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CASE REVIEW SECTION

The Supreme Court Rules on the Scope of Section 423 of the Insolvency Act 1986: *El-Husseiny & another v Invest Bank PSC* [2025] UKSC 4

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Synopsis

On 19 February 2025, the Supreme Court (Lord Hodge, Lord Hamblen, Lord Stephens, Lady Rose and Lord Richards) handed down its judgment in *El-Husseiny and Another v Invest Bank PSC*, unanimously dismissing the appeal brought by Alexander Ahmad El Husseiny and Ziad Ahmad El-Husseiny (the 'Appellants'), in so doing confirming that section 423 of the Insolvency Act 1986 (the 'Act') may apply to transactions where a debtor orchestrates the transfer of assets owned by a company they control (as opposed to assets they personally own), thereby reducing or eliminating the value of their shares in the company to the detriment of creditors.

Background

Proceedings were first commenced in the High Court in July 2021 for the enforcement of judgments obtained in Abu Dhabi against the Appellants' father, Ahmad El-Husseini by Invest Bank PSC (the 'Bank') for AED 96 million. The Bank identified valuable assets in the UK against which it wished to enforce those judgments, including houses in central London or companies owning those houses. The Bank alleged that Mr El-Husseini 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 that owned them. The Bank sought relief from the High Court under section 423 of the Act.

The Bank included several transfers of assets in its claim, but the Supreme Court's judgment focused on one particular transfer as an example – namely, 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 he arranged with one of his sons, Ziad (the second appellant), that he would cause Marquee to transfer the ownership of the property to him. The transfer took place in June 2017, for which

Ziad paid no consideration to either Marquee or to Mr El-Husseini.

The Bank did not allege that Ziad had any dishonest intent, or that the transaction was a sham. Nonetheless the effect of the transaction was that Marquee transferred a valuable asset to Ziad for no consideration, the result of which was that the value of Mr El-Husseini's shareholding in Marquee was reduced in value, and, by extension, the Bank's ability to enforce its judgment was adversely affected.

The issue on the appeal to the Supreme Court was whether section 423 can apply to a transaction such as this, whereby a debtor (here, Mr El-Husseini) agrees to procure a company that he / she owns (Marquee) to transfer a valuable asset owned by that company for no consideration or at an undervalue, thereby reducing or eliminating the value of his / her shares in the company to the prejudice of his / her creditors, or whether such a transaction falls outside section 423 because the debtor does not personally own the asset.

In the High Court, Baker J held that the fact that the relevant assets were not owned by Mr El-Husseini himself, but by his company, did not in law prevent the transfer from falling within the scope of section 423. However, Baker J refused to allow the Bank's pleaded case to proceed on a different ground, namely that Mr El-Husseini had not acted in his personal capacity but only on behalf of Marquee, meaning that the company – and not Mr El-Husseini – had entered into the transaction. Baker J therefore dismissed the Bank's case on the grounds it fell outside of section 423.

The Court of Appeal allowed the Bank's appeal against this latter ruling (regarding the capacity in which Mr El-Husseini acted). There was no appeal to the Supreme Court 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 that he owned. That aspect of the case was the subject of the appeal to the Supreme Court.

Section 423 of the Insolvency Act: a brief overview

Attempts by debtors to put assets beyond the reach of their creditors and make themselves judgment-proof are neither strange nor startling. Indeed, the purpose of section 423 of the Act is to protect against and remedy such measures. In substance, section 423 provides that if a person gives away property for no consideration, or for significantly less than it is worth in money or monies' worth, and does so for the purpose of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him or otherwise prejudicing the interests of such a person, then the court can make an order the effect of which is to restore the position to what it would have been had the transaction not been entered into and to protect the interests of the 'victim' of the transaction.

Supreme Court's judgment: key findings on section 423

The Supreme Court unanimously dismissed the Appellants' appeal, rejecting a range of construction arguments advanced by the Appellants. The Supreme Court found 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 dealing with an asset *owned* by the debtor, but also extends to the sort of transaction which featured in this case. A transfer by a solvent company, owned by a debtor, of a valuable asset for no consideration necessarily resulted in a diminution in the value of the debtor's shares in that company and prejudiced the creditor's ability to enforce the judgment. It also divested the company of an asset that might otherwise have become available for enforcement.

The wording of sections 423–425

The Appellants highlighted that section 423(1)(a) contains two limbs – the first refers to the person making a gift, and the second, to the person 'otherwise' entering into a transaction for no consideration. It was common ground that the word 'gift' in the first limb bears its ordinary meaning. However, the Supreme Court rejected the Appellants' argument that the use of the word 'otherwise' in the second limb shows that a transfer must, like a gift, involve the transfer of a proprietary interest by the debtor.¹

The Appellants also submitted that the word '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. The Appellants argued that a transfer would only fall within the provision if consideration moves to / from the debtor or themselves. Whilst the Supreme Court agreed that 'consideration' in section 423(1)(a) has a narrower scope than in contract law generally, it did not agree that it had the effect contended by the Applicants. Mr El-Husseini had arranged with Ziad that he would procure his company, Marquee, to transfer the property to Ziad for no consideration. The Supreme Court found that that undertaking was effective consideration.

The Appellants also relied on the limited 'good faith' defence for purchasers for value without notice, as set out in section 425(2). This statutory defence is only available if the asset in question was acquired from a person 'other than the debtor'. The Appellants argued that this must mean that the draughtsman had assumed that, for section 423 to bite, there would be necessarily have to be someone who acquired property from the debtor and who was too proximate from the debtor to be able to rely on the defence. The Supreme Court also rejected this argument.

Overall, the Supreme Court found that section 423(1):

'contains no requirement that a transaction must involve a disposal of property belonging to the debtor, although no doubt it will in many cases ... Necessarily, ... there must be a depletion or diminution in value of the assets available for enforcement of claims against the debtor ... But that may occur through a transaction that does not involve the disposal of the debtor's own property...'.²

The purpose of section 423

The Supreme Court also accepted the Bank's arguments that, if the interpretation of section 423 is restricted only to those transactions involving property owned by the debtor, it would undermine the purpose of that provision; the legislation should be capable of capturing transactions that diminish the value of the debtor's assets (such as the transaction in issue on this appeal) if this is done deliberately to frustrate a creditor's interests.

Notes

- ¹ The Appellants argued that, here, there had been no gift of Mr El-Husseini's shares in Marquee because he still owned them, and that he could not gift the relevant property because he did not own it, Marquee did.
- ² Judgment, paragraph 53.

The interrelationship between sections 423, 238 and 339 of the Act

Interestingly for insolvency practitioners (albeit obiter), the Supreme Court said that this broad interpretation of a ‘transaction’ would also apply to section 238 of the Act (which applies to transactions at an undervalue in the case of a company that has entered into administration or gone into liquidation), and section 339 of the Act (which applies to transactions at an undervalue in circumstances where an individual is made bankrupt). In its commentary on these sections, the Supreme Court said:

‘We find it impossible to think of circumstances in which a transaction was held to be within section 423(1) when it would not also appropriately fall within section 238 or 339. In any event, we see no reason as a matter of policy or purpose why a transfer by a company owned by an insolvent company or individual should not fall within those sections’.³

Implications of the judgment

In its concluding remarks, the Supreme Court stated that:

‘We are not persuaded by any of the submissions made by the appellants that the straightforward reading of section 423(1) adopted by the courts below is wrong. On the contrary, we consider that both the language of section 423(1) and the purpose of the section 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, whereby the debtor enters into an arrangement under which a company owned by him or her transfers a valuable asset for no consideration or at an undervalue’.⁴

This is a very significant ruling, in a case that has been closely watched by insolvency practitioners and by potential ‘victims’ alike. The decision confirms the broad ambit of section 423 of the Act. It also closes an obvious potential loophole whereby debtors purport to shield assets by transferring them through corporate entities under their control. It reinforces the principle that the substance of a transaction, rather than its form, is key to determining whether it may be challenged under section 423.

Whilst applicants will still need to overcome the hurdle of proving that the transfer in question was made for the ‘purpose’ of prejudicing the debtor’s creditors, this judgment establishes that section 423 of the Act can be a powerful tool for officeholders, and in enforcement / asset recovery cases.

Notes

³ Judgment, paragraph 64.

⁴ Judgment, paragraph 75.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialised enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

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