Neutral Citation Number: [2023] EWHC 493 (Ch)

Case No: BR-2018-000842

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

IN THE MATTER OF AKRAM HUSSAIN – A BANKRUPT
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Remote Hearing – Microsoft Teams
Date: 10/03/2023

Before :

I.C.C. JUDGE JONES

- -

Between :

(1) STEPHEN PAUL GRANT
(2) MEGHAN ANDREWS
(THE TRUSTEES OF THE ESTATE OF THE ABOVE NAMED BANKRUPT)

Applicants

-and-

(1) AKRAM HUSSAIN
(2) ALTIF HUSSAIN

Respondents

- -
- -

Mr Govinder Chambay (instructed by **Brachers LLP**) for the **Applicants**
Mr Miles Croally (instructed by **Mono Law**) for the **Respondents**

Hearing dates: 15 December 2022 and 16 February 2023

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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.

.....CHJ 10/3/23.....

I.C.C. JUDGE JONES

I.C.C. Judge Jones:

(A) Introduction

1. This is an application by the joint trustees in bankruptcy of Mr Akram Hussain seeking the sale of the family home of Mr and Mrs Hussain for the purposes of the bankruptcy, as 50% beneficial owners. The application notice does not give the names of the joint trustees in the title and this needs to be corrected by amendment.

2. In addition, it does not plead the main issue between the parties which will determine whether that relief should be granted. Namely whether a transaction by a Letter of Severance dated 4 October 2017 that resulted in Mrs Hussain holding a 98% beneficial interest should be set aside as a release of an equitable interest at an undervalue. Whilst it should have been pleaded, this is a case where permission to amend should be granted even at trial to give effect to the fact that the parties have proceeded through to trial on the understanding that this was the main issue.

3. However, whilst Mrs Hussain (through Mr Croally, her counsel instructed on the second day of the trial only) does not object to an amendment for the purpose of pleading s.339(3)(a) of the Insolvency Act 1986, she opposes permission to plead s.339(3)(c) on the basis that this was not advanced within the witness statement evidence. In other words, the amendment can ask the court to decide whether the release was for no consideration but cannot assert that the consideration provided was less than the value of the release.

4. The case as set out in the evidence in support is identified within paragraphs 19-22 of the witness statement of Ms Andrews, a trustee. It is probably most accurate to describe the content as expressing reliance upon s339, whilst being non-committal as to whether s.339(3)(a) and/or s.339(3)(c) were relied upon. The reason for that caution may well have been attributable to the stated concern of the imminent expiry of the s.283A Insolvency Act 1986 limitation period, and the need for further investigations in the context of insufficient information from Mr and Mrs Hussain.

5. The evidence in reply specifically addressed the reason given by Mrs Hussain for the release being for good consideration, namely, in return for Mr Hussain using funds available from a re-mortgage for his sole use. The conclusion drawn by the joint trustees as expressed in reply is that s339 applies because the re-mortgage was obtained by both, funds were paid into a joint account, and it was for their joint benefit.

6. Applying that evidence, the amendment would allege a transfer at an undervalue under s.339. It would not differentiate the sub-paragraphs (a) and (c). This, however, would still give rise to the issue whether the application as advanced in practice (bearing in mind the absence of pleading within the application notice) relied upon s.339(c) and whether amendment should be permitted or be refused as prejudicial and unfair to Mrs Hussain in the light of the way the claim was put in evidence. That is a matter to be considered further when reaching the decision.

B) The Trial

7. Unfortunately the estimate for the trial could not be fulfilled and it was heard over two, full days. On the first day Mrs Hussain was represented by her solicitor and an adjournment was requested. I refused for reasons given at the time. Mrs Hussain continued to be represented by her solicitor, who had been retained shortly before the trial that day. There had been no solicitors acting for her on the record before then. Mr Hussain was represented by Mr Gloag of counsel, and had filed and served an unsigned witness statement. The fact that it was unsigned, as indeed was Mrs Hussain's, was capable of being cured should either give evidence in chief.

8. Mr Gloag very properly accepted that it was not for Mr Hussain to oppose the trustees' claim to a 50% beneficial interest, although he could give evidence which would oppose that claim if required by Mrs Hussain. What he could do as a party, as Mr Gloag asserted, was to give evidence insofar as a possession order would otherwise be made to set out any reasons why it should not be insofar as his personal interests are concerned. He did not do so during the trial.

9. Mrs Hussain did not call Mr Hussain to give evidence during the first day. The trial closed with the recognised possibility that Mrs Hussain might change her mind before the second day, which was later fixed for 16 February 2023. However, it was not until about 4.40pm on 15 February 2023 that Mrs Hussain served a second witness statement on the basis that she was intending to call Mr Hussain as a witness. The Trustees were not even sure from the correspondence whether he was to be treated as a hostile witness but in any event I refused permission to call him for reasons given at the time. The second day closed with submissions completed.

C) Overview

10. As an overview, the starting point is that whilst the trustees originally challenged the validity of the Letter of Severance, they now accept it is a genuine document, and a valid severance and effective declaration of the beneficial interest. As a result, for the purposes of trial this case turns upon whether Mrs Hussain is to be believed when she states that the Letter of Severance was made to give effect to an agreement concerning a re-mortgage of the property for the purpose of releasing £152,000 from the equity for the sole use of Mr Hussain. The burden of proof to establish there was a transaction at an undervalue is upon the trustees, and the issue of belief must be addressed on that basis.

D) The Trustees' Evidence in Support

11. Ms Andrews was released from having to attend for cross-examination by a previous case management order. This was one of the grounds for an application to adjourn made by Mrs Hussain through her solicitor at the beginning of the trial. I refused the application for reasons given but also stated that I would review this direction if that was found to be necessary during the trial. It was not.

12. Ms Andrews' evidence in support can be summarised as follows: The bankruptcy order was made on 28 January 2019. The trustees accept that the beneficial interest was held equally at the date of bankruptcy. Legal title to the property was (and remains) registered at H.M. Land Registry in the joint names of Mr and Mrs Hussain. There is a charge registered in favour of Santander UK Plc., and an interim charging order in favour of a judgment creditor. There are several restrictions including a prohibition against a sole transfer by a sole proprietor.

13. Ms Andrews also stated that the trustees were aware that Mrs Hussain relied upon the Letter of Severance. The Letter of Severance, signed by Mrs Hussain, reads as follows:

> *"1. We … are the joint owners of the property ….*
>
> *2. We hold the property and the future proceeds of sale on behalf of ourselves as beneficial tenants, so that in the event of the death of either of us, the survivor will become the sole owner.*
>
> *3. We understand that having regard to considerations of asset protection, it would be preferable to convert our joint tenancy into a tenancy in common, so that we each have the right in the future to dispose of our individual interests in the property and its respective sale under our respective Wills.*
>
> *4. Accordingly, by virtue of the proviso to Section 36(2) of the Law of Property Act 1925, each of us hereby gives notice to the other of our desire to sever as from the date of this notice our joint tenancy in equity over the property. We hereby separately declare that the joint tenancy is, in consequence, duly severed in equity, and that we hold the property and the future proceeds of sale as tenants in common as to 2% to Akram Hussain and 98% to Altif Hussain.*
>
> *5. It is our intention that this notice shall take effect immediately."*

14. The evidence of Ms Andrews sets out the claim that the Letter of Severance does not establish or even identify that there was consideration for the arrangement that Mrs Hussain should hold 98% rather than 50% on the severance of the joint tenancy. That being so, the arrangement was made at a "relevant time" for the purposes of s.339, and it should be set aside with the result that the bankruptcy estate includes a 50% interest in the property not 2%.

15. The evidence asserts there should be an order for sale, although there would also be an issue if the estate was entitled to a 2% beneficial interest. The property is valued in the region of £730,000 with an estimated equity after redemption of the legal charge in the region of £320,000. The estate's interests is valued in the region of £160,000 subject to sale costs. This sum is required to pay the costs and expenses of the bankruptcy and (at the time of the evidence in support) potentially provide a dividend for creditors estimated in the region of £500,000.

E) Mrs Hussain's Evidence in Answer

16. Mrs Hussain's evidence in answer was unsigned but verified at trial. It can be summarised as follows: She accepts the property was originally held by herself and her husband as joint tenants. She relies upon the Letter of Severance to assert that the tenancy was severed, and the beneficial interest was from then held as to 98% by her

and as to 2% by Mr Hussain. Her evidence explaining the release of equity is set out as in paragraphs 7-10 in the following terms:

> *"7. I instructed solicitors … Jinnah & co to register the severance of the joint tenancy with the land registry. This was duly done … [as a restriction] …*
>
> *8. The notice of severance and the shares in the equitable interest … was instigated solely by me as I wished to protect my interest in the property. The situation … that led to the aforesaid was that in October 2017. The property was re-mortgaged and a sum of £152,055.81 was raised. The monies were used exclusively by the bankrupt. I had no objection to the bankrupt using the monies for his own purposes as long as I had the severance notice in place.*
>
> *9. Therefore, the notice of severance was nothing whatsoever to do with the bankrupt trying to evade his bankruptcy, it was simply a means of me trying to protect my equity in the property.*
>
> *10. The equity split … was not calculated in any specific way. I believe in 2017 the property had a net equity of about £300,000. If £152,055.81 was raised for the bankrupt, then the remaining equity should belong to me."*

17. Mrs Hussain also claimed she is entitled to 50% of the proceeds of number 124 Glenny Road, Barking. A property she asserts was sold by the trustees at an undervalue in a transaction which was not arms' length. Her interest was derived from the fact that it had been purchased in April 2008 from the sale of a former matrimonial home in Chingford. This was not pursued during the trial.

F) The Trustee's Evidence in Reply

18. A significant part of the reply evidence addresses an unsigned statement of Mr Hussain anticipating he would be called as a witness. The fact that he was not means I need not address the reply evidence to that extent. However, that does not mean the trustees cannot make reference to the bank statements exhibited by Mr Hussain for the joint account into which the re-mortgage money of just over £152,000 was paid, and for another Halifax account. They are in the Court bundle. No objection was taken to their inclusion and it would not have been upheld even if it had been. The parties proceeded with the trial on the basis that those bank statements formed part of the documentary evidence for the case. Indeed, counsel for the trustees went through them in some detail in opening making clear to Mrs Hussain what the trustees were saying they revealed.

19. The trustees' position as expressed in opening can be summarised (insofar as it needs to be referred to at this stage) as follows: Although the mortgage application documentation has not been provided, the re-mortgage was a loan to Mr and Mrs Hussain, and both are liable to repay it and its interest. The funds were paid into a joint account for the benefit of both. Those funds were not withdrawn into an account of Mr Hussain for his sole use. Instead they were used as joint account funds. They were obtained for the benefit of both Mr and Mrs Hussain and they were both beneficially entitled to the funds held in that account. Whilst the purpose of a variety of payments cannot be established from the face of the bank statements, or at least not in any or sufficient detail, there were numerous payments that were ordinary day to day living expenses. In addition, the funds were used to pay the mortgage.

G) Assessment of the Witnesses

20. As stated, only Mrs Hussain gave oral evidence at the trial. I found the evidence of Mrs Hussain troubling for many reasons. The starting point being that her witness statement is clearly drafted by a lawyer or someone with legal knowledge in either case with a background in property law. It is certainly not in words that would be normally used by Mrs Hussain. I enquired of this during her cross-examination. She said that it had been drafted to assist her by a friend of her son, who was not a lawyer. When asked what the friend did for a living, however, she said she did not know. That makes it strange she was able to tell me they were not a lawyer. In any event, she provided no further details about them.

21. There is obviously no problem with the fact that she received assistance. It is unfortunate the witness statement is not in her own words. Whilst that is not to be held against her, it creates concern over the extent to which the statement really did reflect her recollection. That concern comes from the language used and also from the fact that she later in cross-examination chose to suggest she knew very little about the person who assisted her. That is unexpected. For this statement to reflect her recollection, she must have spent some time with that person not only discussing her evidence but also considering the meaning of the content of the draft to be sworn as true. Bearing in mind its legalistic form, it is reasonable to expect it would have been explained to her. It is surprising, therefore, that she was able to say so little when asked about that person. It is concerning that she was quick to say they were not a lawyer but unable to tell the court how she knew this when she did not what they did.

22. It is also to be noted that whilst she has clearly been assisted by someone who knew what they were doing, it is strange she did not sign the statement of truth before the statement was filed. On the other hand, as mentioned, she swore to its contents in the witness box.

23. I am also concerned at the potential inconsistency between two different aspects of her evidence. On the one hand she sought to distance herself from any involvement with the family finances. I think it is fair to observe that she was quick and keen on numerous occasions to emphasise that she had no knowledge of the financial aspects of the family household. That she had had no income and no assets other than the family assets. That the finances were managed solely by Mr Hussain, and that she was busy looking after the children and the house. She knew the joint account existed but took no notice of its use, that being her husband's role. Her name was there as an account holder only in case, for some reason, her husband could not access it.

24. As a judge, I certainly recognise the need to be alive to the fact that there are many instances, for many different reasons, where one spouse has an overwhelming role and influence in family affairs including within a stable and good relationship. However, the other side of Mrs Hussain's evidence was the fact that she presented herself as someone who: challenged her husband's wish to re-mortgage the house; insisted that she should receive (effectively) his share of the property if he did so; put forward a house valuation to justify the percentage of 98%; said she instigated the retainer of solicitors resulting in the Letter of Severance; and who said she expressly instructed the solicitors to register it at the Land Registry. That does not fit easily with

the picture of a wife with no interest in or involvement with family finances which were left entirely to her husband.

25. As a judge I am also conscious that sometimes, again for many different reasons, one spouse may be inherently quiet and find it difficult to relate information concerning or affecting their husband and family. I did not reach that view with regard to Mrs Hussain. I saw her as a strong character putting forward her positive case.

26. My concern and overall impression with regard to the way she advanced her evidence was that she was saying what she had either been told to say by others or which had resulted from the conclusions she derived from those discussions. That leads back to the concern over the extent of the involvement of the third party who drafted the witness statement, and whether the statement really did reflect her recollection. Mrs Hussain came across as an intelligent person, someone who would be able to fashion her evidence to meet her case with the assistance of others. It was difficult to believe that she had no role to play in respect of the family finances.

27. I also observe in that regard that there will inevitably have been many family discussions concerning this case, and third parties have been involved as I have mentioned. As will be mentioned, she also referred to a friend explaining the Letter of Severance to her. There is an inherent risk that her recollection has been influenced by those discussions and third party involvement, and my above-stated impressions of her as a witness enhance that view.

28. In reaching those assessments I have taken into consideration that she will have given her evidence under the pressure not only of the court room but also of the seriousness of the issue. She was at one stage visibly upset during cross-examination. I also bear in mind the problems of the expiry of time between events and the trial including the potential for false memory. I have to bear in mind that she is fighting for her family home.

29. Taking all those matters into account, I have concluded that I must treat her evidence with considerable caution, and consider it very carefully against the facts evident from the documentation before accepting it. I will do so appreciating that if her evidence is rejected on one point that will not necessarily mean it should be rejected on other points.

H) The Evidence at Trial

30. The evidence in answer of Mrs Hussain does not refer to any conversation between herself and Mr Hussain evidencing an agreement made or understanding reached between them concerning the use of the available re-mortgage monies before they were paid into the joint account. Mrs Hussain said in her witness statement (paragraph 8) that she *"wished to protect [her] interest in the property"*. Her reference to the use of the money within paragraph 8 is expressed (albeit within the context of the Letter of Severance having been signed) with reference to what happened after the £152,055.81 was raised: *"The monies were used exclusively by [Mr Hussain]"*. She had no objection to him *"using the monies for his own purposes as long as [she] had the severance notice in place"*.

31. I am satisfied this does not mean that this evidence is to be read as though stating there was no such agreement or understanding as to the future use of the money at the time of the Letter of Severance. In context it seeks to explain the release of equity. However, there is a lack of general or specific description of what was discussed or occurred before and at the time of the Letter of Severance.

32. Looking at the evidence as a whole, both in the witness statements and given orally, it is established that Mrs Hussain obtained the advice of solicitors and that this resulted in the Letter of Severance. On the face of the document itself, the stated reason for severing the joint tenancy, which then resulted in Mrs Hussain receiving a 98% interest as a result of the 48% release, was *"considerations of asset protection"*. That is an ambiguous phrase, and it could easily have been stated instead, or additionally, that the division resulted from an agreement that Mr Hussain would use the £152,000 odd from the equity by re-mortgage for his own purpose. However, the ambiguity and the fact that there is no evidence from the draftsman means this is certainly not conclusive for a balance of probability test.

33. The answer to whether such an agreement was the cause of the release should be found with the file of Jinnah & Co, solicitors containing the instructions received. The evidence is that the trustees have tried to recover documents but found that firm had been subject to an intervention, and that the intervenors could not provide the file. Although Mrs Hussain was unrepresented (until shortly before trial), she had the assistance of someone with legal knowledge as evidenced by her statement. It is not unreasonable to expect that she would have tried to find the solicitor who advised her and could give evidence to support her opposition to the application. There is nothing before me to suggest that she took any steps to try to do so. That is potentially surprising if that solicitor would have supported her case.

34. Equally, in circumstances of there being no evidence from the solicitor, it is not unreasonable to expect Mrs Hussain to have described what occurred in her witness statement. For example, her attendance at the solicitor's office (assuming that occurred), who she saw, and what was said. Her witness statement is silent. There is in correspondence from her a statement that the Letter of Severance was signed when no-one else was present but no details have been provided concerning that event and it is not repeated in the witness statement. It is also to be noted that when asked in cross-examination about the drafting of the Letter of Severance, she said she did not understand it. Yet she said she was the person who instigated the retainer of solicitors, and who was insistent upon receiving 98% of the beneficial interest in return for agreeing to the re-mortgage.

35. It is also surprising that Mrs Hussain chose not to have her husband called to give evidence on the first day of the trial. It was obvious that the trustees were disputing both the agreement between Mr and Mrs Hussain and Mr Hussain's actual use of the £152,000 odd for his own purposes. Such evidence would have clearly been relevant for the purpose of supporting the existence of the agreement unless that might not be the case. The decision not to call Mr Hussain gives cause for an adverse inference. On the other hand, there was a very belated attempt to call him.

36. During cross-examination Mrs Hussain said that Mr Hussain told her he needed the money but not what he would be using it for. She said she was concerned by the fact that he was not telling her its future use. Whilst she *"was just involved in the house*

and with the children", this lack of information and the fact of a re-mortgage caused her to be very concerned about the safety of the family home and, therefore, of her interest. That is why she instructed solicitors, she explained. She said that the reason for the Letter of Severance was that if they took out the loan and Mr Hussain took all of it: *"what would I be left with?"*. She signed the Letter of Severance *"to avoid being left with nothing"*, which she explained meant should anything happen to Mr Hussain such as what has happened now.

37. Mrs Hussain explained during cross-examination that she did not know the value of house but knew the mortgage was then about £300,000, and saw £152,000 odd as a figure reflecting the value of their current shares in the house. This does not fit well with someone who did not know anything about the finances. Despite that assertion, she knew how much was outstanding for the mortgage and could determine the value of Mr Hussain's half share assuming he shared it equally with her.

38. Following the Letter of Severance, the re-mortgage was completed. £152,055.81 was paid by HSBC Bank to the current account of Mr and Mrs Hussain held with that bank. Mrs Hussain explained that the upshot of the re-mortgage was that Mr Hussain took the money and she took the house but she knew Mr Hussain's income would have to continue to be used to pay the mortgage. It was the only source of family income.

39. She accepted the Letter of Severance was not registered immediately, not until 23 October 2018 but had no explanation for that. She said she instructed the solicitors to register it when it was made. However, nothing turns on that except, perhaps, with regard to credibility. The point being that it is surprising that someone with no knowledge of or involvement in the family finances and in any event with solicitors instructed would be the one telling them to register the Letter of Severance.

40. Events following the Letter of Severance must be approached with care. The question whether there was consideration for the 98% beneficial interest turns upon what was agreed or arranged by/as at the date of the Letter of Severance. However, subsequent events may provide evidence relevant to the intentions of the parties at that date, subject to appreciating that minds can change.

41. The bank statements show that the £152,055.81 was not transferred to a sole account of Mr Hussain, even though he had at least one such account. Mrs Hussain's explanation during cross-examination was that it did not need to be because he controlled the account. The balance was effectively at zero when the £152,055.81 was paid in on 9 October 2017 and in credit of £1,044.40 on 19 March 2018. Only an additional £6,194 was paid in during that period. Therefore the statement in effect shows the use of the £152,055.81 without needing to carry out any analysis concerning the effect/relevance of other payments in.

42. What can be seen from the statements are a variety of entries concerning: day to day, household living expenses (for example, Virgin Media, Tesco, T-Mobile, and Royal Sun Alliance); credit cards for which there is no evidence of the items purchased; mortgage repayments; and cash withdrawals with no evidence of their purpose. There are also payments to: Mr A Hussain £5,000; Mr T Hussain (their son) £20,000 and £4,994, although he also appears to pay in £300 a month; HMCTS £25,000; Mr Mohammed Sain £20,000 for "Deposit 9 GP Garden"; Mr Mohammed Sain £25,000

marked as loan; M Moghal £1,000 marked as pay loan Hussain; Mr Mafuf £2500 marked as loan fee; Ewan and Co Sols £10,000; and Edward Marshall £16,000.

43. Mrs Hussain said she could not explain the payments because this was the account controlled by Mr Hussain except to the extent that they explained themselves from what was on their face. For example, obvious household living expenses and mortgage repayments. Mrs Hussain was slow to accept that such payments meant she accepted benefit from the £152,055.81, and, insofar as she did, said the payments were a benefit for Mr Hussain and the family, with specific emphasis on the children rather than herself. Despite this lack of knowledge she did not call Mr Hussain.

44. When asked why she should benefit from a 98% interest in the property when Mr Hussain would be paying the mortgage, she said: *"He was living there, the children were living there, and without payment the house would be lost"*. She was adamant that the £152,055.81 was not a common pool for household/family expenditure. The only reason for the account being in joint names was that she could access if Mr Hussain could not for any reason. She would not have seen any financial information because he opened the post.

45. Mr Hussain was later made bankrupt on 28 January 2019. Mrs Hussain said she only knew of the bankruptcy case when he came back from court and told her he had been made bankrupt. She knew he had a case against him but very little else. She explained that Mr Hussain did not want her to worry. She knew he had a problem but not the whole problem.

I) Submissions

46. Both counsel used "speaking notes" to assist their submissions, and as a result (and for pragmatic reasons) it is only necessary to summarise their key points.

47. Mr Chambay submitted on behalf of the trustees that there was a disconnect between what Mrs Hussain said was the reason for the agreement, and what subsequently occurred. The point being that the agreement was unbelievable in the light of the subsequent use of the joint account for obviously joint liabilities or interests/benefits, and the absence of evidence (whether from Mrs and/or Mr Hussain) to the effect that the re-mortgage money paid into that account was used solely for his benefit.

48. There would only have been valuable consideration had the release of 48% of the beneficial interest been in return for Mr Hussain solely receiving the £152,000 odd from the re-mortgage monies. Two key points lead to the conclusion it did not. First the absence not only of any reference to such an oral agreement but also of the absence of reference to the withdrawal of equity from a re-mortgage in the Letter of Severance. Second, the evidence that the funds paid into the joint account were pooled funds for ordinary family expenditure. The re-payment of the mortgage being an obvious example. Even if Mrs Hussain did not personally use the account, she benefited from it and could have used it.

49. Once a transaction at an undervalue is established, he submitted, the obvious relief is to restore the 48% to the bankruptcy estate. That being the position, there could be no

other conclusion than that an order for sale should be made. There were no exceptional circumstances to prevent that course.

50. Mr Croally, having been recently instructed on behalf of Mrs Hussain, relied in part upon his solicitor's speaking note. He emphasised orally that there was nothing surprising or wrong with the agreement relied upon by Mrs Hussain. It was an outcome to be expected when Mrs Hussain was advised by solicitors. He drew analogy with the circumstances often identified in undue influence cases where the husband seeks to have his wife guarantee or otherwise secure the liabilities of his business. The wife should have advice, and advisors would consider how to protect the wife by ensuring she received protection. This is what happened. Mr Hussain was taking out his equity in money and, therefore, released his beneficial interest.

51. He (applying the speaking note) submitted there is no reason to disbelieve that the re-mortgage money was used for Mr Hussain's sole purposes. Mrs Hussain gave clear evidence during cross examination that the joint account into which the re-mortgage money was paid was used and controlled solely by him. She never used the joint bank account.

52. The agreement provided valuable consideration and, although the case is only concerned with whether there was "no" consideration, that value was of an equivalent to the beneficial interest he released. He submitted that the trustees have failed to discharge the burden of proving that the Letter of Severance constituted a transaction at an undervalue.

53. Insofar as that leaves a 2% interest vested in the Trustees, it would be wrong to exercise the s.339 discretion to grant relief by ordering possession and sale of the property for such a small sum. There were other matters addressed in the Note, which I have read and which Mr Croally did not consider necessary to address in his oral submissions. I will adopt the same approach for this section of the judgment. I will only refer to them within my decision if it is necessary to do so.

J) The Decision

54. The decision is founded upon the following facts and matters:

a) Until the Letter of Severance the legal estate of the property was held by Mr and Mrs Hussain for themselves as joint tenants with the result that the share of each would pass to the other on death.

b) The Letter of Severance had the effect of Mr Hussain releasing 48% of his equity. This occurred within the relevant time for the purposes of s.339 of the Insolvency Act 1986. If it was a transaction at an undervalue, the court will have the power to make such order as it thinks fit to restore the position to what it would have been before the severance.

c) The Letter of Severance was drafted by solicitors instructed by Mrs Hussain. Whilst the circumstances or content of their instructions have not been

identified, it is apparent this occurred shortly before and, realistically, in the circumstance of the intended re-mortgage of the property.

d) The property's value at the time of the Letter of Severance meant that a sum in the region of £152,000 would be available to Mr and Mrs Hussain as the joint legal and beneficial owners if they entered into the re-mortgage.

e) There is no contemporaneous documentary evidence of the agreement stated by Mrs Hussain to be the basis for her acceptance of a joint and several liability for the re-mortgage in circumstances where the available £152,000 odd would be used by Mr Hussain for his own purposes as she asserts.

f) The Letter of Severance referred to the decision to become tenants in common as one based upon *"considerations of asset protection"*. That protection being expressly provided by the fact that each would then have the right to dispose of their individual interests in the property *"under [their] respective Wills"*. It made no reference to the re-mortgage or to the agreement that the funds released were for the sole use of Mr Hussain in return for which he would release 48% of his beneficial interest upon severance. There is no other written evidence to identify the advice received from the solicitors.

g) The £152,000 odd paid into the joint account was not transferred to a sole account in the name of Mr Hussain.

55. The decision will also take into account the following post-Letter of Severance facts and matters:

a) The £152,000 odd was paid into a joint account because it had to be when it was borrowed from the Bank in joint names with joint and several liability.

b) Mr Hussain was solely responsible for the use of the joint account. Whereas Mrs Hussain was able to use the joint account, there is no evidence she did.

c) Mr Hussain chose to use the £152,000 to pay family/household bills and also liabilities which do not appear to fall into that category: HMCTS £25,000; Mr Mohammed Sain £10,000 for "Deposit 9 GP Garden"; Mr Mohammed Sain £25,000 marked as loan; M Moghal £1,000 marked as pay loan Hussain; Mr Mafuf £2500 marked as loan fee; Ewan and Co Sols £10,000; and Edward Marshall £16,000. The purpose of the deposit, loans and payments to solicitors is not established but there is no evidence of any of them being a liability of Mrs Hussain.

d) It is unclear which category the payments to Mr T Hussain (their son) of £20,000 and £4,994 fall into and not established why he paid £300 a month.

56. The decision is also reached on the basis that the numerous criticisms of Mrs Hussain's evidence and lack of evidence from Mr Hussain and concerning other specified matters mean her evidence must be approached with considerable caution. It is at least the case that she has not given full disclosure, there are strong reasons from which to conclude that she has been influenced by others and by the pressures of the potential outcome of the claim should her opposition fail.

57. Nevertheless even if Mrs Hussain's oral evidence is ignored, the facts identified establish that the release of the 48% interest did occur in circumstances of the re-mortgage. It would not be a transaction at an undervalue if the release was in return for Mr Hussain receiving the £152,000 odd. There is no case that this would be an undervalue only a case that it was received and used jointly.

58. It was received into a joint account but it had to be and the findings of fact above mean it would be, and indeed was, money held in an account used solely by Mr Hussain. It was, therefore, under his control. Mr Croally at one stage suggested a trust but that is unnecessary to consider. The point to consider is that Mr Hussain would use the money for the purposes he chose.

59. Before addressing that point and still not deciding whether to accept the evidence of Mrs Hussain, it is to be noted that there is nothing wrong with the agreement she proposes in the context of this claim even if the money was subsequently used for her benefit. For example: Suppose a partner agreed to sell their interest for £x and then used the £x to buy the partner purchasing a diamond. The fact that this occurred would raise questions as to the terms of the original agreement, and whether it in fact incorporated the future purchase of the diamond thereby affecting the consideration. However if it did not, there would be good consideration for the sale of the beneficial interest but a gift of the diamond.

60. Looking at the evidence other than Mrs Hussain's, there is nothing to establish that the purchase of the 48% was not in return for the £152,000 odd:

    a) The Letter of Severance drafted by the solicitors does not assist. It refers to *"considerations of asset protection"*. This is an ambiguous phrase but not necessarily damaging to Mrs Hussain's defence. It could simply mean, as the remainder of the paragraph and the context as a whole suggests, no more than that conversion to a tenancy in common had been agreed because Mrs Hussain was receiving a 98% interest. In other words, it is simply addressing the consequences of severance rather than the reasons for her having a 98% interest. That is my construction.

    b) The fact that the £152,000 odd was used in part for household/family expenditure occurred in the context of Mr Hussain being the only person with an income and the only person who paid the household/family expenditure. There is no reason in principle why he should not agree to sell his 48% in return for £152,000 odd and thereafter use part of that sums in ways that benefited Mrs Hussain without it meaning the transaction was at an undervalue. That is because he was using the money as he chose including paying obligations which he had to pay in any event out of his income or capital.

61. Turning to Mrs Hussain's evidence that there was such an agreement. The following factors need to be taken into consideration and weighed against my assessment of her as a witness in the context of the specific evidence of an agreement with Mr Hussain.

    a) The release does fit with Mrs Hussain's positive case. Whether this was advised by solicitors or not, the Letter of Severance was a legitimate means of

achieving severance of the joint tenancy and apportionment of the beneficial interest accordingly.

b) Not only is the form of the agreement unsurprising but also the fact of such an agreement. It is not out of the ordinary that a partner might have separate interests, including business interests, for which he requires additional finance, and for which the other partner would have no liability. Whilst many couples may not trouble about the impact of the withdrawal of funds upon a re-mortgage, it is not difficult to envisage it being agreed that one will receive the funds and the other the equivalent equity. It is not difficult to envisage that occurring either as a result of the thoughts of the one needing the money or of the other.

c) That could occur with or without the advice of lawyers. In this case lawyers were advising. Whilst their advice is not disclosed and the Letter of Severance does not address the agreement, it is certainly credible that they would have advised or approved such an agreement rather than simply draft the Letter of Severance in circumstances of a gift.

d) The fact that the funds were not transferred to a sole account prevents the existence of positive evidence in favour of Mrs Hussain's case but does not in itself establish a negative, as explained above.

62. As to her evidence. The criticisms need not be repeated and cannot be ignored. I have approached her evidence with considerable scepticism. Nevertheless, her evidence is to be considered against the background of Mrs Hussain's role in the family. Whilst the idea of her having nothing to do with financial matters is very questionable for the reasons previously given, there is no evidence to suggest that she incurred personal liabilities outside of her day to day role as a housewife and mother. There is no evidence from which to conclude that any of the following sums would have been her joint or several liabilities: HMCTS £25,000; Mr Mohammed Sain £20,000 for "Deposit 9 GP Garden"; Mr Mohammed Sain £25,000 marked as loan; M Moghal £1,000 marked as pay loan Hussain; Mr Mafuf £2500 marked as loan fee; Ewan and Co Sols £10,000; and Edward Marshall £16,000.

63. Even allowing for the absence of evidence from Mr Hussain and the absence of positive evidence from Mrs Hussain, on the balance of probability (even assuming an evidential shift in the burden of proof) it is to be concluded that those payments were of debts of Mr Hussain alone. That does not prove her agreement (the payments were after the Letter of Severance) but the use of the £152,000 odd for those purposes is consistent with the agreement asserted by Mrs Hussain and the fact of the Letter of Severance. There is no case that Mrs Hussain had an interest in "9 GP Garden", and no case that she lent money, and no case that she had retained Ewan and Co Sols or Edward Marshall.

64. That leaves the evidence that part of the £152,000 odd paid for household/family bills and to the son and for the mortgage repayments. However, as found as fact, Mr Hussain was always the source of those payments. He had to earn the money and use his income and capital to pay those liabilities. Mrs Hussain was not going to do so. In that circumstances, their future payment would not undermine the existence of the

agreement asserted by Mrs Hussain. It would not affect its consideration because his money would have to be used for those payments in any event.

65. That applies if the relevance of those payments is considered at the time of the Letter of Severance on the basis that it was appreciated that the £152,000 odd would be used accordingly rather than other income or capital. It also applies if their relevance is being addressed within a time after the Letter of Severance on the basis that this provides post event evidence which indicates what had been agreed originally.

66. Weighing all of the factors, therefore, her oral evidence that there was an agreement at the date of the Letter of Severance resulting in good consideration for the release cannot be rejected. The trustees have not proved on the balance of probability that the transaction was at an undervalue when it was agreed that the release of 48% was in return for Mr Hussain having use of the £152,000 for his own purposes whether to pay his liabilities or household bills or otherwise.

67. I do not consider those facts and matters which weighed against the existence of the agreement sufficient to shift the evidential burden. However even if they were, and I accept the line is difficult to draw in this case, the facts and matters supporting Mrs Hussain's oral evidence are sufficient for me to conclude that her oral evidence (however badly given) should not be rejected and that it combined with those facts and matters have satisfied that evidential burden to establish the agreement she relies upon.

68. In those circumstances it is unnecessary to decide whether permission should be granted to amend by adding reference to s.339(3)(c).

69. That leaves the question of payment of the 2% but no doubt this will be resolved. The application can be stayed for that purpose.

Order Accordingly