Neutral Citation Number: [2021] EWHC 220 (Ch)

Case No: BR-2014-001819

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 8 February 2021

Before :

JUDGE JONATHAN RICHARDS
Sitting as a Deputy Judge of the High Court

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Between :

(1) DUNCAN LYLE **(2) NIGEL FOX** **(as joint Trustees in Bankruptcy of Jetson Ralph Bedborough)**	**Applicants**
- and -	
(1) JETSON RALPH BEDBOROUGH **(2) SARA EVELIN BEDBOROUGH**	**Respondents**

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Kate Rogers (instructed by **Blake Morgan LLP**) for the **Applicants**
Faith Julian (instructed by **C J Jones Solicitors)** for the **Second Respondent**
The **First Respondent** is a litigant in person

Hearing dates: 12 to 14 January 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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COVID-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by e-mail and release to BAILII. The date and time for hand-down is deemed to be 10am on 8 February 2021.

Judge Jonathan Richards:

INTRODUCTION

1. The Applicants have applied for orders under sections 339 and 423 of the Insolvency Act 1986 (the "Insolvency Act") to set aside transactions relating to a residential property in Uxbridge (the "Property") and for consequential orders, for, among other matters, possession and sale of the Property.

2. Many of the underlying facts relating to these applications are disputed, and I will make findings of fact on contentious matters later in this judgment. However, for the time being, the issues arising can be understood by reference to the following high-level summary of the factual background:

    i) Mr and Mrs Bedborough met in 1983 and were married in 1990. In 1994, they purchased the Property as their family home. At all material times it has been registered in their joint names.

    ii) In 2008, the evidence of Mr and Mrs Bedborough is that they entered into an agreement, which was entirely oral and not reduced to writing to any extent, under which Mr Bedborough agreed to transfer his interest in the Property to Mrs Bedborough. Their evidence is that Mr Bedborough agreed to this transfer because Mrs Bedborough gave him an ultimatum to the effect that, if he did not do so, she would divorce him and make a claim for a property adjustment order under s24 of the Matrimonial Causes Act 1973. I will refer to this alleged agreement as the "2008 Agreement". In doing so, I should not be taken as suggesting that this agreement existed or had any legal force. I will make findings as to the effect of the 2008 Agreement later in this judgment.

    iii) On 10 December 2012, Mr and Mrs Bedborough entered into a declaration of trust (the "2012 Declaration"). In that document, Mr and Mrs Bedborough declared that they held their interests in the Property as tenants in common for Mr Bedborough as to a 5% share and Mrs Bedborough as to a 95% share. The 2012 Declaration, therefore, set out a different position from that which Mr and Mrs Bedborough say was set out in the 2008 Agreement as, under the 2012 Declaration, Mr Bedborough retained a 5% interest in the Property rather than having no interest at all.

    iv) On 25 November 2014, just under two years after the 2012 Declaration was executed, HMRC presented a bankruptcy petition against Mr Bedborough. He was adjudged bankrupt on 13 January 2015 and the Applicants were appointed as his trustees in bankruptcy on 4 August 2015.

3. Much of the complexity in this case arises from the fact that the Respondents maintain that the 2008 Agreement gave rise to a constructive trust that altered the beneficial interests in the Property in 2008, more than 5 years before the bankruptcy petition was presented, and so not at a "relevant time" for the purposes of s341 of the Insolvency Act with the result that s339 cannot apply. As a fall back, the Respondents deny that an interest in the Property was transferred at an

undervalue. By contrast, the Applicants deny that the 2008 Agreement had any effect on the beneficial interests in the Property and say that Mr Bedborough transferred an equitable interest in the Property only in 2012 on the making of the 2012 Declaration. Since the 2012 Declaration was made less than two years before the presentation of the bankruptcy petition the Applicants argue that it was unquestionably made at a "relevant time" for the purposes of s341 and since it was made at an undervalue, it can be set aside. However, in case they are wrong on this, they present a fall-back argument to the effect that s423 of the Insolvency Act, to which no time limit applies, applies to the transfer of the interest in the Property whether it was effected in 2008 or 2012.

4. It is, therefore, necessary for me to determine several issues to determine the applications that are before me and the parties have agreed a list of issues between themselves. The full text of that agreed list is set out in the Appendix and I will structure my decision by reference to those issues. In very broad summary, I need to decide the legal effect of the 2008 Agreement and the 2012 Declaration, whether the conditions of s339 or s423 of the Insolvency Act are engaged and, if they are, what order I should make.

HEARING FORMAT AND EVIDENCE

5. The hearing before me took the form of a fully remote video hearing and neither party applied to me for the hearing to take any different form. For the Respondents, I heard evidence of fact from Mr and Mrs Bedborough and from Mr Fairburn, a solicitor who provided advice on the 2012 Declaration. These three witnesses were cross-examined. For the Applicants, Mr Lyle, one of the joint trustees in bankruptcy, gave evidence and Mr Bedborough cross-examined him. I have accepted Mr Lyle's evidence. In addition, there was agreed expert valuation evidence from Andrew Barton of Gibbs Gillespie Surveyors Limited dealing with the market value of the Property at various times.

6. The Respondents' case was that the 2008 Agreement came into existence following purely oral discussions between them. The Applicants were concerned that, in such circumstances if the trial was fully remote, there was some risk that the Respondents might assist each other with their evidence. Accordingly, in the pre-trial review, the Applicants successfully asked Meade J for an order that while the hearing should, given the COVID epidemic take the form of a fully remote video hearing, the Respondents should attend the offices of one of their legal representatives to give their evidence and both be in separate rooms at all times while either was being cross-examined. However, after Meade J made that order, both Respondents contracted COVID and, while they were well enough to participate at the hearing, they were still exhibiting some residual symptoms which made it impracticable for them to attend a lawyer's office to give their evidence. As a result, both parties realistically and pragmatically agreed that it would be undesirable for the hearing to be adjourned until Meade J's order could be complied with and instead they agreed that the order should be varied as follows:

    i) The Respondents could both give evidence by separate video-links from separate rooms at the Property.

ii) At all times while one Respondent was giving evidence, the other Respondent would have their camera and video switched on with the camera positioned to give a good view of the surrounding area so that the court could be satisfied that neither Respondent was communicating with the other by email or mobile device.

iii) To avoid any risk of confusion as to whether the rules were being complied with, Mrs Bedborough would not seek to contact her solicitor, Mr Fairburn, while Mr Bedborough was giving evidence. Instead, she would make a note of any points she wished to raise and save them up until his evidence had concluded, with proceedings being paused as necessary to enable those discussions to take place.

7. In practice those arrangements worked satisfactorily. When breaks took place during the trial, the two Respondents took it in turns to leave their positions in front of their cameras and the Applicants did not suggest that the Respondents were failing to comply with the amended arrangements.

8. The Bedboroughs' case as to the creation of a constructive trust relied heavily on the contents of purely oral discussions between them in 2008. The Applicants had no first-hand knowledge of those discussions and the Bedboroughs had an obvious self-interest in asserting the presence of a common intention to alter their respective interests in the Property in 2008. In those circumstances, I was looking for transparent and reliable evidence from them. Later in this judgment I will explain why I consider that, in some respects, Mrs Bedborough's evidence involved her putting forward an account of the 2008 discussions which, whether consciously or otherwise, was affected by a wish to bolster her case as to the formation of a constructive trust in 2008. I will also explain why I considered that her evidence gave a somewhat misleading impression of the extent of her knowledge of Mr Bedborough's financial difficulties in 2012. These instances affected my overall impression of her evidence.

9. Mr Bedborough trod carefully when being cross-examined in relation to the 2008 discussions but overall I considered that he was a reliable witness. Understandably given that he is a solicitor, Mr Fairburn was sensitive to any suggestion that his evidence might be untrue. I am entirely satisfied that he was a reliable and honest witness.

FINDINGS OF FACT

The Bedboroughs' early married life and renovations to the Property in 2002

10. Mr and Mrs Bedborough were married in 1990. Their first son, Louis, was born in 1991. At the time they purchased the Property as their family home in January 1994, Mrs Bedborough carried on a small business, but she gave up paid work in 1997, at around the time her second son Oscar was born, to look after her family. At all material times between 1997 and 2012, Mr Bedborough earned the overwhelming majority of the family income.

11. Mr and Mrs Bedborough purchased the Property with the aid of a loan from Halifax that was secured by an "interest only" mortgage. Neither Mr Bedborough nor Mrs Bedborough said in their witness statements whether the loan taken out to finance the property was in their joint names or not. However, I was shown a statement from Halifax which referred to a mortgage account in both their names and in an interview with the Official Receiver, Mr Bedborough referred to the loan as being in joint names. I have inferred, therefore, that they were both jointly and severally liable under the Halifax loan. Mr Bedborough alone provided the deposit which he financed by selling some shares that he owned at the time. Since Mrs Bedborough was not in paid work between 1997 and 2012, when the 2012 Declaration was made, Mr Bedborough made all interest payments under the mortgage between these dates.

12. The Property, when acquired, was registered at HM Land Registry in the joint names of Mr and Mrs Bedborough. The deed transferring the Property into their joint names did not contain any declaration of trust setting out the terms on which they held the equitable interest in the Property. However, no party to the litigation suggested to me that, prior to 2008, when the effect of the 2008 Agreement needed to be addressed, they held that equitable interest as anything other than joint tenants. Therefore, in line with the presumption set out in *Stack v Dowden* [2007] 2 AC 432, I have concluded that prior to 2008, Mr and Mrs Bedborough held the Property as legal and beneficial joint tenants.

13. Mrs Bedborough's mother died in September 2000 and in March 2002, Mrs Bedborough received an inheritance of around £77,000. Mrs Bedborough attached considerable value to this inheritance, viewing it as giving her the opportunity, once it was invested, to build a secure financial base for her children. At no time between the acquisition of the Property and the date on which the 2012 Declaration was executed did Mrs Bedborough have any material financial assets of her own other than (i) the inheritance she received from her mother, and the investments made with that inheritance and (ii) her interest in the Property.

14. By 2002, Mr and Mrs Bedborough had been living in the Property for a few years and discussed refurbishing it by, for example, increasing living space by the addition of a conservatory, the addition of a new kitchen and improving the loft area. At that time, Mr Bedborough was carrying out a glazing business called "The Window Factory" to which I will refer as the "Business". Mr Bedborough told Mrs Bedborough that the Business was doing well and should, in the future, generate enough profit to enable the Property to be refurbished. However, he said that the Business was not yet producing the necessary amount of profit to fund the refurbishment. He asked Mrs Bedborough to fund the cost of refurbishing the Property out of the inheritance left to her by mother.

15. Mrs Bedborough was pressed in cross-examination as to the extent to which she was a willing participant in the initiative to refurbish the Property. It was suggested that since, at the time, she was responsible for cooking the family meals, she would have been the main user of the kitchen and so would have been the instigator of the initiative to install a new kitchen. However, Mrs Bedborough explained in her evidence the pride her mother had in being able to pass on a lump sum and that Mrs Bedborough saw it as an opportunity to make investments for children, for example, buying a buy-to-let property. I accept Mrs Bedborough's

evidence that she did not view the inheritance simply as a windfall and was reluctant to spend a large proportion of it on home improvements. I concluded that it was only after Mr Bedborough "badgered" her (as he put it) that she agreed to spend part of her inheritance on improvements to the Property. The fact that work started just a few months after Mrs Bedborough received her inheritance does not alter that conclusion as I accept the evidence of both Mr and Mrs Bedborough that they knew in advance that Mrs Bedborough would receive an inheritance as her mother had been unwell for some time; they therefore had an opportunity to discuss how the inheritance might be spent even before it was received.

16. Nevertheless, although she was reluctant, Mrs Bedborough did spend £50,000 of her inheritance on home improvements in 2002 and 2003. The basis on which she agreed to do so was the subject of considerable dispute at the hearing. The Respondents argue that by agreeing to the money being spent in this way, Mrs Bedborough made a loan of £50,000 to Mr Bedborough. In this regard, Mrs Bedborough said in her witness statement:

> *"[Mr Bedborough] promised that if I used my inheritance to pay for the work in the short term, he would pay me back. Again, I had no reason not to believe him. He knew that preserving the inheritance was important to me and knew that I would want to protect it for our family's future."*

17. I have found that Mrs Bedborough made no legally enforceable loan of £50,000 to Mr Bedborough in 2002 for the following reasons:

    i) Mr and Mrs Bedborough did not generally in their marriage seek to ring-fence, or compartmentalise, their respective assets. Rather, they approached their marriage as a joint enterprise to which each contributed what they could. Mr Bedborough alone funded the deposit on the Property in 1994. Between 1997 and 2012, only Mr Bedborough was doing paid work, so his contribution to the marriage between these dates was financial: he made mortgage payments on the Property and either paid household bills or gave Mrs Bedborough money with which to do so. Mrs Bedborough's contribution was of a different kind: she did not do paid work, but ran the household and looked after the children. Later on, Mr and Mrs Bedborough came to argue about the extent to which Mr Bedborough was doing enough in the marriage. However, in 2002 they were broadly happy with this arrangement and did not try to dissect it into its component parts. For example, there was no suggestion that Mr Bedborough's greater financial contribution should result in him having an interest in more than 50% in the Property which I conclude was because they acknowledged that Mrs Bedborough's non-financial contribution to the marriage was at least as valuable.

    ii) It would, therefore, have been inconsistent with the couple's approach, in 2002, of pooling their respective assets and resources, for them to make a legal provision between themselves whose economic effect was that the £50,000 was to remain exclusively the property of Mrs Bedborough.

iii) I acknowledge that Mrs Bedborough's witness evidence was that Mr Bedborough would "pay back" the cost of the renovations. However, I do not consider that to be inconsistent with the conclusion above. In 2002, there were two projects, both arising out of the Bedboroughs' marriage on which £50,000 could have been spent. Mr Bedborough wanted the money to be spent on renovating the family home. Mrs Bedborough wanted it to be spent on making some financial provision for the children of the marriage by, for example, purchasing a buy-to-let property. (Mrs Bedborough emphasised in her oral evidence that she wanted to make investments for her children rather than for herself). Mr Bedborough's agreement to "pay back" the money was part of an assurance that both projects could be pursued since, if the renovations were undertaken first, funded by Mrs Bedborough's inheritance, the investment for the children could be made later, funded out of profits generated by the Business. Therefore, understood in those terms, the agreement to "pay back" the money was part of discussions as to the order in which two competing projects of the marriage should be undertaken, with both projects to be funded out of the pool of resources that was available to the couple.

iv) The conclusion that there was no loan of £50,000 is consistent with documents that pre-dated Mr and Mrs Bedborough's witness statements of 4 June 2018. For example, the 2012 Declaration refers to the £50,000 in the following way:

> *"SB paid JB £50,000 in or about 2002 being the cost of repairs and improvements to the Property which she alone financed"*

If the Bedboroughs had thought that the £50,000 was a loan, it would have been described as such. The reference to Mrs Bedborough "alone" financing the repairs and improvements suggest that the Bedboroughs were noting that she had borne the total expense of improvements to a jointly owned asset.

In the Preliminary Information Questionnaire that Mr Bedborough provided to the Official Receiver on 29 January 2015, Mr Bedborough described a rationale for the 2012 Declaration as being to alter the ownership interest in the Property because:

> *"Sara had put money into it [i.e. the Property]. She got approx. £76,000 inheritance in 2002. The money went into the house at this stage".*

The description of the money as "going into the house" is more consistent with Mrs Bedborough applying the money herself in improving the Property than with her making a loan to Mr Bedborough.

Events after 2002 up to the 2008 Agreement

18. Between 2002 and 2008, Mrs Bedborough became increasingly concerned about the ability of Mr Bedborough, by his conduct of the Business, to replenish the £50,000 that had been spent on refurbishing the Property. That concern increased, and strains in the marriage developed, after Mrs Bedborough gave birth to twins

in 2004. Mrs Bedborough began to feel that her husband had taken financial advantage of her: a large part of her inheritance had gone, she doubted the practicability of returning to work since she had been out of work for so long and she felt insecure given her financial dependence on Mr Bedborough. She became depressed and was prescribed anti-depressants in 2005. In 2007 she became unexpectedly pregnant and felt that she had no choice but to have a termination given that the family finances were already stretched and the couple could not afford to extend the house to make room for another child. This termination, which Mrs Bedborough thought would not have been necessary if Mr Bedborough ran the Business more effectively, caused a rift between the couple.

19. Matters came to a head in late 2007 and early 2008 when Mrs Bedborough contacted Stephen Fairburn, a solicitor, for advice about where she would stand if she initiated divorce proceedings. They had some conversations over the telephone and a face-to-face meeting in a coffee shop in January 2008. Mr Fairburn's professional practice involved both the provision of matrimonial and insolvency advice but I have concluded that Mrs Bedborough did not approach Mr Fairburn because she felt she needed any advice on insolvency matters. Rather, she approached Mr Fairburn because he was a solicitor with whom she had some acquaintance (as her mother had known Mr Fairburn's mother). Mr Fairburn did not charge a fee for the advice that he gave. He did not send out a client care letter as he would if he were providing formal advice to a client. Rather, he regarded his discussions with Mrs Bedborough as amounting to the provision of informal advice in response to the kind of request that he not uncommonly received from friends and acquaintances.

20. Mrs Bedborough has not waived her legal professional privilege arising in respect of legal advice that Mr Fairburn has given her whether in 2007-08 or subsequently. Accordingly, no evidence was given as to the content of any legal advice that he gave and I will make findings only as to the non-privileged aspects of the discussions between them. I have concluded that, during their conversations in late 2007 and January 2008 Mr Fairburn formed the view that the Bedboroughs "could not afford to divorce" (as only Mr Bedborough was earning an income) and that the impact of a divorce on the children would be significant. He, therefore, explored with Mrs Bedborough whether a reconciliation was possible and, if so, what might enable such a reconciliation to take place. I do not, therefore, consider that in 2007 and 2008, Mr Fairburn was providing legal advice in connection with a pending or threatened divorce. Rather, he was giving practical advice from the standpoint of someone who had a good understanding of the pitfalls of a divorce as to what accommodations by Mr Bedborough, which need not take the form of legally binding arrangements, might enable a reconciliation to take place.

21. I have concluded that Mrs Bedborough came to realise during her discussions with Mr Fairburn that reconciliation would be possible if her feelings of insecurity could be ended. In part that financial insecurity was caused by her perception that she was dependent on the financial performance of the Business, over which she had no control, and which had already failed to generate the profit necessary to enable investments to be made for the children now that £50,000 of her inheritance had been spent on improving the Property. However, recognising that

the reality was that the Business was not generating sufficient profit to restore the £50,000 spent on home improvements and the fact that Mrs Bedborough felt that she had "missed the boat" by not making investments for the children in 2002, Mr Fairburn suggested that Mrs Bedborough might feel more secure, so that a reconciliation might be possible, if Mr Bedborough transferred his entire interest in the Property to her.

22. In 2008, following Mrs Bedborough's conversations with Mr Fairburn, Mr and Mrs Bedborough had emotional conversations that concerned both the difficulties in their marriage and the ownership of the Property. These conversations were purely oral. Ms Rogers, on behalf of the Applicants, invited me to conclude that no such conversations ever took place. However, I am satisfied that some discussions did take place between Mr and Mrs Bedborough for the simple reason that I believed their evidence to this effect and because their explanations of the general thrust of that conversation were both consistent and plausible in the light of Mrs Bedborough's evidence, not challenged in cross-examination, as to the unhappiness that she was experiencing at the time.

23. The contents and outcome of that conversation were matters of considerable dispute. Later in this judgment, I will analyse what I consider to be the legal effect of the 2008 Agreement in the light of the Respondents' argument that it established a constructive trust that operated to alter the beneficial interest in the Property in 2008. However, for the time being I will simply make findings as to what was said, what Mr and Mrs Bedborough believed to be the effect of what was said and the immediate consequences of their discussion.

24. During their discussions, Mrs Bedborough confronted Mr Bedborough with what she considered to be his shortcomings as a husband. She told him that she was considering seeking a divorce in order to emphasise how unhappy she was. I also find that Mrs Bedborough told her husband that she wanted him to transfer his entire interest in the Property to her. After all, that was what her discussions with Mr Fairburn had revealed to be a possible route to a reconciliation. I also find that Mr Bedborough agreed to some kind of proposal relating to a transfer of Mr Bedborough's interest in the Property because both Mr and Mrs Bedborough said as much in their witness statements and Mr Bedborough's witness statement rang true when he said:

> *"I just cracked. She told me she wanted the house transferred into her name for the children as she didn't trust me any more even felt she knew me. I loved them all so much but I was incapable of showing it. I agreed, I did not want to lose them. I had never seen Sara like this before."*

25. Therefore, Mr and Mrs Bedborough discussed <u>something</u> in 2008 that related to the ownership of the Property. However, their evidence reveals a lack of precision as to <u>precisely what</u> they discussed, or what they thought they had agreed. Mr Bedborough's witness statement did not take matters much beyond his statement that "I just cracked…. I agreed, I did not want to lose them". Mrs Bedborough's witness statement took matters further. Her evidence was that:

> *"I said that, simply, I would leave if he did not transfer the Property to me… I put that to Jet, and he folded…. Jet agreed that the Property would now be mine. From that point I considered myself secure and I know that Jet considered himself bound by our agreement".*

26. I have concluded that, in 2008, Mr Bedborough said to Mrs Bedborough that he was prepared to transfer his interest in the Property to her. However, for the reasons that follow, I do not consider that those discussions resulted in a common intention as between Mr and Mrs Bedborough that Mrs Bedborough should forthwith own the entire equitable interest in the property. Nor do I consider that any such common intention was formed until the 2012 Declaration was executed.

27. First, both Mr and Mrs Bedborough realised that some legal formalities would be needed in order to effect a transfer of Mr Bedborough's interest in the Property. Mrs Bedborough's witness statement suggests that she was relying on Mr Bedborough to sign additional documents saying:

> *"I knew we hadn't put anything in writing, but I knew [he] would not go back on his word."*

28. Mr Bedborough's witness statement also suggests that he thought that further acts would be needed and that their conversation in 2008 had not itself had any effect on the ownership of the Property saying:

> *"Sara seemed a lot happier and life carried on. I know it was her intention to the get the matter confirmed officially, but this was never followed through. I believe just knowing that I had agreed to put her in a safe place… I would honour it no matter what."*

29. Second, Mrs Bedborough had not obtained legal advice from Mr Fairburn as to how interests in the Property could be assigned in law. As I have noted, she obtained practical advice that might help her to secure a reconciliation with her husband. Therefore, I consider that she would not have approached her discussions with her husband thinking, or even expecting, that they would of themselves give her any greater interest in the Property. Rather, she wanted sufficient reassurances as to the position going forward to enable her to feel content that a reconciliation could be achieved.

30. Third, I have concluded that Mr Bedborough would have realised that there were issues to be worked through before there could be an actual transfer of his interest in the Property. One issue was whether it was right that he should have no interest at all in the Property. Another issue was whether it would remain appropriate for him to fund the full cost of the mortgage if he was to have no material interest in the Property. I regard it as significant that, when the parties came to commit to the formal 2012 Declaration, they agreed that Mr Bedborough should retain a 5% interest in the Property. I also regard it as significant that in 2012[1] Mrs Bedborough started making payments on the mortgage but that, even after the 2008 Agreement, Mr Bedborough alone funded mortgage payments. The fact that neither of these issues were resolved in 2008 suggests to me that Mr and Mrs

[1] Perhaps after the time when Bedborough Limited was established so that Mrs Bedborough had a source of income consisting of her shareholding and directorship in that company – see [42] below.

Bedborough had not, in 2008, formed a common intention that their interests in the property should alter at that stage.

31. It follows that Mr and Mrs Bedborough realised that their discussions in 2008 were of no legal effect and at most set out an understanding as to what would, or might, happen to the Property in the future. I recognise that the evidence of Mrs Bedborough suggested a contrary understanding namely that, even without any written document, as between themselves, the Bedboroughs regarded Mrs Bedborough alone as owner of the Property. She suggested as much in her witness statement when she said that "Jet agreed that the Property would now be mine". She made similar statements orally in cross-examination.

32. I am not able to accept that evidence. I consider that it has been affected, subconsciously or otherwise, by Mrs Bedborough's subsequent realisation, during these proceedings, that it would be of great benefit to her if the equitable interest in the Property passed in 2008 and not in 2012.

33. In addition to the points made at [27] to [32] above, the way that the Bedboroughs viewed their agreement can be tested by considering how they spoke about it to others. In January 2015, following Mr Bedborough's bankruptcy, Mr Bedborough signed a Preliminary Information Questionnaire containing information on his financial position. The answers to the various questions were drafted by Mrs Bedborough, but Mr Bedborough checked those answers before signing the form and both Mr and Mrs Bedborough took the form seriously because it had, at the beginning a large box that warned of potential consequences under the Perjury Act 1911 if false statements were made. In that form, in answer to a question as to when Mr Bedborough had sold or given up an interest in the Property, he gave the answer "Dec 2012". He did not suggest that the ownership passed in 2008. In a similar vein, during a meeting in 2015 which both Mr and Mrs Bedborough attended, whose purpose was to provide information supplemental to that on the Preliminary Information Questionnaire, Mr Bedborough went further, making the positive assertion that "Prior to 2012 my wife and I owned [the Property] 50/50".

34. Both Mr and Mrs Bedborough were cross-examined extensively on the alleged inconsistency between their case that the 2008 Agreement resulted in an interest in the Property moving by the creation of a constructive trust, and their statements, in 2015, to the effect that the ownership interests did not change until the 2012 Declaration was signed. In her evidence, Mrs Bedborough sought to tread a fine line saying that on one hand, she regarded both herself and Mr Bedborough as bound by their 2008 discussions, but that since those discussions touched on personal family matters, she did not feel that she either needed to, or was obliged to, discuss them with the Official Receiver. Mr Bedborough said something similar: he viewed himself as having entered into an agreement with Mrs Bedborough in 2008 but that since that arrangement was not "published" (his word) until 2012, when the 2012 Declaration was signed, he did not think it would be correct to have suggested to the Official Receiver that an interest in the Property moved in 2008. He seemed to accept that he regarded the 2008 discussion as an "informal" arrangement and acknowledged that he did not think it was "legal in other people's eyes" until he became aware of, and understood, the arguments being advanced in this case.

35. I am unable to accept Mrs Bedborough's evidence. Mrs Bedborough filled in the Preliminary Information Questionnaire and attended the meeting with the Official Receiver. She would have realised that the Official Receiver's questions were driven by a wish to understand what assets Mr Bedborough had that would be available to his creditors. The reason that it was not suggested to the Official Receiver that Mr Bedborough had transferred his interest in the Property in 2008 was because neither he nor Mrs Bedborough thought he had done any such thing. I regard that as consistent with Mr Bedborough's evidence that the 2008 discussions were an "informal" arrangement.

36. On a related point, I do not consider that either Mr or Mrs Bedborough viewed their 2008 discussions as embodying any formal compromise of divorce proceedings or claims for a property adjustment order that Mrs Bedborough was contemplating making. While Mrs Bedborough referred to the possibility of divorce, she did not do so with the aim of securing a financial settlement of claims that she might bring for ancillary relief. She did so to emphasise to her husband how unhappy she was. Mr Fairburn had told her that she could not afford to divorce and, accordingly, it was not the case that she would have pressed ahead with divorce unless Mr Bedborough offered her a favourable financial settlement. Rather, what she sought from her husband were non-binding assurances that would allay her feelings of insecurity and of feeling trapped and enable her to continue in the marriage.

37. Finally, I have concluded that neither Mr Bedborough nor Mrs Bedborough left the 2008 discussions thinking that Mrs Bedborough would definitely ask Mr Bedborough to execute legal documents transferring the Property to her and that, if she made such a request, Mr Bedborough would definitely comply for the following reasons:

    i) Mrs Bedborough did not ask for any legal documents to be drawn up to effect a transfer of the property until 2012 and then did so only because of concerns as to the financial performance of the Business that arose because of Mr Bedborough's request for help in paying tax bills. That indicates that in 2008, Mrs Bedborough did not need an actual transfer of the Property to allay her feeling of insecurity and of feeling trapped. Rather, what she needed was confidence that, <u>if she asked for a transfer of the Property</u> she would obtain it. That is why, as Mrs Bedborough put it, Mr Bedborough's simple agreement of itself gave her the requisite security and "eased matters" even though it was not accompanied by an actual transfer of the Property.

    ii) I am not suggesting that Mr Bedborough was not in earnest when he gave assurances to his wife in 2008. His subsequent conduct demonstrated that he was prepared to give up a significant interest in the Property as he executed the 2012 Declaration. However, as I have noted there were still issues to be worked through before Mr Bedborough could be prepared to transfer all or part of his interest in the Property.

38. My conclusions as to the 2008 Agreement can, therefore, be summarised as follows:

i) Discussions did take place in 2008 between Mr and Mrs Bedborough relating to the ownership of the Property. During those discussions Mr Bedborough confirmed that he was prepared, in principle, to transfer his interest in the Property to Mrs Bedborough if she asked him to do so.

ii) Both Mr and Mrs Bedborough understood that these discussions were of no legal effect and therefore had no immediate effect on the way in which they held the Property.

iii) The parties did not intend their discussions to effect any alteration to their respective interests in the Property before the point (if any) at which formal legal documentation was drawn up. It was not pre-ordained that such legal documentation would ever be drawn up.

iv) Neither Mr nor Mrs Bedborough viewed their discussions in 2008 as compromising any actual or threatened divorce proceedings or claims for a property adjustment order.

The financial performance of the Business between 2008 and 2012

39. From some time in 2008, Mr Bedborough no longer employed anyone to help with the administrative side of the Business, including tax compliance. This started a gradual process that was to result in a cycle under which Mr Bedborough would not file VAT returns on time, HMRC would issue estimated assessments which would prompt Mr Bedborough "spasmodically" as he put it to file returns, to displace the estimated assessments.

40. Although the seeds of Mr Bedborough's bankruptcy were sown in 2008, the problems were not particularly acute at the time of the 2008 Agreement which was reached shortly after Mrs Bedborough had met Mr Fairburn in a coffee shop in January 2008. Certainly, HMRC's internal ledger from this time revealed problems with VAT compliance: for example, Mr Bedborough's return for October 2007 was filed a few months late, in April 2008. However, at this time Mr Bedborough did not owe HMRC significant sums of money. Indeed, on 11 April 2008, HMRC's ledger showed that he had a nil balance on his VAT account with HMRC.

41. Between 2011 and 2012, these VAT problems increased materially in significance. A letter from HMRC dated 6 December 2012 to an accountant, Mr Hooper, whom Mr Bedborough had engaged to sort out his VAT issues suggested that Mr Bedborough had not filed any monthly VAT return that was due between April 2011 and July 2012 and that HMRC had made estimated assessments in consequence. As at 2 October 2012, HMRC's estimate was that Mr Bedborough owed £54,418.04 in unpaid VAT and associated penalties and surcharges. Mr Bedborough realised that, on 10 December 2012, when he made the 2012 Declaration, HMRC were "hot on his heels". He could not fail to realise, as an HMRC officer made a personal visit to Mr Bedborough at home to chase up payment (leaving with two cheques for £10,000 which both cleared). I accept that Mr Bedborough hoped that his VAT problems might be partially mitigated by successful reclaims of tax deducted under the Construction Industry Scheme, but that was a hope only. Mr Bedborough's tax compliance in 2012 was so poor that

he could not say with any confidence how much he owed HMRC in VAT or how much HMRC might owe him when he came to make reclaims under the Construction Industry Scheme.

42. At this time, Mr Bedborough had been taking steps to insulate himself from the financial consequences of his liabilities to HMRC. In April 2012 a company (Bedborough Limited) was formed to carry out a glazing business with the sole director and shareholder of that company being Mrs Bedborough. I have concluded that Mr Bedborough's intention was that this other company would carry on the glazing business that he had carried on as a sole trader. I accept that part of the rationale for the formation of Bedborough Limited was, as Mr Bedborough explained, to enable a "line in the sand" to be drawn so that the company could carry on the business without being tainted by his previous failings in tax compliance. But another reason for incorporating Bedborough Limited was so that future profits would accrue to that company and would not be available to meet Mr Bedborough's personal liabilities to HMRC. I have also concluded that the decision for Mr Bedborough to be neither a shareholder nor a director of Bedborough Limited, despite himself performing many of the tasks associated with the glazing business, was to minimise the risk of HMRC getting hold of the assets of Bedborough Limited to discharge Mr Bedborough's own liabilities.

43. In the light of his difficulties with HMRC, Mr Bedborough asked Mrs Bedborough if she would pay £20,000 to HMRC to help him to settle part of his tax liabilities. I accept Mrs Bedborough's evidence in cross-examination that Mr Bedborough made this request some time in December 2012. That payment would, if made, exhaust the remainder of Mrs Bedborough's inheritance.

44. Mrs Bedborough said that she was both surprised and upset that her husband should make such a request. I accept that she was upset. A significant element of her unhappiness in 2008 had been caused by a feeling of insecurity and of being "trapped", as she put it. For several years those feelings had been in abeyance because Mr Bedborough had said that he would transfer the Property to her if she asked and she considered he would honour that assurance. The prospect of using the last of her inheritance to pay his tax bill connected with the Business caused her to re-evaluate whether the discussions in 2008 had actually given her the security she needed.

45. However, I do not accept that Mrs Bedborough was as "surprised" as she suggested in her evidence. She said in her witness statement that, in 2012, she had "nothing to do with the Business anymore". I am prepared to take that statement as literally true since her witness statement defined the "Business" as the glazing business that Mr Bedborough carried on as sole trader and Mrs Bedborough did not work in <u>that</u> business. However, the statement, and the general impression given by her witness statement that she was unaware of the parlous financial situation of the Business in 2012 was misleading by omission as it failed to acknowledge that, since April 2012, Mrs Bedborough had been involved as the sole director and shareholder of Bedborough Limited. Since the very rationale of Bedborough Limited was to enable a break to be made with the poor tax compliance of the Business, I have concluded that Mrs Bedborough must

have been aware, at least in general terms, that Mr Bedborough had significant unpaid tax liabilities.

46. Mrs Bedborough's evidence was that she was prepared to use the £20,000 as Mr Bedborough asked, but only if, as she put it, the 2008 Agreement was "put into writing". My finding is slightly different. I have concluded that Mrs Bedborough's awareness of the significant financial problems facing the Business caused her to re-evaluate her perception of the 2008 Agreement. Previously she had thought that Mr Bedborough's agreement in principle to the transfer the entire Property to her if she requested him to do so gave her the security that she needed. However, with the Business facing financial problems, this was no longer the case since she realised that, for so long as Mr Bedborough had any interest in the Property, HMRC could have recourse to that interest to satisfy his unpaid VAT debts. From Mrs Bedborough's perspective, her husband's word no longer gave her the security she needed and she concluded that the time had come to require him to transfer his interest in the Property to her. She therefore contacted Mr Fairburn and asked him to draft necessary legal documents.

The 2012 Declaration

47. Mr Fairburn drafted the 2012 Declaration on Mrs Bedborough's instructions. Mr Bedborough said to his wife that he would like to retain a 5% interest in the Property and she was prepared to agree to that. As a result, the material provisions of the 2012 Declaration were as follows:

    i) It was duly executed as a deed.

    ii) It defined Mr Bedborough as "JB" and Mrs Bedborough as "SB".

    iii) Clause 1 was headed "Recitals". After reciting that Mr and Mrs Bedborough were the registered proprietors of the Property, Clauses 1.3 and 1.4 read as follows:

> *"1.3 SB paid JB £50,000 in or about 2002 being the cost of repairs and improvements to the Property which she alone financed and has paid JB the further sum of £20,000 in 2012.*
>
> *1.4 The Owners have agreed that the Owners hold the Property on trust for themselves in the following manner to reflect the extra investment in the Property which SB has made."*

    iv) Clause 2 contained a declaration of trust in the following terms:

> *"2 Declaration of trust*
>
> *2.1 The Owners declare that as from the date of this deed they will hold the Property both legally and beneficially on trust for themselves as tenants in common in the following manner.*
>
> *2.2 SB shall be entitled to 95% of the net sale proceeds and JB 5% of the net sale proceeds ('the agreed proportions')."*

48. The 2012 Declaration contained no term stating that it was made in consideration of Mrs Bedborough refraining from starting divorce proceedings or, of a compromise of claims for a property adjustment order that Mrs Bedborough might make in such proceedings. In fact, the 2012 Declaration makes no reference to a possible or threatened divorce at all.

49. Mr Fairburn said in his evidence that, if Mr Bedborough had not agreed to execute the 2012 Declaration, Mrs Bedborough would have refused to pay his tax bill and would have filed for divorce. But that might simply have been his understanding of Mrs Bedborough's position as communicated to him. He would not necessarily know what Mrs Bedborough said to her husband. Mrs Bedborough said in her witness statement that she "made it clear I would leave if I did not get everything in writing". Read in isolation that could be read either as an articulation of her negotiating position given to her solicitor, Mr Fairburn, or as an ultimatum given to Mr Bedborough. In cross-examination, Mrs Bedborough said that she did threaten her husband with divorce if he refused to sign.

50. However, Mr Bedborough mentions no threat of divorce in 2012 in his witness statement. Nor is there any suggestion, in any of the witness statements of Mr Bedborough, Mrs Bedborough or Mr Fairburn that negotiations surrounding the 2012 Declaration were particularly difficult. Mr Bedborough agreed to sign it readily, and despite Mr Fairburn suggesting that he should do so, did not take his own independent legal advice on it. The request that he should retain a 5% interest in the Property was readily accommodated. In the absence of any apparent difficulties with the negotiations, I have concluded that it was more likely than not that Mrs Bedborough did not threaten divorce again in 2012. There was no need for her to make such a threat since Mr Bedborough was prepared to transfer almost all his interest in the Property to her willingly.

51. In any event, Mrs Bedborough's evidence is that divorce was raised as a threat: if he did <u>not</u> sign the 2012 Declaration, she would start proceedings. That is not the same as a promise from her that, if he <u>did</u> sign the 2012 Declaration, she would not divorce him. It is quite clear to me that the Bedboroughs did not intend the 2012 Declaration to represent any formal compromise of divorce proceedings or claims for a property adjustment order. If they were intending such a compromise, there would have been much more analysis of the assets of the marriage and, at very least, some attempt to obtain a valuation of the principal asset of the marriage, namely the Property. Yet no estate agent's valuation of the Property was obtained. Moreover, the 2012 Declaration was signed on 10 December 2012 just a few days after Mr Bedborough made his request for the £20,000 which is, in my judgment, inconsistent with it representing the culmination of discussions to compromise divorce proceedings. The fact that Mr Bedborough decided not to seek independent legal advice, and the fact that the 2012 Declaration, despite being professionally drafted, does not refer to any compromise of divorce or related claims, represent still further reasons why none of any consideration provided under the 2012 Declaration consisted of Mrs Bedborough's agreement to refrain from taking divorce proceedings and/or compromising her right to seek a property adjustment order.

52. On a different note, I consider it of significance that the 2012 Declaration does not refer to any agreement or compromise reached between the Bedboroughs in

2008. I will not dwell on this point since I have already made findings relating to the 2008 Agreement. However, I note only that the failure of the 2012 Declaration to refer to events in 2008 supports the conclusion that I have reached separately that neither Mr nor Mrs Bedborough thought or intended the 2008 Agreement to have any effect of their respective interests in the Property.

53. Mrs Bedborough waited until after the 2012 Declaration was signed before giving her husband the £20,000 he had asked for. The Applicants put Mrs Bedborough to proof that she actually spent this £20,000. She was cross-examined on apparent inconsistencies in her evidence that the £20,000 was paid out of the very account into which the inheritance was originally paid as the copy of the pass-book she provided showed that the balance on that account had been substantially extinguished well before 2012. However, Mrs Bedborough's evidence showed that she attached significance to money being invested and I accept her evidence, in cross examination, that she would have invested the £20,000 in one or more ISAs rather than leaving it languishing in a deposit account. I therefore conclude that she did pay £19,000 to HMRC on her husband's behalf and gave him the remaining £1,000 as she said in her witness statement.

The value of the Property at various points in time

54. In February 2020, the parties to these proceedings jointly instructed Andrew Barton of Gibbs Gillespie Surveyors Limited to provide an opinion on the value of the Property at various points in the past. From that expert evidence, I have concluded that the market value of the Property at material times was as set out in the following table:

Renovations in 2002	2008 Agreement	2012 Declaration	May 2020 (most recent valuation)
£312,500[2]	£450,000	£475,000	£720,000

55. The mortgage on the Property was interest only. I have concluded that the mortgage debt stayed constant at £134,000 until 5 August 2016, the date of the mortgage statement from Halifax referred to at [10] above which showed a balance of £122,025.16[3].

DISCUSSION

56. In this "Discussion" section, I will address the issues on the parties' agreed list of issues reproduced at Appendix Two, using the numbering of the issues as appearing in that Appendix.

[2] I have taken the midpoint of valuations provided as at January and December 2002.

[3] Obviously, it is somewhat artificial to assume that a repayment of capital was made on the exact date of this mortgage statement. However, no other date has been suggested.

The 2008 Agreement

Relevant legal principles

57. The parties were substantially agreed on the following issues:

    i) Since Mr and Mrs Bedborough had, in 1994 purchased the Property in their joint names but had made no express declaration as to the way in which they held the equitable interest, they were to be presumed to hold the equitable interest as joint tenants applying *Stack v Dowden*. Neither party suggested that between 1994 and 2008 this presumption was displaced.

    ii) Since the parties' discussions in 2008 were entirely oral, they could not have given rise to a binding contract for any disposition of an interest in the Property given the provisions of s2 of the Law of Property Miscellaneous Provisions Act 1989.

    iii) Nor could they have operated as an express conveyance of any beneficial interest in the Property given the provisions of s53(1)(c) of the Law of Property Act 1925.

    iv) It was nevertheless conceptually possible for purely oral discussions in 2008 to result in a "common intention constructive trust" that resulted in Mr and Mrs Bedborough holding the equitable interest as something other than beneficial joint tenants. Two requirements needed to be present for such a constructive trust to arise: first, Mr and Mrs Bedborough would need to have a common intention that the Property was no longer to be held as joint tenants; second Mrs Bedborough needed to have relied on the existence of that common intention to her detriment.

Questions 1 to 3

58. My findings as to the existence and terms of the 2008 Agreement are set out at [18] to [38] above.

59. As to question 2(iii), I regard those terms as inconsistent with the formation of any common intention constructive trust because, as I have explained, they did not result in any common intention that the Bedboroughs' respective interests in the Property should change in 2008 or indeed at any point prior to execution of the 2012 Declaration.

60. Mrs Bedborough argues that her detrimental reliance consisted of (i) "waiving entitlement to repayment of her inheritance" and/or (ii) staying in the marriage. However, even if I had considered that the Bedboroughs had the requisite "common intention", I would not have considered that either of these constituted detrimental reliance. First, as I have found, Mrs Bedborough had no entitlement to repayment of any "loan" of £50,000 that was spent on improvements to the Property (see [17]). Second, she retained the right at any time to seek a divorce from Mr Bedborough and, as I have found, Mr and Mrs Bedborough did not consider that their discussions in 2008 involved any formal compromise to

pending or threatened divorce proceedings or any associated right to seek a property adjustment order.

61. Accordingly, the answer to Question 2(iii) is that the 2008 Agreement had no effect on the beneficial interest in the Property. It follows that Question 3 does not need to be addressed. However, in case I am wrong in my conclusion on Question 2(iii), I find that, if the 2008 Agreement had operated to transfer any beneficial interest in the Property, it would not be liable to be set aside under s423 of the Insolvency Act. I reach that conclusion because, in my judgment, Mr Bedborough's outstanding financial liabilities to HMRC in early 2008 were not sufficiently significant for his subjective wish to put assets outside the reach of HMRC to amount to a "real and substantial purpose" for the 2008 Agreement. Indeed, if that was a "real and substantial purpose" of Mr Bedborough being party to the 2008 Agreement, he would, in 2008, have ensured that it was properly given effect in legally binding documents.

The 2012 Declaration

Questions 4 to 9: whether the 2012 Declaration is liable to be set aside under s339 of the Insolvency Act

62. Mrs Bedborough advanced two arguments to the effect that the 2012 Declaration was not entered into at a "relevant time" as defined in s341 of the Insolvency Act. Her first argument was that, since the 2008 Agreement created a common intention constructive trust that itself moved the entirety of Mr Bedborough's beneficial interest in the Property, the 2012 Declaration was not a disposition by Mr Bedborough at all; rather, it involved Mrs Bedborough disposing of 5% of her interest in the Property to Mr Bedborough. Strictly, that was not an argument as to the effect of s341 and was more in the nature of an argument that the 2012 Declaration did not involve Mr Bedborough effecting any transaction that could be set aside following his bankruptcy. However, in any event, this argument falls away given my conclusion on Question 2(iii).

63. Mrs Bedborough's alternative argument was that the 2012 Declaration should be treated as having been entered into in 2008 because the decision to make it was made in 2008. Put another way, she argues that the 2012 Declaration was simply a minor variation to the decision that had already been taken in 2008 (minor because it resulted in Mrs Bedborough obtaining 95% of the Property rather than 100% of it). I reject that argument. As I have concluded, the 2012 Declaration and the 2008 Agreement were completely different transactions. The 2008 Agreement had no legal effect. It did not even make it pre-ordained that Mr Bedborough would transfer his interest in the Property to Mrs Bedborough. There is no basis, therefore, for treating the 2012 Declaration as made on any date other than 10 December 2012, the date on which it states on its face that it was executed. Since the 2012 Declaration was executed less than two years before the date of HMRC's bankruptcy petition, the terms of the exception in s341(2) of the Insolvency Act do not need to be considered. The answer to Question 4 is that the 2012 Declaration was entered into at a relevant time.

64. The answer to Question 5 is that the consideration that Mr Bedborough provided under the 2012 Declaration consisted of a transfer of a 45% interest in the

Property. The Property as a whole had a value of £475,000 and was encumbered by a charge of £134,000. Therefore, the encumbered value of the entire Property was £341,000. Mr Bedborough's 45% interest in the encumbered Property had a value, at the time, of £153,450.[4]

65. The answer to Question 6 is that the consideration that Mrs Bedborough gave was (i) her agreement to pay £20,000 (£19,000 to HMRC and £1,000 to Mr Bedborough) and (ii) her agreement not to seek any further recompense to which she might be entitled arising out of her contribution of £50,000 to the renovations in 2002. It did not consist to any extent of any compromise of pending or threatened divorce proceedings or any associated right to seek a property adjustment order.

66. In the light of the judgment of the Court of Appeal in *Ramlort Ltd v Reid* [2004] EWCA Civ 800, I do not need to reach precise figures for what are frequently referred to as the "incoming value" and "outgoing value". A determination as to whether the incoming value is significantly less than the outgoing value is sufficient. The value of limb (i) of the incoming consideration is straightforward; it is £20,000. However, the value of limb (ii) is less clear. Given that I have concluded that the £50,000 was not advanced by way of loan, Mrs Bedborough was not giving up the right to a liquidated claim for £50,000. Rather, it seems to me that she was giving up an unliquidated claim to an equitable account for the sums she spent on renovations. I am reassured in that view by the fact that, in these proceedings, Mrs Bedborough was pursuing a claim for an equitable account as an alternative to the claim that the £50,000 was a loan.

67. Later in this judgment I will explain why I consider that Mrs Bedborough had no right to an equitable account in respect of the £50,000 she spent on repairs. Therefore, with the benefit of hindsight, the value of limb (ii) of the consideration was nil. In any event, only half of Mrs Bedborough's expenditure of £50,000 on improvements to the Property in 2002 benefited Mr Bedborough's undivided share in the Property; the other half benefited her own undivided share. In *Re Pavlou* [1993] 1 WLR 1046, the principle was stated that, in circumstances where the court orders an equitable account in respect of money spent by one joint tenant on improvements to a property, the account should be for just one half of the lesser of the actual expenditure and any increase in the value of the property realised thereby. Therefore, even if Mrs Bedborough had a cast iron claim to an equitable account, the maximum amount of the claim that Mrs Bedborough compromised was £25,000, perhaps with an amount relating to interest from 2002.

68. I consider, therefore, that the value of the consideration that Mrs Bedborough gave was £20,000. Even if some value is ascribed to her release of a claim for an

[4] Mrs Bedborough suggests that some reduction of around £10,000 should be made to this figure to take into account expenses of sale such as estate agents' fees. That would not actually make any material difference to the calculation that follows. However, I reject the submission as wrong in principle since the focus should be on what a reasonably well-informed purchaser would pay for the 45% interest in arm's length negotiations (paragraph 30 of the speech of Lord Scott in *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] UKHL 2). I see no reason why such a purchaser would reduce the price because the seller has to incur costs of sale.

equitable account, the consideration Mr Bedborough received could not have been worth much more than £45,000 (together, perhaps, with interest on £25,000 from 2002). Mr Bedborough gave consideration having a value of £153,450. The value of the consideration Mr Bedborough received is, significantly less than the value of the consideration he gave so the answer to the parties' Question 7 is "Yes".

69. In arguing against the conclusion I have just expressed, Ms Julian argued that questions of value should be approached from Mr Bedborough's perspective, referring in support to the words of Parker LJ at [102] of *Ramlort Ltd v Reid*:

> *"For there to be a transaction by an 'individual' (whom I will call 'the debtor') at an undervalue within the meaning of those paragraphs, the value in money or money's worth, from the debtor's point of view, of the consideration for which he enters into the transaction (I will call it 'the incoming value') must be 'significantly less' than the value in money or money's worth, again from the debtor's point of view, of the 'consideration provided' by the debtor – that is to say, the value in money or money's worth of the totality of whatever it is that the debtor is parting with under the transaction (I will call it 'the outgoing value')"*

Mr Bedborough, she submitted, had shown that he attached value to his perception that transferring his interest in the Property would save his marriage and that, accordingly, judged from Mr Bedborough's perspective, there was no undervalue.

70. I reject that submission. Parker LJ was not suggesting that "value" should be determined in the light of the debtor's subjective views. Rather, the passage quoted above demonstrates that "value" remains an objective concept but that the incoming value must be determined by reference to what the debtor receives rather than, for example, to what the counterparty gives up.

71. I heard argument in relation to the parties' Question 8 which addressed what the Applicants at least considered to be a difference in the authorities between *Papanicola v Fagan* [2008] EWHC 3348 and *Rubin v Dweck* [2012] BPIR 854 on the one hand and *Bibby v ACF Ltd* [2013] BPIR 685 on the other. Since I have concluded that Mr Bedborough did not receive any consideration consisting of Mrs Bedborough's agreement to refrain from divorcing, or seeking ancillary relief, I have concluded that it would be wrong for me to determine a point of law that is, for the purposes of these proceedings, academic.

72. In the light of my conclusions set out above, the 2012 Declaration was a transaction at an undervalue in relation to which I am entitled to make an order under s339 of the Insolvency Act. I will deal with the nature, if any, of the order I should make when dealing with Questions 13 and 14.

Questions 10 to 12 – applicability or otherwise of s423 of the Insolvency Act to the 2012 Declaration

73. I do not need to answer Questions 10 or 11. Nor do I consider I need to do so in case I am wrong in my conclusion on Question 9 as I see no realistic prospect, whatever my conclusions on the other issues, of s423 applying to the 2012 Declaration, but s339 not applying.

74. I am not sure I understand the point behind the parties' Question 12. For completeness, my conclusion on that is that the 2012 Declaration had effect only, as from 10 December 2012. From that date, it resulted in the Property being held for Mr and Mrs Bedborough as tenants in common in the ratio 5:95.

The order that should be made

75. The parties were agreed on the following propositions of law:

    i) Even where the conditions of s339 are satisfied, the court retains a residual discretion not to make an order (see *Re Paramount Airways Ltd* [1993] Ch 225)

    ii) Where the court makes an order it should, by s339(2) to the extent practicable and just to do so, seek to restore the position to what it would have been if Mr Bedborough had not entered into the transaction at an undervalue.

    iii) Section 342 of the Insolvency Act sets out orders that the court may make with the list of possible orders expressed to be without prejudice to the generality of s339(2).

    iv) The Applicants are "trustees of land" for the purposes of the Trusts of Land Appointment of Trustees Act 1986 ("TOLATA") and have standing to apply to the court for orders under s14 of TOLATA including an order requiring sale of the Property. Section 15 of TOLATA does not apply to such an application. Instead, the criteria to which the court should have regard in deciding whether to make an order under s14 of TOLATA are to be found in s335A of the Insolvency Act.

    v) In this case, the Applicants made their application under s14 of TOLATA more than one year after Mr Bedborough's estate vested in the Applicants. Therefore, by s335A of Insolvency Act 1986, the court must assume, unless the circumstances are exceptional, that the interests of Mr Bedborough's creditors outweigh all other considerations.

Whether the court should exercise its discretion not to make an order under s339

76. Ms Julian, on behalf of Mrs Bedborough, asked the court to exercise its discretion (referred to in *Re Paramount Airways*) to decline to make any order under s339(2) in reliance on the following propositions:

    i) The Bedboroughs considered themselves bound by the 2008 Agreement. Had they taken advice in 2008, it is likely that a trust deed would have been

drawn up at that time in which case the Applicants would have been out of time to bring an application under s339.

ii) Mrs Bedborough has, throughout, relied upon the 2008 Agreement and the 2012 Declaration to her detriment by, for example, remaining in the marriage. That ought to affect the conscience of the court.

iii) If Mrs Bedborough had started divorce proceedings in either 2008 or 2012, it is within the range of reasonable possible outcomes that she would have been awarded Mr Bedborough's half share of the Property in any event. On the authority of *Hill v Haines* [2007] EWCA Civ 1284, any such award would have been safe from s339.

77. For his part, Mr Bedborough argued that the amount he owes HMRC is materially less than stated in the proof. During the hearing, he produced stubs for cheques that he said HMRC had not properly credited to his account. However, as he fairly accepted in cross-examination, those cheque stubs could not themselves demonstrate even that payment had been made. Mr Bedborough also referred to other payments he said he had made but which had not been credited (for example the £19,000 that Mrs Bedborough paid to HMRC following the 2012). He did so by seeking to establish that the payments in question did not appear as credits in the particulars of debt accompanying HMRC's bankruptcy petition or in a statement of his VAT liabilities prepared in 2012. However, bearing in mind that this evidence was produced on the day of the hearing and Mr Bedborough had not previously argued that HMRC had overstated the extent of his liability to him, I am not able to accept that I should decline to make an order under s339 on the basis that Mr Bedborough's estate owes less than was thought. I am not satisfied that there is any overstatement of HMRC's debt: it seems to me entirely possible that the sums Mr Bedborough referred to have been allocated to other liabilities that were treated as discharged and so did not feature in HMRC's bankruptcy petition or register as outstanding in 2012.

78. I approach my discretion by noting that s339 addresses the competing interests that arise when a transfer at an undervalue is made at a "relevant time". In such a situation, the transferee (and anyone with whom the transferee has dealt in relation to the asset transferred) have an interest in the transfer being respected. The bankrupt may well have a similar interest if the asset transferred remains within a family unit or otherwise is held by someone whom the bankrupt trusts sufficiently to give continued access to it. By contrast, it is in the interests of the bankrupt's creditors for the transaction to be set aside so that there are more interests available to meet their claims. In s339, Parliament has legislated to provide for the interests of the creditors to prevail. Parliament has provided the court with a residual discretion to make a different order which results in the interests of the transferee prevailing. However, any exercise of that discretion needs to explain why the circumstances of the case should not lead to the usual result which Parliament has prescribed.

79. Mrs Bedborough's arguments set out at [76(i)] and [(iii)] are effectively complaints about bad luck in that if she, or her husband, had made different decisions the Applicants might not have been able to make a successful claim under s339. But if I declined to make an order under s339 for that reason, I would

simply be insulating Mrs Bedborough from the consequences of the decisions that were taken and visiting the associated consequences on creditors who would find that, despite Mr Bedborough having effected precisely the kind of transaction that is within the scope of s339, the assets available to his estate are not increased. Given that Parliament has legislated to provide that, in the ordinary case where s339 is engaged, the interests of creditors outweigh the interests of transferees, I do not consider that would be an appropriate exercise of discretion.

80. Ms Julian emphasised the fact that the 2012 Declaration was executed on 10 December 2012, only a few days less than two years before Mr Bedborough was made bankrupt and so just a few days into the two-year period specified in s341(1)(a). However, I do not consider that weighs greatly in the balance. Parliament has specified "bright line" deadlines in s341 which apply even to transactions implemented relatively close to those deadlines. Ms Julian made other criticisms of the Applicants' handling of this case: suggesting that they should never have made their failed application for disclosure of Mr Fairburn's file and should have been content for the trial to be in Slough County Court as originally planned. However, it is only with hindsight that it can now be seen that the disclosure application would be unsuccessful and that, since I have found that none of the consideration under the 2012 Declaration consisted of a forbearance to divorce and seek a property adjustment order, it would not be necessary to consider the extent to which there is a divergence between the authorities mentioned at [71] above. I do not consider that this hindsight provides a good reason why the Bedboroughs should be allowed to retain the benefit of the undervalue transfer at the expense of Mr Bedborough's creditors.

81. A similar point arises in relation to the point at [76(ii)]. I do not accept, for reasons that I have explained, that Mrs Bedborough gave consideration for the transfer of the interest in the Property consisting of a forbearance to divorce or seek ancillary relief. I am prepared to accept that Mr Bedborough's agreement in principle in 2008 to transfer the Property, and his execution of the 2012 Declaration in 2012 enabled husband and wife to get over difficult periods in their marriage. But, given the way in which Parliament has chosen to balance the competing interests of creditors and transferees of property to which s339 applies, I see no reason why that should lead me to exercise a discretion to make no order under s339.

82. It was suggested to me that, even if the Applicants had recourse to a 50% interest in the Property, Mr Bedborough's estate might not yield sufficient funds, after the expenses of the bankruptcy are paid, to enable the debt to HMRC to be paid. No evidence, however, was given for that proposition. In any event, I consider that Mr Bedborough's creditors nevertheless have a legitimate interest in orders being made under s339 where the conditions of that section are satisfied (see, for example the statements of Lawrence Collins J in *Dean v Stout* [2005] EWHC 3315 (Ch) made in the context of the slightly different, though analogous, discretion given to the court under s335A of the Insolvency Act).

83. I therefore conclude that some form of order under s339(2) is appropriate and the next logical question is what form that order should take.

Whether the order should reverse the transfer at an undervalue and, if so, how

84. Ms Julian submitted that the appropriate order was for Mrs Bedborough to be required to make good the extent of any undervalue present in 2012, by paying an amount into Mr Bedborough's bankrupt estate, rather than for the Applicants to be credited with a further 45% interest in the Property. She made that submission in the context of arguments that the undervalue in 2012 was not that significant, but in principle the same argument could be made in the context of a significant undervalue. Importantly, the argument is that Mrs Bedborough should only have to make good the amount of the undervalue based on 2012 values to prevent the Applicants from obtaining a "windfall" benefit by reference to Property's increase in value since 2012.

85. In considering the nature of order to make I will be guided by the words of Parker LJ in *Ramlort Ltd v Reid*:

> *"in deciding what is the appropriate remedy where there has been a transaction at an undervalue the court does not start with a presumption in favour of monetary compensation as opposed to setting the transaction aside and revesting the asset transferred. Indeed, in my judgment, in considering what is the appropriate remedy on the facts of any particular case the court should not start from any a priori position. Each case will turn on its particular facts, and the task of the court in every case is to fashion the most appropriate remedy with a view to restoring, so far as it is practicable and just to do so, the position as it 'would have been if [the debtor] had not entered into the transaction'. In some cases that remedy may take the form of reversing the transaction; in others it may not. In some cases it may take the form of an order for monetary compensation; in others it may not."*

86. I do not accept that reversing the transaction would confer a "windfall" benefit on the Applicants. Had Mr Bedborough not effected the transaction at an undervalue, the current value of his interest in the Property (including any increase since he first acquired it) would be at the disposal of the Applicants. Accordingly, requiring Mrs Bedborough to make good the undervalue by reference to a snapshot of the Property's value in 2012, rather than by reference to its current value, would not, contrary to the requirements of s339(2)(c) of the Insolvency Act, restore the position to what it would have been if the 2012 Declaration had not been effected

87. I therefore consider that it is both practicable and just to make an order reversing the effect of the 2012 Declaration. When doing so, I should, to the extent practicable, seek to reverse all of its effects. Therefore, the parties should be put in a similar position as if (i) no transfer of an interest in the Property took place in the 2012 Declaration and (ii) Mrs Bedborough gave none of the consideration that she did in connection with the 2012 Declaration. If Mrs Bedborough had proposed making good the undervalue by reference to the current value of the Property, I would have considered that. However, I do not know the current value of the Property (the most recent valuation being as at May 2020). Nor do I have any evidence as to whether Mrs Bedborough would be able to make the necessary

payment within any reasonable timescale. I therefore consider that the most appropriate order is one setting aside the 2012 Declaration altogether. That involves both (i) reversing the effect of the transfer of the interest in the Property and (ii) reversing the effect of Mrs Bedborough's giving of consideration.

88. Reversing the first effect is relatively straightforward and is achieved by an order to the effect that Mrs Bedborough and the Applicants hold the Property on trust for themselves as tenants in common in the ratio 50:50 (the position that applied prior to the 2012 Declaration, but recognising that Mr and Mrs Bedborough's joint tenancy was severed by Mr Bedborough's bankruptcy).

89. As regards reversing the first element of the consideration that Mrs Bedborough gave, the payment of £20,000, I consider that this can be achieved by directing that Mrs Bedborough is to receive a payment of £20,000 (plus interest at an appropriate rate from December 2012 to the date of payment) out of the proceeds of realisation of the Property after the expenses of the bankruptcy, but before any distribution to HMRC[5].

90. The second constituent of the consideration that Mrs Bedborough gave under the 2012 Declaration consisted in releasing her rights to seek an equitable account in relation to the £50,000 she spent on improvements to the Property. Reversing the 2012 Declaration means that she should be treated as retaining the right to claim such an account and indeed Mrs Bedborough has claimed such an equitable account in these proceedings.

91. The parties agreed that the concept of an "equitable account" involves the court determining, after it has determined the respective interests of the parties in a given property, the extent to which those interests impose on one or both party an equitable obligation to account to the other in respect of certain payments made in relation to the property during the ownership period. This question is fact-sensitive and depends on ascertaining the common intention of the parties.

92. Mrs Bedborough has argued that her right to an equitable account extended beyond the £50,000 she spent on improvements and repairs and included the £20,000 she paid to HMRC and her husband in 2012. I reject that argument as the £20,000 was not spent to any extent on the Property. In any event, I have already explained how the £20,000 should be taken into account when reversing the effect of the 2012 Declaration.

93. In *Wilcox v Tait* [2006] EWCA Civ 1867, the Court of Appeal cautioned against performing an equitable account prior to sale of the property without a good reason. However, I took the parties to be agreed that in this case, it was appropriate for any equitable account to be determined now. Certainly neither party suggested that the issue should be deferred until after any sale of the Property and neither suggested that the amount of sale proceeds received would have any bearing on the issue. The matters on which they differed concerned the existence (or otherwise) of a common intention that Mr Bedborough should

[5] I do not consider that it would be appropriate for Mrs Bedborough to receive this £20,000 in priority to, or pari passu with, the costs of the bankruptcy as, whether or not any transaction at an undervalue was effected, the expenses of the bankruptcy would be payable first.

account to Mrs Bedborough for any sums spent on improving the Property. That is a matter which can be determined now based on the evidence that they have given in these proceedings.

94. Following *Wilcox v Tait*, I am entitled to infer that, while they lived together, there was no common intention that either should have to account to the other for sums spent on the Property while living together, for their joint benefit. I am satisfied that the improvements to the Property were indeed for the Bedboroughs' joint benefit. I will, therefore, make the inference. However, recognising that this is an inference only, I will test it against the evidence that Mr and Mrs Bedborough gave.

95. I have made findings as to the nature of the Bedboroughs' marriage in 2002 when the expenditure was incurred. As I have noted, the arrangement at this time involved both parties contributing their different assets and resources to the marriage. I have also explained why I consider that, by referring to the £50,000 being "repaid", Mr and Mrs Bedborough were really discussing the priorities in which assets of the marriage would be spent. Initially the £50,000 would be spent on improvements to the Property and, in telling his wife that he would "repay" this amount, Mr Bedborough was in reality giving an assurance that the Business would generate sufficient profit to enable Mrs Bedborough's project, of making investments for the children, to be pursued as well. I acknowledge that Mrs Bedborough would, in 2002, have preferred to spend £50,000 on making investments for children. But ultimately she was persuaded to spend that money on making improvements to a jointly owned asset of the marriage. I have therefore concluded that the discussions between Mr and Mrs Bedborough at the time were perfectly consistent with the inference referred to in *Wilcox v Tait*.

96. My conclusion, therefore, is that Mrs Bedborough is not entitled to any equitable account in relation to the £50,000.

Questions 13 to 16: Whether, and if so on what terms, there should be an order for sale of the Property

97. That therefore simply leaves the question of whether I should direct that the Property is sold and, if so, within what timescale. That in turn raises the question of whether there are "exceptional circumstances" set out in s335A of the Insolvency Act which mean that the interests of creditors should not be taken as outweighing other considerations.

98. In support of her argument that there were "exceptional circumstances", Mrs Bedborough referred to the factors, set out at [76], on which she relied in the context of her argument that there should be no order under 339. I have already explained why, in my judgment, those factors would not justify recalibrating the balance that Parliament has struck in s339 between the interests of transferees of property and the interests of creditors. For similar reasons, I do not consider those factors amount to "exceptional circumstances" for the purposes of s335A. Nor do I consider that Mr Bedborough's arguments that he owed HMRC less than they are claiming is an "exceptional circumstances".

99. In his submissions, Mr Bedborough submitted that, if he had to move out of the Property, the business (now run by Bedborough Limited) would be adversely affected. The Property is used to store windows used in connection with that business and he doubted that would be practicable if the Bedboroughs had to move to a smaller property. Moreover, much of the business is local to the area where the Bedboroughs live so there would be more travel costs and travel time if they had to move out of the area and return to it for work.

100. Mrs Bedborough put forward the following issues in support of her arguments on "exceptional circumstances":

    i) She has been diagnosed with polymyalgia which means that she experiences pain when lifting her arms or climbing stairs.

    ii) Two children live at the Property who will not reach the age of 18 until the summer of 2022. Their school is close by, they are currently able to walk to school and it is unlikely that this would still be possible if the family moved.

    iii) The family is unlikely to be able to afford a similar size property and their living arrangements are cramped as it is with all four children living at home.

101. By analogy with the reasoning in *Turner v Avis* [2008] BPIR 1113, I have concluded that neither the issues associated with the business nor those with the Bedboroughs' children, their schooling, and their cramped living arrangements amount to "exceptional" circumstances. All are simply aspects of the fact that, if the Property is sold, the Bedboroughs might not be able to afford to live in a comparable home in the same neighbourhood. While that of course engenders sympathy, it will frequently be the case whenever a property is sold following a bankruptcy of one of its co-owners.

102. Nor do I consider that Mrs Bedborough's illness amounts to an "exceptional circumstance". I concluded that she would suffer from her symptoms wherever she lived. There is no suggestion, for example, that the Property has been specially adapted because of her illness. Therefore, while I will take her illness into account, together with all other factors, in deciding the timescale within which to order a sale, I do not consider it is an "exceptional circumstance" that causes the interests of creditors to cease to outweigh other considerations. The creditors' interests, which predominate, require the Property to be sold at some point and that is the case even if (as has been suggested but not proved) the proceeds of realisation of Mr Bedborough's estate will be swallowed up by the costs of the bankruptcy.

103. I will, therefore, make an order for possession and sale of the Property. However, that does not mean that the Bedboroughs and their children have no interests. They should be given time to find alternative accommodation. The time I give them should reflect the fact Mrs Bedborough's medical condition might mean that it takes longer than it would otherwise to view properties and that there might be fewer properties suitable for her than there would be for people without her condition. Also, my order should reflect the fact that the country remains in a

"lockdown" occasioned by the COVID-19 epidemic with no current indication as to when that lockdown will end.

104. During the hearing, neither party was in a position to make detailed submissions as to whether it would even be lawful for the Bedboroughs and their children to view alternative properties at the moment, whether they could all do so at the same time, or the extent to which the COVID restrictions mean that it will take longer for them to find a new house than it would previously. I will hear further argument on these issues before I make my final order. However, I reject Mrs Bedborough's submission that any order for sale of the property should not take effect until 2022 when her two youngest children turn 18. In *Grant v Baker* [2016] BPIR 1409 Henderson J made it clear that, unless there are truly exceptional circumstances, an order for sale of a property in these circumstances should be made in a matter of months. I do not consider that the mere fact that children live in the Property of itself justifies such a lengthy deferral of an order for possession. I have already explained why the fact that the Bedboroughs' children might not be able to continue to walk to school when they move house is not an "exceptional circumstance".

105. Mrs Bedborough argued that a deferral of the order for possession is appropriate given that the Applicants waited until almost the last day of the period within which they could seek an order for possession and sale of the Property. I reject that argument. The Applicants' choice not to seek possession and sale earlier means that the Bedboroughs have been able to remain in the Property longer than might otherwise have been the case. I do not consider that this means that the Applicants should be compelled to submit to a further delay. I will, therefore, order possession and sale of the Property, to take effect within the next few months. I will hear from counsel as to the precise terms of the appropriate order, including the date by which the Bedboroughs are to give up possession, and any submissions they wish to make on costs.

APPENDIX – THE PARTIES' AGREED LIST OF ISSUES[6]

The 2008 Agreement

1. Did Mr and Mrs Bedborough enter into the 2008 Agreement?

2. If so:

    i) What were the terms of the 2008 Agreement?

    ii) What, if any, consideration was provided by Mr Bedborough and/or Mrs Bedborough?

    iii) What is/was the effect of the 2008 Agreement on the beneficial ownership of the Property?

3. If the 2008 Agreement was entered into, and is enforceable as a matter of law, is it liable to be set aside pursuant to the avoidance provisions of the Insolvency Act 1986, in particular s.423?

The 2012 Declaration:

4. Was the 2012 Declaration entered into at a relevant time, as defined by section 341 of the Insolvency Act 1986?

5. What, if any, consideration was provided by Mr Bedborough?

6. What, if any, consideration was provided by the 2nd Respondent?

7. Was the value of the consideration provided by the 2nd Respondent (if any), in money or money's worth, significantly less than the value, in money or money's worth, of the consideration provided by Mr Bedborough (if any)?

8. As a matter of law, is a promise to forbear from pursuing a divorce and consequential relief capable of amounting to partial consideration for the purposes of s.339(3)(c) and s.423(1)(c) Insolvency Act 1986?

9. Is the 2012 Declaration liable to be set aside as a transaction at an undervalue, pursuant to section 339 of the Insolvency Act 1986?

10. Did Mr Bedborough enter into the 2012 Declaration for the purpose of:

    i) Putting assets beyond the reach of a person who is making, or may at some time make, a claim against him; or

    ii) Otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make?

[6] I have conformed the definitions the parties used to those appearing in the main body of the judgment.

11. Is the 2012 Declaration liable to be set aside as a transaction defrauding creditors, pursuant to section 423 of the Insolvency Act 1986?

12. What is/was the effect of the 2012 Declaration on the beneficial ownership of the Property?

Sale of the Property

13. Should there be an order for possession and sale in respect of the Property?

14. If so, on what terms?

15. If so, to whom and what proportions should the proceeds of sale be paid?

16. Are there any deductions to be made from any of the receiving party's net proceeds of sale?