Hilary Term
[2025] UKSC 4
On appeal from: [2023] EWCA Civ 555

JUDGMENT

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

before

Lord Hodge, Deputy President
Lord Hamblen
Lord Stephens
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
19 February 2025

Heard on 7 and 8 May 2024

Appellants
Daniel Warents
Niamh Davis
Graham Virgo KC (Hon)
(Instructed by Longmores Solicitors LLP, Hertford)

Respondent
Paul McGrath KC
Marc Delehanty
(Instructed by PCB Byrne LLP)

LADY ROSE AND LORD RICHARDS (with whom Lord Hodge, Lord Hamblen and Lord Stephens agree):

1. This appeal raises a single but important point on the construction of section 423 of the Insolvency Act 1986 ("IA 1986"). In very broad terms, section 423 provides remedies to creditors in circumstances where a debtor takes steps to defeat or prejudice their claims by entering into a transaction, which is very broadly defined, on terms that provide for the debtor to receive no consideration or consideration worth less than the consideration which the debtor provides. The general issue as initially presented by the appellants was whether section 423 applies only where the transaction involves the transfer of an asset beneficially owned by the debtor. As will appear, this issue was refined and narrowed by the appellants in the course of submissions. The more specific, but nonetheless important, issue has remained unchanged: whether section 423 can apply to a transaction whereby a debtor agrees to procure a company which he owns to transfer a valuable asset 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.

2. This issue arose in proceedings commenced in the High Court in July 2021 to enforce judgments previously obtained in Abu Dhabi by the first respondent, Invest Bank PSC ("the Bank"), against Mr Ahmad El-Husseini ("Mr El-Husseini") for AED 96 million, which is equivalent to about £20 million. The judgment debt arose under guarantees given by Mr El-Husseini in respect of credit facilities granted by the Bank to two companies connected with him.

3. The Bank identified valuable assets in this jurisdiction against which it wished to enforce those judgments. These included houses in central London or companies owning such houses, which, it said, ought to be made available for this purpose. It alleged that Mr El-Husseini had arranged for these assets to be transferred to other people in order to put them beyond the reach of the Bank and its judgment debt or to reduce the value of the companies which owned them. It sought relief under section 423.

4. As described in more detail below, the issue on this appeal was decided against the appellants at first instance and by the Court of Appeal on preliminary applications as to jurisdiction and other matters. The proceedings subsequently came to trial before Calver J in the Commercial Court in July 2024. Following a four-week hearing, Calver J gave judgment on 21 November 2024 ([2024] EWHC 2976 (Comm)), dismissing all the Bank's claims, on the grounds that the Bank had failed to establish that at least one of Mr El-Husseini's purposes in making any of the transfers was to put assets beyond the reach

of the Bank. The judge therefore dismissed the action on a ground that does not arise on this appeal. Whether because of a possible appeal or otherwise, the parties have not requested this Court to refrain from giving judgment on this appeal and, in any event, the general importance of the issue on the appeal is such that judgment should be given.

5. Several transfers of assets were included in the claim, some of London properties and some of shares, some transferred to one or more of Mr El-Husseini's sons and some transferred to companies or trusts. In order to identify and consider the legal point that arises for decision in this appeal, it is useful therefore to focus on one particular transfer as a good example. This is the transaction involving a property at 9 Hyde Park Garden Mews ("9 Hyde Park"). For the purposes of the appeal, the court has assumed the following facts:

a. Before 9 Hyde Park was transferred, it was legally and beneficially owned by a Jersey company, Marquee Holdings Limited ("Marquee"). It was worth about £4.5 million.

b. At the time of the transfer, Mr El-Husseini was the beneficial owner of all the shares in Marquee.

c. Mr El-Husseini arranged with one of his sons, the second appellant Ziad Ahmad El-Husseiny ("Ziad"), that he would cause Marquee to transfer the legal and beneficial ownership of 9 Hyde Park to Ziad for no consideration.

d. In June 2017, Mr El-Husseini caused Marquee to transfer the legal and beneficial title to 9 Hyde Park to Ziad.

e. Ziad did not pay any money or provide any other consideration either to Marquee or to Mr El-Husseini in return for the house.

6. The Bank did not allege that Ziad, in agreeing to receive or in receiving 9 Hyde Park, had any dishonest intent or shared his father's alleged purpose. The Bank did not contend that the transaction was a sham.

7. The effect of this transaction, on the assumed facts, was that Marquee transferred a valuable asset to Ziad and received nothing in return, with the result that Mr El-Husseini's shareholding in Marquee was correspondingly reduced in value. Likewise, Mr

El-Husseini received nothing in return for procuring the transfer of 9 Hyde Park to compensate for the reduction in the value of his shares in Marquee. Thus, the Bank's ability to enforce its judgment was adversely affected to the extent of some £4.5 million. However, the appellants say that the transfer of 9 Hyde Park could not fall within section 423 because the debtor, Mr El-Husseini, did not transfer any property that he himself owned, while the Bank argues that there is no such requirement in section 423(1) and that the transaction could be caught by the regime.

8. The other parties to the action were alleged to have been involved with other properties in respect of which the Bank was also seeking orders but we do not need to refer to them further.

The proceedings

9. The Bank issued these proceedings on 9 July 2021. The day before, at a without notice hearing, the Bank obtained permission to serve its claim on all the individual defendants out of the jurisdiction and also obtained a domestic freezing order against Mr El-Husseini. The Bank sought in summary (a) to enforce the Abu Dhabi judgments in England against Mr El-Husseini or alternatively for a judgment against him on the debts allegedly due to it under the personal guarantees given by him; (b) declarations that certain assets were held on trust for Mr El-Husseini by his sons; and (c) relief under section 423.

10. The Bank obtained a default judgment on the first part of the claim and for our purposes there is no doubt that Mr El-Husseini is liable to pay the judgment debt to the Bank.

11. Mr El-Husseini, Ziad, and Alexander El-Husseini (another of Mr El-Husseini's sons) applied to set aside service of the Bank's claim so far as it made claims under section 423 (save as regards one property) on the ground that those claims did not raise a serious issue to be tried. The jurisdiction challenge and a number of other applications were heard in February 2022 by Andrew Baker J. In a judgment handed down on 13 May 2022 ([2022] EWHC 894 (Comm), [2022] BPIR 1503), he determined two points of law relating to the interpretation of section 423 (the text of which we have set out at para 26 below).

12. First, Andrew Baker J held that the fact that the relevant assets were not legally or beneficially owned by the judgment debtor 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. This point has been referred to as the "Beneficial Interest Point". He dealt with the Beneficial Interest Point at paras 43-46 of his judgment. He noted first that there was no wording in section 423, or in the definition of "transaction" in section 436 of the IA 1986, which limited section 423 to a transaction whereby a beneficial interest of the debtor was transferred. He concluded at para 46:

> "On that statutory language, in my view it is impossible to say that it is a pre-requisite of a transaction entered into by the debtor, for it to fall within section 423, that it concern an asset beneficially owned by the debtor, and cannot extend to an arrangement made with a view to a transferee acquiring at an undervalue an asset owned by a company owned by the debtor, with a view to putting that asset beyond the (indirect) reach of the creditor in any attempt they might make to enforce their rights against the debtor."

13. Secondly, the judge held that a debtor does not "enter into a transaction" for the purposes of section 423 when all his actions are carried out in his capacity as a director or other organ of the company which owns and transfers the relevant assets. We refer to this as "the Capacity Point" since it turns on the capacity in which the debtor effects the transfer – is it in his personal capacity so that he, personally, "enters into" the transaction for the purposes of section 423 or is it only in his capacity as an organ of the company so that it is only the company which "enters into" the transaction? He held at para 47(1) that if and to the extent that the Bank relied on steps taken by Mr El-Husseini which, on analysis, amounted to steps taken by a company controlled by him, those steps cannot themselves amount to or involve the entry into *by him* of any transaction for the purpose of section 423. On that basis and on the basis that, as the appellants claimed, 9 Hyde Park was beneficially owned by Marquee, the judge held that on the Bank's pleaded case the transfer of 9 Hyde Park fell outside section 423: para 71.

14. After the judge made the order giving effect to his ruling ("the May 2022 Order"), the Bank applied for permission to re-amend its Particulars of Claim. The amendments were aimed at identifying steps that were alleged to have been taken by Mr El-Husseini in his personal capacity (rather than, say, as a director of Marquee) such as arranging with Marquee and his sons for the transfers of the assets to take place. The Bank thereby attempted to supplement its pleaded case in a way which avoided the import of the Judge's ruling on the Capacity Point by identifying, so far as it could on the information then available to it, conduct which Mr El-Husseini carried out in his personal capacity rather

than just as a director of the relevant company. Permission was granted to make those amendments on 11 July 2022.

15. Alexander and Ziad appealed against the judge's ruling on the Beneficial Interest Point and the Bank appealed against his ruling on the Capacity Point.

16. The Court of Appeal (Singh, Males and Popplewell LJJ) dismissed the appellants' appeal on the Beneficial Interest Point and allowed the Bank's appeal on the Capacity Point: [2023] EWCA Civ 555, [2024] KB 49.

17. On the Capacity Point, Singh LJ concluded at para 54 that the Bank's appeal should be allowed on a narrow point of law which he explained as follows:

> "It amounts simply to saying that the Judge was wrong to prevent the Bank from pursuing its claim as pleaded on this issue. It amounts to no more than saying that such acts of a debtor are capable in law, without more, of falling within the terms of section 423 of the 1986 Act. Whether they do so, and whether there are other facts (as the Judge himself recognised there may be) which are more than simply the fact that the company acts through its director, would have to be established at a trial on the whole of the evidence."

18. As regards the Beneficial Interest Point, the appellants' appeal was summarised as raising the question whether a "transaction" can be entered into within the meaning of section 423 if the assets transferred are not beneficially owned by the debtor. If, as the appellants submitted, section 423 applied only where a beneficially owned asset of the debtor was transferred, then the judge had been wrong to declare that the court had jurisdiction over the claims to, amongst other things, 9 Hyde Park and had also been wrong to grant the Bank permission to amend the detail of its claims in respect of that property.

19. Singh LJ gave several reasons for concluding that the appellants' construction of section 423 was wrong: paras 60-67. First, it required reading words into section 423 that were not there. Secondly, the word "transaction" was defined broadly in section 436(1) and there was no reason to give a restrictive meaning to the broad terms used: "agreement or arrangement". Thirdly, the interpretation of section 423(1) was informed by the purpose of the section which was clear from subsection (3): the court should not interpret

subsection (1) "in a way which would easily defeat the purpose of section 423 when read as a whole". Fourthly, there was no good policy reason to restrict the meaning. Finally, at paras 65-73, Singh LJ addressed a point made by the appellants comparing section 423 with the wording used in section 238 (relating to insolvent companies) and section 339 (relating to bankrupt individuals), and their submission that the decision of the Court of Appeal in *Clarkson v Clarkson* [1994] BCC 921 on section 339 was binding authority that in the context of these sections a "transaction" must involve a transfer of assets which are beneficially owned by the debtor. Singh LJ stressed that although section 423 was included in the Insolvency Act, it was not limited to situations of insolvency and had a different historical origin from those provisions concerned only with insolvency. He said at para 67:

> "The important point for present purposes is that, although section 423 finds itself in the same Act as those provisions which are concerned with bankruptcy or corporate insolvency, its scope is wider. There is no need for there to be any insolvency. The unfortunate reality of life is that even very wealthy debtors are sometimes unwilling, rather than unable, to pay their debts. They may well make strenuous efforts to use various instruments, including a limited company, for the purpose of putting their assets beyond the reach of a person who is making, or may make, a claim against them; or otherwise prejudicing the interests of such a person."

20. The appellants sought permission to appeal to this Court only on the Beneficial Interest Point and not on the Capacity Point. Permission was granted on 18 October 2023.

The Legislation

21. Attempts by debtors to defeat their creditors and make themselves judgment-proof are not new. In Roman law, the actio pauliana was designed to counter these attempts (see *The Institutes of Justinian,* book 4, title 6, para 6, *The Digest of Justinian*, book 42, title 8), and it remains in differing forms an important feature of many European legal systems: see, for example, article 1341-2 of the French Civil Code, and the Anfechtungsgesetz in Germany.

22. According to the appellants' research, legislation in England goes back to the time of King Edward III (50 Edward III, c 6). The present legislation can be traced to the

Fraudulent Conveyances Act 1571 (13 Eliz, c 5), which was replaced by section 172 of the Law of Property Act 1925.

23. The topic was one of those considered by the review of insolvency legislation by the committee chaired by Sir Kenneth Cork which led to the publication of *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558) (1982) ("the Cork Report"). Chapter 28 of the Cork Report identified two categories of remedies. First, there are remedies which form part of the general law and may be invoked whether or not the debtor has become insolvent. The second are remedies which form part of the law of insolvency and may be invoked only after the debtor has first been declared insolvent: see para 1201 of the Cork Report. The Cork Report, at para 1202, described the principle behind the first category, then in the form of section 172 of the Law of Property Act 1925, as being that "persons must be just before they are generous and that debts must be paid before gifts can be made." The Cork Report made recommendations to improve the protection for creditors provided by this remedy.

24. Those recommendations were adopted but section 423 of the IA 1986 was not enacted in exactly the terms suggested in the Cork Report, a point we note later in this judgment. The IA 1986 represented a substantial reform and re-drafting of insolvency legislation, dealing for the first time in one statute with both individuals and companies in the law of England and Wales. The reforming provisions had for the most part been included in the Insolvency Act 1985 but, save for a few sections, those provisions were not brought into force until they could be consolidated into the IA 1986. For this reason, we shall not refer again to the 1985 Act but will proceed on the basis that the relevant provisions of the IA 1986 were new and implemented the intended reforms.

25. Part XVI, headed Provisions Against Debt Avoidance, comprises sections 423-425 and applies in England and Wales only. Section 423 sets out the elements of the claim which must be established by a claimant, while section 424 identifies those who may bring claims under section 423 and section 425 provides, on a non-exhaustive basis, for the remedies available to the court. Articles 367-369 of The Insolvency (Northern Ireland) Order 1989 (1989/2405 (NI 19)) are in virtually identical terms. There is no statutory equivalent applicable in Scotland, but an alienation of property by an insolvent debtor for inadequate consideration may be challenged without proof of any purpose to prejudice creditors, under statute (section 242 of the IA 1986 in the case of companies or section 98 of the Bankruptcy (Scotland) Act 2016 in the case of individuals) or, without time limits, at common law: see *MacDonald v Carnbroe Estates Ltd* [2019] UKSC 57, 2020 SC (UKSC) 23, [2020] 1 BCLC 419 at paras 19-28 per Lord Hodge.

26. Section 423 is in the following terms:

> "(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—
>
> (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
>
> (b) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; or
>
> (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.
>
> (2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—
>
> (a) restoring the position to what it would have been if the transaction had not been entered into, and
>
> (b) protecting the interests of persons who are victims of the transaction.
>
> (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—
>
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

(4) In this section 'the court' means the High Court or—

(a) if the person entering into the transaction is an individual, any other court which would have jurisdiction in relation to a bankruptcy petition relating to him;

(b) if that person is a body capable of being wound up under Part IV or V of this Act, any other court having jurisdiction to wind it up.

(5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as 'the debtor'."

27. Section 423 contains in sub-section (1) the acts to which the section applies and in sub-section (3) the debtor's requisite subjective intention. They are respectively the actus reus and the mens rea which a claimant must establish.

28. The issue in this appeal arises under section 423(1), but section 423(3) has a crucial role in establishing the purpose of the section and is therefore an important element in considering the proper scope of section 423(1). It may be noted, but it is not directly relevant, that there has been discussion in decisions of the Court of Appeal as to what constitutes the debtor's "purpose" within the meaning of section 423(3): see *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981, [2002] 2 BCLC 489 and *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176, [2019] BCC 96. Issues can arise in cases of mixed purposes. In *Ablyazov*, the Court of Appeal approved the test applied by the judge in that case, namely whether the debtor had "positively intended" to put funds beyond the reach of his creditors. However expressed, it is unquestionably the debtor's subjective purpose that must be established.

29. As regards those who have standing to make claims under section 423, section 424 provides that, in the case of a debtor, whether individual or corporate, that is subject to a

formal insolvency process, an application may be made by the officeholder or (with the leave of the court) by a "victim of the transaction", and in any other case by a victim of the transaction. Special provision is made where the debtor is subject to a voluntary arrangement. In every case, an application is treated as made on behalf of every victim of the transaction: section 424(2). A "victim of the transaction" is defined by section 423(5) as "a person who is, or is capable of being, prejudiced by it".

30. Importantly, section 436(1) defines "transaction" for the purposes of the IA 1986, except in so far as the context otherwise requires, as including "a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly". In particular, the inclusion of an arrangement makes for a broad definition of "transaction". It is not suggested that there is anything in the context of section 423 which would mean that this definition does not apply.

31. There are other provisions of the IA 1986 concerned with transactions at an undervalue, applicable only in the context of a formal insolvency process: section 238, applicable in the administration or liquidation of companies, and section 339, applicable in the bankruptcy of an individual. The definition of "transaction" in section 436(1) applies equally to those sections, which as regards the transactions to which they apply are drafted in very similar terms to section 423. The significant difference is that the remedy under section 423 is triggered by the mental element required by section 423(3), while the remedies under the other sections are triggered by objective criteria, in particular that the transactions were entered into within specified periods before the commencement of the relevant insolvency process. We shall refer in more detail to these sections when addressing submissions based on the drafting similarities, the application of the definition in section 436(1) and decisions on sections 238 and 339.

32. There was no difference between the parties as to the principles of statutory construction. We must look at the wording of the provision in dispute in the context in which it appears in the section and in the Act as a whole, bearing in mind the purpose for which it was enacted: see *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, paras 29 to 31.

A straightforward reading of section 423

33. A straightforward reading of section 423(1), together with the definition of "transaction" in section 436(1), would suggest that the transaction involving 9 Hyde Park fell within the terms of section 423(1), and that there was no requirement for Mr El-Husseini himself to dispose of property belonging to him.

34. On the assumed facts, Mr El-Husseini arranged with Ziad that he would procure Marquee to transfer 9 Hyde Park to Ziad who would not pay a price or provide other consideration for the transfer. Applying section 423(1)(a), Mr El-Husseini made an arrangement ("entered into a transaction") with Ziad on terms that provided for Mr El-Husseini to receive no consideration. If Ziad had agreed to provide some, but inadequate, consideration, section 423(1)(c) would equally have applied. In that case, Mr El-Husseini would have entered into an arrangement with Ziad for a consideration the value of which was significantly less than the value of the consideration provided by himself: the consideration provided by Mr El-Husseini was his agreement to procure the transfer to Ziad of 9 Hyde Park by Marquee, and the consideration provided by Ziad was the inadequate sum to be paid by Ziad either to Marquee or to Mr El-Husseini.

35. A transfer by a solvent company owned by a debtor of a valuable asset for no or inadequate consideration necessarily results in a diminution in the value of the debtor's shares in the company. The Bank accepted that it was a necessary element in their claim that the value of Mr El-Husseini's assets, in this case his shares in Marquee, had been diminished as a result of the transfer. Depending on the circumstances, the transfer may either reduce the value of the shares or destroy their value completely. Either way, it prejudices the creditor's ability to enforce the judgment. It also removes an asset of the company that might otherwise have become available for enforcement of the judgment debt against the debtor: see for example the orders made in *JSC VTB Bank v Skurikhin (No 3)* [2015] EWHC 2131 (Comm) and *Commercial Bank of Dubai PSC v Al Sari* [2023] EWHC 1797 (Comm).

36. An arrangement by a debtor to procure such a transfer is an obvious way in which a debtor may seek to defeat his creditors. This had been the case long before the enactment of the IA 1986. The mental element required by section 423(3) can without difficulty be satisfied as regards such an arrangement. Whether or not it strictly speaking puts assets beyond the reach of creditors within the meaning of section 423(3)(a), it certainly prejudices the interests of creditors within the meaning of section 423(3)(b).

37. In circumstances where the mental element set out in section 423(3) is satisfied, where the transaction is well within the mischief at which section 423 is aimed, as that mischief appears from section 423(3), where the arrangement meets the terms of section 423(1), and where the section contains no express requirement for a disposal of any property belonging to the debtor (as the appellants accept), the application of well-established principles of statutory construction would seem to lead to the same analysis as Andrew Baker J and the Court of Appeal on this issue.

38. The appellants do not accept this approach and submit, on various grounds, that it is implicitly and necessarily a requirement of section 423 that the transaction involves the transfer of property belonging to the debtor.

39. The appellants' submissions may be grouped under three headings:

a. Textual indicators within the wording of sections 423 to 425.

b. A consideration of the purpose that the regime was designed to achieve and what it was not designed to achieve.

c. How the fraudulent transfer regime in sections 423 to 425 was intended to interrelate with sections 238 and 339 dealing with transactions at an undervalue in corporate and personal insolvency.

40. We consider each of these in turn.

Indications in the wording of sections 423-425

(i) Transactions which are "otherwise" like gifts

41. Mr Warents, who appeared for the appellants, pointed out that section 423(1)(a) itself 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.

42. It was common ground that the word "gift" in the first limb bears its ordinary meaning: see *BTI 2024 LLC v Sequana SA* [2019] EWCA Civ 112, [2019] Bus LR 2178 ("*Sequana*") at para 41. Mr Warents relied on *Spellman v Spellman* [1961] 1 WLR 921 as establishing that a donor can only make a gift of property that he owns. In that case the car which the wife claimed that the husband had gifted to her before their separation was in fact owned by the hire purchase company from which the husband had obtained a loan to pay for the car. Mr Warents argued that the use of the word "otherwise" introducing the second limb of section 423(1)(a) shows that the transfer must, like a gift, involve the transfer of a proprietary interest by the debtor. Here there has been no gift of Mr El-

Husseini's shares because he still owned them after the transaction had been completed. He could not make a gift of 9 Hyde Park because he did not own it, Marquee owned it.

43. We do not accept that the word "gift" is so limiting of the transactions to which the second limb of section 423(1)(a) applies. There is nothing in the wording of the provision that suggests that the word "gift" governs the rest of the definition. The Court of Appeal so decided in *Sequana*, holding that the payment of a dividend by a company to its shareholders was not a gift but was a transaction for no consideration: para 50. Further, there is no support in academic commentary for such a limitation. Mr McGrath KC, appearing on behalf of the Bank, referred to the relevant passage in *Parry et al, Transaction Avoidance in Insolvencies,* 3rd ed (2018), para 4.15. The authors state that while a gift, by definition, involves the transfer of an asset, transactions which provide for the debtor to receive no consideration do not necessarily entail the transfer of an asset. They include, for example, the promise of a forbearance for which no consideration is received or the voluntary waiver of a debt. See similarly *Goode on Principles of Corporate Insolvency Law,* 5th ed (2018), para 13-24.

(ii) The requirement that the consideration must be paid to the debtor

44. Mr Warents drew to our attention that section 423(1) specifies that the transaction entered into by the debtor may fall within the provision if it does not "provide *for him*" to receive any consideration (sub-para (a)) or if the consideration "provided *by himself*" is significantly more than the consideration provided by the other person (sub-para (c)).

45. This, he submitted, showed that the term "consideration" in this section does not bear the same meaning as consideration more generally in contract law. In general contract law, consideration moving from one party to someone other than the counterparty to the contract can be good consideration. If a debtor's son owes a debt of £1,000 to a bank and the debtor agrees to pay the bank that £1,000 in return for the bank releasing the son from his debt, that would be a transaction at full value under ordinary contract law principles. However, that would rightly fall within section 423(1)(a) because there is no consideration moving *to the debtor*; his assets are depleted by £1,000 to the detriment of his creditors.

46. That result, Mr Warents argued, creates a conundrum for the Bank. Suppose that the facts relating to 9 Hyde Park were the same except that Ziad had paid Marquee the full value of the house. There would be no diminution in the value of Mr El-Husseini's shares because the assets of Marquee are not reduced. But it would still be a transaction under which *Mr El-Husseini himself* receives no consideration and so appears, on the

Bank's construction of the provision, to be caught when clearly it should not be caught. Under the appellants' construction of the provision, it would not be caught because there is no property of the debtor being transferred.

47. While Mr Warents is correct that "consideration" in section 423(1) has a narrower scope than in contract law generally, we do not accept that it creates the suggested conundrum. Going back to the assumed facts as regards the transfer of 9 Hyde Park, Mr El-Husseini arranged with Ziad that he would procure his company, Marquee, to transfer the property to Ziad for no consideration. Given that a "transaction" includes an arrangement and so "consideration" in section 423(1) may include unenforceable promises, that undertaking by Mr El-Husseini was consideration of very considerable value provided by him. If Ziad had agreed with his father to pay the full value of 9 Hyde Park to Marquee, that undertaking would have been consideration of equivalent value provided to Mr El-Husseini, the performance of which would have ensured no diminution in the value of Mr El-Husseini's shareholding in Marquee.

(iii) The bona fide purchaser defence

48. There is a limited defence in section 425(2) for a bona fide purchaser, in the following terms:

> "An order under section 423 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor entered into the transaction; but such an order—
>
> (a) shall not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and
>
> (b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction."

49. The protection is limited under section 425(2)(a) to any interest in property which was acquired "from a person other than the debtor" and under section 425(2)(b) to a person who was not "a party to the transaction" with the debtor.

50. Mr Warents' submission on this was that the drafter of that provision assumed that in order to be caught by section 423, there would be someone who acquired property from the debtor and who was too proximate to the debtor to be able to rely on the defence and hence the defence was only made available to someone who was at least one remove from the debtor.

51. The provision, Mr Warents said, only makes sense if the most proximate person is a person who receives property owned by the debtor. That person cannot rely on the defence even if they were entirely innocent. However, he said, applying that to the facts of 9 Hyde Park, there is no one who receives property from Mr El-Husseini because he does not pass any of his assets to anyone. In theory therefore, Ziad could, if he had paid full value for 9 Hyde Park, rely on the bona fide purchaser defence even though he is the most proximate person to the original transfer of the house by Marquee. There could be no policy reason for allowing a bona fide person in the position of Ziad (that is to say the first person to receive the property directly as a result of the transaction) to rely on the defence because he receives the property from Marquee and not from Mr El-Husseini, but not allowing Ziad to be able to rely on the defence if he had received the property directly from Mr El-Husseini. That illogicality must mean that the drafter expected that the first person to receive the assets as a result of the transaction received those assets from the debtor. The assumption made by section 425(2)(a) is therefore that the transaction involves the transfer of an asset by the debtor.

52. We do not agree that the wording of section 425(2) indicates that the drafter was making the assumption on which Mr Warents relied. If that was the drafter's assumption, section 423(1) would have been drafted to include it expressly. It is true that it may put a third-party recipient in a more favourable position than someone who receives property directly from the debtor and that, in a case such as the present, there is no person who is so proximate to the debtor that he is ruled out from reliance on the defence. As regards the present case, given that Ziad did not pay anything for the house, he is not in any position to mount a defence under section 425(2) even though it is not alleged that he shared his father's fraudulent purpose.

53. Overall, we consider that the wording of sections 423-425 strongly supports the submissions of the Bank, and the conclusion of the courts below, 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, as Mr McGrath accepted, there must be a depletion or diminution in value of the assets available for enforcement of claims against the debtor (whether by creditors individually or collectively through a formal insolvency process). But that may occur through a transaction that does not involve the disposal of the debtor's own property, such as in the case of 9 Hyde Park.

54. The appellants' case involves a significant limitation on the operation of the provision which, if it were intended, one would expect to see clearly spelled out in the wording of the section. Their construction requires important words to be read into the section because those words are simply not there. One would also expect to see it heavily trailed in admissible Parliamentary materials or academic commentary leading up to and in the wake of section 423 being enacted. Neither party took us to any such material.

55. In places the wording of the provision appears deliberately to have avoided reference to the assets of the debtor. In section 423(3)(a) the fraudulent purpose is described as "putting assets beyond the reach of" the creditor and not "putting *his* assets beyond the reach of" the creditor. The non-exhaustive description of the kinds of order the court can make in section 425(1)(a) and (b) refer to requiring "*any* property" transferred as part of the transaction or vested in any person rather than referring to the *debtor's* property being transferred or vested. It may be noted that while the recommendations in the Cork Report at para 1215 envisaged that the new provision would expressly deal with dispositions of property, they did not specify that this would be restricted to property of the debtor. In the event, section 423 was drafted in wider terms and contains no express reference to dispositions of property.

56. Finally, on the language of section 423, Mr Warents submitted that the exclusion of transactions relating to property not owned by the debtor from the scope of section 423 was in keeping with the presumption against confiscation. In *In re Mathieson* [1927] 1 Ch 283, a case concerning section 42 of the Bankruptcy Act 1914 (4 & 5 Geo 5, c 59) which was replaced by section 339 of the IA 1986, Atkin LJ said at p 296: "I am entitled to expect clear words to be used, if it is intended to divert to the benefit of the debtor's creditors property which bona fide before the bankruptcy had passed beneficially to other persons". We do not accept Mr Warents' submission. First, section 423 expressly contemplates that the transferee of property may be ordered to restore it. As discussed above, there is a defence available to a bona fide purchaser for value without notice of the debtor's purpose, but only if the asset in question was acquired from a person other than the debtor: see section 425(2). The section therefore expressly provides that any other transferee, including *any* transferee from the debtor and any volunteer, may be required to re-transfer property. The powers of the court as to the appropriate remedy in section

423(2) are drafted in very wide terms and, where the transferee has provided some value for the transfer, the court may require reimbursement or compensation to be paid to the transferee as a term of any order for restoration of the property: see *4 Eng Ltd v Harper* [2009] EWHC 2633 (Ch), [2010] 1 BCLC 176, paras 11-16 per Sales J, and as regards the statutory provisions applicable in Scotland, *MacDonald v Carnbroe Estates Ltd* [2019] UKSC 57, 2020 SC (UKSC) 23, [2020] 1 BCLC 419, paras 63-65 per Lord Hodge. Second, the Bank's reading of the section as not being restricted to dealings with the debtor's own property is, for the reasons given in this judgment, no more than a natural reading of section 423(1) in context. It does not involve an expansive reading, whereas the appellants' case involves reading exclusionary words into the section.

The purpose of section 423

57. The appellants accepted that in construing sections 423 to 425, the purpose for which they were enacted is clearly relevant and important. Mr Warents also accepted that the purpose is made apparent by subsection (3). That describes the purpose which the debtor must have when he enters into the transaction, and it makes clear that the purpose of the sections is to provide redress where transactions at an undervalue are entered into with the mental element identified in subsection (3). Mr Warents warned the court, however, against elevating the importance of that purpose such that it overrides the other requirements of section 423. He gave examples of actions by a debtor which would satisfy the mental element of section 423(3) but would not come within section 423(1). In *Delaney v Chen* [2010] EWCA Civ 1455, [2011] BPIR 39, two debtors sold the freehold of their home on terms that there was an immediate grant back to them of a 21-year non-assignable lease. Their purpose was found to have been, at least in part, to make enforcement of a judgment debt more difficult, but a claim under section 423 failed because the debtors had received full value in the form of the cash price paid by the purchaser together with the surrender value of the lease. Mr Warents gave the example of a debtor who owned a valuable wine collection. He might drink his most valuable wine to avoid its seizure by creditors or an officeholder, but it would not fall within section 423(1), even if this involved some "transaction" between the debtor and a third party such as a friend helping him to choose the bottles and carry them up from the cellar. The same could be said of the destruction of a valuable chattel. As Mr Warents put it, section 423 is not a kind of statutory conspiracy claim which requires only some sort of combination between the debtor and another person.

58. Mr Warents also warned against over-reliance on the discretion of the court under sections 423(2) and 425 when deciding whether to grant a remedy and then in fashioning any remedy as a cure-all to resolve the problems that would arise from too broad a construction of the term "transaction at an undervalue". The need for the debtor to have

entered into such a transaction is an additional and logically prior requirement included by the legislature before one gets to the question of what the appropriate remedy might be. That requirement must be given its full weight.

59. We accept that section 423(1) must be satisfied in accordance with its own terms and that their proper construction cannot be dictated by the terms of section 423(3), or by the breadth of the remedies available to the court. Parliament has specified two elements, not one, each of which must be satisfied for a successful claim under the section. Nonetheless, section 423(1) does not stand to be construed in a linguistic vacuum, uninfluenced by its purpose as set out in section 423(3). A proper regard to that purpose may cut both ways. Mr McGrath accepted in the course of argument that a transaction which had no effect on the availability or value of assets otherwise available to meet the claims of creditors would not fall within section 423(1), even if it might strictly fall within its terms. Equally, however, where a transaction not only has the purpose of prejudicing creditors but has that effect, there is no reason why it should not fall within section 423(1), if a reasonable reading of the sub-section permits it. Still less is there any reason to read into section 423(1) an implied restriction which would undermine the purpose of the section, as expressed in section 423(3), as the appellants seek to do in this case.

60. The implied restriction was originally framed by the appellants, in their Grounds of Appeal and written case, as one which required a *transfer* of an asset beneficially *owned* by the debtor. This was diluted in a number of different respects during oral submissions, including in particular by an acceptance that the release of debt owed to the debtor or the surrender of an interest in property, whether gratuitously or at an undervalue, fell with section 423(1), even though it involved no transfer of property. In the light of the terms of section 423(1) and (3), this concession was in our view unavoidable. The appellants' case must instead be that it is an essential element of any transaction falling within section 423 that it directly involves property owned by the debtor, and not as here property owned by a company which is in turn owned by the debtor. This again is a restriction which is not expressly included in section 423. In our judgment, it is a restriction which is not justified by the terms of section 423(1), and which would undermine the purpose of section 423, for reasons already stated.

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

61. Sections 238 and 339 of the IA 1986 were enacted to provide remedies in the case of transactions at an undervalue where the debtor has subsequently entered administration or liquidation (section 238) or been declared bankrupt (section 339). Section 339 replaced section 42 of the Bankruptcy Act 1914 but in substantially different terms. They do not

depend on establishing the mental element required by section 423(3), although there is a defence available to claims under section 238 where the court is satisfied that the company entered into the transaction in good faith and for the purpose of carrying out its business and that there were reasonable grounds for believing that the transaction would benefit the company (section 238(5)). Instead, the condition for their application is that the transaction was entered into within a specified period before the commencement of the relevant insolvency process: two years in the case of the administration or liquidation of a company (section 240) and five years in the case of bankruptcy (section 341), provided in each case the company or individual was insolvent at the time of the transaction or became so as a result of the transaction.

62. These conditions clearly distinguish section 423 and sections 238 and 339, but all three sections apply to transactions which are defined in substantially the same terms.

63. There is force in Mr Warents' submission that where, in three sections in the same statute dealing with transactions at an undervalue, the same language is used to identify the features of those transactions, the court should proceed on the basis that a common meaning was intended for them, unless there are clear reasons to the contrary. This is all the more so when, whatever their historical origins, the sections were newly drafted provisions in the statute introducing for the first time the concept of "a transaction at an undervalue". In *National Bank of Kuwait v Menzies* [1994] 2 BCLC 306, Balcombe LJ said at p 319 that the definition of a transaction at an undervalue in section 423(1) "is in all relevant respects the same as the definition in section 238(4)" and on that basis he applied to section 423(1) Millett J's analysis of section 238(4) in *In re MC Bacon Ltd* [1990] BCLC 324, as did Sir Christopher Slade in *Agricultural Mortgage Corpn plc v Woodward* [1994] BCC 688, 695 and Lord Neuberger of Abbotsbury MR in *Delaney v Chen* [2011] PBIR 39, para 15.

64. Mr Warents argued that it was therefore not appropriate to rely on the purpose of one section (section 423, as expressed in sub-section (3)) to construe a provision which was common to the three sections. There would be merit in this argument if this would result in distortions in the meaning of the common provisions as they appeared in the other sections. But we are unable to see that this is the case. The common purpose is to set aside or provide other redress in cases where there have been transactions at an undervalue which have prejudiced creditors. 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.

65. Mr Warents further argued that in *Clarkson v Clarkson* [1994] BCC 921 the Court of Appeal interpreted section 339 in a way which is inconsistent with the Bank's case as regards section 423(1).

66. In that case each of the three director/shareholders of a property development company took out an insurance policy on his own life which was issued jointly to the three of them as trustees. At that time the company was successful. The trustees held the policy taken out by Mr Clarkson, one of the director/shareholders, and any proceeds on trust for such one or more of a class which comprised his wife and other close family members and the other two director/shareholders, Mr Dawber and Mr Smith. In default of appointment within two years after the death of Mr Clarkson, the trustees would hold the fund for Mr Dawber and Mr Smith in equal shares. Two years later, in the midst of the property crash of 1990/91, the company went into receivership and demands were made under guarantees given by the director/shareholders. In 1992, the three trustees appointed the policy, then constituting the trust property, to Mrs Clarkson, whose husband was by then terminally ill. In 1993, Mr Dawber and Mr Smith were both declared bankrupt.

67. Their trustees in bankruptcy argued that the appointment to Mrs Clarkson was a transaction at an undervalue, on the grounds that she gave no consideration for it and, if that appointment had not been made, the policy could have been appointed to Mr Dawber and Mr Smith or the power of appointment would have vested in the trustees in bankruptcy.

68. The appeal by the trustees in bankruptcy was dismissed. The power of appointment was a power given to the three directors in their capacity as trustees and they were bound to exercise the power in accordance with their fiduciary duties. The power would not have vested in their respective trustees in bankruptcy because, even if categorised as "property" for this purpose, the power was "property held by the bankrupt on trust for any other person" and thus excluded from the bankrupt's estate by section 283(3)(a) of the IA 1986.

69. The facts and issues in *Clarkson* are far removed from those in the present case. Mr Warents relied on it because as part of his reasoning, Hoffmann LJ (with whom Stuart-Smith and Saville LJJ agreed), said at p 930 that section 339:

> "…was intended to enable the trustee to recover for the benefit of the creditors any property which he [ie the debtor] had given away for nothing or at an undervalue during the relevant period

> as defined in section 341. What property did these bankrupts have at the relevant time?"

Having analysed the property held by the bankrupts, Hoffmann LJ said: "The question is: are any of these interests property which they have given away?", and subsequently noted counsel's submission that "the test for whether the bankrupts had given away their property was whether it would, on their bankruptcy, have vested in their trustees. That seems to me a reasonable approach."

70. Mr Warents relied on this part of Hoffmann LJ's judgment to support the appellants' case that a transaction at an undervalue in section 339, and therefore in section 423, must involve some property belonging to the debtor.

71. We reject the suggestion that Hoffmann LJ was laying down a test which must be satisfied in all cases brought under section 339, or sections 238 or 423. There was no question in *Clarkson* of any relevant "property" being owned by anyone other than the bankrupts. He was focused on the particular and rather unusual facts of that case and was applying the relevant legal analysis to those facts. It cannot sensibly be suggested that, if confronted with the very different facts of this case, he would have applied the same analysis as if it were a necessary, albeit implied, element of section 423(1). Mr Warents' submission provides a good example of trying to rely on a judgment as setting out a general and immutable principle without regard to the facts of the case.

72. In our judgment, *Clarkson v Clarkson* is clearly distinguishable on its facts. It is, in our view, wrong to distinguish it on the grounds that it is a decision under section 339, which does not therefore illuminate section 423 with its wider ambit and different historical origins. As we have earlier said, we can see no good reason for giving different meanings to transactions at an undervalue in sections 238, 339 and 423.

73. Finally, Mr Warents argued that there was a "common rationale" for the transaction at an undervalue test in the three sections, namely, to distinguish between such transactions on the one hand and preferences given by a debtor to particular creditors ahead of an insolvency process on the other. In keeping with the Cork Report's recommendation, preferences may only be challenged within a formal insolvency process, for which provision is made in sections 239 and 340 of the IA 1986. The conditions for relief are different from those under sections 238, 339 and 423, as regards the effect of the preference (to put the creditor in a better position than in a formal insolvency process), the mental element involved (the debtor must be influenced by a desire to put the creditor in that better position) and the shorter period before the

commencement of the insolvency period in which the preference must be given. Mr Warents submitted that, since the mental element in section 423(3) could be satisfied in the case of a preference, it was essential that the transaction at an undervalue test should provide an effective mechanism for excluding preferences from the ambit of sections 238, 339 and 423.

74. We are uncertain why, even if this analysis were correct, it would assist the appellants' case that a transaction at an undervalue must involve an asset belonging to the debtor. Although sharing some common features, the regimes for transactions at an undervalue and for preferences are clearly separate and are aimed at different types of transaction. The purpose of sections 238, 339 and 423 is to set aside or grant other relief in respect of transactions at an undervalue and they are drafted to achieve that purpose. A straightforward preference – the payment of a debt, for example – will not be a transaction at an undervalue, but there may be circumstances in which the same transaction falls, to some extent, within section 238 or 339 as a transaction at an undervalue, and, to a different extent, within section 239 or 340 as a preference. For example, a debtor might transfer a property worth £100 to X for no consideration other than the discharge of the debtor's liability of £60 to X. If the transfer took place within the periods applicable under both relevant sections, the transfer could be found to be a preference as to £60 and a transaction at an undervalue as to £40. Indeed, sections 240(1) and 341(1) expressly contemplate that a transaction may be both a preference and a transaction at an undervalue.

Conclusion

75. 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. In our view, the proper approach to the construction of section 423(1) is as set out earlier in this judgment at paras 33 to 37.

76. The appeal is for these reasons dismissed.