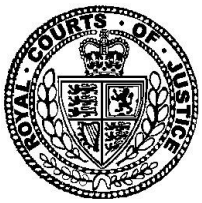

Neutral Citation Number: [2022] EWHC 2083 (Ch) **Case No: BR-2014-000296**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN BANKRUPTCY

IN THE MATTER OF JOHN WOTHERSPOON (IN BANKRUPTCY) IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building, Fetter Lane, London

Date: 16/08/2022

Before :

INSOLVENCY AND COMPANIES COURT JUDGE JONES

- -

Between :

LLOYD HINTON
(as Trustee in Bankruptcy of JOHN WOTHERSPOON)

Applicant

and

GILLIAN WOTHERSPOON

Respondent

- -
- -

Ms ROWENA PAGE (instructed by **Charles Russell Speechlys**) for the **Applicant**
Mr HUGH MIALL (instructed by **Cadence Solicitors LLP**) for the **Respondent**

Hearing dates: 26, 27 May and 19 July 2022

- -

Approved Judgment

This Judgment was handed down remotely by circulation to the parties' representatives by email and released through National Archives"
I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....CHJ 16/8/22.....

I.C.C. JUDGE JONES

I.C.C. Judge Jones:

A) Introduction to the Claim

1. This case starts with the question: did Mr Wotherspoon hold a beneficial interest in the matrimonial home, on the banks of the River Thames in Twickenham ("Strand House"), when it was sold on 29 November 2013 by Mrs Wotherspoon as the sole registered owner?

2. That this apparently simple question hides a number of complex issues of fact and law is demonstrated by the fact that Mr Wotherspoon's trustee in bankruptcy ("Mr Hinton") advances alternative claims concerning the release by Mr Wotherspoon of a restriction at the time of sale and in the further alternative in respect of the earlier transfer of Mr Wotherspoon's interest in Strand House to her on 12 June 2008. Mr Wotherspoon was made bankrupt on 3 June 2014 with liabilities in excess of £1.96m.

3. Mr Hinton's claim may be summarised as follows:

    a) In September 1992 Mr Wotherspoon purchased Strand House in his sole name before his marriage to Mrs Wotherspoon in July 1993 from which date she moved there and it became the matrimonial home.

    b) On 26 April 2001 the legal title of Strand House was transferred by Mr Wotherspoon into the joint names of himself and his wife. In addition, a Form 62 restriction ("the Original Restriction") was registered against the title at Her Majesty's Land Registry. This form is usually used when parties hold the beneficial interest of the property as tenants in common rather than as joint tenants ,when it would not be needed.

    c) On 12 June 2008 the unencumbered, legal title of Strand House was transferred by Mr and Mrs Wotherspoon as joint owners into the sole name of Mrs Wotherspoon. Two documents were executed for that purpose: (i) A TR1 transfer form, which did not refer to the beneficial ownership; and (ii) a side agreement ("the Side Agreement") for a restriction that: *'No disposition (including a legal charge) of the registered estate by the Proprietor of the registered estate is to be registered without a written consent signed by John Wotherspoon or his conveyancer'* ("the Restriction"). The Original Restriction was not removed.

    d) From about February 2009 Mr Wotherspoon failed to pay his tax liabilities and subsequently breached a time to pay agreement he had entered into with HMRC on 24 March 2009.

    e) On 14 November 2013 Mr Wotherspoon was served with a statutory demand by HMRC for a sum of £1,846,587.45 of which £337,492.26 dated back to the 2009/10 tax year.

f) On 29 November 2013, whilst (as alleged) Mr Wotherspoon remained an equal beneficial owner, Strand House was sold for £2 million and the net proceeds used to purchase a property in Leatherhead ("Crabapple Court") in

Mrs Wotherspoon's sole name and without an equivalent of the Restriction. This was a sale at an undervalue, the market value being in the region of £2.2 million.

g) On 5 February 2014 HMRC presented a bankruptcy petition and Mr Wotherspoon was declared bankrupt on 3 June 2014. Creditors' claims in the bankruptcy total £1,965,161.69, of which HMRC claims £1,932,420.48.

h) In the circumstances above, Mr Wotherspoon remained a beneficial owner of Strand House at the date of its sale on 29 November 2013. As a result: (i) he relinquished his interest to Mrs Wotherspoon on sale for no consideration, which was a transfer at an undervalue to which ***section 339 of the Insolvency Act 1986*** ("***the IA***") applies; or (ii) Mrs Wotherspoon held Mr Wotherspoon's overreached share of the net proceeds on trust for him and must account for those proceeds to the bankruptcy estate. Furthermore, the sale itself was at an undervalue.

i) Alternatively, Mrs Wotherspoon became the sole legal and beneficial owner of Strand House on 12 June 2008. If so, either (i) it is to be inferred that Mr Wotherspoon entered into the 2008 transfer with an aim of putting Strand House beyond the reach of creditors and ***section 423 IA*** applies; or (ii) Mr Wotherspoon released the Restriction for no consideration when Strand House was subsequently sold in 2013 and ***section 339 IA*** applies.

B) The Defence

4. The essence of Mrs Wotherspoon's Points of Defence, settled by counsel, is that the June 2008 transfer into her sole name gave effect to her husband's pre-marriage promise that Strand House would become hers. The following is pleaded at paragraph 20(a):

> *"While the Respondent and Mr Wotherspoon were engaged to be married, they viewed Strand House together, and agreed that it would be their matrimonial home. It was purchased in Mr Wotherspoon's sole name prior to their marriage, but he promised from the outset that it would be the Respondent's house. Mr Wotherspoon lived alone in Strand House for a number of months before he and the Respondent were married, and thereafter the Respondent lived there with him. It took a number of years for Mr Wotherspoon entirely to fulfil his promise to give Strand House to the Respondent, and Mr Wotherspoon's ongoing failure to fulfil this promise and the Respondent's response to that, was a source of emotional tension in their marriage."*

5. That promise was in part given effect when the legal title was first transferred into joint names in April 2001. At that stage Mr Wotherspoon did not *"feel comfortable parting with his entire interest"*. The promise was fulfilled in 2008 in the context of his health problems, Mrs Wotherspoon's concerns about his health and with the intention *"to ensure his family's immediate financial security in the event of his death"*. It occurred at a time when her will provided that Strand House would pass to him should she predecease him.

6. From 12 June 2008 Mrs Wotherspoon became the sole legal and beneficial owner in accordance with their intention. The Restriction was entered into because Mr Wotherspoon no longer had a beneficial interest. It provided a degree of protection from the possibility of the property being sold against his will whilst he was still alive, married to Mrs Wotherspoon and resided there.

7. In those circumstances no claim arises from the 2013 sale. The transfer in 2008 cannot be challenged under ***section 339 IA*** because it is time barred; not being within the period of five years prior to presentation of the petition. No claim arises under ***section 423 IA*** because the transfer was not entered into with the purpose of putting assets beyond the reach of Mr Wotherspoon's creditors or otherwise of prejudicing their interests. It had nothing to do with Mr Wotherspoon's financial position and he was not facing mounting financial pressure or aware of the developing global crisis upon which Mr Hinton also relies. There can be no challenge to the release of the Restriction when Strand House was sold. It was not a transaction for the purposes of ***section 339 IA***, it had no value and no benefit was received.

C) The Witnesses

C1) The Trustee

8. Mr Hilton has produced the evidence material to this claim which has come to his knowledge pursuant to the performance of his statutory duties. He having no relevant first-hand knowledge, there was little to be addressed in cross-examination and I need at this stage do no more than observe that I consider he gave his evidence in accordance with his duties to the Court.

C2) The Trustee's Expert

9. Mrs McPartland provided valuation evidence on behalf of Mr Hinton in accordance with the RICS Red Book. Whilst I did think that as an expert witness she should have been prepared to address the possibility that her opinion might be challengeable, I have no doubt that she sought to provide her genuine opinion exercising the skill and knowledge of her expertise in accordance with her instructions and that Red Book. What she would not do, however, is consider the possibility that she should have looked outside a Red Book valuation. She should have done.

10. I cannot accept that the market value for Strand House in 2013 is other than the value evidenced by its sale price to an independent third party on the open market. Mrs McPartland's opinion probably could not be faulted within the context of the square footage approach she adopted. However, the reality is that Strand House is a unique property, it was marketed by reputable local estate agents and in practice the market value depended upon what the market would pay. Mrs McPartland accepted (or at least did not dispute) that local estate agents would probably not have marketed Strand House on the basis of square footage and would have sought the price they thought potential purchasers might pay. That no doubt was the basis for an initial

market price of £2.95 million, its reduction to £2.5 million and then a final selling price of £2 million. This was a property the agents thought might achieve a very high price taking into consideration its location and special garden, found it would not and ended up only being able to find a buyer for £2 million. No-one suggests that price should not have been accepted at the time or that there was any connection between the purchaser and Mr and Mrs Wotherspoon. I find that to be the true market value and that her evidence was of no assistance.

11. The valuation for 2008 on the same Red Book approach is also subject to the same flaws. I cannot accept her valuation evidence for the 2008 transfer in the absence of any consideration by her of the actual state of the Twickenham market at the time.

12. As to valuation of the Restriction, Mrs McPartland's valuation is based upon the proposition that the rights it conferred placed Mr Wotherspoon in the same position as a sole owner and, therefore, its value should be the same as the value of the freehold title. That is plainly incorrect.

13. Even assuming her approach was correct, it was only a power to object and Mrs Wotherspoon would also have had an equivalent power as freehold owner. In those circumstances Mr Wotherspoon's right (applying her approach) would be valued at 50% of the freehold value at best. However, that too is not the correct approach. The value of the right to prevent a disposition (assuming that is what it is – to be addressed below) would be the price to be paid to obtain its release. In other words the ransom value which Mr Wotherspoon did not seek, as the case is put. Mrs McPartland accepted that she provided no such valuation evidence. Her evidence was of no assistance.

C3) Mrs Wotherspoon

14. Mrs Wotherspoon's short evidence in chief can be summarised as follows:

    a) Strand House was purchased on their engagement *"which is when he proposed and promised to purchase the house for me so I would have a home and means for [her son] who [Mr Wotherspoon] could see would need support throughout his life"*. He promised to transfer the property into her sole name without a mortgage once they were married and once he had sold his previous home.

    b) It was a matter of *"considerable … friction"* between her and her husband that Mr Wotherspoon had not transferred Strand House to her even after 8/9 years of marriage. This she describes as a *"failure to fulfil his contractual obligation"* He had only transferred half the beneficial interest to her in 2001 with the mortgage not yet redeemed.

    c) Mr Wotherspoon's health problems caused her considerable concern *"as much of [his] wealth was tied up in his property concerns, primarily the Wickforce Trust, so if anything happened to him [she] would not be in a position to provide for [her son] and herself for any length of time"*. She continued to raise the promise and this put strain on the marriage. *"Eventually in 2007 [he]*

    was finally able to fulfil his obligation to transfer [Strand House] 100% into my sole name".

15. During cross-examination Mrs Wotherspoon explained that she had left school at 18, became a secretary and then moved into the rental property business. She developed her own business and expanded into real property sales. It was apparent that she was an experienced business person in a field which meant she generally understood the transfer, the Side Agreement and other property related documents connected to this claim, albeit not as a lawyer.

16. Unfortunately I found her to be a very unreliable witness at trial. This does not mean I should reject all her evidence but I should treat it with great caution. A starting point of concern was her tendency to suggest that had she known the particular question would be asked, she would have provided more documentary or witness evidence. For example, more medical evidence when it was suggested that the GPs letter did not support her recollection of the timeline for Mr Wotherspoon's ill health. As Ms Page observed on behalf of Mr Hinton, that also raises concerns about her disclosure, which was sparse.

17. I also find that it was also wholly unrealistic for Mrs Wotherspoon to portray herself as a litigant who could reasonably be expected to be unprepared both at trial and in respect of its preparation. Not only had there been considerable pre-claim correspondence from Mr Hinton/his solicitors and statements of case as well as evidence but she had been legally represented throughout.

18. There were in addition a number of examples of her evidence misleading the court until she finally corrected herself under cross-examination from Ms Page. For example, she clearly asserted that she knew Mr Wotherspoon had £1 million in the bank around the time of the 2008 transfer only for her to admit under crossexamination that she did not know that at the time but had ascertained it subsequently from a letter, which is included in the trial bundle. She eventually conceded that she had no idea how much he had held in his bank account in 2008 despite the fact that she had clearly led the court to believe that she had had such knowledge. Another example was the fact that when she was shown the Side Agreement, her immediate approach was to emphasise that she did not take legal advice and her evidence left it unclear as to whether she had even read it. It was only on being pressed by Ms Page that she accepted she had read and understood it.

19. A further example is her misleading evidence concerning an email showing Mr Wotherspoon seeking to raise a mortgage on Strand House after the 2008 transfer. Mrs Wotherspoon attributed this to the money she needed for a conservatory she wanted to build and said she had delegated to her husband the task to achieve its building, so that he made the planning application in his name. She also could not otherwise explain why a charge had been registered in favour of Barclays Bank plc whilst she was the sole owner. Her evidence being that she vaguely remembered the charge applied to the conservatory for which she required funds and that this had resulted from discussions with Mr Wotherspoon.

20. The misleading nature of that evidence only became apparent when she informed the court during her re-examination that the conservatory had not been built. In addition,

    that the charge must have related to borrowing for renovation work for which she was responsible and which she had decided needed to be carried out to improve and, as a result, profit from the value of Strand House. That was her idea.

21. It is in this overall context of unreliability that a statement by her in the witness box that the promise to transfer the property and the transfer itself was necessary because of concerns that Mr Wotherspoon's two daughters, who did not take to her (at least at the time of marriage), might challenge a will, must be considered. This had never been mentioned before. Whilst that may well be something genuinely in her mind now, rather than creative thinking in the witness box, it cannot possibly be accepted as reliable evidence without a good explanation for it never having previously been raised. No explanation was offered.

22. It is also in this context of unreliability that I have concerns that her fundamental statements to the effect that the 2008 transfer occurred to fulfil the promise on engagement and to protect her son sounded too much like a mantra in the witness box. That could, of course, be because it is true but it adds a small weight to the reasons leading me to the conclusion that her evidence must be treated with extreme caution in the absence of acceptable, corroborative evidence.

C4) Mr Wotherspoon

23. Mr Wotherspoon's witness statement may be summarised as follows:

a) The background to his promise to Mrs Wotherspoon to give her sole ownership of the matrimonial home at Strand House was her requirement to ensure that she and her son, Hugo, would have security within the context of her having *"been badly treated in her former marriage"* and his learning difficulties.

b) Strand House was to be their first matrimonial home, they having had separate properties before its purchase. The promise was given before Strand House was purchased. The promise of sole ownership was a requirement or understanding needed by her for her to be prepared to leave her existing property in Chelsea. Mr Wotherspoon purchased Strand House in his sole name to obtain a mortgage and started living there with his daughter before Mrs Wotherspoon moved from Chelsea. It then became the matrimonial home.

c) The decision to transfer half the ownership in 2001 was made because he could not then redeem the mortgage and they had, as a result, decided that Mrs Wotherspoon should have half the house until such time as he was able to redeem. He was also reluctant to transfer the entirety because he *"was not entirely comfortable with what it could mean … so [he] probably put it off for longer than [he] should have"*.

d) His health problems were identified in 2004. They worsened to include the potential for back surgery in 2007. That *terrified [him] as [he] was scared [he] would not wake up or would be left in a wheelchair and [he] was concerned for [Mrs Wotherspoon's] welfare in the event [he] died as it could take years to deal with [his] then estate"*.

e) Mrs Wotherspoon *"continued to press"* for Strand House to be transferred into her sole name. He was first in a position to do that in 2007 when the mortgage could be redeemed and instructed solicitors. They advised the Restriction to ensure it could not be sold or mortgaged against his will during their marriage and whilst he was alive. Ultimately he had heart bypass surgery in 2009 and back surgery in 2010.

f) His witness statement also addresses the financial position but I will deal with that topic below insofar as necessary when considering the evidence and finding of facts .

24. As a witness Mr Wotherspoon, although in later years, and having to address matters which occurred many years ago, came across as a man of quick witted intelligence, a shrewd former business man with a pretty good memory, certainly on the ball and reasonably loquacious. Evidently an experienced property dealer, it is clear that he was an astute business man.

25. He maintained his evidence that the 2008 transfer took place because of the original promise to his wife to be but in a context of him being able to perform that promise because the mortgage had been redeemed and also of having serious health concerns meaning that he should do so then in case he should not survive surgery. He explained he had no concerns about his financial position whether then or in the future, whether with regard to the 2007/2008 financial crisis or otherwise.

26. I will have to decide whether I can believe his evidence that he promised Strand House to his wife to be rather than agreeing they would share this property together equally as their matrimonial home. Obviously, that decision cannot be based solely upon his evidence but must take into consideration the evidence of Mrs Wotherspoon and by viewing their evidence in the context of the subsequent events and documentation. However, an initial observation is that I do not find the proposition sits well with his character. It would be reasonable to expect shared ownership but not for him to be willing to cede all his rights in the matrimonial property. It is also quite difficult to picture the circumstances in which such an offer would arise and he has not provided assistance for that in his evidence, although it is not to be forgotten that it occurred a long time ago. These are all matters to be borne in mind when reviewing the evidence as a whole and reaching findings of fact.

D) The Evidence and Findings of Fact

27. Mr Wotherspoon purchased Strand House in his sole name in September 1992 whilst engaged to Mrs Wotherspoon. At the time of purchase she was living in her property in Chelsea with her six year old son. Mrs Wotherspoon said that it was purchased on their engagement on the basis that it would become their matrimonial home. Mr and Mrs Wotherspoon state in their evidence in chief and maintained vehemently during their cross-examinations that they had agreed at the time of their engagement that Strand House would become hers upon their marriage. The reasons given for this agreement or intention were their relationship and the need for Mrs Wotherspoon to ensure her son, who has learning difficulties, will always be looked after. It was said that it was an agreement reached in circumstances of Mrs Wotherspoon having had a

bad experience from her previous marriage. Mrs Wotherspoon describes it within her witness statement in terms that Mr Wotherspoon purchased Strand House as *"a wedding gift on our forthcoming marriage"*.

28. They married on 16 July 1993 and Strand House became the matrimonial home, her son of course living with them. Mr Wotherspoon explained that the property was not transferred to his wife because of an existing mortgage and both agreed that this caused

considerable friction between them. Despite Mr Wotherspoon's evidence that he had agreed to the transfer as a wedding gift, he also explained the delay on the basis that he was *"reluctant to transfer the entirety"* to his wife and *"was not entirely comfortable with what it could mean for me so [he] probably put it off for longer than [he] should have"*.

29. This does not fit well with a binding commitment based upon their relationship and need to look after the son. It should be observed that the evidence, whilst not inherently implausible, had a contrived feeling when each sought to explain in court under cross-examination from Ms Page why an agreement in 1993 was not fulfilled until 2008 but there had been an intervening transfer of half the beneficial interest in the meantime.

30. On 26 April 2001 the legal title of Strand House was transferred by Mr Wotherspoon into their joint names. In addition, the Original Restriction was registered against the title at Her Majesty's Land Registry. This form is usually used when parties hold the beneficial interest of the property as tenants in common rather than as joint tenants when it would not be needed.

31. On 30 October 2007 Mr Wotherspoon discussed with his solicitors, Boodle Hatfield, his intention for the transfer of his beneficial interest in Strand House to Mrs Wotherspoon. There is no record of that conversation and the Boodle Hatfield attendance sheet has not been disclosed. However, Mr Wotherspoon wrote the same day to explain that he had purchased the property some fifteen years before, gave his wife a half share some ten years previously and now wished to convey the remaining half share to her. Reference was made to the value, around £2.5 million, and to an outstanding mortgage owed to Barclays Bank plc of £284,000.

32. Other than that desire, there was no explanation for the proposed transaction. Although there was brief reference to the original purchase, the 2001 Transfer and his current wish, there was no mention or suggestion that it was attributable to a promise given to Mrs Wotherspoon at the time they became engaged or married. It is also clear, potentially contrary to the promise, that Mr Wotherspoon now wanted to retain some control over Strand House. His expressed concern was to ensure a charge could not be created without his permission. This is not further explained in the letter.

33. By letter dated 13 November 2007 Boodle Hatfield identified the *"simplest and most cost effective way of achieving [Mr Wotherspoon's] aims"* based upon the telephone conversation and letter. The mortgage would be redeemed and title would be transferred from joint names into Mrs Wotherspoon's sole name by execution of a Land Registry form. To enable Mr Wotherspoon to *"maintain an element of control"* over the property, the transfer would contain a provision preventing future disposition without his consent and a restriction would be placed on the title to protect that right

or power. Boodle Hatfield sensibly proposed that the supplemental agreement should contain *"your intentions in respect of the Property so it is clear when (if at all) the restriction will be released and also details of what circumstances would apply where you might wish to withhold your consent to a charge or to your wife selling the Property"*.

34. In or around December 2007 Mr Wotherspoon discharged the outstanding mortgage on Strand House in full, leaving it unencumbered.

35. The Side Agreement dated 12 June 2008 provided that Mr and Mrs Wotherspoon in consideration for the transfer of Mr Wotherspoon's half interest had agreed the Restriction which would cease upon Mr Wotherspoon's death in the following terms:

> *"No disposition (including a legal charge) of the registered estate by the Proprietor of the registered estate is to be registered without a written consent signed by John Wotherspoon or his conveyancer".*

36. The TR1 of even date transferred Strand House for entry in Her Majesty's Land Registry with full title guarantee from Mr and Mrs Wotherspoon to Mrs Wotherspoon with no consideration being paid and with an application for registration of the Restriction. It was registered on 19 June 2008 subject to the Restriction. The Old Restriction remained registered but this appears to be an error rather than evidence of an intention for Mr Wotherspoon to retain a beneficial interest. It was not dwelt on for the purposes of the trial and presumably resulted from anticipation that there would be automatic cancellation under ***the Land Registration Rules 2003, Rule 99*** rather than that an application would be required, as in fact appears to be the case.

37. It is in any event apparent from this contemporaneous documentation, whatever the motive or purpose, that Mr Wotherspoon's intention as implemented by Boodle Hatfield and as executed by him was to transfer his legal and beneficial interest in Strand House to Mrs Wotherspoon. There is no case brought of "sham" or fraud. There is no room in the evidence for a suggestion that this transfer was intended to leave the position as it had been, namely, that Mr and Mrs Wotherspoon held Strand House on trust for themselves.

38. As to the Restriction, *Ruoff & Roper: Registered Conveyancing* explains at paragraph 44.001 that restrictions are entered over properties either because they are required under legislation to be or for the purpose of (i) preventing invalidity or unlawfulness in relation to dispositions; (ii) ensuring that interests that are capable of being overreached are overreached; or (iii) protecting a right or claim in relation to a registered estate or charge.

39. In this case the contemporaneous documentation also establishes that the Restriction was not intended to create any proprietary interest. It was a mechanism to ensure that Mr Wotherspoon could control its future disposition(s) by preventing any registration against the title without his consent. It cannot be construed in the light of the contemporaneous correspondence as protection for a retained or new beneficial interest in Strand House.

40. There is also subsequent evidence leading to the proposition that Mr and Mrs Wotherspoon continued to treat Strand House as their matrimonial home; as an asset available for their joint benefit. However, that cannot overcome the contemporaneous findings based upon intention, and whilst there is no reason that the effect of the 2008 Transfer could not be altered by common intention, that is not the case alleged.

41. There is cause for considering with doubt whether this transaction accords with the proposition that it was intended to fulfil a promise originally made to Mr Wotherspoon on their engagement. However, that would only affect the ***section 423 IA*** issue of purpose not the legal effect of what occurred in fact in accordance with intention. It does not fall to be considered at this stage of the judgment.

42. I find as a fact, therefore, that as at 12 June 2008 Mr Wotherspoon had gifted his half share of the beneficial interest in Strand House to Mrs Wotherspoon. Pursuant to the Restriction he had a personal, life-time contractual right to prevent dispositions. Whilst it may be that Mr and Mrs Wotherspoon intended to continue to treat Strand House as their matrimonial home and to share it as husband and wife, that would not and did not prevent them from achieving the intention of Mr Wotherspoon expressed in his letter to Boodle Hatfield and implemented through the transaction they put in place.

43. Strand House was sold by Mrs Wotherspoon on 29 November 2013. The evidence establishes that this was an open market sale to an arm's length, third party after the property had been marketed for some time by agents and its price reduced from time to time in the face of market conditions. There is no evidence to suggest the existence (actual or potential) of any other purchaser who might pay more than the £2 million sale price. I have rejected the expert's evidence. It was not a transaction at an undervalue.

44. The sale was with Mr Wotherspoon's consent. That is apparent from the transaction itself and their move together to Crabapple Court. However, it will also have been part of the conveyancing and that is evidenced by the fact that this disposition was registered at HM Land Registry and the Restriction removed. The consent was given without consideration being paid and without a corresponding restriction being apparently granted or registered. The case that this was a transfer at an undervalue will be addressed below.

45. Mr Wotherspoon was declared bankrupt on 3 June 2014. This meant the earliest date an antecedent transaction could be challenged as a transfer at an undervalue pursuant to ***section 339 IA*** was 4 June 2009. That means Mr Hinton must rely upon his challenge to the 2008 transfer under ***section 423 IA*** and it is necessary to address the facts relevant to the purpose of that transaction in the light of the findings of fact above. If that fails, Mr Hinton must rely upon the alternative claim concerning the release of the Restriction in 2013.

46. As to the June 2008 transfer, the contemporaneous and post-transaction evidence does not leave open any route or reason for suggesting that the or a purpose of the 2008 Transfer was to fulfil a promise made on engagement that Mr Wotherspoon would transfer Strand House to Mrs Wotherspoon once he could do so because the mortgage was redeemed. There is simply no reference to such a promise when the transfer was raised with and instructions were given to Boodle Hatfield. In addition, such a promise was not referred to after the bankruptcy commenced and before the claim

    was issued. This is entirely inconsistent with the current evidence that the transfer was to fulfil the promise, which I reject. In particular:

    a) During an interview on 27 June 2014 having explained that Crabapple Court was owned by Mrs Wotherspoon, Mr Wotherspoon referred to Strand House. He explained the transfer from his sole into joint names in 2001 was *"done as I was about to undergo major heart surgery. My business affairs were complex, and as probate matter would take time to resolve, I thought it best to put the property in her sole name in the event that I might die during the surgery"*.

    b) This was a statement made pursuant to ***section 291 IA***, subject to ***section 5 of the Perjury Act 1911*** and signed on each page for accuracy having been read by

him and under confirmation that it was true to the best of his knowledge, information and belief. Yet there is no reference to the promise.

c) In response to a solicitor's letter for an explanation for the transfer, Mrs Wotherspoon wrote on 14 April 2015: *"In the period leading up to this transfer my husband had numerous health scares which were extremely worrying. This and other family circumstances deemed it appropriate to transfer the balance of our home to my name"*. Again, there is no reference to the promise.

d) On 5 May 2015 Mrs Wotherspoon's solicitors on her instructions and having seen the previous correspondence seeking an explanation stated that Strand House *"was not transferred to her sole name for any other reason than the health concerns [she] previously set out"*.

e) That position did not alter following receipt of a detailed response from Mr Hilton's solicitors. To the contrary, in her solicitor's letter dated 15 September 2015 details of the medical condition relied upon were provided and the reason of health confirmed. For example, it was explained that Mr Wotherspoon thought that a transfer would provide *"immediate cash"* for Mrs Wotherspoon and her son should it be required whilst waiting for administration of his estate. Plainly her solicitors were not given instructions that the transfer had been to achieve implementation of the promise.

f) The subsequent correspondence establishes there was more than enough time and opportunity for Mr and Mrs Wotherspoon to correct the position if mistaken before the claim's application notice was issued. They did not do so.

47. Whilst Mr and Mrs Wotherspoon each sought during cross-examination by Ms Page to explain the absence of reference to any promise on the basis it was a *"private"* matter, I cannot accept that as a legitimate explanation. They were each in different circumstances (as above) asked before the claim was issued to state why the transfer took place. This arose in obviously serious circumstances and Mr Wotherspoon was under oath. They were each able to refer to Mr Wotherspoon's personal health, a private matter, and yet could not state the simple fact that this fulfilled a promise. Mrs Wotherspoon suggested that it was not mentioned because they did not realise the significance of the promise. However, it was not a matter of identifying what was significant but of informing Mr Hinton of the true reason for the transfer. That was not done in any of those different circumstances mentioned above.

48. The promise was first mentioned as a reason in Mrs Wotherspoon's defence. It may be that their discussions about the claim led them by false memory to think back to the days of engagement and marriage and to identify an understanding that Mr Wotherspoon would always ensure she and her son had a roof over their heads, maybe even ownership of it. However, the failure to previously mention this and my assessment of their evidence as witnesses leads me to find that the transfer did not take place in 2008 in order to fulfil a promise. It is to be noted, however, that this does not mean that a desire to ensure Mrs Wotherspoon and her son were protected economically in the future by receipt of Strand House could not have been in their minds in 2008.

49. Mr and Mrs Wotherspoon's evidence was that this desire did exist (albeit attributed back to the promise) in the context of Mr Wotherspoon's heart problems and the risk of his death. Plainly when assessing this I must bear in mind the fact that both Mr and Mrs

Wotherspoon have been willing to assert an incorrect reason for the transfer in their defence and at trial. The incorrect reliance upon the promise as an explanation of purpose does not necessarily mean they were not telling the truth when stating that fear of death and its potential, practical financial difficulties was the or a reason. However, it does mean their evidence must be viewed with considerable care because there is a propensity not to state the truth when defending this claim. It matters not if that propensity is intentional, sub-conscious or simply attributable to memory problems.

50. There is a particular difficulty to be considered for the explanations of medical reasons, namely the fact that what was said in evidence and before the proceedings were commenced is inconsistent in detail with the chronology established by medical evidence. There is one medical report. Mrs Wotherspoon in cross-examination suggested she would have got more had she realised this would be required but that comment must be viewed as disingenuous. She has been legally advised throughout and the importance of the evidence was self-evident.

51. That report from a general practitioner states that Dr Northridge had looked after Mr Wotherspoon since 1988. He set out a summary of the health problems from 2004 and did so in the expressed context of having been specifically asked to outline Mr Wotherspoon's state of health throughout 2007 and 2008. There can be no suggestion that he has not appreciated his task and no reason to think that his summary is other than accurate.

52. The first finding from that report is that there is no basis for the contention that Mr and Mrs Wotherspoon thought there was a heart problem until after the 2008 transfer, namely in 2009. The second finding is that the problem being suffered as at the date of the 2008 transfer concerned his back not his heart. As at October 2007 when instructions were given to Boodle Hatfield for the transfer, Mr Wotherspoon had persistent back pain due to a disc prolapse. The solution during early 2008 was pulsed radiofrequency neuromodulation. The third finding is that it was not until after the transfer but by the end of September 2008 that surgery on Mr Wotherspoon's back was likely to become necessary subject to taking a second opinion.

53. There can be no doubt, however, that a disc prolapse can cause extreme pain, prevent walking and general mobility and be debilitating from time to time. The evidence I heard from the witness box was entirely consistent with those symptoms. The fact that surgery was considered in September 2008 supports Mr Wotherspoon's evidence that this was the effect it had upon him. Whilst the disc prolapse itself cannot reasonably be described as life threatening, it opens the potential for his evidence relating to fear of death from an operation to be true. It is correct that the medical evidence does not refer to surgery until late September but it is not unreasonable to conclude that surgery would have been mentioned as a potential remedy for disc prolapse before then.

54. Therefore there is certainly cause to consider that the 2008 Transfer was based upon a desire to protect Mrs Wotherspoon and her son in circumstances of the physical problems Mr Wotherspoon faced. However, the defence is not simply presented on the ground of providing Mrs Wotherspoon with security. After all, that might in itself lead to the conclusion that the security was required in the face of anticipated creditor claims. The defence is based in addition upon the proposition that a fear of death from surgery caused him to want to transfer his beneficial interest to ensure Mrs Wotherspoon would have available, accessible assets immediately upon his death which would provide her

with funds during any anticipated delay in the administration of his estate. There are a number of matters which suggest otherwise.

55. First, there is no evidence of this in the correspondence with Boodle Hatfield. In fact to the contrary. The Restriction was for a life time. That is certainly not conclusive because Boodle Hatfield, as good solicitors, would also have considered the position from the alternative perspective of living through the operation had this concern for the need for available assets on death been raised. "Access to cash" as Mrs Wotherspoon described it. Nevertheless, the absence of any reference to death in the letter of instruction or in their letter explaining the transaction they proposed is surprising if this had been a reason for the transfer. One would have expected their letter to explain that their plan would work and achieve Mr Wotherspoon's wishes if he died. They did not.

56. In addition, if death was the only reason as now asserted, it would be reasonable to expect that Boodle Hatfield would have advised upon whether Strand House was currently held as a joint tenancy and, if so, that he and Mrs Wotherspoon could become tenants in common through severance. A straight forward written notice from Mr Wotherspoon would have achieved that. There was no such mention in the evidence before me.

57. Another difficulty is that the proposition is in apparent conflict with Mr Wotherspoon's evidence that at this stage he was a wealthy man with plenty of cash. Furthermore, it assumes that Mrs Wotherspoon would be able to sell or raise money upon Strand House but without any consideration in the evidence of this being discussed with Boodle Hatfield, as to whether that was realistic or as to why she could not do so relying upon her half share. Nor was any explanation given at trial as to why that was the concern when she had a half share in Strand House, owned a yacht which could presumably readily be sold and had a rental income or the potential for such an income from her Chelsea flat.

58. Overall I find their evidence to be unconvincing and unreliable in that they have conflated the time span when considering Mr Wotherspoon's health and proposed a reason for the transfer based upon "access to cash" which does not stack up. Bearing in mind the overall assessment of their unreliability, including with regard to the promise, I reject the evidence that the transfer was for that reason. In doing so I also bear in mind that it was only at the last minute that Mrs Wotherspoon for the first time made mention of her or their concerns with regard to Mr Wotherspoon's daughters and any inheritance.

59. However, as with many false statements (whether false memory or intended), the evidence still presents factual elements which should be accepted. First, their relationship as husband and wife. Second, the concerns Mrs Wotherspoon naturally held for her son. Third, that it is reasonable to conclude that Mr Wotherspoon wanted to protect her by transferring a valuable asset to her. Fourth, that this arose when the mortgage would soon be and was redeemed. Fifth that the back problems and the potential for surgery could be a catalyst for taking action to give effect to the desire to protect.

60. I find that those are facts which need to be considered within the context of deciding whether Mr Hinton has proved on the balance of probability that the 2008 transfer was entered into by Mr Wotherspoon for the purpose of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him or of otherwise

prejudicing the interests of such person in relation to a claim which he is making or may make.

61. Mr Hinton relies upon Mr Wotherspoon's liabilities to HMRC for the purpose of identifying such a person, a (potential) creditor. The starting point must be, however, that the winding up petition presented on 5 February 2014 relied upon a debt of £1.85 million based upon tax years starting in 2009/10, not earlier.

62. Mr Hinton relies upon a letter dated 31 January 2007 from Baker Tilly, Mr Wotherspoon's tax advisers, concerning his 2006/7 tax year return. He was advised by them that he would have to make by the end of the month a first payment on account in the region of £95,000 less £75,000 which he had just paid and a second similar payment by 31 July 2007. Those sums were paid, however.

63. It was a liability which had been reduced significantly from the previously drafted return as a result of revised calculations for income Mr Wotherspoon had received as the beneficiary of "the Wickforce Trust". The Trust held a distribution property let to Marks and Spencer plc in Thurrock and Mr Wotherspoon had to pay tax on part of the income he received or was deemed to receive from the trust, a significant amount. He was advised that the amendment may be the subject of HMRC enquiry but that Baker Tilly had *"a supportable argument"* for their income treatment. This in itself does not suggest that Mr Wotherspoon would be considering that liabilities he could not meet would arise.

64. That could change because an enquiry into the revised calculations followed, as notified on 12 June 2007 by HMRC. However, there is nothing in the documentation for the remainder of the year to suggest that this was identified as a matter which would cause financial difficulty or even that an adverse conclusion would be reached.

65. In November 2007 Baker Tilly informed Mr Wotherspoon about potential consequences for CGT changes announced in a pre-budget report. On 19 March 2008 Baker Tilly wrote to him advising of capital gains tax changes which (in summary) scrapped the old indexation approach from 6 April 2008. They, in effect, proposed that he should consider the consequences and whether a sale of assets to his wife might assist tax planning. Whilst this was relied upon by Mr Hinton, there is no suggestion within the contemporaneous documentation that Mr Wotherspoon should then be concerned about his current financial position. This was a potential tax planning letter.

66. A letter dated 6 February 2008 from HMRC reveals that Mr Wotherspoon had submitted an amended 2005/6 tax return. The effect of this is not identified. The HMRC enquiry continued and, in principle, there might have been an increased tax liability but there is no documentation from Baker Tilly or HMRC to indicate this was likely or anticipated or from Mr Wotherspoon to indicate he was concerned. It was not until 20 May 2009 that Mr Wotherspoon was notified of the enquiry's outcome. His liability for the 2005/6 tax year was reduced by £5,510.80. I do not find that those events provide any factual evidence to suggest that they might be relevant to the decision to transfer Strand House in 2008.

67. As a different approach Mr Hinton refers to and exhibits a variety of evidence to establish the chronology of what became known as the *"2007/8 credit crunch/financial crisis"*. The premise being that Mr Wotherspoon would have been aware of the growing problems and risks and that this explains the 2008 transfer. Within that premise Mr

Hinton draws attention to Mr Wotherspoon's financial position to assert that it establishes a position which meant he needed to protect his finances from those who may make claims against him in the future. Mr Wotherspoon's position on the other hand was that his financial position was *"very strong"*, he had no concerns about that personal financial position and he had the experience of dealing with economic turmoil for the property market in the past to fall back on.

68. Mr Wotherspoon in particular relied upon the value of the Wickforce Trust. In the year ending 31 March 2007 accounts for the Wickforce Trust show he received distributions totalling £174,414, out of a surplus in that year of £175,909 and an accumulated net surplus of £4,416,536. In the year ending 31 March 2008, the Trust's net assets were £4,527,076.

69. This was placed under challenge for three reasons. First because a significant part of the income of the Trust was used to pay interest but that income was to be treated as his for tax purposes and a large part of the interest paid could not be deducted by him for his tax bill. For example, as explained in a letter from Baker Tilly dated 12 February 2009: For the 2007/8 tax year the net surplus income for the Trust after deducting the interest it paid of £1,168,909 was £185,540. That would be the base figure from which to decide the distribution he would receive, which was in fact £75,000. However, when it came to the tax he had to pay on the income he received, he was treated as receiving the total rent of the Trust less only part of the interest paid by the Trust. That meant for 2007/8 he could only deduct £649,947 from the £1,168,909 meaning his tax liability was calculated upon £185,540 plus £457,635. A significant sum to find when he was taxed at 40%.

70. I accept this raises a question as to how he would pay his 2007/8 tax bill, which would have been quantified for the purposes of payments on account by January 2008. However, although the figures have not been disclosed, it is not asserted that the January and July 2008 payments were not made. I also accept that Mr Wotherspoon would have been aware of this problem for the purposes of the 2008/9 tax bill even though it will not have been quantified by the date of the 2008 Transfer (indeed not until January 2009 or as the letter suggests February 2009). However, there is no specific evidence of financial concern on his part leading up to or at the date of the 2008 Transfer.

71. The financial concern relied upon by Mr Hinton as a basis for the decision to transfer Strand House and, therefore, one of the purposes of the June 2008 transfer has to be inferred by reference to a combination of Mr Wotherspoon's overall financial position and the economic climate. The evidence addressed so far does not allow that inference to be made.

72. As to his overall financial position, Mr Wotherspoon during cross-examination did not recognise a problem in the sense that he considered he had more than enough assets with which to pay any liability. There was the value of the Trust itself, although against this it can be observed that this was hardly a liquid asset and whilst its 31 March 2008 accounts showed net assets of £4.5 million, any purchaser would presumably have to take the tax position described above into consideration unless they could avoid it.

73. Another reason he said he did not recognise the problem was that he had a significant investment in his property development company, Headfort Properties Limited. That too was challenged. First because the September 2008 year end accounts recorded it as a dormant company. Second because it had incurred a £513,000 loss and had a £1.4

million deficit in the 2007 financial year end. In addition it was pointed out that he had lent working capital and was owed £523,531, which on the face of it he had now lost.

74. Mr Wotherspoon's response in his witness statement was that the fact a loss would be made from the development would not have been known until *"the accountants had reviewed the books and prepared the accounts and as that investment related to a property development, the question of whether a project would ultimately make a profit or loss was determined at the end of the project and losses for accounting purposes prior to such a date did not, of itself, mean that any paper loss would be realised"*.

75. In the witness box he explained that at the date of the 2008 transfer the company was still involved with completion of a development of a penthouse but it was not until later that problems established the loss. In particular the fact that the licence to operate (as he described it) would not be extended and the building was taken over and subsequently sold at a loss.

76. The problem for that evidence is that whilst it is correct that the director's report for the 30 September 2008 year end accounts were not approved until 29 July 2009, he would or should have been aware of the 2007 financial year end position from draft accounts near to final form (if not in final form awaiting board approval) by the date of the 2008 Transfer. The relevance of that being that the development was sold in the 2007 financial year, there was a £513,639 loss and net liabilities of £1,416,690.

77. Mr Wotherspoon also relied upon his company, Abbotsinch Properties Limited. Ms Page relied upon its accounts for the year ended 31 March 2007, signed by Baker Tilly on 6 March 2008, which record a loss of £148,818, assets of just over £6.1 million and cash at bank of £447,755 but creditors totalling £6,785,051. Mr Wotherspoon's position was that those were the early days of a significant development at Glasgow airport which he reasonably expected to be very profitable. He referred to a letter he signed, from the company to Kaupthing Singer & Friedlander requesting £1 million to be placed back on the money market for two weeks. He also relied upon the note to the accounts that: *"Since the year end there have been sales of land and property realising proceeds of £9.0m"*. I am satisfied that this note supports his recollection of an optimistic approach to his finances and his view of himself as a wealthy man notwithstanding the points made concerning Headfort Properties Limited and the tax consequences for the income he received from the Wickforce Trust.

78. Mr Wotherspoon additionally referred to the substantial cash to be found within his Kaupthing Singer & Friedlander bank accounts. Ms Page accepted that the bank statements would show significant sums in and out but drew attention in particular to the facts that: the balance during September 2008 did not exceed £37,500 and was largely below £15,000; it was in overdraft from time to time during July and September; and was generally significantly below £100,000 from March (the first of the disclosed statements in the bundle). On 12 June it was overdrawn by just under £60,000. She properly observed, however, that some of the substantial withdrawals may have been attributable to transfers on to the money market.

79. The fact that bank accounts were held with Kaupthing Singer & Friedlander was a cause attributed by Mr Wotherspoon for the failure to pay tax for the 2009/10 tax year onwards. His recollection being that he had £500,000 available to pay his tax, including sums kept on the money market, but for its collapse at the beginning of October 2008. Ms Page pointed out that his compensation claim was for £201,193 in respect of

accounts of Abbotsinch Properties Limited. His personal account only held just over £63,226. She disputed that he could rely upon the money of a limited company as "a reserve to pay the HMRC" as he described it.

80. My conclusion is that there were substantial funds kept on the money market. More than sufficient, absent the unforeseeable demise of the bank, to avoid concerns about the payment of tax liabilities arising the time or for a reasonable period after the 2008 Transfer or, indeed from October 2007 when the transfer was first addressed with solicitors. Whilst some of that money may have been treated as his when potentially it should have been treated as a company asset (I make no finding), as Ms Page observed to Mr Wotherspoon, the important point from the evidence concerning his subjective intention was that Mr Wotherspoon undoubtedly saw this money as his accessible funds and a reason why he was a wealthy person.

81. Ms Page also drew attention to the fact that Mr Wotherspoon on 5 April 2007 transferred his shares in the company which owned his yacht to Mrs Wotherspoon. Mr and Mrs Wotherspoon both rejected the suggestion that this was for any other reason

than that he wanted to give her the boat he had bought for her. I have not found this a fact which has presented sufficient evidential weight at trial to shift the decision one way or the other.

82. Looking at this evidence as to his personal financial position as a whole, I do not consider it has been expressly established that Mr Wotherspoon held concerns to the extent that it can be concluded from this alone as a fact that he had the purpose of the 2008 Transfer required by ***section 423 IA***. Whether it can be inferred and/or otherwise be established with reference to all the evidence as a whole will need to be addressed. However, there is another aspect of the financial position which needs consideration first, namely his knowledge of what became known as the credit 2008 crunch/financial crisis.

83. Mr Hinton refers to a number of facts in a chronological assessment of when the 2008 crisis began and when its potential should have been appreciated. Whilst an exact date will always be in issue, plainly 15 September 2008 was a critical day. Lehman Brothers filed for bankruptcy and judicial knowledge can be taken of the fact that the financial world and the availability of credit changed dramatically. However, that was after the 12 June 2008 transfer and over ten months after the transfer had been contemplated by Mr Wotherspoon and raised with Boodle Hatfield on 30 October 2007.

84. Plainly the fact that the transfer was first contemplated in October 2007 means consideration must be given to the purpose at that date. However, it must also be appreciated that the purpose could have altered or another purpose have been added from then through to 12 June 2008. The financial turmoil started by the sub-prime crisis in America had by September 2007 given rise to the collapse of the Northern Rock Building Society. It would have been clear to anyone interested in the financial position that the financial climate was shifting and that problems continued to arise through to September 2008 which brought the collapse of Lehman Brothers and the need for world-wide emergency support for the banking industry.

85. Mr Wotherspoon sought to distance himself from the relevance of the financial crisis. His evidence was that it was not an issue for housing and that corporate property was more affected by the resulting restrictions on lending. Indeed, his evidence under cross-

examination started off along the line that he did not really consider the position. Intervention by me led to the more realistic assessment in his evidence that as a property developer he would have been keeping a careful eye on what was happening, in particular to be able to address future projects.

86. I am sure that was the case. It is the very nature of the property business that those running the business need to look ahead to consider what plans they can commit to. This will involve assessing such matters as the future cost of land and construction and the ability and cost of funding. Mr Wotherspoon will certainly have appreciated the changing economic climate and have been considering the position for the purpose of planning the future both near and long term. Whether that was a factor in his mind within the context of the 2008 transfer must depend, however, upon an assessment of the evidence as a whole.

87. As to that, he described his personal position as being that he had sufficient cash in bank, he did not need to borrow, existing projects would continue and any impact on profits would not be identifiable for years. It could not be foreseen which way the market would go and was a 2 or 5 year problem that could not be subject to forecast. Whilst borrowing became harder over this period, he had no concerns about a credit crunch. I consider this to be a rosier picture than probably applied to his subjective contemporaneous views. He would have been wary of and concerned by the economic crisis but his evidence needs to be assessed within the context of the evidence as a whole.

88. Before being able to reach a final decision as to purpose based on the evidence as a whole, there is also an issue as to whether events after the 2008 transfer provide evidence to support the purpose alleged by Mr Hinton. In essence, that subsequent acts of Mr Wotherspoon and Mrs Wotherspoon support the conclusion that Mr Wotherspoon desired to transfer Strand House to ensure (in summary) creditors would not be able to recover their debts from him. The essence of that evidence, as relied upon by Mr Hinton, being that in reality they sought to treat Strand House as a joint asset even though the Boodle Hatfield advised transfer achieved the position in law that it was not.

89. Ms Page in her submissions started with the fact that Mr Wotherspoon had applied in his own name for planning permission to build a conservatory at Strand House. Mrs Wotherspoon was clear that she had asked him to arrange this because it was his area of expertise and that it was typical of him that he would apply in his own name. It is of course the position that it is not necessary to own the property concerned in order to apply. Ms Page also referred to email correspondence from Mr Wotherspoon to his secretary and to her consequential correspondence with Baker Tilley recording that Mr Wotherspoon was trying to raise funds on Strand House and the broker wanted his (not Mrs Wortherspoon's) SA302 to provide a statement of his tax bill for the most recent two years.

90. As previously mentioned, this led to difficulties with Mrs Wotherspoon's evidence but taking this as a reference to raising money for renovations, as she ultimately proposed (and ignoring to her benefit that the defence states that the intention was to raise money for Mr Wotherspoon) it was suggested by Ms Page that Mr Wotherspoon was recognising that in reality this was still his house. Mrs Wotherspoon's evidence provided no assistance towards answering that suggestion. Mr Wotherspoon accepted that proof of his income was required but insisted he was not borrowing, Mrs Wotherspoon was the borrower. The mortgage broker must have got the "*wrong end of*

the stick", although the problem with that answer is that Mr Wotherspoon still asked Baker Tilly for the form appreciating it was for his income.

91. Mr Wotherspoon also suggested the borrowing would have been for living costs and said that he did not know if there was a subsequent mortgage. He did not know what the charge registered in the name of Barclays Bank plc was for and suggested that he could have relied upon the Restriction to object to it. I do not accept his evidence. Even Mrs Wotherspoon made clear that he had his finger on the financial pulse and the best that can be said for him is that he had a memory lapse.

92. Their evidence on those matters was unreliable and I am satisfied that the evidence relied upon by Mr Hinton does lead to the conclusion that in practice Strand House was treated as a continuing joint asset when and to the extent needed but (importantly) in the context of Mr Wotherspoon having achieved his aim of transferring his beneficial interest. In other words, I am satisfied from the evidence that they treated it as the matrimonial home, they made decisions together, Mr and Mrs Wotherspoon would look to this asset for their current and future financial plans when needed but Mrs Wotherspoon was still the legal and beneficial owner. This evidence does not support a conclusion that the 2008 transfer was for a prohibited purpose.

93. Ms Page next turned to an email of 12 February 2013 from Mr Wotherspoon to Baker Tilly (Mrs Wotherspoon being copied in) in which he referred to previous discussions concerning a potential move to Malta to obtain beneficial off-shore tax status. That proposition was described as being no longer *"potentially useful"* for him, he having sold his company's principal asset at below reasonable expectations combined with the need to spend more time in the United Kingdom for medical reasons and to wind down his affairs. This contemporaneous evidence suggests that even in 2013 and despite not having paid tax since 2009, Mr Wotherspoon did not appear to be thinking in terms of bankruptcy or even of a tenuous financial position. Nevertheless, it is also apparent from the contents of the letter that he and Mrs Wotherspoon needed to raise funds. This was described as funds *"over and above my pension"* and he appears to have been addressing their future income needs.

94. As to raising funds, Ms Page drew attention to the solution referred to in the letter being the sale of Strand House and of Mrs Wotherspoon's property in Chelsea (apparently with tax advantages for her because she was *"covered by the Malta tax"*). Mrs Wotherspoon saw this simply as a case of a married couple having to raise funds from the assets available to them for their future and not, as suggested, as evidence that Strand House was still owned jointly beneficially. I accept that evidence in particular because there has never been any suggestion that Mr Wotherspoon had an interest in the Chelsea property and it is clear they were selling their respective assets for the benefit of their future. This is a further example of assets being available for matrimonial purposes by agreement without altering the underlying ownership.

95. All of the evidence above still needs to be considered as a whole to decide whether the 2008 transfer was made for a prohibited purpose. The decision must be made in the context of the law which will be addressed next. However, before doing so I should return to the earlier rejection of the evidence that the purpose of the 2008 transfer was to give effect to an agreement or promise or wedding gift during Mr and Mrs Wotherspoon's engagement. I have rejected when assessing Mrs Wotherspoon's reliability as a witness her evidence or proposition that behind this promise and/or the transfer itself was a desire to ensure her step-daughters did not seek to overturn a will.

In rejecting that evidence of purpose I have not been persuaded otherwise by her concerns with regard to her son. However, there is no doubt that her son's welfare feature very heavily in her mind and will have done throughout the relevant period with which this case deals.

96. As to that, there is no medical evidence to identify the problems and I gave the opportunity for this to be presented after conclusion of the submissions at the discretion of Mrs Wotherspoon but subject to considering any objection should it be

raised by Mr Hinton. The rational being that this evidence should presumably not be in issue.

97. None has been provided but Mrs Wotherspoon's evidence at trial is that he will be unable to earn a living himself and will need financial assistance throughout his life. It is clear that she is and always has been intent on ensuring that will be available to him. There is no doubt in mind that she is very scared about the effect these proceedings may have on that aim and need. This may or may not be a reason behind the unreliability of her evidence as found but I readily conclude that this family concern will have always been in the foreground including at the time of the 2008 transfer.

E) Law

98. The findings of fact mean that the only area of law that now needs to be specifically addressed when considering the 2008 transfer is ***section 423 IA*** which concerns "transactions defrauding creditors". This provisions confers a discretionary power on the court in circumstances of a transaction having been entered into at an undervalue for a prohibited purpose to make such order as it thinks fit to restore the position to what it would have been if the transaction has not been entered into or to protect the interests of victims of the transaction. The applicant for such relief may be a victim of the transaction (a person who is or is capable of being prejudiced by it, ***section 423(5) IA***) or by a relevant office holder, as here, with the application being treated as made on behalf of every victim in each case (see ***section 424(1) IA***).

99. The inexhaustive definition of a "transaction" in ***section 423 IA*** is set out in ***section 426 IA*** as including, "*a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly"*. Therefore, any agreement or understanding between parties, whether formal or informal, oral or in writing is capable of being a "transaction" under ***section 423 IA*** (see ***Feakins v. DEFRA*** [2007] BCC 54 at [76] per Jonathan Parker LJ. - a decision emphasising the flexibility of the definition in the context of a series of agreements or arrangements which concluded that the court was able to address the transactions as a whole).

100. The prohibited purpose test is now identified as a simple one that does not depend on tests of dominant or substantive or any other adjective. As Leggatt LJ, as he then was, said in ***JSC BTA Bank v. Ablyazov*** [2018] EWCA Civ 1176:

> *"[T]here is no need to put a potentially confusing gloss on the statutory language. It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls*

> *within section 423(3), even if it was also entered into for one or more other purposes. The test is no more complicated than that."*

101. The prohibited purpose for the person entering into the transaction with another (defined as the debtor – ***section 423(5) IA***) is the purpose: *"(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make." (**section 423(3) IA**).*

102. There is no requirement that Mr Wotherspoon had to be insolvent at the time of the relevant transfer. What needs to be proved on the balance of probability is that Mr Wotherspoon entered into the challenged transaction with that purpose for which there must be in his mind not a specific creditor who would benefit from relief at the date of the transaction but a (i.e. any) person who is making or may at some time make a claim against him (see ***Hill v Spread Trustee Ltd*** [2006] EWCA Civ 542, [2007] 1 W.L.R. 2404 at [136], by Arden LJ, as she then was). It follows that it does not need to be the person bringing the claim as Sales J., as he then was, explained in ***4 Eng v Harper*** [2009] EWHC 2633 (Ch) at [22]:

> *"In the present context, in determining whether a relevant purpose is made out under s. 423(3) it would not matter whether Mr Simpson acted in order to protect his assets from possible claims by Mars or from possible claims by 4Eng. It would be sufficient for 4Eng to establish that he acted for either or both purposes, since it is not a requirement of s. 423(3) that the victim claiming relief in relation to a transaction was the very creditor whose claims the transferor was seeking to defeat – it is sufficient that the transferor acted with the purpose of defrauding any person who had made or might make a claim against him (see the reference in general terms in s. 423(3) to "a person who is making, or may at some time make, a claim against [the transferor]" and Sands v Clitheroe [2006] BPIR 1000)."*

103. There is also the application of ***section 339 IA*** to be considered in the context of the claim that Mr Wotherspoon released the Restriction for no consideration in 2013. There was no need to claim under ***section 423 IA*** in the alternative. The claim that this was a transfer at an undervalue is sufficient bearing in mind it took place within the relevant period.

104. To succeed, Mr Hinton must prove on the balance of probability that there was a "transaction", for example a gift, agreement or arrangement, which took place at an undervalue and at a relevant time. It will be at an "undervalue" if it was a gift, or was otherwise entered into by an individual on terms that provide for them to receive no consideration or consideration the value of which, in money or money's worth, was significantly less than the value of the consideration provided by the individual. It will take place at a "relevant time" if it is entered into within 5 years prior to the presentation of the bankruptcy petition on which the individual is made bankrupt. Where (as here) the transaction took place within 2 years of the presentation of the bankruptcy petition, there is no requirement to prove that the individual was insolvent when the transaction was entered into. In the event of success, the court has a range of remedial options available to it (see ***sections 339(2) and 342 IA***).

105. In essence this analysis of the law above for both statutory provisions was agreed between counsel and their submissions, which I will now address.

F) Submissions

106. In the light of the findings of fact, I will limit my summary of Counsels' submissions to the ***section 423 IA*** 2008 transfer and to the ***section 339 IA*** Restriction claims. I should make clear it is a summary which does not do justice to their submissions.

107. Ms Page placed in issue the reliability of both Mr and Mrs Wotherspoon as witnesses and submitted that not only did this require their evidence to be rejected but the Court should also consider whether their approach to their evidence is explained by a desire to conceal the true purpose of the 2008 Transfer, namely a prohibited purpose.

108. Ms Page also submitted that the existence of that purpose is to be inferred from Mr Wotherspoon's financial position at the time. It was far more precarious than his evidence asserts and added to that it is to be inferred that he was inevitably under financial pressure or will have had financial concerns in the context of the unfolding credit crunch. In a context where the stated purposes of protection because of a fear of death and/or to fulfil a pre-marriage promise have to be rejected, she submitted that the personal financial position and economic environment must have been the cause of Mr Wotherspoon's decision to transfer his beneficial interest. The intention being that the transfer would provide protection for Mrs Wotherspoon and himself because future creditors making claims would not be able to look to that asset for payment of Mr Wotherspoon's liabilities. The need to implement that purpose being increased by the need to protect not just themselves but also Mrs Wotherspoon's son.

109. Ms Page readily accepted that the alternative case relying upon the release of the Restriction was novel. However, it was a "transaction" because it was agreed or arranged that Mr Wotherspoon would accede to the sale and it was made without consideration when he could have demanded a "ransom" and/or insisted upon a restriction for the new property.

110. Mr Miall's submissions started with the proposition that the evidence of Mr and Mrs Wotherspoon concerning purpose with reference to the engagement promise, health and death should be accepted. However if not, he disputed there was evidence from which to conclude that Mr Wotherspoon had reason to be concerned about his financial circumstances. Mr Miall submitted that it is to be remembered that he was not made bankrupt until some six years later after much water had flowed under the bridge but in any event there was no existing unpaid creditor at the time of the 2008 Transfer or any creditor identified who might bring a claim based upon the facts at the time. Insofar as the credit crunch is relied upon, the decision to transfer had been made by October 2007 which was far too early for that economic saga to be relevant. In any event the evidence presented is founded entirely on hindsight and speculation.

111. Addressing Mr Wotherspoon's personal position, Mr Miall submitted: He owned Abbotsinch and had reason to believe it would be profitable because it was a substantial development as established by the subsequent sale of land and property realising £9 million. He had cash in the bank with six figure sums on deposit in the money market and a significant asset in the Wickforce Trust. Whatever the position concerning tax on income, there was total equity of £4.5 million shown in the 31 March 2008 accounts. The future problem for tax was caused by the unforeseeable event of the Kaupthing Singer & Friedlander collapse. Mr Wotherspoon's evidence that he considered himself

a relatively wealthy man without existing creditors who could not be paid or financial fears concerning the payment of future creditors should be accepted.

112. The alternative claim was based on a farfetched case that the Restriction must have had the same value as Strand House because Mr Wotherspoon could have prevented

the sale and, therefore, was in a ransom position. The burden is upon Mr Hinton to establish a transaction at an undervalue, the valuation is absurd and there is no other valuation proposed or evidenced. In any event there was no transaction but the exercise of a power. There was no realisable value.

G) Decision – The 2008 Transfer

113. There is no doubt that on 12 June 2008 Mr Wotherspoon aimed to achieve the transfer of his remaining 50% beneficial interest in Strand House as a gift. That, after all, is what occurred. It took place at a time when no specific creditor with a debt due and owing can be identified as a person in respect of whom Mr Wotherspoon was seeking to put his beneficial interest beyond their reach or otherwise to prejudice their interests. The only possible candidate might be HMRC but the evidence establishes that he was able to pay his current tax liabilities at that time. The claim must rely upon Mr Wotherspoon's general financial position and assert a prohibited purpose in respect of persons who may at some time make a claim against him.

114. That claim is based upon circumstantial evidence. There is no direct evidence of Mr Wotherspoon's subjective mindset having a prohibited purpose. Such evidence needs to be viewed as a whole, its effect being cumulative so that the individual elements become stronger by their linkage for the purpose of applying the standard, civil balance of probability test.

115. The problem for the claim is that it cannot be concluded on the balance of probability that there were at the date of the 2008 transfer any possible or potential persons in the mind of Mr Wotherspoon who may at some time make a claim against him. The only possible, identifiable future creditor might be HMRC, as occurred, or another creditor who might be unpaid because of payment to HMRC. However, as at the date of the 2008 Transfer there was no suggestion on the facts or in his mind of any possibility of future tax being potentially at risk of non-payment. That was the position from October 2007 when Mr Wotherspoon first sought advice from Boodle Hatfield.

116. Certainly there is cause for supposing that Mr Wotherspoon may have had concerns about his long term financial position and for supposing that those concerns may have influenced him to decide to transfer his interest to Mrs Wotherspoon to ensure she would have the security of a home for herself and her son (whether those concerns arose from financial and/or health worries or otherwise). However, even if that was proved on the balance of probability, ***s.423 IA*** requires more.

117. It needs a purpose to put assets beyond the reach of or otherwise prejudice the interests of persons making (none) or who may at some time make a claim against him. There was no reasonably foreseeable creditor or type of creditor who might do that. It is not enough to assert that the debtor wished to protect assets and that this would have the result of adversely affecting any creditors in the future because it would inevitably

diminish Mr Wotherspoon's assets. There had to be, and there had to be in Mr Wotherspoon's mind, creditors to whom he would in the future be unable to make payment and who may at some time make a claim.

118. Mr Hinton suggests Mr Wotherspoon's future financial position was far from secure because his companies did not offer the security needed for the future, he did not have adequate alternative resources and the positioning and ultimate risk of his assets becoming available for creditors was increasing because of the economic climate. In support he points to the difficulties caused by the taxation of his income from the Wickforce Trust suggesting that there was a significant prospect or risk that he would not be able to pay future tax demands and that HMRC may become a creditor making a claim against him. He also suggests that the "cash at bank" position was not nearly healthy enough and that the other companies were failing or would fail.

119. I accept these are all factors weighing in the balance for his case and that they should be addressed cumulatively. However, none of this evidence satisfies me that it has been established on the balance of probability that Mr Wotherspoon was considering being unable to pay his tax (or any other creditors) in the future with the result that claims may be made. That applies even though he would have been wary of and concerned by the economic crisis. It also applies notwithstanding the difficulties caused by the taxation of his income from the Wickforce Trust or the position of Headfort Properties Limited.

120. There is insufficient evidence from which to conclude objectively that there was a significant prospect or risk at the time of the 2008 transfer that he would not be able to pay future tax demands and that HMRC may become a creditor making a claim against him or that some other creditor would because of the financial difficulties. There is no subjective evidence from which to conclude on the balance of probability that that he had such matters in mind when deciding to transfer his beneficial interest. The circumstantial evidence is of insufficient weight to satisfy the burden of proof.

121. Moreover, whilst it is not for Mrs Wotherspoon to prove her case, she can reasonably rely upon the facts that Mr Wotherspoon: had access at the time of the 2008 Transfer to cash in amounts relatively significant in the context of current and foreseeable taxation liabilities; he had an interest in a trust fund which appeared to have more than enough equity from which significant money could be raised; Abbotsinch was a substantial development with the potential for profit, as evidenced by the subsequent sale of land and property realising £9 million, and there was no apparent cause to conclude that it would be loss making at the date of the 2008 Transfer or earlier; and the future problem for payment of tax was the unforeseeable event of the Kaupthing Singer & Friedlander collapse. These are all matters which can be weighed in the balance in favour of the defence and provide additional facts to support the conclusion that the burden of proving the subjective existence of the prohibited purpose has not been satisfied on the balance of probability.

122. It is of concern in reaching that decision that important parts of the evidence of Mr and Mrs Wotherspoon has been rejected. That has caused me to consider whether this evidence was presented to hide the true purpose. I have borne in mind that what may be described as the "normal matrimonial arrangement" of equally shared assets had been achieved in 2001 (even assuming there was no common intention constructive trust before then). Also that the 2008 Transfer had nothing to do with fulfilment of a promise made during the engagement. That by 2008 Mrs Wotherspoon had the security not only

of a half beneficial interest but also of her matrimonial rights in the event of divorce and the parties could arrange matters by will to ensure she received

more than her statutory rights upon his death. She also owned the yacht and her flat in Chelsea and both assets would have been relevant to her need to look after herself and her son if required to do so. I have additionally rejected evidence concerning the stepdaughters and the concerns about a will and/or the need for easy access to cash upon Mr Wotherspoon's death.

123. Nevertheless, that still leaves the point that whilst it is plain Mr Wotherspoon wanted to ensure Mrs Wotherspoon was secure and the existence of her son's difficulties no doubt took a place in those thoughts, the rejection of key parts of their evidence does not establish that he had the prohibited purpose in mind. This is a provision concerned with defrauding (not with any requirement of dishonesty) creditors who had brought or may bring claims and I am satisfied it has not been proved that there were such creditors in mind or that there was any intention to escape the liabilities of future claims. Whist purpose may be inferred, it cannot be in this case (see ***Moon v Franklin*** [1996] BPIR 196 and ***Midland Bank v Wyatt*** [1996] BPIR 288).

124. In ***BAT Industries plc v Sequana SA*** [2016] EWHC 1686 (Ch), [2017] Bus LR 82 at [517] Mrs Justice Rose, as she then was, observed that a person cannot have a ***section 423 IA*** purpose if they had or would have sufficient assets left to meet the claim which was or may at some time be made. In this case there is no claim against which to measure that result and nothing to suggest that the assets held as at the date of the 2008 transfer would not be sufficient to cover the foreseeable future. Nor is this a case such as ***Inland Revenue Commissioners v Hashami*** [2002] EWCA Civ 981, [2002] B.C.C. 943 where it was found that the debtor transferred property knowing he would become liable to HMRC for substantial sums and because he could not be sure at the time he chose to make the transfer that he would be unable to make provision for those liabilities at a later date. This is a case (applying the approach of Leggatt LJ in ***JSC BTA Bank v. Ablyazov*** above at [16]) where the fact of the transfer has had the consequence that the beneficial interest is not available for the benefit of Mr Wotherspoon's creditor but it has not been proved that this was his purpose.

H) Decision – The Restriction

125. The Restriction protected Mr Wotherspoon's contractual right to exercise a power to consent and, therefore, to refuse to consent to a disposition of the registered estate by Mrs Wotherspoon or any successor in title. It was a personal right for the remainder of his life. There was no provision for consideration to be paid upon the exercise of that power. It was not a power that could have been sold to anyone else. The best that can be said is that Mr Wotherspoon might have asked for payment but equally Mrs Wotherspoon could have refused to pay or asked payment from him in the event that the disposition proposed was to his liking. The concept that this power was worth the value of Strand House is ludicrous, as Mr Miall submitted.

126. I do not consider the exercise of that power to be a transaction for the purposes of ***section 423 IA***. It was not a gift, an agreement or an arrangement and does not fall within the inexhaustive meaning of transaction. The underlying basis for the claim, that Mr Wotherspoon was required to obtain consideration for his consent to avoid the

granting of his consent being a transaction at an undervalue, is obviously flawed. Mr Wotherspoon was not required to obtain a ransom from Mrs Wotherspoon before they would move together to a new matrimonial home for both of them to avoid this being a transaction at an undervalue. Even if could be said that an asset was lost to creditors by its exercise and that it should have been replaced by an equivalent restriction over the new property, that equivalent restriction would be a personal asset which could not be realised whether within or without a bankruptcy.

I) Conclusion

127. For the reasons set out above I have decided:

(1) Mrs Wotherspoon became the sole legal and beneficial owner of Strand House upon execution of the 2008 transfer.

(2) As acknowledged by Mr Hinton, a claim cannot be brought in respect of the 2008 transfer under ***section 339 IA*** because this gift, although a transaction at an undervalue, was not made at a relevant time applying the definition in ***section 341 IA***.

(3) ***Section 423 IA*** does not apply to the 2008 transfer because it has not been proved on the balance of probability that Mr Wotherspoon entered into it for a prohibited purpose.

(4) ***Section 339 IA*** does not apply to Mr Wotherspoon's decision pursuant to the Restriction to consent to the disposition of Strand House in 2013.

(5) The application notice is dismissed.

Order Accordingly