



Neutral Citation Number: [2024] EWHC 2713 (Ch)

Case No: CH-2023-000141

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**CHANCERY APPEALS (ChD)**  
**ON APPEAL FROM THE ORDER OF MASTER**  
**DAGNALL DATED 6 FEBRUARY 2023**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 25 October 2024

**Before :**

**MR JUSTICE RICHARDS**

**Between:**

**(1) KAMRAN MALIK**

**Appellant**

**(2) URWAH MALIK**

**Prospective**

**(3) SANAA MALIK**

**Appellants**

**(4) ARFEEN MALK**

**(5) IMAAN MALIK**

**- and -**

**FARIDA MESSALTI**

**Respondent**

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**Michael Reason** (instructed on a **direct access basis**) for the **Appellant**  
**Timothy Becker** (instructed on a **direct access basis**) for the **Prospective Appellants**  
**Ms Farida Messalti** appeared in person

Hearing date: 10 October 2024  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 25 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## Mr Justice Richards

1. The Appellant (**Mr Malik**) appeals against the order of Master Dagnall (the **Judge**) of 6 February 2023 (the **Order**). So far as material for present purposes, by the Order Master Dagnall made a final charging order (the **FCO**) in favour of the Respondent (**Ms Messalti**) over a beneficial interest in a property (the **Property**) at 11 St Claire Road, London.
2. Mr Malik's case was that, although he had previously held a beneficial interest in the Property, he had divested himself of that interest by means of a trust deed executed on 10 November 2008 (the **Trust Deed**) in favour of his four children (together the **Children** who are also the Intended Appellants listed on the front page of this judgment) so that he had no longer had an interest in the Property that could be made subject to the FCO. The Judge accepted that the Trust Deed (i) ostensibly had the effect for which Mr Malik argued, (ii) was indeed executed on 10 November 2008 and (iii) was not a sham. However, the Judge concluded that s423 of the Insolvency Act 1986 (**Section 423**) enabled him to make an order setting aside the effect of the Trust Deed on which Mr Malik relied and, having done so, make the FCO.
3. References in the remainder of this judgment to numbers in square brackets are, unless the context requires otherwise, to paragraphs of the Judge's judgment (the **Judgment**) reported at [2023] EWHC 553 (KB). The Judge sits in the King's Bench Division, but the appeal has been transferred to the Chancery Division.

## Preliminary Matters

4. At the hearing before the Judge, Mr Malik sought to argue that Ms Messalti's claim under Section 423 was statute-barred. The Judge dealt with that argument at [171] to [176]. He concluded that Mr Malik and the Children needed permission to amend their pleadings in order to raise that argument. He refused that permission, and so refused to permit them to advance a limitation argument, concluding that it had been raised too late (the **Case-Management Decision**). The Case-Management Decision therefore disposed of the limitation argument. However, at [177] to [179], the Judge set out his view that Ms Messalti had at least six years from the date on which the relevant debt came into existence to make a Section 423 claim and that her claim was in-time on that measure.
5. In the Order, the Judge gave permission to appeal on a single ground relating to the proper construction of Section 423. He expressly refused permission to appeal against his conclusions of fact and against the Case-Management Decision. The Judge ordered that any Appellant's Notice had to be served by 5 May 2023.
6. Mr Malik served an in-time Appellant's Notice on 26 April 2023. That was accompanied by grounds of appeal (the **Grounds of Appeal**) settled by Mr Ben Symons of counsel that referenced the single ground of appeal for which the Judge had given permission. However, on 13 May 2023, Mr Malik himself served a skeleton argument that went well beyond that single ground and included arguments on the substantive limitation point, albeit no arguments addressing the Case-Management Decision.

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7. The Children served no Appellant's Notice and Mr Becker, on behalf of the Children, accepts that they are not presently parties to the appeal.
8. With that background, two applications were made at the commencement of the hearing of the appeal before me:
  - i) The Children made an application for permission to appeal out of time against the Order. They wish to advance arguments going beyond the single ground for which the Judge gave permission, including by challenging the Case-Management Decision. They also sought an adjournment of the hearing to give them time to formulate their application for permission to appeal.
  - ii) Mr Malik applied to amend his Grounds of Appeal so as to advance a substantive argument that the Judge should have concluded that Ms Messalti's claim under Section 423 was out of time. Mr Malik did not apparently wish to challenge the Case-Management Decision.
9. Mr Malik's application that I have described in paragraph 8.ii) was complicated by the fact that he is subject to a General Civil Restraint Order (the **GCRO**) dated 28 July 2023. The GCRO restrains Mr Malik from making any application in the High Court or the County Court without first obtaining the permission of Roth J or Edwin Johnson J. Mr Malik has no permission from either of those judges to apply to amend his Grounds of Appeal.
10. At the beginning of the hearing, I made orders refusing both applications referred to in paragraph 8 and I gave oral reasons. This appeal, therefore, proceeds as an appeal by Mr Malik only on the basis of the existing Grounds of Appeal only.
11. Ms Messalti filed no respondent's notice under CPR 52.13. She arrived nearly an hour late for the hearing partly because, she explained, she had not been able to find the court room. She served no skeleton argument but explained in response to my questions that her position was that Mr Malik's single permissible ground of appeal was misconceived and that the Judge's order should stand for the reasons given in the Judgment.
12. I understood Mr Reason to argue, on behalf of Mr Malik, that Ms Messalti's failure to file a respondent's notice meant that Mr Malik's appeal should necessarily succeed. He provided no authority in support of that contention and I reject it. Mr Malik is asking me to make a determination of the proper construction of Section 423 that has the capacity to be binding on lower courts. I do not accept that I am obliged to make such a binding determination simply because Ms Messalti served no respondent's notice in this particular appeal. I therefore proceed on the basis that it is for Mr Malik to persuade me that his proposed construction of Section 423 is correct. Given Ms Messalti's position, and the fact that she had filed no skeleton argument, I allocated Mr Reason almost all of the speaking time at the hearing to give him the opportunity to do that. That said, I gave Ms Messalti 10 minutes in which to make oral submissions which she did with conspicuous clarity. I offered Mr Reason the opportunity to reply to those submissions but in the event he did not consider that was necessary.

## The Order and the Judgment

### The Property and the Trust Deed

13. The Property is registered at HM Land Registry in the joint names of Mr Malik and his wife (to whom I will refer, following confirmation from Mr Malik, as **Mrs Malik**, although the Judgment refers to her as “Mrs Kamran”). They bought the Property as a family home on 3 March 2003. Until the Trust Deed was executed, they held the beneficial interest in the Property in equal shares. The Trust Deed, therefore, was a dealing in Mr Malik’s 50% beneficial interest in the Property ([2], [11]).
14. The Trust Deed was executed on 10 November 2008 ([149]). It was neither “illusory” nor a “sham” ([164] to [169]). It was not forged or otherwise backdated ([150] to [156]). It operated to constitute Mrs Malik as a sub-trustee of Mr Malik’s 50% beneficial interest in the Property in favour of the Children ([27], [157] to [160]). The nature and terms of that sub-trust are not material for present purposes.

### The application for the FCO

15. From at least 2011 onwards (i.e. some three years after the Trust Deed was executed) Mr Malik started to bring a number of claims, directly or indirectly, against politicians, newspaper editors and others. All of those claims failed and costs awards were made against Mr Malik ([34]). It was that course of conduct that eventually resulted in Mr Malik being made subject to the GCRO.
16. One such claim was a libel claim brought in 2015 against Ms Messalti who was a legal office manager of a solicitors’ firm. On 16 November 2016, Master Kaye struck out that claim and ordered Mr Malik to pay Ms Messalti costs, summarily assessed on the indemnity basis, at £21,000 ([39]).
17. On 12 February 2021, Ms Messalti applied for a charging order over the Property. An interim charging order was made on 17 February 2021. Mr Malik sought to resist that interim order becoming an FCO and there was a hearing on that matter on 14 April 2021. However, the Judge was concerned to ensure that the Children could make submissions on this issue since the matter affected the Property in which they were said to have an interest ([45] and [46]) and that hearing was adjourned. There were a number of delays, and procedural hearings before the final hearing dealing with the FCO was listed.

### Section 423 and limitation arguments

18. Following a hearing on 3 March 2022, Ms Messalti was ordered to provide a statement of case setting out her position on Section 423. She did so in a pleading dated 1 April 2022 [63].
19. Mr Malik responded to that pleading in further points of defence that he served on 15 April 2022. He did not say in those points of defence that Ms Messalti’s claim based on Section 423 was statute-barred ([64]).
20. The hearing that led to the Judgment and Order commenced on 10 August 2022 ([49]). Ms Messalti’s skeleton argument for that hearing had argued that Section 423 applied and gave the court power to set aside any disposition of the beneficial interest in the

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Property to which the Trust Deed had given effect. Neither Mr Malik nor Mrs Malik raised any argument at that time to the effect that a limitation period for a claim based on Section 423 had expired ([68] to [70]).

21. The hearing had to be adjourned because of a shortage of time and it resumed on 22 December 2022. On the second day of that hearing, Mr Malik asserted for the first time that Ms Messalti's argument based on Section 423 was statute-barred ([71]).
22. The Judge directed himself extensively on the law relating to Section 423, including case-law authority, at [100] to [108], [119] to [126], [129] to [130] and [138] to [143].
23. At [110] to [118], and [127] to [128] the Judge considered authorities dealing with the limitation period applicable to claims under Section 423. He considered that there were tensions in the authorities as to (i) whether there was a limitation period at all in relation to claims under Section 423, (ii) whether any limitation period commenced at the time of the transaction with which the court is asked to interfere or later and (iii) when any applicable limitation period ends. Since the Judge made the Case-Management Decision, he did not need to resolve the tension, but he did set out his *obiter* conclusions on the issue at [177] to [179] to which I have already referred.
24. At [180], the Judge concluded that the Trust Deed gave effect to a transaction at an undervalue. There is no challenge to that finding.
25. At [181], the Judge started his analysis of whether Mr Malik had entered into the Trust Deed with the purpose specified in s423(3)(3) to which I, like the Judge, will refer as the "prohibited purpose" by way of shorthand. At [186], the Judge set out his core conclusion which was as follows:

*I have weighed up all the evidence and considered the state of Mr Malik's mind and whether Ms Messalti has proved on the balance of probabilities that Mr Malik had a relevant purpose. I conclude that Ms Messalti has made out that it was more likely than not that a purpose of Mr Malik's in entering into the Property trust deed was to protect the Property, being the family home and indeed his own home, from creditors and in particular future creditors, but that no specific creditors were contemplated as part of that process. His intention was simply a general one to protect the Property from creditors who might arise in the future.*

26. At [211], Judge concluded that this was a prohibited purpose.
27. At [187] to [194], the Judge gave reasons for his finding as follows:
  - i) The Trust Deed contained express provisions dealing with Mr Malik's duties to deal with any creditors, and also restricting his right to use the Property to raise funds to pay creditors. Mr Malik must, therefore, have had creditors in mind when entering into the Trust Deed.
  - ii) There was no other satisfactory explanation for the Trust Deed that did not involve the prohibited purpose. The explanation that it was to "protect the family home" was entirely consistent with a wish to keep it out of the reach of Mr Malik's creditors.

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- iii) He treated “very cautiously” Mr Malik’s evidence as to how the idea for the Trust Deed had come about.
  - iv) Mr Malik had it in mind to engage in a course of litigation conduct that could lead to adverse costs orders against him. The Judge considered this to provide only “some limited support” for his conclusion. However, he did conclude that Mr and Mrs Malik “feared future creditors in the light of Mr Malik’s future aims” even though he did not have any specific creditors in mind and that the only creditors that seemed to exist at the time of the Trust Deed were creditors of Mr Malik’s limited company.
28. At [195] to [204], the Judge addressed Mr Malik’s case that the purpose that he had explained at [186] was insufficient to constitute the “prohibited purpose” because, for Section 423 to apply, it would be necessary for Mr Malik “to foresee then or future creditors with some specificity (even if only of a general class nature)”. Mr Malik was arguing that the finding was only of a general aim to protect against “any possible future creditor but without any individual or type of creditor being contemplated” and that this was not enough to establish the prohibited purpose.
29. At [204], the Judge concluded as follows:

*I have found this to be a very difficult question of law and in principle I am prepared to give permission to appeal with regards to it. However, my conclusion is that I think that it does come within the prohibited purpose for someone to enter into a transaction at an undervalue with an aim that that will mean that the property is not to be available for creditors and in particular any future creditors, but where those creditors are not identified either specifically or by class in that person's mind and none presently exist, and so that the person's hands will not be tied in the future in incurring future debts by a fear that those future creditors could enforce against the property.*

**The Grounds of Appeal**

30. Section 423 provides, so far as material, as follows:

**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;*

...

*(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—*

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(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”.

31. Also relevant is s424 of the Insolvency Act 1986 which provides, so far as material, as follows:

**424.— Those who may apply for an order under s. 423.**

(1) An application for an order under section 423 shall not be made in relation to a transaction except—

(a) ...

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

(2) An application made under any of the paragraphs of subsection (1) is to be treated as made on behalf of every victim of the transaction.

32. The sole Ground of Appeal relates to s423(3) and is expressed in the following terms:

*That “a person who is making, or may at some time make, a claim...” in section 423(3) of the Insolvency Act 1986 refers only to “a person” that was known to the appellant at the time [the relevant transferor] entered into a relevant transaction.*

**Discussion****Overview of Section 423**

33. Whenever a person transfers an asset at an undervalue the effect of that transaction is to put the asset beyond the reach of creditors or potential creditors: the transferor no longer owns the asset transferred and the loss of the asset is not matched by equivalent proceeds of realisation. However, the authorities stress that this effect is not enough to trigger the operation of Section 423. Rather, achieving a result specified in s423(3), must be a purpose of the transaction.

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34. That conclusion is demonstrated by the judgment of Leggatt LJ (as he then was) in *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176. In paragraphs [15] and [16] of his judgment, Leggatt LJ explains the distinction between “purpose” and “effect”. He also explains that, if it is shown that a transferor foresees that a transaction will have the result of putting assets beyond the reach of creditors, that is evidence that the transaction was entered into for a prohibited purpose. However, it is evidence only and not determinative, since the question remains one of “purpose” rather than “effect” or “foreseeability”.
35. As well as distinguishing between “purpose” and “effect”, the authorities also deal with a different issue concerning “multiple purposes” brought out by the facts of *Hashmi v Commissioners of Inland Revenue* [2002] EWCA Civ 981. The transferor in that case was found to be a caring father who transferred assets to his son for a purpose of securing his future. However, the transferor also had a purpose of putting his assets beyond the reach of the Inland Revenue.
36. The authorities have not always spoken with one voice on the proper application of Section 423 in cases of multiple purposes. Some authorities could be read as suggesting that, for Section 423 to apply, the prohibited purpose must be a “substantial purpose” or a “dominant purpose”. However, at [14] of *JSC BTA Bank v Ablyazov*, Leggatt LJ concluded that this risked placing an unwarranted gloss on Section 423 which required only that the debtor entered into the transaction for the prohibited purpose. As Leggatt LJ concluded “the test is no more complicated than that”.

The challenge to the Judge’s conclusion

37. Given the terms of the Judge’s permission to appeal, this appeal has to be brought, as a challenge to the Judge’s construction of Section 423. In order for the appeal to succeed on this ground, Mr Malik has to establish both of the following propositions:
  - i) Section 423 should be construed in the way set out in paragraph 32 above.
  - ii) The Judge found that Mr Malik did not know of Ms Messalti’s status as a person “making a claim” or a person who “may make a claim” at the time he entered into the Trust Deed.
38. The proposition in paragraph 37.i) is one of statutory construction. The proposition in paragraph 37.ii) is as to the Judge’s findings of fact in the Judgment alone, since Mr Malik has no permission to challenge those findings of fact or to argue that new facts should be found. If Mr Malik can establish both propositions, his appeal will succeed since the Judge’s findings of fact would not engage Section 423, properly construed.

Application of principles of statutory construction

39. Mr Malik supports his construction of Section 423 by reference to what he describes as orthodox principles of statutory interpretation:
  - i) the plain meaning of the words;
  - ii) the statutory context surrounding Section 423;
  - iii) the “functional construction rule”;



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- iv) considerations of the “mischief” behind Section 423; and
  - v) the *eiusdem generis* rule.
40. Mr Malik’s arguments to the effect that his favoured construction represents the “natural interpretation” of s423(3) focused heavily on the statutory concept of “a person who is making, or may at some time make” a claim. In his oral submissions on behalf of Mr Malik, Mr Reason argued that this phrase was the “focus” of s423(3). I do not agree. In my judgment, the focus of Section 423(3) is on the “purpose” a transferor has for entering into a transaction. The focus is not on the degree of knowledge that a transferor has of the persons who are making, or may make, claims against him. The concept of “knowledge” on which Mr Malik relies is not mentioned in s423(3). Nor does s423(3) deal with difficult questions that might arise if Mr Malik’s construction were correct such as (i) whether any knowledge must be actual, or whether constructive knowledge would suffice or (ii) whether the necessary knowledge must be of creditors individually, or whether knowledge of a particular class or category of creditors would be sufficient.
41. Indeed, I consider that there is a strong textual indication that points against Mr Malik’s interpretation. A prohibited purpose can include a purpose of putting assets beyond the reach of persons who “may at some time make” claims against the transferor. There is an obvious conceptual difficulty in a transferor having “knowledge” of persons who are not yet making claims but “may” in the future.
42. Of course, the fact that Mr Malik’s interpretation is not the “natural interpretation” does not make it wrong. Sometimes Parliament’s intention in enacting a statutory provision is not straightforwardly apparent from the natural meaning of words and it is, therefore, appropriate to consider the matter by reference to the other principles of construction on which Mr Malik relies.
43. As part of his arguments on “statutory context”, Mr Malik relies on the judgment of Arden LJ (as she then was) in *IRC v Hashmi* [2002] EWCA Civ 981 at [22]:
- In my judgment section 423(3) is a carefully calibrated section forming part of a carefully calibrated group of sections. It only applies to transactions which are gifts or have a gratuitous element (section 423(1)). The transaction is only set aside for the limited purposes of subsections (2)(a) and (b). The onus is on the claimant to show the statutory purpose (see (3)) and although there is very wide jurisdiction to make appropriate orders under 424, these may not prejudice the interests of bona fide purchasers for value under subsequent transactions.*
44. Mr Malik argues that the Judge’s approach to Section 423 would undo the careful calibration to which Arden LJ refers since every time a transferor makes a gift of assets to family members by way of a trust, Section 423 would inevitably apply to undo the effect of that trust. In his oral submissions, Mr Reason described the Judge’s approach as tantamount to an “attack on trusts”.
45. I do not accept that. There is no “attack on trusts” because the Judge’s conclusion does not cut across the rule that s423(3) is concerned with purpose, not effect. The Judge did not conclude that Section 423 would apply whenever a trust has the effect of putting assets beyond the reach of creditors.

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46. Mr Malik also relies on the “functional construction” rule that each component of a statute must be given effect according to its legislative function as such a component (see paragraph 659 of Halsbury’s Laws Vol 96 (2024)). In this context, he relies on the title to Section 423 (“Transactions Defrauding Creditors”) as suggesting that Section 423 is imposing a “high threshold”. He also relies on the preamble to the Insolvency Act 1986 to the effect that it is an act to consolidate enactments “relating to the penalisation and redress of malpractice and wrongdoing, and the avoidance of certain transactions at an undervalue”. In echoes of the submission that the Judge’s interpretation involved an “attack on trusts”, Mr Malik argues that these components of the Insolvency Act 1986 are not given effect by the Judge’s approach to Section 423 since that approach catches an unduly wide category of trusts.
47. I do not consider that these references bear the weight that Mr Malik seeks to place on them. In the first place, the heading to the section provides little guide to the scope of s423(3). As ICC Judge Prentis held in *Hunt v Balfour-Lynn* [2022] EWHC 784 (Ch), the heading is somewhat misleading since Section 423 can apply even without fraud being established.
48. Nor can much weight be attached to the statement in the preamble that the Act is concerned only with “certain” transactions at an undervalue. This simply demonstrates, as Section 423 makes plain, that not every transaction at an undervalue is liable to be set aside without shedding much light on which are to be set aside and which are not.
49. Mr Malik argues that the “mischief” behind Section 423 is to be found in paragraph 12220 of the Cork Report that preceded the enactment of the Insolvency Act 1986 which he quotes as follows:
- the vice of the payment which prefers one creditor to another is not that it defeats or defrauds the creditors who remain unpaid, but that it militates against a pari passu distribution in bankruptcy.*
50. I was not shown the Cork Report itself: the quote above is drawn from Mr Reason’s skeleton argument. I confess to a suspicion that the paragraph quoted might be explaining the rationale for legislation that permits preferences to be set aside without saying much about the mischief at which Section 423 was addressed. Without sight of the relevant section of the Cork Report in its wider context, I am unable to conclude that the extract of it in Mr Reason’s skeleton sheds much light on the question.
51. In any event, in my judgment, considerations of statutory purpose point firmly against Mr Malik’s construction of s423(3). During the course of his oral submissions, I canvassed the example of a transferor entering into a hypothetical trust deed that states expressly in Clause 1 that its purpose is to put assets beyond the reach of all present and future creditors and in Clause 2 declares a trust over all the transferor’s assets for no consideration. Mr Malik’s position is that such a trust deed would not necessarily satisfy the requirements of s423(3) and it would, instead, be necessary to interrogate the transferor’s state of mind at the time he declared the trust to decide which, if any, creditors, he knew about and which he did not.
52. I do not accept that argument. As Ms Messalti said in her oral submissions, Section 423 has a matter of public interest in mind and is concerned with transactions, entered into with a prohibited purpose, to put assets beyond the reach of creditors. Moreover, it is

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concerned to protect the position of both creditors already making claims at the time of the transfer as well as persons who “may” in the future make claims. Creditors, particularly future creditors, may well have no insight into which creditors the transferor does, or does not, know about. Yet on Mr Malik’s submission, creditors’ entitlement to the protection that Section 423 affords would depend on an examination of the transferor’s subjective “knowledge” of creditors in circumstances where the transferor would have an obvious self-interest in denying such knowledge and creditors might lack the information to challenge this denial. I do not consider that to be consistent with the purpose of Section 423.

53. I also canvassed with Mr Reason a related example. Suppose that, at the time of making the hypothetical trust, the transferor knew that the butcher was making a claim against him, but was completely unaware that the baker and candlestick-maker also had claims. Mr Malik’s position is that in that case, the butcher could make a claim under Section 423, but the baker and candlestick-maker could not. I consider that interpretation to be at odds with both the ordinary reading of Section 423 and its purpose for at least three reasons:
- i) The baker and candlestick-maker appear quite clearly to be “victims” of the transfer as defined in s423(5). Yet on Mr Malik’s interpretation, the court is not able to make any order under s423(2) to protect the interest of those “victims”.
  - ii) Mr Malik accepts that the butcher can make a claim under Section 423 and s424(2) provides that any such claim would be treated as made on behalf of both the baker and candlestick-maker. There is no logic to an interpretation that would preclude the baker and candlestick-maker from bringing their own claims under Section 423.
  - iii) As noted, it is at odds with Section 423’s purpose of providing protection both to present and future creditors.
54. Mr Malik also relied on the *eiusdem generis* principle of statutory construction under which, where a statute gives specific examples of something followed by more general words, the more general words are presumed to be addressing examples similar to those specifically mentioned. He reasoned as follows:
- i) Section 423(3) refers to persons “making” a claim and persons who “may make” a claim.
  - ii) A transferor can realistically be expected to have knowledge of persons who are “making” claims,.
  - iii) The scope of persons who “may make” a claim should be construed having regard to the *eiusdem generis* principle as similarly including those persons of whom a transferor has some degree of knowledge.
55. I reject that argument. The concept of a person who “may make” a claim is not a more general example of something previously mentioned specifically. A person “making” a claim is necessarily in a different situation from a person who “may make” a claim. The *eiusdem generis* principle is not engaged.

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56. Mr Malik argues that there are authorities that support his proposed interpretation. I was referred, in particular, to the judgment of ICC Judge Jones in *Hinton v Wotherspoon* [2022] EWHC 2083 (Ch). At [102] when directing himself on the law, ICC Judge Jones said this:

*What needs to be proved on the balance of probability is that Mr Wotherspoon entered into the challenged transaction with [the prohibited purpose] for which there must be in his mind not a specific creditor who would benefit from relief at the date of the transaction but a (i.e. any) person who is making or may at some time make a claim against him (see Hill v Spread Trustee Ltd [2006] EWCA Civ 542, [2007] 1 WLR 2404 at [136], by Arden LJ, as she then was). It follows that it does not need to be the person bringing the claim Sales J., as he then was, explained in 4 Eng v Harper [2009] EWHC 2633 (Ch) at [22].*

57. I do not consider that to be expressing any view on the issue arising in this appeal one way or the other. In particular, I do not read the reference to the need to have creditors “in mind” as saying anything about the presence or absence of a statutory requirement that the transferor has knowledge of particular creditors or classes thereof. Rather, ICC Judge Jones is simply noting that, since s423(3) is concerned with questions of “purpose”, it necessarily involves an examination of the state of the transferor’s mind. Overall, the focus of this passage is on the conclusion in the final sentence: for s423(3) to apply, a transferor does not need to have the purpose of putting assets beyond the reach of the specific creditor making a Section 423 claim. If anything, ICC Judge Jones’s self-direction is inconsistent with Mr Malik’s argument in this appeal since it is at odds with his analysis of the example set out in paragraph 53 above.
58. Mr Malik also placed some reliance on paragraph [117] of ICC Judge Jones’s judgment as follows:

*117. [Section 423(3)] needs a purpose to put assets beyond the reach of or otherwise prejudice the interests of persons making (none) or who may at some time make a claim against him. There was no reasonably foreseeable creditor or type of creditor who might do that. It is not enough to assert that the debtor wished to protect assets and that this would have the result of adversely affecting any creditors in the future because it would inevitably diminish Mr Wotherspoon's assets. There had to be, and there had to be in Mr Wotherspoon's mind, creditors to whom he would in the future be unable to make payment and who may at some time make a claim.*

59. There were also other sections of ICC Judge Jones’s judgment that refer to the relevance of a transferor having specific creditors in mind, but they add little to the paragraph quoted above and Mr Malik’s argument is appropriately considered by reference to that paragraph.
60. Paragraph [117] appears in the part of ICC Judge Jones’s judgment in which he makes factual findings as to the presence or otherwise of the prohibited purpose. Therefore, it

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has to be read in the light of the factual dispute in that case. As can be seen from paragraphs [113] to paragraph [123] of ICC Judge Jones’s judgment, Mr Wotherspoon’s trustee in bankruptcy (Mr Hinton) was inviting the court to infer the existence of a prohibited purpose from the asserted fact that Mr Wotherspoon’s financial position at the time of the transfer was shaky. Mr Wotherspoon’s case was that his financial position was not as bad as Mr Hinton suggested, there were no creditors pressing for payment and no likely future creditor other than HMRC, who Mr Wotherspoon thought would be paid in full. Ultimately, it was HMRC who petitioned successfully for Mr Wotherspoon’s bankruptcy, but Mr Wotherspoon’s position was that he did not have any creditors (whether HMRC or others) in mind when he made the transfer at an undervalue.

61. The first three sentences of paragraph [117] are simply orthodox statements of the distinction between “purpose” and “effect” to which I have referred in paragraph 34. Once read in context, it can be seen that the final sentence of paragraph [117] is part of ICC Judge Jones’s reasoning on a question of fact. ICC Judge Jones first makes a factual finding that there were no creditors making a claim, or reasonably foreseeable creditors who might do so. At [121], ICC Judge Jones concludes that Mr Wotherspoon had access to other significant sums of money when he made the transfer at an undervalue. From this, and the other evidence available, ICC Judge Jones makes the evaluative factual inference that Mr Wotherspoon was not thinking about creditors when he made his transfer. That leads to ICC Judge Jones’s evaluative conclusion that, while Mr Wotherspoon’s actions had the result of putting assets outside the reach of creditors, the transfer was not for a “prohibited purpose”.
62. Paragraph [117] and the other references in *Hinton v Wotherspoon* on which Mr Malik relies cannot bear the weight put on them. In short, what Mr Malik relies on in *Hinton v Wotherspoon* as indications of “authority” that support his conclusion on statutory construction are, in reality, conclusions of fact made in the case that was before ICC Judge Jones. The facts of *Hinton v Wotherspoon* were different from those of this case not least because other explanations of the purpose for the transfer were being advanced (see paragraph [123] of *Hinton v Wotherspoon*). By contrast, the Judge noted at [189] to [190] of the Judgment that no other convincing explanation of the Trust Deed’s purpose has been advanced in this case. All that [117] of *Hinton v Wotherspoon* demonstrates is that ICC Judge Jones in that case found it helpful, particularly given that it was possible that the transferor might have had multiple purposes for the transfer, to consider whether the transferor knew about creditors making claims, or the possibility of them making claims in the future. That involved a factual evaluation and not any conclusion on statutory construction.

### **Conclusion and disposition**

63. I do not consider *Hinton v Wotherspoon* to be at odds with the clear conclusion that I have reached following the principles of statutory construction to which I was directed. Section 423(3) does not contain any statutory requirement for a transferor to have any particular “knowledge” of either persons making a claim, or persons who may make a claim. The appeal is dismissed because I do not accept the proposition of statutory construction on which it relies.
64. In saying this, I am not of course suggesting that considerations of a transferor’s knowledge of creditors or potential creditors are irrelevant when considering whether a transfer is for a prohibited purpose. If it could be shown that a transferor did not know of

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the presence of a particular creditor, or potential creditor, that may well be relevant to the factual enquiry as to the transferor's purpose as indeed it was in *Hinton v Wotherspoon*. The position is similar to that analysed by Leggatt LJ in *JSC BTA Bank v Ablyazov* which I have described in paragraph 34 above. A transferor's "knowledge" of a particular creditor or classes thereof is quite capable of shedding some light on the transferor's purpose in transferring assets, just as considerations of "effect" or "foreseeability" are capable of shedding some light on that question. However, I am not able to accept the argument that s423(3) imposes a statutory requirement to the effect that a transferor has to have knowledge of any or all actual or potential creditors for Section 423 to apply.

65. I do not, therefore, need to address the second component of Mr Malik's argument that I have summarised in paragraph 37.ii). I do, however, note a potential obstacle in the way of that argument. The Judge found at [194] that, in the light of Mr Malik's intention at the time of the Trust Deed to "engage in a course of litigation conduct which risked and resulted in actual cost judgments" it was more likely than not that Mr and Mrs Malik "feared future creditors in the light of Mr Malik's future aims and thus are likely to have thought that there might be (future) creditors in the future". Ms Messalti is a creditor because Mr Malik pursued litigation against her and the court made a costs award in her favour. Accordingly, the Judge does appear to have found that Ms Messalti was within a class of potential future creditors that Mr Malik had in mind at the time of the Trust Deed.