Press Summary

19 February 2025

El-Husseiny and another (Appellants) v Invest Bank PSC (Respondent)

[2025] UKSC 4

On appeal from [2023] EWCA Civ 555

Justices: Lord Hodge, Lord Hamblen, Lord Stephens, Lady Rose and Lord Richards

Background to the Appeal

This appeal concerns the construction of section 423 of the Insolvency Act 1986 (the "**IA 1986**"). Section 423 protects creditors by providing them with remedies in circumstances where a debtor has taken steps to defeat or prejudice their claims by entering into a transaction on terms that provide for the debtor to receive no consideration in return (ie no payment or anything else of value) or consideration worth less than the consideration which the debtor provides. Such transactions are designed by debtors to make themselves "judgment-proof".

In this case, the Respondent, Invest Bank PSC (the "**Bank**"), had obtained a judgment in Abu Dhabi against the Appellants' father, Mr El-Husseini, for approximately £20 million. The Bank identified valuable assets in the UK against which it wished to enforce that judgment, including houses in central London or companies owning such houses. It alleged that Mr El-Husseini had arranged for those assets to be transferred to other people in order to put them beyond the reach of the Bank or to reduce the value of the companies which owned them. The Bank sought relief from the courts under section 423.

Several transfers of assets were included in the Bank's claim, but in order to identify and consider the legal point that arises for decision, the judgment focuses on one particular transfer as an example. This involved the transfer of a property in central London owned by Marquee Holdings Limited ("**Marquee**"). At the time of the transfer, Mr El-Husseini owned all of the shares in Marquee. It was alleged that Mr El-Husseini arranged with one of his sons, Ziad, that he would cause Marquee to transfer the ownership of the property to Ziad. The transfer took place in June 2017 for which Ziad paid no price, whether in money or otherwise, either to Marquee or to Mr El-Husseini.

The effect of this transaction was that Marquee disposed of a valuable house in central London without receiving any consideration in return. With Marquee stripped of its only or principal asset, the value of Mr El-Husseini's shares in Marquee was either eliminated or greatly

reduced, with the result that the Bank's ability to enforce its judgment against Mr El-Husseini was seriously prejudiced.

The issue on this appeal is whether section 423 can apply to a transaction like this one, whereby a debtor agrees to procure a company which he owns to transfer a valuable asset owned by the company for no consideration or at an undervalue, thereby reducing or eliminating the value of his shares in the company to the prejudice of his creditors, or whether such a transaction falls outside section 423 because the debtor does not personally own the asset.

In the High Court, Andrew Baker J held that the fact that the relevant assets were not owned by Mr El-Husseini himself but instead by a company owned or controlled by him did not in law prevent the transfer from falling within the scope of section 423. However, he refused to allow the Bank's pleaded case to proceed on a different ground, that Mr El-Husseini had not acted in his personal capacity but only on behalf of Marquee.

The Court of Appeal allowed the Bank's appeal against this latter ruling, and there is no appeal on that issue. The Court of Appeal dismissed the cross-appeal against the former ruling that section 423 could apply where Mr El-Husseini had procured Marquee to transfer the property for no consideration, rather than transferring an asset which he owned. The Appellants now appeal to the Supreme Court.

Judgment

The Supreme Court unanimously dismisses the appeal. The Court finds that both the language and purpose of section 423 point clearly to the conclusion that a "transaction" within section 423(1) is not confined to a dealing with an asset owned by the debtor but extends to the type of transaction in this case. The reasons for the decision are given in a joint judgment by Lady Rose and Lord Richards, with whom the other Justices agree.

Following the hearing of the appeal in May 2024, the trial of the action took place in July 2024 before a High Court judge who, in a judgment delivered in November 2024, held on the evidence that Mr El-Husseini had not arranged for the transfer with the purpose of making it more difficult for the Bank to enforce its judgment: [2024] EWHC 2976 (Comm). The Supreme Court is, nevertheless, handing down this judgment in case there is an appeal from that judgment dismissing the Bank' claim and because it is important to clarify the point of law raised by the appeal.

Reasons for the Judgment

Lady Rose and Lord Richards begin by examining the relevant statutory provisions of the IA 1986. Section 423(1) contains the acts to which the section applies, including when a person makes a gift to another person or otherwise enters into a transaction with another on terms that provide for him to receive no consideration. Section 423(3) requires the court to be satisfied that the debtor entered into the transaction for the purpose of putting assets beyond the reach of a creditor or otherwise prejudicing the creditor's interests **[26]-[28]**.

A straightforward reading of section 423(1) suggests that on the Bank's pleaded case the transaction in question fell within the terms of section 423(1); Mr El-Husseini made an arrangement ("entered into a transaction") with Ziad on terms that provided for Mr El-Husseini to receive no consideration either in the form of a payment to Mr El-Husseini or in the form of an undertaking by Ziad to pay full value for the property to Marquee **[33]-[34]**. The requirements of section 423(1) were therefore satisfied. The value of Mr El-Husseini's shares in Marquee had reduced as a result of the transfer, prejudicing the Bank's ability to enforce the judgment against Mr El-Husseini. If the facts alleged by the Bank had been proved at trial, the mental element required by section 423(3) would also have been satisfied **[35]-[36]**.

Although section 423 does not expressly provide that property disposed of must belong to the debtor, the Appellants argued that the transfer of the property in this case could not fall within section 423 because the debtor, Mr El-Husseini, did not transfer any property that he legally or beneficially owned. Lady Rose and Lord Richards deal with and reject the Appellants' submissions under three headings.

1. Indications in the wording of sections 423-425

First, the Appellants highlighted that section 423(1)(a) contains two limbs. It refers to the person making a gift – the first limb – and then to the person "otherwise" entering into a transaction for no consideration – the second limb **[41]**. The Appellants correctly identified that a donor can only make a gift of the donor's own property and argued that therefore the use of the word "otherwise" in the second limb of section 423(1)(a) shows that a transfer under that limb must also involve a transfer of the debtor's own property **[42]**. The Court does not accept this submission. There is nothing in the wording of the provision that suggests that the word "gift" limits the transactions to which the second limb of section 423(1)(a) applies **[43]**.

Secondly, the Appellants submitted that the term "consideration" in section 423(1)(a) has a narrower scope than in contract law generally, where consideration moving from one party to someone other than the counterparty to the contract can be good consideration. They argued that the language of the section indicates that a transfer will only fall within the provision if consideration moves to/from the debtor themselves **[45]**. The Court agrees that "consideration" in section 423(1) has a narrower scope than in contract law generally. However, the Court rejects this argument on the basis that, on the Bank's pleaded case, Mr El-Husseini had provided consideration in the form of his undertaking to Ziad to procure Marquee to transfer the property to Ziad **[47]**.

Thirdly, the Appellants relied on the limited defence for good faith purchasers in section 425(2) which is only available if the asset in question was acquired from a person "other than the debtor" **[48]-[49]**. The Appellants argued that this must mean that the drafter assumed that the first transfer made as a result of the transaction must be from the debtor **[51]**. The Court does not agree; if that was the drafter's assumption, section 423(1) would have been drafted to include it expressly **[52]**.

Overall, the Court considers that the wording of sections 423-425 strongly supports the Bank's position that section 423(1) does not contain any requirement for a transaction to involve a disposal of property belonging to the debtor **[53]**.

2. The purpose of section 423

The purpose of section 423 is made apparent by section 423(3). Section 423 is intended to apply to transactions entered into for the purpose of putting assets beyond the reach of a creditor or otherwise prejudicing the creditor's interests. The Appellants warned the Court against elevating the importance of that purpose, highlighting various examples of actions by a debtor that would satisfy the mental element of section 423(3) but would not come within section 423(1) **[57]**. However, the Court finds that restricting section 423 to transactions directly involving property owned by the debtor would not only require an implied restriction to be read into the provision, but that such an implied restriction would also seriously undermine the purpose of the provision itself **[60]**.

3. The interrelationship between sections 423, 238 and 339 of the IA 1986

Sections 238 and 339 of the IA 1986 also apply to transactions at an undervalue and are defined in substantially the same terms as section 423 **[62]**. The main difference between them is that sections 238 and 339 do not depend on establishing the mental element required by section 423(3) **[61]**. The Court sees no good reason for giving different meanings to transactions at an undervalue in sections 238, 339 and 423 **[63]** and disagrees with the Appellants' submission

that it is not appropriate to rely on the purpose of section 423 to construe a provision which was common to all three sections **[64]**.

Finally, the Appellants argued that it was essential that the transaction at an undervalue test should provide an effective mechanism for excluding from the ambit of sections 238, 339 and 423 preferences given by a debtor to a particular creditor **[73]**. The Court does not find this to be of assistance to the Appellants' case, considering that the regimes for transactions at an undervalue and for preferences are clearly separate and, in any event, the IA 1986 expressly contemplates that a transaction may be both a preference and a transaction at an undervalue **[74]**.

References in square brackets are to paragraphs in the judgment.