



Neutral Citation Number: [2024] EWHC 759 (Ch)

Case No: BR-2019-001475

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**INSOLVENCY AND COMPANIES LIST (CHD)**

**In Bankruptcy**

Re: Audun Mar Gudmundsson (a Bankrupt)

In the Matter of the Insolvency Act 1986  
And in the Matter of Section 14 of the Trusts of Land and  
Appointment of Trustees Act 1996

Rolls Building  
Fetter Lane  
London  
EC4A 1NL  
Date: 10 April 2024

**Before Deputy Insolvency and Companies Court Judge Frith**

**Between :**

**Maxine Reid-Roberts and Brian Burke  
(the Joint Trustees in Bankruptcy of the Insolvent  
Estate of Audun Mar Gudmundsson)**

**Applicants**

**and -**

(1) **Hsiao Mei-Lin**  
(2) **Audun Mar Gudmundsson**

**Respondents**

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**Steven Fennell** (instructed by **DLA Piper UK LLP**) for the **Applicants**.  
**Thomas Robinson** (instructed by **Advocate**, formerly the **Bar Pro Bono Unit**)  
for the **First Respondent**.

The **Second Respondent** did not appear and was not represented.  
Hearing dates: 23 February 2024 and 10 April 2024  
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**Approved Judgment**

**This judgment was handed down by the judge remotely by circulation to the parties' representatives by e-mail and release to The National Archives. The date and time deemed for hand down is deemed to be 10.00 a.m. on 10 April 2024.**

## Deputy Insolvency and Companies Court Judge Frith:

### Introduction.

1. This is an application dated 13 February 2023 (the “**Application**”), issued by Maxine Reid-Roberts and Brian Burke (the “**Applicants**”) acting in their capacity as the Joint Trustees in Bankruptcy of the insolvent estate of the Second Respondent, who is the Bankrupt in these proceedings (the “**Bankrupt**”). It seeks declarations as to the beneficial ownership of a former matrimonial home located in Tuffnell Park, London N19 (the “**FMH**”); orders under s.335A of the Insolvency Act 1986 (“**IA86**”) for immediate possession and sale of that home; and orders under s.375 IA86 to vary previous costs decisions of this Court.
2. The First Respondent, Hsiao Mei-Lin (“**Ms Lin**”) is the former spouse of the Bankrupt. She still lives in the FMH with the two children of the marriage who are now aged 10 and 14. In addition, there are two lodgers who are in occupation under informal arrangements agreed between them and Ms Lin.
3. At the hearing before me, the Applicants were represented by Counsel, Mr Steven Fennell. The First Respondent was represented by Counsel, Mr Thomas Robinson. The Bankrupt indicated in correspondence that he did not intend to participate in the hearing. He did not attend and was not represented. I am grateful to both Counsel and those instructing them for their skeleton arguments, supplementary notes and oral submissions.
4. Ms Lin opposes the application on two principal grounds. First, she seeks a declaration that the Second Respondent’s beneficial interest in the FMH has not in fact vested in the Applicants, as Trustees in Bankruptcy of the Bankrupt as they contend. She submits that in fact, before the relevant bankruptcy order was made and in the context of the Respondents’ separation after a marriage breakdown, the Bankrupt had made a written disposition of his interest in the FMH under s.53(1) of the Law of Property Act 1925 to Ms Lin in return for her agreeing to take responsibility for looking after their children (then aged four and eight years old). She relies on the Court of Appeal decision in *Hudson v Hathway* [2023] KB 345. She submits that the written disposition divested the Bankrupt of his beneficial interest in the FMH prior to the making of the bankruptcy order. Consequently, it did not form part of the insolvent estate in the hands of the Applicants and, as a result, they have no further interest in the property capable of founding an order for possession.
5. This point was raised for the first time in the skeleton argument lodged by Mr Robinson shortly before the hearing. It was therefore not dealt with in Mr Fennell’s skeleton argument. To ensure that the parties could deal properly with it at the hearing, I directed that he should be at liberty to file further submissions on this point, with Mr Robinson having the right to respond, if so advised. In the event, both parties were able to provide further submissions at

short notice, for which I was very grateful. I have where appropriate adopted the contents of the skeleton arguments and supplementary notes in relation to the chronology of events and the facts which were not, in the main in dispute.

6. The second principal ground for Ms Lin's opposition to the application is that there are further and separate reasons why it would not be "just and reasonable" under s.335A IA 1986 to make the immediate possession and sale order that is sought:
  - a. The bankruptcy order was made on 26 February 2020, some seven days before the Family Court made a property adjustment order under the Matrimonial Causes Act 1973. This ordered the Second Respondent to transfer his interest in the FMH to the First Respondent. That order followed a hearing that had concluded almost a year earlier, on 20 February 2019. Ms Lin submits that the delay in handing down judgment was largely due to the Bankrupt, who, she submits asked the Judge to delay whilst failing to disclose to the judge or herself, first, the service of a statutory demand on him on 18 November 2019; second, the presentation of a bankruptcy petition on 22 December 2019; and finally, the making of the bankruptcy order itself. By failing to make those disclosures, Ms Lin asserts that the Bankrupt frustrated the effect of the property adjustment order, because it was eventually made on a date after the bankruptcy order when his beneficial interest was already vested in the Applicants by operation of law. She further asserts that this was his intention, relying on subsequent written communications to that effect given to the Applicants and their solicitors. She submits that had the judgment had been handed down earlier, the matrimonial order transferring the Bankrupt's interest could have taken effect before the commencement of the bankruptcy thereby securing her tenure of the FMH unassailably moving forward.
  - b. The FMH is home to Ms Lin's two children, now aged 10 and 14. The older child, has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). Both children and Ms Lin have suffered psychological trauma, due to the Bankrupt's abusive and violent behaviour during the marriage. She was also subjected to physical abuse. There was evidence that he used prostitutes. He had a serious addiction to methamphetamines. The equipment that he used to satisfy his addiction was discovered by his children at the FMH during an access visit. He agreed to subject himself to a drug test regime as a condition for continued access to his children. Ms Lin noticed anomalies in a clear drugs test that he produced. She contacted the test company who confirmed that it was a forgery. He admitted this both in the family proceedings and under cross examination at a hearing before Chief ICC Judge Briggs in March 2021 when he dismissed an application to annul the bankruptcy issued by Ms Lin.

- c. Ms Lin submits that after years of trauma, the children are now beginning to receive the stability of a family home. They are apparently well settled in local schools. She is concerned that both she and her children will suffer again, if they are forced to move home. Ms Lin has herself been diagnosed with complex developmental trauma arising from the breakdown of what appears to have been a tempestuous and abusive marriage. She no longer works in her previous occupation as an artist, devoting all her time to the care of her children. The FMH is now the family's sole source of income, as rooms in it are rented to two other occupants who pay her rent. Ms Lin and her children share one bedroom, and the remaining rooms provide £1700 per month (gross) in income. Meanwhile, she asserts that her husband resides in a five-bedroom house in Iceland, which he owns outright. He pays negligible amounts to her for the maintenance of the children of the marriage, claiming that his current financial circumstances preclude him from so doing.
- d. Ms Lin submits that the assets in the bankruptcy are unclear largely due to what the Family Court described as the "complex and deliberately opaque structures" set up by the husband with the assistance of Mr Stephen Jones, the Bankrupt's solicitor and tax adviser. The Bankrupt was a banker and investment manager, with interests in Icelandic property, Icelandic companies, pension funds and possibly offshore trusts. The Applicants have identified the value of the Icelandic property and a company asset as £925,000 before costs of sale. They have recently agreed to settle their claims to these assets for £203,000. Other assets remain to be investigated and realised. Ms Lin has questioned the decision to accept this sum.
- e. She also takes issue with certain claims in the bankruptcy, which she asserts are similarly opaque. Ms Lin submits that it is unclear as to the level, if any, at which they will be submitted for proof and admitted for dividend purposes. They currently total £2.574m, of which £2.31m is claimed by a company called Esquiline Finance Limited ("EFL"). EFL is a vehicle of the above-mentioned Mr Jones and his group of Jirehouse companies. Mr Jones has been sentenced to two terms of imprisonment; first, for 14 months for contempt in proceedings commenced against him by disaffected investors and second, for a further term of 12 years following his conviction for offences including fraud. EFL, the main creditor of the Bankrupt's Estate played a significant part in facilitating the fraud. His legal practice conducted through the Jirehouse structure has been the subject of an intervention by the Solicitors' Regulation Authority and he has also been struck off the Roll of Solicitors.
- f. EFL is now in compulsory liquidation with two other insolvency practitioners from the Applicants' firm Quantuma, acting as its joint liquidators. The Bankrupt denies this debt. However, the Applicants have decided to admit it to proof, and no party has applied under IR 14.8 to

challenge that admission. No other claim has yet been formally adjudicated upon. The undisputed debts in the bankruptcy are far lower: consisting of unpaid solicitors' fees of £36,000 and unpaid debts to banks of £46,000. The petitioning creditor, who is a friend and business partner of the Bankrupt, claims £157,019; his mother may claim £9,500 and Ms Lin claims £290,925. The costs of the bankruptcy are claimed at £859,554 but have yet to be assessed. The EFL debt and its consequences will be considered further in due course.

- g. Ms Lin submits that there is a lack of clarity as to how much will eventually be realised from the Bankrupt's assets, and as a consequence how much will be needed to settle the claims in the Bankruptcy. In those circumstances, she submits that it is not "just and reasonable", to use the test in s.335A(2) IA86, to make an immediate possession and sale order as the Applicants seek.

## **The Facts**

7. The facts of the case are, in the main, not in issue. I adopt the contents of both parties' skeleton arguments in respect of what follows. The Respondents met in 2006 or 2007, were married in 2009, and had one child in 2010 and another in 2014. The Bankrupt ran a mezzanine finance business, advancing funding through corporate structures incorporated in England and Jersey. The Respondents separated in 2016 and in mid-2017, the Bankrupt was hospitalised for methamphetamine use. Ms Lin presented a divorce petition in October 2017, and shortly after that, the Bankrupt himself presented a divorce petition in Iceland, which did not proceed. On 13 October 2017, Ms Lin commenced financial proceedings under the Matrimonial Causes Act 1973.
8. In January 2018, the Bankrupt produced his Form E in the financial proceedings, disclosing his liabilities. On 5 March 2018, the Family Court made an order providing for the children to live with Ms Lin. They were to have contact with the Bankrupt, subject to his complying with a regime for ongoing drug testing, arising from his long-standing narcotic abuse.
9. The Respondents had discussions in December 2018, concerning a possible settlement of the ancillary relief application in the divorce proceedings. These included an exchange of emails and WhatsApp messages on 3 December 2018, in which the Bankrupt suggested that Ms Lin should take on the responsibility of caring for the children for 100% of the time and, in return, the Bankrupt would sign over his share of the family home, as he no longer needed accommodation in London. The Family Court Judgment records that the Bankrupt asked Ms Lin to confirm that proposition which she did by email, but he later changed his mind. The Judgment states "copies of this exchange of messages were produced in evidence". These exchanges are important in connection with the new point Ms Lin wishes to pursue.

10. These communications of December 2018 are also in evidence for the hearing before me, but not for the same purpose for which they were disclosed in the matrimonial proceedings. Ms Lin now submits, for the first time, that they show the Bankrupt's intention to divest himself of his equitable interest in the FMH and show him getting her agreement to be wholly responsible for the care of their children in return. They commence by WhatsApp messages and then move to email:

[By WhatsApp]

Bankrupt: *"I suggest that the responsibility of taking care of the kids goes to u 100%, then I can sign over my share of southcote road to u without any complications as I don't need any accommodation in London."*

Bankrupt: *"Please let me know that u r happy with this and we can then close the financial part of the divorce this week."*

Ms Lin: *"with some monthly maintenance then ok."*

Bankrupt: *"It goes without saying the monthly maintenance for the kids in accordance with CMS."*

Ms Lin: *"Are you saying I have full custody of kids?"*

Bankrupt: *"Yes that is what I was saying, moving out of London for good and out of the kids life."*

Ms Lin: *"I will take house and full custody of kids. And my paintings [in] Iceland should be returned then is done."*

[By email]

Ms Lin: *"Dear adudun*

*I will have full custody of kids and take the house.*

*This week we shall finish the paperwork According to what we agreed.*

*You are welcome to visit kids and I will never stop you seeing them. Just to let you know.*

*Please email your lawyer and me the confirmation of the arrangements ASAP So I can tell my lawyer this has been agreed to proceed ASAP.*

*Kind regards*

*Hsiaomei"*

Bankrupt:

*“Hsiaomei, For avoidance of doubt this is not agreed.*

*I sent this in relation to your “offer” that I could use a bedroom in southcote when I have the children...”*

Ms Lin:

*“Hi Audun*

*Clearly in you offer there is nothing mention about the room. I have accepted your offer and you should honour your word.*

*My reply to your offer is – yes I will take this offer have the house and have kids 100%*

*Kind regards*

*Hsaio Mei”*

Bankrupt:

*“Hi Hsiaomei*

*Why don’t you just keep the house in London and the kids move with me to Iceland. You can visit them as much as you as want going forward.*

*It’s your call whether you want to spend more time on trying to agree on solution or not.*

*All the best,*

*Audun Mar Gudmundson”*

11. Mr Robinson prayed in aid of his submissions, the Court of Appeal decision in *Hudson v Hathway*. In that case, the Court considered two emails from one civil partner to another regarding their jointly owned property, sent during separation discussions. They were not formally worded, saying (as regards the jointly owned home):

*“You know what, I want none of the proceeds of that either. Take it. Buy yourself somewhere you can afford to live” and “Yes, that’s right . . . Under this arrangement, I’ve no interest whatsoever in the house, so whilst I will continue to contribute, I won’t do so forever”.*



12. The partner then changed his mind and sought an order for sale of the property and half the sale proceeds. Lewison LJ concluded that the emails “*evinced a clear intention to divest himself of that interest immediately.*” He found that they amounted to a disposition of the husband’s share, with the effect that his partner was the sole beneficial owner of the home. Mr Robinson submitted that in this case too, the Bankrupt changed his mind, and asked the Family Court to order a sale of the FMH and equal division of the sale proceeds.
13. The Family Court completed its hearing on financial matters on 20 February 2019, and the Judge (HHJ Meston KC) stated that he hoped to give judgment on 6 March 2019. This did not take place due (as explained by the judge in his judgment) to the pressure of work. However, although it was almost ready to be handed down by 22 September 2019, the Court was then informed by Ms Lin’s legal advisers of the SRA closing down Jirehouse and the imprisonment of Mr Jones. In the light of the possible impact that these developments may have had on the draft judgment, the Court sought further submissions. The Bankrupt accepted those events had a serious impact on his position. He sought time to make further submissions which he was granted but ultimately failed to avail himself of the opportunity.
14. In the meantime, the steps leading to the Bankrupt’s bankruptcy got underway. The bankruptcy petition was presented on 22 December 2019, following the service of a statutory demand upon him on 18 November 2019.
15. Between the presentation of the petition and the making of the bankruptcy order on 26 February 2020, the Bankrupt emailed the Family Court judge on five separate occasions, mainly to ask him to postpone the hand down. On none of those occasions did the Bankrupt inform the Family Court that a statutory demand followed by a bankruptcy petition had been served upon him. Had he made such disclosure, the judge may have elected to hand down the judgment much earlier with the consequential order being made before the bankruptcy order was made. This point is relied upon by Ms Lin as misconduct on the part of the Bankrupt and a special circumstance the Court ought to take into account in the exercise of its discretion under s. 335A IA 1986.
16. The Family Court judgment was eventually handed down at a hearing held on 4 March 2020. It was only at that hearing did the Bankrupt inform the Court and Ms Lin, for the first time, of the bankruptcy order made against him some two weeks earlier. The Court had decided that Ms Lin should be entitled to the transfer to her of the Bankrupt’s interest in the FMH. However, by then, this was to no avail, due to the automatic vesting in the Applicants of the Bankrupt’s interest in the FMH. In addition, she was awarded 80% of her costs. This costs award has not been paid and forms part of the amount she claims in the bankruptcy.

17. Ms Lin then applied to this Court to annul the bankruptcy on two grounds. First, there had been collusion between the Bankrupt and the Petitioning Creditor by failing to declare all the Bankrupt's assets and introducing inflated debts. Second, that the Bankrupt was technically solvent when the Bankruptcy Order was made.
18. That application came before Chief ICC Judge Briggs on 23 March 2021. It occupied the Court for two days at the end of which, the learned judge dismissed the application. In a reserved judgement, delivered on 6 April 2021, he gave reasons for this decision. Ms Lin was ordered to pay the Applicants' costs, subject to detailed assessment if not agreed. Her counsel informed the Court that she would place the FMH on the market forthwith. This has not occurred, and the Applicants now seek to review these directions under s375 IA 1986 as part of the application before me.
19. Other directions were also given by Chief ICC Judge Briggs.
  - 1) The Applicants were given leave to apply for directions as to how they should realise the assets of the Bankrupt in the UK and elsewhere.
  - 2) The Applicants were to seek a proof of debt from HMRC in relation to a debt the Bankrupt had suggested he owed. No such proof was received by the deadline set by the Court, despite the Applicants complying with the terms of the order by which they were to extend an invitation to HMRC to submit one.
  - 3) The Applicants were to adjudicate on the proof submitted by EFL. As noted above, this has now been admitted in full. No formal application has been issued by Ms Lin to challenge that decision. However, the surrounding circumstances giving rise to the debt and the effect of the participation of EFL in the Jirehouse fraud were referred to in the cross examination of Ms Reid-Roberts at the hearing before me. They form part of Mr Robinson's submissions on the discretion he invited me to exercise under s.335A.

### **The 5 issues for determination**

20. At the start of the hearing, the parties helpfully provided an agreed list of 5 issues for my determination. They are as follows:
  - a. Is it open for the First Respondent to run the argument under s.53(1)(c) LPA 1925 at all (the "**Procedural Issue**")?
  - b. If it is, was there an immediate disposition such that the Second Respondent surrendered his interest in the Property as a matter of law? (the "**Hudson v Hathway Issue**")?

- c. If the First Respondent fails on the *Hudson v Hathway* Issue, are there exceptional circumstances under Section 335A of the Act such that immediate possession should not be granted (the “**Exceptional Circumstances Issue**”)?
  - d. What order should the Court make on the application for possession (the “**Disposal**”)?
  - e. Should the Orders of ICC Judge Burton dated 12 March 2021 and Chief ICC Judge Briggs dated 15 April 2023 be reviewed under Section 375 of the Act in respect of the order for costs (the “**Section 375 Issue**”)?
21. Both parties invited me to deal with these matters in turn, delivering judgment on each point before dealing with the next. I decided not to follow this route. The issues raised points that were novel, involved consideration of powerful binding authority and are of course of significant importance to the parties. Therefore, I chose instead to hear all the arguments before reserving judgment. I will deal with each of the issues in turn.

### **The Procedural Issue**

22. In his supplemental note served following receipt of Mr Robinson’s Skeleton argument, Mr Fennell made three submissions. First, he submitted that Mr Rex Howling KC, Leading Counsel instructed by Ms Lin had made an admission in a position statement prepared for the hearing before Chief ICC Judge Briggs and that it was too late for it to be withdrawn. Second, he invoked an argument of issue estoppel and third, that there were case management consequences if I were to reject the position adopted on the first two points. I will take each of these points in turn.

### The admission issue

23. This was to the effect that on behalf of Ms Lin there had been an admission that:
- a. The Bankrupt held 50% of the beneficial interest in the [FMH] at the date of the bankruptcy order; and,
  - b. that 50% interest vested in the Trustees.
24. In paragraph 13 of the same position statement, he further stated on her behalf that:

*“The Applicant [Ms Lin] accepts that as a matter of fact and law HHJ Meston QC did not have jurisdiction to order the transfer of the First Respondent’s [the Bankrupt’s] half share in the former matrimonial home to her on the 4th*

*March 2020 because it had already vested in the Trustees on the making of the bankruptcy order on 26th February 2020.”*

25. Mr Fennell went on to set out further information concerning her position as set out in documents filed by her in the proceedings before HHJ Meston KC as follows:

c. The opening note dated 14 February 2019 prepared by Mr Howling KC in the matrimonial proceedings, in particular para 11:

*“W’s financial position can be shortly stated. As detailed in the attached schedule of assets, she has a half share in the FMH, an investment of £155,000 with Floodcheck Academy and £27,358 in cash ... a total of £902,384.50.”*

d. The list of assets and liabilities referred to in that note, where the Property is shown as worth a total of £1,440,053, with Ms Lin and the Bankrupt each owning 50% of the equity valued at £720,026.50.

e. Mr Howling KC’s note dated 26 February 2019 stated at para 20 that the Property is jointly owned, again referring to the list of assets and liabilities. Mr Fennell submitted that “jointly owned” in this context must mean “beneficially owned”, because the whole purpose of this document is to set out the assets which were available to the parties.

f. Paras 31 and 35 of HHJ Meston KC’s judgment, also record that the parties each approached the hearing on the basis that the Property was beneficially owned by Ms Lin and the Bankrupt in equal shares, with each side inviting the Court to make different orders in relation to those equal shares. Mr Fennell submitted that there is nothing in HHJ Meston KC’s judgment consistent with Ms Lin having taken a position in the family proceedings to the effect that she was already the owner of 100% of the equity.

26. Mr Fennell submitted that the judgment of HHJ Meston KC and the resulting order recorded that the Property should be transferred to Ms Lin. The effect of the judgment and the order would be rendered otiose if she already held the whole of the beneficial interest.

27. He then referred to the recitals of an Order of Mr Justice Peel made in Ms Lin’s appeal against the Meston order as follows:

*“UPON the Appellant’s [the Bankrupt’s] appeal against the financial remedies order of HHJ Meston QC dated 4 March 2020 pursuant to which the Court ordered the Appellant to transfer to the Respondent his 50% interest in 9 Southcote Road, London N19.*

*UPON the Court recording that the Appellant was declared bankrupt on 26 February 2020 and accordingly his 50% interest in 9 Southcote Road, London N19 vested in the Trustees in Bankruptcy and was not capable of being transferred to the Respondent in accordance with the said Court order.” [emphasis added in both instances].*

28. Finally, he drew my attention to Ms Lin’s witness statement dated 4 June 2023 in the appeal in the family proceedings:

*“The family house which I own 50% was valued at 1.5m in early 2022.”*

29. He submitted that these admissions could not be withdrawn without seeking permission from the Court under CPR 14.5. He went on to say that any such application would be bound to fail. He pointed out that no application has been made and no evidence filed, so no reasons have been given. There is no new evidence. Ms Lin’s approach is at odds with her conduct in these proceedings and the family proceedings. He raised a case management point in that it had been raised late and that no disclosure had been ordered such that the Applicants would be at an unfair disadvantage if the case were to proceed on this basis. The interests of justice point to finality – (see the commentary in the White Book at 14.5.1 and *Kojima v HSBC Bank plc* [2011] EWHC 611 (Ch)).

#### The issue Estoppel point

30. The second submission was that there was an issue estoppel. He referred me to the editors of *Spencer Bower, Res Judicata* 5th Ed, 2019, at 15.09, under the heading “*Issue Estoppel in Matrimonial Litigation: Omissions may found an issue estoppel*” where they summarise the law as follows:

*“The principles governing issue estoppel require each party to bring forward his whole case. A party is not permitted to raise a matter later which properly belonged to the earlier case but was not brought forward unless he can establish special circumstances. The principle applies even if the matter was omitted through the negligence or inadvertence of the party or his advisers, or even by accident. However, the point must be one which if determined in the successful party’s favour would have been fundamental to the judgment and if determined the other way would have changed the result. This rule applies in matrimonial causes, subject to the Court’s inquisitorial function, which excludes any estoppel from omissions in summary proceedings.”*

31. At para 15.20 they go on to state:

*“If in making a property adjustment order the Family Division determines property rights between a third party and either or both spouses, that is res judicata in other Divisions of the High Court and elsewhere. The reverse also*

*applies, and a consent order in partnership proceedings between the husband and a third party in the Chancery Division was binding on the wife because of her procedural default was also binding on her in the Family Division.”*

He concluded his submission on this point by submitting that the Family Court proceeded on the basis that it was common ground that the Bankrupt and Ms Lin each held 50% of the equity and as a result, she was estopped from advancing a case to the contrary.

#### The submissions on reply to the admissions issue

32. Mr Robinson challenges the Applicants’ position concerning the new point taken by Ms Lin. He does not accept that a paragraph in the background section of a case summary constitutes an admission under CPR 14 such that an application is required for it to be withdrawn. He submits that Courts are not bound by concessions on questions of law. His primary argument depends on the legal consequences of the relevant emails, which he submits involve a question of law. In those circumstances the Court is not bound by one party’s concession (*Bahamas International Trust Co Ltd v Threadgold* [1974] 1 WLR 1514, an example of a case where a point was raised for the first time in the House of Lords), or the positions taken by the parties on a question of interpretation (*Teesside Gas Transportation Ltd v CATS North Sea Ltd* [2019] EWHC 1220 (Comm) at [119]).
33. He disputes the position adopted by the Applicants to interpret the alleged “admission” as including an admission that the Bankrupt held 50% of the FMH at the date of the bankruptcy order because the communications that are now relied on from December 2018 have no legal effect. He submits that that is a question of law, upon which, the Court is not bound by a concession.
34. Mr Robinson does not therefore accept that the admission referred to in the position statement is an “admission” within CPR Part 14. CPR r.14.2(1) allows a party to admit, by notice in writing, “*the whole or any part of another party’s claim or case*”. He complains that nowhere do the Applicants explain what part of their claim or case in the annulment application is said to be admitted by this paragraph of the Case Summary. Indeed, far from advancing a case on that application, their position appears to have been one of neutrality. Nor do they suggest that the Bankrupt was advancing a case as to the extent of his beneficial interest in the FMH. In short, this is not an admission of a claim or case but a description of what is said to be “the marital background” to another application.
35. Mr Robinson submitted that an “admission” under CPR 14 must be clear (see Commentary at White Book 2023, para 14.1.4). Mr Howling KC’s paragraph “accepts” that HHJ Meston KC did not have jurisdiction to order the transfer of the Bankrupt’s half share in the FMH on 4 March 2020 because it had

already vested in the Applicants on the making of the bankruptcy order on 26 February 2020. He submits Mr Howling KC was not addressing the extent of Ms Lin's beneficial interest. He made no reference to beneficial interests or equity but instead he was addressing the different issue of HHJ Meston KC's jurisdiction to make a property adjustment order after a bankruptcy order had been made.

36. He submits that paragraph 14.1.4 of the 2023 White Book concludes, "*An admission in a defence in one action has been held not to be binding in other proceedings between the same parties on a different issue (Re Walters (1889) 61 L.T. 872)*". Here the Applicants rely on an alleged admission in "other proceedings" on a different issue. The annulment application was dismissed on 15 April 2021 and these possession proceedings were not commenced until the application notice of 13 February 2023, just under two years afterwards.

37. The Applicants argue that an application for permission to withdraw this "admission" would fail (Supplemental Note para 7-8). Mr Robinson challenges their position. As they accept, the Court must consider all the circumstances of the case including the merits of the point and the prejudice to the parties if the admission is withdrawn or not. Here he submits that Ms Lin would suffer significant prejudice in not being able to run the *Hudson v Hathway* argument, while the Applicants claim prejudice by not being able to adduce evidence to answer it. He refers to the submission made to the Court of Appeal in *Hudson* to say that the argument should not be run for the first time on a second appeal. That same submission was rejected in *Hudson* at [40] where the judge stated:

*"...In my judgment the point is a pure point of law, which depends on the interpretation of the relevant emails. As with any question of interpretation of a written document, the test is an objective one; and I am unable to see how the course of relevant evidence might have been affected."*

38. The final point that remains to be dealt with is that Ms Lin should be prevented from running the *Hudson v Hathway* argument because there is an issue estoppel. Mr Robinson submits that this argument overlooks the fact that issue estoppel only arises in subsequent proceedings between the same parties. Here, the Applicants were not parties to the family proceedings and cannot argue that Ms Lin's conduct in those proceedings means she is estopped as against them from running the *Hudson v Hathway* argument in the present application. This position is supported by authorities at the highest level. In *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at [105E] Lord Keith of Kinkel said "*Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue*" (emphasis added).

Conclusions on the Procedural issue

39. In the context of this debate, I prefer the position adopted by Mr Robinson. The legal effect of the communications between Ms Lin and her husband are questions of law. Neither further disclosure nor the cross-examination of Ms Lin would assist on the determination of this issue. The context of the comments in a position statement in separate proceedings does not create an admission that needs to be the subject of an application under CPR 14.
40. There is a difference between the parties on what constitutes “*proceedings*” for these purposes in the context of the debate on the admission. The Applicants submit that this involves any admission in relation to Bankruptcy proceedings taken as a whole. They say that effectively, if any application is issued in bankruptcy proceedings under the same number allocated to the bankruptcy on the presentation of the original petition, that is sufficient.
41. Mr Robinson advocated a narrower approach. He submits that the Applicants’ position is too broad, bearing in mind that in complex bankruptcies, there may be a multiplicity of proceedings involving different distinct parties arguing a multiplicity of different issues at different times. I agree with the submissions made by Mr Robinson on this point. The use of the initial bankruptcy petition number is used purely for administrative convenience. Each application is self-contained and is a different proceeding involving different causes of action and different parties. Bankruptcy proceedings can go on for many years, with a multiplicity of applications being made and decided during their course. As a consequence, any admissions made (such as they are), were made in different proceedings.
42. There is powerful authority that supports Mr Robinson in the position he adopts on the Issue estoppel point. This can also arise in respect of issues that were not raised earlier in proceedings but should have been. However, this will only arise in such cases where the later proceedings are between the same parties. He refers to the explanation provided by Lord Sumption in *Virgin Atlantic v Zodiac Seats* [2013] UKSC 46 at [25] that: “*The focus in Johnson v Gore-Wood was inevitably an abuse of process because the parties to the two actions were different, and neither issue estoppel nor cause of action estoppel could therefore run.*” [emphasis added].
43. The Applicants invited the Court to make preliminary determinations on their submissions to avoid the need for cross-examination “as to the alleged agreement” (Supplemental note para 12). During the course of oral submissions, I indicated that I agreed that the question of whether an agreement (or more accurately a disposition) has occurred is one of law, based on the (objective) construction of the relevant communications. Therefore, cross-examination of Ms Lin is unlikely to be relevant to the determination of this issue. The *Hudson v Hathway* argument was new to these proceedings, but it



is one of law and it is based solely on documents already in evidence filed in this application.

44. As previously mentioned, I declined to accept the invitation made by Mr Fennell to deal with these matters as preliminary points. It follows that I would have allowed Ms Lin to run the new points raised in Mr Robinson's skeleton argument and supplementary note if I had accepted his invitation. It would have involved adopting the same approach as the Court of Appeal adopted in *Hudson v Hathway*, requiring determination of the legal consequences of the email and WhatsApp exchanges as a question of law. I will now turn to the second of the five issues.

### **The Hudson v Hathway issue**

45. The central plank of the argument advanced by Mr Robinson was that the effect of these exchanges was to divest the Bankrupt of his beneficial interest, by way of an immediate disposition that satisfied the requirements of both s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 and s.53(1) of the Law of Property Act 1925. He submits that this took place long before the bankruptcy order was made, such that when it was perfected, there was no interest that was capable of being transferred to the Applicants by operation of law, as would ordinarily be the case. I will set out his submissions by reference to his skeleton argument.
46. The transfer of property rights in land must comply with certain statutory formalities. Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 deals with executory contracts for the sale of interests in land but does not apply to instruments which effect an immediate disposition (as explained by Lewison LJ in *Hudson v Hathway* at [32]). The relevant formalities for an immediate disposition are governed by s.53(1)(c) of the Law of Property Act 1925.
47. Section 53(1) of the Law of Property Act 1925 provides:
- “(a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law; . . . (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.”*
48. The FMH was held by the Respondents as joint tenants. As Lewison LJ explained, *“In strictly technical terms, it is not possible for one joint tenant to assign his beneficial interest to another joint tenant. That is because, as a matter of theory, each joint tenant is entitled to the whole of the land. But*

*section 36(2) [of the Law of Property Act 1925] expressly preserves the right of one joint tenant to release his interest to the other joint tenant.”*

49. A “release” by one joint tenant of his interest to the other needs no particular form of words. It is not a question of subjective intention. The Court simply asks whether the joint tenant has evinced an intention to divest himself of his interest in the property immediately. Such a release amounts to a disposition for the purpose of s.53(1)(c) if the formalities of that subsection are complied with.

The facts of *Hudson v Hathway* [2023] KB 345 23.

50. Mr Robinson submitted that the facts in this case bear some similarity to the facts in the instant case, albeit that the main task the Court must adopt is to determine as a matter of law whether the exchanges have the effect he advocates. It is however helpful to examine the process that the Court adopted in reaching the conclusion that it did on the exchanges that took place between the parties.

51. Ms Hathway and Mr Hudson were not married. They began a relationship in 1990 and had two children. They owned their home as joint tenants. In 2009, they separated. Mr Hudson left the home and moved in with another woman. Ms Hathway stayed in the home with their children. In 2011 the home was blighted by an oil spill, and the parties had “*sporadic email discussions about financial arrangements.*”

52. Mr Hudson wrote an email on 30 July 2013:

53. “*So here it is. We were never married. You have no claim over what is mine. What I consider ring-fenced is what I get from my years of personal graft. They are not up for discussion. I’m not agreeing to give you any . . . The liquid cash, you can have. Savings in the bank, other plans, take it all. Physical property, the contents of the house . . . again I don’t want it; keep it. Which leaves the house, a bad asset which is preventing all of us [from] . . . moving on with our lives . . . You know what, I want none of the proceeds of that either. Take it. Buy yourself somewhere you can afford to live . . . As for a will, if I were to die before this financial mess is sorted, Heidi [his wife] will have no rights to Picnic House . . . What I want is an end to it. So have everything that’s available to have now and when the house is sold.*”

54. Ms Hathway replied: “*Can’t see any point in putting “my side” of the argument. Not because I don’t feel that I have a valid case to make, but because it is clear that it would be pointless.*”

55. On 12 August 2013, Ms Hathway wrote: “*So that we can move forward and get to a point of completely severing our financial connections, your*

*suggestion, as I understand it, is you get sole ownership of your shares and pension, I get the equity from the house, the house contents, savings and income from endowments. Is that right? If so, then I will accept this and will do everything I can to get the house ready for sale as soon as the situation with the oil spill is resolved.”*

56. Mr Hudson replied on 9 September 2013: “*Yes, that’s right . . . Under this arrangement, I’ve no interest whatsoever in the house, so whilst I will continue to contribute, I won’t do so forever.*”

57. Lewison LJ concluded that “*In my judgment Mr Hudson’s emails of 31 July and 9 September 2013 are sufficient in point of form to amount to a release of his equitable interest in the house. They evince a clear intention to divest himself of that interest immediately, rather than a promise to do so in the future.*”

58. Andrews and Nugee LJJ agreed.

#### Analysis of the communications in this case

59. The relevant communications in this case have been quoted above. They were in evidence before the Family Court, but nobody appears to have raised the s.53(1)(c) point until now. Mr Robinson made the point that in *Hudson v Hathway*, the point was not raised until the Court of Appeal did so, on a second appeal, requiring leave to amend the Respondent’s Notice. So there was no issue on the point not having been taken before.

60. Mr Robinson submits that the terms of those communications, like those from Mr Hudson, evince a clear intention on the part of the Bankrupt to divest himself of his interest in the FMH: “*I suggest that the responsibility of taking care of the kids goes to u 100%, then I can sign over my share of southcote road to u without any complications as I don’t need any accommodation in London. Please let me know that u r happy with this and we can then close the financial part of the divorce this week*”, to which Ms Lin agrees “*with some monthly maintenance*”, to which the Bankrupt in turn agrees. He confirms he was agreeing to “*moving out of London for good.*” He further submits that those communications are only consistent with an intention to release his share of the FMH, with Ms Lin agreeing to take responsibility for the children.

61. Even after the communications switch to email, and the Bankrupt then (submits Mr Robinson), wrongly claims an agreement had not been reached, he does not change his position on the FMH: “*why don’t you just keep the house in London and the kids move with me to Iceland.*”

62. The WhatsApp messages on their own evince a clear intention on the part of the Bankrupt to release his share of the FMH to his wife. So too does his email

quoted in the paragraph above. Mr Robinson submits that the effect of this is that Ms Lin is the sole beneficial owner of the FMH and has been since December 2018. The end result, according to Mr Robinson's submissions, is that the Bankrupt's legal interest in the FMH will have vested in the Applicants, but subject to Ms Lin's equitable interest. Property comprised in a bankrupt's estate "*is so comprised subject to the rights of [third parties]*" (s.283(5) IA 1986). Those rights include any equitable interests of those third parties (*Mountney v Treharne* [2002] EWCA Civ 1174).

#### The Formalities under s.53(1)(c)

63. To comply with s.53(1)(c), the Bankrupt's communications must be "*in writing signed by [him]*".
64. Schedule 1 to the Interpretation Act 1978, states that "*Writing*" includes typing, printing, lithography, photography, and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly." The emails in *Hudson v Hathway* were accordingly found to be "in writing", and the emails and WhatsApp messages in this case should similarly be found to be "in writing".
65. The emails in *Hudson v Hathway* were held to be "signed" for the purposes of s.53(1)(c), because they concluded with Mr Hudson's first name, "Lee". The emails in this case conclude "All the best, Audun Mar Gudmundsson", which *a fortiori* should mean that they are "signed".
66. The WhatsApp messages do not conclude with the Bankrupt's name, but his name is in the header to the messages for the purpose of identifying the Bankrupt as the sender and authenticating the message as originating from him. His name is intended to confirm that the message comes from him, which is the purpose of the "signed" requirement in s.53(1)(c) according to Nugee LJ. As to this:
  - a. There is no relevant statutory definition of "signed". As Lewison LJ stated in *Hudson v Hathway*: "*The touchstone for determining what is a signature is an intention to authenticate the document: Caton v Caton (1867) LR 2 HL 127*".
  - b. Section 7 of the Electronic Communications Act 2000, as enacted, defines "electronic signature" as, "anything in electronic form as (a), is incorporated into or otherwise logically associated with electronic communication or electronic data; and (b), purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data, the integrity of the communication or data, or both".

- c. In *Neocleous v Rees* [2020] 2 P&CR 4, the High Court held that an automatic email footer that included the sender's name to every email they sent was sufficient to render an email "signed" for the purposes of s.2 of the 1989 Act. In that case, Microsoft Outlook had been set up to add the sender's name to every email that he sent; this was held to be sufficient to give it authenticating intent.
- d. In *WS Tankship II BV v The Kwangju Bank Ltd* [2011] EWHC 3103 (Comm), at [155], a signature was required on a guarantee under the Statute of Frauds 1677. The guarantee in question was sent by SWIFT message, and the body of the guarantee did not include the guarantor's name, much less a facsimile signature. However, the Court noted that the SWIFT messaging system generated text in an "output message header" to the message, and that header included the guarantor's name, which was sufficient to render the guarantee "signed".
- e. During the hearing, there was an issue as to whether the WhatsApp messages were authenticated for the purpose of the statutory provisions. It was said that the header to such messages can be altered by the recipient, compromising the integrity of an assertion that they had been properly authenticated to satisfy the test. Such an issue would ordinarily require further expert evidence to determine finally. There was no suggestion that they were in any way fabricated, merely that there was insufficient evidence of authentication by the author. Mr Robinson indicated that no such issues arise in respect of the emails, which can be interpreted on their face value.

#### The decision of the Court of Appeal in *Xydhias v Xydhias*

67. Mr Fennell submitted that the negotiations were, in effect conducted on a "subject to contract basis". He relied upon another decision of the Court of Appeal, *Xydhias v Xydhias* [1999] All ER 386. This was a case involving negotiations between a husband and wife in divorce proceedings, and as such was a situation more akin to the instant case than *Hudson v Hathway* which did not involve the ancillary relief application in divorce proceedings, as the parties were not married. As such, the Court in that case was only concerned with considering whether the email exchange involved a disposition of proprietary rights between an unmarried couple. It concluded as a matter of law that the legal effect of the email exchange was that it did. In this case, Mr Fennell submitted that in divorce proceedings, only a consent order made under section 33A of the Matrimonial Causes Act 1973 can put into effect any agreement reached during negotiations. Whilst the authorities referred to by Mr Robinson were, in the main cited in *Hudson v Hathway*, *Xydhias* is not, presumably because it was not relevant given the different circumstances of the case.

68. In *Xydhias*, the negotiations lead to a number of draft agreements. An issue arose whereby that Husband denied that there was any agreement. Delivering the unanimous decision of the Court, Thorpe LJ considered section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. He stated as follows:

*“In my opinion this point too is settled by a proper analysis of the nature and effect of an agreement to compromise ancillary relief proceedings. The agreement, if concluded, is not one for the disposition of an interest in land but an agreement as to the terms which the parties themselves considered fair with the object of avoiding the expense and stress of a contested hearing. One of the terms of the agreement may be that the husband will submit to a transfer of property order in respect of the final matrimonial home. Such an order once made would require the husband's signature to a transfer. But if he declines to sign the document the district judge will sign in his stead.”*

The headnote to the case put the matter succinctly as follows:

*“Where parties in divorce proceedings reached an agreement for the compromise of an ancillary relief application, that agreement did not give rise to a contract enforceable in law; the only way of rendering the bargain enforceable was to convert the concluded agreement into an order of the Court. Moreover, the Court did not automatically or invariably grant the application to give the bargain the force of an order, but conducted an independent assessment to enable it to discharge its statutory function to make such orders as reflected the criteria listed in s.25 of the Matrimonial Causes Act 1973. Accordingly, the purpose of negotiation was not to finally determine the liability, but to reduce the length and expense of the process by which the Court carried out its function, and if there was a dispute as to whether the negotiations had led to an accord, the Court was entitled to exercise a broad discretion in determining the matter and ordinary contractual principles did not apply.*

69. Mr Fennell submitted that there is a material difference between the position if the parties to a disposition are not married and therefore, not involved in divorce proceedings. The Court exercises a supervisory role in the progress of ancillary relief negotiations. This is demonstrated by the fact that the Court will intervene in an appropriate case regardless of whether the parties have reached an agreement. If a property adjustment is made requiring the execution of documentation to give it effect and one of the parties refuses to sign, the judge can sign on behalf of the defaulting party as part of the statutory scheme.
70. It follows that in this case, the parties were engaged in divorce proceedings. It may be the case that the parties did come to terms in this case. Had they not been involved in divorce proceedings, this may well have been sufficient to constitute a disposition under the rule in *Hudson v Hathway*. However, Mr

Fennell indicated that they were akin to “*subject to contract*” discussions and only achieved legal status when the Court made an order. He submitted in support of that position that in this case, both the Respondents speak English as a second language, and it would be unfortunate, to say the least, if they mistakenly concluded a binding agreement due to a linguistic misunderstanding. I am not sure that this is determinative, particularly given that the decision requires the determination of a question of law arising from written communications.

71. However, *Xydias* provides binding authority to the effect that whilst the parties to the divorce proceedings can engage in negotiations to resolve issues in relation to a property adjustment order, any agreement they reach will have to be approved by the judge having the conduct of the matter. It will then be recorded in the appropriate Court order.

#### The disposal of the *Hathway v Hudson* issue

72. It follows that unfortunately, there was no disposition as Ms Lin contends. The Bankrupt’s beneficial interest therefore vested in the Applicants by operation of law on the making of the bankruptcy order.

### **Exceptional circumstances under s.335A IA 1986**

#### Introduction

73. The next issue is to consider the application of the provisions of s335A IA 1986, which provide as follows:

#### **335A— Rights under trusts of land**

*(1) [Application for order for sale of land] Any application by a trustee of a bankrupt’s estate under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (powers of Court in relation to trusts of land) for an order under that section for the sale of land shall be made to the Court having jurisdiction in relation to the bankruptcy.*

*(2) [Interests considered before order] On such an application the Court shall make such order as it thinks just and reasonable having regard to—*

*(a) the interests of the bankrupt’s creditors;*

*(b) where the application is made in respect of land which includes a dwelling house which is or has been the home of the bankrupt or the bankrupt’s spouse or civil partner or former spouse or former civil partner—*

*(i) the conduct of the spouse, civil partner, former spouse or former civil partner, so far as contributing to the bankruptcy,*

*(ii) the needs and financial resources of the spouse, civil partner, former spouse or former civil partner, and*

*(iii) the needs of any children; and*

*(c) all the circumstances of the case other than the needs of the bankrupt.*

*(3) [Assumption by Court re interests of creditors] Where such an application is made after the end of the period of one year beginning with the first vesting under Chapter IV of this Part of the bankrupt's estate in a trustee, the Court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations.*

74. The starting point under this provision is to make such order as the Court considers to be just and reasonable. The Court must have regard to the factors listed in s.335A(2)(a)-(c), above. However, if the application is made over a year after the first vesting of the estate (as is the case in this application), the provisions have the effect of granting priority to the interests of creditors over all other considerations, unless there are considerations that are considered by the Court to be exceptional.

75. Ms Lin relies on two matters which, taken together, constitute exceptional circumstances in this case. The first is the Bankrupt's misconduct in not informing the Family Court or Ms Lin of the service of a statutory demand and of a resulting bankruptcy petition, during repeated communications with the Family Court between November 2019 and February 2020, during which, he asked the Court to delay handing down judgment. She submits that this was deliberate misconduct on the part of the Bankrupt which was designed to frustrate her efforts to secure the FMH.

76. The second concerns the present state and deterioration of her mental health and that of her son as a result of this application and its possible consequences should an immediate possession order be granted.

#### The interests of creditors

77. S. 335A(3) requires the interests of the bankrupt's creditors outweigh all other considerations in relation to the realisation of the value in the FMH unless the circumstances are exceptional. This involves conducting a balancing exercise of the competing interests. The status of their claims and what lies behind them is also a relevant consideration. This is important in the light of recent developments involving the claim of EFL, as the largest creditor in the estate.



78. In this case the Bankrupt's creditors include Ms Lin, who holds the largest claim after EFL due to her £176,306 in costs orders from the Family Court. The Applicants have deferred her claim until all other creditors have been paid, relying on s.329 IA1986, despite this only applying to defer a wife's debts in a situation where a spouse has "provided credit" to another spouse. It is hard to see why this applies to the costs orders owed to Ms Lin and made after the bankruptcy order, or to her other claims.
79. Mr Robinson conceded that it is accepted that the Bankrupt's other creditors have an interest in being paid in full. He submits that such an outcome would have been possible, with the exception of EFL, from realisations in Iceland if the Applicants had realised anything like the £925,000 they initially estimated those assets to be worth (before costs of sale). However, as matters stand only £203,000 has been realised in Iceland and £228,000 odd is required to pay creditors apart from Ms Lin and EFL. He submits that it therefore becomes important to ensure that all other assets of the Bankrupt have been investigated and realised, using the Court's liberty to apply provision as appropriate. The Applicants evidence takes issue with this position. They state that they are not aware of any further realisable assets other than assets that are already the subject of insolvency proceedings in Iceland. The position of the Applicants is that they have investigated these assets and compromised any claims to them in accordance with Icelandic legal advice they received.
80. Mr Robinson then goes on to describe the claim of EFL as a matter of concern. The Family Court noted the evidence that this alleged loan from EFL was not formalised to do anything other than create an impression for tax purposes. The Judgment on the annulment application records the Bankrupt's evidence that he never received money from EFL and did not believe he would have to pay it: describing the loan was "*a bit of window dressing*". This is consistent with EFL's role as part of the Jirehouse group and the *modus operandi* of the Jirehouse companies. He submits that this is not an "innocent" creditor deserving of the Court's sympathy.
81. The EFL debt has now been admitted to proof, and the 28 days to challenge that admission has passed. It would be easy to say that this is an end to the matter for this hearing, as the debt is owed. Any proof can be varied or withdrawn at any time (see: IR 14.10). However, even if a debt is owing to EFL, Mr Robinson submits that this does not determine the outcome of this application. The Court must still exercise its discretion to make an order that is "just and reasonable". He submitted that it is not just and reasonable to make an immediate possession order simply to further the interests of EFL. At present, with uncertainty over realisations from assets other than the FMH and issues over the claim of EFL, it is not "just and reasonable" to make the immediate possession and sale order that the Application seeks. He cross examined Ms Reid-Roberts on these matters to establish the present position on these issues.

82. The cross-examination of Ms Reid-Roberts

83. Mr Robinson cross-examined Ms Reid-Roberts, on three topics. The first involved questions on the application for possession of the property, the second involved the assets under the Applicants' control and the state of the investigations that had been carried out and the third dealt with the liabilities of the estate, specifically on the EFL debt in the context of recent developments.

84. Ms Reid-Roberts answered the questions carefully and clearly. On the occasions her answers were challenged, she answered constructively and in a straightforward manner. She was obviously an honest witness intent on assisting the Court. She was not the original office holder, having replaced the original joint trustee, Mr Sands, in accordance with the terms of a block transfer order made following his departure from Quantuma in 2021.

85. Mr Robinson took Ms Reid-Roberts through the assets under her control by reference to the judgment of His Honour Judge Meston KC in the matrimonial proceedings and her witness statements. He adopted the description of the Bankrupt's financial affairs as being extremely complex, involving a series of trusts, offshore companies and tax avoidance schemes described in the judgment of HHJ Meston KC. These included the tax avoidance scheme involving the EFL debt in respect of which he received advice from Mr Jones of Jirehouse. This was also considered by Chief ICC Judge Briggs at the annulment application hearing on 6 April 2021, when he gave directions that the EFL claim should be adjudicated upon as soon as possible.

86. The trust arrangements, specifically involving the Pasla Settlement were discussed. This topic is important to consider because it is the provenance of the arrangements that resulted in the EFL debt, being the largest of the liabilities of the estate. This was set up in 2003, naming the Bankrupt as the settlor instead of his mother, which the Bankrupt later claimed was a mistake. There was another trust created nominating her as settlor in 2010. Both were registered in Nevis at the date of the matrimonial hearing. There were suggestions that the Bankrupt was a beneficiary and that they were created to provide a fund from which he could draw expenses; something that Ms Reid-Roberts was unaware of, having taken over from Mr Sands. These advances were said to have been transferred into consolidated loan facility of some £3m which, in turn, became the EFL debt facility which gave a right of draw down to the Bankrupt. These arrangements were put to Ms Reid-Roberts as a construct to impose a loan structure to conceal the fact of his having control over the funds. Ms Reid-Roberts explained that creditors had been notified of these matters, but no investigation had yet taken place due to a lack of funding. She further explained that realisations made in respect of certain Icelandic assets would be applied to pay the unpaid costs of the estate. This does

demonstrate a lack of enthusiasm on the part of the creditors for these matters to be taken further forward.

87. After dealing with the potential Icelandic assets, Ms Reid-Roberts referred to an Icelandic bankruptcy and conceded that no payments had been received by the Applicants from the Bankrupt. He has now received his discharge from bankruptcy, thereby precluding the opportunity for the Applicants to pursue an income payments order.
88. There were a number of creditors referred to as being creditors by the Bankrupt who had not submitted claims. Significantly HMRC had not submitted a proof in response to an invitation the former trustees were directed to extend by Chief ICC Judge Briggs in the directions he gave following the annulment application. She was also taken through the list of creditors who had issued claims although no notice of an intended dividend had been sent.
89. The EFL debt was examined in detail, particularly having regard to its status as by far the largest creditor of the estate. It is currently in compulsory liquidation. Its joint liquidators are also partners in Quantuma. Its proof has been submitted, adjudicated upon and accepted in full, following legal advice received by the joint trustees. Mr Robinson focused on the status of the liquidation having regard to the latest progress report filed by the Joint Liquidators dated 20 March 2023. Specifically, he referred to that part of their report that referred to the bankruptcy and the proof of debt that they had lodged and which the Applicants had accepted. Reference to this application was made along with the investigations the Applicants had carried out in Iceland. Of most importance however was the section describing unsecured creditors. It provides as follows:

*“Initially, the only unsecured creditors advised to the joint liquidators were the petitioning creditors being Discovery Land Company, LLC (first petitioner), Taymouth Castle DLC, LLC (second petitioner) and the River Tay Castle LLP. (third petitioner). Both the first and second petitioners were owed £7,171,649.09 and the third petitioner £290,774.60. A further unsecured creditor contacted us who was owed £80,000.*

*It transpires that the 1st and 2nd petitioner debt arises out of the same loss and therefore cannot be double recovered. As a result, Taymouth Castle DLC, LLC have advised they have a nil claim in the liquidation.*

*To date, the joint liquidators have received 4 claims totalling £12,951,530.08 with £200 of this being a claim from HM Revenue & Customs.*

*Based on the latest information available, it is likely that a dividend will be available to unsecured creditors, although the quantum and timing is currently unknown.”*

90. He then referred Ms Reid-Roberts to an email she exhibited to her second witness statement, where she notes that the Bankrupt’s son (Petur Snaer Audunsson (on behalf of Agapa Financial Holdings Ltd, (a family company associated with the Bankrupt which he describes as the true principal creditor of his estate), wrote to the joint liquidators of Esquiline inviting them to withdraw its proof of debt. Ms Reid Roberts deals with this approach and the progress report in paragraph 18 of her second witness statement, as follows:

*“[18]...Mr Audunsson, on behalf of Agapa, also wrote to the joint liquidators of Esquiline inviting them to withdraw its proof of debt. As at the date of this witness statement, the joint liquidators of Esquiline have not withdrawn Esquiline’s proof of debt. Whilst [Ms Lin] states in her evidence that any payment made to Esquiline will revert largely to the Bankrupt and/or, his family trust as a result of Esquiline being part of the Gudmundsson family trust network of offshore companies, this is not correct. Esquiline entered into compulsory liquidation on 15 January 2020. The most recent progress report filed by the joint liquidators at Companies House dated 20 March 2023, states that four unsecured claims have been received in the liquidation which total £12,951,530.08. Whilst details of all creditors are not provided, details of the following claims were quoted in the most recent progress report: from Discovery Land LLC (£7,171,649.09), The River Tay Castle LLP (£290,774.60), HM Revenue & Customs (£200.00) and a further unnamed creditor (£80,000.00). As far as I am aware, no application to challenge the admission of the Esquiline proof debt by the Joint Trustees in May 2021 has been made by any party.”*

91. The context of this approach was further explained in an email sent to Mr Fennell on 8 June 2023, where the Bankrupt stated:

*“Dear Fennell [sic], The attached link is about Jirehouse and the judgement by Judge Knowles looks in detail into Esquiline. I am really surprised that Quantuma and its legal advisors have accepted the Esquiline claim against my estate in the light of this Court judgement without raising any questions regarding its validity. Could you please forward this to the right persons dealing with my case. Kind regards, Audun Mar”*

The recent developments on the EFL claim.

92. The email is a reference to a report circulated by a firm of solicitors following the first instance decision of Mr Justice Knowles CBE that ultimately led to the

decision of the Court of Appeal in *Axis Specialty Europe SE v Discovery Land LLC, Taymouth Castle DLC LLC and River Tay Castle LLP* [2024] EWCA Civ 7 dated 15 January 2024. Pointing out that the case involves the creditors of EFL that are mentioned in the joint liquidators' progress report, Mr Robinson referred Ms Reid-Roberts, first to paragraph 1 of the decision which provides as follows:

[1] *“This appeal concerns a dispute between the Claimants, who were clients of a dishonest solicitor, Mr Stephen Jones, and the insurer providing professional indemnity insurance to the firm in which Mr Jones was a partner (and to two associated companies of which he was a director) about: (i), whether the insurer (“Axis”) can rely upon an exclusion clause in the insurance policy (“the Policy”) to exclude it from any liability to indemnify the Claimants that would otherwise arise under section 1 of the Third Party (Rights Against Insurers) Act 2010 (the insured entities all being insolvent), and ii), if not, whether Axis is entitled to rely on the aggregation clause in the Policy and treat the claims made against it as a single claim.”*

93. He put it to Ms Reid-Roberts as follows:

*Q. The parties are Discovery Land and Axis. So you have not looked it up. It was sent to you by the bankrupt, it gives you the parties and they are also described in paragraph 1 because – and forgive me, you may know this very well, but paragraph 1 tells us that there is a dispute between the claimants, i.e., the creditors you have referred to in your statement who were clients of the dishonest solicitor, Mr Jones. We know he is the solicitor and tax advisor of the bankrupt, and it is a dispute between them on the one hand and the insurer, who is insuring Mr Jones's firm. Do you see that?*

*A. Mmm.”*

94. To reinforce this point further, he then referred her to the second paragraph that provides as follows.

[2] *“The insured entities were a firm named Jirehouse Partners LLP, and two private English registered companies, Jirehouse (an unlimited company) and Jirehouse Trustees Ltd (“JTL”) (a Limited company). I shall refer to them collectively as “the Jirehouse Entities”. The Jirehouse Entities were part of a larger group controlled by Mr Jones, which included companies and Limited partnerships engaged in commercial and financial transactions which did not provide legal services (“the Jirehouse Group”).*

95. He then referred her to the summary of the result of the appeal at paragraph 6 of the judgment which provides as follows:

[6] *“For the reasons which are set out in this judgment, I would dismiss the appeal on both grounds. The Judge's conclusion that Mr Prentice did not condone Mr Jones' dishonesty was one that he was entitled to reach on the*

*evidence before him. He also correctly decided that Axis was not entitled to rely upon the aggregation clause.”*

96. He explained that the effect of the judgement was that the creditors of the EFL liquidation will now be compensated for their loss, “*so the insurer is now on the hook to pay out these creditors.*”

97. Pointing out that whilst the second claimant (TCD) was not a creditor mentioned by Ms Reid-Roberts, (it being an affiliated company), he then took Ms Reid Roberts to paragraph 19 and 20 of the judgment which provide as follows:

[19] *“The first claimant (“DLC”) is a property development company based in Arizona. The second claimant (“TCD”) is an affiliated company incorporated in Delaware for the specific purpose of purchasing Taymouth Castle, in Scotland. The third claimant (“RTC”) is a Limited liability partnership based in the UK which TCD intended to use to hold the title to the castle once it had been purchased.*

[20] *By a letter of engagement dated 11 April 2018, Jirehouse agreed to act as DLC’s English solicitors on the purchase of the castle and in “the structuring of the property holding in the most tax efficient way in accordance with the tax laws and regulations of the United Kingdom...”*

98. Finally, he referred to paragraph 22 of the judgment to show the importance of these matters for present purposes. This provides as follows:

[22] *“On 16 April 2018, DLC and/or TCD transferred the total sum of US\$14,050,000, which was intended to be used to purchase the castle, into JTL’s general client account (which appears to have been used in practice as Jirehouse’s client account). That money should have been held on trust by Jirehouse and JTL for DLC/TCD pending purchase of the castle. It was only to be used for that purpose. Instead, Mr Jones procured that on the same day as it was received, the entire amount was paid into a bank account in the name of Esquiline Finance Ltd, (“EFL”), one of a group of commercial companies separate from the Jirehouse Group, which he also owned or controlled. He then obtained DLC’s agreement to another Esquiline company, Esquiline Asset Management Ltd. (“EAML”), being interposed as a “front” for the purchase of the castle from the vendors, with a back-to-back sale by EAML to RTC. The intention behind this appears to have been to conceal from the vendors the identity of a high-net-worth individual who stood behind the purchase of the castle.”*

99. He went on to make good his point in the following exchange.

*Q. “The Second claimant, TCD, actually not a creditor that you have mentioned but an affiliated company and then RTC which is the other*

*creditor you mentioned, an LLP based in the UK. And these are all engaging Jirehouse, we see from para 20 in the purchase of a castle, so Tay mouth Castle, yes? So that is para 19 and 20. If you go to para 22 you will see what happened is that those creditors transferred a sum of money into JTL's general client account, looking at line 1, 2 and 3, yes? It should be held on trust by Jirehouse, pending purchase of the castle, only to be used for that purpose, instead, Mr Jones procured that on the same date it was received the entire amount was paid into a bank account in the name of Esquiline Finance Limited. That is a proving creditor in this bankruptcy, is it not?*

*A. Yes.*

*Q. OK, one of a group of commercial companies, separate from the Jirehouse Group, which he also owned or controlled. So it is Mr Jones' vehicle and he uses it to take money away from these creditors, yes?*

*A. Mmm*

*Q. Nine point three million US Dollars is equivalent, in pounds terms, to about 7.1 million. It looks as if that is what DLC is claiming in EFL's liquidation. You obviously cannot comment unless you actually know but the figures look as if that is what is being claimed.*

*A. OK.*

*Q. OK. So if the insurer pays out and the Court of Appeal said it must, then DLC's claim will go. Is that right?*

*A. But the insurer ---*

*Q. The insurer will be subrogated and will have a choice.*

*A--- have subrogated, you know, yes.*

*Q. The insurer, can I suggest to you, is very unlikely to maintain a claim in a liquidation of EFL that depends on this bankruptcy for its own assets.*

*MR FENNELL: Judge, I am really going to have to stand up now, this is speculation the witness does not know what this insurer will do in a liquidation of a company where she is not the liquidator, where this is new to her.*

*Q. If she does not want to answer, she is perfectly entitled not to answer but it is a perfectly valid question of an insolvency practitioner who is looking at a progress report she has referred to in her statement. I do not think that is being unfair and if you do not want to answer, you just do not have to.*

*A. It is – I cannot speak on behalf of the insurer ---*

*Q. No, I was not asking ---*

*A. --- and it would be unfair for me to do so.*

*Q. --- no, I was not asking you to do that. I was suggesting that the insurer being a commercial entity, it is very unlikely to pursue in EFL, and we will look at the progress report you have referred to. It is very unlikely to pursue in EFL for a subrogated claim.*

*A But that is not an answer that I could give.*

*Q. No, and so your answer to me is I cannot comment.*

*A Yes, thank you.*

100. He then referred to the contents of the submission of the claim in the bankruptcy in a summary contained in the Joint Liquidators' progress report as summarised in the following exchange:

*Q. And the last page of this report, which is talking about realisations as well, so right at the back, if you go to the back of the progress report, to the final page, do you see the heading of realisation of assets?*

*A. Mmm.*

*Q. Yes, and what that tells us is that what has been done is continued work on the trial balance in an attempt to identify debtors, yes? But we know none of them have been identified except for the bankrupt.*

*A. Right.*

*Q. And then a significant amount of work after identifying the joint liquidators had a claim in personal bankruptcy and corresponding with the trustee including registering the company's claim.*

*A. Yes.*

*Q. So that is what EFL has done. That is the only asset that EFL seems aware of.*

*A. Well there is also cash in bank but I appreciate was, you know, a small sum.*

*Q. Five thousand pounds, something like that?*

*A. Yes.*

*Q. Yes, so the £5,000 in cash at bank. So that is why I put to you that a commercial insurer is not – and I think you have answered the question, is not going to pursue that claim in EFL, in the way that the creditor did. OK, so that is EFL. The effect of where we are then, and I should say EFL we have seen from His Honour Judge Meston's report is the source of this loan to the bankrupt, yes? So when EFL claims in the bankruptcy, it is saying I want back money that I have lent. So that is its argument. We do not know where EFL got that money from, we do know that it has got a habit, no, that is unfair. We know on one occasion, at least, it has been used as a vehicle to dissipate money*



*intended for a property purchase. It looks like it is the vehicle of a dishonest solicitor, does it not?*

*A. Right.*

*Q. No. OK, so where we are now is that Ms Lin may lose her home, mainly due to the effect of EFL's claim, so that is the 2.3 million. And we know EFL is a vehicle of the dishonest Mr Jones and claims to have advanced money from who knows where to the bankrupt. That is right? And that is all in circumstances where EFL's creditors maybe about to be paid off by an insurer. That is a pretty unfair state of affairs, would you agree?*

*A. Ultimately, we have invited claims, at this point Esquiline have not reviewed or withdrawn their debt, and we have not had any applications to reject the acceptance of the approved debt.*

101. There is therefore significant doubt as to the overall position of the principal creditor of the estate. The creditors of EFL have succeeded in obtaining judgment in their favour in their action against the insurers of Jirehouse. Whilst the proof of EFL has been accepted in full, it may be that the insurers may not submit a proof for the subrogated debt. There is, at the very least a significant possibility that the liabilities will be significantly less than appear on the latest progress report filed by its joint liquidators. EFL itself was the vehicle for the fraud. The arrangements it had with the Bankrupt have been described as opaque. Whilst the proof has been admitted by the Applicants, the possibility of it being reviewed or withdrawn for dividend purposes cannot be ruled out.

#### Conclusions on the prejudice to creditors

102. I also bear in mind that there is some doubt concerning the nature and extent of the liabilities of the estate. This arises from the cross examination of Ms Reid-Roberts principally concerning the EFL debt. It is by far the largest claim in the bankruptcy. It has been known since the ancillary relief hearing in 2019. It relates to a business run by a dishonest solicitor now serving a term of imprisonment for a fraud. EFL itself was the vehicle through which the dishonest solicitor misappropriated the funds from its creditors. In his cross examination, Mr Robinson drew the attention to the consequences of the handing down of the judgment in *Discovery Land Co LLC v Axis Specialty Europe SE* earlier this year. The creditors in EFL will recover the money from the insurers who will be subrogated to their rights to lodge a proof in the liquidation of EFL. Whether they will do so is a matter of some conjecture.
103. The EFL debt is the only one that has been adjudicated upon by the Applicants. Given the size of the EFL liability in the bankruptcy, it will have a very significant effect on the level of liabilities in the insolvent estate and the dividend creditors in the bankruptcy may receive.

#### The alleged misconduct on the part of the Bankrupt

104. Ms Lin submits that this was deliberate conduct by the Bankrupt. He must have known that the Family Court ought to be made aware of these matters (as shown by him raising them at the eventual hand down date) but he chose to stay silent beforehand. This ensured that the petition proceedings took its course to the significant detriment of herself and the children. The Bankrupt admits that this was his intention in an email that was referred to by Ms Reid-Roberts in her second witness statement. She stated as follows:

[9] *“The First Respondent states that the bankruptcy was fabricated due to the Bankrupt’s mental illness at the time brought on by the stress of their divorce and his ongoing drug addiction to Class A drugs and/ or financial gain and/ or revenge. The First Respondent also refers to the email received by DLA Piper from the Bankrupt on 22 May 2023 in which he states ‘the reason for my bankruptcy was really to defeat my wife’s claim for the house in a moment of emotional stress and weakness by agreeing to a friend suing for a debt, I owed him. ....’ (emphasis added)*

105. The identity of the person referred to by the Bankrupt in this message is important to note. It was a Mr Nikolaus Ortlieb, (“**Mr Ortlieb**”), a friend and former business partner of the Bankrupt. Chief ICC Judge Briggs in his judgment at [28] commented:

*“An experienced insolvency practitioner may find it curious that Mr Ortlieb would choose to bankrupt a friend to recoup his loan.”*

106. I should mention that during the hearing of the annulment application before Chief ICC Judge Briggs, in March 2021 (and therefore over two years before that email was sent) the Bankrupt was cross-examined on whether he had colluded with the Mr Ortlieb, which he denied. He was also asked whether he had taken this step with the purpose of defeating the claim Ms Lin had made for ancillary relief which he also denied. It is important to note that the question as to whether or not there was collusion is not before me on this application. I mention him only in the relation to the fact of his presence at the time the misconduct of the Bankrupt relied upon by Ms Lin in this case took place.

107. By 2023, the position concerning the claim of Agapa (the Bankrupt’s family company) in his insolvent estate was acquiring greater importance to him. He claimed that it was the principal creditor of his bankrupt estate rather than EFL. Mr Robinson during his closing submissions made it clear that he did not pray in aid evidence of collusion in support of his submissions on s.335A. He confined his submissions on the Bankrupt’s misconduct in failing to disclose the service of the statutory demand and bankruptcy petition to the Court until two weeks after the bankruptcy order had been made. As a result, when the judgment of HHJ Meston KC was handed down after a significant delay, the bankruptcy order had taken effect and his beneficial interest had already passed to the Applicants as his joint trustee in Bankruptcy.

108. Had the Bankrupt not attempted to delay the handing down and been open with the Family Court or Ms Lin, he submits that there is little doubt that it would have been handed down earlier, potentially before the presentation of the bankruptcy petition. The Family Court order recites Ms Lin's position that had she known of the "application" for bankruptcy she would have sought an expedited hearing to procure the hand down of the judgment and with it, the making of the property adjustment order.

109. The judgement of HHJ Meston KC sets out his exchanges with the Bankrupt that resulted in the deferral of the handing down. It is illuminating to consider those exchanges in the context of gaining an insight into both their content and the steps that the Bankrupt took at the time. Mr Robinson's case is that in endeavouring to delay the handing down of the judgment of HHJ Meston KC and with it the order which divested him of his beneficial interest in the FMH, this constituted misconduct sufficient to take this case out of the ordinary.

110. It involved a course of conduct that commenced on 3<sup>rd</sup> December 2019, just over two weeks after he had been served with the statutory demand, when he contacted the judge by email. HHJ Meston KC deals with this approach at paragraph 99 on his judgment where he said:

[99]. *"On 3rd December 2019 the husband sent me an e-mail mainly relating to the hearing concerning the children on the following day in which he also said: "I also ask the Court in the financial settlement of the divorce, to bear in mind my situation before reaching a judgement. Thank you for your attention and consideration in this matter and I do hope it concludes soon and I can build a new life with hopefully some contact with my children in London which are extremely dear to me as are my children in Iceland which need their father support during the time when their mother has not more than few months to live. Finally I want to notify your honourable judge that I will not attend the hearing tomorrow.""*

111. Whilst asking the Court in the financial settlement of the divorce, to bear in mind his situation, there is no mention of the service of the statutory demand by Mr Ortlieb. This is surprising, given that it had been served and he must have understood the seriousness of the financial predicament he was in.

112. The bankruptcy petition was served on 22 December 2019. On 22 January 2020, he contacted the judge once again. This is dealt with by HHJ Meston KC at paragraph 102 on his judgment where he said:

[102] *"On 22nd January 2020 I received a further e-mail from the husband asking for postponement of the judgment until I had taken further developments into consideration. In particular he referred to a notification of a forced auction of Hostel LV to secure payment of a debt of*

*ISK23,026,327 to a creditor (the Icelandic Internal Revenue) for which there was to be a Court hearing of a levy request also on 27th January 2020 which the husband said he was required to attend. I invited submissions on behalf of the wife in respect of the husband's request for an adjournment, and having heard submissions I informed the husband that I did not consider that an adjournment was justified but that I would take into account the further information which he had provided.*

113. Again, there is no mention of the service of the statutory demand by Mr Ortlieb, despite the reference to other creditor claims and action in Iceland. Neither is there any notification to the judge of the service of the bankruptcy petition one month previously. It is also notable that this exchange took place just over a month before the first hearing of the petition when the bankruptcy order was made.
114. Three days later, on 25 January 2020, there is another communication from the bankrupt to the judge. This is dealt with by HHJ Meston KC at paragraph 103 in his judgment where he said:

*[103] "On Saturday 25th January 2020, I received a further e-mail from the husband asking me to re-consider the decision not to postpone the hearing for judgment: "As explained in my letter and attachments I am required to attend in person here in Iceland on 27th jan before District Magistrate. Before sending the email yesterday I had already contacted the Directorate of Internal Revenue to request a postponement due to the divorce hearing in london being at the same time. However the law in Iceland don't allow for the hearing to be postponed. The situation has arisen from Stephen David Jones and Jirehouse et al and is bringing the livelihood of me and therefore my children into a severe situation of non existance. As you have postponed hearings in regards to Jirehouse previously when it came to a letter received from the solicitor of Hsiaomei last year that was very vague and most definately a onesided decision, I am compelled to point out that at this point I truly come to believe that your judgment might be clouded and unfortunately, in my opinion, not fair to me, the children and to any resolution that can be found with not accomodating my request of attendance which makes it impossible due to the above raised matter. I urge you to re consider your decision and call for another date of presenting your ruling.""*

115. There is no mention of the bankruptcy proceedings notwithstanding the imminence of the first hearing date. He disclosed to the judge a hearing in Iceland involving the fiscal authorities but made no mention of the imminent hearing of the bankruptcy petition issued by Mr Ortlieb in London.

The learned judge refers to the response to that request to delay the handing down at paragraph 104 of the judgment where he said: [104] *"I answered:*

*"I have re-considered your request. When the developments relating to Jirehouse and Mr Jones were drawn to the Court's attention on 22nd September I then asked for any submissions as to the possible implications. Unfortunately, I then heard nothing from you or on your behalf, and so another hearing in November was fixed. I have since received statements and e-mails from you and I believe that I understand your position. In the circumstances I do not consider that a further delay is necessary. I therefore intend to deliver judgment, a copy of which will be provided to you. I quite understand that you will then be unable to be in London. If in the next 24 hours you wish to send me further submissions I will of course consider them before finalising the judgment. If so, please copy them also to the legal representatives for Ms Lin."*

116. The tenor of the judge's response is to explain the reasons why he delayed the handing down in the light of the developments involving Mr Jones and Jirehouse. He was clearly troubled by the request that was made of him. What is interesting is the disobliging comments the Bankrupt makes in relation to the adjournment of the handing down at the request of Ms Lin in September. Notwithstanding the different circumstances that prevailed at that time, the Bankrupt was clearly aware before the statutory demand was served by Mr Ortlieb, that the judge may be prepared to respond to a request for an adjournment of the handing down if he asked for it. The Bankrupt made one final attempt to persuade the judge to delay the hand down by a message sent on 26 January 2020. The Judge describes this exchange in paragraph 105 and 106 on the judgment where he states.

[105] *"A further e-mail from the husband sent on the evening of 26th January which I saw on the morning of 27th January objected to my decision to proceed with the judgment. He said:*

*"My last hope of survival with resolving Hlemmur Square is being taken away from me because of misjustice being displayed and rendered over me for more than 3 years of wasted Court time and money issues."*

[106] *"Not even mentioned in my earlier e-mail last week it has no[w] turned out that Mr Stephen David Jones was the signature on the trust funds I have set up for the well-being of my children in 2003 and the funds never seem to have been in control of the trustee apart from on the paper. Hence, Mr Jones was able to redirect/steal every last penny from my children['s] trust accounts that were set up for all my 4 children. Prior to his imprisonment and the intervention of the SRA, Mr Jones had agreed and was to send Hlemmur Square about GBP 400,000 to resolve the issue that has now spiralled to over GBP 550,000 (this is due compounded penalty interest) which is the issue being heard tomorrow and on 6th February in*

*Court with the possibility of the only asset being auctioned off, which is the only asset I have left which could generate an income for me going forward.... I am appealing again to you to postpone the matter until I am able to attend in person and there is at least a clarity about Hlemmur Square and think about the victims, I am at present the greater one having been put into poverty by Miss Lin, restricted from access to my children who ultimately will make their own decision of your judgment and the British justice system, myself and the behaviour of their mother."*

117. At a hearing on 27 January 2020, the handing down of the judgment was deferred.
118. The final exchange refers to creditor enforcement action and to having been put into poverty by his wife. For the final time, he chose to make no mention of Mr Ortlieb and the action he was taking.

What were the consequences of the failure to disclose the statutory demand to the Family Court?

119. There is no doubt that the bankrupt did not inform the Court of the service of the statutory demand upon him by Mr Ortlieb on 18 November 2019. There is also evidence that the bankrupt had discussed matters with Mr Ortlieb beforehand.
120. Had he done so, Ms Lin being aware of these matters she states that she would have sought an expedited handing down to protect her position. Whilst it is difficult to consider with certainty the outcome of such an application, it is completely foreseeable that the handing down of the judgment would have been accelerated by the judge and the property adjustment order made.
121. There have been significant consequences for Ms Lin and her children resulting from this lack of candour on the part of the Bankrupt. From an expectation that the Court would order the transfer of the Bankrupt's interest to her and as a result her family could move on, she has now lost that opportunity altogether.
122. When the exchanges with the judge are considered, the selective nature of the information the Bankrupt supplied, coupled with the evident antipathy he held towards his wife, are entirely consistent with his stated intention as disclosed to the Applicants' solicitors in the email he sent to them.
123. The Applicants seek to play down the significance of this statement. They refer to the Bankrupt making different statements to suit the circumstances that prevail at the time he makes them. They point out that this point was put to him at the annulment hearing when he was cross examined under oath on the allegation that he and Mr Ortlieb had colluded with a view to obtaining a

bankruptcy order. However, as I have said the issue of collusion is not before me on this application. What I have to determine is whether, as a result of the actions of the Bankrupt, the outcome would have been different had he been more forthcoming about his true intentions, specifically after he was served with the statutory demand.

124. In a sense his motivation, whilst interesting, is less important than it was on the annulment application where his motivation was a central issue. What does attract my attention is that whilst he was content to tell the judge of creditor action being taken in Iceland, he made no mention of the statutory demand and the bankruptcy proceedings in this jurisdiction. This is all the more surprising by his making reference to his being driven into poverty by his wife, whilst making no mention of Mr Ortlieb's actions at all.
125. Whilst a property adjustment order made after service of the bankruptcy petition may have been void under s.284 IA 1986, (see *Treharne v Sands v Forrester* [2003] EWHC 2784), Mr Robinson submits that this would not be the case if such an order is made following the service of the statutory demand and prior to the presentation of the bankruptcy petition.
126. It must be considered highly likely that HHJ Meston KC would have fully appreciated the importance of expediting the handing down in these circumstances. He was already aware of the time that this had taken from his stated intention at the hearing and, like any judge in a similar situation, he was anxious to hand it down as soon as he could. He would also have been aware of the effect that a bankruptcy order would have had on the property adjustment order that he intended to make.
127. There has undoubtedly been a material effect upon Ms Lin and her two children as a result of the Bankrupt's lack of candour. Under the property adjustment order, Ms Lin was entitled to the FMH, as the property adjustment order provided. She has now lost that opportunity altogether. It follows that the action of the Bankrupt has sabotaged the effect of an order that would otherwise have been made.
128. The Bankrupt also admitted taking steps designed to misled the court in relation to the forgery of the result of the drug test. He has described his motivation in this case. In my judgment, I find that the documents show he is perfectly capable of taking the steps he describes to sabotage the outcome of the Family Court proceedings and, on the balance of probabilities, that is what he sought to achieve.
129. I find that there was misconduct on the part of the Bankrupt in manner consistent with the way in which Ms Lin puts her case. This conduct and its consequences in my judgment clearly takes this case out of the ordinary. It is therefore an exceptional circumstance for the purpose of s.335A.

Ms Lin's diagnosis with complex developmental trauma and the diagnosis of her son with ADHD

130. I turn now to the second issue that Ms Lin raises as an exceptional circumstance in relation to s. 335A. It relates to the effect the behaviour of the Bankrupt has had on the mental health of herself and her son and whether it would be exacerbated by the making of an immediate order for possession of the FMH.
131. During the marriage, the medical evidence relied upon by Ms Lin describes that she suffered “quite significant levels of emotional and physical abuse from the bankrupt”, along with having to cope with the consequences of his methamphetamine and cocaine abuse. He left drug use paraphernalia in his flat which his children discovered on an access visit. Not surprisingly, Ms Lin felt very unsafe in his company, particularly in relation to his violent and unpredictable outbursts. She often worried for her and her children’s safety whilst in his company.
132. The evidence from the Islington Drug Abuse and Alcohol Service states that problem alcohol; or other drug misuse is known to be an aggravating significant risk factor in domestic abuse. There is though, no proven behavioural cause and effect between them, and it does not explain or excuse violent person to person behaviour in this context.
133. It goes on to explain that Ms Lin has profound and yet unresolved consequences of domestic abuse. She exhibits the primary symptoms of PTSD as a result. She was referred to her GP with a request that they refer her to primary mental health services for further diagnosis for complex PTSD. It is unfortunate that the report is 18 months old. I do not have any more up to date medical evidence at present.
134. The evidence produced on behalf of her son is more up to date. He was diagnosed with ADHD on 6 July 2023. Whilst the evidence explains that he is underperforming at school, he states that he is happy and does not want to move. He was referred to the paediatric department at the Whittington Hospital on 24 January 2024. I have no further medical evidence on his present condition.

Does the medical evidence show an exceptional circumstance under s.335A?

135. I am cognisant of the comments of Nourse LJ in *Re Citro*. There are natural and sad consequences of debt and improvidence in every bankruptcy involving families with young children. Internal personal relationships will inevitably come under strain leading to divorce with all the upheaval that will result.



136. The Bankrupt's misconduct set in train events that frustrated the entirely legitimate application his former wife made. His behaviour towards his wife and their two children cannot on any view be described as normal. He put in jeopardy their expectation to be able to move on from what was a deeply disturbing situation. His actions have resulted in Ms Lin and her children having to endure 4 years of uncertainty to date, thereby depriving them of the certainty that they would have enjoyed of being able to remain in the FMH for the foreseeable future.
137. I conclude that when taken with the bankrupt's misconduct the consequences of his behaviour must have had a significant effect on the mental health of his former wife and their son. They continue to this day prolonged unnecessarily by the misconduct of the Bankrupt.
138. The Applicants submit that there is nothing unusual in this case that it cannot be distinguished from the circumstances Nourse LJ described in *Re Citro*. I disagree. I am of the view the circumstances of this case are exceptional within the meaning of s.335A IA 1986.

### **The Disposal**

139. I must make an order that is just and reasonable having regard to the equities that prevail in this case.
140. I must take into account the fact that Ms Lin will ultimately receive 50% from the proceeds of sale of the FMH. That I do, but in so doing, I point out that had the Bankrupt's misconduct not taken place and the judgement concluded earlier, she would have been entitled to 100% of the equity. She is entirely blameless for any delay in the conclusion of the Family Court proceedings.
141. The 50% share of the proceeds is also subject to erosion from any orders for costs that she may be ordered to pay. Mr Fennell's assertion that she will receive over £750,000, may prove to be over optimistic to a significant degree. She will certainly have to move to a smaller property away from the area causing disruption to the education of her children and running the risk of a deterioration in both her mental health and that of her son.
142. Whilst Ms Lin and her children are, on any view the only victims of the Bankrupt's misconduct, the insolvent estate is the beneficiary. The creditors will, in due course receive a dividend taking into account the realisation of the interest in the FMH. That would not have occurred but for the misconduct of the Bankrupt. Whilst Ms Lin and her children will remain in possession of the property for the time being, they will suffer the uncertainty of knowing the future beyond the date when the possession order will be enforced.

143. The Bankrupt pays no contribution to Ms Lin in maintenance for herself and her children. The FMH also represents their only source of income; an immediate possession order will render them destitute.
144. For the reasons stated, the misconduct of the Bankrupt coupled with the delay in the conclusion of the Family Court represent exceptional circumstances under the terms of s 335A IA 1986.
145. The position concerning creditor claims and the extent to which they will be submitted for proof is uncertain. The EFL liability particularly catches the eye. The proof has been adjudicated upon in accordance with the direction of Chief ICC Judge Briggs and admitted in full. However, recent developments may cast doubt on the amount for which it ought to rank for dividend. The creditors of EFL have the benefit of a judgment in their favour and in due course will receive a substantial payment from the professional indemnity insurers of Jirehouse. There is some doubt as to whether those insurers will submit a proof in the EFL liquidation. This may have a material effect in reducing the liabilities of the bankruptcy estate substantially. This, taken with the fact that there are still further assets that may be realised from the Applicants' continuing investigations, may have a significant effect on the outcome of the bankruptcy.
146. Having considered all these factors, is it just and reasonable for me to make an immediate possession order as the Applicants contend? In the exercise of my discretion, I consider that it is not. This is one of those unusual cases where the equities lie with the family of the bankrupt and not with the creditors of his insolvent estate due to the exceptional circumstances I have set out. I do not believe that great hardship will be suffered by these creditors.
147. Subject to any submissions on the form of the order, I will grant the declaration that Ms Lin is entitled to 50% of the proceeds of sale after deducting the costs of sale. In selecting a date to which any sale of the FMH will be deferred, I will select a date which will take into account the educational needs of the children. Ms Lin's daughter will be 18 on 20 February 2032. To ensure that her preparation for any school examinations will not be interrupted, any sale of the FMH will be deferred until after midnight on 31 July 2032.

### **The s375 IA 1986 review issue**

148. The final matter I must decide is an application to vary 2 orders. It invites me to exercise the jurisdiction conferred on the Court by s.375 IA 1986 in making the following variations of that Order. The variations requested are as follows:

- a. the First Respondent's liability for the costs pursuant to the Court Order dated 12 March 2021, be met from the net sale proceeds payable to the First Respondent prior to accounting to her with the same; and
- b. the First Respondent do make a payment on account of the Applicants' costs of the Annulment Application of £25,187.50 plus VAT, to be paid from the net sale proceeds payable to the First Respondent prior to accounting to her with the same.

149. The order made on 12 March 2021 was made by ICC Judge Burton. On that occasion, she dismissed Ms Lin's application for (i) the transfer of the annulment application to the Family Division to be consolidated with the appeal issued in that jurisdiction by the Bankrupt and (ii) the adjournment of a hearing that had been fixed on 23 and 24 March 2021 to enable her to file and serve an expert forensic accountant report in the annulment proceedings. She summarily assessed the costs in the sum of £6,240 inclusive of VAT. It is this sum that the Applicants suggest should be met from the net proceeds of sale prior to accounting to her for her share.

150. The second variation is more problematic. For that reason, I shall deal with it first. It relates to the order made by Chief ICC Judge Briggs when he handed down his judgment on the annulment application on 15 April 2021. It invites me to order a payment on account of the Applicants' costs of the Annulment Application of £25,187.50 plus VAT, to be paid from the net sale proceeds payable to the First Respondent prior to accounting to her with the same. That sum whilst specified, is in respect of costs that were not summarily assessed by Chief ICC Judge Briggs at the hearing before him.

151. Mr Fennell (who was present on that occasion as counsel for the Applicants) told me that Mr Howling KC, Leading Counsel for the Ms Lin, informed the Court that the FMH would be placed on the market forthwith and that she would seek to complete a sale as soon as reasonably possible and in any event no later than 20 August 2021. This is recorded in the recitals to the Order. In consideration of this development, the Court determined that this constituted a good reason for the purpose of CPR 44.2(8) not to make an order that there should be a payment on account of those costs. Instead, the Court ordered that Ms Lin should pay the costs of the Applicants to be subject to a detailed assessment if not agreed. The Applicants were ordered not to commence detailed assessment proceedings before 10.00 a.m. on 22 April 2021.

152. No such detailed assessment has been commenced in the intervening three years. The order gave further directions that do not apply to this application, save that permission to apply was granted to Ms Lin and the Applicants, any application was to be listed before Chief ICC Judge Briggs, if possible.

153. Implicit in the request to vary is an invitation that, rather than complying with the direction to commence detailed assessment, I should summarily assess the costs instead of Chief ICC Judge Briggs, who heard the case and then make an order for the interim payment sought. CPR r.44.1 defines summary assessment as meaning “*the procedure whereby costs are assessed by the judge who has heard the case or application*”. That said, there have been instances where judges who did not hear the application have dealt with a summary assessment where the matter was determined on the papers (see *Transformers and Rectifiers v Needs Limited* [2015] EWHC 1687 (TCC)). Self-evidently, that is not the situation in this case.
154. Another example is found in *Pipia v BGEO Group Limited* [2022] EWHC 846 where a different judge conducted a detailed assessment and a payment on account had been ordered by the first judge when dismissing the Applicant’s case. Here no payment on account was ordered for the reasons stated. In any event, even if I were inclined to assess these costs summarily (which I am not), I have not been provided with information to enable me to do so. Furthermore, no reason has been provided as to why a detailed assessment has not taken place in the time available since the hearing. The second variation is refused.
155. I can deal with the first variation more expeditiously. This involves a defined liability for costs ordered by the ICC Judge Burton following a summary assessment. The Applicants seek to deduct it following sale of the FMH from the half share of the net proceeds that she will ultimately receive. This example is more akin to the position in *Pipia v BGEO Group Limited*. I will make an order in those terms. The first variation sought is granted.
156. I now invite the parties to submit an agreed order. I will then deal with any other consequential matters on a date to be fixed.