 (around US\$286,000). Given the total transferred was US\$2,850,000 and Integral's claim was only around US\$1,700,000, the status of these modest amounts, he submitted, was inconsequential;
 - ii) The greater part of the sums transferred were alleged to have been used by Company A for its own purposes. But, Mr Peters submitted, even if it might be commonplace for sums to be transferred between companies under common control, where that happened the appropriate way to deal with it was by way of inter-company loans, not, as happened here, by simply gifting the assets of one company to another.
61. I accept these submissions. I have no hesitation in concluding that at least the bulk of the US\$2,850,000 million transferred – certainly enough to justify the relief sought by Integral – represented transactions at an undervalue.

(2) Prohibited Purpose

62. Even if a transaction was entered into at an undervalue, relief can only be granted under section 423 if the transaction was entered into for a Prohibited Purpose.
63. This, as Stephen Gee, KC says in *Commercial Injunctions* (7th ed.) at 13-031 requires proof of a subjective, positive intention on the part of the company entering into the transaction (the debtor) to achieve a Prohibited Purpose, which is a question of fact. However:
- i) Whilst it is important to distinguish between the *purpose* of a transaction and what is simply a collateral *effect*, it is not necessary to show that a Prohibited Purpose was the only, or the dominant, or the predominant purpose. No adjective should be read in to the statutory language: see *JSC BTA Bank v Ablyazov* at [14] *per* Leggatt LJ;
 - ii) Nor is it necessarily fatal that, even absent a Prohibited Purpose, the debtor (here Petrogat) might have entered into the impugned transaction anyway: see *JSC BTA Bank v Ablyazov* at [11] – [12] *per* Leggatt LJ, citing the judgments of Laws and Simon Brown LJ in *Inland Revenue Commissioners v Hashimi* at [33] and [38];

- iii) Proof that the consequence of the transaction was to put assets beyond the reach of creditors is not, in itself, enough; however, evidence that this was the foreseeable and foreseen result may, nonetheless, support an inference that the transaction was, in fact, entered into for a Prohibited Purpose, as may also evidence that this was something the actor desired.
64. Where the debtor is, as here, a company, determining the purpose(s) for which it entered into the impugned transaction necessarily involves a question of attribution: the purpose(s) of which natural person(s) count as the debtor's purpose(s)?
65. In the present case, I am satisfied that at least Ms Sanchouli's purpose(s) are to be attributed to Petrogat. As she explained in her first witness statement, day-to-day control of Petrogat was her responsibility, and she was generally in control of its operations and trading activities. She accepts that she gave the instructions that caused the Transfers to be made from Petrogat's accounts.
66. As for the purpose(s) of the Transfers, in support of his case that the Transfers were made for a Prohibited Purpose, Mr Peters relied in his written and oral submissions on four matters:
- i) The admitted nature of the Transfers;
 - ii) The timing of the Transfers;
 - iii) The Defendants' evasiveness; and
 - iv) The Defendants' refusal to identify Company A.
67. So far as the first – the nature of the Transfers – is concerned, the primary reason given by Ms Sanchouli in her witness statement for most of the Transfers was the fact that ADIB had prevented Petrogat from making international, and ultimately any, transfers from its accounts. She said that, from 29 November 2019, it appeared inevitable that ADIB was going to close the accounts.
68. Even if that is true, however, it is noteworthy that:
- i) Petrogat did not transfer its funds from accounts with ADIB to accounts held by Petrogat at another bank, either within or outside the UAE, although, as Ms Sanchouli recorded in her witness statement, Petrogat succeeded in opening an account in the UAE with the Commercial Bank of Dubai ("CBD"), which was active until 2 February 2020;
 - ii) The sums transferred by Petrogat were not treated by Petrogat as loans, such that the asset originally held by Petrogat in the form of a credit balance in its accounts was replaced by an asset in the form of a debt owed to it by Company A. Nor were they transferred on the basis that Company A would hold the sums on trust for Petrogat. The Transfers were simply gifts made, as Ms Sanchouli accepted, for no consideration.
69. If the only purpose of the transfers had been to address the difficulties caused to Petrogat by ADIB's decision to end its banking relationship with Petrogat, this approach would have been unnecessary. Gifting the assets, however, is consistent with

a purpose of the transfers being to protect Petrogat's assets against enforcement and to ensure that they were available for other ventures in which Mr and Ms Sanchouli and Mr Beisenov were interested.

70. I note in this regard the remarks made by Jacobs J in *PJSC National Trust Bank v Boris Mints* [2019] EWHC 2016 (Comm) at [34] (albeit when considering, in the context of an application for a worldwide freezing order, the risk of dissipation) in response to a submission that transfers of assets between related companies was both normal and reasonable:

I disagree ... The relevant transfers of shares to Adalia occurred, on the evidence before me, after the three companies (Nori, Centimilia and Coniston) were on notice of claims by Bank Okritie to set aside the replacement transaction. In those circumstances, a transfer away of assets which are the subject of intended or actual proceedings, and which takes place shortly after such proceedings are threatened or commenced is prima facie a classic dissipation of assets. I say prima facie, because it would certainly be possible for a party to explain that the transfer had a commercial rationale, and to show that the transferor received full value for the assets which had been transferred away. ... I do not accept that it is commonplace, in circumstances such as the present, for a company simply to transfer its assets away to a different company within the group. Nor is it relevant, in circumstances where there is a potential claim against particular companies within the group, that there has been no overall reduction in the assets of the group as a whole.

71. As Mr Peters submitted, a further alternative, if it was unlikely, given its banking difficulties, that Petrogat would be able to continue trading beyond November or December 2018, would have been for there to be a proper, orderly winding up of Petrogat's affairs, which involved getting in all Petrogat's assets and making appropriate provision for all Petrogat's liabilities.
72. The choice that was made, to transfer Petrogat's funds to Company A for no consideration, however, left it open to Mr and Ms Sanchouli and Mr Beisenov, who owned and/or controlled Company A, to determine which (if any) of Petrogat's liabilities to pay, putting Petrogat's assets beyond the reach of Integral, and inevitably prejudicing Integral in relation to the claim which it was pursuing.
73. Sir Michael Burton GBE in his 29 July 2021 judgment summarised the position in this way at [13], referring to Stephenson Harwood's security for costs submissions, with which summary I agree:

The position is that from being a company with substantial assets, as described in the 5 December 2018 Submissions, Petrogat became worthless by 3 January 2019, after transferring all its assets to Company A without consideration; and whereas Company A made some payments for some of Petrogat's liabilities, the Defendants were able to pick and choose which of Petrogat's liabilities to meet. Whatever may have been the position when the two companies were solvent, the allegedly interchangeable use of the funds of two related companies does not appear, at any rate without explanation, justifiable where Petrogat had given away to Company A all its assets.

74. Ms Sanchouli's evidence, furthermore, was that from around November 2018, or certainly by the end of December 2018, it was likely that Petrogat would cease trading, both because of difficulties with its banking arrangements and also because there was no further business in Turkmenistan where it had principally traded. If this is true, the prospect of a continued ebb and flow of assets between Petrogat and Company A thereafter was inevitably limited.
75. As for the second factor Mr Peters relied upon – the timing of the Transfers – the Transfers were made from 27 November 2018, and then in increasing amounts from 6 December 2018 through to 3 January 2019 by which time Petrogat's USD and AED accounts at ADIB had been closed. This was in circumstances where:
- i) On 10 April 2018 Integral had applied for security for costs in the arbitration in respect of Integral's counterclaim;
 - ii) On 1 May 2018 Integral had made a committal application, seeking an order that Mr and Ms Sanchouli be committed for contempt of court for breaches of the orders made by Morgan J and HHJ Waksman, QC;
 - iii) On 17 October 2018 Moulder J had dismissed Mr and Ms Sanchouli's application for an order, *inter alia*, setting aside service of the committal application;
 - iv) On 20 November 2018 the Tribunal had issued its first Partial Award finding that Petrogat had converted part of the cargo and ordering Petrogat to pay costs of £135,351.20.
76. So far as the last of these is concerned, no order was made for an interim payment on account of damages at that stage, but plainly the Tribunal's decision gave rise to the possibility of further significant monetary liability on the part of Petrogat (as ultimately proved to be the case). Ms Sanchouli's first witness statement itself described the 20 November 2018 award as "disappointing".
77. As I mentioned earlier, on 5 December 2018 Stephenson Harwood filed submissions in the arbitration opposing Integral's application for security for costs which stated that Petrogat had substantial credit balances in its bank accounts. Stephenson Harwood relied in that regard upon Petrogat's bank statements as at 3 November 2018.
78. I do not say that Stephenson Harwood were *themselves* aware of these facts – if they had been, I would have expected them to be disclosed to the Tribunal – but, as Ms Sanchouli at least must have known, by the time the submissions were lodged significant sums had already been transferred to Company A, and within days of the submissions being filed further substantial transfers were made.
79. The inference I draw is that, following the Tribunal's Partial Award, once the credit balances in Petrogat's accounts had served their purpose, *i.e.*, of being shown to the Tribunal through submissions for the purposes of resisting a substantial order for security for costs (as Mr Peters put it orally, "to keep the show on the road"), those balances were swiftly removed.

80. I can take Mr Peters the third and fourth points together. Mr Peters submits that there has been a pattern of evasiveness including:
- i) The Defendants' initial refusal to co-operate with the receiver;
 - ii) The absence of a prompt explanation as to the reasons for and the destination of the funds transferred;
 - iii) The breach of this court's orders, including the contempts for which Mr and Ms Sanchouli have already been punished, the non-compliance with the disclosure provisions of the WFO, and the admitted failure to provide further information, including the identity of Company A.

On the basis of the material I have reviewed, I agree with these submissions.

81. In *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 3863, Lord Leggatt JSC, speaking in that particular case about an adverse inference that may be drawn from the absence of a relevant witness, said at [41] that:

The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so.

82. The fact that Mr and Ms Sanchouli and Mr Beisenov have conducted themselves in the way they have, in particular – in defiance of court orders – withholding information as to the identity and assets of Company A and about their own assets, in my judgment entitles me to draw adverse inferences against them, specifically as to:
- i) The purpose for the Transfers, with which I deal here; and also
 - ii) What the information, if disclosed as required, would have revealed about the benefits obtained by each of them from the Transfers, an issue which I address later in this judgment.
83. Evaluating the evidence as a whole, and drawing such inferences as I consider I am entitled to draw, I conclude on the balance of probabilities that at least *one* purpose of the Transfers was a Prohibited Purpose.

(3) Was Integral a victim of the transactions?

84. Under section 424 of the Insolvency Act 1986, where, as here, the debtor has not been the subject of a stated insolvency process or has entered into a voluntary arrangement, an application under section 423 may only be made by a victim. The term “victim” is defined by section 423(5) as “a person who is, or is capable of being, prejudiced by” the impugned transaction.

85. In my judgment, there is no doubt that Integral, which had an outstanding claim against Petrogat, which was being pursued in an arbitration in which a monetary order (for costs) had already been made against in its favour and where further monetary orders (for damages) might well be made in the future, was, or was capable of being prejudiced by the Transfers and thus qualifies as a victim.

(4) Relief: what, if any, order is appropriate?

86. Assuming, as I have found, that the transactions were entered into at an undervalue and for a Prohibited Purpose, it does not necessarily follow that I should make the suggested, or any order, against Mr and Ms Sanchouli or Mr Beisenov.

87. The court has, however, a wide jurisdiction, and a wide margin of judgment to decide what order is appropriate: see *4 Eng Ltd v Harper* at [12] *per* Sales J. The question of what, if any, relief is appropriate inevitably depends upon the facts of the particular case.

88. In the present case, a number of points arise for consideration.

Sufficient connection with England and Wales

89. The first point concerns the fact that Petrogat is a foreign company, that Mr and Ms Sanchouli and Mr Beisenov are foreign nationals and live abroad, and that many of the relevant events, including the Transfers, occurred abroad.

90. Section 423 of the Insolvency Act 1986 is not restricted to persons or property in England and Wales: see *Re Paramount Airways Ltd* [1993] 1 Ch. 223 at 235 *per* Sir Donald Nicholls, VC. An English court will, nonetheless, refuse to exercise its discretion to make an order under the section unless it is satisfied that there is a sufficient connection with England and Wales: see *Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd* [2018] EWCA Civ 1660, [2019] 1 Lloyd's Rep. 89 at [30] *per* Lewison LJ.

91. So far as the present case is concerned, I am satisfied that there is a sufficient connection with England and Wales, essentially for the reasons set out by Sir Michael Burton GBE in his 29 July 2021 judgment at [19]:

- i) Although Integral and Petrogat are foreign companies, the Contract between them was expressly governed by English law and required disputes to be resolved by LCIA arbitration in London, which is where the arbitration actually took place;
- ii) Insofar as the Transfers were made for the purposes of putting assets beyond Integral's reach, they were, thus, made for the purpose of frustrating the enforcement of awards made and/or likely to be made in an English arbitration (ultimately reflected in an English judgment); and
- iii) Petrogat, the party that entered into the impugned transactions, is the subject of an English receivership order.

92. Factually, this case is closer to *Dornoch Ltd v Westminster International BV* [2009] EWHC 1782 (Admlty), where the underlying dispute involved an insurance policy

governed by English law containing an exclusive English jurisdiction clause and where a sufficient connection was found to exist, than to *Orexim*, where the Court of Appeal held that there was no sufficient connection.

Orders against Mr and Ms Sanchouli and Mr Beisenov

93. A second point concerns the fact that orders are sought, not against Company A, the immediate recipient of the Transfers, but against Mr and Ms Sanchouli and Mr Beisenov.
94. The purposes of the section 423 jurisdiction, as reflected in section 423(2), are restorative and protective. The word “and” between sections 423(2)(a) and (b) is to be read conjunctively (*Chohan v Saggat* at 714 per Nourse LJ): an order must seek, so far as practicable, to restore the position to what it would have been had the transaction not been entered into and to protect the victims of it.
95. So far as restorative relief is concerned, in circumstances where, as I have found, the Transfers were made from Petrogat to Company A for no consideration, and were, thus, transactions at an undervalue, and were made for a Prohibited Purpose, the most obvious target for relief would be Company A to whom the Transfers were made.
96. Mr and Ms Sanchouli and Mr Beisenov have, however, refused to identify Company A, which has made it impossible for proceedings to be commenced or for an order to be made against it requiring it to repay the amounts transferred. Their Defence makes clear that, although they own and/or control Company A, they are unwilling to procure it to pay back the amount of the Transfers.
97. It is plain that the court’s jurisdiction is not limited to making orders against the counterparty to the impugned transaction; that much is clear from section 425(2). There is, however, a question as to whether the court can or should make an order against a person who may have been involved in the transaction but who him or herself may have received no *benefit* from it.
98. The issue has been considered in two cases to which my attention was drawn by Mr Peters.
99. In *Wilson v Masters International Limited* [2009] EWHC 1753 (Ch) the liquidator of Oxford Pharmaceuticals Limited (“OPL”) sought orders under sections 239–241 of the Insolvency Act 1986 against Masters International Limited (“MIL”) and against Dr Masters, who was the sole director of OPL and also a director of and shareholder in MIL, requiring them to repay certain sums paid by OPL to MIL which were alleged to have been preferences.
100. Mark Cawson, QC (sitting as a Judge of the High Court) held that the payments did not involve a preference of Dr Masters, but that some of them involved a preference of MIL. He ordered MIL to repay the relevant sums, but he declined to make an order against Dr Masters personally, primarily on the basis that he had no jurisdiction to do so but alternatively as a matter of discretion:

84. It is correct that s. 241(2) does specifically envisage the making of orders against third parties (i.e. parties that were not in fact preferred themselves).

However, as I see it, the Court could only properly exercise its discretion against such a third party if the order was required as part of the process of restoring the position of the company to what it would otherwise have been, and the third party was in possession of assets applied in making the preference or, at least, had otherwise personally benefited in monetary terms from the payment in some direct and tangible way, *c.f. Re Sonatacus Limited* [2007] BCC 186, to which I was referred, where the third party company had actually received the monies paid by way of preference.

85. Where the preference amounts, as it did here, to the payment of a sum of money to a creditor, then the obvious starting point to any relief is, as I see it, that the recipient creditor should be ordered to repay the relevant monies. In my judgment, the appropriate order to make in the circumstances of the present case, subject to the question of deductions that I consider below, is that MIL should repay the £450,000 to OPL. The monies not having been paid on by MIL to Dr Masters, I do not consider it appropriate to make an order against him for the purposes of restoring the position of OPL. He may have received some incidental benefit as a shareholder in MIL, but it does not seem to me that the making of such an order against Dr Masters is either necessary or appropriate for the purposes of achieving a result required to be achieved by s. 239(3). If, which I do not consider to be the case, I have any discretion to grant relief against Dr Masters in these circumstances, I exercise my discretion against doing so given, in particular, the remedy that exists against MIL and the incidental nature of any benefit that Dr Masters might have gained.
101. The issue arose again in *Johnson v Arden* [2018] EWHC 2633 (Ch) where proceedings were brought by the liquidator of Strobe 2 Limited against directors in connection with a dividend (coupled with an assignment of an inter-company debt) which they had resolved should be paid to the company's shareholders prior to the company entering into liquidation.
102. Claims were made by the liquidator under sections 212, 214, 238, 239 and 423 of the Insolvency Act 1986. In the context of section 423 the liquidator alleged that the payment of the dividend amounted to a transaction defrauding creditors. He sought orders that the defendants restore the company's position to what it would have been if the transaction had not taken place.
103. An issue arose as to whether the court had jurisdiction to make orders against the defendants, *i.e.*, to grant relief against directors who had directed the company to enter the relevant transaction, and, if so, whether the court should make such an order in the exercise of its discretion. Deputy Insolvency and Companies Court Judge Kyriakides said that the answer was "no".
104. The Deputy Judge dealt with the matter first simply as a matter of construction of the relevant statutory provisions. The passage in her judgment is lengthy, but it is worth setting out in full:
91. For the reasons set out below, I do not accept Mr Casement Q.C.'s argument that the court has an unlimited jurisdiction to grant relief under section 238, 239 and/or 423 against any person.

92. I shall start by considering the provisions of sections 238, 239 and 423 without regard to any of the authorities. In sub-sections 238(3), 239(3) and 423(2)(a), the two important words are “restore” and “the position”. It is not limited to restoring the position of the company, but to putting all parties back in the position that they would have been in had the transaction not been entered into or the preference given. The exercise, therefore that the court must carry out is restitutionary in nature, not compensatory.
93. In order to achieve the objective of the provisions of sub-sections 238(3), 239(3) and 423(2)(a) the court is given a discretion as to the order that it may make. Examples of the orders that the court can make are set out in sections 241 and 425, although the court is not limited to these orders. However, the provisions of sections 241 and 425 show that, in exercising its discretion, the court is not bound to restore the position to exactly that which existed prior to the relevant transaction or preference. It may make orders which in substance achieve that result but achieve it in a different way.
94. The issue then is who, as a matter of the construction of the relevant provisions may be required to restore. In order to answer this question, regard must first be had to the substantive provisions of sections 238, 239 and 423.
95. Section 238(2) provides that an office-holder may apply to the court for an order under the section if the company has at a relevant time entered into a transaction with any person at an undervalue. Section 423 contains the same provision save that there is the additional threshold of proving the purpose for which the transaction was entered into. If the objective of the court is to restore the position to what it was prior to the transaction being entered into, what the court is, in effect, doing is notionally setting aside the transaction, although the power itself is not expressed in this way. It seems to me, therefore, that the primary person at which these provisions are aimed and who is clearly within the court’s jurisdiction to make an order, is the counterparty to the transaction with the company and, indeed, if regard is had to sections 241 and 425, it will be seen that the court may make orders against such parties for them to restore the property which was transferred or the proceeds of sale of the property in the event that they have sold it.
96. Section 239(2) provides that where at a relevant time the company has given a preference to any person, the office-holder may apply to the court for an order. It is clear, however, from the provisions of section 239(4) that “any person” does not actually mean “any person” but is limited to persons:
- 96.1 who are either a creditor of the company or a surety or guarantor of the company’s debts or other liabilities; and
- 96.2 who have been put into a better position than they would have been in in the insolvency liquidation of the company as a result of something done or suffered to be done by the company.
97. However, under section 239(5) the court has no jurisdiction to make an order against persons falling within section 239(4) unless the company giving the

preference was influenced in deciding to give it by the desire to produce in relation to that person the effect mentioned in paragraph 96.2 above.

98. Having regard to the above provisions, the primary persons at which section 239 is aimed and who clearly fall within the court's jurisdiction to make an order are creditors of the company and guarantors or sureties of its liabilities whose position has been preferred in the way described in paragraphs 96 and 97 above. As shown by section 241, in order to restore the position: (i) a creditor may be compelled to repay monies, or restore property, received by him by way of preference from the company, which constitutes the preference; (ii) security given to a creditor, which is a preference, may be set aside; and (iii) obligations may be imposed on a guarantor or other surety, which are the same or similar to the obligations from which they may have been released or discharged.
99. However, it is also clear from the provisions of sections 241 and 425 that the court's jurisdiction to make an order is not limited to the counterparties of a transaction (in the cases of sections 238 and 423) or to preferred creditors, guarantors or sureties (in the cases of sections 238 and 423) or to preferred credits, guarantors or sureties, in the case section 239. Having regard to these provisions, the court clearly also has jurisdiction to make orders who have subsequently received the property (including money), which was the subject of the transaction at an undervalue or preference (whether or not they continue to hold it or have sold it) and against parties who have otherwise received a benefit from the transaction or preference.
100. Having regard to the above provisions and to the objective that the court is required to achieve in relation to any remedy it may grant, the court does not, in my judgment, have any jurisdiction to make orders against any persons who do not fall within the parameters set out in paragraphs 95 to 99 above.
101. Accordingly, I find as a matter of construction of the relevant provisions, that the court does not have jurisdiction to make an order under sections 238, 239 and 423 against a director of a company, who has received no benefit from the transaction or preference and whose only role was to direct the company to enter into the transaction or to give the preference. He has nothing to "restore". In such cases, if there has been any wrongdoing by any such director, an office-holder has the armoury of section 212 of the Insolvency Act to make a claim against him for the purpose of recovering loss suffered by the company as a result of his actions. If there has been no wrongdoing by the director, no claim against him under section 212 will lie. However, if the Applicant's arguments are right, such a person will be subject to the court's jurisdiction under sections 238, 239 and 423 and an order for relief may be ordered against him. Such a position clearly cannot be correct.
105. The Deputy Judge then went on to consider whether the authorities supported her conclusion, and she held that they did, referring to the passage in *Wilson v Masters International Limited* cited in paragraph 100 above. She noted that the liquidator had been unable to identify any case where relief had been ordered against a person other than of the type described in [95]-[99] of her judgment.

106. On the facts, the Deputy Judge held that the liquidator had no arguable case for relief against any of the defendants, there being no allegation that they had received the dividend or “any other benefit” from the transactions:

117. In this case, the Applicant does not contend that the Respondents were parties to any of the transactions alleged to fall within sections 238 and 423, or that they were preferred creditors, guarantors or sureties, or that they received the Dividend or any other benefit from the impugned transaction/preference. In light of my findings on the law as set out in paragraph 115 above, I am, therefore, of the view that the Applicant has no real prospect of succeeding in his claims against the Respondents under sections 239, 239 and 423. I agree with the Respondents’ submissions that what the Applicant has sought to do is to pursue claims for breach of duty against the Respondents under the guise of claims under sections 238, 239 and 423.

118. Even if I were wrong on the issue of jurisdiction, in my judgment, there is no real prospect that the court would exercise its discretion in favour of granting a remedy against the Respondents by reason of the matters referred to in paragraph 117 above. In the case of the Non-Executive Directors, this is further fortified by the fact that they were not directors of the Company as at 3 March 2008, when the directors resolved to recommend the Dividend and by my findings in paragraphs 60 to 70 above regarding the alleged agreement between the Directors.

107. Mr Peters resisted the suggestion that the court had no jurisdiction to make an order under section 423 against someone who had not benefited (or had not benefited directly) from the impugned transaction. He submitted that:

- i) The court has broad discretionary powers under sections 423 and 425, which do not themselves confine the court’s power to grant relief to persons who have directly benefited from the transaction;
- ii) Stephen Gee, KC in *Commercial Injunctions* (7th ed.) suggested at 13-037 that the court’s jurisdiction was not so confined:

It may be that the transferee has spent the proceeds of a transaction. The court has power to order him to pay the victims an amount reflecting the benefits obtained by him from the transaction: s. 425(1)(d). This is a personal claim against a transferee and can itself be the subject of Mareva relief. If assets are transferred from one company to another, and then on [by] a series of transfers, and this is arranged by an individual who controls or who is in a position to instruct the various recipients what to do, an order can be made directly against the individual who caused the transfers to be made, even though he personally did not receive any property. This interpretation would further the purpose of the statutory provision, which is to give adequate protection to “victims” of such transactions. It is also just that those who knowingly participate in the wrongful venture with a common design should be responsible to those who are wronged. In such circumstances the victims would have a direct claim against the individual who caused the transfers to be made with the intention of defrauding creditors, as set out in s. 423(3)

(emphasis added).

108. Mr Peters suggested that *Johnson v Arden* should properly be regarded as a case that turned on the exercise of discretion in circumstances very different to the present, the dividend having been declared in favour of third parties who appear to have been wholly independent of the directors with no suggestion that the directors had benefited from it in any way at all.
109. I do not think that *Johnson v Arden* or *Wilson v Masters International Limited* can be dismissed simply as cases that involved a refusal to exercise a discretion; in both cases, the primary reason given for the decisions made by Mark Cawson, QC and by Deputy Insolvency and Companies Court Judge Kyriakides was that they did not consider they had jurisdiction to make the orders sought.
110. That said, in deference to those judges, and whilst noting that Stephen Gee, KC cites no authority (other than the language of the statute) for the proposition that an order can be made against a person who has directed, but who has not received any benefit from, an impugned transaction, I would myself be reluctant to read into section 423 a jurisdictional hurdle that is not expressly there.
111. I quite accept, however, that as a matter of discretion, an English court would ordinarily refuse to make an order against a person who had received no benefit him or herself at all from the relevant transaction and had merely directed or facilitated it. That, I quite agree, would not be consistent with the restorative nature of the section.
112. On the facts of the present case, however, I do not consider that the jurisdictional question – whether the receipt of property or some benefit is a jurisdictional precondition to the granting of section 423 relief against a defendant - is one that I need to resolve. The facts of *Wilson v Masters International* and *Johnson v Arden* are notably different from those here.
113. In *Wilson v Masters International Limited* the recipient of the preference, MIL, could be identified, and an order could be and was sought against it. It is wholly unsurprising in these circumstances that Mr Cawson, QC held that an order against Dr Masters was inappropriate. Although no order was sought against the recipients of the dividend in *Johnson v Arden*, they too, presumably, could have been identified.
114. Further, as Mr Peters submitted, the only role of the directors in *Johnson v Arden* appears to have been to approve the dividend; as the Deputy Judge said, there was no allegation that the directors had themselves received *any* benefit from it. In *Wilson v Masters International Limited* Mr Cawson, QC speculated that Dr Masters “may have received some incidental benefit [from the transaction] as a shareholder in MIL” but that was all. He was acquitted of any misfeasance.
115. Here, in contrast:
 - i) As a result of the deliberate conduct of Mr and Ms Sanchouli and Mr Beisenov, in breach of court orders, Company A has not been identified and the court is unable to make any order against it;

- ii) For the same reason, it is impossible to know what has happened to the funds transferred to it, or indeed as to the precise nature of their interests in Company A (like Petrogat, Company A is apparently legally owned by Mr Beisenov, but the beneficial ownership of Company A has not been revealed);
 - iii) What is known, however, is that Company A is owned and operated by precisely the same individuals who own and/or operate Petrogat. Ms Sanchouli admitted that Petrogat's funds were transferred to Company A in order to enable Company A to carry on its business (and Mr and Ms Sanchouli and Mr Beisenov to carry on their business through Company A); and the transfers would inevitably have increased Company A's asset value and the value of the interests of its owners, even if (which is unknown) sums were not actually transferred on to them.
116. I decline, in these circumstances, to hold that Mr and Ms Sanchouli and Mr Beisenov obtained no benefit from the Transfers, or that, insofar as any benefit was obtained by them, it was only "incidental" (insofar as the identification of a "non-incidental benefit" is a pre-requisite to section 423 relief; whether a benefit is to be regarded as incidental or non-incidental strikes me very much as a matter of fact and degree).
117. On the contrary, and drawing such inferences as I consider I am entitled to draw from the facts, including the circumstances of the Transfers, Mr and Ms Sanchouli's and Mr Beisenov's conduct and their refusal to identify Company A (see paragraphs 81 and 82 above), I conclude on the balance of probabilities that they each received sufficient benefit to justify the court making orders under section 423 against them.
118. In this respect, and although at that stage he was considering only whether Integral had a good arguable case for section 423 relief for the purposes of continuing the WFO, I agree with the remarks made by Sir Michael Burton GBE in his 29 July 2021 judgment at [16]:
- In this case, where even the identity of company A (other than an assertion that it is similarly owned and controlled as is Petrogat) is so closely guarded, no real picture is given at all as to what has happened to its assets, including the assets received from Petrogat. Ms Sanchouli at paragraphs 48 and 49 of her first witness statement states that most of the assets of Company A were used to satisfy Company A's liabilities, of which she gives some examples, but her general description is that "by April 2019, all of the funds that had been transferred from Petrogat to Company A had been spent by Company A in the ordinary course of business either for its own account or to make payment of Petrogat's liabilities". I am unable to conclude in this case that the Second, Third and Fourth Defendants received no benefit from the transfers to Company A, and I am satisfied that they may well have done so.
119. I do not accept, furthermore, that, in deciding what form of relief to grant, it is necessary for me to be able *precisely* to quantify the benefit obtained by *each* of Mr and Ms Sanchouli and Mr Beisenov and to limit the relief ordered against each of them to that *precise* amount, and that if I am unable to do so I cannot order relief against any of them.

120. If that were correct, it would have the startling consequence that the refusal of Mr and Ms Sanchouli and Mr Beisenov, in breach of the court's orders, to disclose information about Company A and its assets, and about their own assets, would have the effect of depriving the court of the ability to grant effective relief. That cannot be right.
121. My conclusion on the facts, and drawing inferences that I consider I am entitled to draw, is that Mr and Ms Sanchouli and Mr Beisenov have collectively received a benefit from the Transfers at least equivalent to the amount for which Integral seeks judgment, and that an order that the three of them are jointly and severally liable for that sum is the appropriate and a just order.
122. There was a suggestion in the evidence previously served that Mr and Ms Sanchouli and Mr Beisenov played different roles within Petrogat and Company A, with the two companies being run on a day-to-day basis by Ms Sanchouli with input from Mr Sanchouli (I note from Moulder J's 17 October 2018 judgment at [75] that Mr Sanchouli used the email ceo@petrogat.com), but being legally owned by Mr Beisenov.
123. This might suggest that the extent of their involvement in and awareness of the Transfers may have been different; but the evidence previously served is completely untested, and Mr and Ms Sanchouli and Mr Beisenov are not entitled to rely upon it for the purposes of defending Integral's claim. I decline to draw distinctions between their roles when considering the order that should be made.

To whom should payment be made?

124. My conclusion is, thus, that an order should be made under section 423 of the Insolvency Act 1986 that Mr and Ms Sanchouli and Mr Beisenov should be jointly and severally liable to pay the amount of the Transfers up to the amount of Integral's outstanding judgment.
125. There remains the question: to whom should payment be made? Given that the purpose of an order under section 423 is restorative, in many cases it will be appropriate to require property to be returned or sums to be repaid to the transferor company. Consistent with this, as set out in paragraph 35 above, the Particulars of Claim sought an order for payment to the Replacement Receiver.
126. But, as Sales J explained in *4 Eng Ltd v Harper* at [9], an order for payment back to the debtor company is not *necessarily* required, and the court's jurisdiction under section 423 is not so limited:

A claim under s. 423 is a claim for some appropriate form of restorative remedy, to restore property to the transferor for the benefit of creditors, who may then seek to execute against that property in respect of obligations owed by the transferor to them. In an appropriate case, an order might be made to require the transferee to pay sums or transfer property direct to the creditors, if the position in relation to execution is clear and any further costs associated with execution ought to be avoided. But often the appropriate order will be for the transferee to pay sums or transfer property back to the transferor, leaving the distribution of those sums or property as between the creditors of the transferor to be governed by the general law

(emphasis added).

127. Here, it seems to me that an order for the sums to be paid to the Replacement Receiver would serve no purpose (and would likely increase costs) and that an order for payment directly to Integral is appropriate:

- i) Ms Sanchouli's first witness statement explained that Petrogat's trade licence has expired, that it does not exist as a trading entity and that it has no operative bank accounts. It is, to all intents and purposes, defunct;
- ii) The Replacement Receiver has confirmed in a letter dated 20 May 2022 that:
 - a) His own fees have been secured and he has no claim for fees;
 - b) He has not been contacted by any other creditors of Petrogat, and that, to the best of his knowledge, Integral is the only creditor of Petrogat; and
 - c) Any payment that is made to Petrogat pursuant to a judgment of this court will simply be transferred to Integral to satisfy its claim against Petrogat.

128. I noted earlier that the Particulars of Claim primarily sought an order for payment to the Replacement Receiver. They also, however, sought:

Such further or other relief as the Court considers to be necessary and/or appropriate to unwind the effect of the Transfers.

The precise nature of the relief, if any, to be ordered under section 423 is always a matter for the court.

129. I consider that I can and should order payment to be made directly to Integral, as sought in the Application Notice, and that I can do so without requiring the Particulars of Claim to be amended (although I would have been prepared to grant Integral permission to amend if I had thought it was required).

Conclusion

130. I will declare that the Transfers identified in Annex 1 to the Particulars of Claim are transactions defrauding creditors within the meaning of section 423 of the Insolvency Act 1986.

131. I will also make an order on a joint and several basis requiring Mr and Ms Sanchouli and Mr Beisenov to pay Integral the amount of the Transfers up to the amount of Integral's outstanding judgment. The Application Notice put this at US\$1,700,613.52, but I was informed during the hearing that there was a credit to be given and that the correct figure was slightly lower.

132. I will hear counsel in relation to this and in relation to any other matters concerning the precise form of order to be made, and also in relation to any consequential matters.