

Calculating limitation periods

Hill (as trustee in bankruptcy of Nurkowski)-v- Spread Trustee Company Ltd and another
2006 EWCA Civ 542

The judgment, which was given by the Court of Appeal in this case on 12 May 2006, answered the important question of when a claim for relief under section 423 of the Insolvency Act 1986 (the "Act") is statute-barred and, related to that, whether there is any statutory period of limitation for claims brought under section 423 and if so, when that period of limitation begins to run.

The essence of section 423 is that it empowers the court to avoid transactions entered into at any time if made by a person at an undervalue and with the purpose of prejudicing his creditors. It can apply, even though the debtor is not in a formal insolvency.

Surprisingly, although section 423 has been on the statute books in one form or another since 1571, no reported case was produced to the court which decided whether any period of limitation applies to claims brought under that section and if so, what that period is.

The judgment also deals with the nature of some of the transactions caught by section 423 but that is outside the scope of this note.

The Facts

The underlying facts are complicated. The first instance judgment runs to nearly 80 pages. However in brief the dispute concerned a settlement made by Mr Nurkowski in favour of his 2-½ year old daughter dated 10 March 1989.

Mr Nurkowski had interests in building and property development and owned two fields, which abutted a 200-acre site for which Gallagher Ltd made an application for planning permission to West Wiltshire District Council. Mr McCluskey was a member of the planning committee of the Council, which granted permission on 4 April 1989. About month before planning permission was granted, Mr Nurkowski made a gift into the settlement of one of the fields, known as OS160. Those representing Mr Nurkowski subsequently advised the Revenue that OS 160 was worth only £35,000 on settlement in March 1989. In fact, the judge found that by then Mr Nurkowski had already received an offer for the land of £ 700,000 and that he knew that £700,000 was the minimum value. A few months later the two fields were sold together for £2 million.

The Revenue did not accept the valuation of £35,000; but on 30 March 1993 the Revenue agreed to compromise its claim against Mr Nurkowski for £160,000. The trustee in bankruptcy took the view that the compromise was colourable and that the Revenue could now raise a new assessment under section 29 or 36 of the Taxes Management Act 1970.

Following receipt of the proceeds from the sale of the two fields, the trustees lent most of it back to Mr Nurkowski. Between 1994 and 1997 Mr Nurkowski executed charges conferring additional security on the trustees for those loans. He also made an assignment dated 21 November 1997 to the trustees of sums owed to him by his company on a loan account.

The Judge concluded that Mr Nurkowski had a plan for making the gift into the settlement and hiding information from the Revenue and accordingly that one of the purposes of making the settlement was to evade tax by pretending that there was little difference between the original cost of the land and its value when gifted into the settlement.

Mr Nurkowski was made bankrupt on 28 January 1999.

The Claims

Claims were brought by the trustee in bankruptcy of Mr Nurkowski to obtain relief under section 423 of the Act in respect of the settlement, the charges and the assignment on the basis that they were transactions defrauding creditors and should accordingly be set aside.

Mr Nurkowski's trustee in bankruptcy sought an order that (1) the trustees of the settlement should indemnify Mr Nurkowski's estate in bankruptcy against any claim by HM Revenue and Customs to set aside the compromise of tax liabilities made with Mr Nurkowski on 30 March 1993; (2) the charges should be set aside and (3) the trustees should repay the £162,051 plus interest to Mr Nurkowski paid to them under the assignment dated 21 November 1997, such sum to be recredited to the amounts owed by him to the trustees.

The proceedings were commenced on 4 December 2002, over 12 years after the settlement was executed.

The Issue

The issue was whether there is any statutory period of limitation for claims brought under section 423 of the Act and if so when that period of limitation begins to run.

The Judgment

The judge at first instance rejected the defence that the claim was statute-barred. He held that the claim under section 423 was a specialty as the essence of a specialty is an obligation imposed by statute and that therefore section 8 (1) of the Limitation Act 1980 applied. Further an action brought by a trustee in bankruptcy could not have been commenced before the bankruptcy order was made as the appointment of the trustee in bankruptcy is a necessary ingredient of the cause of action vested in the trustee. The Court of Appeal agreed.

The cause of action in this case therefore accrued on 28 January 1999 when the bankruptcy order was made.

As section 8 (1) of the Limitation Act 1980 provides that "an action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued", the claim was not statute-barred.

Summary

Claims for relief under section 423 have to be brought within twelve years from the date on which the cause of action accrued, in accordance with section 8 (1) of the Limitation Act 1980. If the claim is brought by the trustee in bankruptcy/liquidator the limitation period begins to run from the date of the bankruptcy/winding up order.

Comment

After 255 years, the judgment provides welcome clarification concerning the calculation of the limitation period for claims brought under section 423 of the Insolvency Act 1986.

As the judgment did not find that there is no limitation period at all for such claims, it ensured that very stale claims cannot be brought.

However as the limitation period begins to run from the date of the bankruptcy order, the limitation period may in certain circumstances begin to run many years after the transaction challenged was entered into.

The judgment avoided creating the problem of the limitation period having expired before the appointment of the trustee in bankruptcy/liquidator, which may well have happened in numerous cases if the Court of Appeal had decided that the limitation period ran from the date the transaction was entered into.

A surprising consequence of the judgment is that it may be that there are victims of transactions whose individual claims may be statute-barred when the bankruptcy order is made; but who may nevertheless be able to recover as creditors in the bankruptcy.

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