IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Case No: QB-2015-005124

NCN: 2023 EWHC 553 (KB)

Courtroom No. 70

Royal Courts of Justice
Strand
London
WC2A 2LL

Monday, 6th February 2023

Before:

MASTER DAGNALL

B E T W E E N:

MR KAMRAN MALIK

and

MS FARIDA MESSALTI

THE CLAIMANT appeared In Person
THE DEFENDANT appeared In Person

APPROVED JUDGMENT

~~*This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of Court.*~~

MASTER DAGNALL:

1. This is my judgment in relation to Ms Farida Messalti's, the original defendant to the claim, application for a final charging order over what is said to be the first respondent, that is to say the claimant in the original claim, Mr Kamran Malik's interest in a property, 11 St Clair Road, London, E13 9DU (and which I will call "the Property"). The Property is registered at HM Land Registry in the joint names of Kamran Malik and his wife, Mrs Humera Kamran, under title number EGL452017. The application for the charging order was made under Part 73 of the Civil Procedure Rules on 12 February 2021. I granted an interim charging order on 17 February 2021, which was sealed on 25 February 2021; that being in relation to a judgment debt for costs which amounted to an original £21,000, although in theory interest would be accruing on that particular debt, and which judgment debt dated from 16 November 2016.
2. Mr Malik then sought to contest the making of a final charging order. Mr Malik relies upon what is said to be a declaration of trust (which I will call "the Property trust deed") dated and said to have been made on 10 November 2008, providing that the Property, which had been owned beneficially in equal shares by Mr Malik and Mrs Kamran, was now to be subject to the Property declaration of trust, which involved Mr Malik giving his 50% share in the Property to Ms Kamran for Mrs Kamran to hold on trust for their four children. Ms Messalti responded to challenge both the genuineness of the Property trust deed, both as a document and as a transaction, and the validity of that transaction against her as a subsequent creditor.
3. In various hearings, I made directions under the Civil Procedure Rules to seek to achieve the Court's overriding objective and to ensure that all issues were properly determined. Those included a direction that Ms Messalti could advance her claim under Part 16, that is to say sections 423 onwards, of the Insolvency Act 1986, to challenge or undo the Property trust deed assuming that it is otherwise valid and effective. That is a common application in cases of this nature and I will return to it in due course.
4. My directions included that the parties should provide statements of case and also, as provided for by my order of 5 May 2022, that Mrs Kamran and the children, following an involvement by one of them, Ms Urwah Kamran Malik ("Urwah"), saying that they were acting on behalf of all of the children, could attend and take part in this hearing, and that if they did not then they would be bound by its outcome. Mrs Kamran took part by counsel on the first day of this hearing, being 10 August 2022, with Mr Malik as well as Ms Messalti; Mr Malik representing himself; and Ms Messalti also representing herself. However, Mrs Kamran then provided a notice of discontinuance document to the Court on 3 December 2022, saying that she was not going to take any further part. She did not attend the second day of the hearing, being 22 December 2022, but Mr Malik and Urwah each attended in person and were heard before me on that day as was Ms Messalti.
5. At this point, the other children had not taken part individually but on 27 December 2022, Urwah issued an application notice seeking to have them joined and attaching witness statements from herself, her brother Arfeen Kamran Malik and her sisters Sanaa Malik and Imaan Kamran Malik. I heard each and all of Ms Messalti, Mr Malik and each and all of the children at a remote hearing, which I conducted on 6 January 2023. I conducted that hearing on the basis that I had not at that point decided whether I should take their then very recent and late evidence and submissions into account.
6. I have decided that what was advanced by them at that hearing was really matters of law and legal submission and that allowing them to be advanced will not have prejudiced Ms Messalti. I have, therefore, considered and taken account of everything what they have said

in preparing this judgment.

7. It also seems to me that these are circumstances in which Civil Procedure Rules 19.1 and 19.2, apply, and which read as follows:

"Parties – general

19.1 Any number of claimants or defendants may be joined as parties to a claim.

19.2 (1) This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period)

(2) The court may order a person to be added as a new party if –

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

(3) The court may order any person to cease to be a party if it is not desirable for that person to be a party to the proceedings.

(4) The court may order a new party to be substituted for an existing one if –

(a) the existing party's interest or liability has passed to the new party; and

(b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings".

8. It seems to me in the particular circumstances of this case that each and all of those jurisdictional provisions are satisfied; in particular that it is highly desirable to have everyone who claims an interest in the Property joined to the proceedings and heard so that the court can resolve all matters in dispute in the proceedings, and that the issues exist between Ms Messalti and each and all of the four children regarding their asserted interests in the Property and that it is desirable to add them so that the court can resolve those issues. It seems to me that I should, therefore, make an order joining the four children. That will have the additional advantage that should they wish to either bring any appeal or appear on any appeal against this judgment and my resultant order, then they will have the position and right to do so. I refer to this aspect again below.

9. As I have said, both Ms Messalti and Mr Malik were litigants in person throughout. The children all appeared in person. Mrs Kamran was represented by counsel, but only on the first day of the hearing and then filed a notice of discontinuance, which said that for a variety of financial and health reasons she was not intending to take any further part. I sought to bear in mind the fact that most if not all persons were acting in person and throughout and during this hearing made directions seeking to comply with the overriding objective and take account of them acting in person, as I am required to do by Civil Procedure Rule 3.1A, and seeking to ensure that in accordance with CPR 1.1(2)(A) all parties were on an equal footing, could participate fully in proceedings and could give their best evidence. I am satisfied that I have done that and enabled each side to put their full case fairly.

10. I heard oral evidence from Ms Messalti, who was cross-examined and answered questions from me. I also heard oral evidence from Mr Malik, who was cross-examined and answered questions from me. I have also had submissions from Ms Messalti and Mr Malik and from all of the children. I have borne all these matters, together with all the written documents before me which include bundles from both Ms Messalti and Mr Malik, and also all their written and oral submissions. If I do not mention any particular matter that is for

reasons of time and space, and I made clear when delivering my oral judgement that I could always have had my attention drawn to such if anyone ever sought a transcript of this judgment, and, although I do not know who requested this transcript, no such requests have been made.

11. The material history is as follows. Mr Malik and Mrs Kamran are husband and wife. They were registered as joint proprietors of the Property, 11 St Clair Road, under title number EGL452017 on 3 March 2003. It is a residential property and from before then was the home of Mr Malik and Ms Kamran, and as they were born and grew up, the various children: Urwah, Arfeen, Imaan and Sanaa. The title to the Property also shows in the charges register, "Registered charge dated 20/1/3 registered 3/3/3… and dated 6/4/18 proprietor Barclays Bank UK Plc". It is clear from the older 2013 office copy entry that originally, that is to say from 3 March 2003, the registered proprietor of the charge was Barclays Bank PLC, a different company with a different company registration number from Barclays Bank UK Plc, although both companies, it seems obviously were, and presumably still are, part of the Barclays Bank Group. Mr Malik is also registered as sole proprietor of 521 Romford Road, E7 8AD under title number EX45100, that being from 22 November 2007. That property has various notices on its title and to which I will return.

12. Mr Malik has been a director and shareholder in various companies. At least some of those companies include or have included the letters KM in their title, although Mr Malik says that that is a coincidence, although he could not explain why it should be the case in his evidence. At least some of those companies sought to provide some form of immigration advice and services. Mr Malik himself is not a qualified lawyer, although he has involved in the companies at least one solicitor, a Raju John, in them. In fact, Mr Malik twice, in 2014 and 2020, has been convicted for unlawfully providing immigration advice or services when not qualified to do so. Mr Malik says these convictions were only due to innocent errors in the precise technical structuring of the relevant operations. The two convictions appear to relate to periods from 2012 onwards. They resulted in two sentences of imprisonment, so they involved matters of some seriousness.

13. In 2008, a relevant company which existed was called KM Legal Advisory Limited with company registration number 06079619. Mr Malik was a director of it. Its accounts, as at 15 September 2008, showed assets of some £370 and creditors of some £12,000, and thus a significant balance sheet insolvency. There are before me two documents entitled "Express Declarations of Trust", which I will call "the trust deeds", which contain nearly identical provisions but in different type fonts, albeit with somewhat similar signatures.

14. One is said to relate to 521 Romford Road, and I will call it "the 521 trust deed". It starts as follows:

> "This declaration of trust is made on the 10th day of November 2008 between Mr Kamran Malik ("the Husband"), of 521 Romford Road, London, E7 8AD, 'the property', and Mrs Humera Kamran, ('the wife'), also of 11 St Clair, London, E13 9DU, for the benefit of Mr Arfeen Kamran Malik, 'the son', dated of birth 1.2.1999, also of 11 St Clair Road, London, E13 9DU; Miss Urwah Kamran Malik, 'the oldest daughter', date of birth 15.12.2000, also of 11 St Clair Road, London, E13 9DE; Miss Sanaa Kamran Malik, 'the second oldest daughter', date of birth 29.11.2001, also of 11 St Clair Road, London, E13 9DU and Miss Imaan Kamran Malik, 'the youngest daughter', date of birth 21.9.2003, also of 11 St Clair Road, London, E13 9DU".

15. The first recital is that the Husband, that is to say Mr Malik, is the sole legal owner of the property as described in the schedule, though there is in fact no schedule, but I note that in the opening section 521 Romford Road is defined as being "the property". Recital number two is that "The Wife is a beneficial owner of the property as per the equal sharing property given that the property was acquired during the marriage" and, number three, that "The Wife therefore has 50% share in the property as a beneficial owner." I am not at all sure that those assertions are correct as a matter of law. While it may be that on a divorce that something of an equal sharing principle is applied, dependant on all the circumstances, by the Family Courts, the mere fact that someone is married to someone else does not in England and Wales law mean that they joint own properties owned by the other spouse. Such matters of beneficial ownership depend on what are the actual or implied agreements between the parties.

16. Recital number seven provides:

> "As from the date of this deed the Husband wishes to give his entire share (50%) in the property to his Wife for the beneficial interest of their son, their oldest daughter, their second oldest daughter and their youngest daughter. The husband appoints his wife as a trustee of his share for the benefit of their son and their oldest daughter, their second oldest daughter and their youngest daughter".

17. Recital number nine provides:

> "The Husband will remain the legal owner of the property. However, the Wife will have additional powers as the trustee under this deed for the benefit of their son, their oldest daughter, their second oldest daughter and their youngest daughter".

18. There is then a section entitled "Duties". Duty number one reads as follows:

> "The Husband will continue to make use of the property and continue to pay the mortgage payments as before. The "Wife has the power to repair, maintain, improve and develop the property as far as the property deed and schedule in the property title will allow given the respective covenants within."

19. Duty number eight reads as follows:

> "The Wife is not liable for making any payments and/or to answer any inquiries from any person who appears to be the appropriate officer collecting debt. The Husband has the liability to answer all inquiries in respect of any debt that may arise".

20. Duty number nine reads:

> "The Husband does not have the power to use the property in order to raise funds thereby potentially incurring debt in the event of non-payment of those raised funds. The Husband does not have the power to sell the property in order to cover debts".

21. In fact, the duties section, which in the first part runs from duties one to 10, is then repeated in a further duties section which runs from one to 12. One to nine is a simple repeat. Numbers 10, 11, 12 are different. They eepeatedly assert in effect that the beneficial interests in the property are to go to the children in equal shares. There is then a paragraph which says:

> "This deed may also be deemed as effective also as an agreed notice under Family Law Act 1996, section 31(10)(a) in the Family Law Act 1996, paragraph 4(3)(b) of Schedule 4 to, the for registration, of the Land Registration Act 2002 of the applicant's mentioned in panel two in respect of the home rights charge in the individual register of the title of the property".

22. That paragraph plainly includes some mistyping. It is also unclear to me as to whether or not the Family Law Act could apply to 521 Romford Road. However, that is not a matter I have to decide in this litigation. There is then a sentence which reads:

> "In addition, the deed is to remain as evidence that the Wife holds the full beneficial share of the entire property, upon all parties being signatory to this deed".

23. Again, it is somewhat unclear as to precisely what is to be meant by that, although the intention appears to be for Mrs Kamran to hold the benefit of the property on some sort of sub-trust for the children.

24. There is then in a paragraph which states:

> "This express declaration of trust shall be executed as evidence of the existence of the expressed declaration of trust. Any person may rely upon this declaration of trust as evidence of the existence of said declaration of trust".

25. It is unclear as to what that is supposed to mean in law as such, but there are then signatures in a form of "Name of Husband" and then "Name of Wife", in each case with a signature and a date. Mr Malik has signed by "Name of Husband" and Mrs Kamran by "Name of Wife", each with hand-printed signatures and individual handwritten signatures, and with Mr Malik signing the date as "10.11.2008" and Ms Kamran as "10/11/2008". There then follows the words "IN WITNESS" and then two forms of a column of signature, name and date, the first column being completed in signed form and printed form by a Zahida Mussarat with a date of "10.11.2008" and the second column, the signature and printed name and date by a Shahid Latif and the date being given as "10-11-2008". There appears below that a printed stamped stamp reading "RAJ JOHN SOLICITOR K.M. LEGAL ADVISORY LTD, Barclay Business Centre, 246-250 Romford Road, London E7 9HZ", and then giving telephone numbers and fax numbers, and which has written over the "RAJU JOHN" what appears to be a signature and with some other signature appearing immediately under the stamp.

26. There was also before me another declaration of trust document which is said to relate to the Property, i.e. 11 St Clair Road, and which I have called and will call "the Property trust deed". The parties' section is very similar to that of 521 Romford Road, except that Mr Malik is said this time to be of 11 St Clair Road, London, E13 9DU, and that place is not defined in any way as being the property.

27. The starting recitals are somewhat different from the 521 Romford Road deed. Recital number one reads, "The Husband and the Wife are both legal owners of the property described in the schedule ('the property')". That refers to a schedule but there is no schedule to the document. Recitals two to five are effectively the same as those of the 521 Romford Road trust deed, except that the husband here is expressed as wishing "to give his entire share (50%) in the property to the Wife for the beneficial interest of [the four children]".

28. The duties section at paragraphs one to twelve is the same as the second duties section of the 521 Romford Road document, apart from the fact that in duty one the starting words are, "The Husband will continue to live at the property and continue to pay the mortgage payments as before".

29. The sections following the duties sections are the same as for the 521 Romford Road property. The signature sections are similar to the 521 Romford Road trust deed, although on this occasion Shahid Latif has signed on the left-hand column and Syeda Mussarat on the right-hand column, whereas it was the reverse in relation to the 521 Romford Road deed. The dating of Mr Malik's and Ms Kamran's signatures are both "10/11/2008". The dating of Shahid Latif's signature is now "10th Nov 2008", and that of Syeda Mussarat's signature is "10.11.2008".

30. Those declarations of trust were not made the subject of any entries on the land register until 20 August 2018 when a restriction was entered on the land register for the property in the form:

> "No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the Court".

31. That is said by the Maliks' side to be to show that what had previously been a joint tenancy between Mr Malik and Ms Kamran had been severed, and this being effectively in response to the fact that Mr Malik's 50% interest in the property was now to be held on trust for the children. It seems to me that there is some logical force in that submission, in terms of its being something which was being done to reflect the Property trust deed, albeit that the Property trust deed itself is not mentioned in the land register in any way.

32. The financial position of KM Legal Advisory Limited clearly worsened. In 2013, it was made the subject of a compulsory winding up order in the High Court of Justice Chancery Division, notwithstanding opposition from the company. There are a number of orders, but a final order was made on 15 July 2013.

33. In the meantime, on 21 January 2013, Mr Malik had incorporated a further company, KM Legal Limited, whose registered office is 521 Romford Road. Mr Malik at all times was a director and from the company documentation it can be send that until 2017 so was Ms Kamran. It appears that that company is still trading.

34. From at least 2011 onwards, Mr Malik had been bringing a number of claims, directly or indirectly, against politicians, newspaper editors and others, all of which claims failed with adverse orders, including as to costs, being made against Mr Malik; and an eventual civil restraint order was made against him for bringing totally without merit claims. Mr Malik says that all that litigation was a part of a set of campaigns for justice related to his seeking, with others, to pursue a career of political activism.

35. One such claim was brought against Sir Robin Wales who obtained a substantial costs order against Mr Malik. Sir Robin Wales then obtained by way of an enforcement a final charging order over what was said to be Mr Malik's interest in the Property, which order was granted in the Chancery Division by Deputy Master Nussey, and also appears to have obtained a final charging order in respect of Mr Malik's alleged interest in 521 Romford Road. I have before me an order of May J of 8 March 2016, which appears to relate to various appeals made against Deputy Master Nussey's orders.

36. It is recited that May J had heard from "the Appellant" described as Mrs Kamran in person by her McKenzie friend, being her husband, Mr Malik, as well as from Sir Robin Wales's side, who had appeared by counsel. It seems from the nature of the order that Mrs Kamran was challenging the final charging orders which had been made. May J made various

orders. One was that a final charging order in respect of 521 Romford Road should be discharged, but that Mrs Kamran was to pay the costs relating to the discharge, although she was also to receive her costs in relation to an appeal relating to 521 Romford Road up to a particular date. The order contains what is entitled "Observation" which reads as follows:

> "For the avoidance of any doubt (Mr Kamran Malik having attempted to make submissions before me today in relation thereto), this Court has no jurisdiction to entertain any further applications made by Mr Malik or Mrs Kamran concerning the final charging order made by Deputy Master Nussey over the property at 11 St Clair Road, London, E13 9DU".

It seemed from that to be clear that whatever final charging order had been made in relation to the Property remained in place and that it could no longer be challenged.

37. I have had adduced to me an email from the solicitors firm BLM to Ms Messalti on 21 September 2021, in which they say that they acted for Sir Robin Wales and had obtained two interim charging orders on 20 November 2013; and that Mr Malik had sought to challenge the making of final charging orders by relying on the declarations of trust; but that the Deputy Master Nussey had not been persuaded by Mr Malik as neither document had a schedule. BLM also said in the email that there had been an ultimate settlement in 2018, and Mr Malik had agreed to pay a substantial sum and had done so. That in itself all seems very credible in the light of the documents. It has not been challenged in evidence or in submission on the Maliks' side, and I accept it as being an accurate explanation as to what had occurred.

38. In 2015 Mrs Kamran applied in the County Court at Central London for an injunction against Mr Malik. The Maliks' side say that there was at that point some marital dispute between Mr Malik as husband and Ms Kamran as wife, and which was the cause, and possibly the subject, of that application. Whatever injunction was sought resulted in the matter coming for HHJ Dight who made an order on 13 August 2015, which made no order on the application for an injunction and no order as to costs but which contained a declaration as follows:

> "On a proper construction of the Express Declaration of Trust ('the Declaration of Trust') dated 10 November 2008, and in the event which have happened, the references throughout the Declaration to 'the property' are to be interpreted as references to 11 St Clair, London, E13 9DU, and wherever the words 'the property' appear, they are to be treated as if the words '11 St Clair Road, London, E13 9DU' appeared".

39. In 2015, Mr Malik brought a libel claim against Ms Messalti, and which was the substantive element of the Claim which is now before me, and which initially bore the number H015D04716. That claim seems to have related to something that Ms Messalti, herself a legal office manager of a solicitors' firm, had said to an ex-client of KM Legal Advisory Limited, who had become a client of Ms Messalti's firm, regarding Mr Malik's first conviction and his practice. Ms Messalti instructed solicitors and counsel to defend the claim. On 16 November 2016, Master Kaye struck out the claim and granted reverse summary judgment against Mr Malik and in favour of Ms Messalti. Master Kaye ordered Mr Malik to pay costs summarily assessed on the indemnity basis at £21,000. That is no more than the money that Ms Messalti had had to pay her own lawyers to enable her to defend the claim. That is the judgment debt.

40. In theory that would accrue 8% interest from 2016, although Ms Messalti has said that all

she wants is the capital, which she says represented her then life savings and which Mr Malik had forced her to spend to defend herself against a claim which lacked any merit. That is Ms Messalti's perception of what has happened, and I accept that it is her perception. Also, it seems to me I should accept her evidence (which is not disputed) as to what the money represented, and also accept from Master Kaye's judgment and order that the claim brought by Mr Malik against Ms Messalti simply lacked merit.

41. Mr Malik continued to bring or to intimate claims thereafter against others. One claim (which I will call "the OISC Claim") was apparently filed, since it bears a Court stamp in the Chancery Division, and is brought against Andrew Kennedy and the Office of the Immigration Services Commissioner (which I will call "OISC") alleging wrongs on their part which are said to have caused the loss of "a business opportunity in Pakistan". Mr Malik says that this reference was just to something which was a mere opportunity which would have been financed by others had it turned into reality; Mr Malik saying that he has no money of his own. Mr Malik also obtained an order of 1 December 2020 from Deputy Master Linwood in the Chancery Division that some interim charging order had been discharged, but I have no more details of that litigation.

42. Mr Malik has also been engaged in litigation in the County Court at the Mayor's & City of London Court under claim number H10CL203 and where he is the third defendant. On 8 September 2022, he was ordered by HHJ Parfitt in the County Court to pay the costs of that claim to be assessed on an indemnity basis with an interim payment to be made by him of over £139,000 together with another £11,000 summarily assessed costs. Mr Malik appears from the relevant order to have tried to say that he was too unwell to attend but was held by the judge to have provided insufficient evidence in that regard. The order cites that Mr Malik was held to have no real prospect of successfully defending the claim. In evidence, Mr Malik has said that he was acting on behalf of others, something which I was not able to understand to any particular degree. I am not concerned with the merits of that litigation, albeit that I do note its outcomes as set out in HHJ Parfitt's order. I also note that Mr Malik said that was in the course of seeking to appeal that judgment.

43. In the meantime, I also note from the Land Registry title documents that on 31 May 2017, Mrs Kamran had registered what is said to be Family Law Act 1996 home rights in relation to 521 Romford Road. There is no particular suggestion or evidence before me that she ever lived there but that may not matter. I also see from the property title register of 521 Romford Road that on 17 December 2020 and 6 January 2021, interim charging orders were made by the County Court in a claim E10CL838, although again I have no further details of these.

44. In relation to the judgment debt owed to her, Ms Messalti says that she made numerous requests to be paid and Mr Malik said that he had no money to pay her with.

45. On 12 February 2021, Ms Messalti applied for a charging order to secure the £21,000 being the original judgment debt amount and applied for it to be granted over Mr Malik's interest in the property. On 17 February 2021, I made an interim charging order against and over Mr Malik's interest in the property which provided for a final charging order application to be heard on 14 April 2021. At a hearing before me on 14 April 2021, Mr Malik resisted on the basis of the alleged existence of the Property trust deed saying that he had no interest over which any charging order could operate or bite.

46. I was concerned that Mr Malik was not the correct person to dispute the charging order if he denied that he had any beneficial interest, although technically he had a right to do so as he is a registered proprietor and his name appears on the title of the Property. I, therefore, ordered that each side serves statements of case setting out their contentions and also that they serve the relevant order on Mrs Kamran and on the children. They were at that point in

time nearly all adults and now they all are. I also made orders for disclosure of documents, although Mr Malik was to say that most of his documents had been lost in the closure of his companies and also floods.

47. There was a further hearing on 3 March 2022 after the parties had served statements of case. It did not appear to me at that point that the parties had fully clarified their particular positions, and I made an order that Ms Messalti serve a further statement of case, which, amongst other things, would set out her case in relation to the Property trust deed and her assertions that it was a sham, and also her contention that it should be set aside under section 423 of the Insolvency Act 1986. I further provided that Mr Malik would serve a statement of case in response, and again that the order should be served on Mrs Kamran and the children, who were now all adults, and made provisions for them to be able to make their own application. In fact the children acting by Urwah served a witness statement objecting to the making of a final charging order and relying on the Property trust deed.

48. At a further hearing on 10 May 2022, when I heard Ms Messalti, Mr Malik and Mrs Kamran, who was then acting in person, Mr Malik confirmed that there had never been any schedule to the Property trust deed, although he did produce the original document. I made an order providing for the final hearing to take place on 10 August 2022, and for Mrs Kamran to be able to attend, including by remote means, and for the children also to be able to attend the final hearing and be heard. I again provided that those of Mrs Kamran and the children who do not appear would be bound by whatever orders were made.

49. The final hearing commenced on 10 August 2022 on a hybrid basis. Mrs Kamran appeared by Mr McGeever of counsel and herself attending remotely, Mr Malik and, I think also Urwah, and in any event Ms Messalti, all appeared in person. Mr Malik sought to strike out the application for a final charging order for alleged non-compliance of my previous orders regarding bundles. I refused that application and refused permission to appeal. Mr Malik sought to appeal my refusal to strike out to the High Court judge, as is his right, and on 14 November 2022, Sir Stephen Stewart adjourned that application for permission to appeal to see what would be the outcome of this final hearing. That day I heard some evidence but had to adjourn due to lack of time.

50. I adjourned the hearing to 22 December 2022, before when Ms Kamran filed her notice of discontinuance based, she said, on financial and health grounds; the result being that while Ms Messalti and Mr Malik at the hearing on 10 August 2022 were cross-examined about their witness statements, Ms Kamran has not been cross-examined on hers. This also had the result that I have not heard any further from counsel from Mrs Kamran. I did though hear on 22 December 2022 from Ms Messalti, Mr Malik and Urwah.

51. On the morning of that hearing, Mr Malik delivered a written submission seeking to raise a limitation argument. I heard submissions with regards to both his attempt to raise that argument and the argument itself, but without deciding at that point in time whether I would or would not permit the argument to be raised. I reserved judgment on all matters and fixed the date of 6 February 2023, being today's date, for judgment.

52. Very shortly before 22 December 2022, Ms Messalti had issued an application for a charging order over 521 Romford Road. I made a direction granting such an interim charging order with an indication that I was not prepared to deal with it on 22 December 2022, in view of the absence of notice to others and with the result that I have adjourned consideration of it. I am distinctly unclear as to whether the Court has ever drawn up and sealed a relevant order and that is a matter which I will deal with following this judgment.

53. Following the hearing on 22 December 2022, on 27 December 2022, Urwah issued an application notice to join all the children supported by witness statements from each of them. I listed that for 6 January 2023 as a remote hearing and heard submissions from all

the children and responses submissions from Mr Malik and Ms Messalti.

54. I should say that Urwah on 22 December 2022, and Urwah and each of the other children on 6 January 2023, presented their case eloquently, carefully and concisely, notwithstanding that they are litigants in person of a relatively young age and in an unfamiliar environment. I have considered everything that they have said carefully.

55. As far as witnesses are concerned, I have had various written statements in evidence before me. I bear in mind that as far as the issues of fact are concerned, I have to decide whether or not particular facts were and are actually the case on the basis of the balance of probabilities test, is it more likely than not, that is to say more than a 50% likelihood that the relevant event occurred. The burden of proof is on the person advancing the case, albeit that is only relevant if I as judge are not able to come to a view either way on the balance of probabilities, which is not the case here in my judgment in relation to anything I have to decide as a matter of fact.

56. In coming to a conclusion on the balance of probabilities I have had to take account of all the evidence. I have borne in mind that witnesses' evidence may be unreliable for a number of reasons, including in particular, firstly, that the events took place a long time ago. Secondly, that recollections of events, particularly of a long time ago, may well be imperfect and thirdly, that there are natural tendencies of the human brain to seek to reconstruct a full picture recollection from possibly isolated fragments of recollection, and also tendencies of the subconscious to carry out such a reconstruction exercise so as to form a memory which presents what happened in the most favourable way for the person whose brain is carrying out the exercise. Such is all perfectly possible, although there are also cases where a recollection may well be entirely accurate and complete. I have also borne in mind that while the demeanour of a witness giving evidence can be given weight, there are dangers in doing so bearing in mind that demeanour may simply be the product of education, culture, nervousness from being in court or various other matters.

57. I have also borne in mind that documents, particularly contemporaneous documents, have the advantage that they speak for themselves, but that that does not necessarily explain whether they are genuine or accurate or arise from the date and time which they purportedly bear. In any event, a document will tend to reflect the thoughts and desires and possibly recollections of its maker at the time of its creation. I have also borne in mind, as I must do, the inherent probabilities and likelihoods of any particular set of events.

58. This is all a holistic exercise where, rather than simply fixing on one matter, what I have had to do and have done is to take account of everything together and balance it all together in the process of coming to my conclusions.

59. Before I come onto the actual witness evidence, I refer to the various statements of case which were produced under my orders and under the various applications. The first such statement of case was Mr Malik's grounds of disputing the interim charging order, which are purportedly dated 5 January 2021, although they must have been somewhat later as they are objecting to the interim charging order which was granted in February 2021. These rely on HHJ Dight's order of 13 August 2015 as having clarified the meaning of the Property trust deed, and assert that Mr Malik had no beneficial interest in the property which could be the subject matter of a charging order.

60. The next statement of case was Ms Messalti's points of challenge to the trust of 6 May 2021 following the hearing of 14 April 2021. Those challenged, firstly, the validity of the Property trust deed as a document. Secondly, they challenged the asserted intention of Mr Malik to dispose of his beneficial interest asserting that he did not have that intention and that the document was a sham.

61. The third document was Mr Malik's points of defence, which said that the Property trust

deed was valid; that his intention was to give up his beneficial interest; and that he had no intention to avoid paying creditors but was in a position where he had no money with which to do so. That document was dated 23 May 2021.

62. The next response was that of Ms Messalti, being her points of reply of 18 June 2021; in which she asserted that the Property trust deed was not a genuine document, and that if it had been it would have been registered at Land Registry at the time.

63. Following those exchanges of the statements of case was the hearing on 3 March 2022, following which further statements of case were produced. First of these was Ms Messalti's further points of challenge on 1 April 2022. They asserted, firstly, that Mr Malik had no intention to create a trust. Secondly, that if he had such an intention, it would have been to defraud creditors; and she sought to rely on section 423 of the Insolvency Act. Thirdly, Ms Messalti said that Mr Malik had been seeking to avoid numerous creditors; and fourthly, that he was just determined not to pay creditors.

64. Mr Malik produced further points of defence of 15 April 2022, in which he firstly repeated that he had no interest in the Property. Secondly, he said that his previous interest in the Property was held on trust for the children. Thirdly, in relation to section 423, he said that the trust had not been created to defraud creditors and pre-dated such matters as the Sir Robin Wales's case and also that it was not at an undervalue. Fourthly, he repeated that he had no money with which to pay the debt. I do note that he did not set out or refer to any limitation defence, and he did not say at that point that Ms Messalti was too late to bring a section 423 claim.

65. Urwah produced her witness statement of 25 June 2021. In that she said she was producing it on behalf of all the children; and said, firstly, that Mr Malik had no beneficial interest in the Property and, secondly, that Mr Malik's incurring of the costs liability to Ms Messalti and his other liabilities had nothing to do with the children. Urwah also did not refer to limitation or lateness.

66. Mrs Kamran also produced a witness statement of 25 June 2021, saying, firstly, that she had had a marital dispute with Mr Malik which had led to the application to HHJ Dight and resultant order. Secondly, that she thereafter entered the restriction on the Land Register in order to make clear the position. She also reiterated that Mr Malik had no interest in the Property. Mrs Kamran also did not refer to limitation or lateness.

67. Various of those documents were also treated as witness statements when I heard evidence.

68. In terms of the cases advanced by the parties; on the first day of this hearing of 10 August 2022, Ms Messalti provided a skeleton argument in which she stated, firstly, that the Property trust deed was not genuine. Secondly, that it did not dispose of Mr Malik's beneficial interest. Thirdly, that it was a sham, and there was no intention to deprive Mr Malik of his beneficial interest. Fourthly, that Mr Malik's aim was to put Mr Malik's beneficial interests beyond the reach of creditors and so that section 423 applied.

69. Mr Malik provided a legal submission document partly dealing with the application to strike out for alleged failures with regards to bundles; and otherwise saying that the property trust deed was not a sham and was genuine, but not really dealing with any section 423 point. It had attached a number of authorities. It did not refer to limitation.

70. Ms Kamran provided a legal submission document that said that Mr Malik's beneficial interest had been given up 14 years before and stated Ms Messalti could not challenge the Property trust deed in the light of the order of HHJ Dight. It asserted that the Property trust deed was created prior to the costs order in favour of Ms Messalti. It also said that the charging order application and section 423 had no application to the Property. It also attached a number of authorities. It did not refer to limitation. As I said, Ms Kamran appeared on the first day by counsel Mr McGeever; and after 10 August 2022, she filed a

notice of discontinuance.

71. There was no mention of any limitation argument in any of these documents or at the hearing on 10 August 2022. As I have said, on the morning of the second day of 22 December 2022, Mr Malik provided a legal submission which focused on section 423. It asserted that it was too late for Ms Messalti to seek to bring a section 423 application and sought to rely on and assert that there had expired an applicable period of limitation. He also submitted that a section 423 claim could not succeed because in 2008 Mr Malik could not reasonably have foreseen that there would be any creditors, and certainly not Ms Messalti as a creditor. He sought again to rely on the validity of the Property trust deed and again referred to HHJ Dight's order.

72. Urwah and the children had not advanced any written submission until their application notice of 27 December 2022. That said that Urwah had been appointed as an additional trustee of the trusts of the Property by deed of 27 December 2022 (a copy of which was attached), and included legal submissions that the Property trust deed was not a sham and had been scrutinised as valid by HHJ Dight, and also asserted that it was not right that the Property should be subjected to a debt of Mr Malik of which the children had no knowledge. It said that the children would appeal any decision to the contrary. The legal submission was signed by all four children and had attached witness statements from each of the children which effectively repeated it.

73. I heard oral witness evidence from Mr Malik and Ms Messalti all on 10 August 2022. Ms Messalti gave evidence on oath in which she verified her witness statements and statements of case and was cross-examined by Mr Malik and by Mr McGeever, the then counsel for Mrs Kamran, and answered questions from me.

74. Ms Messalti referred to having her own legal qualification from the Sorbonne in France.

75. Ms Messalti sought to have her own address kept confidential saying that she feared retaliation from Mr Malik, she saying that when she and bailiffs have gone to the property to seek to enforce the judgment debt against Mr Malik, she had been met by missiles and abuse. I allowed her address to be kept confidential but note that subsequently Mr Malik brought County Court proceedings against Ms Messalti asserting that she had committed a wrong in obtaining and using the particulars of claim in the OISC claim chancery action in the hearing before me and claiming substantial damages. I was distinctly surprised to learn of this and raised my concerns at the hearing on 22 December 2022, although I did say then that I was not sure, and I still am not sure that that is relevant to any of the issues which I cover in this judgment (and so that I have not taken it into account in coming to my various conclusions). I do note that Mr Malik has since filed a notice of discontinuance with regards to those County Court proceedings.

76. Ms Messalti was asked about the libel claim brought against her in 2015/2016 by Mr Malik. She stated that she had been the practice manager at another firm, Wilsons, to whom a file from an ex-client of KM Legal Advisory Limited had been transferred and had told the client, who had been deported to Pakistan over the course of matters, that Mr Malik was not a solicitor and had a criminal conviction for unlawfully providing immigration advice. It was that explanation which apparently was the subject matter of the libel claim.

77. I note that in such circumstances, at first sight, any libel claim would seems always to have been bound to fail as it would be met by defences both as to its truth and as to the statement having been made and published in circumstances which would attract qualified privilege at the very least. I am not surprised that Master Kaye decided to strike out and grant reverse summary judgment against the claim and to order indemnity costs. Again though, I do not think that the absence of merit in the claim is relevant to the issues before me, except that it shows that Mr Malik was prepared at that time to bring seemingly misconceived litigation

for no good reason, a point which is somewhat supported by what happened in relation to other cases from 2011 onwards.

78. Ms Messalti was also asked about why she said that she thought that Mr Malik had intended to defraud creditors. She referred to a Daily Mail article about the second conviction, which referred to the first conviction, and certain statements from a reporter that clients of KM Legal Advisory Limited had been defrauded of thousands of pounds. However, while the article mentions that it is a part of reporter's reporting of proceedings in the criminal Court, the thrust of the judgment which is being reported upon seems to be more that substantial monies had been charged in circumstances where Mr Malik's own involvement was unlawful, and notwithstanding that Mr Malik had already been in prison previously for similar offences.

79. Ms Messalti accepted that she did not have any direct knowledge of the Property trust deed or of the asserted trust and could only draw inferences from the documents.

80. I found Ms Messalti's evidence to be clear and she engaged with the questions which she was asked. I find her to have been a witness of truth. That said, it seems to me that her evidence is of little direct assistance as she simply was not involved with the creation, whenever it took place, of the Property trust deed.

81. Mr Malik gave evidence on oath on 20 August 2022, and was cross-examined by Ms Messalti and answered questions from me. He verified his statements of case and witness statements. He was very confident and very determined in his evidence. He clearly regarded each and every cost order made against him as having been unjustified. He did seek to answer the questions put to him. However, in relation to his evidence I find that, firstly, he so appeared to believe in the righteousness of his cause as to potentially taint his recollection by at least a subconscious tendency to put himself in the best light and to defend the Property trust deed. Secondly, that he was unable to explain in any credible way how the Property trust deed came about and with the terms which it contained. As a result, I have treated his evidence with caution and have very much had to balance it against the actual documents and the inherent probabilities as to what happened in the past.

82. The cross-examination of Mr Malik covered numerous matters of which those of particular relevance seemed to me to be the following. First, he said that he lived mainly at 521 Romford Road, but sometimes at the Property which was and still is the family home, including of his children. I note that I was told by the children that Afreen lived mainly at 521 Romford Road but that the others lived at the Property.

83. Mr Malik said that the Property trust deed was created in 2008 but only sent to the Land Registry in 2013. He said the reason it was sent in 2013 was because Mrs Kamran has said that it should be registered, although he could not explain why Mrs Kamran had said that at that point in time. He accepted that the insolvency petition to wind up KM Legal Advisory Limited had been in 2013. He said that it was founded on unpaid wages.

84. With regards to KM Legal Advisory Limited, Mr Malik was vague. He said that he could not remember having been a director, although the company documents and accounts signed by him said that. Also, he did not accept that the initials "KM" referred to him but could give no other explanation for what seemed to me to be beyond a coincidence. Mr Malik said that he could not recall much of the Sir Robin's Wales's litigation, but he said that the creation of the Property trust deed in 2008 pre-dated and had nothing to do with it.

85. Ms Messalti suggested to him that the year 2008 had been actually chosen in 2013 to avoid the potential of a bankruptcy of Mr Malik resulting in the application of section 339 to 342 of the Insolvency Act. She pointed out that, in relation to applications to set aside a transaction at an undervalue with a family member, there is an effective limitation time

period with the effect that the relevant transaction to be set aside would have to have taken place within five years prior to the application for the bankruptcy; that being the effect of section 341(1)(a) of the Insolvency Act 1986. Mr Malik denied the suggestion that the document had actually been created in 2013 giving the purported year of 2008 for that reason. He also said that the creation of the Property trust deed had had had no connection with the Sir Robin Wales's litigation; in that it had not been created in circumstances where that litigation existed or was contemplated.

86. Mr Malik accepted the fact of his two convictions but said that he was not "KM" and that all he had done was set up an entity which had authorised solicitors acting in it who provided the relevant services. He said that he was in fact innocent of the charges of which he had been convicted. In relation to an aspect of the Daily Mail article, which reported that the judge in the Criminal Court said that Mr Malik had held himself out as a solicitor, Mr Malik said that the Daily Mail had made that up.

87. Mr Malik said he had received no consideration for entering into the Property trust deed. He accepted that the aim was that he would live at the Property and pay the mortgage, but that he would not have any rights in relation to the Property.

88. Mr Malik was asked about the duties recited as numbers eight and nine relating to the Wife and the property not being liable in relation to any debts of the Husband, and the Husband having no power to secure any debts on the property. He said that this was just standard drafting which he had not even read, and for which he had given no instructions.

89. Mr Malik said that there had been no aim to defeat creditors but only to protect the interests of the children. However, he could not explain as to what protection was being afforded to the interests of the children by the creation of the Property trust deed.

90. Mr Malik then went on to say that he had simply decided that the Property would go to the Wife and the children, essentially when Mrs Kamran had asked him to do and effect that; and that he had spoken to the legal staff at KM Legal Advisory Limited who had said that this could be done by either a trust or a will. He had responded by instructing them to draft a trust. He then did accept that he had read the document before he signed it, albeit only in general terms.

91. Mr Malik could not explain the later changes on the title with regards to Barclays Bank. He thought that maybe more money had been borrowed. I ordered him to write to Barclays Bank for statements as to the advances that had been made; and at the 22 December 2022 hearing he said that he had done so but that Barclays Bank had not replied. He denied that the borrowing had been to pay Sir Robin Wales, and said that the payment which was made to Sir Robin Wales had been from a mixture of his own savings and the family's savings and had not been by way ever funded by way of a re-mortgage. Mr Malik had said it had been more convenient for him to pay Sir Robin Wales rather than Ms Messalti, but that he still wanted to pay Ms Messalti when he had money to do so.

92. With regards to the Pakistan business opportunity referred to in the OISC litigation, Mr Malik said it was never any more than a mere opportunity to be funded by others.

93. Mr Malik said he could not produce documents from the litigation between him and Mrs Kamran which had led to HHJ Dight's order because those documents have been lost in a flood at company offices, and any emails had been deleted from a Gmail account whose relevant electronic boxes had been full. He also said that the OISC had raided KM Legal Advisory Limited offices and taken away all his computers so that he no longer had access to them.

94. Mr Malik said that Mrs Kamran had applied for the injunction and that was possibly to do with her in some way preventing a sale of the property; and that he, Mr Malik, had told HHJ Dight that he was a trustee for the children. Mr Malik accepted that neither trust deed

had ever had any schedule.

95. Mr Malik said in relation to May J that she, and possibly also Black J, had said at hearings before them that it was too late to challenge the consideration of Deputy Master Nussey to the effect that the trusts were invalid.

96. Mr Malik could not explain Ms Kamran's registration of home rights over 521 Romford Road, when it was not and had never been her home.

97. I asked Mr Malik why he would simply have given his two main assets, his beneficial interests in the Property and in 521 Romford Road, to the children. Mr Malik responded to say that his family are Muslim, and that it is a tenet of Islam that children will respect, which would include looking after, their parents and that he had no intention to defraud creditors.

98. Before I come to identify the relevant matters of fact and my conclusions on them, I deal with the law. This type of situation where creditors or trustees in bankruptcy are seeking to enforce against or gather in assets of the relevant debtor or bankrupt; and are met with a response that there are past trust deeds which have given relevant assets away; with the result that the creditors or trustees in bankruptcy assert that those deeds or gifts are invalid, and also rely on section 423; has been considered in a number of previous cases. As various of the parties are litigants in person, I notified them well in advance of the December hearing of recent decisions in *Hinton v Wotherspoon* [2022] EWHC 2083 (Ch) and *Sahota v Sohal* [2022] EWHC 2459, but I had also previously and then raised other relevant case law with them.

99. Essentially, the case law and the act of Parliament show that there are four questions. Firstly, as to whether, and if so when, a trust was created. Secondly, whether the terms of the trust divested the beneficial interest away from the relevant debtor; that is to say whether or not it was "illusory". Thirdly, whether those terms, if they existed, were actually intended to have a real effect, or whether the actual intention of the parties was just to create a piece of paper which was not intended to have legal effect; that is to say it was to be an "sham". Fourthly, that if the document is intended to be effective and does divest the beneficial interest, whether section 423 onwards of the Insolvency 1996 applies.

100. For section 423 to apply in essence requires there: firstly, to be a transaction at an undervalue; secondly, for there to have been a real, but not necessarily exclusive, subjective, that is to say in their own mind, intention of the debtor to prejudice creditors; and thirdly, for the application to have been brought by a victim of the transaction or a trustee in bankruptcy. If those section 423 requirements are met, then the Court has a discretion to set aside the transaction or to make some other equivalent order.

101. Stating the considerations required to invoke the section 423 jurisdiction in this way effectively conceals two important questions being: (1) what is the position if a creditor is merely a future creditor rather than a creditor dating from the time of the relevant transaction and (2) as to what happens if the intention of the maker of the transaction (and in particular if they are only to become a debtor at a later time) is only a general one to prejudice anyone who might be a future creditor without having any specific future creditors in view. There are also questions in limitation law as to how the Limitation Act 1980 is applied, if at all, to claims under section 423, including as to what would be the relevant limitation period (in which a section 423 claim must be brought) in terms of both when it would start and for how long it would last, and whether or not there can be more than one limitation period.

102. I first read into this judgment sections 423, 424 and 425 of the Insolvency Act 1996:

> "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;
(b)he enters into a transaction with the other in consideration of marriage; or
(c)he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.
(2)Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—
(a)restoring the position to what it would have been if the transaction had not been entered into, and
(b)protecting the interests of persons who are victims of the transaction.
(3)In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—
(a)of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
(b)of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.
(4)In this section 'the court' means the High Court or—
(a)if the person entering into the transaction is an individual, any other court which would have jurisdiction in relation to a bankruptcy petition relating to him;
(b)if that person is a body capable of being wound up under Part IV or V of this Act, any other court having jurisdiction to wind it up.
(5)In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as 'the debtor'.

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)in a case where the debtor has been made bankrupt or is a body corporate which is being wound up or is in administration, by the official receiver, by the trustee of the bankrupt's estate or the liquidator or administrator of the body corporate or (with the leave of the court) by a victim of the transaction;
(b)in a case where a victim of the transaction is bound by a voluntary arrangement approved under Part I or Part VIII of this Act, by the supervisor of the voluntary arrangement or by any person who (whether or not so bound) is such a victim; or
(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.

425 Provision which may be made by order under s. 423.
(1)Without prejudice to the generality of section 423, an order made under that section with respect to a transaction may (subject as follows)—
(a)require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made;
(b)require any property to be so vested if it represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of the money so transferred;
(c)release or discharge (in whole or in part) any security given by the debtor;
(d)require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct;
(e)provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction to be under such new or revived obligations as the court thinks appropriate;
(f)provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for such security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction.
(2)An order under section 423 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor entered into the transaction; but such an order—
(a)shall not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and
(b)shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.
(3)For the purposes of this section the relevant circumstances in relation to a transaction are the circumstances by virtue of which an order under section 423 may be made in respect of the transaction.
(4)In this section 'security' means any mortgage, charge, lien or other security".

103. One question is as to in which Court an application under section 423 may be brought. The circumstances here is that there is no existing bankruptcy or insolvency process as far as Mr Malik is concerned. It was held in *TSB Bank Plc v Katz* [1997] BPIR 147 at pages 149 to 150 that an application under section 423 can be brought in any part of the High Court. That includes the King's Bench Division. It seems to me to be plainly sensible to allow the section 423 application to be brought in these proceedings because, just as was the situation in the *Katz* litigation, the various actual and legal matters regarding the Property and the

Property trust deed are all bound up together. As Arden J, as she then was, said at the end of her judgment, doing this will involve "costs saved on multiplicity of proceedings avoided". Other judges have taken the same course, such as in *Sahota*.

104. I have also borne in mind sections 1 and sections 2 of the Charging Orders Act 1979:

> "1 Charging orders.
>
> (1)Where, under a judgment or order of the High Court or the family court or the county court, a person (the 'debtor') is required to pay a sum of money to another person (the 'creditor') then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.
>
> (2)The appropriate court is—
>
> (a)in a case where the property to be charged is a fund in court, the court in which that fund is lodged;
>
> (b)in a case where paragraph (a) above does not apply and the order to be enforced is a maintenance order of the High Court or an order for costs made in family proceedings in the High Court, the High Court or the family court;
>
> (ba)in a case where paragraph (a) does not apply and the order to be enforced is an order of the family court, the family court;
>
> (c)in a case where none of paragraphs (a), (b) and (ba) above applies and the judgment or order to be enforced is a judgment or order of the High Court for a sum exceeding the county court limit, the High Court or the county court; and
>
> (d)in any other case, the county court. In this section 'county court limit' means the county court limit for the time being specified in an Order in Council under section 145 of the County Courts Act 1984 as the county court limit for the purposes of this section and 'maintenance order' has the same meaning as in section 2(a) of the M1Attachment of Earnings Act 1971.
>
> (3)An order under subsection (1) above is referred to in this Act as a 'charging order'.
>
> (4)Where a person applies to the High Court for a charging order to enforce more than one judgment or order, that court shall be the appropriate court in relation to the application if it would be the appropriate court, apart from this subsection, on an application relating to one or more of the judgments or orders concerned.
>
> (5)In deciding whether to make a charging order the court shall consider all the circumstances of the case and, in particular, any evidence before it as to—
>
> (a)the personal circumstances of the debtor, and
>
> (b)whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.
>
> (6)Subsections (7) and (8) apply where, under a judgment or order of the High Court or the family court or the county court, a debtor is required to pay a sum of money by instalments.
>
> (7)The fact that there has been no default in payment of the

instalments does not prevent a charging order from being made in respect of that sum.
(8)But if there has been no default, the court must take that into account when considering the circumstances of the case under subsection (5).
(9)In this section 'family proceedings' means proceedings in the Family Division of the High Court which are business assigned, by or under section 61 of (and Schedule 1 to) the Senior Courts Act 1981, to that Division of the High Court and no other.

2 Property which may be charged.
(1)Subject to subsection (3) below, a charge may be imposed by a charging order only on—
(a)any interest held by the debtor beneficially—
(i)in any asset of a kind mentioned in subsection (2) below, or
(ii)under any trust; or
(b)any interest held by a person as trustee of a trust ('the trust'), if the interest is in such an asset or is an interest under another trust and—
(i)the judgment or order in respect of which a charge is to be imposed was made against that person as trustee of the trust, or
(ii)the whole beneficial interest under the trust is held by the debtor unencumbered and for his own benefit, or
(iii)in a case where there are two or more debtors all of whom are liable to the creditor for the same debt, they together hold the whole beneficial interest under the trust unencumbered and for their own benefit.
(2)The assets referred to in subsection (1) above are—
(a)land,
(b)securities of any of the following kinds—
(i)government stock,
(ii)stock of any body (other than a building society) incorporated within England and Wales,
(iii)stock of any body incorporated outside England and Wales or of any state or territory outside the United Kingdom, being stock registered in a register kept at any place within England and Wales,
(iv)units of any unit trust in respect of which a register of the unit holders is kept at any place within England and Wales, or
(c)funds in court.
(3)In any case where a charge is imposed by a charging order on any interest in an asset of a kind mentioned in paragraph (b) or (c) of subsection (2) above, the court making the order may provide for the charge to extend to any interest or dividend payable in respect of the asset".

105. It seems clear from that that a final charging order should only be made if the debtor has a beneficial interest in the asset. If the debtor has no beneficial interest then a charging order is simply pointless as there is nothing for them to be deemed to have granted a charge over . It seems to me there is no jurisdiction to grant a charging order if the debtor is and is to be treated as having no interest in the subject asset (here the Property).

106. I have considered a number of case law authorities. First, the decision in *Beckenham MC Ltd v Centralex Ltd & Ors* [2004] EWHC 1287 (Ch). I read paragraphs 30 to 33 into this judgment:

> "30. Such assistance as can be derived on this point from the Report of the Law Commission (No 74) which led to the passing of the 1979 Act is to be found at paragraph 63, where the following explanation is given:
> 'There is one further situation in which it would be proper for the trustees' interest to be the subject of a charging order – namely, where it is the trustees themselves who are indebted as trustees to the judgment creditor. The trustees' interest in property is not, of course, a beneficial one and so it could not be charged to secure any personal debt of theirs. They hold it on behalf of the trust. But if the debt is also incurred on behalf of the trust, and a judgment has been obtained against the trustees in that capacity, we think it clear that a charging order should be obtainable in respect of the trust assets'
> 31. The primary concept in play in that paragraph is of the liability having been incurred on behalf of the trust. Where the liability is incurred (as here) by virtue of the bare legal ownership of the property in question together with the concomitant rights necessary for its enjoyment (ex hypothesi authorised by the trust) it seems to me entirely apposite to speak of it as having been incurred on behalf of the trust and in that sense a liability of the trustee as trustee. That, in my judgment, remains the case whatever private arrangements exist between the trustee and his beneficiary as to the former's right to be indemnified against the liability out of the trust property.
> 32. I have accordingly concluded that the applicant was indeed prejudiced by the transactions which it seeks to set aside. There is no evidence that Centralex or Karlton London is good for the judgment debt without recourse to the value of the Units. The only remaining question is whether at each stage in the chain of transactions the relevant transferor had the requisite statutory purpose. As to that, the evidence clearly established that the relevant purpose existed in the case of the transfers to Congress and Mortimer: Dr Tayfoor's own evidence was that:
> 'The purpose of these transfers was to ensure that the property of the beneficial owner was not encumbered by the debt of the first 2 Defendants. The beneficial owner requested that I set up 2 new companies into which to transfer the Units so its assets would not get confused with those of the first 2 Defendants'
> In cross-examination he sought to add an additional purpose, namely the desire to separate the ownership of the two Units so as to facilitate a possible sale (to separate purchasers) of the share capital of the two new holding companies. How this squared with the proposition that the Units were trust property (when the share capital in the holding company was not) was not explained or explored but, having regard to the decision of the Court of Appeal in *IRC v Hashmi* [2002] 2 BCLC 489, the existence of this additional purpose (as to which I was not in any case satisfied) is beside the point. I am satisfied that the transfers

were substantially motivated by the desire to prevent the applicant from seeking to enforce its judgment against the Units.

33. The transfer to Karlton London was also, in my judgment, substantially so motivated. No attempt was made in the Defence or witness statements to suggest what other motivation there might have been. In cross-examination Dr Tayfoor proffered a narrative which sought to suggest that the transfer had been motivated by a desire to change the direction of the business being carried on from a hardware computer business to a software business, but the account was both confusing and confused, and unsupported by any evidence other than its own belated assertion. I did not believe it".

107. It is clear from that, that for section 423 to operate, the creditor needs to be prejudiced by the relevant transfer or other transaction so as to be "a victim", and further that the causing of such prejudice needs to be a "substantial motivation" of the transaction.

108. I was also taken to *Hill v Spread Trustee Company Ltd & Anor* [2006] EWCA Civ 542. Arden LJ, as she then was, analysed section 423 at paragraphs 100 to 105 of the judgment:

"100. Most of the issues of law which arise concern section 423 and therefore I start with some general observations about that section and sections 424 and 425, which are connected with it. Sections 423 to 425 are drafted in wide terms. The sections apply to transactions defrauding creditors (using the terminology in the marginal note) whether or not the person effecting the transaction has become insolvent.

101. The scheme of section 423 is unusual. Subs (1) defines the circumstances in which section 423 applies: there must be a transaction at an undervalue as defined. Both gifts and transactions with a gratuitous element are covered. Subs (2) defines the objects for which the court can grant relief and refers to 'victims'. Subs (2) does not set out the circumstances in which the court may grant that relief. Those circumstances appear from subs (3). Subs (3) stipulates the purpose with which the transaction must have been entered into before relief can be granted. Subs (4) identifies the court which can hear a claim under section 423. Subs (5) defines a 'victim' of a transaction defrauding creditors, and it is to be noted that the definition is not restricted to creditors with present or actual debts: whether a person is a victim turns on actual or potential prejudice suffered. The definition of 'victim' is employed in relation to the criteria for relief in subs (2). It is not used in subs (3), which defines the necessary purpose. The person or persons who fulfil the conditions in section 423(3) may thus be a narrower class of persons than those who at the date of the transaction are victims for the purpose of section 423(5). For a person to be a 'victim' there is no need to show that the person who effected the transaction intended to put assets beyond his reach or prejudice his interests. Put another way, a person may be a victim, and thus a person whose interests the court thinks fit to protect by making an order under section 423, but he may not have been the person within the purpose of the person entering into the transaction. That person may indeed have been unaware of the victim's existence. That

answers the question: what connection must there be between the purpose and the prejudice? Section 423(2) in conjunction with the definition of victim in 423(5) makes prejudice or potential prejudice a condition for obtaining relief. That prejudice does not have to be achieved by the purpose with which the transaction was entered into. Nor in my judgment does the purpose have to be one which by itself is capable of achieving prejudice. What subs (3) requires is that the purpose should be one which is to prejudice 'the interests' of a claimant or prospective claimant. The 'interests' of a person are wider than his rights. The expression the 'interests' of a member in section 459 of the Companies Acts 1985 (right of members of a company to apply for relief against unfair prejudice) have been similarly construed: see for example *Re Sam Weller & Sons Ltd* [1990] Ch.682, 685. Likewise in *Peter Buchanon Ltd v McVey* [1955] AC 516n at 521, Kingsmill Moore J of the Supreme Court of Ireland spoke of having to consider the interests of creditors (which included in that case the tax authority in respect of a tax liability triggered by a sale of whiskey stocks), when a dividend is paid by a solvent company, even though those creditors have no right in law to stop a dividend being paid. I do not therefore consider that it is any answer to the application of section 423 in the present case that the settlement did not by itself prejudice the right of the Revenue to make an assessment of tax on the disposal of OS 160 to the settlement when it was exported to Guernsey. In my judgment, therefore, where as in this case the applicant relies on section 423(3)(b), the crucial step is to identify the interests of the person which are said to be prejudiced.

102. The next question is whether a person can be said to have the necessary purpose if he is completely mistaken as to whether entry into the transaction can have the effect of prejudicing a person's interests. This question assumes a rather exceptional state of affairs where a person has the necessary purpose of putting assets beyond the reach of his creditors and wrongly thinks that if he enters into a transaction at an undervalue (e.g. gifts property to his wife) his creditor, B, will be prejudiced. If unbeknown to him his wife has agreed to pay the monies transferred to her to B, the purpose that he had in mind will not be achieved. If the creditor takes the benefit of the transaction solely for himself and refuses to share it out with other creditors, they will be persons who (arguably at least) are prejudiced by the transaction and can constitute victims within section 425(5). Another situation that might occur is where the debtor enters into a transaction knowing that his entry into that transaction, together with the happening of some other event, will prejudice a creditor. I consider that the court does not have to consider the relative causal effect of the two matters. If the transaction is entered into with the requisite purpose, the fact that some other event needs to occur does not mean that the transaction cannot itself be within section 423(3). I consider that this is what the judge meant by his test of whether the transaction was an essential part of the purpose (in which connection he applied his analogy with petrol and matches for a fire). I therefore do not

> accept Ms Newman's subMsion that it is necessary to approach section 423 as if a test of causation were to be applied. The right approach in my judgment is to apply the statutory wording. It is enough if the transaction sought to be impugned was entered into with the requisite purpose. It is entry into the transaction, not the transaction itself, which has to have the necessary purpose.
> 103. Ms Newman seeks to test her propositions by supposing that Mr Nurkowski had entered into the transaction with the requisite purpose but had then thought the better of it with the result that there was no concealment of the £700,000 offer from the Revenue. I infer that the Revenue would in this case have gone on to make a proper assessment of the tax. It is not necessary to express a final view on the application of section 423 to this example but if that example had happened and there was no reason why Mr Nurkowski should not make the gift to the settlement, it is doubtful whether there would have been any victims for the purpose of section 423. However, the point does not arise in this case and I express no view on it.
> 104. Section 424 sets out who may apply for an order under section 423. A victim may bring proceedings under section 424 as well as (say) a trustee in bankruptcy, but any application, by whomsoever brought must be brought on behalf of all the victims of the transaction.
> 105. Section 425 sets out a non-exhaustive list of the orders that may be made under section 423. The 1986 Act does not specify any period of limitation in relation to a claim under section 423. Although section 423 has been in statute in one form or another since 1571, there is no reported case that we have seen which decides whether any period of limitation applies to claims under the section and if so what that period is. I shall have to deal with that question and a number of detailed points that arise on the interpretation of sections 423 to 425 below".

109. I note that from paragraph 101 that it is clear that someone can be "a victim" of a transaction without being a person within the actual subjective purpose of the maker of the transaction. However, that maker can be altogether unaware of the victim's existence. The relevant question to ask is whether there was a purpose to prejudice "the interests" of a creditor or prospective creditor, and that makes it important to identify relevant "interests". I note from paragraph 102 that, as far as causation is concerned, the question is what is "the effect" of the transaction having been entered into, and that is something which is separate from the question of what was "the purpose" of the transaction. I note also from paragraph 104 that an application must be brought on behalf of all victims of the transaction.

110. Arden LJ further considered the question of limitation from paragraphs 106 onwards. I read in paragraphs 111 and 112:

> "111. Before I go to the authorities, attention should be drawn to the features of claims under section 423 which mean that, if such claims are subject to a statutory limitation period, there may be practical difficulties in bringing such claims. As noted above, there is no requirement that the transaction should have occurred in a specified 'twilight' period before the bankruptcy. It is quite possible that it will have lain undiscovered for some time. It is one of the characteristics

> of transactions to which section 423 applies that they are entered into by a person when he is solvent just in case he becomes unable to pay his debts as they fall due later (as where a person is about to begin a new and risky business venture). In that situation he might well have entered into the transaction with the necessary purpose of prejudicing his creditors in those circumstances. Moreover, if the statutory limitation period runs, as Ms Newman submitted, from the date of the transaction, that period might well have expired before the appointment of the office holder who is entitled to bring a claim under section 424(1) (a) or (b) unless, of course, section 32 applies.
>
> 112. Under section 424(1)(c) a victim can bring an application under section 423 at any time. If he does so, he is deemed to bring the claim on behalf of every victim of the transaction (section 424(2)). If the judge is right, then there must be separate limitation periods for different applicants even though there can only be a single cause of action. On the face of it, that is anomalous. A victim who brings an application under section 423 is not enforcing a remedy for prejudice to himself alone because he, like the trustee to bankruptcy, is deemed to bring the proceedings on behalf of all the victims (section 424(2)). Moreover, once the court has made an order on an application under section 423, that must be the end of any claim by any other person under section 423 in respect of that transaction. If there is a statutory limitation period commencing on the date of the transaction, there may well be victims who only come into existence after its expiry, but it may be said that it is the inevitable consequence of any limitation period that it will give the defendant a good defence to claims brought after the expiry of the period. I would add that there is a question on which we have not heard argument as to who benefits from an order under section 423. It may not be the general body of creditors in the bankruptcy (see for example Fidelis Oditah, Legal Aspects of Receivables Financing, 1991, para 7.6)".

111. I note in paragraph 111 that it is said that section 423 can apply when a person enters into a transaction designed to prejudice the creditors of a new and risky business venture where Arden LJ seems to envisage section 423 as being applicable even if the transaction is entered into before the venture was even commenced (and thus any debts or obligations incurred).

112. I note in paragraph 113 that Arden LJ's view was that there would be a limitation period; something which she further considered in paragraphs 115 to 118 in which she concluded that there was a statutory limitation period which might, depending on the relief being claimed, be 12 years under section 8 of the Limitation Act 1980, or possibly six years under section 9 of the Limitation Act 1980.

113. Arden LJ then considered when a period of limitation would begin in paragraphs 119 to 128:

> "126. In these circumstances, in my judgment, the statutory limitation period cannot start to run until there is a victim within the statutory definition. It must be part of the cause of action that it can be shown that he is a victim. The limitation period must in my judgment then continue unless and until whichever first occurs of (a) the disposal of

> the possibility of any claim under section 423 by a binding judgment or settlement, or (b) the expiry of the period of limitation applicable to the section 423 claim.
>
> 127. The next issue is whether the period also begins when a trustee in bankruptcy is appointed. I do not consider that that is the effect of section 424 because the trustee's application is also made on behalf of the victims. This is an indication that he is to be in no better position than the victims themselves, and thus not able to bring a claim if their claims under section 423 or against the debtor are statute-barred. On the other hand he must be in a position to make an application so long as there is any victim whose claim is not statute barred. I note that in *Re Maddever*, the co-applicant was the nominee under letters of administration of the insolvent estate of the deceased but the judgment of this court does not suggest that his presence had any effect on the limitation question. I accept, of course, that that case was decided before section 424 was enacted. I have put forward in para. 113 above a possible explanation for including the trustee as a person who may make an application under section 423.
>
> 128. The next issue is whether the limitation period begins each time a victim comes into existence. I would put my answer to this issue in this way. Section 424 establishes the collective nature of the remedy under section 423: any victim can make the application but if he does so he represents all victims. Likewise, a trustee in bankruptcy can make an application. However, if the trustee makes an application under section 423, his application is also on behalf of all victims. Section 423 is thus a collective remedy. It follows that the ingredients of the cause of action can be established by pointing to the existence of any one of the victims. It must follow logically from this that the limitation period applicable to the section 423 claim made on any particular application cannot start before the victim for the purposes of that application (ie the applicant, or, if the applicant if not himself a victim, the person(s) on whose behalf the applicant makes the application) became a victim. The period then runs from this date or, if the commencement of that period is postponed under section 32 of the 1980 Act, from that postponed date. The length of the period is governed by section 8(1) of the 1980 Act, unless section 9 of that Act applies".

114. I note that in paragraph 126 Arden LJ considered that for a limitation period to start a victim was required to exist, but it would not in a bankruptcy situation necessarily have to be a trustee in bankruptcy. The question was as to when the first victim came into existence.

115. As far as the question of what was a sufficient "purpose", Arden LJ considered that in paragraphs 130 to 133:

> "130. There can be no doubt but that section 423(3) requires the person entering into the transaction to have a particular purpose. It is not enough that the transaction has a particular result. The question which Ms Newman raises is: what must be shown in order for the court to be able to find that a purpose has been formed?
>
> 131. This is different from the question considered by this court in the

> recent case of *IRC v Hashmi* [2002] 2 BCLC 489. In that case the question was whether when there was more than one purpose the proscribed purpose had to be dominant or not. This court held that it is not necessary for the proscribed purpose to be the dominant purpose; it was sufficient if it was a real substantial purpose.
> 132. Here it is said that Mr Nurkowski could not be confident that he would get any tax advantage. It was just a hope that he would save tax, rather than an intention. I would accept that there is a line to be drawn between mere hopes and settled aims. As Asquith LJ said in *Cunliffe v Goodman* [1950] 2 KB 237, 253, a person cannot be said to have an intention merely because he contemplates something as a possibility or if his wishes are merely a minor factor in the achievement of a particular result.
> 133. The judge did not draw a distinction between hopes and purposes. However, in my judgment the strength of his finding makes the distinction irrelevant since he found that inducing the Revenue to make a wrong assessment of the capital gains was something that Mr Nurkowski positively intended and was a factor which 'substantially motivated' him (915A). This in my judgment was enough to show that Mr Nurkowski acted with what was in law a purpose".

116. I note that the purpose was only to be a real substantial purpose, but there is also an indication that a mere hope might be insufficient.

117. In the circumstances, Arden LJ would have dismissed the claim on the basis of limitation. However, the other two Lord Justices disagreed with her, and their's therefore is the majority, and binding, judgment. Sir Martin Nourse, with whom Waller LJ agreed, dealt with limitation from paragraph 141 to 150:

> "141. On that issue the first question is whether there is a period of limitation at all. It is not clear why in *Law Society v Southall* [2002] BPIR 336 the parties, and thus this court, proceeded on the basis that there was no period of limitation applicable to the claim under section 423 of the 1986 Act. What is clear is that the point was not argued, so that the decision is of no assistance in the present case.
> 142. Those who may apply for an order under section 423 are specified in section 424(1). They include, in para (a):
> 'in a case where the debtor has been adjudged bankrupt ……. the trustee of the bankrupt's estate ……. or (with the leave of the court) …. a victim of the transaction'.
> In the present case the action is brought by a trustee in bankruptcy and there is at least one victim of the transaction in the shape of the Inland Revenue.
> 143. There is no general rule that an action brought by a trustee in bankruptcy is not subject to the provisions of the Limitation Act 1980, and I can see no justification for there to be an exception in the case of a claim brought under s.423. That is confirmed by such authority as may be said to bear on the point; see in particular *Re Priory Garage (Walthamstow) Ltd* [2001] BPIR 144, a case relating to the somewhat comparable provisions of section 238 to 241 of the 1986 Act.

144. The second question is whether the claims of the trustee in bankruptcy fall within section 8(1) or section 9(1) of the Limitation Act 1980. My own view, like that of Judge Weeks QC (pp 915-916), is that, since the main claim was in origin and substance a claim to set aside the settlement, the action as a whole was 'an action upon a specialty' within section 8(1). But because the action was commenced on 4 December 2002, more than twelve years after the settlement was made on 10 March 1989 and less than six years after the bankruptcy order was made on 28 January 1999, the question whether the applicable period of limitation was twelve years under section 8(1) or six years under section 9(1) is academic.

145. So the third and decisive question is whether the period started on the date of the settlement, in which case the action is barred, or on 28 January 1999, in which case it was brought in due time. Following the view expressed by Charles J in para 182 of his judgment in *Re Yates (A Bankrupt)* [2004] All ER (D) 373, Judge Weeks held that the cause of action could not have accrued before the bankruptcy order was made. Charles J said:

'If there is a limitation period, the passages in Muir Hunter suggest that in the case of a claim by a trustee in bankruptcy begins to run from the date of the bankruptcy order. Counsel for the trustee made the same subMsion on the basis that that is the date when the cause of action accrued to the trustee. I agree……'

146. The principal objection to that view is that, because section 424(2) provides that an application made under any of the paragraphs of sub-section (1) is to be treated as made on behalf of every victim of the transaction there can only be a single cause of action, while if the view expressed by Charles J and Judge Weeks is right, there must be separate limitation periods for different applicants under section 423.

147. In my respectful view the premise of this objection is incorrect. It may be difficult to know exactly what Parliament did or did not have in mind in enacting section 424(2), but it seems that its main purpose must have been to ensure that a victim who had not applied under section 423 should gain the same advantage as one who had.

148. In any event, I do not think it is right to say that the effect of section 424(2) is that there can only be a single cause of action in respect of one transaction. In *Letang v Cooper* [1965] 1 QB 232, 242, Diplock LJ said:

'A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.'

That shows that the identity of the claimant or applicant is an ingredient of the cause of action and because two different persons may have the same or a similar cause of action it does not follow that there is only a single cause of action.

149. Further, I see no inherent objection to the notion that there may be separate limitation periods for different applicants under section 423. While it has always been the policy of the Limitation Acts to put an end to stale claims, it has not been part of their policy to provide

> that time shall run against a claimant or applicant before he has been able to commence his action; see in particular section 28 of the 1980 Act (disability).
>
> 150. Three further points must be made. First, it is not an objection to the judge's view that the limitation period may begin many years after the transaction. That state of affairs is perfectly capable of arising under other sections of the 1980 Act, e.g. sections 28 and 32. Secondly, I do not agree that the appointment of the trustee in bankruptcy is not an ingredient of the cause of action vested in the trustee. It is not until a bankruptcy order is made that the trustee is identified as the person entitled to sue. Thirdly, it is in my view immaterial that when the bankruptcy order is made there may be other victims of the transaction whose individual claims may already be statute-barred but who may nevertheless be able to claim as creditors in the bankruptcy".

118. At paragraph 141 to 143, Sit Martin Nourse held that there was a limitation period and in paragraph 144 that it was probably 12 years. However, his conclusion in paragraph 146 and then 147 to 150 seems to have been that each individual victim will have their own limitation period, being at least six years from the coming into existence of their debt.

119. In terms of time, the next relevant decision to which I was taken is a decision of Sales J, as he then was, in *4Eng Ltd v Harper & Ors* [2009] EWHC 2633 (Ch). This decision considered the basis on which the Court would come to a particular remedy once the jurisdictional conditions of section 423 were satisfied. I read paragraphs nine to eighteen into this judgment:

> "9. A claim under s. 423 is a claim for some appropriate form of restorative remedy, to restore property to the transferor for the benefit of creditors, who may then seek to execute against that property in respect of obligations owed by the transferor to them. In an appropriate case, an order might be made to require the transferee to pay sums or transfer property direct to the creditors, if the position in relation to execution is clear and any further costs associated with execution ought to be avoided. But often the appropriate order will be for the transferee to pay sums or transfer property back to the transferor, leaving the distribution of those sums or property as between the creditors of the transferor to be governed by the general law. This may be particularly important if the transferor is bankrupt or in liquidation (or about to become bankrupt or go into liquidation) and has a range of creditors not all of whom are before the court on the application made under s. 423. In the present case, 4Eng primarily seeks orders requiring Mrs Simpson to pay monies and restore property to Mr Simpson to assist it in then executing against those monies and property.
>
> 10. The trigger for an order to be made under s. 423 and s. 425 is that it is established that the transferor has entered into a transaction at an undervalue as defined in s. 423(1) in circumstances where the transferor entered into that transaction for the purpose of putting assets beyond the reach of a person who is making or might make a claim against him (s. 423(3)(a)) or of otherwise prejudicing the interests of

such a person in relation to such claim (s. 423(3)(b)) (which I will refer to compendiously as 'a relevant purpose'). Where there is the combination of a transfer of assets at an undervalue entered into by the transferor for a relevant purpose, the usual interest of a transferee in the security of his receipts is overridden in favour of those with valid claims against the transferor ('the transferor's creditors'). The interests of the transferor's creditors override the interests of the transferee. By virtue of the statute, this combination of factors operates so as to make the transaction reversible for the benefit of the transferor's creditors.

11. The statute does not specify any particular mental state or action on the part of the transferee as an ingredient of the trigger conditions for liability, but that does not mean that such matters are irrelevant for defining the extent of the liability to be imposed, or the order to be made, at the next stage in the analysis, when the court considers the question of remedy under s. 423(2) and s. 425.

12. So far as I am aware and according to Counsel's researches, there is no relevant authority governing the operation of these statutory provisions. Once the trigger conditions defined in the statute are satisfied, a creditor of the transferor will have a claim against the transferee. A wide jurisdiction is then conferred upon the court to fashion a suitable remedy. The broad objective of the remedy is set out in s. 423(2) (to 'restore the position to what it would have been if the transaction had not been entered into' and to 'protect the interests of persons who are victims of the transaction'), but leaving a wide margin of judgment to the court to decide what order is appropriate (it is to 'make such order as it thinks fit for' the defined objective). An extensive, non-exhaustive list of the wide range of orders which may be made in pursuit of that objective is set out in s. 425. This includes making an order to transfer any property transferred in the relevant transaction at an undervalue to any other person (such as the transferor, so as then to enable his creditors to execute a judgment against it, or directly to the transferor's creditors) (s. 425(a)), making such an order in respect of any other property which represents in the transferee's hands property which was transferred in the relevant transaction at an undervalue (i.e. a statutory power to trace assets in the transferee's hands – s. 425(b)) and making an order requiring the transferee to pay to the transferor or his creditors such sums as the court may direct in respect of benefits received from the transferor (i.e. an order which does not depend upon the transferee still having in his hands the transferred property or traceable assets representing it).

13. In my judgment, the nature of any order and the extent of the relief granted by the court under s. 423(2) and s. 425 should take into account the mental state of the transferee of property under a relevant transaction (or of any other person against whom an order is sought) and the degree of their involvement in the fraudulent scheme of the debtor/transferor to put assets out of the reach of his creditors. The principles in the application of this statutory regime should reflect in this respect general principles inherent in other areas of the law, which

treat the mental state and degree of involvement of a defendant in wrongdoing as relevant to the extent of recovery available against him (compare, as one example among many, *Seager v Copydex* [1967] 1 WLR 923, 932 – no order of an account of profits ordered against an innocent wrongdoer in respect of a breach of confidence). Although the trigger conditions for liability to make restoration under s. 423 set out the basic balance to be struck between the interests of the creditors and of a transferee as established by Parliament, the making of an order under s. 423(2) and s. 425 necessarily requires some further balancing of the interests of the transferor's creditors and of the transferee to be determined by the court, since by the time the court has to take action events will have moved on from the transfer and the balance of the equities between creditors and transferee may well have been affected by changes in circumstances over time.

14. For example:

(1) A transferee may have received a gift of money in good faith, without knowing that the transferor acted with a relevant purpose in making the gift. In such a case a broad analogy may be drawn with claims based on unjust enrichment, such as a claim for money paid on the basis of a mistake of fact, where the recipient's interest in being able to rely on the security of his receipt is overridden by the unfairness to the transferor of being held bound by a payment made by him by reason of a mistake. In relation to such claims a defence of good faith change of position on the part of the recipient applies (*Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548). In my view, if the transferee in the example has changed his position on the basis of the receipt in a way that would make it unfair to require him to repay the money (e.g., thinking it was a completely valid gift, he has spent the money on a world cruise which he would not otherwise have taken) it would not be appropriate for the court to make an order under s. 425(1)(d) requiring the transferee to pay back a sum equivalent to the amount he received;

(2) Where an asset has been transferred to a transferee who has no knowledge that the transferor acted with a relevant purpose in making the transfer, and then the transferee has simply held the asset while its value has fluctuated in line with market conditions, I think that ordinarily the appropriate order under s. 423(2) and s. 425 should be an order for the transfer of the asset (either to the creditors directly or to the transferee);

(3) At the other end of the spectrum, however, if the transferee has taken property knowing that it was transferred to him by the transferor for a relevant purpose, and has sought to further the fraudulent design by lying to the transferor's creditors to shield the property against their claims, the justice of the case will be very different. Then it may well be appropriate to make orders against the transferee to protect the creditors to the fullest extent - perhaps by a combination of orders to transfer property under s. 425(1)(a) or (b) with orders for payment of money under s. 425(1)(d), if the property has gone down in value in the hands of the transferee – by analogy with the approach to damages

in cases of deliberate deceit exemplified by *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254.

15. Across the range of cases, the position may become more complex if, after the transfer, the transferee has become insolvent, so that the competing interests of the transferor's creditors and the transferee's creditors have to be taken into account (not a complication which arises in the present case). The remedy will also, of course, have to be adjusted as appropriate if the extent of the creditors' claims against the transferor is less than the value of the transferred property in the transferee's hands.

16. In choosing what relief is appropriate in a given case, a great deal will depend upon the particular facts. One of the reasons the court is given such a wide jurisdiction as to remedy under this regime is to allow it flexibility in fashioning relief which is carefully tailored to the justice of the particular case. Helpful analogies may be drawn with other areas of the law to guide the court in reaching its conclusion, but given the wide range of situations which the statutory regime is intended to deal with it would be wrong to be unduly prescriptive in trying to lay down hard and fast rules for the application of these provisions.

17. The claims by 4Eng against Mr Harper and Mr Simpson arise from representations made to induce it to enter into, and the terms of, a share purchase agreement dated 29 June 2001 in relation to an engineering company called Ironfirm Ltd, which traded using the name Excel Engineering ('Excel'), under which Mr Harper and Mr Simpson sold 100% of the share capital in Excel to 4Eng. The nature of the claims was set out in detail in the judgment of Briggs J and is conveniently summarised in this way in the judgment of David Richards J at [2]-[5]:

'2. The facts relevant to the fraud practised by the defendants on the claimant may be summarised as follows. The defendants owned and managed Ironfirm Limited which traded under the name Excel Engineering ('Excel') and provided engineering services. Its principal customer was Mars UK Limited ('Mars'). By a contract dated 29 June 2001, the defendants sold the entire issued share capital of Excel to the claimant 4Eng Limited ('4Eng'). 4Eng had been established by David Shepherd and Ian Tapping as the vehicle for acquiring companies in the engineering sector. Excel was its first, and as a result of the true state of Excel, its only acquisition.

3. The contract provided for a total price of £1.2 million of which £550,000 was payable on completion and the balance by instalments over three years. The instalments were not in the event paid. Following completion, it soon became apparent to Mr Shepherd and Mr Tapping that there were problems in Excel and as a result of their painstaking investigations over a period of at least four years it was revealed that the defendants had over a long period engaged in the systematic bribery of employees of Mars which had resulted in payments by Mars to Excel on inflated or bogus invoices amounting to

> some £1.8 million. By the terms of the contract the defendants represented that they were not aware of any reason which would cause Mars to terminate its requirements for Excel's products. As the defendants knew, because of the bribery this and other representations were completely untrue. Instead of buying a company worth £1.2 million, 4Eng had acquired a company which, as a result of the defendants' corrupt system, was potentially liable to Mars for a large amount and liable also to lose is principal source of business. In short, the defendants had succeeded in defrauding first Mars and then 4Eng.
> 4. On 8 December 2005 each of the defendants was convicted at Reading Crown Court on charges of conspiracy to corrupt and conspiracy to defraud in relation to Excel and Mars and sentenced to six and a half years' imprisonment. The conviction of the defendants clearly established the corruption for which they were responsible and in which, through them, Excel had participated. This in turn established that there was, as long suspected, a large potential liability of Excel to Mars. Excel was insolvent and on 9 January 2006 went into administration. On 13 July 2006 it went into creditors' voluntary liquidation.
> 5. On the application for summary judgment, Briggs J held that the claim in deceit was established against both defendants, based on their knowledge of the falsity of a number of express representations contained in the share sale agreement on which 4Eng had relied in agreeing to purchase Excel. 4Eng's alternative claims for breach of warranty were, at its request, stayed pending completion of the assessment of damages on the claim in deceit'.
> 18. Evidence about the fraud carried on by Excel upon Mars was adduced in the present claim in the form of unchallenged witness statements from Excel employees describing the conduct of Mr Simpson and Mr Harper while they ran the business of Excel. Mr Shepherd and Mr Tapping also gave evidence about the steps they had taken to unravel the fraud and work out what had happened in relation to a series of 'ghost invoices' created by Mr Harper and Mr Simpson to provide a cover for fraudulent payments made to Mars employees as bribes for comMsioning Excel to do work for Mars".

120. I note in paragraph 9 that the Court engages in a search for what is the appropriate remedy. However, paragraph 10 states that it may be to simply reverse the transaction. Paragraphs 11 to 18 make clear that the Court has something of a wide discretion. The width of the discretion is emphasised in paragraph 12. The fact it involves a balancing exercise between potentially innocent parties is stressed in paragraph 13. In paragraph 14 there are invoked such matters as to whether or not a recipient of the relevant gift or transaction or at an undervalue has changed their position, although their mental state is also clearly of considerable importance. In Paragraph 16 it was again emphasised that the appropriate remedy would depend on all the facts.

121. I was further taken to the decision, or elements of it, in *JSC Mezhdunarodniy Promyshlenniy Bank & Anor v Pugachev & Ors* [2017] EWHC 2426 (Ch), that was relied on in general for the proposition that for a transaction to be a sham, all the parties to it must have intended, although intention includes mere recklessness about what would happen,

something different from its actual words so that the document presents something different from one who as the actual intended reality to the outside world. However, I also note that section 423 was considered in paragraphs 443 to 444:

> "443. Given the findings on the previous claims, it is not necessary to look into the s423 claim in any detail. I will focus only on the question of purpose under s423. The principles are summarised in *JSC BTA Bank v Ablyazov* [2016] EWHC 3071. I take them to be as follows. The burden is on the claimants. The focus is on Mr Pugachev's purpose at the time of the transactions. The purpose must be established for each transaction. The real and substantial purpose must have been to defeat the creditors. That result merely being a by-product is not enough. If the transaction is one which the debtor would have entered into in any event, the court should not too readily conclude that he also had the purpose of defeating his creditors. The purpose cannot be inferred from the simple fact of the transaction and the question is whether the individual actually did have the purpose required, not whether a reasonable person would have. Purpose is not the same as result.
>
> 444. I would have found that for each of the trusts Mr Pugachev's purpose in setting it up and each of the transfers of assets in (either himself or by his nominee Victor) satisfied the test in section 423. That is because even if the deeds do in fact divest Mr Pugachev of control, his intention always was to use the trusts as a pretence to mislead other people, by creating the appearance that the property did not belong to him when really it did. Even if his purpose failed in the sense that he actually did divest himself of control, he always intended to use the trusts to hide whatever control he had. The people he intended to hide his control from were persons who might make a claim against him in future".

122. Those paragraphs make clear that the burden, with regards to showing a real and substantial purpose to defeat creditors, is on the claimant; that the Court should not be too ready to infer that such an intention existed, and in particular should not just infer it from what a reasonable person would have thought would be the effect of the transaction, because the question is what was actually in the maker's mind. Those paragraphs were based on what was the then first instance decision in *JSC BTA Bank v Ablyazov & Anor* [2016] EWHC 3071 (Comm). That case in fact went to an appeal, which has reported as *JSC BTA Bank v Ablyazov & Anor* [2018] EWCA Civ 1176. The parties did not refer me to that appeal judgment, but I have read it and I do not feel that it matters to my approach which would have led to the same outcome for essentially the same reasons even if I had not considered it.

123. The leading judgment was from Leggatt LJ, and I read paragraphs 14 to 16 of the judgment into this judgment:

> "14. The description of the requisite purpose as a 'substantial' purpose was not necessary to the decision of the Court of Appeal in the *Hashmi* case and to my mind it risks causing confusion. The word 'substantial' is not used in section 423 and I can see no necessity or warrant for reading this (or any other) adjective into the wording of the section. At best it introduces unnecessary complication and at

worst introduces an additional requirement which makes the test stricter than Parliament intended. I agree with the point made in McPherson's Law of Company Liquidation (4th Edn, 2017), para 11-116, that there is no need to put a potentially confusing gloss on the statutory language. It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls within section 423(3), even if it was also entered into for one or more other purposes. The test is no more complicated than that.

15. Arden LJ made this very point in the *Hashmi* case when she said (at para 23) that 'there is no epithet in the section and thus no warrant for reading one in'. When later in her judgment she referred (at para 25) to a 'real substantial' purpose, it is apparent from the context that the reason for using those adjectives at that point was to underline the distinction between a purpose and a consequence of the relevant transaction. As Arden LJ emphasised, it is not enough to bring a transaction at an undervalue within section 423 that the transaction had the consequence of putting assets of the debtor beyond the reach of creditors. That is so even if the consequence was foreseeable or was actually foreseen by the debtor at the time of entering into the transaction. Evidence that the debtor believed that the transaction would result in putting assets beyond the reach of creditors may support an inference that the transaction was entered into for the purpose of doing so, but the two things are not the same. To illustrate the distinction using a less homely example than that given by Arden LJ, a commander may order a missile strike on a military target knowing that it will almost certainly cause some civilian casualties. But this does not mean that the missile strike is being carried out for the purpose of causing such casualties.

16. When judging a person's intentions, we are generally more inclined to accept that an action was not done for the purpose of bringing about a particular consequence, even if the consequence was foreseen, if there is reason to believe that the consequence was something which the actor wished to avoid or at least had no wish to bring about. Hence, in the example just given, where the missile strike had a clear strategic purpose, we may readily accept that it was not ordered for the purpose of causing civilian casualties – particularly if, for example, there is evidence that the commander gave anxious consideration to how many civilians were likely to be in the target area and planned the strike for a time when the number was expected to be low. By contrast, a consequence is more likely to be perceived as positively intended if there is reason to think that it is something which the actor desired. Thus, evidence that a person who has entered into a transaction at an undervalue foresaw that the result would be to put assets out of reach of creditors and desired that result might lead the court to infer that the transaction was entered into for that purpose. But such a conclusion is not a logical or legal necessity. It is a judgment which has to be based on an evaluation of all the relevant facts of the particular case".

124. From those paragraphs, it is clear firstly that the relevant purpose only needs to be an underlying purpose of the transaction, even if there are other purposes. Secondly, it does not need to be a "substantial" purpose. Thirdly, the mere fact that someone foresees the consequences of the transaction as prejudicing, or knows that it will prejudice, creditors is not the point; as the question is as to what is a substantive "purpose" underlying the transaction, and, also, they may not wish to bring about those foreseen or known consequences so that it is not a "purpose". The example being given, albeit perhaps an unfortunate one in the light of recent events, is that of a military officer planning a missile strike which they know is likely to cause civilian casualties, but which casualties they do not intend, they having only a military purpose within their own minds, although it may be that the military officer does actually intend and have a purpose of inflicting the civilian casualties as well as achieving the relevant damage in military terms.

125. Fourthly, that the question of what is foreseen and what is desired might lead to the Court inferring an intention from the evidence that the Court has as to what was and would have been in the maker's mind, but that the Court needs to evaluate all the facts. I further read in the analysis in paragraph 17, which analysed the question as to whether or not the relevant debtor had positively intended the outcome of the relevant transaction being to prejudice creditors:

> "17. Subject to the bank's arguments which I will come to shortly, it is common ground in the present case that the judge identified the correct legal test. After pointing out that it was 'at least an outcome' of the transfer of funds made by Mr Ablyazov to Madiyar that the funds were put beyond the reach of the bank as a person who was making or might make a claim against Mr Ablyazov, the judge said (at para 130):
> 'What I therefore have to determine is whether this was also a purpose of Mr Ablyazov in making the Transfer. That depends … on whether Mr Ablyazov positively intended that outcome'.
> As discussed above, this was the correct question to ask".

126. However, otherwise, Leggatt LJ upheld the judge's approach and answer (being that the prejudice to creditors was foreseen but had not been proved to have been a "purpose" of the transaction), and emphasised that the Court should not seek to infer an intended purpose too readily.

127. I note also that in that judgment the question of limitation was considered by Leggatt LJ at paragraphs 47 to 48:

> "47. By his respondent's notice, Madiyar has argued that the judge should in any event have dismissed the bank's claim under section 423 of the Insolvency Act on the ground that the claim was barred by limitation. On the conclusion I have reached above – with which I understand that the Vice-President and Coulson LJ agree – it is not necessary to decide this issue. But as we have had the benefit of detailed written submissions on the point, I will explain why in my opinion the judge decided it correctly.
> 48. The judge held – and it is not in issue on this appeal – that the claim under section 423 was an action for a sum recoverable by statute falling within section 9(1) of the Limitation Act 1980, which prescribes a six year limitation period. Accordingly, as this action was begun in December 2015, more than six years after the transfer was

> made on 26 February 2009, the claim was *prima facie* time-barred. The bank relied, however, on section 32 of the Limitation Act, which provides for the postponement of the limitation period in certain cases of fraud, concealment or mistake until the claimant has discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it. In cases of fraud or deliberate concealment, the fraud or concealment must be that of the defendant, but section 32(1) provides that references in that subsection to the defendant include references to 'any person through whom the defendant claims'."

128. I note that he said that it was not necessary to decide the limitation issue in that case, but proceeded without argument to analyse limitation on the basis that there would be a period of six years from the relevant transfer in which to make an application. It does not appear that the reasoning in *Hill v Spread Trustee Company Ltd & Anor* was cited to Leggatt LJ. Coulson LJ agreed with Leggatt LJ's judgment but said nothing about limitation and Gloster LJ simply agreed.

129. I was next taken, as I had drawn parties attention to, to the decision in *Hinton v Wotherspoon* [2022] EWHC 2083 (Ch) and a decision of Insolvency and Companies Court Judge Jones. The situation there was that the husband debtor had transferred property to his wife in 2008. He had failed to pay tax in 2009 and the bankruptcy petition had eventually been presented in 2014, resulting in a bankruptcy and the trustee in bankruptcy seeking to challenge the 2008 transfer. Judge Jones dealt with the law with relation to section 423 at paragraphs 98 onwards, and I read paragraphs 98 to 102 into this judgment:

> "98. The findings of fact mean that the only area of law that now needs to be specifically addressed when considering the 2008 transfer is section 423 IA which concerns 'transactions defrauding creditors'. This provisions confers a discretionary power on the court in circumstances of a transaction having been entered into at an undervalue for a prohibited purpose to make such order as it thinks fit to restore the position to what it would have been if the transaction has not been entered into or to protect the interests of victims of the transaction. The applicant for such relief may be a victim of the transaction (a person who is or is capable of being prejudiced by it, section 423(5) IA) or by a relevant office holder, as here, with the application being treated as made on behalf of every victim in each case (see section 424(1) IA).
>
> 99. The inexhaustive definition of a 'transaction' in section 423 IA is set out in section 426 IA as including, 'a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly'. Therefore, any agreement or understanding between parties, whether formal or informal, oral or in writing is capable of being a 'transaction' under section 423 IA (see *Feakins v. DEFRA* [2007] BCC 54 at [76] per Jonathan Parker LJ. - a decision emphasising the flexibility of the definition in the context of a series of agreements or arrangements which concluded that the court was able to address the transactions as a whole).
>
> 100. The prohibited purpose test is now identified as a simple one that does not depend on tests of dominant or substantive or any other adjective. As Leggatt LJ, as he then was, said in *JSC BTA Bank v.*

Ablyazov [2018] EWCA Civ 1176:

'There is no need to put a potentially confusing gloss on the statutory language. It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls within section 423(3), even if it was also entered into for one or more other purposes. The test is no more complicated than that'.

101. The prohibited purpose for the person entering into the transaction with another (defined as the debtor – section 423(5) IA) is 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.' (section 423(3) IA).

102. There is no requirement that Mr Wotherspoon had to be insolvent at the time of the relevant transfer. What needs to be proved on the balance of probability is that Mr Wotherspoon entered into the challenged transaction with that 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 as Sales J., as he then was, explained in *4 Eng v Harper* [2009] EWHC 2633 (Ch) at [22]:

'In the present context, in determining whether a relevant purpose is made out under s. 423(3) it would not matter whether Mr Simpson acted in order to protect his assets from possible claims by Mars or from possible claims by 4Eng. It would be sufficient for 4Eng to establish that he acted for either or both purposes, since it is not a requirement of s. 423(3) that the victim claiming relief in relation to a transaction was the very creditor whose claims the transferor was seeking to defeat – it is sufficient that the transferor acted with the purpose of defrauding any person who had made or might make a claim against him (see the reference in general terms in s. 423(3) to 'a person who is making, or may at some time make, a claim against [the transferor]' and *Sands v Clitheroe* [2006] BPIR 1000).'"

130. I note that again it was said that the relevant purpose only needs to be an underlying purpose of the transaction and that, as stated in paragraph 102, the purpose does not need to relate to the creditor who is actually bringing the section 423 application or who is said to be the relevant victim of the transaction. Judge Jones analysed the facts of the case from paragraphs 113 onwards, and I read paragraphs 113 to 124 in this judgment:

"113. There is no doubt that on 12 June 2008 Mr Wotherspoon aimed to achieve the transfer of his remaining 50% beneficial interest in Strand House as a gift. That, after all, is what occurred. It took place at a time when no specific creditor with a debt due and owing can be identified as a person in respect of whom Mr Wotherspoon was seeking to put his beneficial interest beyond their reach or otherwise to prejudice their interests. The only possible candidate might be HMRC

but the evidence establishes that he was able to pay his current tax liabilities at that time. The claim must rely upon Mr Wotherspoon's general financial position and assert a prohibited purpose in respect of persons who may at some time make a claim against him.

114. That claim is based upon circumstantial evidence. There is no direct evidence of Mr Wotherspoon's subjective mindset having a prohibited purpose. Such evidence needs to be viewed as a whole, its effect being cumulative so that the individual elements become stronger by their linkage for the purpose of applying the standard, civil balance of probability test.

115. The problem for the claim is that it cannot be concluded on the balance of probability that there were at the date of the 2008 transfer any possible or potential persons in the mind of Mr Wotherspoon who may at some time make a claim against him. The only possible, identifiable future creditor might be HMRC, as occurred, or another creditor who might be unpaid because of payment to HMRC. However, as at the date of the 2008 Transfer there was no suggestion on the facts or in his mind of any possibility of future tax being potentially at risk of non-payment. That was the position from October 2007 when Mr Wotherspoon first sought advice from Boodle Hatfield.

116. Certainly there is cause for supposing that Mr Wotherspoon may have had concerns about his long term financial position and for supposing that those concerns may have influenced him to decide to transfer his interest to Mrs Wotherspoon to ensure she would have the security of a home for herself and her son (whether those concerns arose from financial and/or health worries or otherwise). However, even if that was proved on the balance of probability, s.423 IA requires more.

117. It 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.

118. Mr Hinton suggests Mr Wotherspoon's future financial position was far from secure because his companies did not offer the security needed for the future, he did not have adequate alternative resources and the positioning and ultimate risk of his assets becoming available for creditors was increasing because of the economic climate. In support he points to the difficulties caused by the taxation of his income from the Wickforce Trust suggesting that there was a significant prospect or risk that he would not be able to pay future tax demands and that HMRC may become a creditor making a claim against him. He also suggests that the 'cash at bank' position was not

nearly healthy enough and that the other companies were failing or would fail.

119. I accept these are all factors weighing in the balance for his case and that they should be addressed cumulatively. However, none of this evidence satisfies me that it has been established on the balance of probability that Mr Wotherspoon was considering being unable to pay his tax (or any other creditors) in the future with the result that claims may be made. That applies even though he would have been wary of and concerned by the economic crisis. It also applies notwithstanding the difficulties caused by the taxation of his income from the Wickforce Trust or the position of Headfort Properties Limited.

120. There is insufficient evidence from which to conclude objectively that there was a significant prospect or risk at the time of the 2008 transfer that he would not be able to pay future tax demands and that HMRC may become a creditor making a claim against him or that some other creditor would because of the financial difficulties. There is no subjective evidence from which to conclude on the balance of probability that that he had such matters in mind when deciding to transfer his beneficial interest. The circumstantial evidence is of insufficient weight to satisfy the burden of proof.

121. Moreover, whilst it is not for Mrs Wotherspoon to prove her case, she can reasonably rely upon the facts that Mr Wotherspoon: had access at the time of the 2008 Transfer to cash in amounts relatively significant in the context of current and foreseeable taxation liabilities; he had an interest in a trust fund which appeared to have more than enough equity from which significant money could be raised; Abbotsinch was a substantial development with the potential for profit, as evidenced by the subsequent sale of land and property realising £9 million, and there was no apparent cause to conclude that it would be loss making at the date of the 2008 Transfer or earlier; and the future problem for payment of tax was the unforeseeable event of the Kaupthing Singer & Friedlander collapse. These are all matters which can be weighed in the balance in favour of the defence and provide additional facts to support the conclusion that the burden of proving the subjective existence of the prohibited purpose has not been satisfied on the balance of probability.

122. It is of concern in reaching that decision that important parts of the evidence of Mr and Mrs Wotherspoon has been rejected. That has caused me to consider whether this evidence was presented to hide the true purpose. I have borne in mind that what may be described as the 'normal matrimonial arrangement' of equally shared assets had been achieved in 2001 (even assuming there was no common intention constructive trust before then). Also that the 2008 Transfer had nothing to do with fulfilment of a promise made during the engagement. That by 2008 Mrs Wotherspoon had the security not only of a half beneficial interest but also of her matrimonial rights in the event of divorce and the parties could arrange matters by will to ensure she received more than her statutory rights upon his death. She also owned the yacht and her flat in Chelsea and both assets would

> have been relevant to her need to look after herself and her son if required to do so. I have additionally rejected evidence concerning the stepdaughters and the concerns about a will and/or the need for easy access to cash upon Mr Wotherspoon's death.
>
> 123. Nevertheless, that still leaves the point that whilst it is plain Mr Wotherspoon wanted to ensure Mrs Wotherspoon was secure and the existence of her son's difficulties no doubt took a place in those thoughts, the rejection of key parts of their evidence does not establish that he had the prohibited purpose in mind. This is a provision concerned with defrauding (not with any requirement of dishonesty) creditors who had brought or may bring claims and I am satisfied it has not been proved that there were such creditors in mind or that there was any intention to escape the liabilities of future claims. Whist purpose may be inferred, it cannot be in this case (see *Moon v Franklin* [1996] *BPIR 196 and Midland Bank v Wyatt* [1996] BPIR 288).
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> 124. In *BAT Industries plc v Sequana SA* [2016] EWHC 1686 (Ch), [2017] Bus LR 82 at [517] Mrs Justice Rose, as she then was, observed that a person cannot have a section 423 IA purpose if they had or would have sufficient assets left to meet the claim which was or may at some time be made. In this case there is no claim against which to measure that result and nothing to suggest that the assets held as at the date of the 2008 transfer would not be sufficient to cover the foreseeable future. Nor is this a case such as *Inland Revenue ComMsioners v Hashami* [2002] EWCA Civ 981, [2002] B.C.C. 943 where it was found that the debtor transferred property knowing he would become liable to HMRC for substantial sums and because he could not be sure at the time he chose to make the transfer that he would be unable to make provision for those liabilities at a later date. This is a case (applying the approach of Leggatt LJ in *JSC BTA Bank v. Ablyazov* above at [16]) where the fact of the transfer has had the consequence that the beneficial interest is not available for the benefit of Mr Wotherspoon's creditor but it has not been proved that this was his purpose".

131. I note that in paragraph 115, Judge Jones was considering a problem that in the case before Judge Jones that there was nobody in Mr Wotherspoon's mind at the time with the transfer who might make a claim against him in the future. In paragraph 106, that Mr Wotherspoon did have concerns about his long-term financial position and wished to ensure that his wife and child were financially secure. In paragraph 117 there is the sentence, "It is not enough to assert 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", followed by the sentence, "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".

132. I then note that in the subsequent paragraphs it was held that that test was not satisfied because there was no evidence on which Judge Jones could come to a conclusion that Mr Wotherspoon was actually considering that there was any creditor who in the future he would be unable to pay, but simply had a desire to assure protection to his wife and child.

It, therefore, seems to me to be clear from this judgment that ICC Judge Jones was concluding that a mere possible concern that a person might have future creditors is not enough and neither was a mere intention to "protect" assets; and that, as far as Judge Jones is concerned, there had to be an intention to enable the family in essence to escape, or rather their assets, to escape being exposed to the maker's future creditors, and the potential existence of such future creditors had to be within the person's mind. I note that Judge Jones came to that conclusion notwithstanding, as stated in paragraph 124, that Mr Wotherspoon had divested himself of his only real asset.

133. The other very recent decision to which I was taken, and to which I have also drawn the parties' attention, is the decision in *Sahota v Sohal*, a decision of Deputy Master Henderson sitting in the Chancery Division. This was a situation where an interim charging order had been obtained, which was met by a counterargument of there being no beneficial interest to which it could fasten or bite due to the existence of a declaration of trust as in this case. There was an argument that the declaration of trust had been backdated in that case, but that argument was rejected at paragraph 144 of the judgment. There was an argument then that the declaration of trust was a sham. That was dealt with in paragraphs 145 to 148 with the judgment:

> "145. The classic definition of a sham transaction is that of Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at p.802 where he said:
> 'As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham,' it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.'
> 146. Mr Panton referred me to the statements about shams in Snell's Principles of Equity 24th ed at paras.22-062 – 22-068.
> 147. In my judgment there are two difficulties with the sham argument in relation to the 2012 Deed. First there is no evidence that the 2012 Deed was ever sought to be used to give a false impression to anyone or, indeed, to the court. The argument that it was sets out by assuming that which it needs to prove, that is that the rights and interests of Mr Rajan Sohal, Mrs Pooja Sohal and Mrs Veena Sohal in 31 Windsor Road were intended to be other than those specified in the 2012 Deed. Second, I am not satisfied on the balance of probabilities that the rights and interests of Mr Rajan Sohal, Mrs Pooja Sohal and Mrs Veena Sohal in 31 Windsor Road were intended to be other than those specified in the 2012 Deed.
> 148. There is a difference between (i) what the parties' rights were or would have been but for the 2012 Deed and (ii) what they were under the 2012 Deed. The fact that there was or may have been a difference between those two things does not mean that the 2012 Deed was a sham. What has to be established in order for the Deed to be a sham is that it was not intended to have the effect that it did and was to be used to give a false impression to third parties or the court as to what

the rights and obligations of the parties actually were".

134. I note the definition of sham as being a document which is effectively created so as not to reflect the parties to its true intentions and to mislead the world. I note also that that argument failed on the facts as set out in paragraphs 147 and 148. I note also that the Deputy Master's conclusion as to what the situation was as a matter of fact is set out in paragraph 154, where he stated:

> "154. What in my judgment was the case on the evidence, clearly in respect of the 2015 and 2019 Deeds, and less clearly, but probably also the case in respect of the 2012 Deed, is that Mr Rajan Sohal intended as also, by their reliance on him, did Mrs Pooja Sohal and Mrs Veena Sohal, that the Deeds and the interests which they created or confirmed should be produced and used on some occasions, and not on others. Specifically Mr Rajan Sohal intended that when he considered that it would serve his purposes not to produce or refer to them he would not produce them and vice-versa when he thought that his purposes would be served by producing them, he would produce them. So far as the interests of Mrs Veena Sohal under the 2012 and 2019 Deeds were concerned, essentially the intention of Mr Rajan Sohal was that the Deeds would be available to establish her interests in the event of a 'rainy day' in the sense of his creditors seeking to recover from him and his property, and that in the meantime he could and would deal with the properties and raise money on them and apply that money as he saw fit. The question is whether that makes the deeds shams".

135. He then went on again to consider as to whether or not that rendered the document a sham and he held that it did not in paragraphs 155 to 158 of the judgment:

> "155. It is clearly the law that in order for a transaction to be a sham, all the parties to it must have had a shamming intent. Mr Panton referred me to the passage in Snell's Principles of Equity 24th ed at para.22-068, the accuracy of which I accept, which states:
> 'In establishing the intention to mislead, it is enough that one of the parties signed the document without knowing or caring what he was signing, or that his intentions were not exercised independently of the other party who was controlling the transaction. Either way, this shows a reckless willingness to mislead third parties'.
> 156. Applying that passage in the present context, Mrs Pooja Sohal's and Mrs Veena Sohal's evidence to the effect that they relied upon and trusted Mr Rajan Sohal in relation to the properties and the Deeds means that they are fixed with his intentions in respect of the Deeds.
> 157. In my judgment the 'use in the event of a rainy day' intention does not necessarily result in the Deeds being shams. When they are not produced, they are not being used to mislead; it is their absence which may cause third parties to be misled as to the beneficial ownership of the property. When they are produced and relied upon they are not being used to mislead.
> 158. What would have made the Deeds shams would have been an intention in Mr Rajan Sohal that in reality Mrs Veena Sohal should not have the interest in 31 Windsor Road which the 2012 and 2019

> deeds provided for her. He clearly intended, as the terms of the 2019 Deed themselves show, that the value of Mrs Veena Sohal's interest might be diminished by other borrowings for the purposes of the 31 Windsor Road project; but in my judgment that does not amount to an intention that the Deeds should not take effect in accordance with their terms".

136. Essentially, he held that the documents were intended to have exactly the effect which was set out in them, and the situation was in fact that the documents were not to misrepresent the reality, rather concealing them was intended to present a false picture to the world and that was not enough to render a document a sham. The Deputy Master then went on to consider the question as to whether or not the document effected an illusory trust; that is to say did not dispose of the interest at all. He dealt with that in paragraphs 160 and 161 of the judgment:

> "160. Snell's Principles of Equity 24th ed at para.22-071 explains:
> 'A purported trust may be 'illusory'. To call a trust 'illusory' is a convenient, although analytically inaccurate, label. The trust transaction is illusory when the true intention gathered from the trust instrument was to leave the beneficial interest in the purported settlor of the trust rather than to create a trust for the beneficiaries named in the instrument.
> An illusory trust is analytically different from a purported trust set out in a sham document. The sham doctrine is concerned with the misleading mismatch between the objective intentions of the parties in the trust instrument and their subjective intentions about the transaction between them. The conclusion that a trust is illusory follows from the construction of the trust instruments itself, rather than from a comparison between the terms of [the] trust instrument and the parties' subjective intentions'.
> 161. My interpretation of the sentence in the 2012 Deed beginning 'Mrs Veena Sohal cannot buy …' means that her equitable interest under the Deed is not illusory. It could be reduced or eliminated by Mr Rajan Sohal and Mrs Pooja Sohal taking out further mortgages on the property with priority to Mrs Veena Sohal's charge, but that would not have been possible without her consent if she had protected her interest with a notice. Also it would have been difficult for further borrowings immediately to swallow up the whole of the equity and wholly eliminate the value of Mrs Veena Sohals' equitable charge. Accordingly in my judgment the 2012 Deed is not an illusory trust".

137. I note that he held that the document did contain sufficient terms to amount to a trust.

138. The Deputy Master then went on to consider section 423. At paragraphs 162 and 163, he dealt with the wording of section 423. In paragraph 164, he held that the applicant had standing to make the application, notwithstanding the bankruptcy which existed in that case. In paragraphs 165 to 181, he dealt with the question as to whether the transaction was at an undervalue and held that it was. He then went on to deal with the question of purpose at paragraphs 182 to 190:

> "182. For s.423(3) to be engaged, the relevant purpose of Mr Rajan Sohal did not have to relate to the person who is making the application. S.423(3) is widely worded. It refers to 'a person who is

making, or at some time make a claim against him'. It does not require that person to be identified at the time of the transaction.

183. Nor is it necessary for the purpose specified in s.423(3) Insolvency Act 1986 to be the only or the dominant purpose of a transaction in order for the requirements of s.423(3) to be satisfied. It is sufficient if the relevant purpose is 'a' purpose (*JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176, [2019] BCC 96, per Leggatt LJ at paras.13 and 14).

184. The only specific allegation about possible creditors in 2012 and a possible trigger for the creation of the 2012 Deed was in relation to Acacia Securities. However, I have already found that the case in respect of Acacia was not made out. Even in the absence of an identified creditor in 2012, a general intention to put assets beyond the reach of creditors would suffice for the s.423(3) condition to be satisfied.

185. In 2012 Mr Rajan Sohal was already in business. His evidence in cross-examination was that when 231 Rochford Gardens and 26 Cedar Close were sold in 2012, a deed of trust would be needed because there would be no properties left in Mrs Veena Sohal's name. The 2012 Deed was therefore necessary to protect her. I accept that evidence as evidence of at least one purpose in Mr Rajan Sohal in effecting the 2012 Deed transaction. It is consistent with the sales of the properties and with Mrs Veena Sohal otherwise losing such security as she otherwise had for the moneys provided out of them and otherwise to Mr Rajan Sohal and Mrs Pooja Sohal.

186. The effecting of the implementation of the purpose of protecting Mrs Veena Sohal by providing her with security certainly had the result of putting assets beyond the reach of Mr Rajan Sohal's unsecured creditors or of prejudicing them. In my judgment the effecting of that result formed part of the purpose; it was not merely incidental to it. That is because the essence of providing security is to give the recipient priority over unsecured creditors.

187. Hence in my judgment the transaction effected by Mr Rajan Sohal by the 2012 Deed in favour of Mrs Veena Sohal was effected for the purpose of putting assets beyond the reach of a person who is making, or may at some time make, a claim against Mr Rajan Sohal or of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make within the meaning of s.423(3) Insolvency Act 1986.

188. In order to have standing as a 'victim' of the transaction within the meaning of s.423(5) Insolvency Act 1986 Mr Sahota has to be a person who 'is or is capable of being prejudiced by that transfer'?

189. On the figures and valuations mentioned near the beginning of this judgment it is possible that after payment out of the proceeds of any sale of 31 Windsor Road of the sums due to OneSavings Bank and Castle Trust (a total of a minimum of £2,479,987.35) there will be no equity left for Mrs Veena Sohal's beneficial interest under the 2019 Deed (I anticipate by saying that I find below that the 2019 Deed converted Mrs Veena Sohal's interest from an equitable charge to a

> proprietary beneficial interest which took precedence over Mr Rajan Sohal's and Mrs Pooja Sohal's beneficial interests).
> 190. Thus, if the value of 31 Windsor Road is less than the sums owed to OneSavings Bank and Castle Trust (a total of a minimum of £2,479,987.35) Mr Rajan Sohal's beneficial interest in the property would be non-existent, and Mr Sahota's charging order in respect of it would be worthless, whether or not the transaction effected by the 2012 Deed had taken place or Mrs Veena Sohal had an equitable charge over it or a beneficial interest in it. On that hypothesis Mr Sahota would not in fact be prejudiced by the transaction effected by the 2012 Deed. However, although that would be a possible result, depending on the value of the property and the amounts outstanding to OneSavings Bank and Castle Trust from time to time, it is also possible that he would be. Accordingly I consider that Mr Sahota is capable of being prejudiced by the transaction effected by the 2012 Deed and qualifies as a 'victim' within the meaning of s.423(5), albeit that ultimately he may not be prejudiced by it".

139. I note that in paragraph 182, he emphasised that there was no need for the present applicant to have been identified or identifiable at the time of the transaction (and, here, in the case before me, Ms Messalti is a person who was not in contemplation at the time of the transaction); and in paragraph 183 that there only needed to be "a purpose". At paragraph 184, there is included the sentence:

> "Even in the absence of an identified creditor in 2012, that is to say at the time of the transaction, a general intention to put assets beyond the reach of creditors would suffice for the section 423(3) condition to be satisfied".

140. In paragraph 185 he dealt with the facts. In paragraph 186 he seems to have held in simple terms that putting assets beyond the reach of unsecured creditors, and where the intention was to put assets beyond the reach of unsecured creditors, was sufficient to be a prohibited purpose to satisfy "the purpose" requirement of section 423(3) "that is because the essence of providing security is to give the recipient priority over unsecured creditors". I note that in paragraph 187 this was again regarded as being sufficient to be a "purpose" within the meaning of section 423(3). I note that in paragraphs 188 to 189 it was held that the applicant was a victim in the circumstances. I also note that in paragraphs 191 to 193 the judge considered the question of remedy and that it was a discretion, albeit one which in principle was to make the property available for all victims of the transaction.

141. I also note that the judge dealt with limitation in paragraph 195, which I read into the judgment, and appeared to hold that there was a 12-year limitation period, which, since it could not on any basis have started before the date of the transaction, in that case could not be applicable:

> "195. I have already held that the witness signatures to the 2015 Deed were not the signatures of the purported witness and that therefore the 2015 Deed was not in fact a deed. It may have operated as an agreement between Mr Rajan Sohal and Mrs Pooja Sohal as to the beneficial shares in which they owned 31 Windsor Road, but there is no evidence that Mrs Pooja Sohal gave any consideration for that agreement or that she acted to her detriment in reliance on it. Accordingly the agreement did not alter the pre-existing 50:50

> beneficial ownership of the property as between Mr Rajan Sohal and Mrs Pooja Sohal. It is therefore unnecessary to decide whether the 2015 Deed was a sham or should be set aside or otherwise dealt with under s.423 Insolvency Act 1986".

The judge did not actually decide anything, therefore, about the law of limitation in this area, although I have noted what was said there.

142. I note that in *Sohal* the judge also dealt with a later 2019 deed but that was affected by questions of undervalue and resulted in something of a complex remedy being afforded dependant on the facts of that case.

143. I have also taken account of the even more recent decision in *Integral Petroleum SA v Petrogat FZE & Ors* [2023] EWHC 44 (Comm). This judgment was only delivered after the last hearing. I did not raise it with the parties as again I do not feel that it has altered the law in any way or said anything other than appears from the previous cases. I do, however, read into this judgment paragraph 54 of that judgment, which empathises the Court's discretion as to the relief which might be granted and the need to maintain a balance between the interests of creditors and innocent transferees:

> "54. The summary is lengthy, and I will not set it out in full, but it included the following:
> 116. The following are the key legal tests/principles to be applied for the s. 423 case:
> …
> c) When deciding whether SICA, acting by Mr Munn and/or Mr Rees, entered into the Asset Sale Agreement for the Prohibited Purpose:
> i) It is the purpose of SICA which is to be addressed not that of the person who received the benefit (see *Moon v Franklin* [1996] B.P.I.R. 196).
> ii) The question of whether the transaction was entered into by SICA for the Prohibited Purpose must be judged as a decision of fact based on an evaluation of all relevant facts. There may be more than one purpose. It is sufficient to prove that the Prohibited Purpose was a (not the) purpose positively intended rather than a consequence (see *Inland Revenue Commissioners v Hashimi* [2002] EWCA Civ 981; [2002] B.C.C. 943 and *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176; [2019] B.C.C. 96 at [8-16]).
> iii) Insolvency is not a prerequisite, although the financial position may be evidence relevant to the decision of purpose and (depending on the facts) the absence of insolvency may make a Prohibited Purpose unlikely (see *Moon v Franklin* (same) at 198 and BTI 2014 *LLC v Sequana SA* [2016] EWHC 1686 (Ch); [2017] B.C.L.C. 453 at [494], upheld [2019] EWCA Civ 112; [2019] 1 BCLC 347).
> d) As to the relief which may be ordered:
> i) The Court's very wide discretionary powers of relief are required by s. 423(2) to be exercised (a) to restore the position to what it would have been if the transaction had not been entered into and (b) to protect the interests of victims of the transaction (defined by s. 423(5) as 'a person who is, or is capable of being prejudiced by it'). In other words, exercised to achieve restoration to the extent appropriate to protect the interests of creditors (see *Chohan v Saggar* [1994]

B.C.L.C. 706 at 714).
ii) Although the purpose of the relief is expressed within s. 423 to be restoration, where the position cannot be restored in the literal sense, it can be appropriate to require payment of a sum to compensate for the transaction at an undervalue (see *New Media Distribution Co SEZC Ltd v Kagalovsky* [2018] EWHC 2876 (Ch)).
iii) Mr David Phillips Q.C., sitting as a Deputy Judge of the Chancery Division, decided in *Griffin v Awoderu* (23 January 2008) that those requirements for relief exclude the possibility of placing victims '… in a better or more secured position than if the transaction had not been carried out'. In addition, the relief should not 'punish or otherwise prejudice those involved in carrying out the transaction any more than is a necessary and inevitable consequence of restoring the position and protecting victims'.
iv) In *4 Eng Ltd v Harper* [2009] EWHC 2633 (Ch); [2010] B.C.C. 746, Sales J., as he then was, pointed out that the objective of s. 423(2) can be achieved by the exercise of the Court's ' wide margin of judgment [when deciding] what order is appropriate' having regard to the non-exhaustive list of relief within s. 425.
v) In *Akhmedova v Akhmedova* [2021] EWHC 545 (Fam) at [86-87], Gwynneth Knowles J citing *4 Eng Ltd v Harper* (above) emphasised that the relief 'carefully tailored to the justice of the particular case' would depend greatly upon the particular facts and that it may be appropriate to consider whether a respondent still holds the relevant assets or has changed their position even though that would not provide a defence. Such considerations, if relevant, would need to be addressed within the context of the mental state and degree of involvement of the respondent.
vi) Mr Justice Trower in *Re Fowlds* (a bankrupt), *Bucknall and Roach (joint trustees) v Wilson* [2021] EWHC 2149 (Ch) identified three reasons why it may be appropriate to carry out a balancing act between the interests of the creditors or victims of the transferor on the one hand and the transferee on the other. First because although it is a class remedy, ss. 423 – 425 contemplate the potential for individual victims to claim and be compensated with the result that it may be appropriate to strike a balance between the victim and the innocent transferee. Second, the absence of a statutory clawback period. Third that the power to restore and protect is expressed in terms of 'may … make such order as it thinks fit' which is consistent with a balancing exercise".

144. It seems to me like that I still need to return to my basic analysis of asking the questions, firstly, as to when the trust was created. Secondly, as to what its terms purportedly do. Is it illusory or does it remove with beneficial interests from Mr Malik? Thirdly, as to whether both parties to it, that is Mr Malik and Ms Kamran, intended it should have no effect but rather be used to mislead others; that is to say whether it was a sham? Then, fourthly, to consider section 423, asking, firstly, is it a transaction at an undervalue? Secondly, was a real purpose, even if not the only or the dominant purpose, to prejudice persons who were then making or might make a claim in the future against Mr Malik? Thirdly, whether Ms

Messalti is a victim; that is to say a person whose rights are prejudiced by the Property declaration of trust? Fourthly, if all that is the case, then what should the Court do? Fifthly, I need to consider the potential relevance of the law of limitation. The second stage raises (at least in this case) the question of what is the position if a purpose exists that is simply a general one to protect a family asset from future creditors without any particular creditors in mind, and I return to that question below.

145. I have considered all the evidence and submissions in deciding how to answer these questions and to apply this analysis. I mention first again though the position of the children. They seek to be joined and it did not seem to me that Ms Messalti really opposed that and, in any event, as I have already said in this judgment, I proposed to join them. Firstly, because CPR 19.2(2)(b) effectively provides the Court has a discretion where an issue arises which affects not merely the parties to the litigation but those who wish to be joined. Secondly, it is clear that there is a dispute between the children and Ms Messalti with regards to this, and so that CPR19.2(2)(a) is also in point. Thirdly, the reality is the challenges in this case relate to the beneficial interest and that is really an argument between Ms Messalti and the children.

146. The interests of Mr Malik in all this are very dubious indeed because his case is that he has no interest. Mrs Kamran has served a notice of discontinuance. Even if the ordinary rule is that a trustee should defend the beneficial interests of the beneficiaries against a third party such as Ms Messalti, there is an exception generally if the trustee is not prepared to undertake that duty. Mrs Kamran apparently will not, she says she is unable to, but she clearly will not do so. Further, Urwah has now been appointed as an additional trustee of the alleged trust. Fourthly, I had actually already made orders seeking to engage the children and of which they have sought of to take advantage. Fifthly, if I decide in favour of Ms Messalti, the children wish to be able to appeal the decision. It seems to me that as a matter of justice that they, being those who will be affected by a final charging order, should be able to seek to appeal it. Equally, if I decide against Ms Messalti, it seems to me that the children should be able to seek to resist any appeals she may bring. For all those reasons and those given previously, I propose to join them.

147. The first question then before me is as to the date of the creation of the trust. Mr Malik and the children say 10 November 2008. Ms Messalti says it was later in 2016 or if not then probably 2013. She particularly relies on the following matters, firstly, that it was only registered or a registration arising from it only arose in 2013. However, there is no actual obligation to register the Property trust deed. It merely affects equitable interests, and I will come back to that below. Ms Messalti referred to its also not being registered expressly as a declaration of trust, but there was a change to the register effectively reflecting a shift from a joint tenancy situation to a tenancy in common situation.

148. Secondly, Ms Messalti submits that its aim was to try and defeat Sir Robin Wales and other creditors from 2011 onwards, and therefore I should infer that it was only created after those creditors had started to come into existence and were seeking to advance claims and enforcement against the Maliks' side. Ms Messalti refers also as part of her case to the fact that KM Legal Advisory Limited seems to have had significant creditors and to be balance sheet insolvent in 2008. She does also say as part of her case, to which I will revert, that the creation of the trust deed may have had something to do with that.

149. I have considered all the evidence before me and including Ms Messalti's submissions, and I hold that on the balance of probabilities it is more likely than not that the Property trust deed was executed on 10 November 2008, in particular for the following reasons, though I have borne in mind all matters, firstly, that is a date which both it and the 521 Romford Road document bear.

150. Secondly, it is signed by Mr Malik and Ms Kamran with that date clearly set out. Thirdly, it is also signed by the two witnesses with that date. The various signatures of all of those signing have different styles of dating in terms of figures and words and indeed are different between the two documents, the Property trust deed and the 521 trust deed. While that could be suspicious, I feel that it is more likely to suggest that the documents are genuine, and that this is not a technique which a forger and bank dater would be likely to adopt. The two witnesses have not been called to give evidence, but this all took place over 14 years ago and one would not normally expect them to be called.
151. Fourthly, there is a stamp of KM Legal Advisory Limited and a signature of Raju John, who it seems to be accepted common ground was a solicitor, and whom it is inherently unlikely, without more evidence, would be party to such a back-dating.
152. Fifthly, the document was clearly before HHJ Dight in 2015, so it cannot derive from 2016 or later.
153. Sixthly, while Mr Malik could have created the document as a result of worries regarding Sir Robin Wales in 2013, that is speculation. Ms Messalti herself said that Mr Malik, if worried about creditors, could have been perfectly well worried about creditors in 2008 in the light of the then financial position of KM Legal Advisory Limited.
154. Seventhly, the fact that the Property trust deed was not itself registered or noted on the land register has little weight. There is no need to register declarations of trust. They relate only to the beneficial interests and not the legal title. It would take something of the nature of marital disharmony or other justification for there to be particular reason to register it.
155. Eighthly, it is true that that leaves unclear what is the precise genesis of creation of the document, but Ms Messalti herself has provided explanations which are consistent with 2008 and possible fear of creditors.
156. I have weighed all the matters up and I see it as inherently improbable that five people would have combined fraudulently to misdate this document. I find that the Property trust deed, and also, insofar as it is before me, the 521 trust deed, bear their actual dates of creation and execution.
157. The second question is to the effect of the document and whether it really does mean that Mr Malik has given up his beneficial interest by declaring that he holds it on trust for the children. They are two sets of points here which are matters of construction and law and not fact. The first is that the Property trust deed does not identify the property in terms at all. It says that everyone resides at the property, 11 St Clair Road, but it does not say that it is a declaration of trust of it, rather it refers to a schedule and there was no schedule. I accept, as is effectively common ground since that is also said in Mr Malik's statement, that there never was one, especially since there was not one for 521 Romford Road either. Ms Messalti, therefore, submits that as a matter of law that in the light of that the Property trust deed does not affect the Property at all.
158. However, as against this, HHJ Dight declared that the Property declaration of trust relates to the property in 2015. That is a binding declaration of the Court, which has not been sought to be attacked in the County Court. Secondly, it seems to me that that declaration is clearly actually justified by a number of matters. Firstly, the address of each person is given at the beginning as being 11 St Clair Road, which naturally supports a construction of the document that it relates to that property. Secondly, at that point in time, Mr Malik and Ms Karman were joint owners of that property as it says in the recital. There is no suggestion that they joint owned any other property. There is in fact a contrast with 521 Romford Road, which was solely owned by Mr Malik, which is exactly what the 521 trust deed says about it with various consequential provisions flowing from its sole legal ownership.
159. It, therefore, seems to me that, having applied, the usual processes of construction of a legal

document, where the Court considers all the possible meanings, taking into account in particular the words used but also the circumstances which would be known to the parties, and looks at it through the eyes and minds of the reasonable observer and reader, asking simply which is the most likely construction rather than going through a set of constructions and rejecting them one by one; taking into account the words actually used and the factual circumstances that any judge very well could conclude, and indeed should conclude, that the Property declaration of trust related to the Property, 11 St Clair Road. I also note that this document is a document which is not intended to be on the land register and, therefore, evidence from outside can be more easily used to construe it as part of its factual matrix than if it was a document requiring registration.

160. It, therefore, seems to me both that the Property trust deed related to the Property on its proper construction and that that has been put beyond doubt by HHJ Dight's order in 2015, an order which came into existence before the judgment debt in favour of Ms Messalti.

161. Secondly, Ms Messalti submits the document is illusory. She says that its terms result in Mr Malik retaining control of the Property and that the duties section number one makes clear that Mr Malik can live at the Property before and indeed he will also keep on paying the mortgage.

162. She also says that the Property has actually been used by Mr Malik to further borrow from Barclays Bank to fund Mr Malik's payment off of the debt owed to Sir Robin Wales. As to that point, I do not see that I should come to that conclusion, notwithstanding that I place little weight on Mr Malik's denial as it is very unclear as to how he funded the payment, and I am treating his evidence with caution. However, all that the land register shows is a change in the lending entity. It looks much more like an internal transfer of the mortgage between different companies within the Barclays Group.

163. In any event, even if the payment of the debts to Sir Robin Wales was funded from further mortgage over the property, I do not see that that shows that any of the beneficial interest in the Property was in Mr Malik. May J left the final charging order on the Property and in those circumstances, it would have been in the interests of Mrs Kamran and the children to have the final charging order discharged because it was simply binding over the Property which they then regarded as being theirs. Even if the Property was used as security for borrowing for that purpose, that would not mean that Mr Malik in some way or other was able to use the Property generally for his own purposes. I do also note that there was a suggestion that the mortgage could have been used for other purposes such as house improvements. I have no particular evidence either way in relation to that. For all those reasons, it does not seem to me that the question as to whether or not Sir Robin Wales was paid with monies deriving from Barclays makes very much difference.

164. In my judgment, considering the document as a whole, it does create a trust and it is not illusory. There are many clear clauses in it which make absolutely clear that a trust is being declared in favour of the children. The clauses also say the Property is not to be liable for the Husband's own debts, even though it seems to me that paragraph one of the duties section is somewhat odd in this context. It does seem to me that it is clear that it is a full declaration of trust. I should make clear that I do not feel that any right of Mr Malik to live at the Property is anything more than a mere personal right in him. It does not seem to me that the document creates some right that he could assign to other people from that. I conclude that it follows that the Property trust deed does not create or permit the continuance of any beneficial interest in Mr Malik which could be the subject matter of a charging order.

165. The next question is whether the document is intended to be genuine so as to represent Mr Malik and Mrs Kamran's actual intent, or whether it was intended to be a sham to

mislead while Mr Malik retained his beneficial interest. Mr Malik and Mrs Kamran both said that it was genuine in their evidence, but Ms Kamran has not attended to be cross-examined and I have said that I regard Mr Malik's evidence of being of dubious weight. Ms Messalti says the reality was that the intention was that Mr Malik was always to be and remain a joint owner. This is a question of fact. I have considered all the material together, and I do not find that Ms Messalti's case of a sham has been made out. I find on the balance of probabilities that it was more likely than not that an actual declaration of trust was intended both by Mr Malik and by Mrs Kamran, although it would be sufficient if for the document not to be a sham for only Mrs Kamran to have intended that. I consider the burden of proof on issue this to be on Ms Messalti and that she has not made it out.

166. I rely in particular on the following matters, although I have taken everything into account, firstly, the words and the existence of the documents themselves, which at first sight appear to be and say what is intended i.e. a declaration of trust of Mr Malik's interest in favour of the children. Secondly, at the time that it was made, I can see that Mr Malik would expect, as a father of children who were then young and underage, that he would be able to control what they did in practice. That is consistent with an aim of his that, where he had divested himself of the beneficial interest in circumstances where the children were likely to do what he said in the future, it would mean that it would not prejudice him to the same extent as if the children were already adults who might go their own particular way. Thirdly, I will find in due course that there was some intention on Mr Malik's part to protect the Property against future creditors. The best way (subject to section 423) for Mr Malik to do that was to create a real trust and not a fake trust. That would in fact be the best way whether it was created in 2008, as I have held it that it was, or in 2013.

167. Fourthly, while I accept, as Ms Messalti says that there was no attempt to register the document at all until 2013, there was no particular reason why Mr Malik would wish to register it. It would still be a genuine and effective document, as was held to be the situation in *Sohal*. Fifthly, while I accept, as Ms Messalti says, that I do not have the papers from the Central London County Court litigation between Mrs Kamran and Mr Malik, however, from HHJ Dight's order it does look as if Mrs Kamran was actually suing Mr Malik, and Mr Malik was in no way seeking to defend on the basis of there being a sham. HHJ Dight seems to have accepted that the Property trust deed was genuine, although I bear in mind that there does not appear to have been any suggestion before him that it was not.

168. Sixthly, I do not see the Barclays Bank point as really having much weight in favour of Ms Messalti's arguments for the reasons I have already given. Even if money was raised to deal with Sir Robin Wales's charging order that is not inconsistent with the trust where Mr Malik lacked other assets to use to discharge the charging order.

169. I, therefore, do not see Ms Messalti as having discharged what is in fact something of a heavy burden to the effect that this was a sham. It seems to me more like a genuine attempt to create a genuine document to protect against possible future creditors, even though it might mean that they could be deceived in the meantime, although I have no evidence before me to suggest even that. That would not be enough to make it a sham for exactly the same reasons as developed in the *Sohal* judgement.

170. I pass on then to the question of section 423 and Part 16 of the Insolvency Act. I deal first with Mr Malik's attempt, supported by Urwah on 22 December and by all the children on 6 January 2023 to, on 22 December 2022, raise limitation as a defence to the section 423 claim. This was raised for the first time after the end of the oral evidence on the adjourned second day of the hearing with no other warning.

171. This is a procedure which has taken place as part of an enforcement process, but I had

directed the provision of statements of case and limitation was not raised in them. It seems to me that limitation needs to be raised, if it is going to be raised, in a statement of case expressly.

172. That, it seems to me, flows from a number of decisions and matters, but in particular the decision in *Ronex Properties v John Laing Construction Ltd* [1983] 1 QB 398 and the judgment of Donaldson LJ. It is also reflected in the provisions regarding defences in the Practice Direction to Part 16 at paragraph 13.1, albeit that that is in the context of the Civil Procedure Rules Part 7 procedure. However, that merely reflects what is the general law as referred to *Ronex Properties v John Laing Construction Ltd*, and also as referred to in the decision of *Kennet v Brown* [1988] I WLR 582. It is further referred to in the book *Limitation Periods* by Andrew McGee 9th Edition, where reference is made in paragraph 21.014 to an unreported decision of *Lewis v Hackney* 9 April 1990 in which a judge had refused to allow limitation to be raised at the closing argument stage where it had not previously been advanced.

173. It seems to me that Mr Malik and the children need permission to amend their statements of case to be able to raise this argument, and that technically it is permission to amend which is required because I have directed statements of case, but the same principles would apply even if it was only simply an open question as to whether a party or parties can raise a point at this late stage. The general principle is that, while a Court may ordinarily allow amendments, subject to any questions of significant prejudice such as to costs, the Court is very cautious to allow very late amendments such as this. I refer to the guidance given in section 17.3.8 of the *White Book* and the need to balance not only ordinary prejudice but concealed prejudice where a party will have prepared a case on a false basis as well as being in a position of being unable properly to respond, although the Court still has to carry out a balancing exercise as to what is just.

174. Mr Malik and the children say that this is a point of law and Ms Messalti is too late only to have brought a section 423 claim in May 2022, nearly but not quite six years after the judgement debt in her favour and 15 and a half years after the Property trust deed was created. They say they have only learnt of this point of law from the new authorities I provided to them. They say that limitation applies when any proceedings are brought more than 12 years from the declaration of trust; that it to say in November 2008 and even where the charging order application was only brought in January 2021.

175. I have borne all the submissions in mind, but I am not going to allow limitation to be raised in this case in relation to Ms Messalti's claim for the following reasons. Firstly, limitation should, in my judgment, be pleaded where there are statements of case as I have already said. Secondly, the raising of this matter was extremely late, being only at the closing argument stage after all the evidence had been heard. Although the children had only appeared previously to a limited extent; my previous orders, with which they had been provided, made absolutely clear that they were to set out their cases earlier and they had had a full chance to appear at all points. Thirdly, it seems to me that to allow this argument would engage real prejudice to Ms Messalti. She would have prepared the claim on a false basis. She only received the intimation of the argument on the morning of 22 December and would be unable to respond properly to matters which involve complex questions of law.

176. Fourthly, Mr Malik and the children had the authorities provided by me earlier. The included the *Sahota v Sohal* decision which I notified to them on 10 October 2022 being over two months before the hearing of 22 December. There was no need or reason for them to wait until the morning of 22 December to raise this point. I, therefore, refuse the application on the basis of delay alone.

177. However, I should add that it also seemed to me that the question of limitation would not be at all clearcut. It seems to me that the majority of the Court of Appeal in *Hill v Spread Trustee Company Ltd & Anor* appear to say that Ms Messalti would have at least six years from the coming into existence of the debt owed to her and, therefore, she would be in time in relation to her application with regards to the Property on any basis; even if that argument would not exist perhaps in relation to 521 Romford Road where her application in relation to that property was only brought very recently. However, it is the Property, 11 St Clair Road, with which I am concerned in this judgment.

178. I note that the Court of Appeal in *Ablyazov* appears to have proceeded differently and considered the limitation period be likely to run, and indeed perhaps only be six years, from the underlying transaction. The decision and reasoning in *Hill v Spread Trustee Company Ltd & Anor* does not appear to have been considered by them where the question of limitation does not seem to have been as essential to the case before them. The decision in *Sohal* only seemed to suggest that the transaction date was the earliest possible date from which limitation might run, and it did not consider the particular arguments in *Hill v Spread Trustee Company Ltd & Anor* and those before me.

179. If I needed to decide this point, which I do not, I would be inclined to say that the claim would not be limitation barred in any event on the basis of what is said in *Hill v Spread Trustee Company Ltd & Anor*. However, I am merely treating this as a further reason why, even if delay was not enough, I would not allow the point to be raised. In all the circumstances, and in particular where I am concerned that the parties have not had a chance to fully research the limitation point, I am just going to refuse permission to raise it rather than actually deciding that Ms Messalti is within time; although if this matter goes to appeal then it may be that that point may be revisited.

180. The second question is whether this was a transaction at an undervalue. It seems to me that it is clear that it was. This is a question of fact and I find on the balance of probabilities that it is more likely than not to be the case. Although it could possibly be said that the husband, Mr Malik, received some consideration from being able to live at the Property and having the wife seemingly be under responsibility to carry out repairs, it seems to me the evidence is overwhelming that what Mr Malik received was less than what he gave in circumstances where he still had to pay the mortgage and was giving up a beneficial interest, which would have included a right to reside in any event under the provisions of the Trustees of Land and Appointment of Trustees Act 1996, and where the consequence of what he has done is that the Property will belong absolutely to his wife and the children on his death, but where, even while he is still living, his former interest would belong to them. It has not really been suggested to me that this was anything other than a transaction to undervalue.

181. The next question is whether Mr Malik entered into the Property trust deed with a prohibited purpose. It is clear from the case law that it only had to be a underlying purpose to, in Mr Malik's mind, put assets beyond the reach of a person who may at some time make a claim against him or of otherwise prejudicing the interests of such a person in relation to the claim that they may make. It does have to be a real purpose in his own mind, and I do not simply draw an inference as to "purpose" either from what a reasonable person would have thought or even what Mr Malik himself thought would be the consequences of the Property trust deed, since the question is whether he actually both intended and desired those consequences.

182. I have considered all the cases, including *Ablyazov, Wotherspoon* and *Sohal*; but also, as said in both *Hill v Spread Trustee Company Ltd & Anor* and *Sohal*, that, while the eventual victim is said to be Ms Messalti, the victim does not have to be a person within the purpose.

183. I have asked myself as to what was Mr Malik's state of mind on 10 November 2008. Ms

Messalti says, firstly, KM Legal Advisory Limited had creditors in 2008 that Mr Malik would have been worried about. Secondly, Mr Malik knew that he was going to start pursuing a course of action in the commencing various bits of litigation which would result conceivably in costs judgments against him. Thirdly, that the Property trust deed's purpose was to protect against creditors, and both that no other purpose has been suggested and that the Property trust deed's own terms, in particular, duties eight and nine show that the aim was to protect against creditors. Fifthly, she would say that Mr Malik is dishonest and somebody who wishes and wished to avoid creditors and that this would merely have been part of a process of doing achieving those objectives.

184. Mr Malik says, firstly, that he had no personal creditors whatever may have been in the position of his company at that point in time. Secondly, that all of this actually resulted from a suggestion from Ms Kamran that he should give the Property to the children. Thirdly, that what had actually happened was that he had decided to take that suggestion forward in confidence that the children would respect their father in the future, and that all that he had done was ask lawyers at his company to produce a suitable document and then just had signed what the lawyers produced.

185. I asked each of the children as to what they said was the aim of the Property trust deed. They all answered that the aim was to protect them, and I then asked them as to what they considered the protection would be from. None of them were actually able, it seemed to me, to answer that question except in general terms that there was an intention to protect what was truly the family home. They did submit to me that there was no intention to protect against any specific creditor.

186. 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.

187. In coming to that conclusion, I have weighed all the evidence and submissions and considered them holistically, combining all the various matters together and standing back, but bearing in mind in particular the following principal points.

188. Firstly, the Property trust deed itself contains duties eight and nine where duty eight is clearly stating that one effect of the Property trust deed is to ensure that the Husband's, that is Mr Malik's, creditors would be unable to enforce against the Property. It seems to me that duty nine is to the same effect. I have noted Mr Malik says that it was simply standard wording in a draft provided to him; but as against that, firstly, I feel that Mr Malik, as the true head of KM Legal Advisory Limited, did have a greater role at the time than simply instructing others to prepare a suitable document. He was in charge. The document is very homemade. It seems to me that it was a product of actual instructions. Secondly, duties eight and nine are somewhat odd provisions, which it does not seem to me are normal and which are not needed in the ordinary course of events where a trust is simply being declared. I feel that it is more likely than not that they are provisions which were deliberately created and inserted on instructions from Mr Malik that there should be clear protection against creditors of his. Thirdly, Mr Malik accepted that he read through the document before signing it and I feel that he accepted that this was to be an aim of the document. In any event, I consider it to be more likely than not Mr Malik did not merely note these clauses, but actually wanted them and desired them. To go back to the missile

attack example referred to in *Ablyazov*, this is a situation of the military commander who wishes to achieve the military objective but also desired to kill civilians rather than regarding that as being an unfortunate by-product of a different purpose.

189. Secondly, it is very difficult, it seems to me, to see how or why the Property trust deed would have come about if protection against creditors was not a purpose of it. There has been no suggestion by any person before me that there was tax aims such as to reduce the instance of inheritance tax or some other tax liability by removing the asset from Mr Malik's estate. There is no suggestion that the aim was to provide a specific benefit to a child or children such as to give a child a fund to set themselves up in life.

190. Thirdly, the only other suggestion made to me to justify the decision to create the Property trust deed was that Mrs Kamran suddenly proposed for no apparent reason that the family home should go to the children, and that staff of the company had said that that could be done by trust or will, and Mr Malik picked a trust.

191. I treat Mr Malik's evidence as to this very cautiously. The only evidence came from him in cross-examination and was effectively new and, in any event, I treat his evidence with caution. There is no evidence from Mrs Kamran to the same effect and she has chosen not to continue to take part; but it is not in her witness statement. Even if it were right, it is still a situation where Mr Malik chose to divest himself of the beneficial interest in 2008 and no explanation has been given as to why he did not use a will to only do this from when he died. That gives rise to the conclusion in my mind that Mr Malik wished to get rid of the beneficial interest and that the only natural reason, which itself is inherently probable, is that he chose to do that to avoid the Property being available for his creditors, something which the Property trust deed specifically sets out. It may well be that Mr Malik may have felt comforted in taking this step by the Islamic principle that children respect and care for his parents. However, the existence of that principle is neutral to why Mr Malik decided to take this step. It may even render taking the step less prejudicial as far as he is concerned, but there still had to be a set of reasons as to why he actually caused the document to be prepared and executed.

192. Fourthly, the only other explanation given by Mr Malik and the children, apart from to protect against creditors, was "to protect the family home". This gives rise to the rhetorical question as to protect it from what or whom? To which the only apparent answer would be creditors; there being no suggestion of any tax planning to protect against the revenue in relation to inheritance tax.

193. Fifthly, there is also the point of Ms Messalti's that there were then apparent creditors of KM Legal Advisory Limited which put it into balance sheet insolvency. That, however, I have only given limited little weight to, firstly because any suggestion of financial difficulty seems to have been much more apparent some years into the future when prosecutions took place some years afterwards and the winding up was only four to five years later. Secondly, that the debts would only have been debts of the company and not Mr Malik; he only being a director or shareholder. I have seen no evidence of him giving any personal guarantees or the like. Those points also fortify me in my conclusion that the aim was to protect against possible future creditors generally and not specifically.

194. Sixthly, I have noted Ms Messalti's points that Mr Malik was going to engage in a course of litigation conduct which risked and resulted in actual cost judgments. That, however, was a few years away. I do see it in the background as being of some limited support for my conclusion that it is more likely than not that Mr Malik and Mrs Kamran feared future creditors in the light of Mr Malik's future aims and thus are likely to have had thoughts that there might be (future) creditors in the future. I do not see that this gives rise to any fear of any specific creditor or type of creditor, when the only creditors who then seemed to exist

were creditors of the limited company.

195. That though gives rise to a question of law as to whether this is a prohibited purpose within section 423(3). Mr Malik and the children say "No, it is not." They rely on the *Wotherspoon* decision, and they say it is necessary for the person entering into the transaction to foresee then or future creditors in their mind with some specificity (even if only of a general class nature), and that that was not the case here. They say that my finding that there was only a general aim to protect against any possible future creditor but without any individual or type of creditor being contemplated is insufficient. Ms Messalti says it is a prohibited purpose. She says the intention and purpose existed to protect against future creditors who were seen as a real possibility. She relies on *Sohal*.

196. In relation to this I again bear in mind the words of the statutory section 423(3) as the relevant purpose being one of "putting assets beyond the reach of or for prejudicing the interest of a person who may at some time make a claim against him".

197. It seems to me the decision in *Hill v Spread Trustee Company Ltd & Anor* is of some relevance where I note that in paragraph 111, Arden LJ says the policy of the section is to cover a situation where a person enters into the transaction "in case he becomes unable to pay his debts" as they fall due later and "(as where a person is about to enter a new and risky business venture)". Mr Malik would say that even for that to apply there needs to be a specific venture and hence specific creditors contemplated, albeit that it would be all very inchoate. Ms Messalti would say that in light of that wording it does not matter that creditors are entirely unidentified; that the policy of the section is said by Arden LJ to extend to where somebody feels that they are under a sufficient risk in life to justify taking the step to protect themselves against or protect their assets against future creditors, and indeed that the policy of the section extends to a situation where a person is effectively making themselves judgment proof and freeing themselves up to act in a risky way as Mr Malik ultimately did.

198. The cases immediately following *Hill v Spread Trustee Company Ltd & Anor* do not seem to have considered this point because it did not arise on their particular facts.

199. As far as the *Wotherspoon* decision is concerned that decision is not binding on me being simply a decision of an ICC judge who is the same level of judge as I am. I do bear in mind very much though the contents of that judgment and in particular paragraphs 115, the context being that there was no creditor in the person's mind; 119, that the person was not considering being unable to pay creditors; and as was again repeated in 120, that the person did not have any relevant creditor in mind. I have borne in mind in particular paragraph 117 that there was then no foreseeable type of creditor who might make a claim and the specific statement of the judge "that it had to be in his mind creditors to whom in the future he would be unable to make payment and who may make claims", and then paragraphs 108 to 111.

200. In one sense the reasoning in the judgment is clear that for a person to enter into a transaction just because they want to protect their assets is not enough if there are no potential future creditors or class of potential future creditors in mind. However, I do come back to the question as to what then is the person seeking to protect their assets against. In those circumstances it could only be future creditors, and it seems to me that the judge may not have fully engaged with that point. It is actually possible to see that judgment as just being on the facts i.e. there was simply no real thought about future creditors but simply something entirely vague, rather than laying down a position of law that a general desire to protect is not sufficient to amount to a prohibited purpose unless it is to protect against specific envisaged creditors (whether particular individuals or of a contemplated class). Nevertheless, the *Wotherspoon* decision does contain statements which are inconsistent

with what I find to have been Mr Malik's general purpose being sufficient to satisfy section 423(3).

201. I do, however, also have to consider the *Sahota v Sohal* decision. That also it is not binding on me being merely a decision of a Chancery Master, again a judge as the same level as me. It seems that the *Wotherspoon* was not cited to Deputy Master Henderson in *Sohal*.

202. I have borne in mind in particular paragraphs 182 to 187 of that judgment. That judgment does affirm the simple test in *Ablyazov*. It makes quite clear in paragraph 184 that Deputy Master Henderson considered "a general intention to put assets beyond reach of creditors would suffice". It seems to me that the judgment can clearly be seen as stating that a general intention to protect against future creditors is sufficient. It might be possible to confine it to a situation where there were creditors already at that point in time, which is not the situation before me, though it does not seem to me that that is really the force of what the Deputy Master says.

203. I, therefore, have ICC Jones in one direction apparently stating that the mere general intention to protect against future creditors (not identified specifically or by class and where none presently exist) is insufficient and Deputy Master Henderson apparently stating that it is.

204. 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.

205. I have considered all the material but in particular the following, firstly, the statutory words simply say, "a person who may make a claim". That covers a general intention in relation to any future creditor. It does say "a person", which may suggest some specificity is required, but Arden LJ in *Hill v Spread Trustee Company Ltd & Anor* seems to say that it applies to future claims and future creditors generally, and that goes against specificity being a requirement. Secondly, the statutory policy is to prevent someone engaging in a transaction at an undervalue to make themselves judgment proof against future creditors. It seems to me that that policy does not require an intention to protect against any specific creditor or class or creditors. It simply prohibits that purpose and renders such a transaction, such a route of making oneself judgment proof, something which can be challenged.

206. Thirdly, the statute enables any victim to complain whether they were within the purpose or not. It seems to me that that affords some support for the policy of the statute being that if future creditors are to be prejudiced generally and that that is the intention, then any future creditor should be able to attack the transaction. Fourthly, while I accept that my conclusion as a matter of law potentially makes life very difficult for those who are the recipients of gifts and even purchasers who may be concerned that there is a transaction at an undervalue, they are protected to a substantial degree by the Court's discretion as to what remedies to grant; see *4Eng Ltd v Harper & Ors* and *Integral Petroleum SA v Petrogat FZE & Ors*. A donee who has received a gift may well be able to succeed against a creditor if they have suffered some detriment or engaged in some change of position, or even if there is simply such a delay as to give rise to a limitation defence or it being inequitable for a creditor to be able to claim.

207. Fifthly, it seems to me that this is consistent with what was said in *Hill v Spread Trustee*

Company Ltd & Anor. I do not see any particular difference between someone entering into a transaction because they contemplated in the future engaging in a risky business and someone entering into a transaction because they think they would like in the future to be able to enter into a risky business without their families' assets being enforced against.

208. Sixthly, it is possible to explain *Wotherspoon* on the basis of a finding of fact that there was no purpose of prejudicing any creditors at all.

209. In any event, I find the principle of law, insofar as stated in *Wotherspoon*, to be slightly unsatisfactory in terms of its reasoning because the judge does not explain against who the intended protection was to be afforded. Further, the *Sahota v Sohal* decision goes in exactly the opposite direction. While I note in relation to *Sahota v Sohal* that *Wotherspoon* was not cited and also that there may have been, as a matter of fact, existing creditors when the transaction was entered into in *Sahota v Sohal*, it seems to me that the reasoning is persuasive as being a simple application of the words used in the statute.

210. Finally, I come back to the point that if this situation was not within the prohibited purpose wording, then Mr Malik will have been enabled to do exactly what at first sight the section is designed to prevent, namely to give away his assets so as to become judgment proof so as then to be able to incur debts, in particular in this case to Ms Messalti, in circumstances that she will not have the asset which he previously held available to enforce against.

211. I, therefore, conclude that what I found to be an actual purpose of Mr Malik to protect the Property from the claims of any future, and indeed for that matter any existing, creditors, even where there were none specifically in mind, whilst not specifically contemplating incurring debts to future creditors but wanting to have the freedom to do so without enabling those future creditors to enforce against the Property, to be a prohibited purpose within the meaning of section 423(3).

212. The next question in those circumstances is whether Ms Messalti is a "victim" for the purposes of the litigation. It seems to me to be clear from all the case law that she is still a victim, even if the purpose was only to put the asset beyond the reach of other creditors. I do find as a fact, as was clear on the evidence and was not contested, that Mr Malik, while he might have had an intention to bring libel cases, had no specific intention or contemplation to bring any libel case against Ms Messalti in circumstances where Mr Malik, at that point in 2008, had never heard of Ms Messalti; had not at that point been convicted in any criminal offenses; and believed that he was acting lawfully in his business or at least would not be prosecuted; and could not have contemplated what subsequently happened regarding Ms Messalti. Nonetheless, in law, as a result of what is set out in the various cases, Ms Messalti, in circumstances where she cannot enforce her debt as Mr Malik does not have assets in his own name, is, as a result of the transaction and the transferring of Mr Malik's beneficial interest in the Property is a victim for section 423 purposes because she has been prejudiced by the Property trust deed, which results in her being unable to enforce her debt against the Property, and where there are no other assets available to satisfy her judgment debt.

213. The next question though is to what I should do, which I also find to be a difficult question. Ms Messalti only wants her charging order. She says, and I accept, it not having been contradicted, that the £21,000 debt represents the expenditure of her life savings in defending litigation against her, which litigation obviously lacked any foundation or merit. The children say, as I also find is to be obvious and not sought to be contradicted, firstly, that they knew nothing of Mr Malik's conduct. Secondly, that they did not assent to it and do not approve of it; and, thirdly, that this is the family home and has been their home for, in the case of some of them all, and of others, much of, their lives and that they would be very much prejudiced if it were to be sold to pay this debt.

214. However, I also have to bear in mind, firstly, that the application is deemed by section 424(3) to be brought by Ms Messalti on behalf of all victims, it is a class right. Secondly, that there is material before me that there are other potential victims, especially the County Court claimant in the Mayors and City litigation where they have costs orders for more than £150,000, even though it is expected to be subject to appeal. The *4Eng Ltd v Harper & Ors* decision asserts that the natural order for me to make would be to reverse the transaction, the Property trust deed, but I do bear in mind paragraph 13 of the judgment that I should balance all interests, including the mental state of the transferee. That would include Mrs Karman who had some knowledge of the aim, but also those who are the transferees in reality, being the children, who did not.

215. I also need to balance how matters have moved on. For over 14 years the family home has been subject to a deed which renders only Ms Kamran and the children its owners in reality. I also bear in mind paragraph 14 of the *4EngLtd* judgment, which gives examples of where it may be appropriate not to order repayment or undoing, even though paragraphs 14(2) and 14(3) say that that ordinarily would be the appropriate order at least. I also bear in mind paragraph 16 of the judgment that all depends on the facts, and also the paragraphs I quoted from the *Integral Petroleum SA v Petrogat FZE & Ors* judgment that the Court has a wide discretion to be excised in accordance with the statutory purpose and justice.

216. In all the circumstances I decide as follows. What I am going to do is to order that sufficient of the beneficial interest in the Property should revert to Mr Malik to fully satisfy the charging order, and not only the underlying capital debt but also any interest or costs in relation to the underlying debt or the charging order or any appeal or any enforcement process (e.g. an application for sale) of the charging order, and that the final charging order is made final over that beneficial interest and will secure all of those matters. I stress that the making of a final charging order does not necessarily mean that the Property would be sold. That would be the subject of an enforcement application where different considerations arise.

217. Secondly, I am going to provide that any other victim of the Property trust deed, who is prevented by reason of these proceedings, and this is protective only as I am not actually intending by this order for it to have any preventative effect, but I can only decide that insofar as I have power to do so, from seeking to bring their own claim under section 423 in relation to the Property trust deed, should have permission to apply, subject to the law of limitation, in these proceedings.

218. I am also going to provide that this order should not be sealed by the Court for a period of two months and the time to appeal this order will be extended to 28 days from the expiry of two months from today, or rather two months from slightly after today.

219. My reasons are as follows. I take into account all the above but especially the following matters. Firstly, Ms Messalti is a clear victim for the purposes of the law and who has brought the claim and whose claim in relation to the Property (her claim in relation to 521 Romford Road is different) cannot be subject to a limitation challenge (see above). Secondly, I accept that Ms Messalti has lost her life savings from a claim made by Mr Malik which seems to have lacked any merit at all, and which was rightly struck out, and which life savings are now effectively represented by the costs order made in 2016. That event took place within a reasonable time of the transaction whose purpose was to safeguard the Property from future creditors, and where Ms Messalti is a future creditor.

220. Thirdly, Ms Messalti's monetary claim, as far as she is concerned, is large as far as her own financial resources are concerned, but it does not seem to me that it is likely to be a large claim in terms of the value of the Property or for that matter 521 Romford Road. I have no valuations of those properties, but they seem to be significant properties located in London.

221. Fourthly, I have balanced against this the facts that. Firstly, the children are innocent, albeit they derived their interests through Ms Kamran who was at least somewhat involved in the prohibited purpose. Secondly, that this has been the family home of the children for the majority and in some cases all of their lives. Thirdly, that the Property declaration of trust can be seen now as being old in terms of being over 14 years ago.

222. Fifthly, it seems to me that Ms Messalti should have the transaction undone sufficiently to protect her. I said she is a clear victim for these purposes and has brought the claim, it seems to me, within a reasonable time for such that I have not allowed any limitation argument to be advanced.

223. It seems to me that as far as Ms Messalti is concerned, there is nothing to take this situation out of the ordinary rule as laid down in the *4Eng* case that the transaction should be undone. However, on the other hand, it seems to me that any other creditors, including those who have the benefit of the £150,000 or more County Court judgments, may be in a different position. Firstly, it is possible that their claims, if they brought one, would be barred by the law of limitation. I do not decide that question in any way but it seems to me that there would be something of an incongruity if an out of time victim would gain protection simply because a different in time victim has brought a claim. That may be the general rule and a general situation arising from what is a class remedy, but it seems to me that it ought to be capable of being tested on the facts of the particular case rather than by my at this point simply reversing the Property trust deed. Secondly, I have no real knowledge of other creditors' debts and the basis of them or as to how or when they arose. Thirdly, that to undo the Property trust deed transaction entirely could potentially prejudice the children against Mr Malik where the effect of the declaration of trust is clear that as between the children and Mr Malik the Property belongs to the children.

224. In all those circumstances, conducting the balancing exercise, the essential aim of my order is, firstly, not to actually prejudice the other victims but, secondly, not to actually improve their position. My aim is to avoid predetermining what would be the result of the balancing exercises, and indeed whether or not they actually have rights, but to leave that to another day. I do that in particular by, firstly, having this initial two-month period during which I am going to provide that this order should not be sealed. That will give an opportunity, if they wish to engage in it, for Ms Messalti on the one side and the children and Mrs Kamran on the other side to actually to seek to do some deal to achieve a negotiated settlement. Ms Messalti will have the benefit of the order but be aware that there may well be an appeal against my decision which will involve what in my mind anyway is a very difficult question of law.

225. If the order is never sealed, because some agreement is made between them which replaces it with something else, then it seems to me that the other possible victims of what has occurred will simply have to, if they wish to, bring their own claim at another time. However, if this order is to be sealed, I will have given a substantial period of time for an appeal which will have enabled everyone to consider whether and how this should proceed.

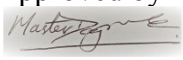
226. If my order can properly provide that other victims bring their claim by separate litigation, then in those circumstances it will be possible for the children to challenge any such litigation, both on limitation grounds and by re-raising the questions of law and fact which have been canvassed in this litigation.

227. If that is not possible, then those victims will not be prejudiced insofar as they can make an application in this litigation. At least then the question of limitation and passage of time will be dealt with.

228. I do also make clear that I will grant the children and Mrs Kamran permission to appeal on at least the questions of law, which arise in this particular case, as it seems to me that there

is at least one very difficult and arguable question of law which exists and if I grant permission to appeal on one matter, then I am likely to grant it in relation to others as well.

Approved by Master Dagnall


17.3.2023

End of Judgment

Transcript from a recording by Ubiqus
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Ubiqus hereby certify that the above is an accurate and complete record of the proceedings or part thereof