Neutral Citation Number: [2016] EWHC 636 (Ch)

Case No: 8276 of 2013

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY
IN BANKRUPTCY
IN THE MATTER OF TARLOCHAN SINGH
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Birmingham Civil Justice Centre
33 Bull Street, Birmingham B4 6DS

Date: 22/03/2016

Before :

MR JUSTICE NEWEY
Between :

MR MARK SANDS	**Applicant**
(as trustee in bankruptcy of Mr Tarlochan Singh)	
and	
(1) MR TARLOCHAN SINGH	**Respondents**
(2) MR CHANAN SINGH THANDI	
(3) MS SUSAN KAUR	
(4) MRS RAMANDEEP KAUR	
(5) MISS JESSICA KAUR (a child)	
(6) MISS KARINA KAUR (a child)	

(Transcript of the Handed Down Judgment of
WordWave International Limited
Trading as DTI
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr John de Waal QC (instructed by **Wright Hassall LLP**) for the **Applicant**
Mr Avtar Khangure QC (instructed by **Barker Gooch & Swailes**) for the **4th to 6th Respondents**
The **1st to 3rd Respondents** did not appear and were not represented

Hearing dates: 17-19 February 2016

Judgment
As Approved by the Court

Mr Justice Newey :

1. This case concerns transactions that the first respondent, Mr Tarlochan Singh, entered into in 2010-2011 in relation to a property he owned in Coventry. Mr Singh having subsequently been adjudged bankrupt, the transactions are challenged by the applicant, Mr Mark Sands, who is his trustee in bankruptcy.

Narrative

2. The property in question is a large house known as "Priors Croft" in Cryfield Grange Road, Gibbet Hill, Coventry. Mr Singh bought it on 20 October 2006 for £976,000. A charge was granted in favour of Northern Rock plc, from which Mr Singh had borrowed £700,000 to fund the purchase.

3. On 16 February 2008, Mr Singh married the fourth respondent, Mrs Ramandeep Kaur ("Mrs Kaur"). Unlike Mr Singh, Mrs Kaur, who was then 22 years old, had been brought up in India and the wedding took place there. The marriage had been arranged between the two families.

4. At the end of March 2008, Mr Singh and Mrs Kaur moved into "Priors Croft". Mr Singh had, however, commissioned very extensive building works at the house and these were not yet finished. After Mrs Kaur had given birth to the fifth respondent, Jessica Kaur ("Jessica"), on 14 October, the family moved out temporarily, initially to 2 Fletchamstead Highway, Coventry and later on to 46 Kenilworth Road, Coventry. Mrs Kaur's evidence was that she understood each of these properties to belong to the second respondent, Mr Chanan Singh Thandi ("Mr Thandi"), who is Mr Singh's father.

5. On 3 February 2010, Mr Singh and Mrs Kaur gained a second daughter, the sixth respondent, Karina Kaur ("Karina"). The following month, Mr Singh and Mrs Kaur moved back into "Priors Croft". While the renovations may still not have been fully complete, the property was by now habitable.

6. The cost of the building works remained outstanding to a great extent. Mr Singh had commissioned G.W. Deeley Limited ("Deeley") to carry out the work. He made an initial payment of £200,000 in April 2009, but in September of that year Deeley raised an invoice for a further £890,000. By the spring of the following year, Deeley was claiming to be owed £913,719 plus VAT. On 28 July 2010, Deeley issued proceedings against Mr Singh in the Technology and Construction Court.

7. By this stage, Mrs Kaur had for some time felt that her marriage had broken down. At the end of 2009 or beginning of 2010, she consulted a firm of solicitors in Leamington Spa, Blythe Liggins. On 21 January 2010, Blythe Liggins asked the Land Registry to enter on the register for "Priors Croft" notice of home rights under the Family Law Act 1996.

8. At much the same time, Mr Singh agreed to charge "Priors Croft" in favour of his father. An agreement dated 20 January 2010 provided for "Priors Croft" to be charged as security for a loan from Mr Thandi of £506,000 for five years from 20 October 2006 (subject to extension at Mr Thandi's discretion) with interest at base rate. The charge ("the January Charge") was registered at the Land Registry on 11 March.

9. On 15 April 2010, Mr Singh agreed to charge "Priors Croft" in favour of the third respondent, Ms Susan Kaur, who is Mr Singh's sister. The agreement referred to Ms Susan Kaur lending Mr Singh £70,000 for five years from the date of the agreement (subject to extension at Ms Susan Kaur's discretion) with "Fixed Interest" of £30,000. The charge ("the April Charge") was registered at the Land Registry on 29 April 2010.

10. On 4 August 2010, Mrs Kaur left "Priors Croft" with her two children. She went to live at 30 Duke's Avenue in Muswell Hill, a property owned by Ms Susan Kaur and a Mr Simon Thurgood and where Mrs Kaur's cousin Sharon was a tenant.

11. Mrs Kaur consulted Family Law Associates ("FLA"), a firm of solicitors in Crouch End. On Wednesday 18 August 2010, they sent a letter to Mr Singh (at "Priors Croft") in which they said that they had been instructed to file a divorce petition on Mrs Kaur's behalf and that both she and Mr Singh would need to give full disclosure of their financial positions. FLA continued:

> "However, our client hopes that the financial issues between you can be resolved without the requirement for full financial disclosure. To this end, our client wishes to put forward the following financial proposals:-
>
> 1. The former matrimonial home at Priors Croft be transferred into our client's sole name, subject to the mortgage;
>
> 2. You pay our client the sum of £5000 per month by way of spousal maintenance, and;
>
> 3. You pay 20% of your net income to our client for the benefit of Jessica and Karina each month by way of child maintenance.
>
> If the above terms are accepted, our client will make no further claim against your assets or income."

12. In a letter dated Friday 20 August 2010, Dent Abrams, a Hammersmith firm of solicitors who were already acting for Mr Singh in connection with Deeley's claim against him, asked FLA to note that they had been instructed by Mr Singh. A letter from Ms Ghauri of Dent Abrams to Mr Singh also dated 20 August included this:

> "I also understand that you have a dispute ongoing with Deeley's Construction Limited. Can you please, therefore, arrange a time to come to my offices for a meeting with myself and a family specialist barrister to ensure that there is no detriment that you suffer in connection with this. Whilst, I appreciate that your financial position is a difficult one, with respect to the ongoing proceedings and therefore it will be necessary to show that there has been a fair settlement reached and also to protect your children's interest."

13. By 25 August 2010, Dent Abrams had booked Ms Emily James of counsel to advise "in connection with ancillary relief issues" at a conference two days later. In the event, Ms James does not appear to have given any advice until 28 September. A fee note refers to her having spent an hour and a half on advice she gave on that date.

14. On 9 September 2010, Dent Abrams sent a substantive response to FLA's letter of 18 August. The letter explained:

> "1. Our client has agreed to transfer the former matrimonial home at Priors Croft for the benefit of the children in a trust and for one trustee to be appointed from each side;
>
> 2. In relation to paying maintenance to your client in the sum of £5,000 is extortionate and our client is not in a financial position to pay this, however, he has agreed to pay a lump sum of £50,000 which will be paid over a period of one year if your client agrees;
>
> 3. Our client will pay 15 percent of his net income to your client for the benefit of Jessica and [Karina] each month by way of child maintenance."

15. A divorce petition was issued on 17 September 2010. FLA told Dent Abrams of this in a letter of 21 September. They also said that they were taking instructions on the settlement that Mr Singh had proposed but would like to know whether he would be prepared to meet "the obligations under the mortgage on the former matrimonial home on an ongoing basis". They also requested details of the proposed trust and documentary evidence of Mr Singh's income.

16. Dent Abrams evidently spoke to Mr Singh at least once on 4 October 2010. An attendance note refers to Mr Singh earning about £2,000 a month from "taxi" and about £3,000 a month from "chauffeuring". The attendance note also includes the following:

> "- Prior's Croft has approx. £650k mortgage with Northern Rock, £506k charge for father and £100k charge for S. Kaur.
>
> - Monthly payments are £2836.70.
>
> - Prior's Croft worth £1.3m.
>
> - £50k to be loaned from father.
>
> Re children, he prefers to pay 15% maintenance or as low as poss."

17. That same day, Dent Abrams wrote to the clerk to Mr Michael Nicholls QC to ask for his "advice for setting up a trust and also drafting the terms and conditions of a Consent Order". The instructions to counsel referred to the claim that Deeley had issued and observed that Mr Singh had "come under an enormous amount of pressure

with his marriage and financial problems", was "too upset to be going through further proceedings and simply wants to bring the family matter to an end" and would like "advice in connection with a reasonable settlement to be made in the children's favour". The instructions also included this:

> "The Respondent [i.e. Mr Singh] would like to be guided and advised as to the most appropriate option to pursue and he would like to be fair in his stand point. His main concern is the children; if the Respondent has to transfer the whole of his interest to be held on trust for his children then he is happy to do so but has reservations to transfer the whole interest over for the benefit of his wife. The reason being that his wife may remarry and then perhaps her new husband may take half of that interest from her. The Respondent is happy for a fair Consent Order to be drafted and to be more in the children's favour."

18. Attendance notes record that Dent Abrams spoke to Mr Nicholls' chambers on the telephone on both 4 and 5 October 2010 and that they were referred on to Mr Valentine Le Grice QC because Mr Nicholls was away. In an advice dated 6 October, Mr Le Grice concluded:

> "[T]he proposed consent order may be grossly unfair to Mr Singh. Unless and until I know this is not the case I cannot see how it is in Mr Singh's interest for me to draft a consent order encapsulating the terms set out in the letter of 18th August."

Earlier in his advice, Mr Le Grice had said this:

> "On my present instructions it is impossible to form any picture of Mr Singh's overall financial position. Regardless of whether the builders are entitled to the sum claimed, it is apparent that Priors Croft must be a relatively large and potentially valuable property. I have no idea how Mr Singh was able to buy such a property. I know … that the house is subject to mortgage, but I do not know how much is outstanding. Secondly, it is impossible to see how Mr Singh could afford to pay Mrs Kaur £5,000 per month in maintenance together with 20% of his income in child maintenance; yet I am instructed he wishes to accept that proposal. Thirdly, Mr Singh is prepared to give up his interest in the matrimonial home. If Mr Singh has no other capital it is highly surprising that he would countenance doing so, even on the basis of transferring his interest to the children. Given these peculiarities and the lack of full instructions on the finances of the family I am unable to advise whether Mrs Kaur's proposal is a reasonable one. All I can say is that if Mr Singh has no capital apart from the matrimonial home and his earning capacity is limited to what he can earn as a private hire driver, Mrs Kaur's proposal is absurd and grossly unfair on Mr Singh."

19. By 7 October 2010, Mr Le Grice had received further instructions from Dent Abrams. These asked him to "look at this matter again and instead of giving advice assist on drafting the terms and conditions of the trust to enable instructing solicitor to draw up a Consent Order". The instructions contained, too, this:

> "Mr Singh runs an executive business and also provides wedding day and other special occasion services in his Bentley. His average charge for a full days hire for a wedding is £1000. During the week he does provide private hire earnings in the region of £600 or £700 per week.
>
> His business has been running for 8 months and it is still growing as well as his earnings. For this reason he has no completed set of accounts to demonstrate his income. Although he earns above £5000 per month, he needs the rest to be set aside for his tax liabilities.
>
> His property is worth £1.3 million and was recently surveyed by a local estate agent. He purchased the property for £900,000 with a mortgage of around £650,000. He has borrowed [£500,000] from his father to use as a deposit and his father was given a second charge over the property until it was sold. He also then borrowed £70,000 from Susan Kaur as he had a tax bill to clear and gave her a charge over the property. If the property were to be sold today, it would release very little if any equity. Mr Singh's father and Susan Kaur are prepared to wait for their money as the loan was a possible long term investment on their part.
>
> Mr Singh's monthly payments are £3000 per month.
>
> Mr Singh has proposed to pay Mrs Ramandeep Kaur a lump sum of £50,000 [with] the property put in trust for the two children and he will continue to pay the mortgage."

20. Mr Le Grice continued to have concerns. In an advice dated 12 October 2010, he queried whether Mr Singh was agreeing to "unaffordable maintenance provisions" and whether the proposal was for "Priors Croft" to be transferred subject to all three mortgages or only the first mortgage.

21. Dent Abrams sought to address Mr Le Grice's concerns in a document dated 13 October 2010. Among other things, this said that Mr Singh had an income of £5,000 per month after tax, that the "mortgage on the matrimonial home" was £2,836.70 a month and that he was willing to pay his wife a lump sum of £50,000 (to be borrowed from his father) in lieu of the £5,000 a month she had asked for.

22. Dent Abrams included similar information in a letter of 13 October 2010 to FLA. The letter also summarised what Mr Singh was offering in these terms:

> "1. Pay your client a lump sum of £50,000 as a settlement amount.

2. Place the matrimonial home in a trust for the benefit of the children.

3. He will continue to pay the mortgage.

4. He will pay 15% of his income as maintenance for the children."

23. FLA replied on 20 October 2010 that they needed to see a draft trust deed and some documentary evidence as to Mr Singh's income. In the course of the next week, Dent Abrams sent FLA bank statements and an accountant's reference for Mr Singh and also drafts of a consent order and trust deed. The draft consent order provided for Mr Singh to undertake to place his beneficial interest in "Priors Croft" in trust for Jessica and Karina on the basis that Jessica and Karina would have equal interests; the house would not be sold until (broadly) Mrs Kaur remarried or died or one of the children attained the age of 21; and, in the event of an earlier sale, the net proceeds of sale after "redemption of the mortgages secured against the house" would be invested in a substitute property to be held on the same trusts. There was also provision for Mr Singh to give an undertaking in these (as yet, not fully fleshed out) terms:

> "to pay the mortgage on the house in favour of until the Petitioner's death, remarriage or further order".

In addition, the draft envisaged that Mr Singh would be ordered to pay Mrs Kaur a lump sum of £50,000 within three months and make payments of £375 a month each in favour of Jessica and Karina until they reached the age of 17 or finished full-time secondary education. Finally, the parties' claims against each other for, among other things, financial relief were to be dismissed.

24. On 29 October 2010, FLA suggested to Dent Abrams that the parties should exchange "Form Es" by way of disclosure of their financial positions. On 8 November, they commented in six numbered paragraphs on the draft consent order and trust deed with which they had been provided. Among other things, they proposed that there should be a second trustee, that it should be clear that "Priors Croft" should not be sold without a suitable alternative being bought, that there should be provision for Mrs Kaur to be consulted on plans to sell "Priors Croft" and that Dent Abrams should ensure that Mrs Kaur retained exclusive occupation for herself and the children.

25. Dent Abrams largely agreed to the six points in a letter to FLA of 9 November 2010, although they said that they could only agree to there being a second trustee on "confirmation of [Mrs Kaur's] nominated co-trustee". Dent Abrams further said that they had had "Priors Croft" valued at an average of £1.28 million. The letter continued:

> "No doubt you will agree that our client does not need to enter into any Trusts, nor is your client capable of taking over the mortgage. Also he has no other assets or savings. If the property was to be sold, and our client did not obtain the loan amount in order to make the lump sum payment, your client is looking at a much less favourable settlement.

> Certainly, she would receive a maintenance order for herself and the two children but she will not receive any lump sum payment from our client, nor any equity from the property. She would also be in a position of having to find alternative accommodation for herself and her children. In light of these facts, our client cannot understand why his generosity is being questioned and why your client feels she is in a position to make demands over the trust when, if our client was to have it sold, she would have no further say.
>
> Our client wishes for your client to understand that he is only prepared to do all this for the benefit of the children. He also wants her to understand that he does not want to place her, and therefore his children in a position where they will be homeless."

26. FLA none the less pressed for Form Es to be exchanged, and this took place in late November 2010. In his Form E, Mr Singh identified a bank account with Royal Bank of Scotland. He made no reference to an account that was held in his name with Barclays Bank ("the Barclays Account") or to having any interest in the 16 properties mentioned in paragraph 40 below. Nor did he mention having any debts other than those secured on "Priors Croft". Dent Abrams did, however, send FLA copies of "the loan agreements which the mortgage charges relate to".

27. On Wednesday 1 December 2010, Mrs Kaur wrote a letter to Dent Abrams in which she said that, as of the previous day, FLA were no longer acting for her and that correspondence should therefore be sent to her at 30 Duke's Avenue. Although Mrs Kaur said in evidence that she did not remember the letter being faxed to Dent Abrams, it seems that it must have been because in a letter also dated 1 December Dent Abrams referred to Mrs Kaur's "fax received by us today". Dent Abrams went on:

> "[W]e enclose copies of the Trust and the consent order based on the negotiations we have had with your previous representatives The Family Law Associates. From what we understand, you were to confirm whether you are prepared to accept the offer made by [our] client. For your reference, his offer is as follows:
>
> 1. He is to place the matrimonial home in a trust for the benefit of the two children.
>
> 2. He is to pay you a monthly maintenance of £375 for each child.
>
> 3. He will be responsible (under the trust) to pay the Mortgage.
>
> 4. You will receive a lump sum figure of £50,000.00 from him as a final settlement.
>
> 5. You will have no further claim over him.

> To that effect, we enclose a copy of the Consent order and a Deed of Trust. You need to take this to an independent legal advisor who can explain the terms of them to you and provide you with a letter confirming that you have been advised of and understand the terms of both documents. If you are in agreement with them, then please sign both documents and return them to us. Although it is the Petitioner, in this case yourself, that would send these documents to the court, we suggest that we review and send these ourselves to ensure the correct procedures are followed."

28. In this (final) form, the trust deed provided for Mr Singh to hold "Priors Croft" on trust for the benefit of Jessica and Karina. After referring to the fact that Mrs Kaur had matrimonial rights to the property under the Family Law Act 1996, it stated:

> "In consideration of the setting up of this trust Ramandeep Kaur hereby waives all her rights to and claims in the Property"

before providing:

> "Ramandeep Kaur retains the exclusive occupation of the Property for herself, her children and her extended family until such time when Property is sold under the circumstances listed in Clause 2 below. If a substitute property is purchased, she will retain the same occupational rights of that property also."

The trust deed then continued as follows:

> "2. SALE OF THE PROPERTY AND DISTRIBUTION OF THE SALE PROCEEDS
>
> (1) Subject to Subclause (2) below, the Property shall not be sold until the earliest of the following events:
>
> (a) The remarriage of Ramandeep Kaur;
>
> (b) The death of Ramandeep Kaur;
>
> (c) Karina's 21st birthday or if she should die before attaining the age of 21, Jessica's 21st birthday and forthwith on Karina's death if Jessica is then aged 21;
>
> (d) The death of the last surviving child of the family.
>
> (2) If for reasons beyond the control of the Trustee [i.e. Mr Singh], the Property has to be sold before any of the events under (1) above has happened then the Net Proceeds of Sale, being the gross sale price less the costs of sale and redemption of all the mortgage(s) or charge(s) secured against the Property, shall be invested in alternative domestic residential accommodation ('Substitute Property') to be held on the same trusts and in this Deed the reference

to the Property shall include the Substitute Property where appropriate. If funding for the Substitute Property cannot be secured by the trustee, then any equity released shall be place[d] in a joint bank account in the names of the Beneficiaries until such time that funding can be arranged. Ramandeep Kaur shall also be consulted prior to any decision being made regarding the sale of the property being made.

(3) On the sale of the Property under Clause 2(1) above or the Substitute Property the Net Proceeds of the Sale shall be distributed equally between the Beneficiaries if both are alive or to the survivor if the other is deceased.

(4) If on the sale of the Property both of the Beneficiaries are deceased then this Trust shall terminate and the Net Proceeds of the Sale shall be paid to myself or to my estate.

3. INCOME AND DEBT ON THE PROPERTY

(1) The Trustee will not receive any income from the Property.

(2) Ramandeep Kaur will be discharging all the rates and expenses with regard to the Property during her occupation of the Property.

(3) The Trustee will be paying all the payments arising from any legal mortgage or charge secured on the Property during the operation of this Trust until the earliest of the following events:-

(a) The sale of the Property;

(b) The remarriage of Ramandeep Kaur;

(c) The death of Ramandeep Kaur."

29. Mrs Kaur evidently signed the consent order and trust deed the day after Dent Abrams had sent them. She returned them to Dent Abrams under cover of a letter of 2 December 2010, stating:

> "Now, I am forwarding these above said documents to you to get it signed by your client Mr Singh, to get the matter finished as soon as possible. Can you please make sure that you do it as quick as possible because I want to move back to the matrimonial home before Christmas?"

30. Mrs Kaur also sent Dent Abrams a letter from Kinas, a firm of solicitors in Haringey. This confirmed that Mrs Kaur had signed the consent order and trust deed in their presence after they had "explained the documents to [her] thoroughly and advised [her] generally in relation to ancillary relief".

31. On 6 December 2010, Mr Singh executed the trust deed ("the Trust Deed") and Dent Abrams signed the consent order on his behalf. On the following day, Dent Abrams sent the consent order to the Court, explaining in their letter:

> "You will note that the financial matters have been agreed mutually by both sides and now the petitioner is keen to conclude so that she may move back to the matrimonial home."

In a letter of 13 December, Dent Abrams told Mrs Kaur that they had submitted the consent order to the Court, adding:

> "Also, with regards to Mr Singh moving out of the matrimonial home, he is now making alternative arrangements and hopes to vacate as soon as the sealed Consent Order is returned which should be before the end of this week."

32. Dent Abrams rang the Court to enquire about progress several times in the second half of December 2010. On 23 December, they reported to both Mr Singh and Mrs Kaur that a decree nisi had been pronounced and that the consent order would be sealed in the New Year.

33. In a letter dated 11 January 2011, the Court informed Dent Abrams that a District Judge had made a number of observations in relation to the consent order. Among other things, he had queried whether Mrs Kaur had had the opportunity to take independent legal advice and how Mr Singh was to pay the mortgage as "his income is £5,000 per annum (or is it per month?)". Dent Abrams replied on 14 January (asking that the application be processed as a matter of urgency because Mrs Kaur was "very anxious to complete this matter as soon as possible so that she and the children may return to the matrimonial home") and chased the Court by telephone on 20 January.

34. On 31 January 2011, District Judge Walker made an order in the terms of the agreed draft ("the Consent Order"). This followed the draft described in paragraph 23 above, except that Mr Singh's second undertaking had now become:

> "to pay the mortgage on the house in favour of Northern Rock, Mr Chanan Singh [i.e. Mr Thandi] and Miss Susan Kaur until the Petitioner's death, remarriage or further order".

35. That same day, Deeley applied without notice for, and was granted by Edwards-Stuart J, a freezing order against Mr Singh. The order, which was essentially in standard form, extended to the Barclays Account and 15 properties, including "Priors Croft". On 4 February 2011, Dent Abrams wrote to tell Mrs Kaur that they had been served with the freezing order. While, however, the freezing order was continued on 8 February in other respects, it was discharged as regards the various properties listed in the 31 January order, including "Priors Croft". Dent Abrams explained in a letter to Kinas of 14 February that the Court had "accepted that our client has no beneficial interest in any of those properties".

36. Mrs Kaur moved back into "Priors Croft" on 19 February 2011 and a decree absolute was granted on 24 February. In June, Mrs Kaur was paid the lump sum of £50,000 for

which the consent order had provided. Between March and September, Mrs Kaur also received monthly payments from Mr Singh in respect of child maintenance.

37. On 28 September 2011, Mr Singh was adjudged bankrupt on a petition presented by Deeley. The claim that Deeley had brought in the Technology and Construction Court had been disposed of by a consent order in April 2011. This recited that Mr Singh had accepted a Part 36 offer that Deeley had made on 29 November 2010 and provided for judgment to be entered in favour of Deeley for £750,000 (including interest) plus costs. Mr Singh having failed to pay, Deeley served a statutory demand and then initiated bankruptcy proceedings.

38. Warwick University had been a judgment creditor of Mr Singh for much longer than Deeley. As long ago as 13 October 2006, Mr Singh had been ordered to pay the University's costs of proceedings that it had brought in Coventry County Court, to be the subject of detailed assessment if not agreed. On 19 May 2008, the relevant costs were assessed at £57,718.38. In April 2011, the University took steps to serve a statutory demand on Mr Singh. Nothing had, however, been paid when Mr Singh went bankrupt.

39. On 18 January 2012, Mr Sands, was appointed as Mr Singh's trustee in bankruptcy jointly with a Mr Andrew Appleyard. Later that year, Mr Sands and Mr Appleyard were registered as the proprietors of "Priors Croft" at the Land Registry.

40. In 2013, Mr Thandi issued proceedings in which he claimed to be the beneficial owner of 16 properties in the Coventry area which had been registered in Mr Singh's name and were mostly let to students. On 14 July 2014, however, Judge Cooke, sitting as a Judge of the High Court, dismissed Mr Thandi's claim. In the course of his judgment, Judge Cooke observed (at paragraph 75) that he had concluded that both Mr Singh and his father "would be prepared to give any evidence, written or oral, that they thought would assist them to keep the family assets away from creditors". Judge Cooke went on (in paragraph 76):

> "The most reliable evidence of [Mr Singh's and Mr Thandi's] actual intentions at all relevant times must therefore be that which can be inferred from what they actually did. I accept that on the evidence all or substantially all the finance for acquisition of the initial properties was provided by Mr Thandi. He chose however to have them all transferred to, or purchased in the name of, his son Tarlochan Singh. In doing so he might have intended that Tarlochan Singh would hold them on trust, but that is by no means the only possible intention, particularly in the context of the acquisition and management of family assets and family wealth. It is just as possible, in principle, that he intended to build up a portfolio of assets that his son would own, or that would be regarded as assets of the family to be dealt with in future as they might agree or as he might procure by exercise of informal influence as head of the household. Neither such arrangement would involve a trust in his favour."

As regards a deed of trust that had been dated 8 August 2003, Judge Cooke considered that "both the draft and the signed deed were produced in 2006, when the deed was backdated" (paragraph 67). He also said (in paragraph 80):

> "Insofar as the deed of trust is relied on, I am satisfied that it was created for the purpose of showing a position to third parties that was not the actual intention of the parties to it, by way of insurance against claims against Tarlochan Singh. It is thus neither persuasive evidence of the prior existence of any trust nor legally effective to create a trust where none existed before. It was a sham, in that sense."

41. Mr Sands and Mr Appleyard issued the application that is before me on 25 September 2014. However, on 19 October 2015 Judge Purle QC, sitting as a Judge of the High Court, ordered that the defences of Mr Singh, Mr Thandi and Ms Susan Kaur should be struck out without further order unless they provided Mr Sands (Mr Appleyard having ceased to be one of Mr Singh's trustees in bankruptcy on 19 June) with copies of the documents referred to in their list of documents. No copies having been so provided, the defences of Mr Singh, Mr Thandi and Ms Susan Kaur stand struck out.

42. Mr Sands has expressed the view that "Priors Croft" is now worth about £1.5 million, but there is no expert evidence as to the property's current value. Virgin Money plc, which has taken over the Northern Rock loan, stated on 20 November 2015 that the outstanding balance on it was £724,722.10.

43. With regard to the properties that were the subject of the trial before Judge Cooke, Mr Sands explained in cross-examination that some £175,000 was recently realised from sales and that there is ongoing litigation about the disposal of some other properties that were charged to Nationwide Building Society. There was no return from the remaining four or five properties, which were disposed of by mortgagees.

The claims

44. In these proceedings, Mr Sands challenges the January Charge, the April Charge and the linked transaction of the Trust Deed and the Consent Order. As regards the January and April Charges, Mr Sands contends that these are void as shams or, in the alternative, that they represent preferences within the meaning of section 340 of the Insolvency Act 1986 ("the 1986 Act"). So far as the Trust Deed and Consent Order are concerned, Mr Sands' case is that these should be set aside as constituting a transaction defrauding creditors under section 423 of the 1986 Act or a transaction at an undervalue for the purposes of section 339 of the 1986 Act.

The January Charge

45. As Diplock LJ noted in *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786 (at 802), the word "sham" refers in law to:

> "acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights

> and obligations different from the actual legal rights and obligations (if any) which the parties intend to create".

46. In *Hitch v Stone* [2001] EWCA Civ 63, [2001] STC 214, Arden LJ explained that the following points emerge from the authorities:

> "[65] First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.
>
> [66] Second, as the passage from *Snook* makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.
>
> [67] Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.
>
> [68] Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding….
>
> [69] Fifth, the intention must be a common intention (see *Snook*)…."

47. Turning to the facts of the present case, Mr Thandi explained the basis of the January Charge in these terms in an affidavit he swore in the Deeley proceedings:

> "In 2006, I had just sold … one of my properties and as I was looking around to buy another, Tarlochan Singh approached me to borrow … the money instead so that he could buy a house to call his own and settled down. He had seen a property, Priors Croft, and proposed that he could purchase it, renovate it, refinance it and then pay me back. As this is how I build my portfolio, I agreed to help him get started. I then loaned him £307,000 to use as deposit for the purchase.
>
> As Tarlochan Singh tried to renovate his property, he lost a lot of money to builders who either did not do the job properly or would simply disappear after taking a deposit of him. For this reason Tarlochan Singh approached me for some more money

> when he agreed a deal with the Claimant company. Although I was reluctant at first, but as he had suffered, I agreed to help him again. After all, he is my son, so I loaned him a further £200,000. I also agreed to pay the balance due to the claimant from the fixed price if and only if he was unable to re-finance. This was on condition that he would then sell his property, Priors Croft, and pay me back in full.
>
> When I realized that my interest in the property was not protected, and the claimant had begun legal proceedings against Tarlochan Singh, I then insisted that I should have a charge over the property to protect my money that I had loaned him."

48. This account is corroborated in part by documentation from the records of Sarginsons, Hughes & Masser (now Sarginsons Law LLP), the firm of solicitors which acted for Mr Thandi on the sale of a property at 8 Gosport Road, Coventry. The documentary evidence appears to show that £237,000 of the cost of buying "Priors Croft" in 2006 came from the proceeds of sale of 8 Gosport Road, which was evidently owned by Mr Thandi. Sarginsons also seem to have received sums totalling £70,000 from "National Savings & Investments" and a "Nat West bankers draft", and Mr Ian Cox of Sarginsons said in a letter dated 7 February 2011 that his firm's instructions were that that money "came from accounts owned by Mr Thandi".

49. As regards Mr Thandi's claim to have lent a further £200,000, some documents dating from 2009 suggest that the sum in question was raised on the security of the properties that Judge Cooke held to be beneficially owned by Mr Singh. That, of course, tends to undermine the argument that the money was lent to Mr Singh by his father.

50. Even assuming, however, that Mr Thandi provided his son with sums totalling £506,000 between 2006 and 2009, it does not follow that Mr Singh was lent that (or any) sum by his father. As was pointed out by Mr John de Waal QC, who appeared for Mr Sands, Mr Thandi could have been *giving* Mr Singh money rather than *lending* it. That view is consistent with the fact that there is no reference in the contemporary materials to Mr Thandi lending any of the £506,000 allegedly secured by the January Charge, let alone to Mr Singh providing security for any such loan, until January 2010, when the January Charge was executed. The credibility of the January Charge is further weakened to an extent by the fact that it appears to proceed on the basis that Mr Singh was lent the full £506,000 in 2006 when no one suggests that as much as that was provided to him at that stage. While, moreover, Mr Singh and Mr Thandi have each claimed in the past that the former was lent £506,000, neither has given any evidence in these proceedings. Nor is there even any evidence from Mr Cox. It is also noteworthy that the explanation of events quoted in paragraph 47 above differs slightly from that given by Dent Abrams in a letter written to Mr Sands' then solicitors on 21 February 2013.

51. In all the circumstances, it seems to me that Mr Sands has sufficiently proved his case in respect of the January Charge. On balance, I accept that the January Charge was intended to give the impression that Mr Thandi had lent his son £506,000 and was being granted security for that debt when both parties were in fact aware that Mr

Singh had not been lent any money and that there was, therefore, no indebtedness to secure. I find, accordingly, that the January Charge is a sham and so a nullity.

52. That conclusion is consistent with Judge Cooke's judgment of 14 July 2014. As I noted in paragraph 40 above, Judge Cooke considered that Mr Singh and his father "would be prepared to give any evidence, written or oral, that they thought would assist them to keep the family assets away from creditors".

The April Charge

53. As mentioned above (paragraph 9), the April Charge was stated to secure a loan of £70,000 made to Mr Singh by his sister, Ms Susan Kaur, in April 2010.

54. Mr Sands explained in his points of claim, which date from June of last year, that he had "seen no evidence that [Mr Singh] received a loan of £70,000 from [Ms Susan Kaur]". The materials that are now available, however, indicate that Ms Susan Kaur paid a cheque for £70,000 into the Barclays Account in April 2010. Thus, a statement for the account records that £70,000 was deposited into the account at "Barclays Muswell Hill" (i.e. a branch of Barclays close to Ms Susan Kaur's home) on 9 April and Mr Thandi exhibited to an affidavit he swore in 2011 a cheque for £70,000 drawn on an account held by Ms Susan Kaur and Mr Thurgood and made payable to Mr Singh.

55. On 16 April 2010, £100,000 was transferred out of the Barclays Account to an "Essential Savings Account" (number 53444678) held with Barclays. Mr Singh said in an affidavit that he swore in the Deeley proceedings that the transfer had been effected by his father, who was evidently an authorised signatory on the Barclays Account, with the intention of paying the money into a different "Essential Savings Account" that he (Mr Thandi) held; account 53444678 should not, he said, have been opened. Be that as it may, between May and August of 2010 at least £62,743, and very possibly £90,473, was transferred back into the Barclays Account from account 53444678. In turn, manuscript annotations on statements for the Barclays Account refer to sums of £32,473 and £1,973.91 being paid out in respect of "Tax". Some other withdrawals from the Barclays Account were to "Mr T Singh" (presumably, Mr Singh) or seem to have related to the properties of which Judge Cooke held Mr Singh to be the beneficial as well as legal owner. Mr Singh stated in an affidavit that he swore on 7 February 2011 in pursuance of the freezing order that Edwards-Stuart J had made that the account was used only in connection with the property business that, he asserted, belonged to his father.

56. The references to "Tax" chime to an extent with the instructions that Mr Le Grice received later in 2010. As can be seen from the quotation in paragraph 19 above, Dent Abrams told Mr Le Grice that Mr Singh had "borrowed £70,000 from Susan Kaur as he had a tax bill to clear". It is, however, hard to see how Mr Singh can have used *all* the £70,000 to meet tax liabilities. Even the annotations on the bank statements suggest that no more than about half of the £70,000 was disbursed in this way. Further, Ms Susan Kaur, like her brother and father, has not given evidence in these proceedings.

57. Nonetheless, I do not think I would be justified in concluding that the April Charge is a sham. It was entered into at a time when, it would appear, Ms Susan Kaur paid

£70,000 into an account in Mr Singh's name, and much of the money (and potentially all of it) looks to have been used to benefit him. That being so, I do not consider it to have been proved that the parties to the April Charge (viz. Mr Singh and Ms Susan Kaur) did not intend the document to have effect. To the contrary, it seems probable that they wished the April Charge to give Ms Susan Kaur security for a loan that she was regarded as making to her brother.

58. In the course of submissions, both sides referred to the provision in the April Charge for interest of £30,000 to be paid. Mr Avtar Khangure QC, who appeared for Mrs Kaur and her children, argued that, since the loan was to be for a five-year period, the £30,000 equated to an interest rate of only 8.6% a year. Mr de Waal suggested that 8.6% would have been a high rate of interest for a secured loan in 2010 and that Ms Susan Kaur would anyway have realised that, but for the grant of security, there was no likelihood of her brother being in a position to pay the sums for which the April Charge provided. In my view, however, these points cannot lend any support to the proposition that the April Charge is a sham. Even assuming it to be the case that the interest payable under the April Charge was generous to Ms Susan Kaur and that she could not have hoped to recover either principal or interest in the absence of security, I cannot infer from that that the parties did not intend to create the rights and obligations to which the April Charge purportedly gave rise. In fact, the danger of being unable to obtain payment if unsecured might have encouraged Ms Susan Kaur to ensure that she was granted genuine security.

59. There remains Mr Sands' alternative claim that the April Charge represents a preference. The difficulty with this is that the April Charge was entered into at more or less the same time as Ms Susan Kaur paid the £70,000 into the Barclays Account and itself provided for the loan of that money. That suggests that Ms Susan Kaur was granted security over "Priors Croft" as part of the arrangement under which the £70,000 was lent rather than with a view to improving her prospects of recovering pre-existing indebtedness. As, however, is explained in Goode, "Principles of Corporate Insolvency Law", 3rd ed., "a creditor who takes security for a contemporaneous or subsequent advance does not obtain a preference, since the diminution in assets created by the security is matched by the influence of new funds" (paragraph 13-84); the "payment, transfer or other act under attack must relate to a past indebtedness, for to the extent that the creditor gives new value, he gains no advantage" (paragraph 13-83). In the circumstances, I do not consider Mr Sands to have proved that the April Charge was a preference.

60. In brief, Mr Sands has not made out either of his challenges to the April Charge.

The Trust Deed and Consent Order

61. As I have already mentioned, Mr Sands seeks to have the Trust Deed and Consent Order set aside both under section 423 of the 1986 Act (transaction defrauding creditors) and under section 339 of the 1986 Act (transaction at an undervalue). As, however, Mr de Waal recognised, section 423 adds nothing of significance in the present context. Section 423, like section 339, applies only where there has been a transaction at an undervalue (see section 423(1)). If the Trust Deed and Consent Order constituted such a transaction, Mr Sands can obtain relief under section 339 without needing to rely on section 423. It will be irrelevant whether he can also prove (as he would have to for section 423 purposes) that the transaction was entered into for the

purpose of putting assets beyond the reach of, or otherwise prejudicing the interests of, a creditor (see section 423(3)).

62. The key question is, therefore, whether the Trust Deed and Consent Order amounted to a transaction at an undervalue.

Legal principles

63. Section 339(3) of the 1986 Act explains that an individual enters into a transaction with a person at an undervalue if:

> "(a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration,
>
> (b) he enters into a transaction with that person in consideration of marriage or the formation of a civil partnership, or
>
> (c) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual".

64. The transaction at issue in the present case involved an order made pursuant to Part II of the Matrimonial Causes Act 1973 ("the 1973 Act"). As its heading indicates, Part II, which at the time comprised sections 21-40A, deals with "Financial relief for parties to marriage and children of family". Section 23 empowers the Court to order periodical or lump sum payments to be made to a spouse or children or for the benefit of the latter. Under section 24, the Court can order property to be transferred to or for the benefit of a spouse or children or settled for their benefit. Section 25(1) requires the Court, when deciding whether to exercise its powers under Part II and, if so, in what manner, to have regard to all the circumstances of the case, "first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen".

65. The leading case on the extent to which orders made under Part II of the 1973 Act are susceptible to challenge under section 339 of the 1986 Act is *Hill v Haines* [2007] EWCA Civ 1284, [2008] Ch 412. In that case, a husband had transferred his interest in the former matrimonial home to his wife in pursuance of an order made under section 24 of the 1973 Act. The husband having subsequently been made bankrupt, his trustees in bankruptcy sought to have the transfer set aside pursuant to section 339 of the 1986 Act. The Court of Appeal held that the District Judge who had heard the matter at first instance (Judge Cooke, as he now is) had been right to dismiss the application. Given their importance, I should refer in some detail to the judgments given by the three members of the Court of Appeal.

66. Morritt C concluded (in paragraph 40) that section 339(3)(a) and section 339(3)(c) of the 1986 Act were each inapplicable because "the wife did give consideration" and "the consideration provided by the wife is in money or money's worth and its value

was not less than the value of the consideration provided by the bankrupt whether significantly or at all". Earlier in his judgment (at paragraph 29), Morritt C had said:

> "whatever the position may have been in earlier days, it is, in my view, self-evident that the ability of one spouse to apply to the court for one or more of the orders referred to in sections 23 to 24D [of the 1973 Act] is a right conferred and recognised by the law. Further it has value in that its exercise may, and commonly does, lead to court orders entitling one spouse to property or money from or at the expense of the other. That money and property is, prima facie, the measure of the value of the right."

Morritt C went on (in paragraph 35):

> "If one considers the economic realities, the order of the court quantifies the value of the applicant spouse's statutory right by reference to the value of the money or property thereby ordered to be paid or transferred by the respondent spouse to the applicant. In the case of such an order, whether following contested proceedings or by way of compromise, in the absence of the usual vitiating factors of fraud, mistake or misrepresentation the one balances the other. But if any such factor is established by a trustee in bankruptcy on an application under section 339 of the 1986 Act then it will be apparent that the prima facie balance was not the true one and the transaction may be liable to be set aside."

In paragraph 38, Morritt C endorsed this proposition (set out in paragraph 20):

> "in the ordinary case a transferee under a transfer made pursuant to [a property transfer] order is to be regarded as having given consideration (in the sense that word is to be understood in this context) equivalent to the value of the property being transferred, unless the case is an exceptional one where it can be demonstrated that the property transfer order was obtained by fraud or some broadly similar exceptional circumstance."

Finally, Morritt C said (in paragraph 38) that his conclusions involved "acceptance of the dictum of Ferris J in *Kumar's* case [1993] 1 WLR 224 applying *Abbott's* case [1983] Ch 45".

67. Thorpe LJ also referred to Ferris J's decision in *In re Kumar (A Bankrupt)* [1993] 1 WLR 224. Having expressed agreement with Morritt C's judgment, he said in paragraph 46:

> "Plainly if the ancillary relief order was the product of collusion between the spouses designed to adversely affect the creditors the trustee would intervene in the ancillary relief proceedings and apply for the order to be set aside. Such a

situation is illustrated by the decision of Ferris J in *Kumar's* case [1993] 1 WLR 224."

Thorpe LJ continued:

> "47 Additionally the ancillary relief order, like any other order, might be set aside if some other vitiating factor could be established, including a failure on the part of the wife to make full and frank disclosure of her own assets.
>
> 48 It can be assumed that ancillary relief orders resulting from a hard fought trial are less likely to be tarnished by collusion or fraud on the creditors than consent orders. However the same principles apply, albeit that the trustee's burden of proof may be more easily discharged."

Thorpe LJ concluded in paragraph 60:

> "Between the two systems of law [viz. insolvency and ancillary relief] there needs to be a fair balance which on the one hand protects the creditors against collusive orders in ancillary relief and on the other protects orders justly made at arms length for the protection of the applicant and the children of the family."

68. The third member of the Court, Rix LJ, agreed with both Morritt C and Thorpe LJ. At the end of his judgment (in paragraph 82), Rix LJ said:

> "Finally, as to policy, it would be unfortunate in the extreme if a court-approved, or even (an a fortiori case) a court-determined property adjustment order would be liable, in practice, to be undone for up to five years because the husband goes bankrupt within that period. That could even encourage such bankruptcy on the part of a disaffected husband. Although a collusive agreement by a divorcing husband and wife to prefer the wife and children over creditors and thus dishonestly to transfer to her more than his estate can truly bear, if his debts were properly taken into account, and thus more than her ancillary relief claim could really and knowingly be worth, is no doubt susceptible to section 339 relief despite the existence of a court order in her favour (see the decision in *Kumar's* case [1993] 1 WLR 224): nevertheless, in the ordinary case, where there is no dishonest collusion, and where a court approves or determines the sum or property to be transferred, it would be entirely foreign to the concept of a 'clean break' if the husband's creditors could thereafter seek to recover, in bankruptcy, the property transferred or its value. However, in my judgment, it would require the overthrow of long established jurisprudence, the reinterpretation of section 39 [of the 1973 Act], the misunderstanding of the doctrine of

> consideration, and an assault on current views of the statutory entitlement to ancillary relief, to arrive at that unhappy and unnecessary situation."

In paragraph 77, Rix LJ had said:

> "In these circumstances, there is nothing foreign to the concept of consideration in the idea that the compromise of a section 24 claim can provide good consideration—even if for section 339 purposes the question of adequacy can be reviewed, especially where there is room to find collusion, fraud or concealment. Where, however, such a claim is assessed by the court itself, in adversarial proceedings, in circumstances where the court is required to take account of all the circumstances, there must be little if any room for the possibility that the court's decision and order can be reviewed on the ground that it gives to the transferee more than the transferee is entitled to in law—even if in theory it is possible for the court itself to be deceived by dishonesty or collusion."

69. In *In re Kumar* [1993] 1 WLR 224, to which there was reference in *Hill v Haines*, a trustee in bankruptcy had succeeded in having set aside the transfer by a husband to his wife of his share in their matrimonial home. Ferris J concluded (at 236) that:

> "*In re Abbott*, although it is a decision on section 42 of the [Bankruptcy] Act of 1914, is applicable to section 339 to the extent that it decides that a compromise of a claim to a provision in matrimonial proceedings is capable of being consideration in money or money's worth."

It will, I think, be this passage that Morritt C had in mind when in *Hill v Haines* he endorsed "the dictum of Ferris J in *Kumar's* case".

70. Ferris J went on to consider "the question of the value of such consideration", but he found on the evidence that the wife had not provided any consideration by way of a release of claims under the 1973 Act (see 235H and 240C-D) and that the value of the consideration provided by the husband significantly exceeded the value of any provided by the wife. He explained (at 240-241):

> "In the result, I find that there was no consideration provided by Dr. Gupta [i.e. the wife] beyond her assumption of sole liability in respect of the Westpac mortgage [i.e. the mortgage on the matrimonial home]. As that mortgage stood at only £30,000 at the time of the transfer and there was clearly an equity of redemption of very considerable value, the value of such consideration was, clearly, significantly less than the value of the consideration provided by Mr. Kumar [i.e. the husband]. The transfer of Mr. Kumar's interest in 43, Broadwalk [i.e. the matrimonial home] to Dr. Gupta was, in my judgment, therefore at an undervalue for the purposes of section 339. I would add that even if I had accepted the argument that there

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

71. The other case that I should mention is *Re Jones (A Bankrupt)* [2008] BPIR 1051. In that case, ancillary relief claims had been disposed of by a consent order which gave the husband the vast majority of the couple's assets and, in consequence, allowed the husband and children to remain in the matrimonial home. Chief Registrar Baister declined to accede to an application by the wife's trustee in bankruptcy for the consent order to be set aside as a transaction at an undervalue. At paragraph 39 of his judgment, the Chief Registrar said this:

> "[Counsel for the trustee in bankruptcy] accepts that following *Haines v Hill* the court will not ordinarily be able to go behind a consent order. It will only do so where there is a vitiating factor. [Counsel for the husband] accepts that proposition. In the circumstances it is unnecessary for me to undertake the detailed analysis of the three judgments of the Chancellor, Thorpe LJ and Rix LJ which we went through at the hearing."

72. It is also relevant to note, on the one hand, that the jurisdiction of the Court under Part II of the 1973 Act cannot be ousted by an agreement between the parties and, on the other hand, that the existence of such an agreement is a relevant circumstance and may lead to an abbreviated procedure for translating it into an enforceable court order (see *Hill v Haines*, at paragraph 31). In *Hill v Haines*, Thorpe LJ explained (at paragraph 54):

> "the contractual agreement between applicant and respondent for the compromise of an ancillary relief claim is not conclusive unless and until made the subject of a consent order of the court. That is because the court exercises a quasi-inquisitorial jurisdiction and has an independent duty to investigate and determine what is fair to the parties. In very rare cases the court may decide to order more or less than had been agreed".

In *Sharland v Sharland* [2015] UKSC 60, [2015] 3 WLR 1070, Baroness Hale (with whom the other members of the Supreme Court agreed) observed (at paragraph 20):

> "Although the court still has to exercise its statutory role, it will, of course, be heavily influenced by what the parties themselves have agreed."

73. In the light of the authorities, I take the law to be as follows:

i) Giving up a claim for ancillary relief under Part II of the 1973 Act constitutes "consideration" within the meaning of section 339 of the 1986 Act. An order disposing of such a claim will not, therefore, be open to challenge under section 339(3)(a) of the 1986 Act;

ii) Nor, normally, will it be possible to attack such an order under section 339(3)(c) of the 1986 Act. The value of the claim for ancillary relief will generally be taken to have been equivalent to the value of the money and property required to be paid and transferred under the order;

iii) This principle applies to consent orders as well as those made after contested hearings;

iv) A trustee in bankruptcy may nonetheless be able to set aside an order made under Part II of the 1973 Act if he can show a "vitiating factor". In *Hill v Haines*, Morritt C spoke of "the usual vitiating factors of fraud, mistake or misrepresentation" and "fraud or some broadly similar exceptional circumstance"; Thorpe LJ of "collusion between the spouses designed to adversely affect the creditors" and "a failure on the part of the wife to make full and frank disclosure of her own assets"; and Rix LJ of "a collusive agreement by a divorcing husband and wife to prefer the wife and children over creditors", "dishonesty" and "collusion, fraud or concealment";

v) The paradigm case in which an order under Part II of the 1973 Act can be set aside will be one involving collusion between the spouses. It is, however, possible to envisage circumstances in which an order could be challenged without there having been any such collusion. Suppose, for example, that a husband, knowing that he was about to be served with a statutory demand and preferring his assets to benefit his wife and children than his creditors, dishonestly concealed his debts and overstated his assets so that the Court made an order in favour of the wife and children which it could never have approved had it known the true facts. It seems to me that, if the husband were subsequently adjudged bankrupt, it might be possible for his trustee in bankruptcy to have the order set aside even though the wife had genuinely believed the husband to be as wealthy as he represented and had been innocent of any complicity. On the other hand, the Court is, I think, likely to be slow to set aside an order under the 1973 Act in the absence of collusion;

vi) In *Hill v Haines*, Thorpe LJ spoke of a trustee in bankruptcy intervening "in the ancillary relief proceedings". Even, however, if that is a possibility, a challenge to an order made in ancillary relief proceedings need not, as it seems to me, be mounted in those proceedings. I can see no reason why a trustee

should not bring separate proceedings in the Chancery Division (or, where appropriate, the County Court) to have an order set aside under section 339 of the 1986 Act (as in fact has happened in the present case without objection).

Collusion?

74. Mr Sands contends that the Trust Deed and Consent Order are the product of collusion between Mr Singh and Mrs Kaur. It is suggested that Mrs Kaur colluded with her husband in the creation of a scheme designed to prefer the interests of herself and her children to those of Mr Singh's creditors. Mrs Kaur and Mr Singh both knew, it is said, that the latter had serious financial problems and that the charge over "Priors Croft" that had purportedly been granted to Mr Thandi was a sham.

75. Mr de Waal argued that it was implausible that Mrs Kaur had not come to know that her husband had financial difficulties. He pointed, too, to the speed with which Dent Abrams responded on Mr Singh's behalf to FLA's letter of 18 August 2010; it is to be inferred, he suggested, that Mr Singh and Mrs Kaur had discussed a possible settlement before she left "Priors Croft" on 4 August. In any case, Mr de Waal said, Mrs Kaur will have been privy to conversations about her husband's debts when, having gone to 30 Duke's Avenue, she was living under the same roof as Ms Susan Kaur. Mr de Waal relied, too, on the way in which Mrs Kaur dispensed with FLA's services and turned instead to Kinas: why, he asked, would Mrs Kaur have disinstructed FLA at a crucial moment if she had not been complicit in collusion? Mrs Kaur's conduct cannot, Mr de Waal submitted, be attributed to impatience to return to "Priors Croft" as there was nothing to stop Mr Singh agreeing with his wife that she and the children could move back there. The real driver by December 2010 was, Mr de Waal contended, a concern that, if the ancillary relief proceedings were not disposed of quickly, Mr Singh's financial problems might render him unable to make the desired provision for Mrs Kaur and the children.

76. Mrs Kaur, however, denies any collusion with Mr Singh. During her marriage, Mrs Kaur said in her witness statement, Mr Singh "was often out of the house and never really had much time for [her]". She had, she said, no idea about her husband's income and finances and did not think it her place to ask questions about them; in particular, Mr Singh never discussed any financial problems with her nor spoke of having a plan to protect "Priors Croft" from creditors. Between 4 August 2010 (when she left "Priors Croft") and 19 February 2011 (when she returned there), Mrs Kaur met her husband, she maintained, on only one occasion, when she went to "Priors Croft" with the children to collect some clothing and personal items, and she did not otherwise speak to him. So far as she was concerned, the Trust Deed and Consent Order were reasonable and offered the best hope of a home for herself and the children. It was her understanding at the time that there was very little equity in "Priors Croft" and she had no knowledge of any claim being made by Deeley until she was informed in February 2011 of the freezing order that Edwards-Stuart J had made; her husband had never told her that he was in dispute with Deeley. She had only learned of the charges in favour of Mr Thandi and Ms Susan Kaur from FLA, who had discovered them from a Land Registry search. When Mrs Kaur then asked Ms Susan Kaur about the charge in her (Ms Susan Kaur's) favour, she was told that it was something between brother and sister, and she did not infer from the existence of the charges that her husband had financial problems because it was standard practice for members of her own family in India to lend each other money. She parted

company with FLA because they envisaged pursuing her claim in contested proceedings when she was keen to have matters resolved: she and her children did not have a home of their own as things stood and she had been diagnosed as suffering from depression in August 2010 and was on anti-depressants.

77. I accept Mrs Kaur's evidence. As Mr de Waal recognised, there is no direct evidence of collusion and the circumstantial matters on which he relied have not persuaded me to reject Mrs Kaur's account. Given the picture Mrs Kaur paints of her relationship with her husband, it does not strike me as implausible that she should have been ignorant of his financial dealings and circumstances. Further, I cannot read anything adverse to Mrs Kaur into the speed with which Dent Abrams replied to FLA's letter of 18 August when (a) Dent Abrams were already acting for Mr Singh on another matter and (b) the letters they sent on 20 August to FLA and Mr Singh were largely standard form. It is true that Mrs Kaur lived under the same roof as Ms Susan Kaur after moving out of "Priors Croft", but she was also sharing the house with, among others, her cousin Sharon. I can, moreover, understand Mrs Kaur's explanation of how she came to disinstruct FLA. It is to be noted in that connection that, while it might theoretically have been possible for Mrs Kaur to return to "Priors Croft" before the Consent Order was made, Dent Abrams referred in a letter to Mrs Kaur of 13 December 2010 to Mr Singh hoping to vacate "as soon as the sealed Consent Order is returned". It is also noteworthy that:

    i) Mr Singh did not simply accept the proposals put forward in FLA's 18 August letter, as he might have been expected to do had he been in cahoots with his wife. Among other things, while he agreed to "Priors Croft" being held on trust for his children, he was not willing to transfer it to Mrs Kaur and told Dent Abrams that he wished to limit maintenance for the children to "15% … or as low as possible"; and

    ii) The negotiations were not concluded all that quickly. There was an interval of more than five months between FLA's letter of 18 August and the Consent Order being made on 31 January.

78. In short, I do not consider the Trust Deed and Consent Order to be the product of collusion between Mrs Kaur and her husband.

Wholly inadequate consideration?

79. Mr de Waal submitted that, supposing there to have been no collusion between Mrs Kaur and her husband, the Trust Deed and Consent Order should nevertheless be held to constitute a transaction at an undervalue because the consideration Mr Singh received was wholly inadequate.

80. At the heart of Mr de Waal's arguments on this aspect of the case was the proposition that the Consent Order required Mr Singh to redeem the mortgages over "Priors Croft". However, I do not read the Consent Order that way. While the drafting may be less than pellucid, it seems to me that Mr Singh's undertaking "to pay the mortgage" meant that he was to *service* the mortgages on "Priors Croft" (so far as necessary) rather than to discharge the underlying debts. In particular, he was obliged to pay the interest falling due to Northern Rock. The idea, I think, was that the mortgages on the property were to be redeemed from the proceeds of any sale, at which point "the net

proceeds of sale, being the gross sale price less the costs of sale and redemption of the mortgages secured against the house" were to be reinvested. It is significant that the undertaking refers to Mr Singh paying "until the Petitioner's death, remarriage or further order". That makes sense if the draftsman had *recurring* payments in mind.

81. On this basis, what Mrs Kaur and the children were to receive pursuant to the Trust Deed and Consent Order was, on the face of it, far from overly generous to them. The debts with which "Priors Croft" was said to be encumbered would have appeared to exhaust any equity in it. It can also be observed that the obligations that Mr Singh undertook to make ongoing payments (in respect of the "mortgage" and by way of maintenance for the benefit of his children) could be expected to be of little or no value in the event of his becoming bankrupt.

82. Does it make a difference that I have concluded that the January Charge was a sham? On balance, I do not think so.

83. It is true, of course, that, if the supposed indebtedness to Mr Thandi is disregarded, there was significant equity in "Priors Croft" at the dates of the Trust Deed and Consent Order. In his Form E, Mr Singh put the balance outstanding on the mortgages secured on "Priors Croft" at £1,320,000 (against a figure of £1,284,000 for the property's current market value). Deducting the £506,000 that Mr Thandi was said to have lent, the £1,320,000 falls to £814,000, implying net equity (ignoring costs of sale) of £470,000. On that basis, Mrs Kaur and the children were to benefit to the tune of £520,000 (i.e. equity of £470,000 plus the lump sum payment of £50,000 for which Mr Singh was to borrow from his father) aside from the maintenance payments for the children. It can also be noted that Mr Singh did not disclose any indebtedness to Deeley in his Form E.

84. That said, neither did Mr Singh disclose the Barclays Account or, more significantly, any interest in the various properties that Judge Cooke held to be owned by him beneficially as well as legally. Such disclosure would have tended to increase the provision that might have been thought appropriate for Mrs Kaur and her children.

85. In any case, I understood Mr de Waal to accept during the trial that, if Mrs Kaur regarded the January Charge as genuine at the time, the question whether the Trust Deed and Consent Order constituted a transaction at an undervalue should be determined on the assumption that it was effective. (By the same token, Mr de Waal argued that the properties at issue before Judge Cooke should be disregarded because Mr Singh would not have seen himself as their beneficial owner at the time.) Approaching matters in that way, my finding that the January Charge was a sham must be immaterial given that I have also concluded that Mrs Kaur did not know of the Charge's invalidity. The Trust Deed and Consent Order will not have appeared to make excessive provision for Mrs Kaur and the children.

86. Even supposing, however, that it is appropriate to assess the Trust Deed and Consent Order by reference to what has since been held to be the reality (in other words, on the basis that the January Charge is a sham and Mr Singh was the beneficial owner of the properties considered by Judge Cooke), I do not think I would be justified in characterising the Trust Deed and Consent Order as a transaction at an undervalue. In the *Kumar* case, Ferris J said that he could not believe that any Court would have ordered the transfer with which he was concerned under the 1973 Act (see paragraph

70 above). I cannot arrive at a similar conclusion in the present case. While (on the footing that the January Charge is a sham) there was significant equity in "Priors Croft", a Court considering whether to approve the Consent Order under the 1973 Act would also have taken into account Mr Singh's ownership of the numerous other properties later at issue before Judge Cooke, his earning capacity and the needs of Mrs Kaur, Jessica and Karina, "first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen" (see paragraph 64 above). Further, Deeley had not yet obtained judgment against Mr Singh. In the circumstances, it is not evident to me that the Consent Order could not have been approved had the Court been aware that the January Charge was a sham. Put differently, this does not appear to me to be one of those exceptional cases in which a non-collusive order under the 1973 Act should be set aside as a transaction at an undervalue.

Conclusion

87. I have not, accordingly, been persuaded that I should set aside the Trust Deed or Consent Order under either section 339 or section 423 of the 1986 Act.

Overall conclusions

88. I can summarise my conclusions as follows:

i) The January Charge is a sham and so a nullity;

ii) In contrast, the April Charge has not been proved to be either a sham or a preference;

iii) More importantly, the challenge to the Trust Deed and Consent Order also fails.