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BR 2018 000655

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF ANN STEPHANIE HURST
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice 7 The Rolls Building Fetter Lane London EC4A 1NL

Date: 26/08/2022

Before :

ICC JUDGE BARBER

- - - - -
Between :

PAUL ALLEN

(As Trustee in Bankruptcy of Ann Stephanie Hurst)

Applicant

- and -

**(1) ANN STEPHANIE HURST (IN
BANKRUPTCY)**

Respondents

(2) ROBERT ALFRED HURST (IN BANKRUPTCY)

(3) FIONA SARAH BOROSHEK

(4) PETER ADAM HURST

(5) CAROLINE JOANNA HURST

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Mr. Andrew Mace (instructed by Kingsley Napley LLP) for the **Applicant**

The First and Second Respondents appeared in person

Mr. Daniel Warents (instructed by Longmores Solicitors) for the **Third, Fourth and
Fifth Respondents**

Hearing date: 17 June 2022
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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be sent to The National Archives for publication. The date and time for hand-down is 10 a.m. on 26 August 2022.

ICC Judge Barber

1. At a hearing on 17 June 2022, I granted a declaration that a declaration of trust entered into on 19 June 2009 by the First and Second Respondents in favour of the Third, Fourth and Fifth Respondents ('the Declaration of Trust') in respect of the beneficial interest in a freehold property known as 73 Southway London NW11 6SB registered in the names of the First and Second Respondents at HM Land Registry under Title Number NGL369279 ('the Property') constituted a transaction at an undervalue which was entered into by the First and Second Respondents for the purpose of (a) putting assets beyond the reach of a person who was making or might at some time make a claim against them, or (b) otherwise prejudicing the interests of such a person in relation to the claim which he was making or might make, within the meaning of s.423 of the Insolvency Act 1986. I granted the declaration on the basis that written reasons would follow. This judgment sets out my reasons for that decision.

Introduction

2. This is the Applicant's application for an order under s.423 of the Insolvency Act 1986 to set aside the Declaration of Trust in respect of the Property which he maintains was entered into for the purpose of putting assets beyond the reach of creditors. The Declaration of Trust was made by the First and Second Respondents ('Mr and Mrs Hurst') in favour of their children, the Third, Fourth and Fifth Respondents ('the Beneficiaries').
3. Prior to the hearing before me, the Beneficiaries by their solicitors' letter dated 8 June 2022 formally admitted that the requirements of s.423(1) and s.423(3) of the Insolvency Act 1986 were satisfied in respect of the Declaration of Trust. The Beneficiaries take issue only with the relief sought by the Applicant, contending that, as the total sum required to cover all debts, costs and expenses of the bankruptcy plus statutory interest is considerably less than the value of the equity in the Property, the Court should not order that the Declaration of Trust be set aside, but should instead order payment by the Beneficiaries of a monetary sum, such sum to be secured on the Property pending its sale. In contrast, the Applicant seeks an order setting aside the Declaration of Trust, together with orders for possession and sale. The issue of what further relief (over and above the declaration already granted) the Court should grant has been adjourned to a later hearing.
4. Mr and Mrs Hurst initially opposed the s.423 claim in its entirety and filed evidence in opposition. Prior to the hearing before me, however, Mr and Mrs Hurst formally withdrew their witness statements in opposition. The hearing before me therefore proceeded on the Applicant's written evidence alone.
5. During the course of the hearing before me, having heard the Applicant's submissions on the evidence, Mr and Mrs Hurst each also conceded that the requirements of s.423(1) and s.423(3) of the Insolvency Act 1986 were satisfied in respect of the Declaration of Trust.

6. It follows that, save as to remedy and costs, the application now comes before me unopposed.

Evidence

7. For the purposes of this hearing, I have read the first and second witness statements of Paul Allen dated 11 February 2021 and 21 May 2021 and their respective exhibits.

Background

8. Mr Hurst is a solicitor. Until 31 October 1990, he was a partner of Malkin Janners. In 1992, he started High Court proceedings against his former partners (the ‘Malkin Janners Action’). His claim was dismissed by Carnwath J in April 1995. His appeal to the Court of Appeal was dismissed in 1997.
9. One of Mr Hurst’s former partners, Nicholas Treppass, obtained costs orders against him which were secured by charging orders dated 18 October 1995 and 17 April 1997 and a caution over the Property. In 1997 Mr Treppass commenced proceedings against Mr and Mrs Hurst (Ch 1997 H No 1715) seeking inter alia orders for possession and sale of the Property.
10. Following his defeat in the Court of Appeal in 1997, Mr Hurst found himself in financial difficulty. At that stage, he had three dependent children under the age of 21. His mother, Hanna Hurst (‘Mrs Hurst Senior’), provided some financial assistance. Mr Hurst has stated in correspondence with the Applicant that he believed the sums contributed by Mrs Hurst Senior over the years to have been in the approximate region of £300,000. He sent the Applicant’s solicitors a handwritten note, which he maintains was prepared by his brother-in-law David Green, said to list some of the payments. The note is included in the exhibit to the Applicant’s first witness statement. Its authorship is not confirmed in evidence by Mr Green and there is no indication in evidence of the information on which the list of payments set out in the note is based. The payments listed in the note span from 17 November 1997 to 26 June 2006 and total approximately £300,000. Of that total, approximately £190,000 of the sums listed bear dates prior to 12 April 2001, the date that Mr Hurst was made bankrupt. Only one of the sums listed, a sum of £7863.23 said to have been paid on 26 July 1998, is expressly described as a payment to a building society.
11. To return to the chronology: on 30 March 2000, Mr Hurst’s subsequent appeal to the House of Lords in the Malkin Janners Action was dismissed.
12. On 21 June 2000, four of Mr Hurst’s former partners presented a bankruptcy petition against him.
13. On 25 September 2000, Mr Treppass obtained a possession order and an order for sale of the Property in proceedings numbered Ch 1997 H No 1715. On 8 February 2001, Mr Treppass successfully applied for a writ of possession to be issued in respect of the Property, pursuant to the possession order which he had obtained in September 2000.
14. On 14 March 2001, Mr Treppass entered into a Deed of Settlement with Mr and Mrs Hurst (‘the Deed of Settlement’). Among other things, this provided:

- (1) for Mr Hurst not to take any further steps in the charging order proceedings and possession/sale proceedings and not to commence any further proceedings against Mr Treppass relating to the partnership Malkin Janners;
 - (2) for Mr and Mrs Hurst to grant Mr Treppass a legal charge over the Property to secure various sums agreed by the Deed of Settlement to be payable to Mr Treppass in respect of the charging orders of 1995 and 1997 and certain other costs orders; and
 - (3) for Mr Treppass not to take steps to execute the writ of possession for 6 months, subject to the proviso that Mr and Mrs Hurst complied with their obligations under the Deed of Settlement.
15. On 15 March 2001, Mr and Mrs Hurst executed a legal charge over the Property in favour of Mr Treppass, pursuant to the Deed of Settlement ('the Legal Charge'). The total 'debt' secured by the Legal Charge was defined as £74,000. This related to the sums secured under the 1995 and 1997 charging orders together with certain costs orders. The 'payment day' was defined as 14 June 2001 or earlier sale of the Property. The Legal Charge contained a joint and several covenant by Mr and Mrs Hurst to pay the 'debt' with interest on the payment day. The charge was registered at HM Land Registry on 26 March 2001.
 16. On 12 April 2001, Mr Hurst was made bankrupt on the petition of four of his former partners. He had attempted to stave off bankruptcy by applying for an interim order with a view to pursuing an IVA, but his application for an interim order had been dismissed. The bankruptcy order would impact to an extent on the Deed of Settlement and the Legal Charge (as post-presentation events under s.284), but only (i) insofar as the same involved a disposition of Mr Hurst's property in the period between presentation of the bankruptcy petition and the vesting of his estate in his trustee in bankruptcy (ii) subject to the provisions set out in ss.284(4) and (6) and (iii) subject also to the court's powers to validate any disposition under s.284. The original charging orders obtained by Mr Treppass (in 1995 and 1997) pre-dated presentation and were not affected by s.284. Any costs orders made against Mr or Mrs Hurst in Mr Treppass's favour were not affected by s.284 either, as the section only bites on dispositions of property.
 17. Mr and Mrs Hurst did not pay Mr Treppass 'the debt' by the payment day of 14 June 2001 prescribed under the Legal Charge.
 18. In the autumn of 2001, Mr Hurst applied unsuccessfully for a stay of the possession order obtained by Mr Treppass. His application was refused by Master Bowles on 14 September 2001 and again by Neuberger J on 24 September 2001.
 19. In order to avert repossession and sale of the Property at this stage, Mrs Hurst Senior offered to help. Having taken advice from her own solicitors, in March 2002, Mrs Hurst Senior agreed to pay Mr Treppass the sum of £54,549.03 in return for an assignment to her of the 1995 and 1997 charging orders. Under the terms of the deed of assignment dated 25 March 2002 ('the Deed of Assignment'), Mr Treppass agreed (inter alia) not to take any steps to enforce his remaining rights (if any) under the Deed of Settlement or the Legal Charge until after 11 October 2002, but without prejudice to any arguments as to the validity or effect of those documents.

20. On 6 October 2003, Mr Hurst's first Trustee in Bankruptcy, Anthony Supperstone of BDO Stoy Hayward ('the First Trustee') issued an application for an order for possession and sale of the Property against Mr and Mrs Hurst. Mr and Mrs Hurst opposed the application. On 21 December 2004, the First Trustee obtained an order for possession and sale of the Property, together with a declaration that the Property was held beneficially 50:50 as between the First Trustee and Mrs Hurst, subject to a relatively small equity of exoneration in favour of Mrs Hurst.
21. Mr and Mrs Hurst sought to challenge the order for possession and sale on numerous occasions, without success. On 17 January 2005, Mrs Hurst appealed against the order, represented by Mr Hurst, but the appeal was dismissed. Mr Hurst then on 6 September 2005 applied for a stay of the order for possession, on the basis of a negligence claim that he had issued against BDO, contending that if the claim was successful, he would be able to buy out the First Trustee's interest in the Property. The basis of the negligence claim was that the First Trustee (when acting as nominee) should have suggested that the equity in the property available might be less than 50% in a bankruptcy, and that an equity of exoneration would arise. It was argued that had the First Trustee (as nominee) done so, the court would have made an interim order, the IVA would have succeeded and Mr Hurst would not have been made bankrupt. Mr Hurst's stay application was adjourned pending the determination of a strike out/summary judgment application brought in respect of the BDO negligence claim.
22. On 10 October 2005, Master Moncaster struck out Mr Hurst's claim against BDO, concluding (at paragraphs 26 and 31 of his judgment) that the allegations of negligence were hopeless and further that the alleged negligence could not in any event be causative of the loss alleged. Mr Hurst appealed but the appeal was dismissed by Peter Smith J, who commented (at paragraph 62 of his judgment) that it could not be said with any credibility that the petitioners would have allowed an IVA to go ahead.
23. Following the strikeout of the BDO claim, Mr Hurst's application for a stay of the possession order obtained by the First Trustee came back before the court for determination. At that stage, a further stay of possession was sought, both on the basis of an appeal against the strikeout, and a further set of proceedings which had been commenced against BDO. In the second set of proceedings, Mr Hurst alleged negligence based on a refusal by the First Trustee to pursue a claim for partnership accounts. The court refused the stay application, which decision was upheld on appeal by Warren J on 31 October 2005.
24. On 16 February 2006, Warren J refused another application to stay the possession proceedings based on Mr Hurst's appeal against the decision of Master Moncaster to dismiss the first BDO claim. The judge emphasised that Mr Hurst had a very weak case which was bound to fail, as Peter Smith J subsequently confirmed. On 17 February 2006, Warren J dismissed a further application by Mr Hurst for a stay on the basis that it was the same application that he had dealt with the day before.
25. On 24 February 2006, Mrs Hurst made an application to Registrar Rawson to stay the possession order, based (in part) on a claim that she had issued against BDO. That claim was based on alleged misrepresentation or negligence, said to arise out of

documents that Mrs Hurst had signed for the purpose of advancing Mr Hurst's IVA proposal.

26. No stay was granted on the basis of Mrs Hurst's claim against BDO. Only a short stay (of 10 days) was allowed by Registrar Rawson, based on the illness of Mrs Hurst's mother at the time and the difficulties that this was causing her.
27. On 10 May 2006, a further stay application was made by Mrs Hurst based on her misrepresentation/negligence claim against BDO (which at that time had not yet been struck out). That application was refused by Registrar Jaques on 17 May 2006. On 19 May 2006 (the day on which the bailiffs had been instructed to take possession of the Property), three applications by Mrs Hurst were heard seeking to stay the possession, including an application before Rimer J. None succeeded, and the First Trustee obtained possession of the Property. Mr Hurst subsequently sought a review of the decisions of Registrar Jaques and Rimer J (refusing to stay the possession). This was refused by Registrar Jaques, who described the attempt at review as 'hopeless'.
28. Once possession had been obtained, Mrs Hurst offered to purchase the First Trustee's interest in the Property. Her initial offer was not accepted. In June 2006, Mr Hurst sought to challenge the First Trustee's decision under s.303 of the Insolvency Act 1986. That application was dismissed by Warren J who in his judgment of 8 June 2006 described the application as 'wholly without merit'.
29. In July 2006, Mrs Hurst's negligence/misrepresentation claim against BDO was struck out by Master Bragge. Mrs Hurst appealed against that decision but failed. Warren J described certain points run by Mrs Hurst on appeal as 'completely unarguable', observing that none of the representations alleged to have been made had been made (see paragraph 52 of Warren J's judgment).
30. In the meantime, the First Trustee, who had found a purchaser for the Property, had to apply back to court for a further order, relating to execution of the conveyance. David Richards J granted that order and dismissed an application by Mrs Hurst (which the learned judge treated as an application akin to a s.303 application) to challenge the First Trustee's decision to sell.
31. Ultimately, Mrs Hurst made an offer to the First Trustee which matched the third party's offer. On 9 August 2006, the First Trustee sold his interest in the Property to Mrs Hurst for the sum of £257,603. At this stage the charging orders and caution in favour of Mrs Hurst Senior remained registered against the Property, as did Mr Trepass's Legal Charge.
32. Later in 2006, Mrs Hurst's mother died.
33. In February 2007, Mr Hurst applied for a review of the order of David Richards J, alleging that the First Trustee had misled the court. That application was rejected by Lindsay J on 13 March 2007.
34. In the same month (March 2007), Mr Hurst commenced further proceedings against Mr Trepass, seeking inter alia to have the Legal Charge set aside ('the 2007 Action'). Mrs Hurst joined the 2007 Action as Co-Claimant in 2008.

35. In October 2007, Mr Hurst issued another s.303 application against the First Trustee, seeking to challenge the First Trustee's conduct on two grounds: first, as to whether a life insurance policy fell within the estate, and secondly whether the First Trustee should have obtained the opinion of leading counsel on the prospects of a claim against Mr Hurst's former partners. In January 2008, Registrar Simmonds dismissed the s.303 challenge as 'totally without merit'. The question of whether a limited civil restraint order applicable to the bankruptcy proceedings only should be made was adjourned in order to give the First Trustee an opportunity to prepare and bring an application for an ECRO if so advised.
36. In March 2008, Briggs J refused permission to appeal against the decision of Registrar Simmonds and declared the application for permission to appeal against the decision not to seek the opinion of leading counsel as being 'wholly without merit'.
37. Mrs Hurst then issued further proceedings against the First Trustee, which were litigated on her behalf by Mr Hurst. On 2 May 2008, Mrs Hurst issued a claim for (i) rescission of the court's orders of 17th and 19 May 2006 (ie those of Registrar Jaques and Rimer J refusing a stay of the original possession order obtained by the First Trustee) (ii) rescission (on the grounds of misrepresentation, duress and undue influence) of the deed entered into between Mrs Hurst and the First Trustee whereby the First Trustee's interest in the Property was transferred to Mrs Hurst (iii) reimbursement of the sum paid pursuant to that deed and (iv) damages and interest.
38. Mrs Hurst's claim against the First Trustee was struck out by Deputy Master Behrens on 17 September 2008, who concluded that the claim was 'wholly without merit' and 'bound to fail'. At that stage, a limited civil restraint order was made against Mrs Hurst. Notwithstanding this, Mrs Hurst wrote to the court on 22 September 2008 to state that she proposed to seek to amend the particulars of claim to plead fraud against the First Trustee. An appeal against the strikeout decision was refused both on paper and orally by Arnold J on 20 October 2008 and 4 December 2008 respectively.
39. On 9 January 2009, the First Trustee issued an application seeking extended civil restraint orders ('ECROs') against both Mr and Mrs Hurst ('the Supperstone Proceedings'). A hearing was listed for 9 June 2009. Mr and Mrs Hurst were served with the application and the evidence in support on 12 January 2009.
40. In the meantime, Mr and Mrs Hurst were still litigating against Mr Treppass. Over the period 2007 to 2009, there had been a variety of interlocutory skirmishes (including strikeout applications and applications for summary judgment either way) and appeals from orders made in those applications in the 2007 Action. In the interest of brevity, I shall not attempt to summarise them all. Suffice it to state that, by June 2009, Mr and Mrs Hurst had not managed to rid themselves of Mr Treppass's defence or his counterclaim and were facing the prospect of trial.
41. On 3 June 2009, Master Bragge ordered that the 2007 Action be listed in a trial window of 1 February 2010 to 20 April 2010 and required Mr and Mrs Hurst to attend the Clerk of the Lists to fix a trial date no later than 30 June 2009.
42. A few days later, on 9 June 2009, in the Supperstone Proceedings, Mr Bernard Livesey QC, sitting as a judge of the High Court, granted ECROs against both Mr and

Mrs Hurst for a period of two years. The learned deputy judge also ordered that Mr and Mrs Hurst pay 85% of the First Trustee's costs.

43. By the time of the hearing before Mr Livesey QC in June 2009, the litigation pursued variously and jointly by Mr and Mrs Hurst against the First Trustee and BDO had led to costs orders being made in favour of the First Trustee and BDO 'in excess of £120,000 (of which approximately £60,000 have already been the subject of assessment by the Court)': Bernard Livesey QC's judgment at [41].
44. As a result of the Supperstone Proceedings, further costs were awarded against Mr and Mrs Hurst. Mr Hurst was already bankrupt and there were insufficient funds in his estate to cover the First Trustee's costs. With the ECROs now firmly in place for a period of two years from 9 June 2009 to 9 June 2011, the ability of Mr and Mrs Hurst to 'buy themselves time' before enforcement of existing costs orders made in favour of the First Trustee and BDO by appealing existing orders and/or issuing fresh proceedings and seeking a stay pending determination of the same was severely restricted.
45. Ten days later, on 19 June 2009, Mr and Mrs Hurst executed the Declaration of Trust. There is no evidence before me to suggest that the Beneficiaries knew of its execution at the time and absent any such evidence, on the evidence as a whole I consider it legitimate to conclude that they did not. According to a retrospective valuation of the Property as at 19 June 2009 in the evidence before me, the accuracy of which was not contested and which I accept, as at 19 June 2009, the Property was worth £1,300,000.
46. On 20 June 2009, Mrs Hurst Senior signed certain Land Registry forms to remove the charging orders and caution registered in her name against the Property.
47. Shortly thereafter, on 9 July 2009, Mr and Mrs Hurst issued a further application for summary judgment in the 2007 Action. This was not their first summary judgment application in that action. The application was listed for hearing on 3 September 2009 before Deputy Master Henderson. It was dismissed on 25 November 2009 as 'totally without merit'.
48. In December 2009, Mr and Mrs Hurst served their disclosure list in the 2007 Action. This made no mention of the Declaration of Trust. Whilst the Declaration of Trust had post-dated the Legal Charge, it was potentially relevant on the issue of validation, which Mr Treppass had raised in the 2007 Action.
49. On 21 December 2009, shortly before the trial of the 2007 Action was due to commence, Mrs Hurst commenced a fresh action against Mr Treppass, seeking to challenge the Deed of Settlement ('the 2009 Action').
50. The trial of the 2007 Action was listed to commence on 15 February 2010. The parties agreed to a stay of the 2007 Action pending the outcome of the 2009 Action, with the costs of the 2007 Action reserved to the judge hearing the 2009 Action.
51. On 6 May 2010, Mr Justice Briggs struck out Mrs Hurst's claim in the 2009 Action and ordered Mrs Hurst to pay indemnity costs. He also granted a further civil restraint order against Mrs Hurst.

52. On 25 May 2011, Deputy Master Smith granted Mr Treppass's application for summary judgment against Mrs Hurst on his counterclaim against her in the 2009 Action. A money judgment of £32,737.93 was awarded and an order for sale of the Property was made.
53. On 20 June 2011, Deputy Master Smith dismissed Mrs Hurst's application for reconsideration of his order of 25 May 2011 and awarded costs against her.
54. On 17 July 2011, Mr Hurst issued a notice of appeal against the orders of Deputy Master Smith made on 25 May 2011 and 20 June 2011. On 20 July 2011, Mr Justice Floyd granted a stay of the order for sale of the Property pending determination of the application for permission to appeal or further order.
55. On 31 July 2011, permission to appeal the orders of Deputy Master Smith made on 25 May 2011 and 20 June 2011 was refused by Mr Justice Henderson. Mr Hurst sought an oral renewal.
56. In the meantime, in August 2011, a barrister who had formerly acted for Mrs Hurst by the name of Mr Denton-Cox applied for a final charging order against Mrs Hurst's beneficial interest in the Property. Mrs Hurst did not raise (or mention) the existence of the Declaration of Trust in answer to Mr Denton-Cox's application for a final charging order, notwithstanding that it would have been a complete answer to that application. A final charging order was made. It was later discharged on payment of the sum purportedly secured by it.
57. On 12 October 2012, at an oral renewal hearing, permission to appeal the orders of Deputy Master Smith made on 25 May 2011 and 20 June 2011 was refused. This ended the 2009 Action. Mr Treppass was not sent a copy of the order made at the hearing.
58. On 1 August 2014, Mrs Hurst Senior died. Mr Hurst was the sole proving executor of her estate.
59. In December 2015, Mr Treppass issued an application for a further charging order against the Property in respect of the judgment which he obtained against Mrs Hurst in 2011. The backdrop appears to have been that Mr and Mrs Hurst were still seeking to challenge the Legal Charge and to have it removed from the register. On 2 March 2016, Mr Treppass was granted an interim charging order over the Property ('the 2016 Interim Charging Order')
60. In March 2016, Evelyn Green, David Green and Ian Mablin, in their capacity as trustees of an inter vivos trust set up by Mrs Hurst Senior in July 2003 ('the 2003 Trust'), commenced proceedings against Mr Hurst in his capacity as executor of Mrs Hurst Senior's estate, seeking an account and orders for payment in respect of the proceeds of sale of a property said to fall within the 2003 Trust which Mr Hurst had sold. On 3 August 2016, Master Price granted orders in favour of the Claimants in the proceedings and dismissed Mr Hurst's counterclaim, refusing permission to appeal.
61. In October 2016, Evelyn Green, David Green and Ian Mablin, in their capacity as trustees of the 2003 Trust, commenced proceedings against Mrs Hurst as a wrongful recipient of monies forming part of the trust. On 28 June 2017, Master Price granted

orders in favour of the Claimants in the proceedings, ordering Mrs Hurst to repay the sum of £91,086.45 forthwith and costs, with an interim payment of £20,000 on account of such costs.

62. In 2017, Mr Treppass sought to have the 2016 Interim Charging Order made final ('the FCO Application'). The FCO Application came on before DJ Langley in the County Court at Central London on 29 August 2017. Both Mr and Mrs Hurst attended the hearing. On the evidence before me, which includes the transcript of the hearing before DJ Langley (the accuracy of which was not contested in the evidence before me and which I therefore take to be accurate), it is clear (and I so find) that at the hearing of 29 August 2017, Mr Hurst spoke on behalf of himself and Mrs Hurst. This followed the usual pattern; Mr Hurst usually represented his wife at court hearings and, save for one or two immaterial exceptions, Mr and Mrs Hurst 'acted as one' in any litigation to which they were both parties. The skeleton argument which Mr Hurst lodged for the hearing of 29 August 2017 was headed 'Defendants' Skeleton Argument'. Acting on his own behalf and that of his wife, Mr Hurst opposed the making of a final charging order.
63. It was in the context of the FCO Application in 2017 that the existence of the Declaration of Trust was first disclosed to Mr Treppass and the court. Mr Treppass was highly sceptical of this late revelation, pointing out to the court that there had been numerous hearings in other proceedings in the past at which no mention had been made of it. Mr Hurst sought to argue that the Declaration of Trust had been 'irrelevant' in earlier proceedings.
64. Mr Treppass queried why the existence of the Declaration of Trust had not been mentioned in 2011, in response to the earlier application of Mr Denton-Cox for a charging order. Mr Hurst addressed DJ Langley on this issue during the course of his submissions, saying:

'He's [Mr Treppass is] also questioning why, if there was a trust in 2009... why didn't I raise that in 2011 in relation to the charging order obtained by Mr Denton-Cox. The reason for that is simple; and that is in 2011 the 2009 trust wouldn't have been effective as against Mr Denton-Cox because under the Insolvency Act, it only kicks in - it only becomes valid - after five years. And had I raised this with Mr Denton-Cox in 2011 he would've said well no, if you're raising this then all we'll do is we'll withdraw the charging order, we'll make Mrs Hurst bankrupt and the trust will not be available to use against Mr Denton-Cox....'

65. At the hearing of the FCO Application in 2017, Mr Hurst continued:

'The reason why the trust was created in 2009 was again very simple. The litigation against Mr Treppass and my other partners proved disastrous. We were in very serious financial difficulty. I was made bankrupt. Mr Treppass obtained a possession order on our house; we were threatened with homelessness. And my mother and my mother-in-law were

extremely generous in bailing us out of our difficulties. The sums involved were hundreds of thousands of pounds. The only protection taken by my mother was the assignment of the charging order, which had been granted to Mr Treppass. And in consideration of my mother paying off Mr Treppass, she took an assignment of a charge which [he'd] obtained. And understandably my mother said okay fine, I'm quite happy to bail you out, but any money that I pay I want it to stay within the family. I don't want your creditors to have any benefit of this...'

66. Pausing there, Mr Hurst's account of events, as quoted in paragraph 65 above, is not entirely accurate. Mrs Hurst Senior had paid Mr Treppass £54,549.03 in 2002, in return for an assignment of his 1995 and 1997 charging orders. These charging orders (or their equivalent) were then registered against the Property in her name. It was the *release* of these charging orders registered in Mrs Hurst Senior's name and the removal of the caution lodged in her favour that was under discussion in 2009. At no point did Mrs Hurst Senior take an assignment of the Legal Charge. Nor did she pay Mr Treppass any further sums in 2009.

67. Mr Hurst went on to tell DJ Langley at the FCO hearing on 29 August 2017:

'In 2009 my mother was 87/88, obviously she was thinking of the worst eventually happening and she was saying that it might be tidier that in the event of the worst happening that the charge is released so that you don't have any complications in the event of my dying. But she said that one of the conditions of my releasing the - from this charge, that I don't want any more of my money to go to your creditors. So what she said was that I'm only going to sign this charge if you agree to hold the house on trust for my grandchildren. We recognised at the time that the clear intention of this was to avoid the possibility of the money going to any creditors that might crop up over the next few years, and we also recognised that it wouldn't be valid as against creditors for a period of five years. This is the valid trust that was granted in 2009, which became effective in 2014 after the expiry of five years. Now if you'd like me to confirm all that under oath in the witness box, I'd be very happy to do so.'

68. Again, for reasons given at paragraph 66 of this judgment, the references to Mrs Hurst Senior 'signing a charge' in 2009 are inaccurate. It was the release of her charging orders and the removal of her caution against the Property that was under discussion in 2009.

69. Mr Hurst was later sworn in at the FCO hearing on 29 August 2017. He stated under oath that what he had previously told the court in submissions was correct.

70. In cross-examination at the FCO hearing in 2017, Mr Hurst was pressed to explain why he had not mentioned the existence of the Declaration of Trust at a hearing

before Deputy Master Smith when resisting the grant of a charging order over the Property. He responded by saying:

‘No, it would’ve been totally irrelevant. If I had mentioned it, both your counsel and Deputy Master Smith would’ve said that because the five-year period under the Insolvency Act hadn’t expired, it’s totally - it’s totally irrelevant’

71. He later reiterated in cross-examination: ‘all that would’ve happened is that had I produced that ... then you would’ve applied for my wife’s bankruptcy. And then the trust deed would not be valid as against the [trustee] in bankruptcy, so it would’ve been totally pointless raising the 2009 trust’;

‘it was totally irrelevant. It only became relevant after June 2014, after the expiry of the five-year period;’ and

‘I’ve got no doubt that had I raised it 2011, either before you or Mr Denton-Cox would’ve applied for my wife’s bankruptcy in order to secure the setting aside of the trust deed.’

72. I pause here to note that Mr Hurst had said much the same in the skeleton argument which he had prepared for the hearing before DJ Langley in 2017 on behalf of himself and his wife, a copy of which was exhibited to Mr Allen’s second witness statement in evidence before me. The skeleton argument made express reference to ss.339 to 341 of the Insolvency Act 1986 and stated at paragraph 12:

‘it would have been inappropriate to raise the 2009 Trust in connection with Mr Denton-Cox’ Charging Order in 2011, because the five-year period provided by section 341(1)(a) of the Insolvency Act 1986 had not yet passed’.

73. It was clear from Mr Hurst’s skeleton argument and oral testimony at the hearing before DJ Langley that he was unaware of s.423 of the Insolvency Act 1986 or the fact that s.423 was not subject to the same five-year restriction.

74. In cross-examination at the hearing before DJ Langley, it was put to Mr Hurst that ‘There was a clear intention to avoid money going to the creditors’, to which he responded:

‘A. There was a clear intention on the part of my mother.

Q. But she didn’t make the disposition; you and your wife did?

A. Yes, but it was an insistence on the part of my mother that she would not release the charges from the register unless there was a confirmation that the house would be held in trust for our - her grandchildren.

Q. So you could’ve left the charges on the register?

A. Could've done, yes.'

75. At a later stage in oral testimony, Mr Hurst confirmed that his 'mother's interest – the value of the charging orders was only about £55,000'. The cross-examination continued:

'Q. Exactly, she had no interest in the rest of the property at all, did she?

A. No...'

76. At the hearing of the FCO Application in 2017, DJ Langley ultimately found that the Declaration of Trust *had* been executed on 19 June 2009. The learned judge was not, however, persuaded by Mr Hurst's reasons for not having mentioned it before. Having heard Mr Hurst in submissions and oral testimony, DJ Langley concluded (at paragraph 15 of the judgment):

'I do not accept Mr Hurst's submission that the existence of the deed of trust was irrelevant in the earlier proceedings, after it was entered into. I am quite satisfied that he deliberately chose not to mention the existence of the trust to other tribunals, because he was fully aware that if Mrs Hurst was to be made bankrupt within five years of the date of the execution of the deed of trust, then her trustee in bankruptcy would certainly set it aside, or at least set it aside in part. I am satisfied that that was the sole reason that Mr Hurst did not mention the deed of trust to Deputy Master Smith or others, and the fact that he considered it to be irrelevant was not the main reason.'

77. In light of the Declaration of Trust, the 2016 Interim Charging Order could not be made final. The FCO Application was therefore dismissed.
78. On 15 February 2018, Mr Hurst was made bankrupt for the second time, on the petition presented by Evelyn Green, David Green and Ian Mablin based on the judgment which they had obtained against him in 2016. Mr Hurst's later application to annul the second bankruptcy order under s.282(1)(a) was dismissed and permission to appeal was refused.
79. On 25 April 2018, Evelyn Green, David Green and Ian Mablin presented a bankruptcy petition against Mrs Hurst. The petition was based on the judgment debt arising from the order of Master Price dated 28 June 2017. The petition was opposed. By her Notice of Opposition, Mrs Hurst maintained that she was 'seeking the removal of the Judgment Creditors as Trustees of the [2003] Trust on which the Petition Debt is based'. By a later skeleton argument filed on her behalf, ahead of a hearing of the petition on 1 August 2018, Mrs Hurst abandoned any reliance on plans to apply for the Trustees' removal and instead sought an adjournment on the basis that she planned to sue Mr Mablin of Wilson Wright LLP for professional negligence relating to the 2003 Trust. Mrs Hurst's application for an adjournment was refused and a bankruptcy order was made against her on 1 August 2018.

Legal Principles

80. Section 423 provides:

‘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 the formation of a civil partnership; 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”.

81. It will be seen that a party bringing a claim under s.423 must clear three essential hurdles. The first is to establish a transaction. The second is to establish a gift or undervalue. The third is to establish the statutory purpose.

Was the Declaration of Trust a transaction?

82. In my judgment the Declaration of Trust is a transaction for the purposes of s.423(1). For these purposes, it does not matter that it was executed without the knowledge of the Beneficiaries. The definition of ‘transaction’, contained in s.436, provides that it includes a ‘gift, agreement or arrangement ...’. As made clear by Richards LJ in *BTI 2014 LLC v Sequana S.A. & Ors* [2019] EWCA Civ 112 at [58], the definition is to be construed expansively:

‘58. First, the language of section 423(1) does not in my judgment preclude its application to the payment of a dividend, even if it is treated as a unilateral act by a company. I have earlier referred to the definition of ‘transaction’ in section 436(1): it ‘includes a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly’. There are two relevant points to note. First, it is an inclusive, not an exhaustive, definition. A dividend is capable of coming within the definition of transaction, even if it is not a gift, agreement or arrangement. Second, Lord Reid observed in *Greenberg v IRC* [1972] ACT 109 at 136-137, a case like *Laird* that concerned whether dividends were transactions relating to securities, that ‘the word ‘transaction’ is normally used to denote some bilateral activity but it can be used to denote an activity in which only a single person is engaged’. The inclusion of a gift within the definition in section 436(1) suggests, like the definition of transactions in securities, that no bilateral element is necessary. In my view, it is not correct to read the inclusion of a gift as providing an exception to the definition. The statutory definition should be read according to its own terms’.

Was the Declaration of Trust at an undervalue

83. On the evidence before me, I am satisfied that the Declaration of Trust was a transaction at an undervalue within the meaning of s.423(1).
84. There is no evidence suggesting that the Beneficiaries themselves provided any consideration. In the absence of any such evidence, I consider it legitimate to conclude that they did not. I would add that by the time of the hearing before me, the

Beneficiaries themselves had conceded that the transaction was at an undervalue for the purposes of s.423(1).

85. At times both prior to and during the course of these proceedings, Mr and Mrs Hurst sought to argue that the transaction was not at an undervalue, on the ground that consideration was provided by their respective mothers. A few days before the hearing before me, however, they withdrew their written evidence and, during the course of the hearing before me, they each conceded that the Declaration of Trust was a transaction at an undervalue.
86. In my judgment they were right to concede the point.
87. The charging orders and caution registered in Mrs Hurst Senior's name against the Property secured only a sum of approximately £55,000. This was substantially less than the value of the equity in the Property as at 19 June 2009. It follows that even if Mrs Hurst Senior's release of her charging orders and caution over the Property in 2009 can be said to qualify as consideration for the execution of the Declaration of Trust, the Declaration of Trust was still a transaction at an undervalue.
88. I was taken to no evidence to suggest, still less establish on a balance of probabilities, that Mrs Hurst Senior enjoyed any other interest in the Property at any material time prior to execution of the Declaration of Trust. In the absence of such evidence, I consider it legitimate to conclude that she did not. I am fortified in that conclusion by Mr Hurst's confirmation under oath in the FCO proceedings before DJ Langley in 2017 that Mrs Hurst Senior's interest in the Property was limited to approximately £55,000. I am further fortified in that conclusion by the fact that Mrs Hurst Senior was not made a party to the Declaration of Trust.
89. Mrs Hurst's mother had died in 2006. I was taken to no evidence establishing on a balance of probabilities that Mrs Hurst's mother (or latterly her estate) enjoyed any interest in the Property at any material time prior to execution of the Declaration of Trust. In the absence of such evidence, I consider it legitimate to conclude that she (and latterly her estate) did not. I am fortified in that conclusion by the fact that no persons expressed to act in the capacity of personal representatives of her estate were made parties to the Declaration of Trust.
90. There is therefore no question on the evidence before me of either Mrs Hurst Senior or the estate of Mrs Hurst's mother having abandoned any interest in the Property which they might enjoy (save, in the case of Mrs Hurst Senior, that in respect of the charging orders and caution securing £55,000 odd) in return for the execution of the Declaration of Trust.
91. Any historic suggestion on the part of Mr and Mrs Hurst that the financial support said to have been provided variously by Mrs Hurst Senior and Mrs Hurst's mother in the period 1997 to the date of execution of the Declaration of Trust somehow qualified as consideration for its execution was not supported by (still less made out on) the evidence before me.
92. In relation to Mrs Hurst's mother, there was no quantum evidence before me of the sums claimed to have been contributed by her prior to her death in 2006 and no

evidence to suggest that any sums which were advanced were advanced by way of loan rather than out of familial love and affection. Still less was there any evidence to suggest that Mrs Hurst's mother, or (following her death in 2006), the personal representatives of her estate, agreed to waive, or did waive, any loans made by Mrs Hurst's mother to Mr and Mrs Hurst during her lifetime in return for execution of the Declaration of Trust in 2009; and in the absence of any such evidence, I consider it legitimate to conclude that they did not.

93. In relation to Mrs Hurst Senior, the only documentary evidence before me of the sums claimed to have been contributed by her from 1997 to the date of execution of the Declaration of Trust comprised the list of payments referred to at paragraph 10 of this judgment. I was taken to no evidence to suggest, still less establish on a balance of probabilities, that any sums which were advanced by Mrs Hurst Senior to or for the benefit of Mr and Mrs Hurst and their family in the years leading up to execution of the Declaration of Trust, other than the sum of £55,000 odd paid in 2002 to Mr Treppass in respect of the 1995 and 1997 charging orders thereafter secured by way of charging orders on the Property in Mrs Hurst Senior's name, were advanced by way of loan rather than out of familial love and affection.
94. On the evidence before me, I am satisfied on a balance of probabilities that any payments made by Mrs Hurst Senior to or for the benefit of Mr and Mrs Hurst and their family in the years from 1997 leading up to execution of the Declaration of Trust other than the said sum of £55,000 odd paid to Mr Treppass in 2002 were made simply out of familial love and affection, without expectation of repayment.
95. I am fortified in the conclusions reached in paragraph 94 above by the steps taken by Mrs Hurst Senior in relation to the 1995 and 1997 charging orders in 2002. Before paying Mr Treppass the sum of £55,000 odd in respect of those charging orders, Mrs Hurst Senior took independent advice from her own solicitors, Denton Wilde Sapte. It was on the advice of her solicitors that she secured the sums which she had paid to Mr Treppass by way of charging orders and caution registered against the Property in her own name. Had she viewed her prior advances to Mr and Mrs Hurst from 1997 to 2002, or any future advances which, as at 2002, given their ongoing financial difficulties, she anticipated making in favour of Mr and Mrs Hurst, as loans, it is in my judgment legitimate to conclude that on a balance of probabilities (a) her solicitors would have ascertained this when taking instructions in 2002 regarding the proposed payments to Mr Treppass; (b) having advised Mrs Hurst Senior to secure the sum of £55,000 odd against the Property, her solicitors would also have advised her to secure any other sums advanced by way of loan or to be advanced by way of loan by taking a charge on the Property in respect of the same; and that (c) having followed her solicitors' advice in relation to the £55,000 odd, Mrs Hurst Senior would also have acted on her solicitors' advice to protect any other loan advances which she had made or expected to make to Mr and Mrs Hurst, by way of a charge on the Property. In my judgment, the fact that the security taken by Mrs Hurst Senior against the Property in 2002 remained limited to the sum of £55,000 odd paid to Mr Treppass in such circumstances strongly supports the conclusion that any other sums which Mrs Hurst Senior advanced to Mr and Mrs Hurst from 1997 up to execution of the Declaration of Trust were not advanced by way of loan but out of familial love and affection.

96. Moreover, there is no evidence before me to suggest (still less establish on a balance of probabilities) that Mrs Hurst Senior agreed to waive, or did waive, any loans to Mr and Mrs Hurst in return for execution of the Declaration of Trust in 2009, save for the sum of £55,000 odd paid to Mr Treppass in 2002. In the absence of any such evidence, I consider it legitimate to conclude that she did not.
97. Prior to conceding that the Declaration of Trust was at an undervalue, Mr Hurst had sought to argue that the issue of the consideration provided by Mr and Mrs Hurst's respective mothers in return for the grant of the Declaration of Trust was 'res judicata' in light of the judgment of DJ Langley on 29 August 2017. For the sake of completeness, I confirm that I reject that argument.
98. It is correct that in outlining the background to the FCO Application before the court in 2017, DJ Langley made several references to sums having been contributed by Mr and Mrs Hurst's mothers. By way of example:

(1) at paragraphs 4 and 5:

‘4. As far as the history of the matter is concerned, there is a very long history of litigation between Mr Treppass and others on the one hand, and Mr Robert Alfred Hurst on the other...

5. It is clear that Mr and Mrs Hurst, throughout all of this, were in severe financial difficulties and as a result they received substantial financial support from both Mrs Hurst's mother and Mr Hurst's mother; both since deceased.’

(2) at paragraph 6: ‘6. The position then was that the claimant, Mr Treppass, and others obtained these charging orders. He then applied for an order for possession in order to enforce the charging orders. It was then that the parties reached an agreement and Mr Hurst's mother agreed to basically pay out the sums due on the charging orders which were secured by the legal charges, which she did. She took an assignment of the charging orders and subsequently I understand that they were in fact removed from the register. I am told that her condition for doing that, in view of the large sums which had been paid to the family by both mothers of the parties over the years, was that there should be a deed of trust entered into, in which both the defendants confirmed that they held the property at 73 Southway on trust for their three children, who are named in the trust.’

(3) at paragraph 14:

‘14. [Mr Treppass] did question Mr Hurst, who did give evidence on oath, as to why the charging orders were not just assigned by Mr Hurst's late mother to the grandchildren. Mr Hurst replied that over the years his mother and Mrs Hurst's mother had made substantial financial contributions to maintain and support the family and she needed to deal with all of that, not just the £55,000 that was paid under the terms of the charging orders. There is no evidence as to the total amount paid by the mothers of Mr and Mrs Hurst, but I accept that it clearly amounted to a very substantial sum.’

(4) at paragraph 17:

‘17. However, looked at in the round, I have concluded that the only evidence before the court realistically is that this deed of trust was executed on its date; namely 19 June 2009. I accept that there was clear consideration not only in relation to the payment of the £55,000 due under the charging orders, but also in the previous financial assistance which had been provided by both the mother of Mrs Hurst and the mother of Mr Hurst over some years.’

99. The issue of whether consideration was given for the execution of the Declaration of Trust was not an issue which fell for DJ Langley to determine in the context of the FCO Application before the court in 2017. The Declaration of Trust was made by deed; absent an insolvency context, no consideration is required for a transaction effected by deed. The court did not have a s.339 or 423 claim before it. The only issue for determination at the hearing of 29 August 2017 was whether or not to grant an FCO. This turned on the timing of execution of the Declaration of Trust. On the evidence before the court, DJ Langley concluded that the Declaration of Trust had been executed on 19 June 2009 and that accordingly the 2016 Interim Charging Order should be discharged.

100. Moreover, even if DJ Langley did intend to make findings on the consideration given in return for the execution of the Declaration of Trust, the findings and conclusions of the learned judge on the issue do not bind the Applicant or the court in this case. The rule in *Hollington v Hewthorn* [1943] KB 587 applies. As summarised by Sales J (as he then was) in *Seven Arts Entertainment Limited v Content Media Corporation Plc* [2013] EWHC 588 (Ch) at [73]:

‘... the basic rule is that, before a person is to be bound by a judgment of a court, fairness requires that he should be joined as a party in the proceedings, and so have the procedural protections that carries with it. This includes the opportunity to call any evidence he can to defend himself, to challenge any evidence called by the claimant and to make any submissions of law he thinks may assist his case. Although there are examples of cases in which a person may be found to be bound by the judgement of a court in litigation in relation to which he stood by without intervening, in my judgment those cases are illustrations of a very narrow exception to the general rule. The importance of the general rule and fundamental importance of the principle of fair treatment to which it gives expression indicate the narrowness of the exception to that rule.’

101. It is for this court, on the basis of the evidence before it, to reach its own conclusions on the issue whether the requirements of s.423(1) are made out.

102. On the evidence before me I am satisfied that the requirements of s.423(1) are made out. For the reasons which I have given, I am satisfied that the consideration given for the Declaration of Trust comprised, at most, only the release of the charging orders

and removal of the caution by Mrs Hurst Senior. These secured an interest in the Property of only approximately £55,000, a sum substantially less than the value of the equity in the Property forming the subject matter of the Declaration of Trust as at 19 June 2009.

103. For all these reasons, on the evidence before me, I am satisfied that the Declaration of Trust was a transaction at an undervalue for the purposes of s.423(1).

Statutory Purpose

104. I turn next to consider whether the Applicant has made out its case on statutory purpose under s.423(3). Again, in the light of the Respondents' concessions, the issue of statutory purpose comes before me on the basis of the Applicant's evidence alone.
105. The Applicant by his Application Notice seeks a declaration that the Declaration of Trust entered into on 19 June 2009 by the First and Second Respondents in favour of the Beneficiaries was entered into for the purpose of putting assets beyond the reach of the First and Second Respondents' creditors or of otherwise prejudicing the interests of such a person in relation to the claim he is making or may make.
106. On behalf of the Applicant, Mr Mace referred me to a helpful summary of the approach to be adopted in determining the issue of purpose, as set out in *JSC BTA Bank v Ablyazov & Anr* [2016] EWHC 2071 (Comm) at [128] per Laurence Rabinowitz QC sitting as a deputy High Court Judge:

[128] The approach to be taken to establishing the existence (or otherwise) of the purpose necessary for section 423(3) might therefore be summarised as follows:

(1) The inquiry for the Court is as to 'the purpose' of the transferor in entering into the transaction. More particularly, was the transferor's purpose to put assets beyond the reach of a person who is making or may at some time make a claim against him or of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make? I refer to this below as the 'statutory purpose'

(2) In order for section 423(3) to be engaged, it is sufficient that the statutory purpose was a purpose of the transferor in entering into the transaction. It need not be his dominant purpose, but must play more than a trivial role in his consideration in the sense that it made a contribution of importance to the transferor's purpose in entering into the transaction. Put differently, the transferor must be 'substantially motivated' by the statutory purpose.

(3) It follows that provided that the statutory purpose was a purpose of the transferor in entering into the transaction, the fact that the transferor might also have had some other purpose in entering into the transaction will not prevent section 423(3) being engaged. This is so even if that other purpose was in fact

the transferor's dominant purpose in entering into the transaction.

(4) It is important in this context to distinguish between something being a purpose of the transaction as opposed to it being merely a consequence or by-product thereof. For something, eg an outcome, to be regarded as a purpose of a transaction rather than merely a consequence or by-product thereof, it must be shown that the outcome was positively intended by the transferor; if such a positive intention on the part of the transferor cannot be shown, the outcome will be merely a consequence or by-product of the transaction rather than its purpose.

(5) The fact that, even absent the statutory purpose, the transferor would have entered into the transaction, does not necessarily entail that section 423(3) will not be engaged.

Where however that this is the case, the Court must be alert to see that ... the statutory purpose has in truth substantially motivated the donor if he is to find that the section bites' (per Laws LJ). As Simon Brown LJ put it, where the Court concludes that 'the transaction is one which the debtor might well have entered into in any event', the Court "should not then too readily infer that the debtor also had the substantial purpose of escaping his liabilities".

107. I am also reminded by Mr Mace that, when considering whether the s.423(3) threshold is cleared, the Court is not limited to direct evidence of intention. It may also draw inferences from the surrounding facts of the case: *Inland Revenue v Hashmi & Anr* [2002] EWCA Civ 981 at [5] to [10].

Discussion and Conclusions

108. In my judgment the evidence points overwhelmingly in favour of a conclusion that Mr and Mrs Hurst each executed the Declaration of Trust on 19 June 2009 for the purpose of putting assets beyond the reach of their (or more particularly, Mrs Hurst's) creditors or of otherwise prejudicing the interests of such a person in relation to the claim which he was making or may make. On the evidence before me I am satisfied that in executing the Declaration of Trust on 19 June 2009, Mr and Mrs Hurst were each substantially motivated by this purpose. They each positively intended this outcome. I so find.
109. I do not accept that the execution of the Declaration of Trust was simply at the insistence of Mrs Hurst Senior, as a quid pro quo for her releasing the charging orders and caution registered in her name against the Property. As I have found, and as admitted by Mr Hurst in the FCO proceedings in 2017, Mrs Hurst Senior's interest in the Property was limited to approximately £55,000. She was in no position to require Mr and Mrs Hurst to execute the Declaration of Trust. There was no evidence that she was even demanding repayment of the sum of the £55,000 odd at any material time

prior to execution of the Declaration of Trust and in the absence of any such evidence I consider it legitimate to conclude that she was not.

110. Whilst Mrs Hurst Senior was 87 or 88 by 2009, I was taken to no evidence that her demise was considered to be imminent at that time. In the absence of such evidence (coupled with the fact that Mrs Hurst Senior thereafter survived a further five years) I reject any suggestion that the timing of the Declaration of Trust was dictated by the age of Mrs Hurst Senior or by any health condition which she may have suffered.
111. Moreover, any concerns about estate planning for Mrs Hurst Senior did not require execution of the Declaration of Trust; the simple expedient of an assignment of the charging orders registered in her favour to the Beneficiaries (or a release of her charging orders in return for the grant of equivalent charging orders in favour of the Beneficiaries) would have sufficed from an estate planning perspective.
112. The fact that Mrs Hurst Senior may have expressed a wish to see the Declaration of Trust put in place in order to protect the Property from future claims from creditors and preserve it for the Beneficiaries is not of itself inconsistent with Mr and Mrs Hurst executing the Declaration of Trust with the statutory purpose. As I have found, Mrs Hurst Senior was not demanding repayment of the sum of £55,000 odd in 2009 and was in no position to insist on the execution of the Declaration of Trust. As Mr Hurst admitted at the FCO hearing in 2017, Mr and Mrs Hurst could simply have left the charging orders on the register in 2009 (see paragraph 74 above). Ultimately it was Mr and Mrs Hurst's decision whether or not to execute the Declaration of Trust.
113. On the evidence as a whole, I am satisfied that obtaining the release by Mrs Hurst Senior of the charging orders and caution registered in her name was (at most) a minor, ancillary purpose of the Declaration of Trust; it was not the substantial motivation for its execution. The real driver was as described in paragraph 108 above.
114. Mr Hurst admitted that he and Mrs Hurst acted with the statutory purpose during the course of addressing DJ Langley at the FCO hearing in 2017, when he stated:

‘We recognised at the time that the clear intention of this [ie the Declaration of Trust] was to avoid the possibility of the money going to any creditors that might crop up over the next few years, and we also recognised that it wouldn't be valid as against creditors for a period of five years’

Once sworn in, he confirmed the foregoing to be true under oath.

115. On the evidence as a whole (which includes the full transcript of the FCO hearing, which I have read), I am satisfied that the ‘we’ referred to in the passage quoted at paragraph 114 above was intended to and did include Mrs Hurst.
116. Mr and Mrs Hurst acted as one in the FCO litigation. Mr Hurst had filed a skeleton argument on behalf of both himself and his wife and spoke on her behalf at the hearing. On the evidence as a whole, I consider it legitimate to conclude that he did so with Mrs Hurst's permission. Mrs Hurst was sitting in court at the FCO hearing in 2017, at the time that Mr Hurst stated the words set out in the passage quoted at

paragraph 114 above and at the time that he confirmed the same under oath. It was open to her to distance herself from Mr Hurst's account of their reasoning at the time and she did not do so. I consider it legitimate to conclude that the reason why she did not do so was because the passage quoted was an accurate summary of Mr and Mrs Hurst's thinking when entering into the Declaration of Trust.

117. I accept that Mr Hurst is a solicitor and that Mrs Hurst has no legal qualifications. Having had the benefit of hearing Mrs Hurst address me in court at the hearing on 17 June 2022, however, it is clear that Mrs Hurst is an intelligent, articulate individual who is more than capable of thinking and speaking for herself. During the course of the hearing before me, for example, she expressed her own views on who should have conduct of any future sale of the Property; she did not simply fall in line with the views expressed in court by or on behalf of other family members in attendance. Whilst Mrs Hurst may habitually choose to allow her husband to speak for her at hearings, that is a matter of choice rather than necessity.
118. Moreover, my conclusion that the statutory purpose is made out does not rest simply on the direct evidence of intention referred to at paragraph 114 above.
119. In my judgment, even absent that direct evidence on intent, it may properly be inferred from the surrounding facts in this case, as set out in the evidence before me that, in executing the Declaration of Trust, Mr and Mrs Hurst were each substantially motivated by the statutory purpose.
120. On the evidence before me, I am satisfied that by the time of the Declaration of Trust, Mr and Mrs Hurst were each acutely aware of how vulnerable the Property was to the claims of creditors. Mrs Hurst did not need to be a lawyer to appreciate this. In this regard I refer to paragraphs 13-15 and 17-31 of this judgment. Mr and Mrs Hurst had narrowly avoided losing possession of the Property in February 2001, when Mr Treppass had successfully applied for a writ of possession. Mrs Hurst was a party to the deal then struck with Mr Treppass, which resulted in the Deed of Settlement and the Legal Charge which she (among others) executed in March 2001. Mrs Hurst was also a party to the Deed of Assignment executed in 2002, by which Mrs Hurst Senior took an assignment of the 1995 and 1997 charging orders, in order to stop Mr Treppass obtaining possession of the Property in 2002. Both Mr and Mrs Hurst were also respondents to (and opposed) the First Trustee's successful application for an order for possession and sale of the Property. The Property was on the brink of being sold by the First Trustee to a third party when Mrs Hurst stepped in and purchased Mr Hurst's 50% share in the Property from the First Trustee in 2006. Whilst the 2006 purchase left Mrs Hurst as 100% beneficial owner of the Property (thereby protecting the Property from future claims by creditors of Mr Hurst), on the evidence before me I am satisfied that having witnessed (and having been party to attempts to stop) Mr Hurst's creditors (and latterly his Trustee in Bankruptcy) from realising the Property to pay off Mr Hurst's debts, Mrs Hurst must have known, by the time of executing the Declaration of Trust in 2009, that her beneficial interest in the Property was similarly vulnerable to the claims of her own creditors. On the evidence before me I am satisfied that Mr Hurst was fully aware of that risk too.
121. On the evidence before me, I am also satisfied that by the time that they executed the Declaration of Trust, Mr and Mrs Hurst were each acutely aware of the adverse costs

consequences of failure in litigation and of their own largely unsuccessful track record as litigants. Mr Hurst's unsuccessful litigation against his former partners had been catastrophic. The costs orders made in favour of Mr Treppass alone had been a thorn in their side for many years. On the evidence as a whole I am satisfied that Mrs Hurst was at all material times aware of these costs orders; she undertook joint and several liability for the same in the Deed of Settlement and the Legal Charge in 2001. By 2008, Mrs Hurst herself had been made the subject of a limited civil restraint order on the application of the First Trustee, following the striking out of her claim against him that year (see paragraph 37 above); an order with costs consequences directly affecting Mrs Hurst as sole claimant. By 2009, the First Trustee and BDO had costs orders totalling in the region of £160,000 against Mr and Mrs Hurst. Whilst not all of the costs orders were against *both* Mr and Mrs Hurst, a material number *were*; and some costs orders were against Mrs Hurst alone. The ECROs made against Mr and Mrs Hurst in the Supperstone Proceedings on 9 June 2009, ten days before execution of the Declaration of Trust, had added a further costs order, requiring Mr and Mrs Hurst jointly and severally to pay 85% of the Applicants' costs of the application. On the evidence as a whole, I am satisfied that by the time of executing the Declaration of Trust Mrs Hurst was well aware of the mounting number of costs orders being made against her. I am also satisfied that Mr Hurst was aware of the same.

122. I am further satisfied on the evidence before me that by the time of executing the Declaration of Trust, Mr and Mrs Hurst were each aware of their potential exposure to *further* costs orders, as a result of their ongoing litigation against Mr Treppass. The 2007 Action which they had started against Mr Treppass to challenge the Legal Charge was gearing up for trial; on 3 June 2009, Master Bragge had ordered that the 2007 Action be set down for trial, directing that Mr and Mrs Hurst attend the listing office by the end of June to set down the trial for hearing in early 2010.
123. Against that backdrop, I am satisfied that by the time of executing the Declaration of Trust, Mr and Mrs Hurst each knew full well that the Property was at risk of further claims from creditors – both in respect of existing unsatisfied costs orders made against Mrs Hurst (including those made against Mr and Mrs Hurst on a joint and several basis) and in respect of Mrs Hurst's potential exposure to adverse costs orders in the future, in the ongoing litigation against Mr Treppass which, at the time of execution of the Declaration of Trust, Mr and Mrs Hurst remained intent on pursuing. Viewed in this context, on the evidence as a whole and in the absence of any persuasive alternative explanation, in my judgment the timing of the Declaration of Trust largely speaks for itself.
124. For reasons already explored, any concerns about estate planning for Mrs Hurst Senior do not explain execution of the Declaration of Trust in 2009; the simple expedient of an assignment of the charging orders registered in her favour to the Beneficiaries would have sufficed from an estate planning perspective: see generally paragraphs 109-11 above. Mrs Hurst Senior was not demanding repayment of the sum of £55,000 odd in 2009 and was in no position to insist on the execution of the Declaration of Trust. Ultimately it was Mr and Mrs Hurst's decision whether or not to execute the Declaration of Trust.
125. The fact that Mr and Mrs Hurst, as parents, may ultimately have wished their children to have the benefit of the Property does not explain the execution of the Declaration

of Trust in 2009 either. Following its execution, nothing changed on a day to day basis for many years. Mr and Mrs Hurst carried on living at the Property. The Declaration of Trust was not registered at HM Land Registry. Mr and Mrs Hurst continued to hold themselves out as the beneficial owners of the Property. Benefitting the Beneficiaries may have been a purpose of the Declaration of Trust, but it was not the (or even a) substantial motivation for its execution in 2009.

126. In considering the issue of statutory purpose in relation to each of Mr and Mrs Hurst, I also take into account the evidence before me of their complicit behaviour in keeping the Declaration of Trust a secret for five years to avoid any challenge under s.339 in the event of Mrs Hurst's bankruptcy. Whilst such conduct post-dates execution of the Declaration of Trust, the Court of Appeal has made clear that in appropriate cases, conduct post-dating a transaction challenged under s.423 may properly be taken into account: see by way of example *Inland Revenue v Hashmi and Anor* [2002] EWCA Civ 981 at [6] and [29] per Arden LJ.
127. In this regard it is in my judgment significant that following execution of the Declaration of Trust, Mr and Mrs Hurst continued to treat the Property as their own and to hold themselves out as beneficial owners of the Property at court hearings until after expiry of the five-year period.
128. At hearings before Deputy Master Henderson on 3 September and 25 September 2009, for example, when asked by Deputy Master Henderson who would be prejudiced by validation of the Legal Charge, Mr Hurst (acting on behalf of himself and Mrs Hurst) responded that only Mr and Mrs Hurst and possibly creditors would be prejudiced, making no mention of the Beneficiaries (see paragraph 31 of the judgment of Deputy Master Henderson dated 25 November 2009). These hearings took place approximately 3 months after execution of the Declaration of Trust; it can hardly be suggested that its execution had slipped their minds. In context this was a misrepresentation to the court of who the beneficial owners of the Property were at the time.
129. Moreover, Mr Hurst openly admitted that the Declaration of Trust was kept secret for five years in order to avoid challenge under s.339, in the skeleton argument which he prepared on behalf of himself and Mrs Hurst for the FCO application in 2017 and in his oral testimony at the hearing of that application: see paragraphs 62 to 72 above.
130. Mrs Hurst cannot distance herself entirely from these tactics as she was personally involved in them. In this regard it will be recalled that in 2011, Mrs Hurst personally faced an application for a final charging order against her beneficial interest in the Property, brought by her former barrister, Mr Denton-Cox and failed to mention in response that she no longer had a beneficial interest in the Property as a result of the Declaration of Trust. This would have been a complete answer to the application and yet, rather than raise the point, Mrs Hurst allowed a final charging order to be made: see generally paragraph 56 above. In contrast, when, in 2016 (after the five years had expired), Mr Treppass gave notice to Mrs Hurst that he was seeking a final charging order against her beneficial interest in the Property, Mrs Hurst promptly emailed him, stating that she no longer had a beneficial interest in the Property as a result of the Declaration of Trust and attaching a copy of it to her email. I consider it legitimate to infer from these contrasting responses and from the evidence as a whole that Mrs

Hurst was well aware of the need to keep the Declaration of Trust a secret for five years after its execution and was complicit in that process.

Conclusion

131. For all these reasons, I am satisfied that the requirements of s.423(1) and (3) are made out and shall grant the declaration sought.
132. The issue of what consequential relief should be granted as a result on my conclusions in this judgment will be considered at a further hearing on 23 September 2022.

ICC Judge Barber