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Case Note

HIDE AND SEEK: CLARIFYING THE REACH OF DEBT-AVOIDANCE PROVISIONS FOR TRANSACTIONS DEFRAUDING CREDITORS

Invest Bank PSC v El-Husseiny [2025] 2 WLR 320

In *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320, the UK Supreme Court clarified the scope of "transactions" under s 423 of the UK Insolvency Act 1986 (c 45), holding that it extends to cover situations where the debtor procures a company owned by the debtor to transfer an asset at an undervalue. This case note considers the possible implications of the decision on the interpretation of equivalent provisions under Singapore's insolvency legislation, and highlights how the decision may influence Singaporean courts to adopt a similar expansive approach, thereby enhancing creditor protection in insolvency cases.

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I. Introduction

1 Does s 423 of the UK's Insolvency Act 1986[2] ("UKIA") apply only to transactions involving the transfer of assets beneficially owned by the debtor, or can it also apply to transactions where a debtor agrees to procure a company they own to transfer an asset at an undervalue, thereby prejudicing creditors? This was the key issue that the UK Supreme Court grappled with in the recent case of *Invest Bank PSC v El-Husseiny*[3] ("*El-Husseiny*"). This case note considers the decision and explores its

1 This article is written in the author's personal capacity. The views expressed in this article are entirely the author's own, and any errors or mistakes remain the author's alone. The author wishes to express his thanks to the anonymous reviewer for their helpful comments, as well as to Nuraziah for her excellent copyediting.
2 (c 45) (UK).
3 [2025] 2 WLR 320.

implications on the interpretation of the equivalent provision under Singapore's insolvency legislation.

II. Facts and procedural history

2 The facts of *El-Husseiny*[4] are as follows. Ahmad El-Husseini ("Mr El-Husseini") gave personal guarantees in connection with credit facilities granted by Invest Bank PSC ("Bank") to two United Arab Emirates companies connected with Mr El-Husseini. When the companies defaulted, the Bank brought proceedings against Mr El-Husseini in Abu Dhabi, and obtained a judgment for approximately £20m.

A. Decisions of the courts below

3 In seeking to enforce the Abu Dhabi judgment against Mr El-Husseini, the Bank identified various valuable assets in the UK, including houses in central London and companies owning such houses.[5] However, it was alleged that Mr El-Husseini had arranged for these assets to be transferred to other people, so as to put these assets beyond the reach of the Bank.

4 One such impugned arrangement centred around the transfer of a property in central London, owned by Marquee Holdings Limited ("Marquee"), and valued at approximately £4.5m. Mr El-Husseini was the beneficial owner of all shares in Marquee at the relevant time, and it was alleged that he had caused Marquee to transfer ownership of the property to one of his sons. In exchange for this transfer, the son did not pay any consideration either to Marquee or to Mr El-Husseini. The effect of this transaction, accordingly, was that Mr El-Husseini's shareholding in Marquee was correspondingly reduced in value, with the result that the Bank's ability to enforce its judgment against Mr El-Husseini was adversely affected.

5 The Bank thus commenced proceedings against Mr El-Husseini and others in the High Court,[6] seeking, amongst other things, relief under s 423 of the UKIA, which provides as follows:[7]

4 *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320.
5 *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320 at [3].
6 *Invest Bank PSC v El-Husseiny* [2022] EWHC 894 (Comm).
7 Insolvency Act 1986 (c 45) (UK) s 423.

> **423 Transactions defrauding creditors.**
>
> (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;
>
> …
>
> (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.
>
> …
>
> (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".

6 This provision empowers the court to set aside a transaction at an undervalue that a debtor has entered into with another person, if the transaction was entered into for the purposes set out in s 423(3).

7 At first instance, the trial judge was tasked with dealing with two points of law in respect of the interpretation of s 423 of the UKIA. There, the trial judge held that the fact that the relevant assets were not legally or beneficially owned by Mr El-Husseini, but by a company owned or controlled by him, did not prevent the transfer from falling

within the scope of s 423 ("Beneficial Interest Issue").[8] More pertinently, the trial judge held that, where the Bank sought to rely on steps taken by Mr El-Husseini carried out in his capacity as a director of the company transferring the assets, such steps could not amount to the entering into a transaction *by Mr El-Husseini* for the purpose of s 423 ("Capacity Issue").[9] Accordingly, the trial judge held that the transfer of the property by Marquee fell outside the scope of s 423.[10]

8 On appeal by both Mr El-Husseini and the Bank, the Court of Appeal dismissed the former's appeal on the Beneficial Interest Issue, while overturning the trial judge's decision on the Capacity Issue.[11] In relation to the latter, the Court of Appeal recognised that it did so on a "narrow issue of law",[12] namely that the relevant facts should be properly established through the avenue of a proper trial:[13]

> … I would stress, however, that this is on a narrow issue of law. 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. …

9 As regards the Beneficial Interest Issue, the Court of Appeal noted that the key issue was whether, on proper interpretation of s 423 of the UKIA, there could be a "transaction" notwithstanding that the asset in question was not beneficially owned by the debtor.[14] The Court of Appeal ultimately answered this question in the affirmative.

10 Dissatisfied with the judgment, Mr El-Husseini thereafter sought and obtained permission for a further appeal to the UK Supreme Court, albeit only on the Beneficial Interest Issue.

B. Decision and reasoning of UK Supreme Court

11 The issues before the UK Supreme Court were: (a) whether a person could "enter into" a transaction where they act on behalf of a company; and (b) whether there could be a "transaction" for the

8 *Invest Bank PSC v El-Husseini* [2022] EWHC 894 (Comm) at [24] and [36].
9 *Invest Bank PSC v El-Husseini* [2022] EWHC 894 (Comm) at [47].
10 *Invest Bank PSC v El-Husseini* [2022] EWHC 894 (Comm) at [71].
11 *Invest Bank PSC v El-Husseini* [2024] KB 49.
12 *Invest Bank PSC v El-Husseini* [2024] KB 49 at [54].
13 *Invest Bank PSC v El-Husseini* [2024] KB 49 at [54].
14 *Invest Bank PSC v El-Husseini* [2024] KB 49 at [56].

purposes of s 423 of the UKIA where the relevant asset was not legally or beneficially owned by the debtor. In a unanimous decision, the UK Supreme Court dismissed the appeal, holding that both the language and purpose of s 423(1) pointed to the conclusion that a "transaction" within the meaning of the provision extends to cases where the debtor enters into an arrangement under which a company owned by the debtor transfers a valuable asset at an undervalue.[15]

12 In relation to the Beneficial Interest Issue, several strands of the UK Supreme Court's reasoning were largely consistent with that of the Court of Appeal. In particular:

(a) Section 423 of the UKIA was drafted using "very broad language" and did not require the transfer of any assets, let alone assets of which the debtor was the beneficial owner – to adopt Mr El-Husseini's argument would be to read words into the provision.[16]

(b) The word "transaction", for the purposes of s 423, was defined broadly to include "a gift, agreement, or arrangement". This definition far exceeded the mere scope of a "gift", and there was no reason to give a restrictive meaning to the phrase "agreement or arrangement".[17]

(c) Section 423 should be interpreted in accordance with its purpose as laid out in subsection (3) – this militated against adopting Mr El-Husseini's construction of the provision.[18]

(d) There was no "obvious policy reason" to adopt the construction advanced by Mr El-Husseini, and policy reasons instead leaned toward a broader construction of the provision.[19]

13 Notably, the UK Supreme Court also observed that:[20]

> A straightforward reading of section 423(1), together with the definition of "transaction" in section 436(1), would suggest that the transaction … 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.

15 *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320 at [75].
16 *Invest Bank PSC v El-Husseini* [2024] KB 49 at [60]; *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320 at [54].
17 *Invest Bank PSC v El-Husseini* [2024] KB 49 at [61]; *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320 at [30].
18 *Invest Bank PSC v El-Husseini* [2024] KB 49 at [63]; *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320 at [28].
19 *Invest Bank PSC v El-Husseini* [2024] KB 49 at [64]; *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320 at [64].
20 *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320 at [33].

14 This was because a transfer of a valuable asset, by a solvent company owned by a debtor, for no or inadequate consideration would necessarily result in a diminution in the value of the debtor's shares, and would likely "either reduce the value of the shares or destroy their value completely",[21] with the effect of prejudicing the creditor's ability to enforce against the debtor.

15 Further, the UK Supreme Court noted that the requisite mental element required under s 423 of the UKIA could be satisfied without difficulty where a debtor entered into an arrangement to procure the transfer of property by a company owned by him.[22] This was because regardless of whether the arrangement "[put] assets beyond the reach [of creditors]" within the meaning of s 423(3)(a),[23] it would undoubtedly "[prejudice] the interests of [creditors]" within the meaning of s 423(3)(b).[24]

III. Analysis

A. History of section 438 of the Insolvency, Restructuring and Dissolution Act 2018

16 In Singapore, transactions to defraud creditors were previously dealt with under s 73B of the Conveyancing and Law of Property Act[25] ("CLPA"). Section 73B was subsequently repealed by the commencement of the Insolvency, Restructuring and Dissolution Act 2018[26] ("IRDA") and appears in a different form as ss 438 and 439 of the IRDA,[27] which are in turn intended to mirror the language of s 423 of the UKIA.[28] In this regard, s 438 of the IRDA provides as follows:[29]

> **Transactions defrauding creditors**
>
> **438.** – (1) This section relates to any transaction entered into by a person (called in this section and section 439 the debtor) with another person at an undervalue.

21 *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320 at [35].
22 *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320 at [36].
23 Insolvency Act 1986 (c 45) (UK) s 423(3)(a).
24 Insolvency Act 1986 (c 45) (UK) s 423(3)(b).
25 Cap 61, 1994 Rev Ed.
26 (No 40 of 2018) s 464. Note that the current version is the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).
27 *Rothstar Group Ltd v Chee Yoh Chuang* [2021] SGHC 176 at [75].
28 Ajinderpal Singh, Adriel Chioh & Alexander Lee, *Insolvency, Restructuring and Dissolution Act Compendium* (LexisNexis, 2020) at para 439.2.
29 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 438.

(2) For the purposes of subsection (1), a debtor enters into a transaction with another person at an undervalue if –

(*a*) the debtor makes a gift to the other person or the debtor otherwise enters into a transaction with the other person on terms that provide for the debtor to receive no consideration;

(*b*) the debtor enters into a transaction with the other person in consideration of marriage; or

(*c*) the debtor enters into a transaction with the other person 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 the debtor.

(3) Where a debtor enters into a transaction at an undervalue, the Court may, if satisfied under subsection (4), make such order as the Court 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 any person who is, or is capable of being, prejudiced by the transaction (called in this section a victim).

(4) An order under subsection (3) may only be made if the Court is satisfied that a transaction at an undervalue was entered into by a debtor 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 the debtor; or

(*b*) of otherwise prejudicing the interests of any person in relation to a claim which the person is making or may make against the debtor.

(5) An application for an order under subsection (3) must not be made in relation to a transaction except –

(*a*) in a case where the debtor has been adjudged bankrupt under Part 16, by the Official Assignee, the trustee in bankruptcy or (with the permission of the Court) a victim of the transaction;

(*b*) in a case where a victim of the transaction is bound by a voluntary arrangement approved under Part 14, by the nominee of the voluntary arrangement or by any person who (whether or not so bound) is such a victim;

(*c*) in a case where the debtor is a company that is being wound up under Part 8 or is in judicial management under Part 7, by –

(i) the Official Receiver;

(ii) the liquidator or judicial manager (whichever is applicable); or

(iii) a victim of the transaction; and

(*d*) in any other case, by a victim of the transaction.

(6) An application made under subsection (5) is deemed to be made on behalf of every victim of the transaction.

17 On plain reading, there are three requirements under s 438 of the IRDA:[30]

(a) the application for an order must be made by an eligible person under s 438(5);

(b) the court must be satisfied that the transaction concerned was entered into at an undervalue (as defined by s 438(2)); and

(c) the court must be satisfied that the impugned transaction was entered into by the debtor for the purposes spelt out in s 438(4), namely to defraud or prejudice creditors; and

18 Where these requirements are met, the court can thereafter make an order under s 438(3), though it bears emphasis that s 438 of the IRDA has not been fully interpreted and applied in Singapore since its enactment.[31]

19 There are several clear differences between s 73B of the CLPA and s 438 of the IRDA:[32]

(a) Section 438 focuses on a narrower category of transactions, as opposed to "every conveyance of property".

(b) Section 438 eschews the requirement of having to prove an "intention to defraud creditors" in favour of a subjective inquiry into the "purpose" of the transaction.

(c) Section 438 provides prescriptive remedies subject to the overriding purpose of restoring the position to what it would

30 *DDP v DDR* [2024] 3 SLR 1457 at [30].

31 *DDP v DDR* [2024] 3 SLR 1457 at [3].

32 See generally Law Reform Committee, Ministry of Law, *Report of the Insolvency Law Review Committee: Final Report* (2013) at para 53, where s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) is compared against s 423 of the Insolvency Act 1986 (c 45) (UK) – s 438 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) mirrors the language of the latter.

have been had the transaction not taken place and protecting the interests of persons who are victims of the transaction.

20 The Singapore courts have noted that s 438 of the IRDA is "not meant to be an exact replica of s 73B of the CLPA", and thus, cases interpreting s 73B "may be of limited value" in interpreting s 438 of the IRDA.[33] Conversely, given that s 438 of the IRDA is meant to largely mirror the language of s 423 of the UKIA, this means that UK cases interpreting the latter are "highly persuasive in the interpretation of section 438".[34]

21 Reference to UK case law[35] interpreting the equivalent provision under the UKIA would thus provide the Singapore courts with more guidance in shaping their interpretation of s 438 of the IRDA. At the same time, however, any reference to UK case law remains subject to the qualification that any resulting interpretation must be consistent with the policy rationale underlying s 438 of the IRDA, namely to "preserve the net asset value of the company concerned so as to maximise the possible distribution to the creditors".[36]

22 In this regard, it is suggested that the way the UK courts have applied and interpreted s 423 of the UKIA is consistent with the policy rationale underlying s 438 of the IRDA. Indeed, the reasoning of the UK Supreme Court in *El-Husseiny*[37] – in adopting a broad definition of the term "transaction" – was cited with approval by the Singapore Court of Appeal in *Affert Resources Pte Ltd v Industries Chimiques du Senegal*[38] ("*Affert Resources*").[39] In *Affert Resources*, the Court of Appeal provided guidance on identifying a relevant "transaction" in the context of s 98 of the Bankruptcy Act:[40]

33 *DDP v DDR* [2024] 3 SLR 1457 at [29].
34 *DDP v DDR* [2024] 3 SLR 1457 at [29].
35 See, for example, *Integral Petroleum SA v Petrogat FZE* [2023] EWHC 44 (Comm); *Lemos v Church Bay Trust Co Ltd* [2023] EWHC 2384 (Ch); *Purkiss v Kennedy* [2024] EWHC 1081 (Ch); and *Purkiss v Kennedy* [2025] EWCA Civ 268.
36 *DDP v DDR* [2024] 3 SLR 1457 at [29].
37 *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320.
38 [2025] 1 SLR 649.
39 *Affert Resources Pte Ltd v Industries Chimiques du Senegal* [2025] 1 SLR 649 at [53]–[55].
40 Cap 20, 2009 Rev Ed. See *Affert Resources Pte Ltd v Industries Chimiques du Senegal* [2025] 1 SLR 649 at [47]–[48]. The Court of Appeal indicated at [40] that while its findings were in relation to s 98(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed), the principles were "broadly applicable to s 224 of the IRDA", which deals with transactions at undervalue. As is discussed below, these same principles applicable in determining a transaction at an undervalue under s 224 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") are equally applicable to s 438 of the IRDA.

(a) An expansive definition of the term "transaction" was consistent with the objective of s 98, which was to revisit any disposition of assets tainted by an inadequacy of consideration.

(b) The definition should not be restricted to a contract that the company had entered into, and extended to any "arrangement" that the company was a party to – in turn, the term "arrangement" was to be given an expansive definition, and included associated and inter-related agreements undergirded by a unity of purpose.

(c) The court should have regard to all relevant circumstances in order to understand the true nature of the transaction, so as to enable the consideration given and received by the company to be accurately assessed.

23 This consistency in policy, coupled with the materially similar language of the respective provisions, means that UK cases dealing with s 423 of the UKIA should be highly persuasive in the Singapore courts' interpretation of s 438 of the IRDA.

24 For context, the UK courts have observed that the essence of s 423 of the UKIA is to empower the courts to avoid transactions entered into at any time if made by a person at an undervalue and with the purpose of prejudicing his creditors,[41] and have sought to interpret s 423 broadly,[42] in a way that generally favours creditors. *El-Husseiny* is but the latest in a line of cases which have interpreted s 423 of the UKIA in a manner that appears to favour an aggrieved creditor. The affirmation of the broad approach toward s 423 by the UK Supreme Court in *El-Husseiny* reinforces this expansive view of s 423 under UK law, enhancing the protection available in respect of creditors' interests.

25 Such a pro-creditor approach is arguably consistent with the development of Singapore law, which has been observed to be fairly "pro-secured creditor or pro-creditor".[43] For example, the courts have observed that s 438 of the IRDA supports the rationale of "[preserving] the assets of a company in liquidation", in so far as it aids the liquidators of a company to reconstitute its assets when the company is being wound up.[44] Indeed, albeit in the unrelated context of non-charitable purpose trusts, it has been observed that reduced creditor protections "would not be consistent

41 *Hill v Spread Trustee Co Ltd* [2007] 1 WLR 2404 at [1].

42 Ajinderpal Singh, Adriel Chioh & Alexander Lee, *Insolvency, Restructuring and Dissolution Act Compendium* (LexisNexis, 2020) at para 439.3.

43 Wee Meng Seng & Hans Tjio, "Singapore as International Debt Restructuring Center: Aspiration and Challenges" (2021) 57 *Texas International Law Journal* 1 at 13.

44 *DGJ v Ocean Tankers (Pte) Ltd* [2024] 2 SLR 790 at [143] and [148].

with existing creditor-debtor protection policies in Singapore".[45] The UK's approach toward interpreting s 423 of the UKIA should accordingly be highly persuasive toward the interpretation of s 438 of the IRDA.

B. Implications for Singapore law

26 Section 438 of the IRDA has the potential to play a key role in insolvency law, and is a useful tool in the toolbox of any insolvency practitioner. While it is noted that ss 224 and 361 of the IRDA similarly allow for transactions at an undervalue to be challenged *via* an application to court, there are a few key differences between s 438 and those provisions.

27 Firstly, while applications to the court under ss 224 and 361 of the IRDA can only be made by the judicial manager/liquidator and Official Assignee respectively,[46] applications under s 438 can be made by a larger group of parties, in particular any "victim" of the transaction.[47] Secondly, unlike for ss 224 and 361, an application under s 438 is not predicated on the insolvency of the debtor.

28 Lastly, while there are clear time limits within which a transaction can be challenged under ss 224 and 361 of the IRDA,[48] no such limits are prescribed in relation to applications under s 438. In relation to this last point, however, the wording of s 438(3) arguably requires the court to balance the interests of the transferor's creditors and that of the transferee, which may have an indirect effect on timing. This is because by the time the court is asked to make an order, the passage of time and change in circumstances may sway the balance of the equities between the creditors and the transferee.[49] Indeed, eminent academic authority has suggested that any advantage conferred by this absence of a time-limit may be "more illusory than real in that the courts are reluctant to reopen transactions going back many years".[50]

45 Law Reform Committee, Singapore Academy of Law, *Report on the Enactment of Non-Charitable Purpose Trusts* (May 2021) at para 3.27.

46 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ss 224(1) and 361(1).

47 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ss 438(5).

48 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ss 226(1)(*a*) and 363(1)(*a*).

49 *4Eng Ltd v Roger Harper* [2009] EWHC 2633 (Ch) at [13].

50 "423 – Transactions Defrauding Creditors" in *Sealy & Milman: Annotated Guide to the Insolvency Legislation* (David Milman & Peter Bailey eds) (Sweet & Maxwell, 27th Ed, 2024).

29 While the requirements to bring an application under s 438 of the IRDA would appear to be less onerous than under ss 224 and 361, it should be noted that, as set out in s 438(3), the applicant must satisfy the court that the impugned transaction has been entered into for an impugned purpose. The equivalent of this subsection under the UKIA has been noted to introduce "stricter requirements" as compared to the other avoidance provisions, with the onus ultimately on the applicant to prove the existence of the proscribed statutory purpose.[51] In this way, s 438 is not simply a fall-back, catch-all option to be relied upon when all other options have been exhausted; instead, it presents an alternative option, the relative merits of which should be properly considered as part of a creditor's strategy towards the recovery of debts.

30 Given that s 438 of the IRDA offers a different angle in relation to the recovery of assets as compared to the debt-avoidance provisions, it is perhaps surprising that it has not been pursued or pleaded more often in the Singapore courts.[52] Nevertheless, the decision in *El-Husseiny* is helpful in confirming that the scope of this provision is capable of extending to address complex transactions which might otherwise be structured in a way that deprives aggrieved creditors of any form of recourse. The UK Supreme Court's pronouncement on *how* the requisite mental element under s 423 of the UKIA, which is identical to that under s 438 of the IRDA, may be satisfied also appears to lower the bar for a creditor to challenge transactions entered into by a debtor – this is because where the debtor procures a transfer by a solvent company owned by the debtor for no or inadequate consideration, this would result in a diminution in the value of the debtor's shares in the company, and would thus be deemed to have been entered into for the purpose of "prejudicing the interests of creditors".[53]

31 The UK Supreme Court in *El-Husseiny* also made another pronouncement which is likely to be helpful in interpreting s 438 of the IRDA, namely that its broad interpretation of a "transaction" would be capable of applying to s 238 and s 339 of the UKIA:[54]

> … The common purpose [of sections 238, 339, and 423 of the UKIA] 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

51 *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981 at [22].

52 The fact that the provision is relatively new may explain this – the IRDA came into operation on 30 July 2020. However, it bears noting that there appear to be relatively more reported cases dealing with s 224 of the IRDA, notwithstanding that s 224 came into force at the same time as s 438.

53 *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320 at [36]; Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 438(4)(*b*).

54 *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320 at [64].

> 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.

32 It is worth noting that in reaching this interpretation, the UK Supreme Court had rejected the Court of Appeal's view on this point, with the latter having taken a narrower approach in holding that:[55]

> … guidance [from section 238] is also helpful in the context of section 423 but it does not follow that the meaning of 'transaction' and 'enters into' which may have to be adopted under section 238 of the 1986 Act must necessarily be applied to section 423 irrespective of the facts.

33 Section 238 of the UKIA applies to transactions at an undervalue in the case of a company which has either entered into administration or gone into liquidation, and is functionally similar to s 224 of the IRDA.[56] While the remedies under ss 238 and 339 of the UKIA (and by extension ss 224 and 361 of the IRDA) are dependent on objective criteria – namely the entering into of transactions within a specified period before the commencement of the relevant insolvency process – s 423 of the UKIA (and by extension s 438 of the IRDA) hinges on the mental element of intention. The UK Supreme Court's pronouncement in *El-Husseiny* thus sheds light on the possible interpretation of s 438 of the IRDA, which forms a useful complement to the other transaction avoidance provisions under the IRDA.

C. Summary of applicable principles

34 Having fleshed out the relevant elements under s 438 of the IRDA, and having highlighted the utility of using UK case law dealing with s 423 of the UKIA to interpret the ambit of s 438, this note goes on to summarise the relevant principles which ought to shape the applicable approach to be taken under Singapore law.

(1) Locus standi

35 An application under s 438 may only be brought by the eligible parties as prescribed under s 438(5). In particular, a "victim of the

55 *Invest Bank PSC v El-Husseini* [2024] KB 49 at [84].

56 On the other hand, s 339 of the Insolvency Act 1986 (c 45) (UK) applies to transactions at an undervalue where an individual is adjudged bankrupt, and is functionally similar to s 361 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

transaction" is permitted to make an application under the provision.[57] The term "victim" is defined under s 438(3)(*b*) as "any person who is, or is capable of being, prejudiced by the transaction",[58] and this has been interpreted in a broad manner, and in accordance with its plain meaning, to include anyone who suffers actual or potential prejudice by virtue of the impugned transaction.[59]

36 Indeed, a person may be a victim even where they may not have been within the scope of the debtor's purpose for entering into the transaction, or even known to the debtor.[60] However, by virtue of the express wording of s 438(5), such prejudice – whether real or contemplated – *must* arise by virtue of the transaction having been at an undervalue.[61]

(2) Transaction at undervalue

37 The term "transaction" is defined under s 2(1) of the IRDA, and following *El-Husseiny*, includes situations where the transferred asset in question was not beneficially owned by the debtor.[62] As regards the aspect of the transaction being one at an "undervalue", the same principles under s 224(3) and s 361(3) of the IRDA would apply,[63] in respect of which there is an established body of case law.

(3) Prohibited purpose(s)

38 As regards the final element, the court must be satisfied that the impugned transaction was entered into by the debtor for a prohibited purpose. Based on English case law, this is arguably one of the most contentious and frequently litigated elements under s 423 of the UKIA (and foreseeably, for s 438 of the IRDA). Nevertheless, the existing *corpus* of authority has established several key propositions to guide the court in making its determination.

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57 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 438(5)(*c*)(iii).
58 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 438(3)(*b*).
59 Kristin van Zwieten (ed), *Goode on Principles of Corporate Insolvency Law* (Sweet & Maxwell, 5th Ed, 2018) at para 13-132; Harold Foo & Beverly Wee, *Annotated Guide to the Singapore Insolvency Legislation* (Academy Publishing, 2023) at para 16.021; *Clydesdale Financial Services Ltd v Smailes* [2009] EWHC 3190 (Ch) at [73].
60 Harold Foo & Beverly Wee, *Annotated Guide to the Singapore Insolvency Legislation* (Academy Publishing, 2023) at para 16.021; *Purkiss v Kennedy* [2025] EWCA Civ 268 at [18].
61 *Vasdev v Bellnorth Ltd* [2017] EWHC 1395 (Ch) at [152].
62 *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320 at [56].
63 Harold Foo & Beverly Wee, *Annotated Guide to the Singapore Insolvency Legislation* (Academy Publishing, 2023) at para 16.012.

39 Firstly, the court should focus on establishing the debtor's subjective purpose.[64] Here, the court must be satisfied that the relevant purpose was one directly contemplated by the debtor *themselves*, as opposed to one contemplated by a reasonable person in the debtor's position.[65]

40 Secondly, the court may infer the existence of such a purpose, notwithstanding the debtor's denials of having had such a purpose.[66] Such a determination is ultimately one based on an evaluation of all relevant facts, and the financial position of the debtor may be evidence relevant to the court's ultimate decision.[67]

41 Thirdly, this requirement for a prohibited purpose means that the court must be satisfied that this prohibited purpose was a "positively intended" purpose of the transaction,[68] and not merely a "by-product or consequence of the transaction".[69] However, there is no requirement that the prohibited purpose, where established, must be the dominant purpose – it merely needs to be established as *one* of the purposes undergirding the impugned transaction.[70]

IV. Conclusion

42 Ultimately, the UK Supreme Court's confirmation in *El-Husseiny*[71] that a transaction can fall within the scope of s 423 of the UKIA, even if the relevant property in question was not legally or beneficially owned by the debtor, is both sensible and helpful. The decision is one with potentially significant implications for Singapore's insolvency regime, and could provide greater clarity to insolvency practitioners in seeking to recover assets from defaulting creditors. For the same reason, insolvent debtors will have to take greater care to consider and assess the possibility of proposed transactions falling within the scope of s 438 of the IRDA – and by extension s 224 or s 361 of the same.

64 *El-Husseiny v Invest Bank PSC* [2025] 2 WLR 320 at [28].
65 *Hill v Spread Trustee Co Ltd* [2007] 1 WLR 2404 at [86] and [130].
66 *Hill v Spread Trustee Co Ltd* [2007] 1 WLR 2404 at [86]; *Purkiss v Kennedy* [2025] EWCA Civ 268 at [18].
67 *Re Dormco SICA Ltd* [2021] EWHC 3209 (Ch) at [116]; *Integral Petroleum SA v Petrogat FZE* [2023] EWHC 44 (Comm) at [54].
68 *Re Dormco SICA Ltd* [2021] EWHC 3209 (Ch) at [116].
69 *Lemos v Church Bay Trust* [2023] EWHC 2384 (Ch) at [16]; *Purkiss v Kennedy* [2025] EWCA Civ 268 at [18].
70 *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981 at [23]; *JSC BTA Bank v Ablyazov* [2018] EWCA 1176 at [13].
71 *Invest Bank PSC v El-Husseiny* [2025] 2 WLR 320.

43 While there continues to remain a dearth in case law interpreting and applying s 438 of the IRDA, this note has considered: (a) how the provision could provide a useful complement to the other transaction avoidance provisions within the IRDA; and (b) how the existing *corpus* of English case law could provide helpful guidance to the Singapore courts in fleshing out this relatively underdeveloped area of law.

44 Until a formal pronouncement is made by the Singapore courts, it remains to be seen whether, and to what extent, cases such as *El-Husseiny* will ultimately impact the interpretation of avoidance provisions under the IRDA – though given the fast-evolving nature of insolvency law, it is suggested that this is likely to happen sooner rather than later.