Neutral Citation Number: [2021] EWHC 2149 (Ch)

Case No: CH-2020-000146

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
ON APPEAL FROM ICC JUDGE JONES

IN THE MATTER OF PETER HERBERT FOWLDS (A BANKRUPT)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 30 July 2021

Before :

THE HONOURABLE MR JUSTICE TROWER

- -

Between :

(1) SEAN BUCKNALL	**Appellants**
(2) MARK PETER GEORGE ROACH	
(As Joint Trustees in Bankruptcy of Peter Herbert Fowlds)	
- and –	
GINA LOUISE WILSON	**Respondent**

- -
- -

JAMES MORGAN QC and ANDREW BROWN (instructed by **Coffin Mew LLP**) for the **Claimant**
The Respondent acting in person

Hearing date: 10th May 2021

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Approved Judgment

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.

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THE HONOURABLE MR JUSTICE TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 30 July 2021

Mr Justice Trower :

Introduction

1. This is an appeal against a decision of ICC Judge Jones handed down on 22 May 2020 ([2020] EWHC 1200 (Ch)) by which he dismissed an application for relief pursuant to s.340 of the Insolvency Act 1986 ("s.340" and "the Act" respectively). The applicants are the trustees in bankruptcy (the "trustees") of Peter Herbert Fowlds, who was made bankrupt on 22 March 2017 on a petition presented by his son, Mark Fowlds, on 19 January 2016.

2. The background to the application, and indeed the bankruptcy as a whole, was described by the judge as tragic and most unfortunate. It is understandable that he took that view. As he explained at the beginning of his judgment, the bankruptcy emanated from a bitter family dispute between Peter Fowlds and Mark Fowlds, who is the only significant creditor in the bankruptcy. This led to litigation in which Mark Fowlds obtained judgment against Peter Fowlds on 15 July 2014 as a result of which the father became indebted to his son in an amount which, together with interest and an interim award of costs, exceeded £700,000.

3. The application related to a preference in the form of a payment of a sum of £47,675.51 (the "Payment") by Peter Fowlds to his stepdaughter, Gina Louise Wilson ("Ms Wilson"), on 4 September 2014. The Payment was made in partial discharge of Peter Fowlds' indebtedness to Ms Wilson arising out of accountancy services that she provided during the period of the litigation.

4. The final order made on the application was unusual in at least one respect. Having determined that all the elements of a preference claim under s.340 were satisfied, the judge nonetheless decided that this was a case which was sufficiently out of the norm for him to refuse relief altogether. The factors that caused him to reach that conclusion were that Ms Wilson received the preference on a commercial basis, that she acted in good faith, that she no longer has the preference or its proceeds, that she had changed her position so that it would be inequitable to require restitution and that she will face wholly disproportionate consequences should an order for restitution be made.

5. At the heart of the trustees' appeal is a challenge to the judge's decisions that Ms Wilson had established a change of position, and that this was a relevant factor in his determination to grant no relief. On the question of the relevance and importance of change of position, the trustees contended that two decisions of Sales J (*4Eng v Harper* [2009] BCC 746 ("*4Eng*") and *Trustee in Bankruptcy of Claridge v Claridge* [2011] BPIR 1529 ("*Claridge*")) were to that extent wrong.

The Background Facts

6. For the purposes of this appeal, it is not necessary to recite the background facts in any detail. The judge gave an outline of them in paras [32] to [55] of his judgment. In large part, he did so for the purposes of explaining why he was satisfied that the elements of a cause of action under s.340 had been met. There is no appeal against

his conclusion that this was the case. I can therefore take this aspect of the case quite shortly.

7. The dispute between Peter Fowlds and Mark Fowlds arose out of work which they carried out together in relation to certain residential property developments and investments. A development in Hastings ran into difficulties during the 2008 financial crisis, which led to a major dispute between them concerning how much, if anything, Peter Fowlds owed Mark Fowlds, and whether Mark Fowlds had abused his position and defrauded Peter Fowlds whilst managing the property companies and their properties.

8. Ms Wilson, who is a qualified management accountant, became involved in the dispute in about 2010 when she was retained by Peter Fowlds to provide certain services including drawing up an account of the property dealings. The judge found as a fact that the agreement between Peter Fowlds and Ms Wilson was that she was retained to be paid at a rate of £40 per hour and that the amounts so earned would be paid when Peter Fowlds could afford to settle her invoices. The judge also found that, although Ms Wilson was retained because she was Peter Fowlds' stepdaughter, the retainer was agreed and the services were provided on a professional, arm's length, commercial basis. There was no challenge to these findings on this appeal.

9. The 15 July 2014 judgment obtained by Mark Fowlds included an order for payment by Peter Fowlds in the sum of £254,141, together with interest to be assessed. On 18 November 2014 the interest was assessed in the sum of £279,165. Peter Fowlds was also ordered to pay £200,000 on account of costs pending detailed assessment and a further sum of £53,330.70, which the judge described as arising under part 36 of the CPR. It appears that Peter Fowlds sought to appeal, and obtained both an extension of time and a stay of execution until 1 September 2014. The judge said that the steps taken on the appeal were not entirely clear from the papers, but in the event permission to appeal was refused in April 2015 (the judge said that the application was dismissed as being out of time).

The Preference

10. Meanwhile, on 15 August 2014, i.e. shortly after the judgment obtained against him by Mark Fowlds, Peter Fowlds had sold a number of properties (the "August 2014 realisations"), from the proceeds of which he paid solicitors and counsel in respect of the litigation and certain other debts including fees due to agents and conveyancing solicitors. Amongst the properties sold on 15 August 2014 were a property in Brighton and a property in Hove (the "relevant properties"), the net proceeds of which amounted to £47,747.51.

11. By the time of the August 2014 realisations, Peter Fowlds was indebted to Ms Wilson in the sum of £99,330 pursuant to invoices she had rendered dated 23 February 2012, 3 July 2013, 8 January 2014 and 28 July 2014. On 4 September 2014 the sum of £47,747.51 realised from the sale of the relevant properties was transferred to Ms Wilson. The Payment, derived as it was from this sum, was the preference with which these proceedings are concerned. I will return later in this judgment to the

findings made by the judge on what happened to the Payment after it had been received by Ms Wilson.

12. The judge's conclusion was that the effect of the payments made out of the realisations of the properties in August 2014 was that all of Peter Fowlds' creditors apart from Mark Fowlds and Ms Wilson were paid in full. Ms Wilson received part payment to the extent of 48% of the amount she was owed. Nothing was paid to Mark Fowlds.

13. The judge concluded that Peter Fowlds chose to pay what he could to Ms Wilson having first paid his other creditors in full. He was satisfied that Peter Fowlds made the Payment because Ms Wilson was owed money as a commercial creditor, not because she was a creditor who was also his stepdaughter. The judge said that he had reached the conclusion that the fact that she was also Peter Fowlds' stepdaughter was the reason why he decided he did not have to pay her in full, in contrast to the other creditors (apart from Mark Fowlds). It was not the reason why he paid her in the first place. These conclusions are not challenged on appeal.

The Bankruptcy

14. Shortly after the Payment was made to Ms Wilson, Mark Fowlds took a number of steps to enforce the judgment he had obtained against Peter Fowlds. They included a freezing injunction and orders for the disclosure of assets. There were also committal proceedings. On 19 January 2016, Mark Fowlds presented a bankruptcy petition against Peter Fowlds based on a statutory demand dated 11 August 2015 which was itself founded on the judgment debt. A bankruptcy order was eventually made by Mr Registrar Baister on 22 March 2017.

15. On 19 October 2017, the trustees' solicitors sent a letter of claim to Ms Wilson. The letter asserted the trustees' claim that Ms Wilson was an associate of Peter Fowlds, that the Payment was made to her as a creditor of Peter Fowlds within the period of two years prior to the bankruptcy petition, that it put her into a better position than she would have been in if the Payment had not been made and that, because she was an associate of Peter Fowlds, it was to be presumed that he was influenced by a desire to prefer her. The trustees contended that the Payment was therefore a preference within the meaning of s.340 of the Act and should be set aside. The letter also urged Ms Wilson to seek independent legal advice.

16. Some limited efforts were then made to mediate the dispute, which given the relatively modest amount of money at stake was an obvious and sensible course for the parties to adopt. Unfortunately, those efforts were unsuccessful, and on 3 October 2018 the application which eventually came before the judge was issued.

17. It seems that Peter Fowlds has not cooperated with the trustees, nor has he complied with all of his obligations under the Act. The consequence is that his statutory discharge from bankruptcy was suspended on the grounds of a failure to make full disclosure of his financial affairs, a suspension that was continuing at the time of the hearing before the judge. The relevance of Peter Fowlds' non-cooperation was that

the judge accepted that it explained why he was not called as a witness at the trial and also why the trustees had not examined him before they issued the application.

18. The judge gave some indication of the estimated outcome of the bankruptcy, recognising that there remains uncertainty both in relation to the assets still to be realised (including the proceeds if any from this claim) and whether any further creditors emerge as part of the formal proving process. The only creditors who had proved as at the date of the judge's judgment (some 3 years into the bankruptcy) were Mark Fowlds with a debt of £715,876 and Southern Water with a debt of £35. Ms Wilson is also a creditor for £51,582.49 in respect of the balance outstanding to her from the invoices which the judge was satisfied were properly rendered. As Mr James Morgan QC who appeared for the trustees accepted at the hearing before me, she should also be able to prove for the amount of the Payment if and to the extent that she is required to repay.

19. The assets are limited. As I understand it, they are the claim against Ms Wilson, a claim against Peter Fowlds' wife and anticipated realisations from an income payments order against him. The present estimate is that a dividend of 6p in the £ may be payable, although even that is doubtful and is in any event dependent on the outcome of these proceedings. There is a realistic possibility that any proceeds from these proceedings will simply be used in partial discharge of the costs and expenses of the bankruptcy.

The Jurisdiction under s.340

20. Against this background, the judge concluded that the jurisdiction to grant relief against Ms Wilson under s.340 was established in relation to the Payment. Before explaining why, it is convenient to set out the relevant parts of ss.340, 341 and 342 of the Act:

> 340. Preferences.
>
> (1) …where an individual is made bankrupt and he has at a relevant time (defined in s.341) given a preference to any person, the trustee of the bankrupt's estate may apply to the court for an order under this section.
>
> (2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not given that preference.
>
> (3) For the purposes of this and the next two sections, an individual gives a preference to a person if
>
> > (a) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities, and
> >
> > (b) the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the

> event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.

(4) The court shall not make an order under this section in respect of a preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3)(b) above.

(5) An individual who has given a preference to a person who, at the time the preference was given, was an associate of his (otherwise than by reason only of being his employee) is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (4).

...

341. "Relevant time" under ss. 339, 340.

(1) Subject as follows, the time at which an individual … gives a preference is a relevant time if … the preference given—

> …
>
> (b) in the case of a preference which is not a transaction at an undervalue and is given to a person who is an associate of the individual (otherwise than by reason only of being his employee), at a time in the period of 2 years ending with [the presentation of the bankruptcy petition on which, the individual is made bankrupt], and
>
> …

(2) Where an individual … gives a preference at a time mentioned in paragraph … (b) … of subsection (1) … that time is not a relevant time for the purposes of section … 340 unless the individual—

> (a) is insolvent at that time, or
>
> (b) becomes insolvent in consequence of the … preference;

342. Orders under ss … 340.

(1) Without prejudice to the generality of section … 340(2) , an order under [that] section with respect to a … preference … given by an individual who is subsequently made bankrupt may (subject as follows)-

> (a) require any property transferred … in connection with the giving of the preference, to be vested in the trustee of the bankrupt's estate as part of that estate;

> (b) require any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred;
>
> (c) release or discharge (in whole or in part) any security given by the individual;
>
> (d) require any person to pay, in respect of benefits received by him from the individual, such sums to the trustee of his estate as the court may direct;
>
> (e) …;
>
> (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for the security or charge to have the same priority as a security or charge released or discharged (in whole or in part) … by the giving of the preference; and
>
> (g) provide for the extent to which any person whose property is vested by the order in the trustee of the bankrupt's estate, or on whom obligations are imposed by the order, is to be able to prove in the bankruptcy for debts or other liabilities which arose from, or were released or discharged (in whole or in part) under or by, … the giving of the preference.
>
> (2) An order under section … 340 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the individual in question entered into the transaction or, as the case may be, the person to whom the preference was given; but such an order—
>
> > (a) shall not prejudice any interest in property which was acquired from a person other than that individual and was acquired in good faith and for value, or prejudice any interest deriving from such an interest, and
> >
> > (b) shall not require a person who received a benefit from the … preference in good faith and for value to pay a sum to the trustee of the bankrupt's estate, except where … the payment is to be in respect of a preference given to that person at a time when he was a creditor of that individual."

21. The judge held that Ms Wilson was an associate of Peter Fowlds because associate is defined in s.435(2)(b) of the Act to include a relative, which itself includes a stepchild (s.435(8)(a)). The consequence of this was that the Payment was vulnerable to challenge as a preference, having been made within the period of two years ending on the day the petition resulting in the bankruptcy was presented. The judge also concluded that Ms Wilson was a creditor of Peter Fowlds and that he was insolvent within the meaning of s.341(2) at the time the Payment was made.

22. The judge was satisfied that the Payment was a preference because it put Ms Wilson into a position which, in the event of Peter Fowlds' bankruptcy, would be better than the position she would have been in if the Payment had not been made. She received a payment rather than being an unsecured creditor proving in the bankruptcy for the

amount paid. He also concluded that Ms Wilson had failed to rebut the presumption that Peter Fowlds was influenced in deciding to make the Payment by a desire to prefer her. The onus was on Ms Wilson to prove that Peter Fowlds did not have any such desire because s.340(5) applied to her as his associate.

23. It is apparent from the judge's judgment that the only one of these issues which was seriously contested by Ms Wilson at trial was what he called the desire rebuttal test. She did so on the basis that the Payment was made in consideration for professional work undertaken for Peter Fowlds and was just one of various payments to other creditors made in circumstances in which she received only 48% of the amount outstanding to her, while the others were all paid in full.

24. The judge concluded that this consideration did not amount to a rebuttal of the presumption that Peter Fowlds was influenced in making the Payment by a desire to prefer Ms Wilson, because the circumstances were consistent with the existence of a desire to prefer all creditors apart from Mark Fowlds. He summarised his conclusion in para [74] of his judgment as follows:

> "Looking at all those matters and the evidence taken together, in my judgment it would be wholly unrealistic to conclude that Ms Wilson has satisfied the Desire Rebuttal Test. The judgment debt was due and owing, there was no permission to appeal and Mr Fowlds was insolvent. He knew that and chose to realise his available assets to pay all his creditors to the extent that he could but not his major creditor, Mr Mark Fowlds. He did so without being pressed for payment, at least in regard to the Payment. It is easy to infer a desire to prefer Ms Wilson and impossible to rebut the presumption based on this evidence."

25. It follows from these conclusions that the judge was satisfied that he had jurisdiction to grant relief under s.340(2). His findings to this effect were not challenged by Ms Wilson on this appeal and, based on the evidence relied on by the judge, seem to me to be a conclusion which he was bound to reach.

The judge's four factors

26. The reason the judge refused to grant relief notwithstanding these findings was a combination of four factors which he said took the case out of the norm such that the making of any order would be unjust. I summarised these four factors at the beginning of this judgment, but the judge described them as follows.

27. The first factor was that, even though Ms Wilson was an associate with the consequence that a two-year (rather than a 6 month) claw back period applied, the debt arose out of a commercial relationship, and represented a fair amount for the work carried out. It was an arm's length transaction and payment, and Peter Fowlds paid Ms Wilson least in contrast with all the other creditors except Mark Fowlds. Those considerations are not usually present where the preferee is an associate. Therefore, they do not meet the usual justification for the two-year time limitation period which distinguishes associates from other commercial creditors.

28. The second factor on which the judge relied was that Ms Wilson played no part in the giving of the preference other than receipt of the Payment. The judge said that she had no reason to question the Payment at any material time and did not do so. He said that this justified a finding that she acted in good faith throughout.

29. The third factor was that the Payment was no longer available to her, nor does she have available assets of value purchased from the funds so paid. The judge said that this consideration was a factor in its own right, but was given greater weight by his conclusion that Ms Wilson had changed her position on the basis of the receipt of the Payment in good faith (i.e. without knowledge of the possibility of a preference) in a way that would make it unfair to require her to repay. He pointed out that there was no suggestion from the evidence that she herself dissipated the sum paid to her with knowledge that it even might have been a preference.

30. The fourth factor was Ms Wilson's existing financial position and her inability to provide restoration without sale of her family home. The judge concluded that restoration of the Payment would have what he called "a significant and wholly disproportionate effect upon her when compared with the receipt into the bankruptcy estate of a sum less than £50,000". He said there was little doubt that Ms Wilson and her children would suffer detrimentally from the sale of the home through no fault of their own in circumstances in which the Payment was received and then dissipated in good faith.

31. It is appropriate to recite the judge's findings in relation to the fourth factor in full:

> "91. The "fourth factor" relied upon by Ms Wilson is her existing financial position and her inability to provide restoration without sale of her family home. It can be argued that the Court should only be concerned in this context with restitution of the Payment not with interest or costs. That is not only because they only arise because repayment was not made earlier but also because the decision not to grant relief relates to the remedy restoring the position as if the payment had not been made. However, the facts establish that her only means of repayment will be through the sale of her home, whichever is the correct sum to address. Assuming it is the lower sum of the Payment alone, its payment will leave her with an amount in the region of £175,000 if the home has to be sold, assuming a net equity of £225,000.
>
> 92. No-one has presented evidence of reasonable rental cost but presumably that figure would provide her with accommodation for some years during which the children will grow up and she may be able to achieve a better financial position. However, even that will mean that restoration of the Payment will have a significant and wholly disproportionate effect upon her when compared with the receipt into the bankruptcy estate of a sum less than £50,000. There is no doubt based upon the facts above that Ms Wilson and the children will suffer detrimentally both individually and as a unit from the sale of the home. This will occur through no fault of their own in the sense that the Payment was received and dissipated in good faith and had no connection with her pre-existing ownership of their home resulting from the divorce.
>
> 93. In addition, it will directly affect her business and income, it will affect their location and it will have resulting consequences for schooling, friends and even

> contact with the father. It may well affect the problems referred to in the last sentence of paragraph 52 above, although I bear in mind there is no medical evidence to that effect. Restitution would alter the whole position of Ms Wilson and the children compared with the one envisaged by the outcome of the divorce proceedings.".

32. In his assessment of the significance of these four factors, the judge decided that the first and second factors formed an important foundation for Ms Wilson's argument that this case is out of the norm, but would be insufficient if it were not the case that she no longer had the Payment or realisable assets of value purchased from the funds so paid. In fact, he went further and said that the case would only be taken out of what he called "the wide scope of the norm" if taken with the added ingredients of the change of position evidence and/or the circumstances of Ms Wilson's financial position which he included in his discussion of the fourth factor.

The Grounds of Appeal

33. The first, second, third and fifth grounds of appeal related to the third factor relied on by the judge in support of his conclusion that no relief should be granted, i.e. that Ms Wilson had changed her position on the basis of the receipt of the Payment in a way that would make it unfair to require her to repay it. These grounds amounted to a comprehensive challenge both to the judge's conclusions on the relevance of change of position as a defence to proceedings under s.340 of the Act and to his findings that change of position had been established in this case.

    i) Ground 1: It was said that the decision of the judge to allow Ms Wilson to lead and rely upon oral evidence in support of a 'change of position' argument was unjust and constituted a serious procedural or other irregularity.

    ii) Ground 2 raised a point of general principle and reflected the trustees' challenge to *4 Eng* and *Claridge* that I have already mentioned. The trustees contended that the judge had erred in law in considering change of position and applying it to a preference claim under s.340 of the Act.

    iii) Ground 3: The judge in any event erred in fact in making his findings that Ms Wilson had established a complete (or partial) change of position.

    iv) Ground 5 is essentially conclusory. It is said that the judge erred in law, in fact and in the exercise of his discretion in holding that Ms Wilson had changed her position and, taken with his first and second factors, the case was therefore out of the norm.

34. The remaining grounds of appeal were concerned with the weight that the judge gave to the first, second and fourth factors. In some respects, the arguments they addressed were subsidiary to the arguments on change of position and they did not raise any issues in relation to the manner in which the relevant evidence was adduced.

Discretion under s.340: general principles

35. It was not in issue on the appeal that the court has a discretion as to the relief, if any, it grants under s.340(2) once the jurisdiction to do so is established. The principle was explained by the Court of Appeal in *Re Paramount Airways Limited* [1993] Ch 223, at 239:

> "Sections 238, 239, 339 and 340 provide that the court "shall," on an application under those sections, make such order as it thinks fit for restoring the position. Despite the use of the verb "shall," the phrase "such order as it thinks fit" is apt to confer on the court an overall discretion. The discretion is wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction or the person to whom the preference was given."

36. *Paramount* was a case in which the issue arose in the context of a dispute as to whether s.238 of the Act (transactions at an undervalue in a corporate insolvency) had extra-territorial effect, and the court was concerned to emphasise that the discretion could always be used to deny relief altogether where the respondent did not have a sufficient connection to the jurisdiction. Nonetheless, it is clear that Sir Donald Nicholls V.-C. considered that the principle he described was one of general application, and the foreign elements with which he was concerned were just one example of circumstances in which justice required that relief should be refused altogether.

37. The existence of this discretion was reconfirmed by the Court of Appeal in *Haines v Hill* [2007] EWCA Civ 1284 at para [5], another case concerned with an alleged transaction at an undervalue not a preference, but this time in the context of ancillary relief proceedings. In the event, however, the Court of Appeal decided (see para [40] of the Chancellor's judgment) that the transferee, who was the bankrupt's wife, had given consideration that was not significantly less than the value of the consideration given by the bankrupt. It followed that no question of exercising any discretion allowed by the section arose.

38. The judge addressed the broad types of circumstance in which justice might require the court to decline to exercise its discretion to grant relief in paras [11] to [14] of his judgment. He relied on the decision of Mann J in *Re Ramrattan (In Bankruptcy); Stonham (Trustee in Bankruptcy of Ramrattan) v Ramrattan and Bortolussi* [2010] EWHC 1033 (Ch) ("*Ramrattan*") in support of his conclusion that there will have to be something unusual to justify such a course and made clear that the burden was on Ms Wilson to establish why the discretion should not be exercised in favour of the trustees.

39. *Ramrattan* was a case concerned with a transaction at an undervalue not a preference, but it seems to me that the same broad principles must apply. The issue was whether delay by the trustee, coupled with prejudice to the respondents arising out of the delay, was sufficient to justify the exercise of the discretion to grant no relief. Mann J concluded that delay in itself was insufficient, because a combination of the Act and the Limitation Act 1980 provided for a 12-year limitation period, and it was impermissible to curtail that which had been prescribed by Parliament.

40. Mr Morgan submitted that Mann J concluded that, if no relief were to be granted despite satisfaction of all the elements of the cause of action, the circumstances had to be very unusual or exceptional. He took this test from the first case in which the point had then been raised (*Singla v Brown* [2008] Ch 357 at paras [59] and [60], a decision of Thomas Ivory QC to deny relief even though the elements of a transaction at an undervalue within the meaning of s.339 had been established). A similar approach has since been adopted by Judge Hodge QC in *Re Whitestar Management Limited* [2018] EWHC 743 (Ch) at para [117], where he said the question was whether, exceptionally, justice required that no order be made.

41. I agree that this is the correct approach, although it is important to appreciate what Mann J meant by exceptional: see the way he expressed the position at para [40] of his judgment:

> "The purpose of s 339 and its allied sections is to prevent a bankrupt from defeating the aim of a *pari passu* distribution of his assets by certain transactions; in the case of s 339 a transaction of an undervalue, in the case of other sections a voidable preference. The thesis underlying those sections is that the creditors are entitled to a *pari passu* distribution not merely of assets of which the bankrupt is owner at the date of his bankruptcy, but also those which he has otherwise put beyond the reach of his trustee in bankruptcy by virtue of transactions which are gratuitous or ill-motivated. Gratuitous transactions within the relevant timeframe are to be brought back within the bankruptcy fold. That is clearly the underlying basis of s 339. Since that is the underlying principle, it will require something unusual, to put it at its lowest, for the court to decide that, notwithstanding the fact there is an ostensibly qualified transaction on the facts of the particular case, those assets can and should properly be left outside the scope of the bankruptcy. It would be a departure from the norm to allow that to be the case. It may be that that is what Mr Ivory meant by 'exceptional'. If he did then I agree with it. There has to be something unusual, and, bearing in mind the wide scope of the norm, it might be thought very unusual, to allow the court to decline to exercise a jurisdiction which prima facie it ought to be exercising. That seems to me to be another way of putting the matter. If one chooses to use the word 'exceptional' to describe that, then I would not necessarily gainsay that myself."

Change of position and s.340

42. Mr Morgan submitted that the judge was wrong to conclude that what he called "change of position (or similar)" was a relevant consideration when deciding what if any relief is to be granted in a preference claim, or, if it has any relevance, that it has the significance the judge attributed to it when he described it as a strong factor. I agree that the judge was wrong to call it a strong factor, but as I shall endeavour to explain I do not accept that it has no relevance in a case such as the present.

43. The route by which the judge reached the conclusion that it was capable of being a factor to be taken into account when deciding whether justice required the court to grant no relief under s.340(2) was to consider other relevant contexts in which the court had concluded that it was. The case on which the judge placed particular reliance, and which was the subject of detailed criticism from Mr Morgan, was the

decision of Sales J in *4Eng*, an authority concerned with the question of whether or not relief should be granted under ss.423(2) and 425 of the Act where the elements of a cause of action under s.423 have been established.

S.423 and *4Eng*

44. S.423 provides that, where a transaction has been entered into at an undervalue, the court is empowered to make such order as it thinks fit for restoring the position to what it would have been if the transaction had not been entered into and for protecting the interests of persons who are victims of the transaction. The court's power to grant relief arises if but only if it is satisfied that the transaction was entered into by a person 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 a person in relation to that claim (s.423(3) of the Act).

45. It follows that the jurisdiction is similar in its structure to the transaction at an undervalue provisions of ss.238 and 339 of the Act, but with the inclusion of a guilty mind on the part of the transferor. It is not limited to circumstances in which formal insolvency proceedings are extant, and *4Eng* is an example of a case in which there was no formal insolvency. But any application is treated as made on behalf of every victim of the transaction (s.424(2) of the Act), and to that extent the proceedings are or may be brought on behalf of a class.

46. In addition to the general jurisdiction to make such order as it thinks fit for restoring the position to what it would have been if the transaction had not been entered into, s.425 makes provision for specific heads of relief. These are very similar to the heads of relief for which specific provision is made by ss.241 and 342 where a transaction at an undervalue is entered into or a preference is given in the period prior to a liquidation, administration or bankruptcy, excluding only those which are tailored to the existence of a formal insolvency.

47. As with claims made under ss.238, 239, 339 and 340 of the Act, the court has a discretion as to whether or not to grant relief under s.423 in circumstances in which the jurisdiction to do so is established. The only difference is that the discretion is spelt out in s.423(2) by the use of the word "may", while the discretion under the insolvency clawback sections derives only from the phrase "such order as it thinks fit", which was established by *Paramount* to give rise to a general discretion notwithstanding the use of the word "shall".

48. The following passage from the judgment of Sales J in *4Eng* explains his view that the wide discretion conferred by s.423 requires the court to take into consideration the mental state and degree of involvement in the transaction of the transferee:

> "13. In my judgment, the nature of any order and the extent of the relief granted by the court under s.423(2) and s.425 should take into account the mental state of the transferee of property under a relevant transaction (or of any other person against whom an order is sought) and the degree of their involvement in the fraudulent scheme of the debtor/transferor to put assets out of the reach of his creditors. The principles in the application of this statutory regime should reflect

> in this respect general principles inherent in other areas of the law, which treat the mental state and degree of involvement of a defendant in wrongdoing as relevant to the extent of recovery available against him (compare, as one example among many, *Seager v Copydex* Ltd [1967] 1 W.L.R. 923, 932—no order of an account of profits ordered against an innocent wrongdoer in respect of a breach of confidence). Although the trigger conditions for liability to make restoration under s.423 set out the basic balance to be struck between the interests of the creditors and of a transferee as established by Parliament, the making of an order under s.423(2) and s.425 necessarily requires some further balancing of the interests of the transferor's creditors and of the transferee to be determined by the court, since by the time the court has to take action events will have moved on from the transfer and the balance of the equities between creditors and transferee may well have been affected by changes in circumstances over time."

49. Sales J then gave some examples of how the further balancing of the interests of the transferor's creditors and the transferee might be carried out to establish how the balance of equities between them might be affected by changes in circumstance. The first of these, described in para [14(1)] of his judgment, related to change of position:

> "A transferee may have received a gift of money in good faith, without knowing that the transferor acted with a relevant purpose in making the gift. In such a case a broad analogy may be drawn with claims based on unjust enrichment, such as a claim for money paid on the basis of a mistake of fact, where the recipient's interest in being able to rely on the security of his receipt is overridden by the unfairness to the transferor of being held bound by a payment made by him by reason of a mistake. In relation to such claims a defence of good faith change of position on the part of the recipient applies (*Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548). In my view, if the transferee in the example has changed his position on the basis of the receipt in a way that would make it unfair to require him to repay the money (e.g. thinking it was a completely valid gift, he has spent the money on a world cruise which he would not otherwise have taken) it would not be appropriate for the court to make an order under s.425(1)(d) requiring the transferee to pay back a sum equivalent to the amount he received."

50. Sales J also addressed the question of the transferee's own needs, financial requirements and quality of life as an additional defence. He rejected an argument that they were of relevance pointing out that, if these aspects of the transferee's position were to be taken into account, then so should that of the victims of the transaction, which would add significantly to the costs and length of s.423 proceedings. He went on to say at para [92]:

> "There is no additional defence of the general kind proposed by Mr Burles. The inquiry under ss.423 - 425 focuses upon claims to property, with a comparatively narrow scope for limited, recognised principles of justice (such as the change of defence position) to be taken into account. Parliament has not stipulated any legal standard by reference to which any such wider balancing exercise as is proposed by Mr Burles could be undertaken, and I think it clear that it did not intend that the application of these provisions should involve any such exercise. Accordingly, I conclude that no wider inquiry of the kind proposed by Mr Burles is necessary or appropriate."

51. The way that the judge applied the reasoning of Sales J to a claim under s.340 of the Act was explained in para [19(e)(vii)] of his judgment. He said that any unfairness resulting from a change of position without knowledge that the transaction was avoidable should be considered when exercising the discretion not to grant relief because a "broad analogy may be drawn with claims based on unjust enrichment". He then said later in his judgment (at para [89]) that *4Eng* included the observation that it will not be appropriate for the court to make an order for restoration in respect of a recipient who has changed position on the basis of a receipt in good faith in a way that would make it unfair for him to repay. He also said in para [102] of his judgment that Sales J had made clear in *4Eng* that change of position is a strong factor in the way that the discretion under s.340 is to be exercised.

52. Although *4Eng* was not a case in which change of position was established (see para [86] of the judgment), Mr Morgan submitted that the decision of Sales J was wrong for six reasons. It followed, so he submitted, that the judge was wrong to apply the reasoning in *4Eng* so as to conclude first that it will not be appropriate to make an order under s.340 where the recipient has changed position and secondly that it is in any event a strong factor when declining to exercise its discretion not to grant relief.

53. In making that submission Mr Morgan has some significant support, anyway in general terms, because *4Eng* has been criticised by Professor Sir Roy Goode QC: Principles of Corporate Insolvency Law at para 13-144. It was also considered by the Privy Council in *Skandinaviska Enskilda Banken AB v Conway* [2020] AC 1111 ("*Conway*") to which I shall revert later. Although the Board concluded that it was not the occasion on which to decide whether or not the reasoning in *4Eng* is correct, the discussion at paras [113] to [117] is sympathetic to a conclusion that the availability of a change of position defence (properly so-called) to a statutory clawback claim would be wrong in principle.

54. Nonetheless, Mr Morgan's submission is a bold one, because a High Court judge will normally follow a prior decision by a court of coordinate jurisdiction, unless there is a powerful reason for not doing so (*Willers v Joyce (No 2)* [2018] AC 843 at para [9]) or if the views that he expressed were *obiter* and not necessary for the decision that he reached. That is more particularly the case, where the decision or its reasoning has been followed on subsequent occasions. In the present context, the reasoning on which *4Eng* was based has been adopted and followed on a number of occasions, and in *BAT Industries plc v Sequana SA* [2017] Bus LR 82 it was described by Rose J at para [520] of her judgment as the leading case on the scope of the powers of the court under s.425.

55. The first reason advanced by Mr Morgan is that, although Sales J was told that there was no relevant authority on ss.423(2) and 425 of the Act, he was not referred to *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd* [1990] BCC 636 or *Chohan v Saggar* ([1992] BCC 750 at first instance and [1994] BCC 134 on appeal), both of which were concerned with the relief to be granted once the jurisdiction under s.423 had been established. It was submitted that these cases all indicated the narrowness of the discretion to refuse relief once the criteria for avoiding a transaction have been made out, a submission that I accept.

56. It is correct that neither of these cases was referred to in Sales J's judgment and it is correct that both of them stress that the underlying policy is that the court must so far

as practicable reverse the impeachable transaction and restore the loss to the victims. However, I do not think that the decision in *4Eng* is incompatible with them, because there is no suggestion in any of the judgments that the underlying policy meant that the position of the recipient could not be taken into account as a matter of principle. They are, however, difficult to reconcile with the idea that change of position is a strong factor in the way in which the discretion is to be exercised, which was the test that the judge applied.

57. The second reason was said to be that Sales J did not give sufficient weight to the role that s.423 plays in preserving assets for creditors and, where a formal insolvency has intervened, in maintaining the *pari passu* distribution principle. Its character as a class remedy is also apparent from the fact that, even outside a formal insolvency, the claim is treated as made on behalf of every victim of the transaction (s.424(2) of the Act).

58. It followed from this, so Mr Morgan submitted, that the court should not usually be concerned with balancing the competing interests of two persons. Rather, it is concerned with wider policy considerations with regard to which the transferee's equity flowing from his change of position has no role to play. In this regard, he relied on the decision of the Alberta Court of Appeal in *Ernst & Young Inc v Anderson* (1997) 147 DLR (4th) 229 at 234:

> "The whole idea of the defence of change of position is that the equity lies with the payee and not with the payor who wants to get back his payment. But where a trustee in bankruptcy carries out a duty to sue to undo a fraudulent payment, it is difficult to say that change of position makes the trustee's suit inequitable."

59. I will come back to the underlying point of principle, but I do not think that Mr Morgan's reliance on *Anderson* in support of this submission was well founded. The voidable preference provision with which the Alberta Court of Appeal was concerned provided for automatic avoidance where the elements of the cause of action were established. Where that is the case, change of position either is or is not a defence. Although the essential mischief is the same as an English preference claim under s.340, different jurisdictions have very different approaches to the rigidity of the appropriate policy response to antecedent transactions. In my view the Canadian approach casts only limited light on the way in which the discretion should be exercised where the statute provides for discretionary relief of the form set out in ss.342 and 425 of the Act.

60. The third reason was that Sales J did not test his conclusion by reference to s.425(2) of the Act, a provision which is reflected in the context of preferences and transactions at an undervalue by s.342(2). These sub-sections give a specific statutory defence to third parties acquiring an interest in property from a person other than the debtor (or receiving a benefit from the transaction) in good faith for value and without notice of the relevant circumstances. Mr Morgan pointed out that these subsections provide no protection to the immediate transferee of the property. He submitted that this was a strong indication that Parliament did not intend that the state of mind of an immediate transferee would be relevant to the court's consideration of whether or not to grant relief against him.

61. On this point, Mr Morgan also relied (as his fourth reason, which he submitted fortified his third), on the Report of the Review Committee on Insolvency Law and Practice, otherwise known as the Cork report (1982: Cmnd 8558). At para 1278, the committee recommended that the court should refuse recovery in whole or in part if (a) the person from whom recovery is sought received the money or property in good faith and has altered his position in the reasonably held belief that the payment or transfer to him was validly made and was not liable to be set aside and (b) in the opinion of the court it would be unjust to order recovery or recovery in full as the case may be. This proposal was not adopted in the legislation when enacted.

62. Mr Morgan submitted that, because Parliament limited the defence based on an acquisition in good faith, for value and without notice of the relevant circumstances to 3rd parties despite para 1278 of the Cork report, there can have been no legislative intent that good faith change of position could operate as a defence for the immediate transferee.

63. I am not persuaded by Mr Morgan's third and fourth reasons. It is of course correct that ss.425(2) and 342(2) give a complete statutory defence to a third-party transferee where he has an innocent state of mind and gives value and there is no such complete defence for the immediate recipient of the transaction or preference. But it does not follow that the immediate recipient may not have a good argument for the statutory discretion to be exercised in his favour where he also has an innocent state of mind and gives value. The mere fact that there is legislative provision for a complete defence to be available to a third party, does not mean to say that there cannot be a legislative intent for the elements of that defence to be sufficient to found a discretion to deny relief against an immediate transferee.

64. The fifth reason was that, in *BTI 2014 LLC v Sequana SA* [2017] EWHC 211 (Ch) ("*BTI*") at para [25], Rose J held that the overriding purpose of s.423 is to recover assets for the victims so as to protect their interests. She said that this statutory objective would generally override the interests of the transferee. This was said by Mr Morgan to be inconsistent with Sales J's decision in *4Eng*, and particularly those parts of it in which he discussed the need to balance the interests of the transferor's creditors and the interests of the transferee.

65. *BTI* was a judgment given by Rose J on the appropriate relief to be granted in the light of her main judgment on the claim (reported as *BAT v Sequana* [2017] Bus LR 82 and referred to above). I do not agree that there is any real inconsistency between *BTI* and *4Eng*. Indeed, consistently with the approach adopted by Sales J in *4Eng*, Rose J said at para [25] that "one of the factors to take into account at the stage of fashioning the remedy, as discussed by Sales J in *4Eng* at para [11] of his judgment, is the state of mind of the transferee or other action on the part of the transferee". She then went on in paras [31] and [33] to consider whether there was in fact a change of circumstance such that the transferee should not now have to provide relief under s.427.

66. This reflected the conclusion that she had reached in her main judgment ([2017] Bus LR 82 at para [523]) that the changes of position relied on are "relevant to the question of what is the appropriate relief to be granted and do not provide a complete defence to the claim under s.423". She went on to say that she did not accept that the transferee must be shown to have acted in bad faith before it was appropriate to fashion a remedy under s.425. It is clear from this discussion that, so far as both Sales

J and Rose J were concerned, one of the examples of a relevant state of mind was the good faith of a recipient who has changed his position on the basis of the receipt in a manner that would make it unfair to require him to repay.

67. This was but one example of what Rose J referred to as "the need for the relief to be carefully tailored to the justice of the particular case and the absence of any "hard and fast rules" that might impede a just result" (para [39]), a passage that was subsequently cited by David Richards LJ in the Court of Appeal ([2019] Bus LR 2178 at para [82], who went on to say at para [88] that:

> "it was for the judge to fashion the remedy that, in her discretion, she considered would best restore the position to what it would have been if the May dividend had not been paid and best protect the interests of the victims."

68. *BTI* is not the only case in which *4Eng* has been cited with approval. In her judgment in *Akhmedova v Akhmedov* [2021] EWHC 545 (Fam) at paras [86] and [87], Gwynneth Knowles J said the following about *4Eng*:

> "86. The fact that a respondent no longer holds the assets which were received as part of the transaction or has changed position because it received those assets does not provide any defence to a claim under s.423. Those matters may be relevant however to fashioning the relief to be granted. In that regard, the mental state of the respondent and the degree of their involvement in the scheme will be relevant factors (see *4Eng* at [13]). The reasons are obvious: if a recipient further dissipates assets as part of a joint scheme to put them beyond the reach of the judgment creditor, the recipient cannot rely on his own further wrongdoing to excuse him from having to restore the victim's position; and, equally, if a person chooses to engage in risky ventures with assets which they know have been improperly transferred away by the debtor, they do so at their own risk and not at the victim's risk.
>
> 87. In choosing what relief is appropriate in a given case, a great deal will depend upon the particular facts. One of the reasons the court is given such a wide jurisdiction as to remedy is to allow it flexibility in fashioning relief which is carefully tailored to the justice of the particular case (see *4Eng* [16]). This may be because, by the time the court has to take action, events will have moved on from the transfer and the balance of the equities between creditors and transferee may well have been affected by changes in circumstances over time."

69. In my view, some care has to be taken in transposing the principles established by the cases on s.423 of the Act into the context of a statutory claw back claim under s.339 or s.340 of the Act. I think that there are three reasons why, in a s.423 case, it may be more appropriate to carry out a balancing exercise between the interests of the creditors or victims of the transferor on the one hand and the transferee on the other. I do not think that the judge gave sufficient consideration to these reasons when relying on *4Eng* to the extent that he did in the present case.

70. The first is that, although the remedy in a successful claim under s.423 is a class remedy in a limited sense because the application is treated as made on behalf of every victim of the transaction (s.424(2)), the jurisdiction exists independently of the statutory trusts which arise in a formal insolvency. Those trusts were described in the

case of a company by Lord Hoffmann in *Buchler v Talbot* [2004] 2 AC 298 at para [28] and are imposed in the case of a bankrupt by Part IX of the Act.

71. One of the consequences of the role fulfilled by s.423, standing free as it does from the intervention of a formal insolvency, is that the statute contemplates single or limited victim cases in which it is more likely to be possible to strike the balance between a victim of the transferor and an innocent transferee. This will rarely arise in the context of a claim under s.339 or s.340 where the statutory scheme for the distribution of the bankrupt's assets, which will have been imposed in order for the jurisdiction to arise in the first place, affects every creditor claim and the costs of the bankruptcy. This means that any form of balancing exercise between the interests of the transferee and all of those interested in the statutory scheme will rarely be an exercise on which it is appropriate for the court to embark or even practical if it were to attempt to do so.

72. The second is that there is no statutory claw back period in a s.423 claim, whereas the "relevant time" provisions of s.341 reflect the legislative intent that, during a specified limited period, but only during that period, a *pari passu* distribution has what amounts to retrospective effect. It follows that the last sentence of para [13] of Sales J's judgment in *4Eng* and the last sentence of para [87] of Gwynneth Knowles J's judgment in *Akhmedova* (both cited above) has nothing like the same resonance in a s.339 or a s.340 case as it has in a case under s.423. The opportunity for affecting the balance of equities between creditors and transferee is likely to be a materially less significant consideration where a s.339 or s.340 claim is made.

73. The third is that s.423(2) uses the phrase "the court may, if satisfied under the next subsection, make such order as it thinks fit" while the equivalent phrase in both ss.339(2) and 340(2) is that "the court shall, on such an application, make such order as it thinks fit". The language of s.423 is less imperative than the language of ss.339(2) and 340(2). That is not to say that the language of ss.339 and 340 excludes the discretion to make no order if it thinks fit not to do so - it is clear from *Re Paramount* that that is not the law. But it remains the case that the policy to restore reflected by the wording of ss.339(2) and 340(2) is still expressed in a manner that is less consistent with the carrying out of the balancing exercise contemplated by Sales J in *4Eng* than is the case with the wording of s.423. In my view the likely explanation for this difference in wording is that the intervention of the statutory distribution scheme on a formal insolvency is less consistent with carrying out that exercise than will sometimes (albeit not always) be the case when there is claim made under s.423.

74. It is also relevant that in *Trustee in Bankruptcy of Claridge v Claridge* [2011] EWHC 2047 (Ch), Sales J referred to what he had recently decided in *4Eng*. *Claridge* was concerned with a transaction at an undervalue, not a transaction defrauding creditors, and much of the judgment was concerned with the question of whether the elements of the cause of action had been established. Sales J concluded that the judge below had been wrong to decide that the transaction challenged by the trustee was not a transaction at an undervalue but declined to grant any relief on the grounds that the circumstances were sufficiently exceptional that the just result was for him to exercise his discretion not to make an order at all.

75. At para [49(ii)] of his judgment Sales J referred to what he had decided on change of position in *4Eng*, but the ratio of his decision was that in the very peculiar

circumstances of that case, there was no simple way to restore the position to what it would have been if the transferor had not entered into the relevant transaction (s.339(2)). It followed that this was a straightforward, but very unusual, application of the words of the statute which requires the court to concentrate on the relief that restores the position when crafting the form of the order (if any) to be made. This chimes with the decision in *Re Hawkes Hill Publishing Co Limited* [2007] BCC 937, where, at paras [35]-[36], Lewison J said that he would not have made an order even if the relevant agreement had been a preference in law, because on the facts the company would have been worse off if the position were restored to the position that pertained if the order had not been made (see also *Re MDA Investment Management Limited* [2005] BCC 783 at para [123] per Park J).

The s.127 cases

76. The judge also relied on authority relating to s.127 of the Act. This section operates to avoid any disposition of a company's property made after the commencement of its winding up unless the court otherwise orders. It does not include any further provision for the relief which the court can grant where a disposition is avoided by the section, but it does give the court jurisdiction to validate the disposition thereby preventing it from being void in the first place. The judge regarded s.127 as a provision in respect of which evidence of a change of position was capable of being relevant.

77. In support of this view, the judge referred to the decision of Mr Nicholas Warren QC in *Rose v AIB Group (UK) plc* [2003] 1 WLR 2791, a case in which it had been argued that there was no need or room for a defence of change of position, which should neither feature as a defence to the restitutionary claim arising out of the void disposition nor come into the assessment of how the court should exercise its discretion to validate. The judge said that *Rose v AIB* was authority for the proposition that what he called the change of position concept was not contrary to the statutory scheme and policy of equal distribution amongst creditors, but was rather the application of "an inherent qualification to the right of restitution" which was the remedy for statutory invalidity. The judge concluded (see paras [19(e)(ii)] of his judgment referring back to para [19(b)] that Mr Warren QC's reference to change of position as an inherent qualification to the restitutionary right pointed to it being a factor to be taken into consideration in the exercise of any discretion to decide that no relief should be granted under ss.340 to 342 where the circumstances of the case are out of the norm.

78. The way that Mr Warren QC actually expressed himself (at para [41]) was "I do not consider that change of position can be entirely ruled out as a possible way of resisting a claim for repayment by liquidator". He then went on to say that applications to validate were directed principally at achieving a *pari passu* distribution of assets while permitting transactions which are likely to be of benefit to the company. It is at least implicit in what he said that the fact that the operation of a change of position defence would by its nature distort the *pari passu* distribution of a company's assets was not a reason to conclude that it could never be available, although on the facts of that case he held that the elements were not satisfied.

79. The trustees submitted that I should not follow the approach in *Rose v AIB*, not just because the nature of s.127 is different from s.340 (a point to which I will revert), but also because it is very difficult to see how it can stand in the light of the decision of the Privy Council in *Conway* (supra). They also said that the judge was wrong not to give the decision in *Conway* the weight that its reasoning warranted.

80. In *Conway*, the Board was concerned with a voidable preference under Cayman law. S.145 of the Caymans Islands' Companies Law (2013 rev) was in the following terms:

> "Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of s.93 with a view to giving such creditor a preference over the other creditors shall be invalid if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation."

81. It followed therefore that, in the same way that s.127 of the Act provides for automatic avoidance of post-commencement dispositions (albeit subject to discretionary validation), s.145 of the Cayman Companies Law provided for automatic invalidation of preferences given within the statutory avoidance period, leaving the consequences of the invalidation to general restitutionary principles. This was also the position under the English law of voidable preferences before the enactment of the Act, because s.44 of the Bankruptcy Act 1914 provided for automatic invalidation, where the elements of the cause of action are established. There was no provision under the statute for the exercise of a discretion.

82. The question that arose in *Conway* was whether, in the absence of a statutory discretion, change of position was available as a defence to a restitutionary claim based on a payment rendered invalid by s.145. As the Board explained (see paras [99] and [100] of the judgment), the liquidators' arguments were: (a) that s.145 creates a statutory entitlement to repayment which is unqualified, and that the common law relating to restitution is simply irrelevant and (b) alternatively that a defence of change of position is inconsistent with the statutory aim of s.145 "since it would subvert the fundamental principle of *pari passu* distribution of an insolvent company's assets".

83. The first of these arguments was rejected, but the second was accepted. It was based in part on the views of Professor Sir Roy Goode QC in "Goode: The Avoidance of Transactions in Insolvency Proceedings and Restitutionary Defences in *Mapping the Law: Essays in Memory of Peter Birks* (2006) at pages 307 to 308):

> "… Whilst common law defences against a statute may be available in litigation between private parties where no others have an interest, it is quite another matter where the statutory provisions in question are concerned to protect the wider interests of the public or a section of the public. In such cases neither estoppel nor change of position should be available as a defence. The court's task is to implement the policy of the statute. As we have seen, the insolvency avoidance provisions are designed to ensure *pari passu* distribution. To allow a defence such as estoppel or change of position would be to promote the interests of a particular

> party who had received a benefit to which he was not entitled over those of the general body of creditors whom the statute is designed to protect."

84. The way in which the question was identified in *Conway* was whether, if a payment is avoided under s.145 (or other pure avoidance provisions of that sort), the operation of the statutory scheme takes priority over the detriment suffered by the preferred creditor against whom the claim is made. The Board answered that question in the affirmative. It was satisfied (see para [104]) that there is a well-established principle of public policy which denies effectiveness to a voidable preference, without picking and choosing according to the detriment which may be suffered by the preferee as a consequence of its operation. The consequence of this conclusion was that there was no room for the existence of a change of position defence under s.145 of the Cayman Companies Law.

85. That is not, however, the same question which now arises under English law, either in relation to s.127 of the Act or the statutory clawback provisions of ss.339 and 340 of the Act. S.127 is different because it contains a discretionary power to validate that which would otherwise be void and ss.339 and 340 are different because the court has the general discretion confirmed by *Re Paramount* to make such order as it thinks fit for restoring the position. In neither of these contexts does the legislation require the court to make a black and white choice between the existence or absence of a change of position defence. Nonetheless, the policy may well be the same. As the Privy Council said in *Conway*:

> "As a matter of principle, the well-established principle of public policy which is applied by the courts so as to deny effect to arrangements in fraudem legis does not, of its nature, pick and choose according to the detriment which may be suffered by the defendant as a consequence of its operation."

86. Although s.127 is doing a slightly different job from s.340, I think that the judge was entitled to take the applicable law into account because the underlying principle of protecting the *pari passu* rule is the same. However, his reliance on Mr Warren QC's judgment in *Rose v AIB* is not in my view well placed in light of further developments in the law. I also think that, even if it is appropriate in a general sense to treat change of position as an inherent qualification to the right of restitution (which was how Mr Warren QC and the judge analysed its relevance), I have difficulty in seeing how that is a helpful approach divorced from the context of the court's power to validate what would otherwise be void and the law which has developed as to the circumstances in which the exercise of that power is appropriate.

87. In *Rose v AIB* at para [14], Mr Warren QC summarised the approach to a validation application as follows:

> "(a) First, the discretion is at large. (b) The basic principle is one of *pari passu* distribution. Lightman J explains the principle in *Coutts & Co v Stock* [2000] 1 WLR 906, 909. In a passage at para 6 (cited with approval by the Court of Appeal in *Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] Ch 555, 563, para 21) he describes the invalidation of dispositions under s.127 as
>
> > "part of the statutory scheme designed to prevent the directors of a company, when liquidation is imminent, from disposing of the company's

> assets to the prejudice of its creditors and to preserve those assets for the benefit of the general body of creditors."
>
> (c) In determining whether a validation order should be made, the court should ensure that the interests of the unsecured creditors are not prejudiced. (d) The court should not, except in special circumstances where it was in the interests of creditors generally, validate a transaction which would result in one or more pre-liquidation creditors being paid in full where other such creditors would only receive a dividend. (e) A disposition carried out by the parties in good faith at a time when they were unaware that a petition had been presented would normally be validated unless there are grounds for thinking that the transaction was an attempt to prefer the disponee."

88. To the extent that this summary confirms that in the normal course the answer on a validation application will depend on whether the disposition operated to prejudice the interests of the creditors as a whole (e.g., whether it was part of post-commencement profitable trading) it remains good law. It is also consistent with the policy described by the Privy Council in *Conway* to the effect that the position of a recipient is irrelevant to an exercise of the discretion.

89. But, sub-para (e), which is an accurate reflection of what was said by Buckley LJ in *Re Gray's Inn Construction* Limited [1980] 1 WLR 711, 718 and repeated by Fox LJ in *Denney v John Hudson & Co Ltd* [1992] BCC 503, 505 as his proposition (7), cuts across the application of the *pari passu* distribution rule, because where the disponee was unaware that a petition had been presented, this of itself was said to be capable of amounting to a ground for validation, unless an attempt to prefer the disponee can be inferred. If the court were to take that approach it would amount to recognition of a context in which the mental state of a recipient who has benefited from a payment made in breach of the *pari passu* principle will always be taken into account when the court is determining whether or not a validation order should be made.

90. However, this summary no longer reflects in all respects the approach which the court is required to adopt on a validation application. In *Express Electrical Distributors Ltd v Beavis* [2016] 1 WLR 4783, Sales LJ said (in a judgment with which Sir Terence Etherton C and Patten LJ agreed) the following about the passages from the judgments of Buckley LJ in *Gray's Inn Construction* and Fox LJ in *Denney* summarised by Mr Warren QC in sub-para (e):

> "55. As so often with a paraphrase, some nuances in the judgment of Buckley LJ have been lost in these propositions. Moreover, in stating the propositions Fox LJ does not examine the points at which they may be in tension with each other and how such tensions might be resolved: I have referred to some of the difficulties above. In particular, proposition (7) appears to me to be misleading as a general proposition, not least because Fox LJ himself did not apply it as a governing criterion in the *Denney* case, but also because it does not marry up in a coherent way with the basic principles identified in the *Re Gray's Inn Construction* Limited case [1980] 1 WLR 711and repeated by Fox LJ.
>
> 56. In my judgment, the time has come to recognise that the statement by Buckley LJ at p 718F–H cannot be taken at face value and applied as a rule in itself. The true position is that, save in exceptional circumstances, a validation

> order should only be made in relation to dispositions occurring after presentation of winding up petition if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors, such that it is appropriate to disapply the usual pari passu principle."

91. Para [56] of Sales LJ's judgment in *Express Electrical* has subsequently been referred to with approval by both Lord Mance and Lord Neuberger of Abbotsbury PSC in *Akers v Samba Financial Group* [2017] AC 424 at paras [47] and [75] respectively. It follows that in this, as in other similar areas, an exceptional circumstances test is the one which a court is required to apply.

Conclusion on change of position

92. It seems to me that, if it were to be the case that Sales J's decision in *4Eng* had led to a conclusion that change of position was a "strong factor" in a s.340 preference case, (as the judge understood to be the position (see para [102] of his judgment)), there would have been some tension with Sales LJ's conclusions on the correct approach in a s.127 case (*Express Electrical*). In both instances, the court was concerned with the impact on an innocent recipient of a statutory provision designed to protect creditors in a formal insolvency from the consequences of an improper distribution of a debtor's assets carried out at or before the intervention of that formal insolvency. It would be surprising if the overall approach were to be different and in my view it is not. A proper understanding of the limits of what was described in *4Eng* does not compel such a conclusion.

93. Whatever the case may be under in a s.423 claim, it seems to me that, where a court is concerned with the appropriate relief to be granted in a preference or transaction at an undervalue claim, it will rarely be possible to give weight to a change of position by the preferee or the transferee, while at the same time honouring the policy which is reflected in the statute, the normal operation of the statutory insolvency scheme and the restorative nature of the relief (if any) it is required to grant. There will be the very occasional case (and *Claridge* is probably one) where that proves to be possible, but in my view such cases will be rare. For the reasons I have sought to explain, the position is not so clear cut in a section 423 claim, anyway where the transferor is not the subject of formal insolvency proceedings.

94. It follows that in my judgment, the right approach is as follows:

    i) Change of position does not operate as a defence under ss.339(2), 340(2) and 342.

    ii) There will be exceptional circumstances in which the facts that would establish a change of position defence (if it had been available) will weigh in the balance when the court is determining how to exercise its discretion as to the order it thinks fits for restoring the position to what it would have been if the transaction had not been entered into or the preference had not been given.

iii) In any event, change of position is not the strong factor which the judge considered it to be. To characterise it in that way is to give insufficient weight to the underlying policy considerations illustrated by *Conway* and the difficulty of balancing the interests of a class against the interests of an innocent transferee.

95. It also follows that I do not consider that it is necessary for me to decide on this application whether I think that *4Eng* was wrongly decided, because the context of s.423 is different from s.340. Although the world cruise example given by Sales J might be read as a finding that change of position operates as a complete defence, that is not how his judgment has been read in subsequent authorities. It operates as no more than one of the factors that might affect the balance of equities between creditors and transferee (in circumstances where it is possible to carry out that balancing exercise) when the court is determining the relief if any to be granted. The policy that underpins the statute means that the balance is only likely to come down in favour of the transferee where the circumstances are sufficiently out of the norm to be exceptional.

96. In my judgment, the judge's approach to the exercise of his discretion on this point is problematic because he overemphasised the weight that change of position will always have. I think that he was wrong to say that the authorities establish it to be the strong factor with significant weight that he regarded it as having. In any event I think that there are difficulties with the factual findings he made on change of position, a consideration to which I will now turn. However, that does not necessarily mean that the decision he ultimately reached was wrong.

Discretionary factors: the Evidence

97. There was no serious challenge by the trustees to the evidential basis for the judge' findings of fact on the first, second and fourth factors, although their significance as grounds for denying relief was not accepted, and I shall return to consider them briefly in that context.

98. As can be seen from the first and third grounds of appeal, the same cannot be said about the evidence which underpinned the third factor. Mr Morgan was very critical of the circumstances in which the evidence relating to change of position was adduced. This was largely because change of position was not a point that was articulated by Ms Wilson at any stage before or during the course of the trial. He submitted that the admission of evidence on the point was unjust and constituted a serious procedural or other irregularity. He also submitted that the conclusions which the judge reached on the facts as they related to change of position had no proper evidential basis and were not findings that it was open to a judge acting reasonably to make.

99. The legal context in which these submissions were made is that, when change of position is advanced as a defence to a claim in restitution, it should be pleaded so that its factual merits can be explored at the trial (*Adrian Alan Ltd v Fuglers* [2003] PNLR 14 at [16] per Brooke LJ). One of the important considerations for the court will be to determine (and the burden of proof will be on the defendant) whether the use to which

the monies were put did not disqualify the defence, for example by using them in the ordinary course of things, or acquiring an asset with a realisable value, or by being used to discharge existing debts (per Lewison LJ in *Prudential Assurance Co Ltd v Revenue and Customs* [2017] 1 WLR 4031 at [149]-[150]).

100. The judge did not say that change of position was a defence, strictly so called. He relied on it as a discretionary consideration which counted against the grant of relief under s.340 rather than as a defence, the establishment of which barred a remedy. Nonetheless, as the judge himself recognised in para [57] of his judgment, the approach reflected in the judgment of Brooke LJ in *Fuglers* is equally applicable in both contexts, and it seems to me that this is more particularly the case in circumstances in which the judge held that, if change of position were to be established, it would be a strong reason to refuse relief. Otherwise, the claimant or applicant will not have adequate forewarning of the case he has to meet, and will not have an opportunity to investigate, obtain disclosure if appropriate and test the evidence.

101. Where a defendant is acting without legal representation, as was the position in which Ms Wilson found herself, it may well be appropriate for the court to grant considerable latitude in the way in which an assertion of change of position is made. So long as the essential facts from which a change of position can be established are clearly ascertainable from the pleadings, the witness statements or even the pre-trial correspondence, it may not be necessary for the respondent to articulate that change of position is the legal consequences of what has been said. In the present case, there was no forewarning at all.

102. As is commonplace in the trial of an insolvency application to which Part 12 of the Insolvency (England and Wales) Rules 2016 (the "Rules") applies, the court did not direct particulars of claim and a defence in accordance with rule 12.11(b). It follows that there were no statements of case by which Ms Wilson could have asserted a change of position. However, I agree with Mr Morgan's submission that, in the context of an insolvency application, the witness statements will normally fulfil the function of a statement of case, more particularly where the parties have prepared a list of the issues to be determined by reference to those witness statements.

103. Ms Wilson made two witness statements before the trial: one dated 11 January 2019 and the second dated 12 August 2019. They both focussed on two matters in particular: first the financial position in which Ms Wilson found herself and secondly a number of matters which she advanced in her attempt to rebut the presumption that, in making the Payment, Peter Fowlds was influenced by a desire to prefer her. There was no mention in the witness statements of what had happened to the Payment once it had been received, nor was there any mention of any other matters which might have pointed to a change of position argument being available.

104. There was a list of issues dated 1 May 2019, prepared two weeks before the first hearing of the claim at which directions were given. This included the issues which each party then considered should be determined at the hearing and was not updated thereafter. The list of issues did not mention change of position, nor did it mention any of the factual questions from which a change of position might have been inferred.

105. The trial took place on 7 April 2020. Ms Wilson gave evidence. She was permitted by the judge to supplement her witness statements. She did so but concentrated on the fact that the Payment was made to her for the provision of commercial services for which she was only paid in part as compared to other creditors who had been paid in full. She also reiterated the serious impact which the grant of relief would have on her personal position and that of her children. She did not allude to what had happened to the Payment.

106. Ms Wilson was then cross examined by counsel for the trustees (Mr Andrew Brown). He did not ask any questions about what had happened to the Payment or any other matter relating to change of position. That is not surprising as the possibility of a change of position had not been raised by Ms Wilson in any of the evidence. The closest that her evidence got to the point was that her assets were very limited, a statement that was consistent with her no longer having the Payment, anyway in cash form. In her submissions on the appeal, she confirmed that this was something that she had told the trustees shortly after they intimated their claim against her in late 2017.

107. The evidence relied on by the judge in the findings he made on this aspect of the case only came out in response to his own questioning of Ms Wilson, the relevant parts of which I should set out in full:

> "ICCJ Jones: Now, then that's obviously a large sum to receive, although clearly in accordance with your entitlement under the contract, but it's still a large sum to receive.
>
> Ms Wilson: Yeah.
>
> ICCJ Jones: What happened to it?
>
> Ms Wilson: Well, during the period where I was providing Peter with these professional services, I, I wasn't working, so I sort of shelved my plans to restart working. So, I was actually, at the time, I was in the fairly fortunate position that my, my father, who isn't a party to any of this, had been financially propping me up. He was, thank God, at that point, he was able to do it, particularly at the point when my marriage started to break down and I was having to go through legal proceedings with that as well, I mean, fortunately we managed to stay out of court but, going through a divorce is not an easy thing to do. So, fortunately, my father was able to subsidise me doing that and then, following the divorce, he was, again, continuing to subsidise me. So, the money, I, I repaid what I owed my father. My father and my stepmother are currently in lockdown in Barcelona. My stepmother is Spanish. She is, she has terminal breast cancer and he, I believe, he spent the money on paying for treatment for her. He has no assets and he's 83 tomorrow and he has no income to speak of, except a small pension. And, under the circumstances, not only do I believe he has no money to be able to lend me, but I wouldn't, I couldn't bring myself to ask him. He's about to lose his wife and we can't be with him because they're in lockdown in Spain. So, so that's really where the money went. There was, some of it was also spent on things like paying for doing some other borrowings and then just paying bills like, you know, putting food on the table and gas bills and stuff, it's living expenses.

ICCJ Jones: I'm sorry, this was because I didn't hear it, before you talked about spending money on bills, you referred to spending money on something else, what, what was that?

Ms Wilson: Just paying off other debts, you know, where I've got, where I had credit card bills.

ICCJ Jones: Credit card bills, thank you.

Ms Wilson: Like, just generally trying to get myself in a more stable, slightly more stable, financial position.

ICCJ Jones: If you didn't have that money, when would you have had to repay your father?

Ms Wilson: Oh, pretty much, I think it, we had some discussions for quite some time about it. Initially, he was, he jokingly called it an advance on my inheritance which is a joke because there is no inheritance to come but, sadly. But I, I did, I can't remember the date when I did transfer the funds to him.

ICCJ Jones: Right, OK, so it was, I mean, in the sense of the term advance on inheritance indicates he wasn't expecting it back.

Ms Wilson: Well, he wasn't but the situation was that he was, he ended up with, he, at one point, had a house, no, a flat, but he sold that, he lost a lot of money on the stock, no, the foreign exchange markets and just got himself into no end of financial trouble and, I'm his daughter, I couldn't, in any consciousness, just not repay what he, when he had been there for me, I needed to be there for him. He's my father. What else, what else would anybody do? And, and now, with the situation with my stepmother, I'm even more grateful that I did it.

ICCJ Jones: OK. Thank you. Just see, bear with me, are you able to recollect when your stepmother first needed treatment approximately? I appreciate it won't be exact.

Ms Wilson: It is, oh gosh, I think it's been going on for a couple of years. So, she's quite close to the end now.

ICCJ Jones: So, we're talking more about 2017, are we?

Ms Wilson: Yeah, I think so.

ICCJ Jones: Roughly, very roughly, OK, that's fine.

Ms Wilson: Yeah, to be, to be honest, they are, they, they're quite, they don't tell me an awful lot because they have this ridiculous idea that, if they tell me, I'll worry.

ICCJ Jones: OK.

Ms Wilson: I know. I, I have to drag information out of them.

> ICCJ Jones: OK. That's, those are my questions. Just pausing to think that they are. Yes, thank you. What I'm going to, although I said that you've got a right to, actually, Mr Brown, I know you can, may wish to re-examine on it, I think what I'll do is, I'll ask Miss Wilson to say anything she wants to and then you can pick up after that …
>
> Mr Brown, following up from my questions, it must be right that you could ask, if you wish to, anything with regard to the answers that came out, if you wish.
>
> Mr Brown: I have no desire to do so, Judge.
>
> ICCJ Jones: Thank you."

108. On 20 April 2020, the judge circulated a draft judgment in accordance with Practice 40E to CPR Part 40. The draft was headed with the following endorsement:

> "The fact that Ms Wilson explained what happened to the Payment during the trial and, as a result, introduced the principle of "change of position" has resulted in this judgment including case law to which the court was not referred. Fairness requires the Applicants through Mr Brown to have the opportunity to consider whether they require the opportunity to address that law.
>
> As a result, judgment will be handed down on a date to be fixed. Mr Brown should first inform the court of any proposals should the Applicants wish to take advantage of that opportunity. The Court will be grateful if he could email to inform it of the Applicants' intentions as soon as practical and if possible by 4.00 pm on Friday 24 April at latest …
>
> It is emphasised for the avoidance of doubt that there is no criticism of Mr Brown's submissions. He would not have been prepared to cover the point."

109. The form of endorsement was a reflection of the fact that Mr Brown did not know, even at the end of the hearing, that change of position was in issue. Until the draft judgment was produced, he had not been informed by the judge that, in asking the questions he did, he took the view that a change of position defence might be established.

110. The draft judgment then included a discussion of the application of change of position as an answer to a preference claim and concluded that a good faith change of position was relevant to the exercise of the court's discretion to grant relief under s.340. The judge also made the following draft findings as to the evidence that Ms Wilson had given in response to his own questions:

> "39. I asked during Ms Wilson's examination what had happened to the Payment. She explained that she had had to borrow money from her father to "*prop her up financially especially when her marriage broke down and following her divorce*", which would have been during 2013/14. No time for repayment had been specified and it was jokingly described as an advance on her inheritance. He was not expecting it to be repaid. However, her father's financial position deteriorated as a result of losses on the foreign exchange market. As his daughter, she felt and decided she had to repay him when he was in need and most of the Payment was

transferred for that purpose. The balance of the Payment was used to help her pay for her living expenses including to repay credit card balances.

40. The sums received from the Payment were no longer available to her father by the time the claim was notified to Ms Wilson by the Trustees. He had had to spend it largely to pay for his wife's cancer treatment during 2017. He has no assets to assist her and lives off a "meagre" pension. She changed her position before the nature of a claim was indicated to her by the Trustees. I accept she did so believing it to be a valid payment of the consideration contractually owed to her for the work she provided and for which she invoiced."

111. In light of these draft findings, the trustees took the opportunity afforded by the judge's endorsement. Mr Brown prepared lengthy written submissions which addressed the law in some detail. He also made the argument that change of position must be properly pleaded and evidenced, which did not occur in the present case, and submitted that a conclusion on change of position without giving the trustees the opportunity to test the evidence would be procedurally unfair. He said that either the court should not consider change of position at all or should direct Ms Wilson to produce a further witness statement detailing what occurred to the Payment and giving the trustees an opportunity to put in evidence in answer with a hearing for a further cross-examination of Ms Wilson if necessary. He had not been in a position to conduct any cross-examination at the end of the judge's own questions because he did not have the material from which he would have been able to do so, nor did he know at that stage that change of position was at the forefront of the judge's mind. The fact that he might have worked out that this was the point at which the judge was driving in his questions is not a complete answer.

112. In the approved judgment handed down on 22 May 2020, the judge expanded his discussion of the law on change of position to take account of the written submissions made by Mr Brown but maintained his substantive conclusion that a good faith change of position was of central relevance to the exercise of the court's discretion to grant any relief under s.340. As I have already explained, the judge said that change of position was a strong factor in the court's overall consideration of the position and left his findings on the facts unaltered from his draft. He also held that there were good grounds for rejecting the trustees' submission that an adjournment with directions to test Ms Wilson's evidence on change of position was the only fair way to proceed.

113. The way that the judge explained his conclusion on this last point was as follows:

"110. … Whilst the information concerning the use of the Payment was not previously provided, nor was it sought. The Trustees have wide investigatory grounds, the question I asked is an obvious one in the context of the statutory provisions and the nature of the claim and it is now too late within this litigation for them to start to ask it and conduct investigations. That conclusion is substantiated by the fact that it has never been suggested that Ms Wilson retained the Payment or has access to it or to its fruits. Indeed, the trial proceeded on the basis that it was accepted she has not.

111. Another reason for my decision is that the same result will apply even if the third factor is excluded from consideration when exercising the discretion.

> Alternatively, the principle in ex parte James will apply in any event. There is also the need for finality especially in the context of the costs being disproportionate to the sum involved."

114. In a case which bears some similarities to the present case, *Global Corporate Limited v Hale* [2018] EWCA Civ 2618, Asplin LJ summarised the position as follows:

> "A trial judge is perfectly entitled to ask a party or other witness to clarify the answers he or she has given in evidence and it is often important to do so. Where a party is unrepresented, as a matter of fairness both to the unrepresented party and the other party or parties to the litigation, it may also be both appropriate and necessary to ask questions in order fully to understand the unrepresented party's case as pleaded, their submissions and their evidence. In doing so, the judge should take care not to ask leading questions of the unrepresented party in his capacity as a witness. It may even be necessary to ask questions of other witnesses about matters central to the issues in the case which have not been posed by the unrepresented party in cross-examination. Such questioning should be approached with caution and limited to essential matters. In this case, as Patten LJ has pointed out, the judge's finding that no definitive decisions were made about declaring dividends did not form part of Mr Hale's case at all and was based upon the judge's own line of cross examination for which there was no existing evidential basis. It is very important that whilst seeking to clarify the issues and the evidence and to be fair to all parties the trial judge does not stray from the case as pleaded and the evidence before the court."

115. The judge went some way towards redressing the balance when he asked the trustees' counsel (Mr Brown) whether he wished to ask any further questions with regard to the answers that had been given. Counsel did not take up that opportunity, but I accept Mr Morgan's submission that Mr Brown was put in a difficult position because the point was not foreshadowed, he did not have any material from which he could have challenged Ms Wilson's evidence, and he had very little time to consider or take instructions on the significance of what the judge had just elicited from her in his questioning.

116. It seems from para [110] of the judge's judgment that he considered that the question he had asked was an obvious one, and for that reason it was now too late for the trustees to start an investigation into whether her evidence as to what had happened to the Payment, or its fruits was accurate. This was a point that was picked up by Ms Wilson in her oral submissions, when she said that it was not a great leap for the trustees to have asked her what she had done with the money when she said that she no longer had it. However, the force of this submission was rather undermined by the fact that (in a witness statement made for the purposes of the appeal on 7 May 2021, which Mr Morgan did not say I should not consider) she said that she told the trustee's solicitors that "I had cleared debts" with the Payment. Had the judge seen this evidence, it is difficult to see how he could have concluded that a change of position defence had been established for the reasons described by Lewison LJ in *Prudential Assurance* (referred to above).

117. In my view, although the judge was in a difficult position in light of the way the evidence had come out, and although he was concerned with case management considerations as to which an appeal court will not lightly interfere, the approach he

adopted to this point was wrong. For perfectly understandable reasons, he was concerned to ensure that Ms Wilson had every opportunity to put forward the arguments that he considered might have been available to her. She was faced with a technical area of insolvency law with which even many non-specialist lawyers may have struggled. But I think that the judge lost sight of the limited role which his own questioning should have had, more particularly as Ms Wilson confirmed in her submissions to me that she never presented any of what she told the judge as a defence, but simply answered the questions he had asked. The evidence having developed in the way that it did, I think that the right way to proceed at that stage was to give the trustees a further opportunity to put in evidence and cross examine Ms Wilson. Proportionality and finality were obviously very relevant considerations, but in all the circumstances it was wrong to treat them as determinative.

118. In any event, the difficulty with the approach taken by the judge to this point is that it reversed the burden of proof on an issue in relation to which as he himself recognised (see paras [13] and [75] of his judgment), the burden fell on Ms Wilson. While it may have been prudent for the trustees to investigate what had happened to the Payment in case the circumstances of what happened to it or its proceeds were raised by Ms Wilson as an answer or a potential answer to their claim, I do not think that they were under any legal obligation to do so, anyway until the point was raised against them.

119. Mr Morgan also submitted that the judge was not in any event entitled to reach the conclusion that all the elements necessary to establish a change of position on the facts had been proved by Ms Wilson. He said that it was relevant to any change of position to know with some precision when it was that the transfer by Ms Wilson to her father was made. Without clarity on that point, the judge could not be satisfied that Ms Wilson had transferred away any part of the Payment at a time before she was on notice of the trustees' claim against her. It is difficult to see how she could have been acting in good faith in changing her position by making the transfer to her father after the date of the trustees' letter of claim (cf *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] 2 All ER (Comm) 705 at [135]). Indeed, as the bankruptcy petition had been presented in January 2016, the date at which notice might have been attributed to her may have been earlier than that.

120. The judge held that most of the Payment was transferred to Ms Wilson's father for the purpose of repaying him when he was in need as a result of losses on the foreign exchange market, but she said that she could not remember the date the transfer was made. There were no documents to substantiate her case and the only evidence which touched on the point was Ms Wilson's oral evidence relating to the time at which her stepmother first needed cancer treatment (because that is the time by which her father must have received the transfer in order to pay for the treatment). Ms Wilson said that "it had been going on for a couple of years", to which the judge suggested that "we're talking more about 2017 are we?", a suggestion with which Ms Wilson agreed.

121. The difficulty with this evidence (apart from the fact that Ms Wilson was led to the answer she gave) is that a couple of years before the date at which her evidence was given was April 2018, not 2017. While the phrase "couple of years" is inherently imprecise, this discrepancy matters, because April 2018 was well after both the time at which the bankruptcy order had been made (March 2017) and the time at which the trustee's solicitors first wrote to Ms Wilson to assert their claim (October 2017).

122. I also think that there is substance in Mr Morgan's submission that the evidence did not justify any finding as to how much of the Payment had been used to fund the transfer to her father. She had received the Payment in September 2014 and accepted that some of it was used for the purpose of repaying her own borrowings and paying bills and other living expenses. To the extent that this was the use to which the proceeds of the Payment were put, a defence of change of position would not lie (*Lipkin Gorman (a Firm) v Karpnale Limited* [1991] 2 AC 548, 580F-H). In my view the judge was wrong to conclude that Ms Wilson had proved with sufficient clarity how much of the Payment was used for a purpose other than daily living expenses or existing debts. It was also the case that Ms Wilson continued to pay the mortgage after receipt of the Payment, and there was no evidence to counter what Mr Morgan described as the obvious possibility that the Payment simply allowed her to augment the value of her own assets.

The remaining discretionary factors

123. Although I have concluded that the judge went wrong on his approach to change of position, this is not determinative of the appeal, because he said in paras [103] and [111] of his judgment that he would have reached the same conclusion without considering change of position. He said that the fourth factor (when added to the first and second factors) had such disproportionate consequences that it would not be just or fair to order repayment knowing that the only source for repayment was Ms Wilson's home. Mr Morgan said that the judge was plainly wrong to take this view, and these formed the subject matter of the 6th and 7th grounds of appeal.

124. In considering these grounds, I keep in mind the fact that, although the appeal has focussed on the question of change of position, it is all too easy to lose sight of the fact that the judge's detailed description of the background makes clear how far from the norm the circumstances of this case actually are. The question is whether taken together they can be regarded as sufficiently exceptional to justify the grant of no relief (or some relief other than an order for repayment) and the weight that I should give to the judge's view that this is the case even assuming that change of position had not been established.

125. I should add that, the parties both agreed that if I should decide, as I have, that the judge went wrong in his approach to any relevant aspect of the way that he exercised his discretion, I should do the best I could with the available evidence. Given the sums of money at stake, and the need for certainty, it would be wholly disproportionate for me to remit the matter for further consideration in the light of this judgment.

126. In some respects, the judge's conclusion on this part of the case is one with which any court is bound to have sympathy, but at first blush it is also a puzzling one for the judge to have reached. Earlier in his judgment (at para [19(e)(v)]) he had referred with apparent approval to those parts of Sales J's judgment in *4Eng* at paras [91] and [92] in which he had concluded that the court should not take into account the transferee's own needs, financial requirements and quality of life because it would lead to a wide-ranging and unstructured enquiry. However, I agree with the judge's later view (at paras [95] and [96]) that Sales J was not laying down some form of

blanket exclusion that personal needs could not be taken into account if the ends of justice so require. In my view they can be taken into account where the circumstances are sufficiently exceptional for that to occur and for an appropriate balancing exercise to be carried out. The judge is very experienced in this area and, although I have disagreed with the approach that he took to change of position, his views on the exceptional nature of the case are entitled to considerable weight.

127. Mr Morgan submitted that this part of the judge's approach sits unhappily with the way in which the exceptional circumstances test is applied where a trustee in bankruptcy applies for an order for possession and sale of a bankrupt's matrimonial home. The decision of the Court of Appeal in *Re Citro* [1991] Ch 142, 157 makes clear that the situation in which Ms Wilson and her children finds themselves would not without more be described as exceptional for those purposes. As Nourse LJ said at p.157:

> "As the cases show, it is not uncommon for a wife with young children to be faced with eviction in circumstances where the realisation of her beneficial interest will not produce enough to buy a comparable home in the same neighbourhood, or indeed elsewhere. And, if she has to move elsewhere, there may be problems over schooling and so forth. Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society has been familiar."

128. There are similarities between applications for the sale of a matrimonial home (which are now governed by their own statutory code: s.335A of the Act) and applications for discretionary claw back relief. They both have in common a situation in which a trustee is seeking the realisation of an asset for distribution in the bankruptcy, in circumstances in which the grant of the relief will have an adverse effect on the position of an innocent third party. Furthermore, the test in both contexts is that the interests of the creditors will normally prevail and the circumstances in which they will not prevail have been characterised as exceptional. However, in at least one other respect they are also very different: applications for the sale of a matrimonial home are commonplace as a means for realising distributable assets in a bankruptcy, but as the judge himself made clear, the same cannot be said about the circumstances surrounding the preference claim in the present case.

129. In my view, there is a danger in looking in isolation at each factor going to whether exceptional circumstances have been shown, without stepping back and looking at the overall picture. As Nourse LJ went on to explain in *Re Citro*, (when distinguishing the earlier decision of the Court of Appeal in *Re Holliday* [1981] Ch 405), the adverse impact on the personal position of the spouse and her children of the grant of the relief sought is capable of being an exceptional circumstance when taken in conjunction with the other circumstances, including in particular the true extent of the effect of its grant or refusal on the position of the creditors.

130. Having regard to these considerations, I think that the judge was entitled to take the view that he did, even though I have concluded that all of the elements of a change of position by Ms Wilson were not established. There are a number of reasons for this, all of which flow from the factors the judge took into account, and which, taken together, mean that a refusal of the application for relief was the right order to make.

131. First, it is a striking feature of the case that the only reason Ms Wilson was vulnerable to the claim was because she happened to be an associate of the bankrupt and was therefore vulnerable to a 2-year claw back period. There is nothing unusual about this looked at in isolation, but the other creditors (apart from Mark Fowlds) who were paid at the same time as her, and in full rather than like Ms Wilson only in part, are not vulnerable because they were not associates and so were only subject to a 6-month claw back period. It follows that, because the other creditors (apart from Mark Fowlds) were paid in full while Ms Wilson was only paid in part, Peter Fowlds was influenced by a desire to produce a more complete preferential effect in relation to the other creditors who were paid at about the same time, against whom a claim does not lie, than he was in relation to Ms Wilson against whom a claim does.

132. While I agree that this was still a preference for the reasons the judge gave, the fact that the judge found that Ms Wilson's status as an associate was the reason that she was paid less than the other creditors who were paid in full, is inconsistent with the underlying policy that permits a preference claim against associates to extend back for a further period in time than a preference claim against those who are not.

133. In its essence this is the same reason as the judge's first factor. I think that he was correct to regard it as significant. The preference was not given to Ms Wilson because she was an associate, it was given to her simply because she (like all the other creditors who were paid at the same time) was not Mark Fowlds. She was not therefore preferred because of any association which justified the 2-year claw back period. I agree with the judge that this situation is far from the norm, and that it is exceptional in a relevant sense because it undermines the policy which justifies a necessary part of the cause of action on which the trustees' claim against Ms Wilson was based. Put another way, this is one of those very rare cases in which the fact that the elements of the preference were established does not mean that the strong policy imperative to restore the payment for the benefit of the creditors as whole (in this case only Mark Fowlds) is engaged.

134. Secondly, although this does not give rise to an exceptional circumstance in its own right, I agree that the judge's second factor is relevant. He found as a fact that Ms Wilson's claim was akin to one made by an ordinary commercial creditor acting in good faith without knowledge that the Payment was a preference. This is not particularly unusual where a creditor benefits from a payment that amounts to a preference, but in many cases participation by the preferee in the preferential act is established or can be inferred. This is not such a case and means that one of the necessary conditions for refusing relief was present.

135. Thirdly I think that it is relevant that the judge found as a fact that Ms Wilson no longer has the Payment. This is what the judge called the "Prerequisite". For the reasons that I have already explained that is not sufficient to justify a finding that she changed her position in any conventional sense but, like the second reason I have just given, it is an important underpin to the argument that no relief should be granted. The reason for this is linked to the next point. If Ms Wilson still had access to the Payment or its proceeds, she would have a less powerful case for arguing that the impact on her of having to restore the Payment would be wholly disproportionate to the benefit to the estate.

136. Fourthly, and flowing directly from the first point, the present case is to all intents and purposes a single creditor bankruptcy. This is relevant because the status of a preference claim as a class remedy flows from the preference which one or more of the bankrupt's creditors receives over the class as a whole. In the wholly exceptional circumstances in which there is only one member of the class, there is less reason to favour the class over the recipient, more particularly where the other factors I have already considered are present. The single member of the class is closer to the single victim in a single creditor s.423 case.

137. This also means that it is more practical (so long as the circumstances are otherwise exceptional) to make an assessment of the comparative positions of creditors and preferee than is normally the case. In short, the present case is one of the very unusual ones in which it is appropriate to carry out the balancing exercise to which the judge had regard. Of course, the court must be cautious before taking that course for the reasons given in *Conway*, but where the circumstances are sufficiently exceptional, justice may require no order to be made.

138. The facts in the present case are that the only creditor (other than Southern Water which stands to recover 6p in the £ on a debt of £35, which can properly be regarded as wholly de minimis) is Mark Fowlds. It follows that the creditor / transferee contest is readily identifiable as one between a single creditor who may or may not stand to gain a small increase in his dividend depending on the impact which the costs of the bankruptcy have on his return, and the judge's finding that Ms Wilson (who was and still is also a creditor) will stand to lose her home, with the other significant consequences described in paragraphs [91] to [93] of the judge's judgment (recited above) if she has to repay. Mr Morgan pointed out that it is also necessary to have regard to the costs of the bankruptcy. I agree that is the case as a matter of principle, but it seems to me that it becomes a matter of less significance where the asset sought to be recovered is as comparatively modest as the claim in the present case, and it is obvious that issues of proportionality would arise.

139. In my view, the judge was entitled to reach the conclusion that he did on these points. I would also echo what he said at the end of his judgment, disagreeing only with the approach that he took and the conclusion that he reached in reached in relation to change of position, but accepting like the judge that in the circumstances of this case there is no other appropriate remedy short of refusing relief altogether:

> "105. There is no danger of this decision opening the flood gates to wash away the importance of section 340 of the Act to the statutory scheme and policy of equal distribution. It would not then be out of the norm. The discretion is only to be used in rare cases because of the strength/weight of the statutory scheme and policy of equal distribution amongst creditors I have reached the decision that this is one of those cases. The decision is fact sensitive and is made in this case within the context of a most unusual set of circumstances and facts. It is a decision to be made if justice requires and this is a case out of the wide scope of the norm where it does. Restoration would be unfair and unjust. No other remedy has been proposed or is apparent."

<u>Ex parte James: a postscript</u>

140. Although the point does not arise in light of my overall conclusion, I should add that I do not consider that the judge's reference to the rule in *ex parte James* is apposite when assessing the fair and just result. *Ex parte James* is about the circumstances in which an officer of the court will not be permitted to exercise his strict legal rights where it would not be fair for him to do so. The judge said that in his view a right-thinking person representing the current view of society would not consider it right to exercise legal rights resulting from a preference in this case. In expressing himself in this way he was seeking to apply the recent restatement of the rule by the Court of Appeal in *Lehman Bros (Australia Limited v McNamara* [2021] Ch 1 at para [68], where David Richards LJ said:

> "the court will not permit its officers to act in a way that it would be clearly wrong for the court itself to act. That is to be judged by the standard of the right-thinking person, representing the current view of society. If one were to pose the question "would it be proper for the court to act unfairly?", Only one answer as possible"

141. I agree with Mr Morgan' submission that it is very difficult to see how it can be said that the trustees in the present case are acting unfairly in the sense used by David Richards LJ when they were simply pursuing an available cause of action arising out of events prior to the commencement of the bankruptcy in order to recover assets from which to make a distribution to creditors and in respect of which, as the judge himself found, the underlying elements of the claim under s.340 were made out. They were then entitled to relief unless (per the Court of Appeal in *Paramount*) all the circumstances of the case meant that justice requires no order to be made. That is a matter for the court in the exercise of its discretion on the application. It does not mean that the trustees were acting unfairly in having the point tested - the rule in *ex parte James* is simply not engaged.