

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY LIST (Ch D)
IN THE MATTER OF MICHAEL SHERIDAN (A BANKRUPT)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

24 JUNE 2021

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE AGNELLO QC

Between :

MELISSA JACKSON
(as TRUSTEE IN BANKRUPTCY OF THE ESTATE OF MICHAEL JOHN
SHERIDAN)

Applicant

- and -

JIAN SONG

Respondent

Mr Rory Brown (instructed by Francis Wilkes & Jones) for the Applicant
Mr Miles Croally (instructed by Mono Law) for the Respondent

Hearing dates: 26,27,28,29 April 2021

JUDGMENT

Introduction – background facts

1. In 1999, Mr Michael Sheridan met Ms Jian Song in Shanghai. Ms Song comes from Shanghai. The couple carried on a relationship which continued after June 2001, when Mr Sheridan was posted by his then employer, Astra Zeneca, back to the UK. Their first child, Liam was born in Shanghai in November 2001. Ms Song became extremely ill after the birth and to this day, as set out in her first witness statement dated 3 March 2020, she suffers from Guillain-Barre syndrome

which continues to affect her balance and co-ordination. In June 2002, Ms Song and their son moved to England. They were married in September 2003 when their second child, Lily was born. Ms Song developed a brain tumour, the outcome of which is she still suffers from dizziness if she bends or crouches to pick up something. She is also on medication which gives her nausea which also makes her sleepy and tired.

2. During their marriage and in fact after their separation, Mr Sheridan was the only wage earner. Ms Song did not work outside the house. She looked after the children and also, as I will deal with in more detail below, she supervised renovations and decorations to their home at 53 Hamilton Park West, London N5 1AE ('the Property'). The Property had been acquired in July 2007 in the sole name of Mr Sheridan although both Ms Song and Mr Sheridan assert that the property was jointly owned. That is an issue for determination in these proceedings. By March 2012, the marriage had broken down. As explained to me by Mr Sheridan, he was then obsessed with a woman, called Sonia, to whom he gave large sums of money. He also had a problem with alcohol and mental illness (depression). He spent large sums of money going out to places to drink.

3. By this time, Mr Sheridan was working for Care UK Limited with a wage of approximately £80,000 per annum. He and Ms Song agreed that the property needed to be sold, the mortgage repaid and that a substantial sum from the proceeds would be provided to Ms Song. She wanted to buy a home for her and the children, who were then 10 and 8 years of age. Although Mr Sheridan stated that he thought originally that Ms Song would be looking to rent a place for her and the children, Ms Song then informed him that she wanted to buy a place for her and the children.

4. Ms Song went to see a solicitor and explained that she had reached an agreement with Mr Sheridan relating to their separation. The result was the separation agreement dated 27 March 2012 which was executed as a deed by the two of them. The agreement is expressed to be an agreement which will dispose of any financial claims that either of them may have against the other. The agreement did not set out the assets and liabilities of either party. A buyer was

found and the property was sold. Thereafter, Ms Song realised that the agreed 80% of the proceeds of sale from the Property were insufficient for her to be able to complete her proposed purchase of 50 Waterside Apartments, London N5 ('50 Waterside'). She sought further sums from Mr Sheridan to enable her to complete the purchase of 50 Waterside Apartments. He was certainly aware then that she needed further sums to be able to complete the purchase of the property which was to be the home for her and the children. He agreed to provide a further £40,000. She also obtained further sums from her parents and sister in China by way of loans from them and she completed the purchase on 11 May 2012 in her sole name.

5. Mr Sheridan received the sum of £57,282.21 from the proceeds of sale, being less than the 20% of the proceeds set out in the agreement. He applied those funds to the payments of what he considered were his debts, being his John Lewis credit card debt, his overdraft and he also paid off his Marks and Spencer credit card balance. According to his evidence, that was the totality of the debts he had. He was still earning £80,000 per annum and he moved into a rented flat. He continued his affair with Sonia paying her substantial sums after his separation and he also continued his drinking. He entered a depressive state, stopped opening his post and was off work in November 2012. He got into debt problems and in March 2013 sought help from a debt counselling charity, StepChange. He compiled a list of his creditors with their assistance. HMRC was not on the list.

6. Ms Song issued a judicial separation petition on 21 May 2012 and she and Mr Sheridan were divorced on 14 January 2015. No ancillary relief application was made by her.

7. Some time later, on 29 August 2013, HMRC presented a bankruptcy petition against Mr Sheridan. The debt related to assessments, penalties and interest raised by HMRC for the periods 2008/9 and 2009/10 and totalled £65,717.52. Mr Sheridan explained to me that he was unaware of these liabilities and also that he was not convinced that they were correct. However, he did not seek to defend the petition and a bankruptcy order was made on 10 December

2013. The Applicant was appointed as Trustee in Bankruptcy of Mr Sheridan on 19 March 2014.

8. I will need to expand on what I have set out above relating to the facts as I go through this judgment.

The Application and summary of the position of the parties

9. On 7 November 2019, the Trustee issued the current proceedings, seeking the following declarations:-

(1) that the payment of £429,128.82 from the net proceeds of sale of the Property made to Ms Song on 26 April 2012 pursuant to the separation agreement dated 27 March 2012, including the payment of £40,000 constituted a transaction at an undervalue;

(2) as to the nature and extent of the interests of Mr Sheridan and Ms Song in the property and in 50 Waterside.

The balance of the application notice relates to the specific remedies sought in the event that certain declarations sought by the Trustee are made by me. I will return to these remedies in so far as necessary. At this stage, it is important to set out the case that the Trustee seeks to establish which appears from the witness statement of the Trustee dated 7 November 2019 as well as from the replies to the Request for Further Information ('RFI') dated 24 July 2020. The Trustee asserts:-

(1) that no consideration was provided for the transaction, being the payment to Ms Song of the sums pursuant to the separation agreement in accordance with section 339(3)(a); or

(2) that the consideration provided by Ms Song in money and money's worth was significantly less than the consideration provided by Mr Sheridan pursuant to section 339(3)(c);

(3) that Mr Sheridan was the beneficial owner of the Property. This is what was argued on behalf of the Trustee before me. Alternatively, it was argued that if Ms Song had a beneficial interest in the property, this should be valued as at ¼ of the entire beneficial interest.

10. The Trustee has not set out what she asserts was the value of the consideration provided by Ms Song pursuant to her alternative section 339(3) (c)

case. The Replies to the RFI assert that in the event that the Court determines that Ms Song has provided consideration, then the Trustee will invite the Court to determine the value of that consideration. Mr Brown submitted on behalf of the Trustee that until there is a determination of the beneficial interest, if any, of Ms Song in relation to the Property, then the Trustee is unable to determine the consideration provided. I will deal with this below. However, I note that the Trustee does not provide any evidence as to the value of the consideration for the purposes of section 339(3)(c). It would have been possible to set out her case on the alternative basis of (1) Ms Song having a beneficial interest of 50%; (2) Ms Song having a beneficial interest of 25%; or (3) Ms Song having no beneficial interest at all. However, the Trustee has not provided any such valuations or any evidence as to what the Trustee asserts was the value of Ms Song's financial claims arising under the Matrimonial Causes Act 1973 as at the time of the separation agreement.

11. Mr Croally, on behalf of Ms Song, submitted as follows:-

- (a) that Ms Song did have a 50% beneficial interest in the Property;
- (b) that the separation agreement entered into by Ms Song and Mr Sheridan did provide for valuable consideration from Ms Song to Mr Sheridan in accordance with section 34 of the Matrimonial Causes Act 1973 and relevant case law, being the settlement of her potential claim in ancillary relief proceedings; and
- (c) that the Trustee has failed to provide evidence that the consideration provided by Ms Song, in money or money's worth, was significantly less than the consideration provided by Mr Sheridan as at the date of the transaction, but that on its face, the separation agreement and the transfer of the majority of the net proceeds of sale to Ms Song provides a level of financial provision very much in line with the value of her financial claim.

12. Both parties also addressed me in relation to the discretion in section 339. I will deal with those aspects alongside any other remaining aspects once I have dealt with the three main claims set out above. For the purposes of this judgment, reference to sections in an Act will relate to the Insolvency Act 1986 unless otherwise specified. References to the Matrimonial Causes Act 1973 will be referred to as the MCA. In relation to section 339, the arguments really centred

around the consideration provided. Other constituent elements of the section 339 claim were not in issue as between the parties. Accordingly, there is no need to deal with them at this stage. Section 339 states as follows:-

(1) Subject as follows in this section and sections 341 and 342, where an individual is made bankrupt and he has at a relevant time (defined in section 341) entered into a transaction with any person at an undervalue, the trustee of the bankrupt's estate may apply to the court for an order under this section.

(2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction.

(3) For the purposes of this section and sections 341 and 342, an individual enters into a transaction with a person at an undervalue if—

(a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration,

(b) he enters into a transaction with that person in consideration of marriage or the formation of a civil partnership, or

(c) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual.

Evidence and witnesses

13. The Trustee had produced several witness statements but her case really relies on the documents she has produced as well as her assertion that the significant parts of the witness statements of Ms Song and Mr Sheridan are untrue. She also relied heavily on a meeting she had with Ms Song on 10 May 2016 as well as emails from Mr Sheridan which assert (with no evidence in support) that Ms Song owned property in China. Ms Song produced three witness statements and there were two witness statements from Mr Sheridan. Additionally, there was a witness statement from Mr Harvey Wheaton dated 23 July 2020. Mr Wheaton's evidence was short and was relied upon by Ms Song so as to establish that Mr Sheridan was unaware of the HMRC liability until about November/December 2013. Mr Brown did not cross examine Mr Wheaton. As will become clear from what I set out below, I have concluded on my assessment of the evidence I have considered having heard and assessed Mr Sheridan and Ms Song, that Mr Sheridan did not know that he had a liability to HMRC, in so far as that liability

existed in 2012, or subsequently. In my judgment, he discovered this liability when, with Mr Wheaton, they went through his post in November/December 2013. That was shortly before the bankruptcy order was made. There is, in any event, no evidence of any demand being made by HMRC on Mr Sheridan around the time of the separation agreement in 2012. In fact, the evidence of the HMRC liability only emerges in the statutory demand served prior to the issue of the bankruptcy petition in 2013.

14. As I have already stated above and as is common in these cases, the Trustee, has no direct evidence. She sought to rely in her evidence on the notes made of the meeting she had with Ms Song on 10 May 2016. She was questioned about what was said at that meeting and under cross examination she asserted that part of the handwritten notes taken by her assistant, Ms Ashley Davis, were inaccurate. This related to the point made by Mr Croally and put to the Trustee, that the Trustee actively sought to persuade Ms Song to bring proceedings to seek to obtain half the valuable pension pot of Mr Sheridan and that the Trustee volunteered to pay for this advice. The note says this was so as to enable Ms Song to pay the sums to the Trustee which the Trustee asserted represented the Trustee's claim against Ms Song. The Trustee denied that she had done so. However, she did assert that she had advised Ms Song to take advice on the position relating to the pension pot.

15. Mr Croally put to the Trustee that effectively there was an inconsistency in the approach of the Trustee. As Mr Croally put to the Trustee, Ms Song would only have a claim to part of the pension pot if the sums she had received under the terms of the separation agreement were effectively less than the sums she was entitled to in ancillary relief proceedings. The Trustee replied that she did not know what the value of Ms Song's claim was so couldn't answer. In my judgment, as will appear below, Mr Croally is correct. In so far as Ms Song had a claim against the pension pot of Mr Sheridan, this would have been on the basis that the settlement she received under the separation agreement was effectively less than the true value of the financial claims she had against Mr Sheridan. The Trustee's response did not seem to be one where the Trustee really appreciated the inconsistency in her position, namely, on her case, (1) advising Ms Song to take advice relating to the pension pot which Ms Song could only really obtain in the

event that the Court determined that what she had received under the terms of the separation agreement was insufficient, and (2) notifying Ms Song that the Trustee had a claim against her on the basis that, effectively, the value of her financial claim against Mr Sheridan was valued at zero or valued at significantly less than what she received under the terms of the agreement. The approach by the Trustee does seem to have been driven by a desire to seek to obtain sums from Ms Song without much thought being given to the value of financial family claims and in particular without taking into account the fact that a family court would take into account what Ms Song had already received from Mr Sheridan. In short, Ms Song would only have a claim to a share in the pension pot if the family court determined that what she had already received was insufficient (or that the agreement was obtained by reason of misrepresentation, fraud or other vitiating factor). That effectively would defeat the section 339 (3)(c) (and also in my view the section 339(3)(a)) claim being made by the Trustee. Whatever the Trustee's view of matters was either at the time of the meeting or indeed before me, the real issues for my determination are those that I have already identified. To that extent, the position taken by the Trustee at the meeting or even in correspondence with Ms Song do not in my judgment really affect my consideration of the issues which depend upon the relevant evidence and legal principles.

16. As appears clear from the three issues which I have set out above at the end of paragraph 8, the issue of any beneficial interest of Ms Song in the Property requires a careful assessment and consideration of the evidence filed and given in Court. In relation to the section 339 claims which the Trustee sought to establish, these are objective provisions. The parties agreed this is the position and I agree. A lot of time was spent by Mr Brown in cross examining both Ms Song and Mr Sheridan in relation to (1) their knowledge of the HMRC liability and whether he was insolvent as at the time of the separation agreement; (2) whether Ms Song owned an property in Shanghai, (3) whether Ms Song asserted that the separation agreement was part of Ms Sheridan's design to go bankrupt; and (4) whether the sums transferred from China to Ms Song were in reality her money rather than sums belonging to her family. In my judgment, these issues did not significantly progress the Trustee's case in relation to section 339. The issue as to whether there was consideration provided by Ms Song is partly an issue of law and

thereafter requires an assessment of the valuation of Ms Song's financial claim. As to the latter, as the Trustee has not provided evidence in relation to the valuation of Ms Song's financial claim, then it seems to me that the issues raised by Mr Brown in cross examination and his submissions thereon, are of limited relevance to establishing the section 339 claim. There did not appear to be any real dispute relating to the insolvency of Mr Sheridan. However, that issue alone does not enable the Trustee to succeed in her claims. In assessing both Ms Song and Mr Sheridan, I have considered the evidence they have given and their replies on a number of issues, whether these issues formed part of what the Trustee needed to establish or were more peripheral.

Ms Song as a witness

17. In my judgment, care must be taken in assessing a witness who is replying to questions asked through an interpreter. There was one clear example of the care which needs to be taken when Ms Wang, the interpreter, corrected herself an error in her translation of what Ms Song had said. Ms Wang had translated 'a Chinese bank' as 'the Bank of China'. Mr Brown had started to challenge Ms Song in relation to inconsistencies on the basis that she had said her father opened an account at the Bank of China and later she said she didn't know at which bank in China her father had opened the account in her name. Ms Wang then intervened and explained that the two phrases were the same in Mandarin Chinese and she believed she had translated a bank in China (' a Chinese Bank ') as 'the Bank of China' incorrectly. This is a prime example of the need to be extremely careful in assessing the replies to questions posed and in particular when lengthy questions are being asked. In many instances, Ms Song replied, 'I don't understand the question' or 'I don't know'. Whilst Mr Brown asserted this was an example of her lying, in my judgment, that was not the case. Having considered carefully her evidence in the witness box, she appeared to be someone who did not genuinely understand some of the questions being posed. When asked more straightforward questions, she replied. Even then, some of her replies were somewhat unreliable because it would then become clear that she had not really understood some of the words being used. On questioning by Mr Brown relating to whether the sums being transferred to her from her family in China in reality belonged to her, she was, in my judgment, clear that the sums being transferred

did not belong to her. Mr Brown's questions were formulated on the basis that those sums did belong to her. So she replied that they did not. However it was apparent that she appeared a bit confused by the failure of Mr Brown to accept what she had said previously. In my judgment, her evidence was clear when she denied that the flat in China (located in Shanghai) in which her parents lived, belonged to her. She was also clear that the sum transferred to her by her family, including the sum transferred under her own name did not belong to her. I accept her evidence in this respect. She was clear in her evidence. There was also no evidence produced by the Trustee in opposition to her evidence on this point with the exception of an assertion made by Mr Sheridan which he stated before me was 'guesswork'. I also accept her evidence that the sums being sent were differing sums and in one instance sums were transferred from an account opened in her name by her father who had her Chinese identity card, because of the currency restrictions in China at that time. Although she was challenged on the currency restrictions and she was unable to say how much could be transferred in a year, the Trustee failed to adduce any evidence relating to the currency restrictions and their existence. I accept the evidence of Ms Song. There was no evidence submitted or relied upon the Trustee to contradict what Ms Song had asserted.

18. Her evidence was somewhat confused and less reliable relating to what she told the Trustee at the meeting. Mr Brown sought to rely upon something which the Trustee asserted Ms Song had informed her at the meeting on 10 May 2016 relating to Mr Sheridan, namely that the separation agreement was in some way part of his plan or design to go bankrupt. When asked during cross examination whether at the time she agreed and entered into the separation agreement in 2012, she understood the word 'bankrupt' she replied no. Although the Trustee heavily relied on what Ms Song told her at the meeting, I have considered the evidence of what Ms Song is said to have said at that meeting somewhat unreliable. This is not because I consider she has changed her story, but because having heard her give evidence with the benefit of an interpreter, I am not convinced that she understood the questions being put to her at that meeting with the Trustee. Before me, it appeared that Ms Song struggled to understand some of the questions put to her even with the interpreter.

19. In reply to many questions, she gave, in my judgment, truthful replies. When the questions were complicated, I did feel sometimes she simply said ‘I don’t understand the question’ or ‘I don’t know’ rather than trying to understand or grapple with what was being asked. Her evidence of what she said or did not say at the meeting with the Trustee is to be treated with caution. Her evidence relating to what was happening at the time of her separation in relation to what she did or didn’t know about Mr Sheridan’s finances was given somewhat emotionally by her. I am not persuaded that Ms Song really knew much, if anything, about Mr Sheridan’s finances at that stage. So I have treated her evidence in this respect with a certain amount of caution. Having said that, I am not prepared to reject her evidence and do not do so on the issues which I have highlighted in this judgment. It was also clear when giving her evidence, Ms Song still found the break up of her marriage a painful subject. She was clearly distressed about having to deal with questions relating to the break up, what she knew, whether she was aware of mortgage arrears, her husband’s drinking, his affair and his mistress and other subjects along these lines. I accept her evidence that at the time of her separation and the signing of the separation agreement, she was unaware that it was possible for Mr Sheridan to go bankrupt. The Trustee relied heavily on her recollection and record of the meeting with Ms Song whereby the Trustee asserted that Ms Song stated or agreed that the intention of Mr Sheridan when he entered into the separation agreement was for him to go bankrupt. As I have already stated, I reject the evidence presented by the Trustee in this regard. In my judgment, the evidence presented in this regard by the Trustee is unreliable for the following reasons. Firstly, I accept the evidence of Ms Song that in 2012, she was unaware that Mr Sheridan could go bankrupt. She stated in replying to a question from me that she did not know in 2012 what ‘bankrupt’ meant in 2012. I believe her evidence in this respect. It also fits in with her understanding at the time of what was happening but also importantly it also fits in with her lack of knowledge relating to Mr Sheridan’s finances. Whilst married to Mr Sheridan and before their separation, she received sums paid into their joint account and she used those sums. She had no access to Mr Sheridan’s bank account and she stated she was not aware of the amount of mortgage arrears. Secondly, as I deal with below, I accept the evidence of Mr Sheridan who stated that as at the time that he and Ms Song separated and entered into the separation

agreement, he had not formed any intention or had any plan to go bankrupt. However, even if Mr Sheridan did have in 2012 some design or plan to go bankrupt, this is, in my judgement, irrelevant to the case. The Trustee has not issued proceedings based upon section 423. Section 239 sets out an objective test and the desire or design of a debtor to go bankrupt is therefore irrelevant to what the Trustee needs to establish relating to consideration. It is the issue of consideration which forms a large part of this judgment.

Mr Sheridan as a witness

20. I should add that a lot of the relevant evidence of Ms Song was confirmed as being true by Mr Sheridan. He had been the subject of a witness summons, but he had signed two witness statements on behalf of the Respondent. Overall, I found Mr Sheridan a truthful and honest witness. The one exception relates to what he said about the additional £40,000 which he provided to Ms Song in order for her to be able to complete the purchase of 50 Waterside. I will deal with this below. He gave his answers carefully and it was noticeable that he considered in his replies, what he knew at the time rather than what he knew now. He struck me as very honest in his explanation as to his circumstances and, in particular, his recognition that he had been suffering from both mental illness and alcoholism for some years. In particular I was struck by the candid reply that he was unable to say when he became an alcoholic or suffered from mental illness (later diagnosed as depression). He said that such illnesses are progressive and it is therefore not possible to say when he was actually an alcoholic. As to his alcoholism, he stated that since 2018, he was effectively recovering both from his alcoholism and his mental illness. This has enabled him to view his conduct in 2012 as being such that he was then seeking to blame everyone save himself for the predicament he found himself in. He could see excessive spending by him during this period on alcohol, drinking at expensive venues as well as large sums going to Sonia. He stated that he withdrew from Ms Song and that she knew little about what was going on.

21. Despite his difficulties at the time of their separation, he was clear in his evidence that he did not believe that he was insolvent at the time and he had no intention of making himself bankrupt as part of entering into the separation

agreement. He wanted to ensure that Ms Song and his children were provided for. He pointed out that with his proceeds from the sale of the property, he paid off what he considered were his outstanding debts. In fact, this also, in my judgment, fits in with his insistence that he could not pay more than an additional £40,000 to Ms Song towards the purchase price of 50 Waterside. He used the sums he received to clear his debts and explained that this felt like a clean start for him. He still had at that time a well paid job with Care UK earning about £80,000 per annum. He was able to rent a flat and continue his somewhat extravagant lifestyle brought on by his alcoholism, Sonia and his mental illness. He explained that after the separation, his alcoholism and mental illness increased. He had to take time off for illness, he lost his job and was taking out short term 'payday' loans. He was ignoring any post which arrived for him.

22. Despite the lengthy and detailed questioning by Mr Brown challenging amongst other matters, (1) his denial of seeking or designing to go bankrupt, (2) his lack of knowledge relating to the HMRC liability or potential liability; (3) his evidence relating to the ownership of the property and the conversation he had with Ms Song, I consider that Mr Sheridan was telling the truth in his evidence on these matters. As I set out below, I accept his evidence relating to the common intention of joint ownership of the property as well as his evidence, confirming Ms Song's evidence relating to the conversation which occurred. I accept his evidence that he had not formed any plan to go bankrupt when he entered into the separation agreement and I also accept his evidence that he was unaware of any HMRC liability when he entered into the separation agreement. His comment when asked about this is that he would have found a way to pay it had he known about it at the time of the separation agreement. I also accept his evidence in this respect.

23. I note that Mr Brown specifically put to Mr Sheridan that he was motivated in giving his evidence to assist Ms Song in her case. This was rejected by Mr Sheridan. Again, his reply to the questions demonstrated to me that he was a truthful witness. Mr Brown put to him that his motivation was that he was fearful that if Ms Song lost the case, she would blame Mr Sheridan and turn the children against him. Mr Sheridan's reply was that he had been concerned after

their separation that Ms Song would indeed seek to turn the children against him, but actually his fears in this respect turned out to be groundless. He said that Ms Song had ensured that whatever the troubles were between her and him, the children could see their father and build their relationship with him. He said that he had an excellent relationship now with his children and said that Ms Song had done a good job in effectively having the main responsibility for them. She had not turned his children against him. Having explained this to the court before me, his considered reply to Mr Brown was that in those circumstances, he did not fear that she would seek to turn the children against him if she lost the case. I accept his evidence in this regard and do not accept that the evidence given by Mr Sheridan and accepted by me was that given by someone who was motivated to the extent that the evidence was untruthful or unreliable.

24. Importantly, as I deal with below, Mr Sheridan confirmed the evidence of Ms Song relating to the conversation which the two of them had relating to the purchase of the Property and he also confirmed the renovation works she carried out. In so far as some of Ms Song's evidence needs to be treated with caution, as I have explained above, in my judgment, the evidence of Mr Sheridan was truthful and reliable in these matters and I accept it. I will deal with particular aspects of the evidence given in the relevant parts of the judgement below.

The beneficial ownership of the property

The law

25. There was no real dispute as between the parties relating to the test to be applied by me relating to whether Ms Song had a beneficial interest. The issues between the parties is whether, on the facts, Ms Song had satisfied me that she had a beneficial interest. The principles are well established in case law and therefore I will set them out here in brief terms. *Lloyds Bank v Rosset [1991] 1 AC 107* sets out the test in a case where the property is held in the sole name of one of the spouses. In order for a spouse (or partner) to establish an interest in the property, there needs to be evidence of an agreement or common intention or understanding that the house is to be beneficially co-owned and that the non-registered partner has acted in reliance on that agreement or common intention or understanding significantly to her detriment. If the Court is satisfied on the evidence that there is

such an agreement/common intention or understanding and that the spouse has acted in reliance on that to her detriment, then the court will normally give effect to the agreement/common intention or understanding. Cases where these principles have been applied include *Grant v Edwards* [1986] 1 Ch 638 and *Eves v Eves* [1975] 1 WLR 1338.

26. When Ms Song and her son moved to the UK, she and Mr Sheridan initially lived in a property at 10 Highbury Crescent, London. In around 25 August 2002, Mr Song explains that she and Mr Sheridan moved to what she called ‘our first property’, being a flat in York House at 14 Highbury Crescent, London N5 1RP. In her statement, Ms Song stated that Mr Sheridan had told her that he had purchased it as a family home for them to live together with their son. As I have set out in the introduction, on 3 September 2003, Ms Song and Mr Sheridan got married and on 18 September 2003, their daughter, Lily was born. As Ms Song explains, as the children were growing, the space in their flat provided to be insufficient and by 2007, they had decided to look to buy a house. As Ms Song further explained, as Mr Sheridan was working full time, she assumed the responsibility of looking for their new property. She came across the Property (53 Hamilton Park West, London N5 1 AE) and they both liked it. They decided to buy it.

27. Ms Song confirms that there was no discussion at that stage between her and Mr Sheridan about ownership. As she stated in her first witness statement dated 3 March 2020, ‘..we were happy and in love at the time. When we purchased 53 Hamilton Park West therefore, we regarded it as our family home belonging to us both jointly.’ At paragraph 1 (j) (page 6 of her statement), she states, ‘Once the legal process of purchasing the property started, I asked Michael why my name was not being put on the title as a joint owner of the property. Michael explained to me that because I was still a Chinese citizen and not a British citizen at the time, and I did not work, adding my name as the joint owner would complicate the purchase of the property. It was therefore better for the property to be bought in only Michael’s name. As Michael was more knowledgeable about these matters than me, I trusted him and had no reason to question him’.

28. Mr Sheridan confirmed in his evidence that he considered that they owned the property jointly. He also stated that he recalled the conversation with Ms Song where he explained that it was simpler for the property to be in his name. Both Ms Song and Mr Sheridan were cross examined by Mr Brown who asserted that the conversation did not take place. I am satisfied that the conversation did take place and I believe the evidence of both Ms Song and Mr Sheridan in this respect. In particular, I note that Mr Brown sought to challenge Mr Sheridan by asking him whether he was aware that a trust could have been entered into after the purchase so as to place the property into the names of both of them. Mr Sheridan replied that he was not aware of this. Having considered the evidence and the replies given in cross examination, I also hold that the understanding/intention was that they would own the property in equal shares. There was no evidence to support Mr Brown's submission that effectively the understanding/common intention was that Ms Song would have less than a half share.

29. Mr Croally helpfully set out a well known passage from the earlier case of *Grant v Edwards* [1986] 1 Ch 638 at 649B, where Lord Justice Nourse stated as follows :-

'these facts appear to me to raise a clear inference that there was an understanding between the plaintiff and the defendant, or a common intention, that the plaintiff was to have some sort of proprietary interest in the house; otherwise no excuse for not putting her name on to the title would have been needed.'

The facts on *Grant v Edwards* were similar to the ones here in that there was a conversation between the parties relating to why the property in question was placed in the sole name of Mr Sheridan. As to reliance by Ms Song and acting to her detriment, Mr Croally relies upon the evidence relating to the work carried out by Ms Song in managing, supervising and ensuring the renovations to the property were carried out. The Trustee did not in her case deny that Ms Song carried out work on the property, but sought to characterise the work carried out by Ms Song as being work she would carry out because she was married to Mr Sheridan and that she also wanted her marital home to be well decorated.

30. In my judgment, the characterisation of the work carried out by Ms Song was more substantial than simple decoration and evidenced her acting to her detriment. From the evidence, it is clear that the work carried out and managed and supervised by her exceeded merely decorative elements. It included opening up the kitchen and in general it made the property increase in value. She sourced the builders and supervised the works. Although Mr Brown sought to persuade me that her contribution in some ways was not that significant, I do not accept that submission. It was the type of work which Mr Sheridan would have had to pay someone to do had Ms Song not taken on the task. Mr Brown sought to argue that the value of the works carried out was in the region of £20,000 and therefore, in so far as I considered that this gave rise to a beneficial interest in the property, it would have to be significantly lower than 50%. Mr Brown referred to the case of *Eves v Eves* where the Court of Appeal determined that the share was of one quarter. I do not read *Eves and Eves* as setting out a principle that the percentage of the beneficial interest reflects the value of the work carried out and relied upon. In my judgment, it is important to consider the facts of that case. The Court of Appeal appear to have been influenced by the fact that the Plaintiff had remarried. Although the Judges considered that she had acted to her detriment due to the work she carried out including using a pick axe to do some of the manual labour, this in itself provides little guidance relating to how the court determines the relevant beneficial interest. Mr Justice Brightman found that the issue of the quantum of the beneficial interest '*the most difficult part of the case*'. The Judge also noted that, '*The problem is increased by the passive attitude of the defendant*'. In *Eves*, the defendant stated in evidence that he had made an excuse about not being able to put the house in joint names due to her age in order to avoid having to put the house in joint names. As Mr Justice Brightman stated, '*it seems to me that this answer raises a clear inference that there was an understanding between them that she was intended to have some sort of proprietary interest in the house: otherwise no excuse would have been needed*'.

31. In my judgment, the facts in the case before me are very different because both Ms Song and Mr Sheridan assert that the intention was that the house was to be their joint home, that effectively it would belong to both of them jointly. In my judgment, on the facts in this case, there was a common understanding or intention that the property would be owned equally. This is what both Ms Song and Mr Sheridan

believed to be the case. In reliance on that understanding, Ms Song acted to her detriment. I consider the work she carried out sufficient for meeting the test of reliance and detriment set out in *Lloyds Bank v Rosset*. However, even if I had determined that Ms Song's share was one quarter rather than one half, this would not have assisted the Trustee's case. As I set out below, the valuation of the consideration provided by Ms Song is not necessarily restricted by whether she owned a quarter or one half of the family home. The exercise carried out by the Family Court is much wider as I deal with below.

32. Mr Brown also relied upon two documents in support of the Trustee's case that Ms Song had no beneficial interest. Firstly, he relied upon the TR1 which stated that Ms Song consented to the sale as an occupier and therefore was not an owner. This document was put to her as well as to Mr Sheridan. Mr Sheridan stated that she had signed but did not accept that this meant she was not an owner. As Mr Croally submitted, the TR 1 is a document which relates to legal ownership because it relates to the transfer of the legal estate. It provides no indication as to beneficial interest. He also submitted that the consent provided by Ms Song as occupier does not have any bearing as to whether she is also a beneficial owner. One of the purposes of the document is to ensure that interests such as beneficial interests are overridden. I agree. Despite the submission made by Mr Brown, I do not consider that the contents of the TR1 and the consent to the sale by Ms Song as an occupier provides any evidence in support of the Trustee's case that Ms Song had no beneficial interest.

33. Mr Brown also invited me to consider the fact that Ms Song had registered a Matrimonial Homes Rights notice as against the property in 2011. This, he submitted was evidence which contradicted Ms Song's assertion that she had a beneficial interest in the property. In my judgment this registration does not take the Trustee's case any further. I accept, as submitted by Mr Croally, that frequently spouses register such a notice as a protective measure. That in itself does not negate the existence of a beneficial interest, but appears to me to be simply a protective measure taken. Mr Brown invited me to consider these documents in assessing the evidence as to beneficial interest. I do not consider for the reasons I have set out above that either document causes me to reach a different conclusion.

34. Having determined that on the evidence Ms Song did have a 50% beneficial interest in the property, I now need to consider the position in relation to the separation agreement entered into between the parties.

The separation agreement and its status

35. The Trustee asserts that the separation agreement fails to provide any consideration for the promise by Mr Sheridan to transfer 80% of the proceeds of sale to Ms Song. This is an issue of construction which I will deal with now. The evidence of both Ms Song and Mr Sheridan explain that after they had agreed their separation and had reached agreement about the property being sold and how the proceeds were to be divided between them, Ms Song went to see her solicitor. The separation agreement which was drawn up and executed as a deed by both of them was drawn up by Ms Song's solicitor. As Mr Sheridan stated in reply to some of the questions put to him relating to the terms of the separation agreement, he read it and sought one amendment, being the addition of clause 2. This is a confidentiality clause which Mr Sheridan explained he asked to be inserted into the agreement. Mr Brown had sought to question Ms Song on the basis that she has wanted to keep matter confidential because, Mr Brown asserted, she didn't want anyone to know about property she owned in China. Ms Song denied that she owned any property in China. I accept Mr Sheridan's reply that in fact, it was he who asked for this confidentiality clause to be inserted because he didn't want people in the area of London where he had grown up to be aware of what had happened. Mr Sheridan recognised his conduct at the time as being part of his way of seeking to blame others for what was going on with him. He therefore wanted to ensure that Ms Song would not inform others of the terms of their agreement.

36. The separation agreement is short. Whilst some of its terms are located under a heading 'recitals', in my judgment, upon reading the entire agreement, it is clear that certain of those 'recitals' are part of the terms of the agreement itself. This is also confirmed by the fact that prior to the sub heading 'recitals' the agreement states, 'It is agreed that:'

37. The following are relevant clauses :-

‘1.4 the parties wish to effect an agreement which will dispose of any financial claims that either of them may have against the other

1.5 The wife is generally unaware of the other’s financial situation. Whereas the husband is aware of the wife’s financial position (in the UK).

1.6 Each party is entering into this Agreement freely and voluntarily after receiving independent legal advice on its provisions and implications.

1.7 The parties intend that this Agreement will be legally binding on them’

38. Clause 3 sets out the agreed division relating to the net proceeds of sale. Ms Song was to receive 80% and Mr Sheridan the balance. Just pausing there, on the figures given on the separation agreement, it is clear from this document, Ms Song expected to receive well in excess of £410,000. She had entered into a contract to acquire 50 Waterside for the sum of £481,101. From her evidence, it appears she believed that the proceeds of sale would be higher thereby enabling her to acquire 50 Waterside.

39. The separation agreement is silent relating to issues as to beneficial interest. Mr Brown also sought to rely on this as part of the Trustee’s case. In my judgment, nothing really turns upon this point. This agreement was a record of what the parties had agreed relating to the division of the proceeds of sale in consideration of the financial claims which Ms Song had by reason of her married status.

40. There are two further clauses as part of clause 3,

‘3.4 Both parties retain their own bank and/or building society accounts’

‘3.6 there are no other assets of that marriage’

41. Clause 5 has as its sub heading ‘*Debts*’

‘5.1 All debts will be the responsibility of the party in whose name they presently are.

5.2 Each party promises to pay the debts for which he or she has assumed responsibility and will indemnify the other against all costs, claims, proceedings and demands arising in respect of those debts.’

42. One of the key provisions in my judgment is clause 6, which states,

'it is further intended that during the course of any divorce proceedings a clean break consent order will be drafted reflecting the agreement reached and set out in this document'

Clause 7 states that the agreement can only be varied by an instrument in writing executed as a deed by both parties. Mr Brown submitted that in some way clause 6 demonstrates that there was a requirement that a court order was necessary in order for the separation agreement to be valid. In my judgement, that is not what the agreement actually states to be the case. What clause 6 states is that in 'any' divorce proceedings, a consent order would be drafted to reflect the terms of the agreement. This does not make its terms conditional upon a divorce or indeed upon a court order. As I deal with below, the separation agreement is valid and binding. The fact that it is not encompassed in a court order does not make it in some way invalid. As with a consent or other order made by the Court, the separation agreement can be the subject of a section 339.

43. In questioning Ms Song, it was not clear whether she had read the terms of the agreement. She had clearly informed her solicitors of what she had agreed with Mr Sheridan but she was unable to comment upon the terms set out in this agreement. She was clear that she had signed it and also she was also clear that this agreement was one where she would receive the majority of the proceeds of sale of the property. She was clear that for her the agreement enabled her to acquire a property for her and the children to live in. She said she trusted her solicitor. Mr Sheridan confirmed that he had read it and also he explained that he had asked for the clause relating to confidentiality to be inserted. At one stage, it appeared that Mr Brown was seeking to argue that Ms Song was not really bound by the agreement and therefore its terms did not reflect the consideration provided by her. As I observed during the course of the hearing, there was no case of non est factum being raised by Ms Song. Even if she trusted her solicitor and signed it without reading it, in my judgment she is bound by its terms. However, it was not part of Ms Song's case that she was not bound by the separation agreement.

44. Mr Brown pointed to the judicial separation petition dated 16 May 2012 and the fact that Ms Song had signed that document in which every single financial orders option had been ticked. These options were an order for maintenance pending suit, an order for periodical payments, a secured provision order, a lump sum order, a property adjustment order and an order under section 24B, 26B or 25C of the MCA, and paragraphs 15, 25 or 28 of Schedule 5 to the Act of 2004 (Pension Sharing/Attachment Order). She also confirmed that she had not read that document but trusted her solicitor. In my judgment, not much weight can be given to the boxes being ticked in this document. The options which had been ticked made no real sense and in my judgment demonstrate simply an attempt to cover all possibilities. For example, the boxes ticked included the one entitled 'property adjustment order'. This of course was at a time when there was no matrimonial home. Even if at that time Ms Song was actually going to seek more than she had obtained under the terms of the separation agreement, this does not, in my judgment, invalidate the separation agreement or more importantly mean that no consideration had been provided by her under its terms

45. Additionally, in my judgment, the terms of the agreement itself are clear. Ms Song agreed to accept the proceeds of sale of the property in consideration of any financial claims she had against Mr Sheridan. The types of financial claims that she had can clearly be envisaged by clause 6 which expressly states that in the event of any divorce proceedings, a clean break consent order will be drafted reflecting the agreement reached. In my judgment, the parties were bound by the terms of the separation agreement, subject to what is set out below relating to the effect of section 34 MCA on the separation agreement.

46. Mr Brown also submitted that it was clear that Ms Song did not have details of Mr Sheridan's financial position and that Mr Sheridan did not have details of Ms Song's assets in China. He also submitted that Mr Sheridan had not taken legal advice despite what the documents stated to be the case. In my judgment, these points do not invalidate the agreement between the parties. Issues relating to lack of financial detail of one party or the other may well provide grounds in the event that a party seeks to challenge the settlement made under the terms of the agreement, but neither party in this case has sought to make such an application to the Family Court. I have already

determined that in my judgment, Ms Song did not own any property (or have any funds) in China. The evidence of any such ownership was not substantiated before me. It was denied by Ms Song and Mr Sheridan's evidence was he has made a statement that Ms Song owned a property in China based on guesswork, but he provided no further information or detail. However, in my judgment, even if Ms Song did own property in China, that would also not invalidate the separation agreement. Both parties remained bound by its terms unless one of the two of them applied to the Family Court seeking to set aside/vary the agreement. The Trustee's case is essentially one which asserts that Ms Song provided zero consideration, or consideration the value of which was significantly less than the consideration she received.

Was there consideration provided by Ms Song in relation to the separation agreement

47. I turn to the effect of the separation agreement and whether the Trustee is correct in her assertion that there was zero consideration provided by Ms Song. Both parties agree that the separation agreement is one which falls under section 34(2) of the MCA. Section 34 of the MCA states as follows :-

'34 Validity of maintenance agreements

(1) If a maintenance agreement includes a provision purporting to restrict any right to apply to a court

for an order containing financial arrangements, then—

(a) that provision shall be void; but

(b) any other financial arrangements contained in the agreement shall not thereby be rendered void

or unenforceable and shall, unless they are void or unenforceable for any other reason (and subject to

sections 35 and 36 below), be binding on the parties to the agreement.

(2) In this section and in section 35 below—

“maintenance agreement” means any agreement in writing made, whether before or after the commencement

of this Act, between the parties to a marriage, being—

(a) an agreement containing financial arrangements, whether made during the continuance or after

the dissolution or annulment of the marriage;

(b) a separation agreement which contains no financial arrangements in a case where no other

agreement in writing between the same parties contains such arrangements;

“financial arrangements” means provisions governing the rights and liabilities towards one another

when living separately of the parties to a marriage (including a marriage which has been dissolved or

annulled) in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the family.'

48. In my judgment, the parties are correct. The separation agreement is clearly one within the definition of being a 'maintenance agreement'. It is in writing between the parties to a marriage and it contains financial arrangements made during the continuance, dissolution or annulment of the marriage. It also seeks to govern the rights and liabilities of the parties towards one another while living separately in respect of the making or securing of payment or disposition of any property. Having satisfied myself that section 34 applies, I then turn to the effect of section 34 (1) MCA 73 on the separation agreement. Mr Brown asserts that as the provision relating to restricting the right to apply to the court is void, then this means that there is no consideration for the transfer. Mr Croally asserts that this is not the effect of section 34. The agreement remains valid and binding as between the parties. What section 34 (1) MCA 73 makes clear is that it is the provision restricting any right to apply to the court for an order containing financial arrangements which is void. Section 34(1)(b) also states, *'any financial arrangements contained in the agreement shall not thereby be rendered void or unenforceable and shall, unless they are void or unenforceable for any other reason ...be binding on the parties to the agreement.'*

49. Before turning to the cases which assist in this area, which Mr Croally took me to, I should say that on reading this provision, it does not say that the agreement itself lacks consideration merely because the provision which restricts an entitlement to apply to the court is void. The fact that the agreement remains valid and binding

between the parties does not at first glance seem to mean that in some way the consideration is itself void or invalid. Otherwise, it is hard to see how the agreement could be valid and binding without the consideration being valid as between the parties.

50. As Mr Croally submitted, a short historical analysis of this provision is useful. This analysis sets out that family law does allow married couples to make binding arrangements as to the financial consequences of their separation, but the case law also stipulates, as a rule of public policy, such arrangements are incapable of ousting the jurisdiction of the Family Courts. As Lady Hale stated in *Sharland v Sharland* [2015] UKSC 60, (at paragraph 18) public interest required that a proper provision was made for dependent family members. So in *Hyman v Hyman* [1929] AC 601, the House of Lords held that a wife who covenants with her husband not to take proceedings against him to allow her alimony or maintenance beyond the provisions made to her under the deed, is not precluded by the covenant from petitioning the court for permanent maintenance. The House of Lords stated (Lord Hailsham LC) that the issue was not whether what was set out in the deed was adequate but whether the covenant entered into by the wife prevented her from applying to the court. However, the difficulty in the approach became apparent in the later case of *Bennett v Bennett* [1952] 1KB 249, where it was held that the wife's promise not to go to court was the main consideration given for the husband's promise to pay and could not be severed. This meant that the agreement could not be enforced, which was to the detriment of the wife. Thereafter, section 34 MCA was brought into existence (with its earlier form being in the Matrimonial Proceedings and Property Act 1970).

51. As stated by Lady Hale in *MacLeod v LacLeod* [2008] UKPC 64 in considering the identical provisions to section 34 in the Manx Matrimonial Proceedings Act 2003, at paragraph 24,

'It will be seen that this retains the rule in Hyman v Hyman [1929] AC 601, reverses the effect of Bennett v Bennett [1952] 1 KB 249 in that the agreement is still valid and enforceable even if the only or main consideration is the invalid promise not to go to court, and provides a power of variation. Section 51 of the 2003 Act (section 36 of the 1973 Act) provides a similar power of variation after the death of one of the parties.'

52. Lady Hale also went on to note that in *Hyman v Hyman*, their Lordships were at pains to stress that it might well turn out that the maintenance agreement in the separation agreement was reasonable. It is clear that weight is given to the existence of the deed and its terms, as '*most relevant factors for consideration by the Court in reaching a decision*' (Lord Hailsham in *Hyman*, page 609). The case of *Edgar v Edgar* [1980] 1 WLR 1410 provides a further discussion as to the weight to be given to such agreements in subsequent divorce proceedings, with rather strong language as to the approach to be adopted being used by Lord Justice Oliver at page 1424, when his Lordship stated as follows:-

'the court must, I think, start from the position that a solemn and freely negotiated bargain by which a party defines her own requirements ought to be adhered to unless some clear and compelling reason, such as, for instance, a drastic change of circumstances, is shown to the contrary'

53. Lord Justice Omerod approached the matter in a more nuanced way as to the weight to be given to an agreement, stating as follows at page 1147:-

'To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of

both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue. ‘

54. In my judgment, it is clear that there is a value attributed to these agreements and Courts will carefully consider the terms of agreements made by the parties as separation agreements. In *Sharland v Sharland* [2015] UKSC 60, Lady Hale also considered section 34 of the MCA. Her Ladyship stated as follows :-

‘Settling matrimonial claims

17 It is in everyone's interests that matrimonial claims should be settled by agreement rather than by an adversarial battle in court. The financial resources of the family are not whittled away by the often substantial legal costs involved. The emotional resources of the family are not concentrated on conflict. The future relationship between the adult parties is not soured, or further soured, by that conflict. This is not only good for them but also for their children, whatever their ages, and for the wider family. It is for these reasons that there are processes, both within the procedures of the Family Court and independent of them, for helping the parties to reach agreement on the practical consequences of the breakdown of their relationship.

*18 It has long been possible for a married couple to make a binding agreement about the financial consequences of their present separation. However, it is not possible for such an agreement to oust the jurisdiction of the court to make orders about their financial arrangements. This was a rule of public policy, because of the public interest in ensuring that proper provision is made for dependent family members: see *Hyman v Hyman* [1929] AC 601. Any doubt about whether this meant that there was no*

consideration for the paying party's promise to pay was laid to rest by what is now section 34(1) of the Matrimonial Causes Act 1973. This provides that any provision in a maintenance agreement purporting to restrict any right to apply to a court for an order containing financial arrangements . . . shall be void but that

any other financial arrangements contained in the agreement shall not thereby be rendered void or unenforceable and shall, unless they are void or unenforceable for any other reason . . . be binding on the parties to the agreement .

This has since been held to apply to post-nuptial agreements for the consequences of a future separation between the parties and (albeit obiter) to ante-nuptial agreements: see MacLeod v MacLeod [2010] 1 AC 298 and Granatino v Radmacher (formerly Granatino) [2011] 1 AC 534.

19 Thus it is impossible for the parties to oust the jurisdiction of the court, but the court also possesses powers to achieve finality (a clean break) in the parties financial arrangements which the parties cannot achieve for themselves. For those reasons, it is now much more common for separating or divorcing spouses to negotiate with a view to embodying their agreed arrangements in a court order than to make a formal separation agreement. If they do this, the fundamental principle is that an agreement to compromise an ancillary relief application does not give rise to a contract enforceable in law. Furthermore, the court does not either automatically or invariably grant the application to give the bargain [the] force of an order. The court conducts an independent assessment to enable it to discharge its statutory function to make such orders as reflect the criteria listed in section 25 of the Matrimonial Causes Act 1973, as amended. See Xydhias v Xydhias [1999] 2 All ER 386, 394, per Thorpe LJ.

20. Although the court still has to exercise its statutory role, it will, of course, be heavily influenced by what the parties themselves have agreed. Section 33A of the Matrimonial Causes Act 1973, as inserted by section 7 of the Matrimonial and Family Proceedings Act 1984, provides that, notwithstanding the preceding provisions of Part II of the Act (which deal with the court's powers and duties in relation to financial provision and property adjustment), on an application for a consent order, the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application (and see FPR r 9.26). This permits the court to make the order in the terms agreed, but does not in any way inhibit its power to make further inquiries or to suggest amendments to the parties.'

55. In my judgment, this passage provides the very clear answer to the Trustee's submission that in some way there was no consideration provided by Ms Song for the transfer of the proceeds of sale to her. As Lady Hale makes clear, the notion that there was no consideration for the paying party's promise to pay was laid to rest by section 34 MCA. Accordingly, even though the ouster provision would be void, this does not mean, as is clear from the passage above, that there is no consideration. The whole point of section 34, as explained by Lady Hale in the passage I have set out above from *Macleod*, was to stop *Bennett v Bennett* applying but to retain *Hymans v Hymans*.

56. The above passage makes also an important distinction between two types of cases, being (1) a compromise agreement such as in *Xydhias v Xydhias* [1999] 2 All ER 386 where an agreement is made by way of compromise in ancillary relief proceedings which needs to be embodied in a final court order and (2) a final separation agreement which is agreed by the parties outside any ancillary relief proceedings. The latter is, in my judgment, clearly valid and enforceable as between the parties, even if section 34(1)(a) MCA 1973 strikes down the ouster provision. This is exactly what is the meaning of section 34 MCA set out in both *Macleod* and *Sharland*. Mr Brown invited me to consider carefully the paragraphs I have quoted above. I have considered them and they leave me in no doubt that in this case, there is valid consideration even if the ouster is void pursuant to section 34 (1)(a). This is clearly the conclusion from consideration of both *MacLeod* and *Sharland*.

57. Mr Brown also sought to persuade me, despite what is set out above from the Family cases and in particular, *Sharland*, that the agreement was to be treated as zero consideration for the purposes of section 339 of the Insolvency Act 1986. He invited

me to consider certain passages in *Hill v Haines* [2008] Ch 412 as well as *Re Kumar* [1993] 1 WLR 224. Before I turn to the passages which he relied upon, it is worth placing this submission in some context. Essentially, despite the fact that both *Macleod* and *Sharland* state that there is valid consideration for a separation agreement even if the provisions, relating to the ouster is void, the Trustee asserts that this valid consideration would be treated as being no consideration pursuant to section 339. That is, even before I turn to the cases relied upon to consider the passages therein, a most startling submission. It is difficult to see how in some way section 339 would treat the issue of consideration in a different way from section 34 MCA 73. Of course, the value of the consideration provided is a different matter, but the Trustee's case relies heavily on section 339(1)(a) which requires her to establish that there was no consideration.

58. Mr Croally took me back to the case of *Re Pope* [1908] 2 KB 169 where the Court of Appeal considered the issue as to whether a person was a 'purchaser' for valuable consideration within the exception referred to in section 47 of the Bankruptcy Act 1893. The case concerned a post nuptial settlement of the bankrupt's property entered into within two years of his bankruptcy. The Court of Appeal (Cozens-Hardy MR and Fletcher Moulton LJ by a majority) held that the post nuptial settlement constituted valuable consideration. The first instance Judge had found as a fact that the settlement was executed in pursuance of bargain made between the bankrupt and his wife that she would not take proceedings against him in the Divorce Court on the ground of matrimonial misconduct if he would settle the property upon her. The Court of Appeal held that the settlement therefore fell within the exception in section 47, as being a settlement 'in favour of a purchaser or incumbrancer in good faith and for valuable consideration' The Court of Appeal dismissed the notion that

there needed to be either money or physical property given by the purchaser in order to bring the case within the exception. The release of a right or the compromise of a claim sufficed to bring it within the meaning of purchaser. In fact, all three Lord Justices concurred that the wife had provided valuable consideration having regard to the findings of fact by the Judge. The dissenting judgment related to the issue of being a ‘purchaser’. The current provision, being section 339 IA 86, uses different wording, but I agree with Mr Croally, that *Re Pope* accepts that the giving up of a valuable claim in relation to a claim under the relevant matrimonial proceedings can constitute consideration. As in the current case, that case related to a settlement agreement entered into when there were no proceedings.

59. *Re Pope* was considered in the more recent Court of Appeal decision in *Hill v Haines [2008] Ch 412*, being a second appeal from the decision of HH Judge Pelling QC. That case involved a court order dated 22 December 2004 (becoming effective on 28 February 2005) in the ancillary relief proceedings which was made shortly before a bankruptcy order was made against the husband on 31 March 2005. The order required the transfer of the husband’s beneficial interest in the former matrimonial home to the wife. As the judgment of HH Judge Pelling QC sets out, at the time that the property adjustment order was made in the ancillary relief proceedings, the District Judge sitting in those proceedings was aware from the Bankrupt’s case that he was hopelessly insolvent and that there was a substantial risk that the Bankrupt would be made the subject of a bankruptcy order. HH Judge Pelling QC held that the consideration provided by the wife, being her ancillary relief claims, did not fall within section 339(3)(a) IA 86 as being valid consideration. In the Court of Appeal, the wife argued that the decision of HH Judge Pelling QC (already an appeal for the District Judge) was wrong for three reasons, (1) to hold that only the release of a

pre-existing legal right or cause of action is capable of constituting consideration for the purposes of section 339; (2) to focus his attention on a compromise agreement rather than the relevant transaction, i.e. the order; and (3) to hold that consideration is not given by a party to an agreement compromising ancillary relief claims.

60. In relation to the issue of whether an agreement to forebear from taking matrimonial proceedings was valuable consideration, the Court of Appeal effectively approved both *Re Pope* and the later case of *Re Abbott [1983] Ch 45*. At paragraph 32 of the Court of Appeal Judgment, the Chancellor stated as follows,

'It is true that section 339 is not in the same terms as either of the provisions [in Re Pope and Re Abbott] but in the same context it speaks of 'consideration' in both paragraphs (a) and (c) of subsection (3). I do not consider that any of the grounds on which the Judge relied justifies the rejection by this court of the conclusion to which those cases clearly point. Accordingly, in my view, the Judge was wrong in law when in paras 21 – 23 of his judgment he concluded that the parties to an order of the court granting some form of ancillary relief do not give 'consideration' at all for the purposes of section 339(3)(a).'

61. The Chancellor then considered the determination of the Judge below that such consideration was not 'in money or money's worth' so as to enable a comparison of value for the purposes of section 339(3)(c). At paragraph 34, the Chancellor agreed with the criticism made by Counsel on behalf of the wife as to the reasoning applied by the Judge below in reaching this conclusion. In support of this approach, the Chancellor considered again both *Re Pope* and *Re Abbott*, before stating the following at paragraph 35 and 36 :

'35. If one considers the economic realities, the order of the court quantifies the value of the applicant spouse's statutory right by reference to the value of the money or property thereby ordered to be paid or transferred by the respondent spouse to the applicant. In the case of such an order, whether following contested proceedings or by way of compromise, in the absence of

the usual vitiating factors of fraud, mistake or misrepresentation the one balances the other. But if any such factor is established by a trustee in bankruptcy on an application under section 339 of the 1986 Act then it will be apparent that the prima facie balance was not the true one and the transaction may be liable to be set aside.

36. That this is the true interpretation of section 339(3)(c) appears to me to be confirmed by the terms of section 39 of the 1973 Act. If it be assumed that the relevant transaction is a transfer made by one spouse in favour of the other effected after but pursuant to the order of the court made on an application for ancillary relief then, as section 39 recognises, such a transfer may fall within section 339. But if the applicant spouse is not treated as providing consideration for the transfer either at all or in money or money's worth then all such transfers will be void under paragraphs (a) and/or (c). I cannot accept that Parliament intended that what must be one of the commonest orders made by courts exercising their matrimonial jurisdiction, namely that the husband do transfer his beneficial interest in the matrimonial home to the wife, should be capable of automatic nullification at the suit of the trustee in bankruptcy of the husband against whom a bankruptcy order was subsequently made on his own petition.'

62. In my judgment, the issue as to whether the consideration provided by the wife under a settlement agreement is capable of being consideration of value and measurable 'in money or money's worth' has been effectively determined by *Hill v Haines* and the earlier cases of *Re Pope* and *Re Abbott*. I do not consider that there is any distinction to be made as between the case relating to a settlement agreement, such as in *Re Pope* or the present case, or a case such as *Hill v Haines*, where the order is made in the ancillary relief proceedings. In relation to settlement agreements, then there is a risk that a court may subsequently alter what had been agreed by the parties. That does not, in my judgement invalidate the consideration provided or enable it to be valued at zero. In cases such as *Xydhias v Xydhias* [1999] 2 All ER 386, a compromise between the parties reached during the ancillary relief proceedings needs to be approved by the court. This is the distinction explained in the passage I

have quoted above from *Sharland*. However in both types of cases, in my judgment, the consideration is not zero and according to the Court of Appeal in *Hill v Haines*, is capable of being valued in money or money's worth.

63. The Court of Appeal in *Hill v Haines* did not expressly deal with this point, raised by Counsel on behalf of the wife in *Hill v Haines*, as number 3, namely, to hold that consideration is not given by a party to an agreement compromising ancillary relief claims (see above). The Chancellor expressly agreed with the first two points as to why HH Judge Pelling QC was incorrect. As to this third point, the Chancellor stated that he did not find it necessary to comment further on it (paragraph 38). However, in my judgment, there is no reason or justification for a distinction between a case where the Court sanctions the proposed compromise and a case where the parties have freely entered into a separation agreement pursuant to section 34 MCA73. The same financial rights and entitlements which the Court of Appeal in *Hill v Haines* has held are consideration, 'in money or money's worth' must equally be capable of being consideration 'in money or money's worth' for the purposes of assessing an agreement entered into by the parties outside the scope of ongoing ancillary relief proceedings. This also accords with what is set out clearly by Lady Hale in *Sharland*. Additionally, Mr Brown's submission in this regard would lead to an illogical outcome, namely that those who reach valid and binding agreements outside of any ancillary relief proceedings will always be held to have been entered into for zero consideration whilst those who reach no such agreement but have the benefit of an order of the Court have provided valuable consideration, subject to vitiating factors. This is, in my judgment, contrary to *Re Pope* which was expressly approved by the Court of Appeal in *Hill v Haines*

64. Although Mr Brown relied on *Hill v Haines*, as is clear from the passages set out above, this case does not assist Mr Brown's submission that the consideration provided was zero consideration or even that there is a difference between a case of a settlement agreement (as is here) and the case in *Hill v Haines*, where there is a court order made. Mr Brown relied on the approval by the Court of Appeal in *Hill v Haines* of the dicta of Mr Justice Ferris in an earlier case of *Re Kumar* [1993] 1 WLR 224. In that case, the husband and wife were beneficial joint tenants of their matrimonial home. By a deed dated 11 June 1990, the husband transferred his share in the home to his wife. She assumed the liability of the mortgage thereon. Divorce proceedings were thereafter instituted with the decree nisi being made on 21 January 1991. By a consent order of the Court on 19 April 1991, the wife's claim for capital provision was dismissed in consideration of the husband having transferred to the wife his legal estate and equitable interest in the matrimonial home.

65. On a section 339 application issued by the Trustee in bankruptcy, the Judge held on the facts that there was no consideration for the transfer beyond the assumption by her of the mortgage. The Judge held that the value of this consideration was significantly less than the value of the consideration received by the wife and therefore the transaction was at an undervalue. The Judge rejected the wife's position that she provided other consideration being a release from claims she might have under sections 23 and 24 of the MCA 73 or alternatively from claims for capital provisions under those sections and the assumption by the wife of the responsibility for the children of the marriage (only one of which was still just a minor).

66. The Judge held that on the facts, there was no evidence of any express request by the husband for forbearance on the part of his wife in relation to her financial

claims. The Judge held that the wife provided no consideration of the kind relied upon by her. This was his express findings on the facts as assessed and determined by the Judge. However at page 236, the Judge also concluded, applying *Re Abbott*, that such a release was capable of being consideration, in money or money's worth, even though on the facts before him, no such consideration was provided. At page 240, the Judge stated:-

'I would add that even if I had accepted the argument that there was such a compromise of Dr. Gupta's prospective claim for capital provision as was contended for on her behalf, it appears to me that I would have been driven to substantially the same conclusion. The transfer of Mr. Kumar's interest in 43, Broadwalk was a disposal of his only remaining capital asset of any significance. I cannot believe that any divorce court would have so exercised its jurisdiction under section 24 of the Matrimonial Causes Act 1973 as to require Mr. Kumar to transfer to Dr. Gupta, who had a superior earning capacity, substantially the whole of his capital, leaving him without the means to contribute from capital to the cost of acquiring a separate home for himself. In my view, in all the circumstances of this case as I find them, the transfer of his interest in 43, Broadwalk, contained a substantial element of bounty on the part of Mr. Kumar even if, as I find not to be the case, Dr. Gupta had agreed in return not to seek further provision out of capital.'

67. In my judgment, that passage establishes that on the facts of the case before the Judge, the forbearance in relation to ancillary relief claims was not established but that the Judge clearly considered that had it been so established, then its value would need to be considered. It was this passage which was quoted and effectively approved by the Chancellor in *Hill v Haines* at paragraph 17. After quoting this passage, the

Chancellor stated as follows, '*Thus Ferris J evidently considered that the insolvency court was entitled to go behind the release of a spouse's statutory right to claim ancillary relief in the matrimonial court to see if it was genuine and for full value*'.

The Chancellor also stated that at page 236, Ferris J had accepted, as I have set out above, that in accordance with *Re Abbott*, such a release of ancillary relief claims was capable of being consideration in money or money's worth.

68. Mr Brown places great reliance on a sentence higher up on page 236 which was not expressly referred to by the Chancellor in *Hill v Haines*:-

'The release which constitutes the first of these two heads requires to be of a somewhat technical kind if it is to be effective. Under section 34 of the Matrimonial Causes Act 1973, a provision in a maintenance agreement which restricts any right to apply to a court for an order containing financial arrangements is void. "Financial arrangements" clearly includes matters which could be the subject of an order under section 23 or section 24. A void release cannot be consideration in money or money's worth for the purposes of section 339 of the Act of 1986. "Maintenance agreement" is defined in section 34 of the Act of 1973 as any agreement in writing which does certain things. It is not suggested that there was any agreement in writing between Mr. Kumar and Dr. Gupta, but a restriction of the kind mentioned in section 34 which is contained in an oral agreement cannot, in my view, have any greater validity than a similar restriction contained in a written agreement. Apart from other possible arguments, it would, it appears to me, be void on grounds of public policy: see, for example, Hyman v. Hyman [1929] A.C. 601.'

69. In my judgment, *Hill v Haines* is not authority for the proposition that a release or a restriction (or ouster) which is void pursuant to section 34 MCA 73 is incapable of constituting valid consideration for the purpose of section 339. That is not a passage which was actually approved by the Court of Appeal in *Hill v Haines*. Moreover, it certainly appears to contradict what was expressly approved by the Court of Appeal in *Hill v Haines* from the judgment of Mr Justice Ferris in *Re Kumar* (which I have set out above.) In particular, at paragraph 17 in *Hill v Haines*, the Chancellor expressly stated the following :-

'It had been argued that there was other consideration for the transfer, namely the release by the wife of her claims for ancillary relief. Ferris J concluded, at p 236, applying Abbott's case [1983] Ch 45, that such a release was capable of being consideration in money or money's worth though on the facts of that case no such consideration had been provided.'

70. In my judgment, paragraph 17 of *Hill v Haines* contradicts what is set out in page 236 in *Re Kumar* and relied upon by Mr Brown as establishing that a release pursuant to section 34 is void and cannot be valid consideration. In my judgment, the passage in *Hill v Haines* in this respect is clear and I will adopt what is set out therein being that a release by the wife of her claims for ancillary relief is capable of being consideration in money and money's worth. In any event, I note the passage heavily relied upon by Mr Brown in *Re Kumar* does not provide any real analysis for the statement, *'A void release cannot be consideration in money or money's worth for the purposes of section 339 of the Act of 1986'*. There is no reference to there being any analysis of either *Re Pope*, *Bennett v Bennett* and *Hymans v Hymans*. Moreover, *Hill v Haines* did not endorse this statement in its judgement.

71. Whatever the Judge meant by the statement at page 236 in *Re Kumar*, in my judgment, the same is clearly not part of the ratio of the case. On the facts of that case, the Judge had held that the facts did not support the assertion made by the wife that she obtained her husband's share of the property in consideration of her forbearance in respect of her financial claims. In those circumstances, I will follow the ratio of *Hill v Haines* as well as the later very clear statements made by Lady Hale in both *Sharland* and *MacLeod*. I cannot see any basis for holding that there is consideration in money or money's worth in relation to a court order, as opposed to an agreement by the parties which falls under section 34 MCA 73.

72. As set out in *Hill v Haines*, a case where there is a court order, the grounds upon which there is an ability to go behind the court order are somewhat restricted to cases involving vitiating factors (see the passage above). This is because, it is assumed that the value of the consideration provided by the one side equals to the consideration provided by the other. As the Chancellor stated at paragraph 35 in *Hill v Haines*, *'If one considers the economic realities, the order of the court quantifies the value of the applicant spouse's statutory relief'*. In the case of a separation/settlement agreement

falling under section 34 MCA, it is certainly open to a trustee to seek to argue that the value of the consideration provided by the wife in money or money's worth is significantly less than the consideration provided by the other spouse. However, this is not the same as asserting that the separation agreement is for zero consideration. For the reasons I have set out above, I reject the Trustee's case on section 339(1)(a) and hold that there was valuable consideration which is capable of being assessed in money or money's worth.

The Trustee's case based on section 339(1)(c) IA 86

73. In her notice of application, the Trustee also sought a declaration pursuant to section 339(3)(c) IA 86, namely that the consideration provided in money or money's worth, was substantially less than that provided by the debtor, Mr Sheridan. This was the alternative case which was set out in the Notice of Application by the Trustee and also relied upon before me by Mr Brown. As already set out above, the RFI raised by the Respondent sought further particulars from the Trustee as to the case she was making in relation to the value of the consideration. Having considered carefully the evidence relied upon by the Trustee in support of her application which expressly consisted of a section 339(3)(c) claim as an alternative to section 339(3)(a), I was not surprised to see the RFI had been made. The Trustee's evidence in support of the notice of application contained no particulars of the value of the consideration itself. The reply to the RFIs did not assist or provide any further particulars. It referred to the application notice itself which states as follows, seeking declarations,

(a) 'that the payment of £429,128 from the net sale proceeds of constituted a transaction at an undervalue...'

(b) as to the nature and extent of the interests of the Bankrupt and the Respondent in the Property and in 50 Waterside...'

The Reply to RFIs stated that the Trustee's case was either section 339(1)(a) or section 339(1)(c). The Reply then goes on to assert that, the Respondent does not appear to have provided any consideration and the Applicant required '*that the Respondent prove that she had*'. Further, the Reply asserts that in the event that the Respondent can prove that she has provided consideration, then '*the Applicant will ask the court to determine the value of that consideration*'. No further details are provided in the Trustee's evidence in relation to the value of the financial claims of the Respondent. In submissions, Mr Brown made the point that the Trustee is not aware of the value. That may well be the case, but that does not in my judgment alter the position before me on the evidence. As has been said many times, office holders are no different from other litigants and face the same rules on evidence and establishing their cases to the requisite standard.

74. In my judgment, it is for the Trustee to establish her case on the alternative limb being section 339(3)(c). Once the Court has considered the Trustee's case as to value of the consideration provided and given, then the Court would determine whether the Trustee has discharged the burden of proof to the relevant standard. It is not for the Court to assess what is the value of that consideration. The burden remains on the Trustee. The relevant date , as it is accepted by both sides, is at the time that the separation agreement was entered into.

75. When I asked Mr Brown about the value of the consideration relied upon by the Trustee in support of her section 339(3)(c) claim, Mr Brown replied that the Trustee did not have any additional evidence. He pointed out that as the issue of beneficial interest had to be determined by me, then this would have a bearing. Mr Brown also submitted that effectively the Trustee's case remained that there was no consideration.

After the hearing terminated and before I handed down judgement, I received a note from Mr Brown relating to the position taken by the Trustee in relation to her section 339(3)(c) claim. That note repeated the point which had been made before me by Mr Brown that in the event I was against him on the section 34 MCA point (being his submission that there was no consideration) and that I also held that the Respondent did have a beneficial interest in the property, then he states, '*the transaction was at an undervalue to the extent she received more than the value of her share as quantified by you*'. This means essentially that the Trustee invites me to determine that there is no value in Ms Song's financial claims. I have already set out above why in my judgment her financial claims were not only of value, but also that they were capable of being assessed in money or money's worth.

76. In my judgment, the Trustee has failed to establish, to the appropriate standard, that the transaction was at an undervalue for the purposes of section 339(3)(c). Regardless as to whether I determined that Ms Song had or did not have a beneficial interest in the property, the burden remained on the Trustee to establish that the transaction was one which the value of the consideration provided by Ms Song, in money or money's worth, was significantly less than the value of the consideration provided by Mr Sheridan. The Trustee has provided no evidence of the value of Ms Song's financial claim, beyond her assertion that it has no value. I have dealt with this zero consideration point above and held that the Trustee has failed on section 339(1)(a). On the submission made by Mr Brown that the undervalue is the sum in excess of the value of Ms Song's beneficial interest in the property, there is no evidence presented to me by the Trustee which enables me to consider that the value of Ms Song's financial claim is less than the sums she received in excess of her 50% share in the property. As is clear from even a brief consideration of family cases in

this area, the exercise by the family judges of the wide and far reaching powers set out in sections 23, 24 and 24A of MCA and the value of such claims, depends upon many factors, including the welfare of minor children of the marriage.

77. In fact, the evidence which is available to me, whilst not necessarily comprehensive, provides support for Ms Song's financial claim being worth more than the consideration provided by Mr Sheridan. The jurisdiction exercised by Family Judges pursuant to the MCA , sections 23 – 25, contains an overriding principle, being *'first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen'* This leads to the expression that 'the needs of the children are paramount'. In *Re Jones (A Bankrupt):Ball v Jones [2008] BPIR 1051*, Chief Registrar Baister considered a case where the Trustee was seeking to challenge a consent order which had been approved by the Family Judge between the debtor wife and the respondent husband. The Trustee in that case sought to establish effectively that the respondent had received more than the value of his claim under the terms of the consent order. The Trustee also had to establish one of the vitiating factors under *Hill v Haines*. The Chief Registrar considered in summary the family jurisdiction and set out the following passage as a very brief summary of the position taken from Butterworth's Family Law Service:-

'The clearest post-White guidance in more limited means cases has been given by Thorpe LJ in Cordall v Cordall. [The case is actually Cordle v Cordle [2001] EWCA Civ 1791, [2002] 1 FLR 207]. In dealing with lower income cases, Thorpe LJ produced the following useful comments and guidelines:

- (a) there is no rule in White v White that district judges must produce equality of outcome unless there are good reasons to justify departure;*
- (b) the cross-check of equality is intended to be a safeguard against discrimination;*
- (c) White v White decides that it is the first duty of the court to apply the s 25 criteria in search of the overarching objective of fairness;*

(d) in search of the overarching objective, in a typical ancillary relief case, the district judge will always look first to the housing needs of the parties;

(d) in the ordinary case, the court's first concern will be to provide a home for the primary carer and the children. In many cases, however, the satisfaction of that need may absorb all that is immediately available;

(e) where there is sufficient to go beyond the primary carer's housing need, the court's concern will be to provide the means for the absent parent to re-house;

(f) another factor that should be considered is buttressing the ability of one or other of the parties to work. After many years of marriage, one or other of the parties will need some capital provision to enable him or her to get back into the labour market;

(g) if there is cash beyond that, then the judge has to look to what in his estimate is the fair result;

(h) the only universal role is to apply the s 25(1) and (2) criteria and to arrive at a fair result that avoids discrimination.'

78. The above is a very basic summary. As noted by the Judge in *Re Jones* (paragraph 25) the family courts also take into account the conduct of the parties:-

*'The order was also fair, Miss Barber submits, in giving effect to what the family courts call the principle of re-attribution enunciated in *Martin v Martin* [1976] Fam 335, [1976] 3 WLR 580 and more recently by Wilson LJ in *Vaughan v Vaughan* [2007] EWCA Civ 1085 as follows (at para [14]):*

*'Although [*Norris v Norris*] was a decision at first instance, it is the last in a line of authority which stretches back to the decision of this court in *Martin v Martin* [1976] Fam 335 that, in the words of Cairns LJ at 342H: "a spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of what was left as he would have been entitled to if he had behaved reasonably".'*

79. I have set out above the conduct of Mr Sheridan and his spending at the time of the separation agreement. Additionally, the evidence before me showed that he had spent an inheritance and allowed mortgage arrears to build up before the separation agreement was entered into. He had also given large sums to Sonia. From my summary consideration of these factors alongside the position of the minor children, it seems to me that the financial claim of Ms Song was worth more than what she

received. No provision was made in the separation agreement as to maintenance. Ms Song indicates that this had been agreed but it is not in the agreement itself. Furthermore, Ms Song had to seek further sums from Mr Sheridan and also borrow sums from her family so as to be able to purchase 50 Waterside. As there were two minor children and she was the principal carer, it is difficult to imagine that any order made by a Family Judge, would be valued at less than what she received. The evidence before me also demonstrated that Mr Sheridan had employment at the time and was earning around £80,000 per annum. Even if the court took into account the HMRC liability, it would have been surprising if the Family Court had not made such provision so as to enable Ms Song to be housed with her children. Additionally, the evidence demonstrates that Mr Sheridan had a valuable pension fund. That is something else which would have been considered and taken into account. Although the Trustee asserted effectively that the value of Ms Song's claim was zero and/or the value of the undervalue was the sum in excess of Ms Song's beneficial interest in the property, the evidence available to me actually demonstrates, in my judgment, that Ms Song's claim in existence at the time was extremely valuable. The evidence does not suggest that her financial claim was simply the difference between the value of her beneficial interest and what she received from the proceeds of sale. I do not consider on the evidence before me that the value of her claim at the time of the separation agreement was in money or money's worth significantly less than the sums she received from Mr Sheridan from the net proceeds of sale of the property.

80. Mr Croally submitted that, on the evidence, the separation agreement made no more than the level of financial provision which would have been expected given the financial circumstances of the parties, including their respective levels of earnings and earning capacity, the need for the two children to be housed and the value of the

assets owned by the parties. I have set out above my view of the matter, but as the Trustee did not engage in how she sought to value the consideration in money or money's worth, I do not need to take this issue any further. I have already rejected the Trustee's claim that Ms Song's financial claims are valued at zero. The Trustee has failed to establish her claim pursuant to section 339(1)(c).

The additional £40,00 provided by Mr Sheridan to Ms Song

81. This leaves me to consider the issue of the £40,000 provided to Ms Song by Mr Sheridan in order to enable her to complete the purchase of 50 Waterside. The Trustee's application dealt with the additional £40,000 as part of her transaction at an undervalue claim, where she claimed the payment of the total of £429,128.82. This includes the additional £40,000. However, the additional £40,000 deserves a separate consideration because it exceeded the 80% of the proceeds of sale due to be paid to Ms Song under the separation agreement. As is set out in her evidence, Ms Song wanted to ensure that she had enough money to provide what she called, 'a safe and secure home for the children'. (paragraph 3 (p) first witness statement). Ms Song set out in her evidence that she believed that the 80:20 split of the proceeds of sale of the property would result in her receiving £450,000. That is what she asserted Mr Sheridan had promised her when they were discussing the proposed split. Based upon what she believed she would receive, Ms Song had started to search for suitable properties in the area and she located 50 Waterside, which was nearer to Manor House tube, in what she described as a less desirable area, but sufficiently close to the property. She contracted to purchase 50 Waterside. It is not entirely clear where she was going to obtain the difference between the purchase price of 50 Waterside (£481,101) and the £450,000 she thought she would receive from the net proceeds of

sale of the property. I assume she was intending to meet the difference with loans from members of her family. When the property was sold and after the mortgage arrears were paid, 80% of the net proceeds of sale were £389,128.82, which was less than Ms Song was expecting. She explained this to Mr Sheridan and he agreed that Ms Song would receive a further £40,000 from the net proceeds of sale. This still left her short of the sums she needed to complete the purchase of 50 Waterside and her evidence shows she then asked her family to loan her the further sums required. It is the transfers of sums made to her during this time from her family in China which were the subject of the questioning by Mr Brown. As I have already determined, I accept that the sums sent to her from China were sums which did not belong to her. This is despite certain transfers being made from an account in her name. I accept the evidence she gave that her father had her Chinese identity card and used it to open a bank account in her name so that further sums could be sent. This was due to the restrictions she said existed in relation to transfers of sums overseas.

82. The evidence of Mr Sheridan before me is that he believed that the additional £40,000, which he agreed could be paid to Ms Song out of the net proceeds of sale, was a long term loan. Ms Song's evidence is that the sum was not a loan to her but part of what Mr Sheridan agreed would be her share of the net proceeds of sale. She also asserted in her evidence that the £40,000 represented a payment in relation to sums which she asserts were owed by Mr Sheridan to her family in China. Mr Sheridan disputed that he owed any sums to her family in China.

83. There is an exchange of correspondence between the respective solicitors to Mr Sheridan and Ms Song between the period May 2012 and September 2012. Mr Sheridan had then instructed solicitors to claim what was then called a short term loan

from Mr Sheridan to Ms Song in the sum of £40,000. The letter from Messrs Taylors instructed by Mr Sheridan also raised issues relating to access to the children and seeking to commence divorce proceedings. Solicitors acting on behalf of Ms Song wrote back denying that the sum of £40,000 was provided to Ms Song as a short term (or any type of) loan. Ms Song maintains that the sum of £40,000 was part of the sum which Mr Sheridan had agreed to pay, effectively under the agreement reached between the parties. She had relied on the 80% of the proceeds being in the region of £450,000 and not the £389,000 which was due to be paid to her. She asserted that she agreed 80% of the net proceeds on the promise by Mr Sheridan that this would provide her with a sum in the region of £450,000. I accept her evidence that she expected her 80% to be in the region of £450,000 and that expectation arose from what had been promised to her by Mr Sheridan. It is clear that at the time she wanted to ensure that she had a home for her and the children.

84. The evidence of Mr Sheridan in relation to his agreement to provide the additional £40,000 is somewhat unsatisfactory. In his written evidence, he stated that the sum of £40,000 was a loan and that he did not pay it to discharge any liability to Ms Song's family. When giving evidence before me, Mr Sheridan maintained he had loaned the additional £40,000, but he also said when asked that he understood why Ms Song maintained that it was not a loan. He said at the time there was a lot going on with the separation and the sale of the property. In my judgment, I do not accept that the additional sum of £40,000 was a loan as maintained by Mr Sheridan. I found his evidence on this point unconvincing. In particular, when asked questions about it, he made the point that he could see why Ms Song did not accept that the additional £40,000 was a loan. Having considered his evidence overall and also what he said about all that was going on between him, Ms Song and his personal life, it seems that

he agreed to provide a further sum of £40,000 because Ms Song had explained that she needed further sums to buy a flat. I agree with Ms Song that the same was not stated by him to her to be a loan. Mr Sheridan agreed that Ms Song could have an additional £40,000 because she had explained that the sums were needed for the acquisition of the property for her and the children. This, in my judgment, was the factor which made Mr Sheridan agree to the additional £40,000. She had obtained a promise from Mr Sheridan that the sums which would be paid to her would be in the region of £450,000. There was no real denial from Mr Sheridan that he had promised that her share would be in the region of £450,000. I am not certain that he gave much thought to this. He was aware that there were mortgage arrears, but I am not certain that he deliberately misled her as to what the proceeds would be. Even if Mr Sheridan was not aware as at the time that he and Ms Song entered into the separation agreement that Ms Song intended to purchase a property for her and the children he was aware of this being the position when she asked him for further sums. He was aware that she needed the further sums to purchase a place for her and the children. In my judgment, the additional £40,000 represented effectively a variation of the terms of the separation agreement in increasing what Ms Song was to receive. This is how Mr Croally put the matter. I do note that the terms of the separation agreement contain a clause that any variation needed to be in writing, but in my opinion the variation here is valid despite the terms of the separation agreement. Mr Sheridan admitted when being asked questions that he wanted to ensure that the children were secure after the separation. Even if he chose to say he believed it was a loan, it is clear that he was well aware of the reason Ms Song sought additional sums and he clearly wanted to ensure at the stage that Ms Song was able to fund the purchase of 50 Waterside. He agreed to provide an additional £40,000 which he believed would still

leave him with sufficient to pay what he believed were his outstanding liabilities at that time. Ms Song used the additional £40,000 as part of the purchase price she needed for 50 Waterside and therefore acted on what she saw as a variation in the original terms of the separation agreement.

85. In my judgment, the provision by Ms Sheridan of the additional £40,000 does not alter the analysis I have set out above in relation to the Trustee's claim pursuant to section 339(1)(a) or (c). In my judgment, based on my assessment of the evidence, the sum was provided by Mr Sheridan as part of the agreement between the parties. Despite the solicitors' correspondence thereafter and Mr Sheridan's assertion that it was a loan, I do not accept his evidence on this point. It would have made little sense for Mr Sheridan to loan sums to Ms Song who had no means of paying them back. Mr Sheridan was well aware of this. After the initial 'demand' for payment, there is no evidence that Mr Sheridan sought to pursue Ms Song for repayment of the alleged loan. After Mr Sheridan was made bankrupt, the additional £40,000 was subsequently pursued by way of a statutory demand by the Trustee based on what Mr Sheridan had asserted, but this was opposed by Ms Song. I am satisfied that the additional £40,000 falls to be considered on the same lines as the rest of the net proceeds of sale received by Ms Song under the terms of the separation agreement. Accordingly, I dismiss the Trustee's claim relating to the additional £40,000.

86. In any event, in so far as I am wrong about the position relating to the additional £40,000 being in reality part of the separation agreement between the parties, I would not have, in the exercise of my discretion pursuant to section 339(2), made an order for Ms Song to account to the trustee in relation to the additional £40,000. Ms Song

entered into the separation agreement and agreed a split of 80% of the net proceeds of sale, relying upon the promise made by Mr Sheridan, that the sum which would be available to her would be in the region of £450,000. Her intention was clearly to obtain sufficient funds to enable her to purchase a property for her and the children. She had clearly relied upon what she believed the sums available to her were to be when she exchanged contracts for the purchase of 50 Waterside. Although Mr Sheridan asserts that he was unaware that Ms Song intended to use the sums to buy a new property, in my judgment, he was certainly aware of that intention when Ms Song asked for further sums because of the shortfall. He agreed to provide further sums to Ms Song because she needed them for the acquisition of the new home for her and the children.

87. Although Mr Brown was keen to submit that in exercising my discretion, I cannot treat the matter on the basis of what necessarily would have happened had Ms Song protected herself by way of a court order approving the agreement reached, in my judgment, that does not mean that I should ignore the position as to the value of her claim. Even with the additional £40,000, the value of Ms Song's financial claim would not in my judgment have been significantly less in money or money's worth. Although the Trustee did not provide evidence in support of her claim that what Ms Song received was significantly less in money or money's worth, the evidence which was before me is against the Trustee's case. I have not sought to deal with the issue of exercise of discretion in relation to what I have determined on the law is valuable consideration provided by Ms Song contrary to the Trustee's case pursuant to section 339(1)(a). The separation agreement is clearly valid for the reasons I have set out above and provides valuable consideration.

88. Accordingly, the Trustee has failed in her application. I declare that Ms Song had a 50 % beneficial interest in the property, 53 Hamilton Park West at the date of its sale and I dismiss the Trustee's claims based on section 339(1)(a) and (c).