

Mulligan and Doherty in Disputes Magazine: The Modern Approach to Transactions at an Undervalue

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PRACTICES Bankruptcy Litigation, Restructuring

In an article for *Disputes Magazine*, Haynes Boone Partner [Michael Mulligan](#) and Associate Charlotte Doherty explore the recent shift in the English courts' approach to transactions at an undervalue.

Read the article below.

The past eighteen months have seen a significant shift in the English courts' approach to transactions at an undervalue (TUV) claims in insolvency and enforcement proceedings. Once governed by a relatively settled framework, the law has been reshaped by a series of important decisions: *El-Husseiny v Invest Bank PSC* [2025] UKSC 4 (“El-Husseiny”), *Commercial Bank of Dubai PSC v Abdalla Juma Majid Al Sari & Ors* [2025] EWHC 1810 (Comm) (“Al Sari”), *Malik v Messalti* [2024] EWHC 2713 (Ch) (“Malik”), and *Purkiss v Kennedy* [2025] EWCA Civ 268 (“Purkiss”). Together, these cases signal a decisive movement away from formalism and towards an emphasis on substance, with courts increasingly willing to scrutinise the real-world effect and purpose of transactions.

The Legal and Policy Framework

English insolvency law allows the courts to set aside transactions at an undervalue – where assets are transferred for significantly less than their true worth – under sections 238, 339 and 423 of the Insolvency Act 1986.

- Section 238 applies to companies in formal insolvency.
- Section 339 applies to individuals in bankruptcy.
- Section 423 is broader, enabling any victim to challenge a transaction if it was entered into for the purpose of putting assets beyond the reach of creditors or prejudicing their interests.

The policy objective is clear: to prevent debtors from undermining the collective interests of creditors by dissipating value prior to insolvency. An important part of a section 423 claim is the “purpose test,” which requires the court to be satisfied that the debtor’s intention was to prejudice creditors, rather than acting for a legitimate commercial or tax reason. The test has proved to be a recurring point in litigation, and recent case law has sharpened its application.

El-Husseiny – Section 423 Extends to Company-Owned Assets

The Supreme Court’s decision in *El-Husseiny* marks a pivotal moment in TUV litigation. The debtor, facing enforcement of a multi-million dollar judgment, arranged for companies under his control to transfer valuable London properties to family members for no consideration. The key issue was whether section 423 could apply when the assets in question were not beneficially owned by the debtor but by companies he controlled.

The Supreme Court held that it could. It determined that the statutory language is deliberately wide, covering any “transaction” or “arrangement” designed to prejudice creditors. To confine the provision to assets directly owned by the debtor would invite abuse: debtors could avoid scrutiny simply by interposing corporate or nominee structures.

By focusing on the debtor’s orchestration of the transfer, rather than the technical ownership of the asset, the Court confirmed that section 423 has a substantive reach that reflects its policy purpose.

The judgment is particularly notable for the way it distinguishes undervalue claims from the doctrine of corporate veil-piercing. The Court did not disregard corporate personality, but instead interpreted section 423 purposively to capture transactions “through” companies. This enables creditor protection without disturbing fundamentals of company law.

Al Sari – Sham Transactions and Cross-Border Evasion

Whilst *El-Husseiny* considered statutory scope, the focus of the Court in *Al Sari* was evidential robustness. The case involved a sophisticated scheme designed to frustrate enforcement of a substantial debt judgment. The *Al Sari* family created backdated and sham documents purporting to evidence debts and tenancies, seeking to keep valuable London properties beyond the reach of creditors.

Calver J found that the documents were fabricated, the transactions were shams, and the arrangements were deliberately orchestrated to defeat creditors. The Court drew adverse inferences from the defendants’ failure to provide proper disclosure and from the deliberate creation of “documentary black holes.” Importantly, the court also refused to allow foreign judgments, obtained on the basis of fraudulent documents, to shield the scheme from scrutiny.

The decision illustrates several points of principle:

- Substance prevails. The court will not be distracted by complex or cross-border structuring where the commercial reality is obvious.
- Evidential gaps matter. Failure to provide disclosure will be held against the debtor; missing documentation may itself point to an improper purpose. This case makes clear that that disclosure failings are not just procedural problems, but can be central to the outcome. A pattern of missing or inconsistent records was itself evidence of dishonest purpose.
- International dimension. Fraudulent foreign judgments will not be recognised or allowed to insulate a scheme from challenge in England.

Al Sari therefore provides a powerful reminder that the courts are prepared to deploy every available tool to protect creditors, particularly in the face of sophisticated and dishonest arrangements.

Malik & Purkiss - The Purpose Test in Practice

At the heart of section 423 lies the purpose test. The debtor’s subjective intention is critical. It is not enough that the effect of the transaction was to disadvantage creditors; the claimant must show that this was at least one of the debtor’s purposes in structuring the deal.

Two recent cases illustrate how this test is being applied in practice:

Malik v Messalti: The debtor settled the family home into a trust with a general aim of asset protection. The court held that it was not necessary to identify a specific creditor: a broad, non-

specific intention to shield assets from potential future claims was sufficient. Malik confirms that a generalised purpose to defeat creditors can satisfy the statutory test, widening the availability of relief.

Purkiss v Kennedy: The issue before the Court was whether a tax avoidance scheme fell within section 423. The Court of Appeal emphasised that merely avoiding a tax liability does not equate to prejudicing creditors, unless the transaction is aimed at existing or prospective claims, it falls outside the statute. The case draws a line between legitimate tax planning and arrangements designed to undermine creditor recovery. Together, these authorities sharpen the evidential battleground. Courts may be willing to infer purpose from surrounding circumstances, but they will also police the limits to avoid capturing bona fide commercial or tax activity.

Practical Guidance for Practitioners

The recent authorities carry several lessons for insolvency office-holders, judgment creditors, and their advisers.

1. Structuring claims across statutory routes: *El-Husseiny* confirms the breadth of section 423, but practitioners should consider carefully when to deploy it alongside, or instead of, section 238 or section 339. For example, a liquidator may prefer section 238 where insolvency at the “relevant time” is provable, but judgment creditors may turn to section 423 as a standalone remedy. Strategic mapping of statutory routes at the outset can avoid wasted costs or jurisdictional hurdles later
2. The importance of evidencing purpose: Both *Malik* and *Al Sari* show that purpose rarely emerges from a single “smoking gun.” Courts will draw inferences from a pattern of behaviour — e.g. a trust settled days before judgment, or a suite of backdated tenancy agreements. Practitioners should anticipate the need to assemble circumstantial evidence (timing, counterparties, internal communications, gaps in disclosure) into a persuasive mosaic.
3. Disclosure as both sword and shield: *Al Sari* illustrates the dangers of “documentary black holes.” Where disclosure is partial or inconsistent, the court may infer dishonesty or improper purpose. Conversely, directors facing undervalue allegations should ensure board minutes and working papers contemporaneously record the commercial rationale for transactions — absence of such records will be held against them.
4. Valuation and expert evidence: Although valuation evidence was not central to the cases discussed in this article, undervalue litigation in practice often rises or falls on valuation evidence so should always be front of mind for practitioners. Courts typically expect rigorous expert analysis of both balance-sheet and cash-flow solvency, together with fair value assessments of transferred assets. Weak or speculative reports can be fatal to a claim.
5. Distinguishing legitimate planning from prejudice: *Purkiss* demonstrates the importance of evidentially separating legitimate tax or commercial structuring from arrangements intended to defeat creditors. For example, documenting that a distribution was driven by a tax efficiency programme, rather than a reaction to looming liabilities, may be decisive.

Conclusion

The past year has reinforced and expanded the reach of TUV proceedings. The Supreme Court in *El-Husseiny* confirmed that section 423 cannot be circumvented by interposing corporate structures. The Commercial Court in *Al Sari* demonstrated a robust approach to sham arrangements, disclosure failings, and cross-border evasion. *Malik* and *Purkiss* have refined the “purpose test,” showing both how broadly it can be inferred and where the limits lie.

Across these cases, three themes emerge. First, the courts are emphasising substance over form, unwilling to let complex structures or artificial documentation obscure reality. Second, the debtor's purpose remains the decisive factor under section 423, with courts prepared to infer intention from context but careful not to capture legitimate planning. Third, evidence is paramount: from expert valuation in corporate cases to disclosure and inference in fraud claims, outcomes turn on the strength of the evidential record.

The tools available to protect creditors are becoming broader and more robust than before, but success depends on careful pleading and rigorous evidence. For insolvency practitioners, this means closer scrutiny of the substance and purpose of transactions. For debtors and directors, it underlines the risks of asset transfers in the shadow of insolvency: whatever the form, if the effect and purpose is to prejudice creditors, the courts are likely to intervene.