A HIDDEN GEM?

THE 'SUFFICIENT CONNECTION WITH THE JURISDICTION' TEST UNDER S.423 OF THE INSOLVENCY ACT 1986 IN THE LIGHT OF SUPPIPAT V NARONGDEJ [2023] EWHC 1988 (COMM).

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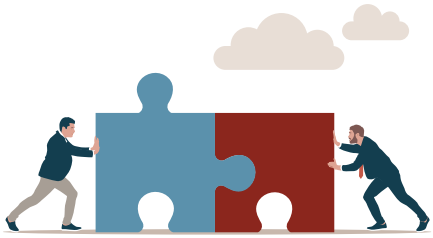
Introduction

Hidden within the mammoth 1593 paragraph judgment of Calver J in Suppipat v Narongdej [2023] EWHC 1988 (Comm) ("the Judgment") lies an important analysis – albeit obiter – of how the court should approach the issue of whether a claimant has satisfied, the 'sufficient connection with the jurisdiction' test for the purposes of a claim under s.423 of the Insolvency Act 1986 ("s.423").

By way of reminder, s.423 gives the court a far-reaching power to make such order as it sees fit to restore the position if a person has entered into a transaction, either for no value or not for money's worth, for the purpose of putting assets beyond the reach of or otherwise prejudicing their creditors. Far from being confined to the insolvency context, s.423 is an increasingly important tool in all forms of civil litigation, even reaching the Family Division in the high-profile divorce case of Akhmedova v Akhmedov [2021] EWHC 545 (Fam).

In Suppipat, the claimant and his companies brought proceedings against 17 defendants, only one of whom was resident in England and Wales, (i) claiming damages under Thai (alternatively, Singaporean or Chinese) law, against a number of the defendants for fraudulent misrepresentation in relation to the sale and purchase of shares in a Thai wind-farm company ("the SPA"), and (ii) in relation to the allegedly unlawful post-SPA asset-stripping of the corporate purchasers of the shares, claiming (a) damages under Thai (alternatively, Chinese) law, and/or (b) financial orders reversing transactions to defraud creditors under s.423.

Following a 20-week trial in the Commercial Court in 2022 and 2023 in respect of the foreign law claims (which the court held fell to be determined under Thai law), by its Judgment the Court (i) dismissed the claims under Thai law for fraudulent misrepresentation, but (ii) awarded the claimants damages under Thai law in respect of a 'cheating against creditors' claim involving the unlawful asset-stripping of the purchasers under the SPA.



However, of most significance for this article, between [1326] and [1350] of the Judgment, the Judge also dismissed all of the claimants' claims under s.423, holding that the claimant had not satisfied the threshold requirement of proving a 'sufficient connection with the jurisdiction'.

This was the case even though, during the pre-trial interim skirmishing, the claimant had persuaded the court that there was a serious issue to be tried that it would be able to satisfy the 'sufficient connection' issue at trial by reason of the existence of its other sufficiently connected claims in the same proceedings (see Suppipat v Narongdej [2020] EWHC 3191 (Comm), Butcher J, at [71-77]).

In case it is thought that this obiter part of the judgment was really of no consequence because the claimant in Suppipat succeeded under its foreign law claims, think again. The logical consequence of the Judgment on this issue is that, if the claimant had failed in its Thai law claims (for example, on limitation grounds), s.423 would not have ridden to the claimant's rescue – even if the s.423 claim had otherwise been well-founded – by reason of their failure to overcome this threshold test. It would also seem to follow that the approach adopted by the court at the interim stage (and other cases which have adopted similar approaches) may be ripe for reconsideration.

In this article, we analyse these issues, which we suggest ought to be of great interest to those lawyers who practise in the area of cross-border fraud claims. In such claims there are often tenuous links (at best) to the jurisdiction in which the claimant seeks to bring the proceedings, which jurisdiction is often chosen more for the availability of draconian interim injunctive relief such as WFOs and Search Orders and/or for the high reputation of its judicial system, than for any real connection with the parties or dispute. Whilst the general trend in recent years has been for the courts to adopt a more expansive approach towards granting cross-border relief, the approach to s.423 in Suppipat sounds an intriguing note of judicial caution.

The 'Sufficient Connection' Test

On its face, s.423 is of unlimited territorial scope, so the threshold "sufficient connection" test is a critical safeguard against the exorbitant exercise of the power.

The leading case is Re Paramount Airways (No. 2) [1993] Ch 223. That was decided in the context of s.238 of the 1986 Act, which applies only to English-registered companies but also provides for orders to be made against "any person" in order to reverse transactions at an undervalue. The Court held that the words "any person" in s.238 (and a number of other sections of the Insolvency Act 1986, including s.423,) bear their literal and natural meaning and permit orders against a foreigner resident abroad. (Although, contrast Re Akkurate Ltd [2020] EWHC 1433 (Ch) in which the Chancellor, following the decision of the Court of Appeal in Re Tucker [1990] Ch 148 and overruling several contrary High Court authorities, held that the phrase "any person" in s.236 does not give that provision extra-territorial effect).

However, Sir Donald Nicholls V-C provided an important gloss on this broad starting point at 239–240, in a passage warranting full quotation:

"The court's discretion: a sufficient connection with England

This conclusion is not so unsatisfactory as it might appear at first sight. The matter does not rest there. Parliament is to be taken to have intended that the difficulties such a wide ambit may create will be sufficiently overcome by two safeguards built into the statutory scheme. The first lies in the discretion the court has under the sections as to the order it will make … The discretion is wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction or the person to whom the preference was given. In particular, if a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. This connection might be sufficiently shown by the residence of the defendant. If he is resident in England, or the defendant is an English company, the fact that the transaction concerned movable or even immovable property abroad would by itself be unlikely to carry much weight. Likewise if the defendant carries on business here and the transaction related to that business. Or the connection might be shown by the situation of the property, such as land, in this country. In such a case, the foreign nationality or residence of the defendant would not by itself normally be a weighty factor against the court exercising its jurisdiction under the sections. Conversely, the presence of the defendant in this country, either at the time of the transaction or when proceedings were initiated, will not necessarily mean that he has a sufficient connection with this country in respect of the relief sought against him. His presence might be coincidental and unrelated to the transaction. Or the defendant may be a multinational bank, carrying on business here, but all the dealings in question may have taken place at an overseas branch.

Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question, whether the defendant acted in good faith, and whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections."

In Erste Group Bank AG v JSC 'VMZ Red October' [2015] 1 CLC 706 at [116],

the Court of Appeal[1] re-emphasised, citing Paramount Airways, that for the court to exercise its jurisdiction under s.423 extra-territorially, the court must be satisfied that, in respect of the relief sought, the defendant (our emphasis) is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element.

Paramount Airways was also approved by the Supreme Court in Bilta (UK) Ltd v Nazir (No 2) [2016] AC 1, at [110] (Lord Sumption) and [213]-[214] (Lord Toulson and Lord Hodge), and the sufficient connection test was held to be equally applicable in the context of s.213 of the Insolvency Act 1986.

In Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd [2018] 1 WLR 4847 the Court of Appeal again endorsed the Paramount Airways sufficient connection test. Lewison LJ stated at [30] that:

"The effect of the legislation, therefore, is that it confers on the court power to make orders against persons or property outside England and Wales, subject to the court being satisfied that there is a close enough connection with England and Wales."

At [54] Lewison LJ reiterated the point that the sufficient connection must be 'between the defendant and England and Wales', and at [55] he emphasised that:

"The breadth of the potential scope of section 423 makes it all the more important that in a case with a foreign element the court is scrupulous to ensure that the safeguards are rigorously applied."

Having re-entrenched those principles, the Lewison LJ at [58] held that the first instance judge's failure to advert to the factors identified by Sir Donald Nicholls V-C in Paramount Airways vitiated his judgment. At [59] it was further held that there was not even a serious issue to be tried that there existed a sufficient connection between the claim and England and Wales. Importantly, the fact that there was a separate damages claim against the transferor that would be litigated in any event in England and Wales under a settlement agreement governed by English law, was not enough to establish a connection; the s.423 claim had "its own factual and juridical basis"

(see [55] and [59]).

Finally, and most recently, both Paramount Airways and Orexim were cited with approval by the Privy Council in AWH Fund Ltd (In Compulsory Liquidation) v ZCM Asset Holding Company (Bermuda) Ltd [2019] UKPC 37, again noting at [40-41] and [55] the importance of a sufficient connection between the jurisdiction and the defendant.

Thus, as the appellate authorities stand, the overarching question is whether, in respect of the relief sought against the defendant on the s.423 claim, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. The focus is on the s.423 claim against the defendant, not other claims against the defendant, still less other claims against other defendants or the proceedings more broadly.

Suppipat

In Suppipat, with the exception of one defendant domiciled in the jurisdiction, the court was dealing with defendants who had no connection at all with the jurisdiction: they were foreign nationals, and it was not alleged that they had ever resided or carried on any business in, or otherwise had any connection with England and Wales; the s.423 claim did not concern property that was or ever had been in England and Wales; no relevant dealings were alleged to have taken place in England and Wales; the relevant transfer for the purposes of the asset-stripping claims took place in Thailand between Thai nationals or Thai companies pursuant to contracts governed by Thai law.

Thus, Suppipat was not a case concerned with an attempt by defendants to frustrate a judgment of an English court or an English-seated arbitral tribunal (by contrast with the Commercial Court decisions in Dornoch Ltd v Westminster International BV [2009] 2 CLC 226 (Tomlinson J), considered by Lewison LJ in Orexim at [60], and Integral Petroleum SA v Petrogat FZA [2021] EWHC 1365 (Comm) at [30] (Calver J), where the English court held that the sufficient connection test was satisfied).

It was in these circumstances that the defendants in Suppipat submitted to the English court that it should not play the role of international policeman. In essence, the defendants submitted that if the claimants' Thai law asset stripping damages claims succeeded, there was no need for the English Court to make a concurrent order under s.423, whereas if the claimants' Thai law claims should fail, it would not be appropriate for the English court to step in to improve the claimants' position, by exercising a discretion under an English statutory provision (despite having no other connection with the jurisdiction) to grant a remedy that would not be available under the governing law of the transaction or in the jurisdiction with which the transaction was overwhelmingly connected.

For their part, the claimant relied upon the fact that the s.423 claim was 'inextricably connected' to the Thai law asset-stripping claims already before the English court, involving the identical factual basis, and submitted that it would be perverse for the court to decide the Thai law claims, over which

1 Gloster LJ giving the judgment of the Court, the other members of which were Aikens and Briggs LJJ.

it did have jurisdiction, and not to decide the s.423 claims. The claimants relied upon the judgment of Evans-Lombe J in Jyske Bank (Gibraltar) Ltd v Spjeldnaes [2000] BCC 16, in which s.423 relief was granted against a defendant whose only connection with the jurisdiction was as a defendant to other claims in the jurisdiction, and where none of the Paramount Airways considerations and factors were present. The claimants also relied upon the judgment of Flaux J (as he then was) in Fortress Value v Blue Skye at [116-118], where the court held that even in the absence of any of the factors identified in Paramount Airways, the court might have jurisdiction to make an order under s.423.

In Suppipat, the Judge rejected the claimants' submissions for the following reasons:

The starting point is Paramount Airways, and the requirement that the defendant is sufficiently connected with the jurisdiction to make it just and proper for the English court to make an order against him despite the foreign element: [1345].

None of the factors identified in Paramount and Orexim as indicating a sufficient connection were present in the case before the Judge: [1346].

The Judge doubted the correctness of the pre-Orexim authorities which suggested that, in a given case, the claimant might be able to establish the existence of a sufficient connection to the jurisdiction in the absence of any of the specific factors identified in Paramount and Orexim; at least, in such circumstances it would only be in 'an exceptional case' that sufficient connection could be established: [1347(1)].

The Judge distinguished the previous authorities in which s.423 orders were made despite the absence of any of the Paramount factors. Thus, (i) Dornoch was a case where the impugned transaction could be viewed as an attempt to frustrate an award of the English court arising out of a dispute before the English court; (ii) Fortress Value was a case where the claimant had established a good arguable case that English law would be the applicable law at trial, and (iii) Jyske Bank was a case where, if the English court declined relief, the victim would suffer delay and increased costs in issuing fresh proceedings in Ireland, and the court was giving the victim an effective remedy – the Judge might also have distinguished Jyske Bank on the ground that it was an application made post-judgment, where the main judgment had been handed down by the English court in favour of the victim.

Perhaps most significantly for future cases, at [1348] the Judge accepted the defendants' submission that, had the claimants failed to establish their Thai law claims in relation to the alleged cheating against creditors claims (i.e., the asset-stripping), it would not be appropriate for the English court to step in and give the claimant a remedy under English law by way of relief under s.423, particularly in the absence of any connecting factors and where the claims were already the subject of criminal proceedings in Thailand. Effectively, the Judge held that the claimants' arguments were 'bootstraps' arguments.

Consequences For Future Claims

We respectfully suggest that, in the light of the Judgment, it might legitimately be argued that some of the earlier judgments of the Courts, particularly in relation to the question of whether at an interim stage a claim under s.423 should be permitted to go to trial, have adopted an overly liberal approach to the 'sufficient connection' test. In particular, it is arguable that they have erred in finding that the mere existence of litigation in this jurisdiction between the parties related to the s.423 claim is itself a connecting factor: see for example, Butcher J in Suppipat [2020] EWHC 3191 (Comm) and Cockerill J in Avonwick Holdings Ltd v Azitio Holdings Ltd [2018] EWHC 2458 (Comm), neither of which were referred to in the Judgment.

In Avonwick, Cockerill J candidly accepted at [55] that "what might be termed the preponderance of the standard factors [i.e. those identified in Paramount] do point away"

from there being a sufficient connection. But she continued at [55]-[56] "I do need to consider any other relevant factors together with them. Where there is litigation in this jurisdiction between the same parties, which litigation is related to the section 423 claim, that is of itself in my judgment a factor." Therefore, she held at [66]

Overall, I conclude that there is sufficient material for me to say that there is a real prospect of establishing that, despite the relative lack of indications within the initial or standard factors, there is a sufficiently close connection to make the exercise of the discretion appropriate and that it would therefore be appropriate, subject to forum conveniens, to grant permission to serve out. Those factors are the ones that I have been through, the link in the existence of the litigation itself, the links in relation to English law, the case in relation to motivation and the factual overlap of issue."

In similar terms, at the interim stage in Suppipat, Butcher J (having quoted from Avonwick and other earlier decisions) held as follows at [74] – [75]:

…I recognise that what Cockerill J called the "initial or standard" factors do not indicate a significant connexion with England. However, in this case, the Tenth Defendant will be involved in this litigation in any event, irrespective of the claim under s. 423….

The decision in Jyske Bank indicates that the involvement of the relevant defendant in litigation here, even in the absence of other "initial or standard" connecting factors can, in an appropriate case, mean that there is a

sufficient connexion…In paragraph [56] of her judgment in Avonwick Cockerill J stated that the existence of litigation in this jurisdiction between the same parties and which is related to the s. 423 claim is itself a connecting factor. I agree with that. It is true that it is likely to be a weightier factor if the impugned transaction is said to have been designed to thwart proceedings here, as was the case in Dornoch , but I do not consider that it can have no weight in other circumstances. How much weight it has will depend on the circumstances of the case."

Whilst it is correct that Paramount did not purport to lay down an exhaustive list of factors, whether the existence of other claims in England can ever be a relevant factor is open to question, both in light of the facts and reasoning in Orexim, and in light of the rejection of a 'bootstraps' argument in the Judgment. After all, s.423 is not, properly considered, an alternative form of personal or proprietary claim; it is a form of statutory class-action remedy (albeit increasingly invoked by and exercised in favour of a single creditor) to which different jurisprudential considerations may apply.

In the context of interim injunctive relief the courts have sometimes taken an expansive view of its jurisdiction in order to combat international wrongdoing and assist foreign courts. For example, in Haiti v Duvalier (No. 2) [1990] 1 Q.B. 202 (CA) a Mareva injunction was granted in support of proceedings in France in circumstances where the sole connection with England was the fact that the respondent had used English solicitors to hold property abroad. But the facts of that case were extreme, and it was described by Lawrence (later Lord) Collins in an LQR article as going to

"the very edge of what is permissible".

In contrast, where final substantive relief is sought, the English courts have generally been more circumspect about the circumstances in which it is appropriate to assume jurisdiction: see e.g. Vedanata Resources Plc v Lungowe [2019] UKSC 20 at [66] – [87].

This reticence to grant exorbitant final relief may explain the differences between Jyske Bank and Suppipat. In Jyske Bank it was clear that there was an equivalent to s.423 in Irish Law, and that the consequence of refusing jurisdiction would simply have been to require parallel proceedings to be issued in Ireland at additional cost and expense in order to obtain the remedy. Evans-Lombe J held that in those circumstances it was 'convenient' to grant the relief in England. In contrast, in Suppipat the s.423 claim was an attempt to obtain a remedy which was not otherwise available under Thai Law.

There are also practical considerations which may have to be considered on another occasion. If it were the case that the sufficient connection test could be satisfied by the mere fact that the relevant defendant will by the end of the trial have participated in related claims, any s.423 defendant would in practice be required to take the sufficient connection point at the jurisdiction stage or on a strike-out/ summary judgment application (in each case to be determined on a real prospect of success basis) or risk being presented with a fait accompli. As matters presently stand, defendants would be well-advised to make such an application at the earliest opportunity.