



Neutral Citation Number: [2022] EWHC 2649 (Ch)

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: 26/10/2022

Before :

ICC JUDGE BARBER

Between:

PAUL ALLEN
(As Trustee in Bankruptcy of Ann Stephanie Hurst)

Applicant

- and -

- (1) ANN STEPHANIE HURST (IN BANKRUPTCY)**
- (2) ROBERT ALFRED HURST (IN BANKRUPTCY)**
- (3) FIONA SARAH BOROSHEK**
- (4) PETER ADAM HURST**
- (5) CAROLINE JOANNA HURST**

Respondents

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: 23 September 2022

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 9.30am on 26 October 2022.

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ICC Judge Barber

Introduction

1. This is the Applicant's application, brought in his capacity as Trustee in Bankruptcy of the First Respondent, for an order under s.423 of the Insolvency Act 1986 setting aside a declaration of trust entered into on 19 June 2009 ('the Declaration of Trust') by the First and Second Respondents ('Mr and Mrs Hurst') in favour of their three adult children, the Third, Fourth and Fifth Respondents ('the Beneficiaries') in respect of the beneficial interest in a four bedroomed semi-detached freehold property known as 73 Southway London NW11 6SB registered in the names of Mr and Mrs Hurst at HM Land Registry under Title Number NGL369279 ('the Property') on the grounds that it was a transaction defrauding creditors within the meaning of s.423 IA 1986.
2. The background to this matter is fully addressed in my earlier judgment dated 26 August 2022 (Allen v Hurst [2022] EWHC 2204 (Ch)).
3. At a hearing on 17 June 2022, I granted a declaration that the Declaration of Trust constituted a transaction at an undervalue which was entered into by Mr and Mrs Hurst 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, with written reasons to follow. Judgment was handed down on that aspect on 26 August 2022.
4. As there was insufficient time to deal with consequential relief at the hearing of 17 June 2022, the Order of 17 June 2022 made provision for a further hearing. The consequential hearing was listed on an expedited basis before me on 23 September 2022. All parties were notified of the hearing date in June 2022.
5. By the time of the hearing before me on 23 September 2022, the parties' respective positions, as presented to me, were as follows:
 - (1) All parties remained agreed that the Property had to be sold.
 - (2) Mr and Mrs Hurst, who live in the Property, wished to retain conduct of the sale until 31 December 2022. The Applicant and the Beneficiaries opposed this and sought an order providing for the Applicant to have immediate conduct of the sale.
 - (3) The Beneficiaries and the Applicant were agreed on an asking price of £2.05m, with a minimum price of £1.8m (subject to downwards adjustment with the consent of the Beneficiaries or by further order of the Court). Mr and Mrs Hurst contended for a minimum price of £2.028m, subject only to downward adjustment by further order of the Court.
 - (4) The Applicant sought an order that Mr and Mrs Hurst deliver up vacant possession of the Property by 23 November 2022. The Beneficiaries adopted no position on the date of possession, save for inviting the Court to make a 'humane' order. Mr and Mrs

Hurst each offered to deliver up possession by 23 January 2023 but resisted any earlier date.

(5) The Beneficiaries and the Applicant were agreed that the Declaration of Trust should be set aside but invited the Court to order that any surplus proceeds be paid in equal shares to the three Beneficiaries rather than to Mrs Hurst. Mr and Mrs Hurst did not oppose an order setting aside the Declaration of Trust but contended that any surplus proceeds should be paid to Mrs Hurst.

(6) Half-way through the hearing on 23 September, Mrs Hurst, encouraged by Mr Hurst, sought an adjournment of the hearing in order to seek legal advice/representation. The Beneficiaries and the Applicant each opposed the adjournment application.

6. I refused the adjournment application and, at the conclusion of the hearing of 23 September, I ordered pursuant to s.423(2) of the Insolvency Act 1986 (in summary) that:

(1) the Declaration of Trust be set aside;

(2) the Property be sold, with attendant directions (a) that the Applicant's solicitor shall have conduct of the sale and be appointed under s50 of the Trustee Act 1925 to convey the Property on behalf of Mr and Mrs Hurst and (b) that the Property be marketed for a price of not less than £2.05m, subject to downwards adjustment (i) at a price of not less than £1.8m without reference to the Court on the advice of any reputable estate agent instructed by the Applicant's solicitor and (ii) at a price of less than £1.8m with the consent of all the Applicant and the Beneficiaries or pursuant to further order of the Court;

(3) Mr and Mrs Hurst shall cooperate in the process of selling the Property;

(4) Mr and Mrs Hurst shall vacate the Property on or by the earlier of (i) 23 January 2023 and (ii) completion of the sale;

(5) Upon a sale of the Property, the proceeds shall be distributed as follows:

(a) in payment of any sum required to be paid to satisfy or obtain the discharge of the charge registered to Mr Trepass dated 15 March 2001 at HM Land Registry;

(b) in payment of the reasonable costs of sale;

(c) in payment to the Applicant of all of the bankruptcy debts, remuneration, costs, fees, expenses, disbursements and liabilities (without prejudice to any challenge under rule 10.134 IR 2016 in the event of an application for an annulment of Mrs Hurst's bankruptcy);

(d) after payment of all sums required to be paid under paragraphs (a) to (c), any remaining proceeds shall be paid in equal shares to the Beneficiaries;

(6) that the Applicant and the Beneficiaries shall have liberty to apply for further directions in relation to the conduct of the sale of the Property.

7. I made the Order of 23 September 2022 on the footing that written reasons would follow. This judgment sets out those reasons.

The adjournment application

8. I shall address the adjournment application first. Mrs Hurst was made bankrupt as long ago as 2018. But for the Declaration of Trust, the Applicant would have been in a position to seek a simple order for possession and sale of the Property in 2019. Immediately prior to execution of the Declaration of Trust, Mrs Hurst had been sole beneficial owner of the Property.
9. The s.423 proceedings themselves have been on foot since February 2021. Mr and Mrs Hurst contested the same until June 2022, filing evidence in opposition in which they denied that the Declaration of Trust was a transaction defrauding creditors within the meaning of s.423.
10. There have been numerous interlocutory hearings. Mrs Hurst has had ample opportunity to arrange legal representation and has been encouraged on several occasions to do so. Notwithstanding such encouragement, she has remained a litigant in person throughout the proceedings, speaking on her own behalf or adopting positions put forward by Mr Hurst.
11. The s.423 claim was initially listed for final hearing on 17 June 2022 with a time estimate of one day. Mr and Mrs Hurst had notice of the hearing of 17 June 2022 in November 2021; that is to say, over six months prior to the hearing date itself. Mrs Hurst did not arrange legal representation for the hearing of 17 June.
12. Shortly before the hearing on 17 June 2022, Mr and Mrs Hurst formally withdrew their evidence in opposition to the s.423 claim.
13. A full summary of the various positions adopted at the hearing of 17 June 2022 may be found in my earlier judgment dated 26 August 2022 ([2022] EWHC 2204). At the outset of the June hearing, Mrs Hurst told me that she planned to apply for an annulment under s282(1)(b) IA 1986. When I asked her if she was seeking an adjournment, she confirmed that she was not and that she would ‘seek an annulment in due course’.
14. The Beneficiaries made clear at the hearing on 17 June 2022 that they would be inviting the Court, when granting consequential relief, to ensure that the Beneficiaries retained the benefit of any surplus proceeds of sale of the Property which were not required to cover the bankruptcy debts and expenses in full. Whilst the mechanics proposed by the Beneficiaries in June to achieve this outcome differed from those proposed in September (in June, they were inviting the court not to set aside the Declaration of Trust, but instead to order that the Beneficiaries pay a sum of money sufficient to cover the bankruptcy debts and expenses, such money judgment to be secured on the Property pending its sale; whilst in September, they were seeking an order setting aside the trust coupled with an order that the surplus proceeds of sale of the Property be paid to the Beneficiaries in equal shares), the underlying stance remained the same.

15. The hearing of 17 June 2022 went part-heard due to lack of time. Whilst a declaration was granted, a further hearing, to consider consequential relief, was listed for 23 September 2022 with a time estimate of one day.
16. The parties have been on notice of the hearing date of 23 September 2022 since June 2022.
17. It is against that backdrop that I consider the adjournment application made on 23 September 2022. Mrs Hurst first intimated to the court that she would like to apply for an adjournment, in order to seek legal advice and representation, shortly before lunch on the day of the hearing. When asked, Mrs Hurst had no adequate explanation for why she was making such a late application for an adjournment.
18. Mrs Hurst had had ample time (three months) in which to seek legal advice on consequential relief and/or legal representation ahead of the hearing of 23 September 2022, even putting to one side (i) the six months' notice given of the June hearing and (ii) the fact that Mrs Hurst had been on notice of the proceedings since February/March 2021.
19. Whilst it appears that Mr and Mrs Hurst did make initial approaches to a solicitor for advice, that approach was made in or around mid-September 2022, very shortly before the hearing of 23 September, and appears to have related primarily to Mrs Hurst's proposed s282(1)(b) annulment application rather than the s.423 proceedings themselves (see email dated 15 September 2022 from Mr Hurst to Ms Allard). I was taken to no evidence at the September hearing that any solicitor had been formally instructed by Mrs Hurst to advise or represent her in relation to the s423 proceedings. In the absence of any such evidence, I consider it legitimate to conclude that no solicitor had been so instructed.
20. Considered against the backdrop of these proceedings, viewed as a whole, Mrs Hurst's last-ditch attempt to secure an adjournment of the proceedings was hopeless. Even if, as was suggested at the hearing on 23 September 2022, the parties had been engaged in without prejudice settlement negotiations for a short period in the run-up to that hearing, as an experienced litigant, Mrs Hurst must have known that it was far from guaranteed that any such negotiations (which were by no means the first attempted by the parties) would result in a settlement. As is clear from my earlier judgment (reported at [2022] EWHC 2204 (Ch)), Mrs Hurst is no stranger to litigation.
21. Moreover, Mrs Hurst knew ahead of the hearing of 23 September 2022 that any without prejudice negotiations which may have taken place had not resulted in a settlement, and yet she gave no indication ahead of the hearing - either to the court or to the other parties - that she intended to seek an adjournment. In this regard I note that Mrs Hurst received Mr Warents' skeleton argument on 21 September 2022. This made clear the Beneficiaries' continued stance regarding any surplus proceeds of sale of the Property (see paragraph [14] above). In response, with Mrs Hurst's consent, Mr Hurst then prepared and filed a skeleton argument dated 22 September 2022 on behalf of himself and Mrs Hurst. This skeleton made no reference to an adjournment.

22. No application for an adjournment was made at the start of the hearing. Instead, it was not until half-way through the hearing, having heard the lion's share of Mr Warents' submissions on behalf of the Beneficiaries, that, on a 'prompt' by Mr Hurst, Mrs Hurst applied for an adjournment.
23. Considered in context, it was in my judgment clear that the adjournment application made at that stage was simply a tactical attempt to 'stall' the proceedings and to put off the point at which Mr and Mrs Hurst would be required to vacate the Property.
24. Granting an adjournment at that point would have caused several months more delay in proceedings which have already been prolonged unnecessarily by the manner in which Mr and Mrs Hurst have vacillated in their conduct of their defence of these proceedings to date. For a full summary, reference should be made to my judgment at [2022] EWHC 2204 (Ch). The Applicant, as Trustee in Bankruptcy, has a duty to get in and realise the assets in Mrs Hurst's estate for the benefit of the creditors as a whole. The creditors have already waited several years for a distribution, whilst Mr and Mrs Hurst remain in occupation of the Property.
25. Granting an adjournment would also use up more of the court's resources, at the expense of other litigants requiring court time; and at further cost to the parties. In this regard I remind myself that in determining whether to grant an adjournment, the court must have regard to the overriding objective.
26. An adjournment would also serve no good purpose. Mr and Mrs Hurst had already formally withdrawn their evidence in answer to the s.423 claim ahead of the hearing on 17 June 2022. The only further evidence directed after that point related simply to the value of the Property.
27. With the support of Mr Mace, Mr Warents, mindful of the fact that Mr and Mrs Hurst were unrepresented, took great care in addressing the Court on the caselaw, drawing all relevant arguments, for and against, to the attention of the Court when making his submissions. As previously noted, he had made the lion's share of his submissions, presented on this basis, by the time that the adjournment application was made.
28. Overall, an adjournment would simply put off the final conclusion of these proceedings, using up further court resources and at further cost to the parties, for no good purpose.
29. For all these reasons, I declined the application for an adjournment.

Substantive Consequential Relief

30. I turn next to the substantive consequential relief granted.
31. Section 423(2) sets out the power of the Court to 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'.

32. Section 425 then sets out a non-exhaustive range of orders that the court may make. The fact that it is intended to be a non-exhaustive list is made clear by the opening words of Section 425(1), ‘Without prejudice to the generality of section 423’.
33. Both Mr Mace and Mr Warens referred me to a helpful summary set out in *Dormco Sica Ltd & Ors v SBL Carston Ltd* 2021 EWHC 3209 (Ch) at 116:
- ‘116 ...
- (d) As to the relief which may be ordered:
- i) The Court’s very wide discretionary powers of relief are required by s423(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 s423(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] 1 BCLC 706 at 714).
- ii) Although the purpose of the relief is expressed within s423 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)).’
34. On behalf of the Beneficiaries, Mr Warens reminds me that one of the reasons the court is given such a wide jurisdiction as to remedy ‘is to allow it flexibility in fashioning relief which is carefully tailored to the justice of the particular case’: *Akhmedova v Akhmedov* [2021] 2 WLR 88 at [87].
35. Mr Warens submitted that when fashioning relief which is carefully tailored to the justice of this case, two highly material factors are (1) that (as I found in my previous judgment and as in any event conceded by the Applicant), the Beneficiaries are entirely innocent recipients and (2) that, even if one leaves to one side the possibility of a successful challenge of the Applicants time costs and legal costs, and assumes such costs will be paid in full, there will, on any footing, be a surplus of at least £500,000.
36. The provisions of s.423, Mr Warens submits, were not intended to punish those who receive assets as a result of a qualifying transaction: *Deansgate 123 LLP v Workman* [2019] BPIR 341 at [57]. He reminds me that the relief granted under s423 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’: *Griffin v Awoderu* [2008] BPIR 877 at [40].
37. Mr Warens contended that the proper approach where the transferee is innocent and the asset which is the subject matter of the s423 transaction is worth more than the sum needed to pay the debtor’s creditors was expressly considered by Sales J in 4 Eng

Ltd v Harper [2010] BCC 746. In that case, in the course of considering the principles applicable to the exercise of the court's discretion as to the appropriate remedy to grant under s423-5 IA 1986, Sales J (at [13]) spoke of the balance to be struck between the interests of the creditors and of the transferee; and identified the transferee's mental state as an important factor.

38. At [15], Sales J went on to observe that:

'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'

39. Mr Warens very properly reminded me that the observations of Sales J at paragraph [15] of his judgment were strictly obiter, as 4 Eng was not a 'surplus' case. 4 Eng was nonetheless a fully reasoned judgment delivered after detailed submissions from leading counsel on both sides on the scope of relief which may be ordered on a s.423 claim. Whilst some commentators (and indeed the Privy Council in Conway [2019] UKPC 36 at [116]-[117]) have expressed reservations about the extent to which *change of position* may operate as a complete defence to a s.423 claim, 'the reasoning on which 4Eng was based has been adopted and followed on a number of occasions': Bucknall v Wilson [2022] 1 WLR 61 per Trower J at [54]. In BAT Industries plc v Sequana SA [2017] Bus LR 82, 4Eng was described by Rose J at paragraph 520 of her judgment as the leading case on the scope of the powers of the court under section 425.

40. Moreover, the observations of Sales J at paragraph [15] of his judgment in 4Eng are fully consistent with the principles explained by the Court of Appeal in Chohan v Saggat [1994] 1 BCLC 706. At 714d-e in Chohan, Nourse LJ observed (with emphasis added) that:

'Any order made under [s423(2)] must seek, so far as practicable, both to restore the position to what it would have been if the transaction had not been entered into and to protect the interests of the victims of it. It is *not* a power to restore the position *generally, but in such a way as to protect the victim's interests*'

41. Mr Warens submitted that any order granted in the exercise of the court's powers under ss423-5 should not prejudice a transferee any more than is required to protect the victim's interest.

42. He further submitted that this approach is reflected in, or at the very least consistent with, the non-exhaustive range of orders listed in s.425, noting that one of the alternatives to setting aside a transaction in its entirety is ordering the payment of a sum of money (s.425(1)(d)), secured where appropriate by a charge (s.425(1)(f)). Had the inclusion of s.425(1)(d) been intended simply to cater for cases in which some (rather than no) consideration was given, or for cases where restitutio in integrum was no longer possible, Parliament could have said so. The absence of any express restrictions on the use of the orders listed in s.425(1), coupled with the fact that the

list is expressed to be non-exhaustive, was entirely consistent with Parliament's intention to confer on the courts a wide jurisdiction as to remedy.

43. Mr Warens further submitted that the observations of Sales J at paragraph [15] of his judgment in 4Eng tacitly acknowledge that in 'surplus' cases, the balance ordinarily to be struck between creditors and transferee *falls away*, as the creditors have no interest in the surplus. He submits that in such circumstances, the only remaining legitimate interest to be considered is that of the transferee. As a secondary position, he contends that if a balance does fall to be struck between transferee and transferor, then ordinarily, the balance will come down firmly in favour of the transferee. This, he submits, is in keeping with the very restricted circumstances in which the courts will allow a donor to reverse a gift. In this regard he helpfully referred me to *Shalson v Russon* [2005] Ch 281 at [187], [190]; *Pitt v Holt* [2013] 2 AC 108 at 110 para 2; *Times Travel (UK) Ltd v Pakistan International Airlines Corp*n [2021] 3 WLR 727; *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 and Chapter 15 of Snell's Equity: all of which, he submitted, reflect a principle of general law that, save in specific, carefully defined circumstances, the consequences of a voluntary disposition are not to be interfered with and that, even where they are, the conduct of the donor will be highly material to the manner in which the court exercises its discretion.
44. This, Mr Warens submits, is the background against which Parliament legislated; it would be surprising, he argued, if, in a s.423 context, Parliament wished to subvert general policy regarding gifts in respect of any property transferred which is surplus to the requirements of victims/creditors. He further submitted that Parliament would be expected to use express words if it intended to depart from such principles.
45. As a useful cross-check, he invited me to compare the consequences, set against the backdrop of the purpose of ss.423-5; on the one hand, the innocent transferee retaining such of the property as is not required to protect the victims' interests: on the other hand, the non-innocent transferor getting a windfall, as a result of their own wrongdoing.
46. For all these reasons, Mr Warens submitted that the court could be satisfied that it had jurisdiction under ss423-5 both to set aside the Declaration of Trust of the Property and to order that the surplus proceeds of sale of the Property be paid to the Beneficiaries.
47. On the issue of discretion, Mr Warens went on to stress that the Beneficiaries had 'no desire to see Mr and Mrs Hurst destitute and on the streets'. That was not the intention of the order sought. The Beneficiaries were very concerned that Mr and Mrs Hurst had spent the best part of 30 years engaged in unsuccessful litigation at enormous cost; they had each been made the subject of ECROs on more than one occasion (indeed, Mr Hurst is subject to an ECRO at present): Mrs Hurst is now bankrupt and Mr Hurst has been bankrupted twice. The Beneficiaries, as innocent recipients, now simply want to retain the benefit of what is left of the 'family treasure'.
48. There was also a practical advantage, he submitted, in adopting, as a matter of mechanics, the option of (1) setting aside the Declaration of Trust regarding the Property and ordering the surplus proceeds of sale of the Property to be paid to the Beneficiaries, rather than (2) ordering the Beneficiaries to pay a given sum of money,

such sum to be secured by way of a charge on the Property pending its sale. Whilst the Inheritance Tax position was the same whichever option was adopted (because Mrs Hurst in practice reserved a benefit by continuing to live at the Property following execution of the Declaration of Trust), there was a potential Capital Gains tax saving in adopting option (1).

49. In addition, an interest in the surplus monies would allow the Beneficiaries a ‘foot in the door’, at least, in establishing locus to bring a s.282(1)(b) annulment application themselves, following payment in full of the bankruptcy debts and expenses from the proceeds of sale of the Property, rather than leaving any such challenge to Mr and Mrs Hurst. This would pave the way for an orderly, targeted and proportionate challenge of the Applicant’s time costs and legal fees under 10.134 IR 2016 and would also bring clarity to the issue of who would reap the benefits of any successful 10.134 IR 2016 challenge.
50. A further practical advantage, he maintained, was that it would obviate the need for any tortured debate on the sum in which any money judgment should be set, given the likelihood of a fee challenge.
51. Mr Mace supported Mr Warent’s position, both on jurisdiction and discretion.
52. On the issue of discretion, Mr Mace added that the hearing of 23 September 2022 was the culmination of 30 years of litigation. He maintained that if the balance of the proceeds were ordered to be paid to the Beneficiaries, the Applicant hoped that this might limit the scope for Mr and Mrs Hurst to continue to litigate.
53. By the afternoon of the hearing, Mrs Hurst confirmed that she was ‘prepared to let the Court decide who gets the surplus proceeds’.

Discussion and conclusions on jurisdiction

54. At first glance the proposal that the Declaration of Trust be set aside, but that the surplus proceeds of sale of the Property should be paid to the beneficiaries of that trust, appears counter intuitive. Ordinarily, if a trust is set aside, the logical consequence is that the trust property reverts to the settlor. This is not, however, an ordinary context. The powers which the court is being invited to exercise arise from the bespoke jurisdiction conferred by ss 423-425 of the Insolvency Act 1986.
55. Under ss 423-5, the court is given a wide jurisdiction as to remedy ‘to allow it flexibility in fashioning relief which is carefully tailored to the justice of the particular case’: *Akhmedova v Akhmedov* [2021] 2 WLR 88 at [87].
56. The flexibility of the jurisdiction is readily exemplified by *Chohan v Saggar* [1994] 1 BCLC 706. In *Chohan*, B, in an attempt to put his assets beyond the reach of a judgment creditor, C, transferred a house to S, a protected tenant living at the property, for £50,000, subject to a legal charge in favour of Anglia Building Society. On the same day, the charge in favour of Anglia Building Society was discharged and a charge in favour of Chelsea Building Society was executed to secure a loan to S. A few weeks later, S executed a trust deed, declaring that she held the property on trust for M, a business associate of B. C brought a claim under s.423. At first instance, the

judge set aside the trust deed and declared that S held the property (subject to the charge in favour of the Chelsea Building Society) on trust as to given proportions for herself and B. C appealed, arguing (inter alia) that the judge should have set aside the transfer of the property rather than the trust deed, and that the proportions in which he found that the beneficial interests in the equity of redemption were held by S and B were wrong. On appeal, the Court of Appeal upheld the judge's decision to set aside the trust deed rather than the transfer, on the grounds that under s.425(2)(a) IA 1986, no order should be made which would prejudice the interests of the Chelsea Building Society. The Court of Appeal did however conclude that the judge had erred as a matter of principle in his assessment of the respective shares of the beneficial interests of S and B in the property, holding that the charge in favour of Chelsea Building Society should be debited wholly against the interest of S rather than being borne rateably between S and B. There was therefore an adjustment in this respect.

57. Clearly, Chohan was not a 'surplus' case and, as Mr Warents very properly reminded me, the Beneficiaries are not in the same position as the Chelsea Building Society; they do not qualify for protection under s.425(2), as (among other things) they did not provide value. What Chohan does demonstrate, however, is the flexibility of the jurisdiction; to allow the fashioning of relief appropriate to meet the justice of the case. As observed by Nourse LJ in Chohan at p713:

'... the power under s423(2) is a power to restore and protect so far as is practicable. Moreover, it is important to note that it is not expressed as a power to set aside the transaction. Provided that it is exercised in order to restore the position and protect the interests of the victims of the transaction so far as practicable (see below), the whole or any part of the transaction may be set aside. Thus, for example, where the transaction is made up of more than one component the power may be exercised by setting aside one component and not the other or others of them. Any lingering doubt on this question is dispelled by a consideration of the wide range of possible orders specified in s425(1). It is clear that Parliament intended the court to have much fuller powers than were previously available under s172 of the Law of Property Act 1925. I therefore reject Sir William Goodhart's submission that it was not open to the judge to set aside the trust deed but not the transfer'

58. Nourse LJ went on to conclude that the judge had been right to declare a trust of the equity of redemption. His only error of principle was in not debiting the amount owing under the legal charge in favour of Chelsea Building Society wholly against S's share. To that limited extent, the appeal was allowed and the judge's order varied accordingly.
59. This clearly demonstrates the flexibility of the jurisdiction; the remedy fashioned by the judge and upheld with some modifications by the Court of Appeal involved the setting aside of a trust *and* the declaration of a *new* trust, with *different* beneficiaries, in its place. Whilst one of the beneficiaries of the new trust was the settlor of the old trust, the other beneficiary was not. As noted by Nourse LJ (with emphasis added):

‘Any order made under [s423(2)] must seek, so far as practicable, both to restore the position to what it would have been if the transaction had not been entered into and to protect the interests of the victims of it. It is *not* a power to restore the position *generally, but in such a way as to protect the victim’s interests*’

60. That some adjustment should be made when fashioning relief in a surplus case was readily acknowledged by Sales J in 4Eng at [15], where he observed:

‘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’

61. One of the alternatives to setting aside a transaction in its entirety is ordering the payment of a sum of money (s.425(1)(d)), secured where appropriate by a charge (s.425(1)(f)). In the absence of any express restrictions on the circumstances in which s.425(1)(d) may be employed, it would in my judgment be open to the court in this case to leave the Declaration of Trust intact and simply to order the Beneficiaries to pay the Applicant a sum of money sufficient to cover all bankruptcy debts and expenses. The alternative proposed by the Applicant and the Beneficiaries, of setting aside the Declaration of Trust but directing payment of any surplus to the Beneficiaries, is simply a matter of mechanics, driven by practical considerations. As a matter of jurisdiction, I am satisfied that it is open to the Court, in the exercise of its powers under ss 423-5, to adopt the alternative proposed by the Applicant and the Beneficiaries. The order which the Applicant and the Beneficiaries invite the Court to make does protect the victims’ interests.

Discretion

62. The next question is whether the Court should exercise its *discretion* to grant the order sought by the Applicant and the Beneficiaries.
63. I accept Mr Warens’ submission that the obiter observations of Sales J at paragraph [15] of his judgment in 4Eng tacitly acknowledge that in ‘surplus’ cases, the balance ordinarily to be struck between victims/creditors and transferee falls away, as the victims/creditors have no interest in the surplus.
64. It does not follow, however, that in surplus cases, the *only* remaining legitimate interest to be considered is that of the transferee. In solvent cases involving a gift, for example, a balance does fall to be struck between donee and donor. In the absence of any circumstances which, under general law, would warrant an order setting aside the gift, or a declaration that the gift is void, however, the balance will ordinarily come down firmly in favour of the donee; that is to say: absent any such ‘vitiating’ circumstances, an order granted in the exercise of the court’s powers under ss423-5 should not prejudice the donee any more than is required to protect the victims’ interests.

65. This approach is consistent with that exemplified in *Shalson v Russon* [2005] Ch 281 at [187], [190]; *Pitt v Holt* [2013] 2 AC 108 at 110 para 2; *Times Travel (UK) Ltd v Pakistan International Airlines Corp*n [2021] 3 WLR 727; *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 and addressed more generally in Chapter 15 of *Snell's Equity*. In this regard I accept Mr Warents' submission that, save in such defined 'vitiating' circumstances (none of which are advanced or evidenced in this case), the consequences of a voluntary disposition are not lightly to be interfered with.
66. For the sake of completeness I would add that, during the course of the hearing, I explored with Mrs Hurst her current circumstances. She confirmed to me that she and Mr Hurst were looking at properties to rent and that they had adequate income to cover the rent. Whilst initially inviting me to order payment of the surplus to her, she did not at any stage suggest that she and Mr Hurst needed any part of the surplus to cover their rent and living costs. By the afternoon of the hearing, Mrs Hurst confirmed to me that she was 'prepared to let the court decide who gets the surplus'. From my exchanges with Mrs Hurst during the course of the hearing, I consider it legitimate to conclude that Mr and Mrs Hurst have no need for the surplus in order to cover their rent and living costs. Since circulation of this judgment in draft, Mrs Hurst has by email dated 21 October 2022 sought to 'row back' from her statement in court that she and Mr Hurst had adequate pension and other income to cover rent and living expenses on vacating the Property, suggesting instead that she only had "sufficient savings with which to pay for a few weeks' or months' rent" and that "those savings will soon be exhausted". In my judgment Mrs Hurst's ready responses to me in court on this issue are more likely to reflect the accurate position than her later email of 21 October 2022, composed after consideration of this judgement. In this regard it is of note that the later position adopted in Mrs Hurst's email of 21 October 2022 makes no reference to the 'income' and 'pension' to which she referred at the hearing; simply to savings. Moreover, Mrs Hurst's email of 21 October 2022 does not explain why, at a later stage of the hearing, Mrs Hurst confirmed to me, in a fairly relaxed fashion, that she was 'prepared to let the court decide' who gets the surplus. Submissions and emails aside, I have been taken to no CPR-compliant evidence to suggest, still less establish on a balance of probabilities, that Mr and Mrs Hurst have any need for the surplus in order to cover their anticipated rent and living costs. In the light of the foregoing, notwithstanding Mrs Hurst's email of 21 October 2022, I remain of the view that it is legitimate for this court to conclude that Mr and Mrs Hurst have no need for the surplus in order to cover their rent and living costs.
67. Moreover as previously noted, Mr Warents was at pains to stress that the Beneficiaries had 'no desire to see Mr and Mrs Hurst destitute and on the streets'. The Beneficiaries' main concern is that Mr and Mrs Hurst have spent the best part of 30 years engaged in unsuccessful litigation at enormous cost. The Beneficiaries, as innocent recipients, now simply want to make the best of a bad lot and to preserve the benefit of any assets remaining after payment in full of the bankruptcy debts and expenses. Notwithstanding these proceedings, they remain a family.
68. In the circumstances of this case, I have come to the firm conclusion that I should exercise my discretion in favour of granting an order setting aside the Declaration of Trust and directing that the surplus proceeds of sale of the Property be paid to the

Beneficiaries in equal shares. In reaching this conclusion, I take into account the following factors:

(1) The Court has found that Mrs Hurst acted for the purposes of putting assets beyond the reach of creditors within the meaning of s423. Mrs Hurst should not therefore be regarded as being innocent when balancing her interests against those of the Beneficiaries.

(2) In contrast, as I have found previously, the Beneficiaries are entirely innocent transferees.

(3) Mrs Hurst voluntarily gave away her interest in the Property to the Beneficiaries by means of the Declaration of Trust. No grounds have been advanced or evidenced which under general law would warrant an order setting aside that gift or a declaration that the gift is void. Subject to appropriately protecting the interests of her creditors, on the evidence before me, there is no principled basis upon which Mrs Hurst should be permitted to avoid the consequences of that gift now.

(4) Even if one were to put (3) to one side (which in my judgment one should not), for reasons previously given, I consider it legitimate to conclude that Mr and Mrs Hurst have no need for the surplus in order to cover their rent and living costs.

(5) Standing back and comparing the consequences, set against the backdrop of the purpose of ss.423-5; on the one hand, the innocent transferees retaining such of the Property as is not required to protect the victims' interests: on the other hand, the non-innocent transferor getting a windfall as a result of her own wrongdoing, in my judgment, in the circumstances of this case, as addressed in this judgment and my earlier judgment reported at [2022] EWHC 2204 (Ch), the answer is clear. The relief granted in this case in the exercise of the court's powers under ss423-5 should not, in my judgment, prejudice the Beneficiaries any more than is required to protect the victims' interests.

(6) In the absence of any express restrictions on the circumstances in which s.425(1)(d) may be employed, it would in my judgment be open to the court to leave the Declaration of Trust intact and simply to order the Beneficiaries to pay the Applicant a sum of money sufficient to cover all bankruptcy debts and expenses ('Option 1'). The alternative proposed by the Applicant and the Beneficiaries, of setting aside the Declaration of Trust but directing payment of any surplus to the Beneficiaries ('Option 2'), is simply a matter of mechanics, driven by practical considerations.

(7) Adopting Option 2 rather than Option 1 obviates the need to quantify a money judgment in a case where the money judgment required is something of a moving target, given that the Applicant's time costs and legal fees are likely to be the subject of challenge.

(8) Adopting Option 2 may also have fiscal advantages. Whilst the Inheritance Tax position is the same whether Option 1 or Option 2 is adopted (because Mrs Hurst in practice reserved a benefit by continuing to live at the Property thereafter), there is also potential, at least, for a saving of Capital Gains tax if Option 2 is adopted.

69. For all these reasons, I shall make an order setting aside the Declaration of Trust and ordering that any surplus be paid to the Beneficiaries in equal shares.

Remaining heads of relief

70. All parties were agreed that the Property had to be sold and that Mr and Mrs Hurst would have to deliver up vacant possession of the Property. There were some differences between the parties, however, on sale price, who should have conduct of the sale, the date upon which Mr and Mrs Hurst should deliver up possession, and costs. I shall deal with these in turn.

Sale Price

71. At the hearing on 17 June 2022, Mr and Mrs Hurst indicated that they were already seeking to sell the Property, that they had received an offer for the Property from an unnamed buyer which they wished to pursue; and that they wished to continue to have conduct of the sale.
72. By paragraph 5 of the Order of 17 June, the Respondents were granted liberty to file and serve, not less than five days before the consequential hearing (ie by 18 September 2022), a witness statement setting out details of any offers received for the purchase of the Property and exhibiting any valuation reports obtained in respect of the Property.
73. Paragraph 6 of the Order of 17 June gave the Applicant liberty to file and serve not less than 4 days before the consequential hearing (ie by 19 September 2022) a witness statement exhibiting a valuation of the Property to be produced by Pantera Property.
74. The Beneficiaries filed and served their valuation evidence on 15 September. This comprised the witness statement dated 15 September of Nathanael Young, exhibiting the report dated 13 September 2022 of Mr R G Maunder Taylor, an RICS Registered Valuer of a firm of chartered surveyors and estate agents known as Maunder Taylor, based in London N20 ('the Taylor Report'). The Taylor Report valued the Property at £2,050,000.
75. The Applicant filed and served his evidence shortly thereafter. This comprised the third witness statement dated 15 September 2022 of Michael Mulligan, exhibiting a valuation of the property by Ms Gabriella Snook BSc (Hons) MRICS Registered Valuer on behalf of Pantera Property ('the Pantera Report'). The Pantera Report valued the Property at £1.8m.
76. Mrs Hurst, the First Respondent, filed no evidence.
77. Mr Hurst, who on any footing has had no beneficial interest in the Property since his first bankruptcy in 2001, filed two witness statements, dated 16 September and 21 September respectively. Mr Hurst did not exhibit a valuation report to either statement.

The Taylor Report

78. Mr Taylor was instructed by the Beneficiaries.
79. At paragraph 1.5 of his report, Mr Taylor states that he had been ‘unable to gain access to the Property’ and so had prepared his report on a desktop basis without inspection. It was clear from the report, however, that Mr Taylor had spoken to the local estate agent instructed by Mr and Mrs Hurst, Goldschmidt & Howland (‘Goldschmidt’), and had read that agent’s particulars for the Property.
80. At paragraph 3.1 and 3.2 of the Taylor Report, Mr Taylor notes that Goldschmidt’s particulars for the Property suggest that it ‘requires modernisation throughout’ and has a total floor area of 1915 square feet (177.9m) including the garage. Mr Taylor confirms that he has prepared his valuation on the assumption that these measurements are correct.
81. At paragraph 7 of his report, Mr Taylor considers what he describes as recent transactions of similar properties that have sold in the local vicinity. Two of the properties are five-bedroomed properties rather than four, however, with total floor areas (250.4m and 196.9m respectively) significantly exceeding that of the Property (177.9m) and so are not terribly close comparables.
82. A further comparable considered by Mr Taylor is 72 Wildwood Road, sold in December 2021 for £1.695m, a four-bedroomed property with a total floor area excluding the loft room of 139.9m. The adjusted value, having regard to the Land Registry House Price index which suggests that values have increased by approximately 4.5% from December 2021 to June 2022, is said to be £1.77m as at June 2022. Comparing 72 Wildwood and the Property, Mr Taylor observes ‘In my opinion, the [Property] is larger and in a better position closer to local amenities, and I would therefore expect the [Property] to achieve more on the open market’. I pause here to note that during the course of the hearing, Mrs Hurst also informed me that 72 Wildwood was not as well positioned as the Property.
83. At paragraph 7.1.4, Mr Taylor went on to observe that Goldschmidt ‘have had the property on the open market since the end of August 2022 with an asking price of £2.3 million.’ He also stated that ‘I have been informed by the agent that they have had viewings and received one offer at £2 million which was rejected’, adding, ‘In my opinion, although this offer has been rejected, it provides an indication as to what someone is willing to pay for the property’.
84. Mr Taylor concludes that the value of the Property is £2,050,000.

The Pantera Report

85. The Pantera Report dated 15 September 2022 was prepared on the instruction of the Applicant. It was based on an inspection of the Property on 13 July 2022.
86. At page 3 of the Report, the Property was said to have been ‘in dated condition’ at the time of inspection. This accords with Goldschmidts’ particulars for the Property, which state that it ‘requires modernisation throughout’.

87. The measurements for the Property set out in the Pantera Report (1700 sq ft or 158 sq m) do not tally with Goldschmidts' measurements (1915 sq ft or 177.9m). The Pantera Report states that the Property was measured in accordance with RICS Property measurement professional statement; it appears that a laser method was employed.
88. At page 4 of the Pantera Report, Ms Snook states that 'Having spoken to Goldschmidt estate agents, they believe the current asking price of £2,300,000 is very optimistic and it is much more likely to achieve in the region of £2,000,000'. Ms Snook continues (at p4) that 'The difference in measurements between our report and the estate agent is a small margin of error that can occur due to measurements carried out by individuals with a laser measurer. This may explain the small discrepancy between our Market Value and what Goldschmidt estate agents believe the property will sell for.' This is an acknowledgement that, allowing for the differences in measurement, the Property may be worth £2m (ie 'what Goldschmidt estate agents believe the property will sell for') rather than £1.8m.
89. At page 5 of the Pantera Report, Ms Snook goes on to consider recent sales of 'similar' properties. Three of the five properties considered, however, sold at prices ranging from £2m to £2.3m, (i) were five-bedroomed houses rather than four-bedroomed, (ii) were in 'fair' or 'good' condition rather than 'dated' and (iii) even working from Goldschmidt's measurements for the Property (1915 sq ft or 177.9m) were larger than the Property, sporting measurements ranging from 2,282 sq ft to 2,336 sq ft.
90. A fourth property considered by Ms Snook, 73 Northway, a four-bedroom detached house in average condition with a total floor space of 2,160 sq ft, was said to be under offer at £2.1m. Again however, this floorspace is larger than that of the Property, even working from Goldschmidt's measurements.
91. The fifth property considered was a property also considered by Mr Taylor, 72 Wildwood, a four-bedroom semi-detached house in dated condition with a total floor space, according to the EPC Register, of 1981 sq ft (but on Mr Taylor's calculations, excluding the loft space, 1505 sq ft), which sold for £1,695,000 in December 2021.
92. Taking all such comparables into account, the Pantera report concludes that a market value of £1.8m is achievable for the property, 'given its smaller size and dated condition'.

Mr Hurst's evidence

93. Mr and Mrs Hurst did not adduce in evidence any valuation report in respect of the Property – even from their own estate agents, Goldschmidts, who have been formally instructed since at least June 2022. In my judgment this is a telling omission, considered against the backdrop of (1) Goldschmidt's retainer letter dated 24 June 2022, which, unusually, does not recommend an asking price, but instead states at paragraph 3 'we note that the price that we should quote is a Guide Price of £2,300,000'; (2) Ms Snook's conversation with Goldschmidts, summarised at page 4 of the Pantera Report, in which Goldschmidts are reported to have expressed a belief that 'the current asking price of £2,300,000 is very optimistic' and that the Property

‘is much more likely to achieve in the region of £2,000,000’; and (3) Mr Hurst’s failure to controvert or dispute the conversation between Ms Snooks and Goldschmidts referred to in (2) above in either of his witness statements dated 16 and 21 September 2022.

94. Mr Hurst sought to justify the guide price of £2.3 million by reference to an alleged offer dated 22 May 2022 of £2.2m plus various benefits said to be worth approximately £100,000. The only documentary evidence adduced of the offer of 22 May 2022, however, is an un-headed document with the signature section blanked out. Whilst Mr Hurst’s evidence was that the offer was ‘put on ice’ pending the June hearing and that the prospective purchasers pulled out shortly thereafter as a result of a hike in interest rates in June and a consequential ‘nervousness’ in the property market, his evidence does not explain why the purchasers could not be identified, or why they could not be asked to confirm, by way of a simple email, that they had made such an offer but had subsequently withdrawn it. The document also sits in glorious isolation; Mr Hurst’s witness statements do not exhibit any correspondence between Mr and Mrs Hurst and the prospective purchasers before or after 22 May 2022.
95. Even if the unheaded document dated 22 May 2022 is taken at face value, however, it is clear from Mr Hurst’s evidence that the offer, having initially been ‘put on ice’ by Mr and Mrs Hurst, was withdrawn only a month after it was made, at the point at which Mr and Mrs Hurst took it ‘off ice’ and sought to follow up on it. Mr Hurst blames a hike in interest rates, but on his own evidence, that did not stop the sales of 46 and 62 Southway going ahead in June and July/August 2022. The rapidity of the withdrawal of the offer of 22 May 2022 at the point at which it was followed up by Mr and Mrs Hurst does impact on the extent to which it can be taken to be a reliable indicator of the market value of the Property as at May/June 2022, particularly when considered against the backdrop of Goldschmidt’s own assessment of the value of the Property, summarised at paragraph 93(2) above, and the professionally prepared valuation reports in evidence.
96. Save for the foregoing and confirmation that the total floor area of the Property is 1915 sq ft rather than 1700 sq ft, Mr Hurst’s statements dated 16 and 21 September 2022 are of little if any probative value on the issue of the current market value of the Property. Neither statement exhibits a valuation report for the Property itself, and the evidence of comparables sought to be introduced is for the most part undocumented and unparticularised.
97. At paragraph 8 of his statement dated 16 September 2022, Mr Hurst lists three sales in the same street as the Property in 2022 (46, 62 and 66 Southway) which he maintains achieved prices of between £2.7m and £3m. Even assuming that such sales were achieved, however, no details are given of the number of bedrooms each property has, or of its condition. Whilst by his later statement of 21 September 2022, Mr Hurst confirmed that 62 Southway had had a loft extension, neither of Mr Hurst’s witness statements states whether a loft conversion had yet been effected at the other two properties (44 and 66 Southway). What is clear, however, is that on Mr Hurst’s own evidence, all three properties are materially larger than the Property, ranging from 2400 sq ft to 2850 sq ft.

98. At paragraph 4 of his witness statement dated 21 September 2022, Mr Hurst refers to an email dated 15 September 2022 in which he lists the sale prices for six properties in the same area as the Property. Three of the six properties included in the list were 46, 62 and 66 Southway, addressed above. Of the remaining three (15 Middleway, 15 Raeburn Close and 28 Litchfield Way), one (28 Litchfield Way) is said not to have been sold, but to be under offer. As with the witness statement of 16 September 2022, no details are given of the number of bedrooms each property has, or of its condition. In addition, no total floor areas are given for 15 Middleway, 15 Raeburn Close and 28 Litchfield Way. It is clear from the comparables listed in Mr Taylor's report, however, that one of the three, 15 Raeburn Close, which sold for £2.565m in June 2022, is considerably larger than the Property. It has 5 bedrooms and a total floor area of 196.9m, compared to the Property's 4 bedrooms and 177.9m. As noted by Mr Taylor at paragraph 7.1.2 of his report, 15 Raeburn Close is 'larger and has more bedrooms, and I would therefore expect the Property to achieve less on the open market'.
99. By paragraph 22 of his witness statement dated 21 September 2022, Mr Hurst confirms that he and Goldschmidt had decided 'earlier this week' (ie, the week commencing 19 September 2022) to reduce the 'Guide Price' to £2.1m.
100. Working from Pantera's estimate of £1059 per sq ft, Mr Hurst states at paragraph 23 of his witness statement dated 21 September 2022 that in his view, the 'market value' of the Property is 'approximately £2,027,985 (i.e 1915 square feet @ £1,059 per square foot)'.

Discussion and Conclusions on Valuation

101. As will be seen from the foregoing, ultimately, there was very little between the parties on the appropriate sale price. In summary:
- (1) The Beneficiaries and the Applicant were agreed on an asking price of £2.05m, subject to (a) downwards adjustment to no less than £1.8m on the advice of a reputable estate agent instructed by the Applicant and (b) downwards adjustment to below £1.8m (i) with the consent of the Beneficiaries or (ii) by further order of the Court; whilst
- (2) Mr and Mrs Hurst contended for a minimum price of £2.028m, subject only to downward adjustment by further order of the Court.
102. On the evidence before me, I am satisfied that the open market value of the Property is currently in the region of £2m to £2.05m. I am fortified in this conclusion by (i) Goldschmidt's reported views on the current market value of the Property, summarised at page 4 of the Pantera Report (ii) the recent reduction in guide price to £2.1m agreed by Mr and Mrs Hurst and Goldschmidts and (iii) the factors addressed in the Taylor Report. Whilst I accept that the Pantera Report was prepared with the benefit of an internal inspection, when the Taylor Report was based on a desktop valuation, the analysis undertaken on the adjusted value of 72 Wildwood Road by Mr Taylor at paragraph 7.1.3 of his report and his comparison of the 72 Wildwood and the Property has persuaded me that the Pantera Report may have pitched the current market value of the Property a little low when valuing it at £1.8m. I am fortified in

this conclusion by Ms Snooks' acknowledgement in the Pantera Report that, working from Goldschmidts' measurements, £2m was about right.

103. For these reasons, I am satisfied that the Property should initially be marketed for sale at £2.05m as proposed by both the Applicant and the Beneficiaries. That said, given the current tension between fiscal and monetary policy in the UK and the inevitable impact that will have on the property market over the coming months, I have come to the conclusion that downwards adjustments in the asking/sale price to a minimum of £1.8m should be permitted without reference back to Court on the advice of a reputable estate agent. I have also come to the conclusion that the Applicant should be permitted to sell the Property at a price lower than £1.8m with the consent of all the Beneficiaries or in the absence of such consent, permission of the court.
104. The alternative proposed by Mr and Mrs Hurst, of requiring the permission of the court for any downwards adjustment of the sale price lower than £2.028m, is impracticable and unnecessary. It will simply slow down the sales process and generate further litigation and costs for no good purpose. The Beneficiaries, as the only individuals interested in the surplus, should be free to consent to a price lower than £1.8m. It is only in the absence of the Beneficiaries' consent that reference back to court for approval of acceptance of a price lower than £1.8m is warranted.

Conduct of Sale

105. The Applicant and the Beneficiaries maintain that the Applicant should be given conduct of the sale forthwith. Mr and Mrs Hurst maintain that they should have conduct of the sale until 31 December 2022 and that only if they have not achieved a sale by that stage should conduct be given to the Applicant.
106. On the evidence before me, I am entirely satisfied that the Applicant should have conduct of the sale forthwith.
107. Whilst Mr and Mrs Hurst insist that they have been using their best endeavours to sell the Property, on the evidence before me, it is clear that they have not.
108. Mr Hurst's evidence makes no specific reference to viewings until May 2022.
109. On Mr Hurst's evidence, it was not until 24 June 2022 that Mr and Mrs Hurst formally instructed Goldschmidt to prepare sales particulars with a view to circulating them to applicants on their database (witness statement of 21 September 2022, paragraph 15). Even then, the 'guide price' set at Mr and Mrs Hurst's insistence was £2.3m, when it is clear from the evidence that the view of their own agents was that this was 'very optimistic' and that the Property was 'much more likely to achieve in the region of £2,000,000'.
110. Only one viewing in June 2022 is mentioned in Mr Hurst's statement.
111. No viewings at all took place in July or August 2022.
112. It was not until 31 August 2022 that the Property was placed on the open market for sale, albeit still on a 'sole agency' basis, and at an inflated guide price of £2.3m.

113. Whilst Mr Hurst's statement of 21 September 2022 mentions four viewings in September (on 5, 7, 9 and 13 September, in the run up to the hearing), he maintains that no offers were received.
114. It was only very shortly before the September hearing that Mr and Mrs Hurst agreed with Goldschmidt that the guide price should be reduced to £2.1m.
115. The Applicant contends that Mr and Mrs Hurst deliberately stalled on placing the Property on the open market for sale and, until very shortly before the hearing of 23 September 2022, held out for an inflated price, because they have no wish to vacate the Property or to sell it.
116. In my judgment, the factors set out at paragraph 109 to 114, viewed in the circumstances of this case as a whole, support this conclusion.
117. In the absence of evidence from Goldschmidt and cross-examination, it would not be appropriate for me to determine whether either or both of Mr and Mrs Hurst also rejected an offer of £2m as suggested in the Taylor Report. Even leaving this contested issue to one side, however, it is clear from the factors summarised at paragraphs 109 to 114 above, viewed in the circumstances of this case as a whole, that there is a need in this case for conduct of the marketing and sale of the Property to be handed to the Applicant forthwith.
118. Mr and Mrs Hurst have had ample opportunity to find a purchaser for the Property already. They have paid lip service to wishing to sell the Property but have made little or no real effort to secure a timeous sale at a realistic price. On the evidence as a whole it is clear that they should not be left in charge of the sales process.
119. Mr and Mrs Hurst have no beneficial interest in the Property or the proceeds of sale of the same. They are merely registered proprietors who currently occupy the Property free of charge. Viewed objectively, they have little incentive to secure a timeous sale of the Property at a realistic price.
120. In contrast, the Applicant, as office-holder, is under a duty to collect in and realise assets in the estate. He is plainly the appropriate person to have conduct of the sale.
121. For all these reasons, I shall direct that the Applicant has conduct of the sale forthwith.

Date of Possession

122. There was very little between the parties on the issue of when Mr and Mrs Hurst should be ordered to deliver up possession.
123. The Applicant sought an order that Mr and Mrs Hurst deliver up vacant possession of the Property by 23 November 2022. The Beneficiaries adopted no position on the date of possession, save for inviting the Court to make a 'humane' order. Mr and Mrs Hurst each offered to deliver up possession by 23 January 2023 but resisted any earlier date.

124. Having considered the submissions of all parties with some care, I have come to the conclusion that Mr and Mrs Hurst should be ordered to deliver up possession on the earlier of completion of a sale and 23 January 2023. Whilst I appreciate the Applicant's wish to press on with marketing and his concerns that Mr and Mrs Hurst will, if left in occupation, hinder that process, the order which I have made does impose an obligation on Mr and Mrs Hurst to cooperate in the sales process. Moreover, the long-stop date of 23 January 2023 absent earlier completion affords the Applicant adequate protection and control in that process.

Costs

125. In light of the fact that there will on any footing be a surplus in this case, I declined the Applicant's invitation to order that the Respondents pay the Applicant's costs of the proceedings. As office-holder, the Applicant is in any event entitled to an indemnity from the estate in respect of his proper costs and expenses. The order which I have made, with the full consent of the Beneficiaries, reflects that entitlement.

Other Matters

126. For the sake of completeness I confirm that after circulation of this judgment in draft, Mr Hurst wrote in by email dated 21 October 2022 seeking to correct what he maintained was a 'factual misunderstanding' in paragraph 12 of the draft (and this) judgment. Having considered the contents of the email, I am satisfied that there is no 'factual misunderstanding' in paragraph 12 of the judgment; the witness statements of Mr and Mrs Hurst were formally withdrawn only shortly before the hearing of 17 June 2022.

ICC Judge Barber