

SECTION 423

RECOVERING THE VALUE OF ASSETS



THOUGHTLEADERS4 FIRE
CORPORATE
PARTNER
THOUGHTLEADERS4 FIRE



serle court

Authored by: Marc Delehanty (Barrister) - Serle Court

Marc Delehanty acted for the successful respondent bank in El-Husseiny v Invest Bank [2025] UKSC 4



The target of an asset recovery or enforcement action will naturally be assets of real financial or practical economic value. So, it is important that there are legal tools available in English law to facilitate challenges to transactions which result in the diminution of the value of assets (i.e., extending beyond challenges to transfers of ownership of assets).



One such tool is Section 423 of the Insolvency Act 1986 ("IA 1986"). It

provides English courts with the power to reverse transactions at an undervalue entered into by a debtor where the debtor's purpose was to put assets out of the reach of its creditors or otherwise prejudice its creditors' interests. In recent years, the boundaries of Section 423 have been tested in cases where various different forms of transactions have been subject of challenge.

In its February 2025 decision in *El-Husseiny v Invest Bank* [2025] UKSC 4, the Supreme Court held that Section 423 may be engaged where a debtor which owns a company procures that that company transfer away company assets (i.e., assets owned legally and beneficially by the company).

The Court rejected the contention of the appellants that Section 423 was only available where a transaction involved the transfer of an asset beneficially

owned by a debtor. This is because, even though an asset beneficially owned by the debtor has not been transferred away, creditors would be prejudiced by effect of the transaction: the reduction in value of the company shares owned by the debtor (against which the creditors might enforce).

On a proper interpretation of Section 423 there was nothing in its wording to limit it so as to exclude such transactions.





In broad terms, the appeal outcome means that it is no answer to a Section 423 claim involving transfers of corporate assets to say

‘well, look, the debtor still holds his/her company shares, they haven’t been transferred away and remain available for creditors to enforce against’.

What matters from a legal perspective – and what has always mattered to creditors from a practical perspective – is whether there has been a transaction involving a debtor’s company, procured by the debtor, which has reduced or destroyed the value of those company shares. (Of course, Section 423 can also be used to challenge transactions beyond relatively straightforward transfers of assets away from a debtor’s company – it can be deployed against multifarious transactions procured by debtors which result in a depletion or diminution in the value of their asset base.)

The judgment upholds the Court of Appeal’s decision on this issue, but the Supreme Court’s reasoning sweeps much more broadly and so will be of great interest to civil fraud / asset recovery lawyers and, indeed, general insolvency lawyers and practitioners. In resolving the interpretation arguments, the Supreme Court:

- Reasoned that it could not see why the same wide interpretation for Section 423 should not also apply to Sections 339 and 238, IA 1986 (which deal with challenges to transfers of assets in the period before individual bankruptcy and corporate insolvency, irrespective of whether there was an intention to prejudice creditors).

- Clarified that a “transaction” need not involve a transfer of an asset and would cover other types of prejudicial action, such as a debtor releasing a debt or surrendering a lease.
- Provided guidance on how to evaluate the receipt and provision of “consideration” in multi-party transactions for the purposes of Section 423 (which is related to but differs from the understanding of consideration in the contract law sense).
- Considered how the statutory bona fide purchaser defence for onward transferees of property, at Section 425(2), may operate when a transferee receives property from a company owned by the debtor rather than directly from the debtor.

Notably, the Supreme Court did not address the related question of whether debtors themselves (as distinct from their companies) can be said to have “enter[ed]” into a transaction for the purposes of Section 423(1) if their only acts in procuring and effecting their company’s asset transfer were acts done in an official company capacity (e.g., as director). So, the Court of Appeal’s decision that such acts are capable in law of constituting debtors themselves “enter[ing]” into the transaction remains undisturbed.



Finally, the Supreme Court did not address the question of the form of relief that would follow from a successful challenge to a transaction involving a corporate asset transfer. However, Sections 423–425 provide for a broad discretionary power to fashion appropriate relief depending upon all of the circumstances. Some possibilities include: vesting the asset back in the debtor’s company or for transfer of the asset directly to the creditor.

L