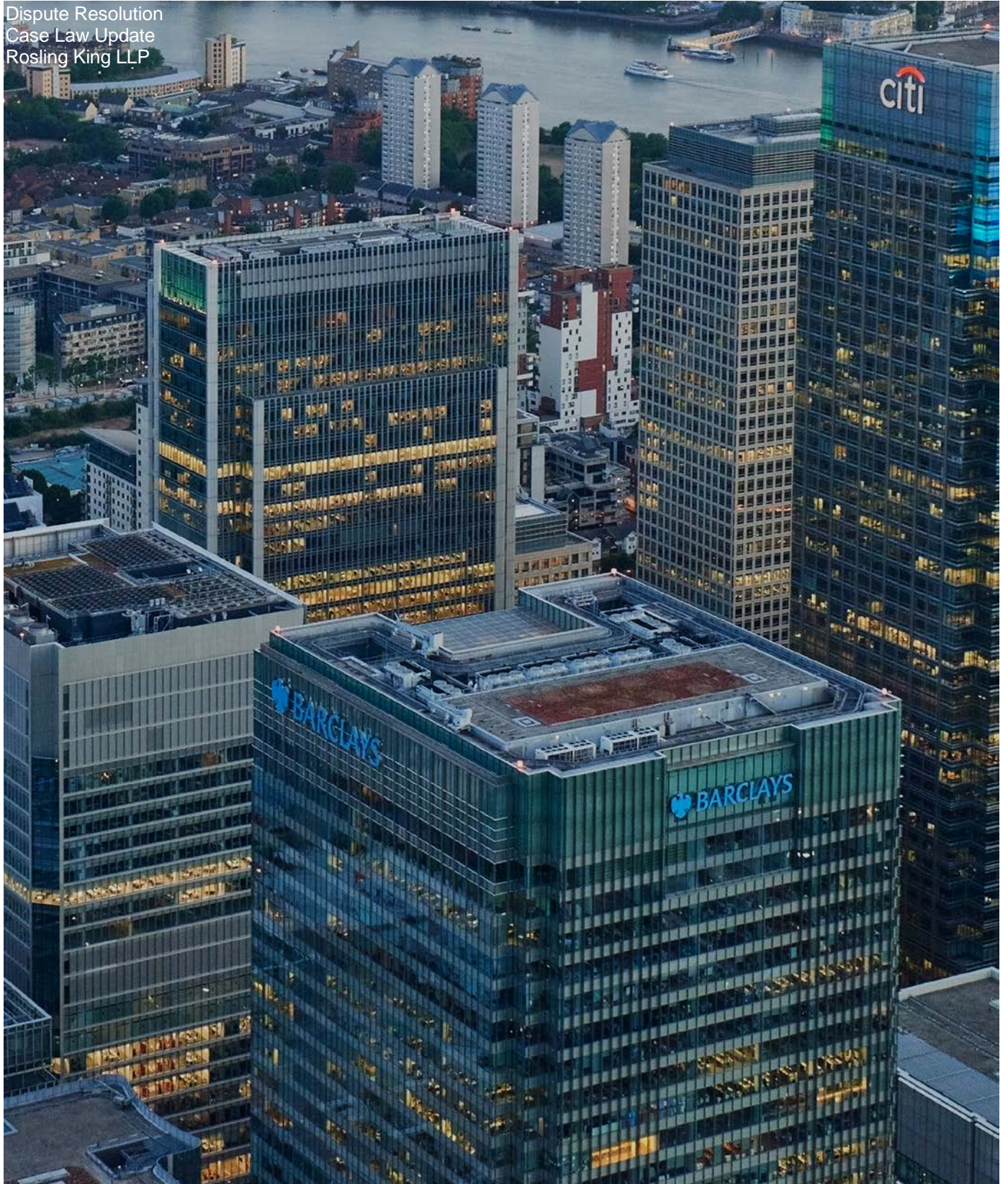


Dispute Resolution
Case Law Update
Rosling King LLP



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This decision of the Chancery Division is a useful reminder to lenders of the Court's power to set aside a transaction intended to defraud a creditor under s.423 of the Insolvency Act 1986.

Background

The Defendant, Mr Ahmed, was registered as the proprietor of two properties known as High Elm and Hilltop (the "Properties"). The Claimant advanced monies to be secured over the Properties by second legal charge. The Defendant fell into arrears and the Claimant commenced possession proceedings.

Throughout the course of proceedings, it transpired that the Defendant had transferred the legal and beneficial interest in the Properties to his wife via a Deed of Trust (the "Deed") The Defendant's wife's interest was not registered against the Properties at the Land Registry. On commencement of possession proceedings, the Defendant's wife alleged that she had an interest in priority to the Claimants'.

The Claimant made an application requesting that the Court exercise its powers under s.423 of the Insolvency Act 1986 (the "IA 1986") to set aside the Deed, or to make an Order to restore the position to what it would have been but for the Deed being entered into.

The Decision

The Court held that when considering a s.423 IA 1986 application, the Court should be satisfied that:

- (1) The transaction was entered into at an undervalue;
- (2) The real and substantial purpose of entering into the transaction was to put assets beyond the reach (or otherwise prejudice the interests) of someone who may be entitled to make a claim; and
- (3) It was appropriate in all the circumstances to grant the relief sought.

On the evidence before the Court, Norris J agreed to set aside the Deed, with the result that Mr Ahmed was re-vested with the beneficial ownership of the Properties.

In the Judgment, the Court made it clear that, in an application under s.423 IA 1986, it will be particularly interested in the documentary evidence. This is because the Court held that "direct evidence of a disponent's purpose in entering a transaction nine years earlier may not be reliable. People rarely dissect and prioritise their reasons for action at the time of acting, and their later recollection of their thinking at the time is inevitably viewed through the prism of subsequent events". Additionally, the fact that the Defendant had failed to register dealings with the beneficial ownership of the Properties was a factor to be taken into account when considering the real and substantial purpose of the transaction.

An interesting aspect of this case was the Judge's decision to admit evidence which had come to light between the conclusion of the trial and judgment. The additional evidence was admitted for two reasons. Firstly, relying on the decision of *Mulholland v Mitchell [1971] AC 666* and the words of Lord Wilberforce, Norris J held that "it may be expected that courts will

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allow fresh evidence when to refuse it would affront common sense, or a sense of justice” and, secondly, relying on *Vernon v Bosely (No. 2) [1999] QB 18*, it was held that without admitting the additional evidence, the Defendant’s evidence as stated at trial “was liable to mislead”.

Commentary

This decision should be of comfort to lenders. It confirms that in some circumstances, the Court may be willing to set aside prior transactions where it can be shown that the intended purpose was to defraud the creditor. It is also an example of where the Court is willing to consider fresh evidence at a late stage in the proceedings in circumstances where not to do so could lead to the Court being misled.

For further information, please contact [Rebecca Sharpe](#) or the Partner with whom you usually deal.