Neutral Citation Number: [2020] EWHC 1200 (Ch)

Case No: BR-2016-00080

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

In The Matter Of PETER HERBERT FOWLDS (A BANKRUPT)
And In The Matter of THE INSOLVENCY ACT 1986

A Skype Business Hearing
The Rolls Building, 7 Fetter Lane, London
Date: 22/05/2020

Before :

I.C.C. JUDGE JONES

- -

Between :

SEAN BUCKNALL
MARK PETER GEORGE ROACH
(As Joint Trustees in Bankruptcy of Peter Herbert Fowlds) **Applicants**

- and -

GINA LOUISE WILSON **Respondent**

- -
- -

MR ANDREW BROWN (instructed by **Coffin Mew LLP**) for the **Applicants**
Ms GINA WILSON appeared in person

Hearing dates: 7 April 2020
Further Written Submissions from the Applicants by 4 May 2020

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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 22/05/20.....

I.C.C. JUDGE JONES

I.C.C. Judge Jones:

A) An Overview

1. This application claims under ***section 340 of the Insolvency Act 1986*** ("***the Act***") that a payment ("the Payment") given by Mr Fowlds on 4 September 2014 to Ms Wilson, his stepdaughter, was a preference. If his trustees in bankruptcy ("the Trustees") establish that claim, two matters of complexity will arise to justify its retention in the High Court notwithstanding that it concerns a sum of £47,675.51. Namely, (i) whether the court should exercise its "out of the norm" discretion not to grant relief or (ii) apply the principle of ***ex parte James***. Embedded within those matters is an additional feature unearthed in detail for the first time during the examination of Ms Wilson. Namely, whether she can rely upon a "change of position" as a result of the Payment no longer being available to her as a source of repayment.

2. Mr Fowlds's bankruptcy under an order made on 22 March 2017 emanates from litigation brought by his son ("Mr Mark Fowlds") concerning their business connections. According to a 10 May 2019 estimated outcome statement for the bankruptcy, Mr Mark Fowlds is the only significant creditor with a judgment debt of £715,876. The estimated return is only £6.30p in the £ even assuming the success of this claim both in terms of result and recovery. Although there are also claims against others which it does not value, the estimate does not include Ms Wilson as a creditor. It should if the claim is successful and because she is owed more than she received.

3. This is a dismal outcome for Mr Mark Fowlds from his successful litigation. It is also tragic that a father and son dispute has led to a claim against a stepdaughter particularly when it is brought for the benefit of the son, subject to any judgment recovery having to be used to pay the bankruptcy's costs and expenses. This most unfortunate scenario occurs in circumstances of no-one suggesting Ms Wilson played any active role in procuring the Payment other than by invoicing for a sum of just under £100,000 owed to her for professional, forensic accountancy services duly and properly rendered. It is pursued in circumstances of her continuing to have to struggle financially. She has a low income and her and her childrens' home is at risk as the only asset available for execution should a preference be established.

4. Ms Wilson was not the only creditor paid by Mr Fowlds after Mr Mark Fowlds was awarded judgment ("the Judgment") on 15 July 2014 by District Judge Langley. All his other creditors with debts due and owing appear to have been paid in full. Ms Wilson, however, was the only one whose debt was paid in part. She received about 48% of the total debt. She is also the only one of those creditors against whom a claim of preference could be made. Any claims against the others would always be time barred because of the length of the period between the payments and presentation of the bankruptcy petition. The claim is made against her applying a two-year time limit, not the normal six months', because she is a stepdaughter.

5. The matter is made more difficult because both sides ask the Court to decide this case without Mr Fowlds being a witness and without there having been an interview to provide hearsay evidence concerning Mr Fowlds's mind-set when he made the Payment. This appears to have arisen in the context of Mr Fowlds failing to co-operate with the Trustees. That being so, Mr Fowlds' misguided approach in breach of his statutory obligations has further impacted badly on his close relatives.

B) The Claim and Law

6. The claim requires the Trustees to establish:

   a) Mr Fowlds was made bankrupt. This is not in issue. The bankruptcy order was made on 22 March 2017.

   b) Ms Wilson is an "associate" of Mr Fowlds (other than by reason of being an employee). This too is satisfied because "Associate" is defined in ***section 435 of the Act*** to include a relative. "Relative" is defined in ***section 435(8) of the Act*** as including a lineal descendent treating a stepchild. Ms Wilson is a stepdaughter and, therefore, an associate.

   c) The Payment, not being a transaction at an undervalue, was made within the period of 2 years ending on the day the petition resulting in his bankruptcy was presented, 19 January 2016. This "relevant time" requirement (see ***section 341(1)(b) of the Act***) is satisfied. The payment was on 4 September 2014.

   d) Mr Fowlds was insolvent at the time or became insolvent in consequence of the Payment. Insolvent means unable to pay his debts as they fall due or the value of his assets is less than the amount of his liabilities including contingent and prospective liabilities ("the Insolvency Test"). This additional, "relevant time" requirement (see ***section 341(2) of the Act***) will need to be considered below.

   e) Ms Wilson was a creditor of Mr Fowlds. This is not in issue. Her evidence is that the Payment was for sums due to her for forensic accountancy services.

   f) The Payment put Ms Wilson into a position which, in the event of Mr Fowlds' bankruptcy, will be better than the position she would have been in if the Payment had not been made ("the Preference"). That is the case. She received payment rather than being an unsecured creditor proving in the bankruptcy for the amount

   g) Mr Fowlds was influenced when deciding to make the Payment by a desire to produce the Preference. This is established unless the contrary is shown by Ms Wilson ("the Desire Rebuttal Test"). She needs to do so because ***section 340(5) of the Act*** creates a presumption of a desire to produce a preference in the case of an *"associates"*. The presumption may be rebutted by Ms Wilson but the burden is upon her to do so. "Desire" is to be construed by its normal meaning and applied to the facts.

7. That analysis means the only extant issues for the purpose of deciding whether there was a preference are the Insolvency Test and the Desire Rebuttal Test.

8. The Insolvency Test is a cash flow or balance sheet test. The decision of the Supreme Court in ***BNY Corporate trustee Services Ltd v Eurosail-UK 2007-3BL Plc*** [2013] 1 W.L.R. 1408 concerning the application of those tests within ***sections 123(1)(e) and 123(2) of the Act*** applies. For reasons which will become apparent from the findings of fact, it is unnecessary to repeat its holding within this judgment.

9. When considering the Desire Rebuttal Test, the best description of the desire to prefer test is still to be found in the decision of Mr Justice Millett, as he then was, in ***Re MC Bacon Ltd (No.1)*** [1990] B.C.L.C. 324 at 335e-336d, when considering the equivalent provision for companies. It reads as follows and Ms Wilson must establish there was no such desire:

> *"It is sufficient that the decision was influenced by the requisite desire …*
>
> *… desire is subjective. A man can choose the lesser of two evils, without desiring either …*
>
> *There must have been a desire to produce the effect mentioned in the subsection, that is to say, to improve the creditor's position in the event of an insolvent liquidation. A man is not to be taken as desiring all the necessary consequences of his actions … only that the desire should have influenced the decision. That requirement is satisfied if it was one of the factors which operated on the minds of those who made the decision. It need not have been the only factor, or even the decisive one …*
>
> *Some consequences may be of advantage to him and be desired by him; others may not affect him and be matters of indifference to him; while still others may be positively disadvantageous to him and not be desired by him, but be regarded as the unavoidable price of obtaining the desired advantages. It will still be possible to provide assistance to a company in financial difficulties provided that the company is actuated only by proper commercial considerations … a transaction will not be set aside as a voidable preference unless the company positively wished to improve the creditor's position in the event of its own insolvent liquidation.*
>
> *There is, of course, no need for there to be direct evidence of the requisite desire. Its existence may be inferred from the circumstances of the case … But the mere presence of the requisite desire will not be sufficient in itself. It must have influenced the decision to enter into the transaction …".*
>
> *(see also, amongst other cases,* ***Re DKG Contractors Ltd*** *[1990] B.C.C. 903,* ***Re Ledingham Smith*** *[1993] BCLC 635;* ***Re Agriplant Services Ltd (In Liquidation)*** *[1997] 2 B.C.L.C. 598; and* ***Abdulali v Finnegan*** *[2018] EWHC 1806 (Ch); [2018] B.P.I.R. 1547)*

10. If a preference is established, ***section 340(2) of the Act*** provides that the court *"shall make such order as it thinks fit for restoring the position to what it would have been if the Payment had not been made"*. An inexhaustive list of orders the court may make is contained in ***section 342 of the Act***. The Trustees propose that the Payment be repaid with interest and costs.

11. The phrase *"shall make such order as it thinks fit"* establishes a discretionary power and the court may decline to make an order or to make one less than a full restitutionary order:

> *"The discretion is wide enough [despite the use of the verb 'shall"] 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"* (see ***In re Paramount Airways Ltd*** [1993] Ch 223 at 239-240).

12. The discretion is unfettered, although obviously it is to be exercised judicially within the context of the statutory provision and its purpose (and the phrase "unfettered" "is to be read accordingly throughout this judgment). Unfairness has been acknowledged by case law to be a possible factor. However, case law has made clear that it will be a departure from the wide scope of the norm to refuse relief if all the other requirements of the statutory provision are satisfied. There will have to be something unusual to

justify such a course. As Mr Justice Mann explained in ***Re Ramrattan (In Bankruptcy)*** [2010] EWHC 1033 (Ch); [2010] BPIR 1210 (concerning equivalent wording in ***section 339 of the Act***, which applies to transactions at an undervalue and is an allied section to ***section 340***) that is because the purpose of ***sections 339 and 340 of the Act*** is to bring the results of gratuitous and preferential transactions back into the bankruptcy estate and achieve the equal rate of distribution to which creditors should be entitled under the statutory waterfall.

13. The starting point, therefore, is that the Court will grant relief if the requirements of ***section 340 of the Act*** are met and the burden is on Ms Wilson to establish why the discretion should not be exercised in favour of the applicant.

14. The Insolvency Court will also always bear in mind the principle in ***Re Condon Ex p. James,*** (1873-74) L.R. 9 Ch. App. 609, namely (in summary) that a trustee should not take full advantage of his legal rights if it is unfair to do so. The scope and application of the principle in ***ex parte James*** was most recently explained by Lord Justice David Richards in ***Lehman Brothers Australia Ltd (In Liquidation v MacNamara and Others*** [2020] EWCA Civ 321 as follows, whilst emphasising that it application *"in any case will critically turn on the particular facts of that case":*

> *"68. While the formulation of the test in the authorities, involving so many phrases with perhaps different shades of meaning, has something of the quality of dancing on pinheads, resolution of this issue lies in going back to the fundamental principle underlying the jurisdiction. 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 is possible. It is interesting to note that fairness was introduced by some judges in the cases dealing with Ex parte James at a comparatively early stage, but in general "fairness" as a test in substantive, as opposed to procedural, law has grown significantly since many of those cases were decided. Insofar as it involves a broader test than, say, dishonourable, it reflects a development in the standards of conduct to be expected of the court and its officers."*

C) The Defence and Law

15. Ms Wilson does not accept that the Insolvency Test is satisfied, although she offers no positive evidence to defend this issue and is really putting the Trustees to proof.

16. She contends that the Desire Rebuttal Test should be decided in her favour. She emphasises that the Payment was made in consideration for professional work undertaken for Mr Fowlds. It was part of a debt due and owing as at 4 September 2014 and it was one of various payments to other creditors. These were all commercial payments of debts due and owing and the one distinction between her and the other creditors is that she only received about 48% of her total liability, whilst they were paid in full. If anything, they were the preferred creditors and she was not. In her second witness statement she observes that *"If [Mr] Fowlds was influenced by a desire to better my position, he would have settled my invoice total of £99,330 before settling any other of his professional consultants' fees, the others of which [he] paid in full"*. In addition, she draws attention to the fact that he was preparing an appeal and *"had every expectation of success. He had not been made bankrupt"*.

17. Ms Wilson argues in the alternative that those facts take this matter out of the norm. Added to them, in this context, are her personal circumstances. She no longer has the Payment and cannot recover it. She is a lady of limited means. Her income is low. She will have little to purchase a place to live if she has to sell her home, which she will if judgment is obtained. The loss of that home will be extremely damaging to her and her children. It would be unfair and unjust for her to be placed in that position when she was no different to the other arms' length creditors against whom such claims cannot be made because of the expiry of the relevant limitation periods under ***section 341 of the Act***. The fact that she is Mr Fowlds's stepdaughter was and should be irrelevant to the existence of her debt and to his part payment to her as a commercial creditor. The discretionary defence should be exercised in her favour and account taken of her change of position resulting from the fact that she no longer has the Payment or any assets resulting from it and at all times acted in good faith. Alternatively, the principle in ***Ex p. James*** should be applied.

18. Ms Wilson did not deal in her witness statements with what happened to the Payment. As will be seen, this was explained in answer to questions by me during her examination. Her answers raise a "change of position" argument if or to the extent that one is available in answer to a preference claim. That is an issue which was not addressed by the parties at the trial. I decided that the best course was to send a draft judgment in the usual manner but with the invitation to the Trustees to provide written submissions concerning the law and its application to this trial. Mr Brown provided detailed submissions on 4 May as asked. Ms Wilson is at the disadvantage of not having the same opportunity and I will address that at the end of my judgment.

19. As to the law on this issue:

    a) "Change of position" (a defence available to a person whose position has so changed that it would be inequitable in all the circumstances to require restitution) cannot be a defence because this is a statutory remedy and there is no reference within ***sections 340-342 of the Act*** or elsewhere to a "change of position" being a defence.

    b) The issue, therefore, is whether a change of position (or similar) may be a factor to be taken into consideration when deciding whether to exercise the Court's discretion to decide that no relief will be granted in circumstances of the case being out of the norm.

    c) It is appropriate to consider that issue by first referring to the Privy Council's decision in ***Skandinaviska Enskilda Banken AB v Conway*** [2019] UKPC 36, [2019] 3 W.L.R. 493. The Board addressed the availability of a change of position defence within the context of the Cayman Islands' ***Companies Law (2013 rev), section 145(1)*** which provides that: *"Every conveyance or transfer of property … made … by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of section 93 with a view [accepted as meaning dominant intention] to giving such creditor a preference over the other creditors shall be invalid …"*

    d) It is not a decision binding upon this Court because the Privy Council is not a Court of any part of the United Kingdom. Nor would it otherwise have been

because it concerns a different statute prescribing invalidity for a preference but without providing a statutory remedy in contrast to ***section 340 of the Act*** (see ***sections 340(2) and 342***). Recovery in the Cayman Islands is under the common law entitlement to restitution of the avoided transaction. Nevertheless, all Privy Council decisions have great weight and persuasive value because of the status of the judges. Therefore, it is to be noted in the context of sub-paragraph (b) above that:

i) Neither specialist, eminent Counsel from this jurisdiction or the Board could identify a judicial decision in which a change of position has been held to be available as a defence to a claim brought at common law for the recovery of a preference.

ii) The principal reason for the Board's rejection of a defence of unjust enrichment, notwithstanding that the statute did not address the consequences of invalidation, was that it would produce an unequal distribution of the bankrupt's assets among creditors with the same ranking if the recipient of a preference should be relieved from any liability to restore. That would be contrary to ***the Act's*** scheme of distribution. It was concluded that it cannot be argued that compliance with a statutory scheme will be unjust.

e) However, there are cases concerning potentially relevant provisions within ***the Act*** and a plainly relevant decision concerning ***section 339 of the Act*** where the Court has accepted that it is right to consider evidence of a change of position:

i) First, the winding up provision of ***section 127 of the Act***, its equivalent for bankruptcy being ***section 284 of the Act***. In ***Rose v AIB Group (UK) Ltd*** (above) Mr Nicholas Warren Q.C., sitting as a Deputy High Court Judge, as he then was, distinguished the statutory consequence of a transaction being void subject to validation by the Court from the question of recovery. As with the Cayman Island statute, ***section 127 of the Act*** does not address the consequences or remedies of invalidity. The remedy is restitutionary and the Judge described the "change of position" concept as an *"inherent qualification to the right of restitution"*. He held that it was not contrary to the statutory scheme and policy of equal distribution amongst creditors but the application of an inherent qualification which applied to the consequences of and remedy for statutory invalidity.

ii) It may be suggested that his judgment treated ***section 340 of the Act*** and ***section 339 of the Act*** (transactions at an undervalue) differently. However, whilst he distinguished them from ***section 127***, that was because counsel submitted that ***section 340 of the Act*** left no room for a change of position defence and that the same should apply to ***section 127***. The Judge did not and did not need to address the underlying question of whether that submission concerning undervalue and preferences transactions was correct. Therefore, the suggestion would misunderstand his judgment and his inherent qualification explanation is potentially relevant to the issue at sub-paragraph (b) above.

iii) Second, in ***4Eng Ltd v Harper*** [2009] EWHC 2633 (Ch), [2010] 1 BCLC 176, Mr Justice Sales, as he then was, when addressing ***section 423 of the Act*** (transactions defrauding creditors) also distinguished liability based upon the intentions of the transferor from its consequences and remedy. ***Section 423 of the Act*** confers a discretionary power upon the court 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, protecting the interests of persons who are victims of the transaction"*. The similarity of this discretion with the discretion under ***section 340 of the Act*** and the consequential, potential relevance of this decision is apparent. There is also a similar provision to ***section 342*** in ***section 425 of the Act***.

iv) Mr Justice Sales decided that the wide discretion conferred by ***section 423 of the Act*** to restore the position to what it would otherwise have been and to protect the interests of the victims required the court to take into consideration the mental state and degree of involvement of the transferee. This, he explained, would reflect general principles inherent in other areas of law into the statutory regime.

v) Mr Justice Sales also decided that the Court should not consider matters such as the transferee's *"own needs, financial requirements and quality of life"* as part of a balancing exercise involving all who would be affected by the decision of the relief to be ordered. That, he observed, would go *"well beyond what the court is required to focus upon in making property adjustments and orders"*. There is *"a comparatively narrow scope for limited, recognised principles of justice (such as the change of defence position) to be taken into account"*.

vi) It is not a decision binding upon me as precedent because it concerns ***section 423 of the Act*** but the similarity of the statutory provisions and the relevance of the matters considered by the Judge to the application of ***section 340 of the Act*** mean his judgment must be treated as relevant and his approach as a High Court Judge should be followed by me insofar as its content and purpose is consistent with the application of ***section 340***. The Privy Council in ***Skandinaviska Enskilda Banken AB v Conway*** (above) decided not to address the question whether its reasoning was correct.

vii) Accordingly, it is potentially significant that Mr Justice Sales accepted that any unfairness in a restorative order resulting from a change of position without knowledge that the transaction was voidable should be considered when exercising the discretion not to grant relief because a *"broad analogy may be drawn with claims based on unjust enrichment"*.

viii) The same approach was adopted by Mrs Justice Rose, as she then was, in the ***section 423*** decision of ***BTI 2014 LLC and Others v Sequana S.A. and Others*** [2017] EWHC 211 (Ch). It is to be noted that in acknowledging the existence of the discretion to refuse relief, she emphasised that it would only be in an exceptional (i.e. out of the norm)

case that no relief would be granted if the requirements for a transaction defrauding creditors were met. That is because the purpose of the provision was to recover assets for victims and generally override the interests of the transferee. This too raises similarities with ***section 340 of the Act*** where the company is the victim of the preference transaction

ix) Mrs Justice Rose also drew specific attention to the observation of Mr Justice Sales that *"a great deal will depend upon the particular facts"* when exercising the Court's broad discretion. She too adopted the approach that the relief should be tailored to the justice of the case. She observed that whilst analogies may be drawn with other areas of law for guidance, *"it would be wrong to be unduly prescriptive in trying to lay down hard and fast rules for the application of these provisions"*. The Court of Appeal did not raise issue with this in the subsequent appeal, [2019] EWCA Civ 112, [2019] 1 All ER 784. Whilst that passage must not be read out of context to undermine the "out of the norm" test to be applied to the discretion not to grant relief under ***section 340 of the Act***, it provides guidance which is equally appropriate for that discretion.

x) The approach of Mr Justice Sales and Mrs Justice Rose if applied to ***section 340 of the Act*** will conflict with the views of those who contend that that the statutory scheme and policy of equal distribution means that an order for restoration cannot be unjust and should be made to give effect to statutory intention.

xi) In post hearing, written submissions Mr Brown distinguishes ***sections 340 and 423 of the Act*** because the former can only be brought by a trustee in bankruptcy, whereas a ***section 423*** claim can also be brought by an individual creditor for their own personal benefit against a third-party transferee where that creditor has been the victim of an impugned transaction defrauding them. He also observes that the relief obtainable under ***section 423(2) of the Act*** differs from that in ***section 340(2)*** by allowing such an individual creditor to claim and by the addition of ***subsection (b)***, which requires the relief to protect the victims. His underlying submission is:

> *"These actions under s.423 dealt with the balance to be struck between the interests of an individual creditor and the third-party transferee, which in* ***Skandinaviska Enskilda Banken AB*** *was described at [111] as, 'the private interests of the two parties which are mainly in issue, and the equitable considerations requiring the benefit to be returned to the plaintiff can be cancelled out by equitable considerations arising from a change of position on the part of the defendant".*

xii) In support of his submission he draws attention to the use of *"shall"* not *"may"* within ***section 340(2)***, as opposed to ***section 423(2) of the Act***. He submits that the statutory discretion is wider when *"may"* is used and that this *"makes logical sense within the context of the Court potentially considering competing individual interests which might arise in a s.423 claim … where the Court will need to balance equitable considerations between those interests"* in contrast to a claim under ***section 340 of the***

Act which is brought for the collective benefit of those interested in the bankruptcy estate.

xiii) Those submissions, therefore, draw strength when relying upon the statutory scheme/policy of equal distribution from the fact that the ***section 423*** discretion has two purposes, restoration and protection of victims. ***Section 340*** is concerned only with restoration (see ***Chohan v Saggar and Another*** [1994] 1 BCLC 706 at 714C-I and the observations of ICC Judge Barber in ***Re Rathore (In Bankruptcy)*** [2018] BPIR 501). However, even assuming the identified distinctions are pertinent, if the approach of Sales J. and Rose J. is not to be applied to ***section 340 of the Act***, it would need to be concluded that a broad analogy should not be drawn with claims based on unjust enrichment and that the mental state and degree of involvement should not be taken into consideration to reflect general principles from other areas of law when exercising the discretion to restore rather than to restore and protect victims.

f) Mr Justice Sales did not consider that to be the correct conclusion in the case of ***In Re Claridge*** [2011] EWHC 2047 (Ch), (2011) BPIR 1529. This was an appeal decision concerning a claim of transfer at an undervalue relying upon ***section 339 of the Act***. The transferee acting in good faith when changing her position by using the money received from the impugned transaction for improvements to her property. When considering what order should be made to restore the position to what it would have been if the transaction had not been entered into (the same, single purpose being addressed as ***section 340***), he decided it was an exceptional case to which the discretion identified in the case of ***Paramount Airways*** (above) should be applied. One route by which he reached that conclusion relied upon the fact that the transferee had changed her position in good faith and he decided *"it appropriate to take account of any change of position on the part of a recipient of a benefit under [the] transaction, where made in good faith"*.

20. S***ection 339*** is allied to ***section 340 of the Act***. The underlying restitutionary purpose is the same and the statutory scheme/policy of equal distribution equally applies. Within ***paragraph 49(ii) of the judgment*** he referred expressly to ***paragraphs [12-16]*** of his decision in ***4Eng Ltd v Harper*** (above). They are the paragraphs where he addresses the need for the mental state and degree of involvement of the transferee to be taken into consideration to reflect general principles inherent in other areas of law. His approach is entirely consistent with the later approach of Mr Justice Mann in ***Re Ramrattan***, although Mann J. was not referred to the decision. I am bound to follow the law applied by Mr Justice Sales ***In Re Claridge***. Not only was he sitting as a High Court Judge but he was also hearing an appeal.

21. In any event it is difficult to understand why that would not be the correct approach. It follows logically from binding Court of Appeal authority (see paragraph 11 above) which establishes that the Court has an unfettered discretion not to grant relief. There is no exclusion of facts and matters relevant to the transferee. Indeed, the other side of the coin is that continued access to the asset received will most likely result in the

Court deciding to make an order for its restoration. It could not be argued that continued access should not be taken into consideration.

22. As stated above, the Court of Appeal has held that no order may be made *"if justice so requires"*. The existence of the unfettered discretion means Parliament intends there to be cases, albeit out of the norm, when the Court may decide that justice trumps the statutory policy of equal distribution and, in which case, the policy will not be applied. There can be no reason for not considering applying the broad analogy identified by Mr Justice Sales in an appropriate case when deciding whether to exercise that discretion. It is not contrary to the statutory scheme and policy of equal distribution amongst creditors. It is the application of an inherent qualification.

23. The distinctions drawn by Mr Brown concerning the potential role of the victim and ***section 423***'s dual purpose (sub-paragraphs 19(e)(xi) and (xii) above) do not assist his submissions. They will be relevant when applying the discretion to an individual case. For example, the policy of equal distribution will not apply when the ***section 423*** application is made by a victim and the transferor is not insolvent. However, ***section 423 of the Act*** does not provide either expressly or impliedly that the statutory scheme and policy will prevail upon the exercise of the discretion if the application is made by a permitted office holder or by a victim when the transfer is insolvent. The discretion is left unfettered.

24. Whilst Mr Brown drew attention to the "may and "shall" difference, a different approach towards the discretion cannot be read into that. The Court of Appeal in ***Paramount Airways Ltd*** (above) drew no such distinction when comparing the use of those words in ***sections 340 and 423 of the Act*** respectively. The Court of Appeal's decision that a discretion was conferred under ***sections 339 and 340*** resulted from the use of the words *"such order as it thinks fit"* not from those verbs.

25. Nor can I accept his submission that the ratio of ***Paramount Airways Ltd*** (above) is that the discretion is limited to cases concerning jurisdictional power over foreign, third party transferees. The case was concerned with jurisdiction and the discretion was described as being especially applicable to that issue but the judgments do not suggest or imply that the words *"such order as it thinks fit"* were fettered. Indeed, the decision illustrates the breadth of the discretion. Despite Parliament having used wording to enable a claim to be made irrespective of territory, a court when exercising the discretion can make no order against a transferee from abroad who received a preference. The discretion is unfettered but the importance of the statutory scheme/policy of equal distribution means that the discretion not to make an order will only be exercised in "out of the norm" cases.

26. The unfettered nature of the discretion is also illustrated by Mr Justice Mann's judgment when dealing with the relevance of delay in ***Re Ramrattan (A Bankrupt)*** (above). He was concerned with the submission that it would be inappropriate to exercise the discretion not to grant relief if a limitation period had not expired. He decided that would be correct if delay were the only reason being considered because it would curtail a limitation period prescribed by statute. However, he added that the discretion is so wide that it is *"impossible to say that delay can never be a factor in the exercise of [the] discretion …"*. It may be possible, for example, for *"delay to come into the mix"* if proceedings have been delayed *"but it would have to be*

combined with other circumstances". He added within paragraphs [34-35] of his judgment, subject to the "out of the norm" requirement (see paragraph 12 above):

> *"If s339 allows the court a discretion, then any attempt to circumscribe the exercise of that discretion by describing some matters as inevitably within and some as inevitably without is a dangerous exercise … The facts of any particular case may, at least in theory, demonstrate that it is unfair to grant relief against a particular respondent"*.

D) The Trial and The Witnesses

27. The trial took place through the remote medium of a Skype Business Conference, which worked extremely well. There had been a pre-trial case management conference to ensure the parties were ready for that process and directions included the service of a pre-recorded opening by Mr Brown to assist Ms Wilson, as a litigant in person. The aim of the direction was to ensure she was familiar not only with the issues but also with the use of the electronic bundle. In fact, I understand she also had a paper bundle.

28. The evidence of Mr Bucknall, the First Applicant, is inevitably limited to information derived from his role as a Trustee rather than being based upon personal knowledge. As a result, it was agreed and directed that Ms Wilson was not required to put her defence to him in cross-examination. This was on the basis that Mr Bucknall could be recalled should the trial require that course, which did not occur. Ms Wilson asked Mr Bucknall a number of questions concerning delay but I have not found this a topic requiring consideration within this judgment.

29. Ms Wilson was cross-examined. I found her to be an honest, straight forward witness. She answered clearly and concisely, making clear when she did not have personal knowledge. I have no reason not to conclude that she was telling the truth throughout her examination. I accept her evidence including that summarised below. There is the complication that she had not previously explained what had happened to the Payment, as mentioned above. However, there was nothing in her answers which caused me to change my mind concerning her evidence, whether generally or in respect of this specific issue.

30. There is the further complication that Mr Fowlds was not called as a witness. The Trustees explain through Mr Brown that his failure to co-operate in the bankruptcy meant they were unable to interview him. Their position is that they did not need to call him as a witness not only because of the presumption of a desire to prefer but also because the desire can be inferred from the evidence before the court.

31. Ms Wilson remains in contact with her stepfather. She referred to a recent conversation with him during her cross-examination, albeit one that I note for completeness was not of assistance to the case. She stated that she had not realised when drafting her evidence in answer that she could call him as a witness. It was too late to do so when the time for filing and exchanging that evidence had expired. In the circumstances and taking into consideration that she had not been advised by lawyers, I offered her the opportunity at the end of the trial to ask for an adjournment to enable

her to obtain a witness statement. That offer was made within the context of an explanation to the effect that any such application would undoubtedly be opposed and would most likely present a high hurdle to overcome. After a short adjournment to allow her time to consider, she chose not to ask, explaining that she needed closure. I did not conclude that any adverse inference should be drawn from that decision but the position remains that she has to meet the Desire Rebuttal Test without the evidence of the man whose desire is in issue.

E) The Evidence

32. The history of the dispute between Mr Fowlds and Mr Mark Fowlds need only be outlined. Indeed, that is the correct approach in any event in the absence of any record of the decision of District Judge Langley on 15 July 2014. Her findings of fact are binding upon the parties and the Trustees, as Mr Fowlds's privies. It is not for me to make new findings of fact. The following summary from the documents before me is adequate. They indicate that father and son were involved in different roles and capacities in respect of residential property development and investments. These included a development in Hastings which began around 2000 but ran into difficulties during the 2008 financial crisis. This led to a major dispute between them concerning how much, if anything, Mr Fowlds owed his son or whether Mr Mark Fowlds had abused his position and defrauded Mr Fowlds whilst managing the properties and property companies. This resulted in the litigation and eventually led to an account being taken by District Judge Langley. There is reference in the documents to a Scott schedule with 5,755 transactions.

33. Ms Wilson became professionally involved in the dispute in about 2010 when she was retained by Mr Fowlds to provide forensic accountancy services, essentially to draw up an account of the property dealings. This had coincided with her discussions with her husband for her to return to work now that her children were older. Her second child having been born in 2006. She is a qualified management accountant. I accept her evidence that she was retained orally to be paid a £40 an hour rate and on the basis that the resulting contractual sum would be paid when Mr Fowlds could afford to settle her invoices.

34. Ms Wilson in her evidence in answer has emphasised the considerable quantity of hard work that she undertook for Mr Fowlds, at a reasonable hourly rate. It resulted in invoices dated 23 February 2012, 3 July 2013, 8 January 2014 and 28 July 2014 and a total debt of £99,330. The debt upon the invoices is not in issue. She remains a creditor for about 52% of that total. It has not been suggested that the sums invoiced did not represent fair and reasonable value for the work she carried out. That not having been questioned, I accept that it did.

35. It was put to Ms Wilson in cross-examination that her retainer only resulted from the fact that she was Mr Fowlds's stepdaughter. There is no doubt that this is correct but I am satisfied that the retainer was agreed and the services provided on a professional, arm's length, commercial basis. It was suggested by Mr Brown that her fee was relatively low because of the relationship. I am far from convinced it is a "low" fee in the circumstances of her return to work but I have no evidence of fee rates. In any event, the "reasonableness" of the fee does not alter my finding.

36. Ms Wilson had also been appointed by Mr Fowlds from 7 May 2010 to replace Mr Mark Fowlds to manage 12 properties which he described in an email to "Charters Property Agents" sent 7 May 2010 as *"my property portfolio"*. This had no relevance for her invoices or the Payment. It appears her management ended in July 2014 and nothing turns on this role.

37. The Judgment, delivered on 15 July 2014, included an order for payment of the sum of £254,141 plus interest to be assessed. Mr Mark Fowlds was also granted a declaration that he was the sole beneficial owner of a property company, Brickcase Limited. On 18 November 2014 the interest was assessed in the sum of £279,165. In addition, Mr Fowlds was ordered to pay £200,000 on account of costs pending detailed assessment and a sum of £53,330.70 under Part 36 of the Civil Procedure Rules.

38. Permission to appeal was refused on 15 July 2014 but time to seek permission from the Circuit Judge was extended until 1 September 2014. A stay of execution was granted until the same date. The reasons for District Judge Langley refusing permission are (in summary) that the Judgment was based upon findings of fact in circumstances of the evidence of Mr Fowld's witnesses not having been disputed. The account turned upon *"money manager accounts"* sent to Mr Fowlds's accountant annually. Mr Mark Fowlds's case was supported by a large amount of documentation, whereas Mr Fowlds had little documentary evidence.

39. Cross-examination of Ms Wilson addressed the issue of whether she expected to be further involved in the litigation in a professional capacity if an appeal followed. She anticipated she would but there is no evidence to the effect that she required payment of her outstanding invoices as a condition for that future involvement.

40. The position concerning the appeal is unclear from the documents. There is an undated and, on its face, unissued Appellant's Notice. A detailed skeleton argument signed by a solicitor on 17 October 2014 incorporates the grounds of appeal. It is apparent, therefore, that Mr Fowlds had an appeal in mind.

41. Whilst there is no evidence of any advice he received, it can be observed that the grounds provide potential for an appeal, as opposed to being apparently hopeless on their face: (i) The finding of the beneficial interest in Brickcase Limited is described as being contrary to *"all the formal documents"*, the knowledge of lenders and to Mr Mark Fowlds's charging of commission and fees; (ii) Attention is drawn in respect of the Judgment to large sums withdrawn as *"personal payments"* which were excluded from the Scott Schedule and to the decision being reached notwithstanding Mr Fowlds' witnesses were not cross-examined and their evidence, including Ms Wilson's, was not disputed. Ms Wilson's witness statement included evidence of manipulation of *"money manager accounts"* and established losses to Mr Fowlds which were not taken into account. Other witnesses also provided evidence of financial discrepancies. I am informed by Mr Brown that Court records establish the appeal was made subsequently and dismissed in early 2015 for being out of time.

42. On 15 August 2014 a number of properties in Brighton were sold by Mr Fowlds and one of his property companies, Petrian Limited. The following facts are derived from an affidavit made by Mr Fowlds on 25 August 2015 for the purpose of removing a pension income from the freezing order. His evidence is supported by exhibits

including a completion statement for these sales. The net proceeds of sale were used to pay existing debts. Some £166,000 out of £195,671.91 was paid to Aventus Law Limited for their legal fees and disbursements, including counsel, in respect of the litigation with Mr Mark Fowlds. £14,500 was returned by Aventus Law Limited and this was to have been used for the appeal. However, *"in the circumstances, it was deemed that it might not be considered proper to hold such sum on account"*. It was used instead to *"repay borrowings for living expenses, utility bills … insurance premiums, condominium fees, travel expenses and including repair and maintenance for a car …"*. The balance of the net proceeds was used to pay debts including the fees due to agents instructed to sell properties and conveyancing solicitors.

43. Mr Fowlds was also the sole registered owner with title absolute of 5a Cleveland Road, Brighton and Flat 3, Goldsmid Road, Hove. Their sale on 15 August 2014 produced net proceeds of £16,441.51 and £31,306 respectively. It was these sums which were used to pay Ms Wilson some 48% of the debt owed to her.

44. That is established by the following documentation:

    a) By email sent on 31 July 2014 from Mr Fowlds to Aventus Law, he informed them that the conveyancing solicitors, Messrs Howlett Clarke, were instructed to release the Cleveland and Goldsmid Roads' net funds to Aventus Law but to hold back £20,000 to pay for the lease extension cost for the above-mentioned Shaftesbury Road property, which was being dealt with by Ms Wilson.

    b) On 3 September 2014 in an email sent to Mr Edmonds of Howlett Clarke, cc Ms Wilson, Mr Fowlds asked for the net proceeds of sale from another property, 29a Shaftesbury Road, Brighton, to be transferred to Ms Wilson once the sale was completed plus £20,000 from the sale of Goldsmid and Cleveland Road. There is also an email of even date in which Ms Wilson asked Howlett Clarke to transfer the net proceeds of sale of Shaftesbury Road to her upon completion.

    c) On 4 September 2014 Mr Fowlds by email instructed the transfer of the net proceeds from Goldsmid and Cleveland Road to Ms Wilson. This expressly superseded his previous instructions. The Payment was made accordingly. Mr Fowlds disclosed in his above-mentioned affidavit that the proceeds of sale of 29a Shaftesbury Road, Brighton totalling £28,000 odd paid debts owed to Hauser Investments for agent's fees.

45. As at the date of the Payment, 4 September 2014, Mr Fowlds's existing liabilities included the Judgment debt and the interest, costs and Part 36 payment which had to be assessed. The documents reveal that very little was credited to his bank accounts. In a disclosure affidavit made 20 October 2014, resulting from a freezing injunction, Mr Fowlds stated that as at that date, he had no assets in excess of £5,000 excluding the value of his pension funds and his equity in two properties at Eversfield Place, one being his home. He valued that equity at about £92,000 before the costs of sale. His pension income was declared as about £1500 a month. Nothing was or has been paid to Mr Mark Fowlds.

46. Taking into consideration that financial information, of which it is to be inferred Mr Fowlds would have been aware at the time, I am satisfied from the evidence that Mr

Fowlds chose to pay Ms Wilson what he could having first paid his other creditors in full. That fact does not establish that the Payment was or was not a preference. However, I find that it establishes on the balance of probability that Mr Fowlds made the payment because she was owed money as a commercial creditor and not because she was a creditor who was also his stepdaughter. I have reached the conclusion that the fact she was also his stepdaughter was the reason why he decided he did not have to pay her in full in contrast to the other creditors not why he paid her.

47. 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.

48. 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.

49. Ms Wilson has provided details of her current financial position. In the absence of dispute, it can be summarised as being insufficient in terms of income and assets to enable her to repay the Payment or even any part above a nominal sum without having to sell her home and move to a different, cheaper area. Her income relies upon a curtain making and upholstery business she started in October 2014 and the maintenance payments required of her former husband under the terms of their divorce. She is the position where any increase in income will be offset by the consequential reductions in tax credits. There are also credit card debts representing about two-thirds of her small annual income.

50. It is plain Ms Wilson has no available funds or source of funding except the equity in her house. She explained in evidence that she is unable to increase her mortgage and I accept that evidence, which is readily understandable taking into consideration her limited income and the fact that her husband has a charge over the property under the terms of the divorce. A signed, 2014 consent order made subject to the decree absolute resulted in Ms Wilson becoming the sole beneficial owner of the former, matrimonial home subject to the mortgage for which she would assume sole liability. She was required to pay a lump sum of £68,000 to her husband with provision that this would increase, as it did, to £85,000 if not paid within 9 months. That liability remains a secured debt. Although the charge is not to be exercisable until one of a variety of circumstances occurs, the sale of the property is one of them. She receives £5760 a year from her husband until specified events occur and the children receive £11,640 a year until they are 18 or complete undergraduate education.

51. She has referred in her evidence to personal, medical issues. She says she has offered what she can absent the sale of the home, which is very little. She values her interest in the region of £225,000 by reference to net proceeds of sale but should she have to sell, she will be left with a relatively small sum for the purposes of finding a new home after the deduction of the Payment, interest and costs. She will need to relocate and that in itself would have a detrimental effect upon her business. However, she also states that relocation will mean she will lose the business she has worked so hard to set up. She will not be able to afford a property of the size required to enable her to run her business from home. The income it generates is insufficient to enable premises to be rented. She is extremely concerned by the effect of a sale and relocation on her children including the need to change schools at an important educational stage. The elder is 16 years old and her daughter 14. Her evidence refers to specific problems concerning the children which it is unnecessary to specify but is to be borne in mind.

52. Mr Fowlds was made bankrupt on 22 March 2017 following presentation of a petition on 19 January 2016. In his Preliminary Questionnaire dated 8 April 2017 he stated the following information as true:

    a) No payment had been made to a creditor in the last two years other than in the ordinary course of business and none with a view to improving a creditor's position in case he became subject to bankruptcy proceedings (Question 2.4).

    b) Mr Mark Fowlds owes the bankrupt estate in excess of £300,000 (Question 6.2).

    c) The reason for his insolvency was the Judgment (Question 25.1).

53. There is also a hearsay statement of Mr Mark Fowlds written, it appears, for the bankruptcy to the effect that Mr Fowlds refused to disclose the details of the sales of the investment properties in Brighton which occurred in the weeks immediately following the trial. Disclosure only resulted from his committal for contempt for failing to comply with the freezing order disclosure requirements.

54. On 16 March 2018, the Trustees issued an application to suspend Mr Fowlds's automatic, statutory discharge from bankruptcy on the ground that he had failed to disclose his financial affairs, and in particular had not provided the Trustees with bank documents related to accounts in England, Italy, and Cyprus. On 30 November 2018, Deputy ICC Judge Barnett ordered suspension and on 27 September 2019, Chief I.C.C. Judge Briggs ordered the suspension to run until an examination was concluded. No hearing date has yet been listed for the examination.

55. The previously mentioned, estimated bankruptcy outcome statement as at 10 May 2019 lists estimated assets totalling £113,267 but with claims concerning properties and against Aventus Law Limited being described as of "uncertain" value. This sum includes the claim against Ms Wilson of £47,000. There is also a claim against Mr Fowlds's wife estimated at £20,000. Absent those claims, the estimated value of assets is just over £46,000 but dependent upon Mr Fowlds making income payments totalling £45,000. The costs of realisation are estimated at £68,185. The only unsecured creditors are Mr Mark Fowlds with a debt of £715,876 and Southern Water

with a debt of £35. It is clear from this document that costs and expenses will eat into, if not devour any recovery from this claim. The current estimate of the Trustees' legal costs for the litigation is over £30,000.

F) Submissions

56. I will continue to address the submissions within the context of the relevant parts of the judgment. It is unnecessary to refer to all of them but I have taken them all into consideration. However, I should set out here the post hearing submissions in which Mr Brown contends that Ms Wilson should not be able to rely upon a change of position defence raised without warning and only, for the first time, in answer to a question asked by the Judge. He refers to the following authorities:

    a) ***Adrian Alan Ltd v Fuglers*** [2003] PNLR 14 in which the Court of Appeal made plain that a defence of change of position must be *"fairly and squarely put forward in the defendant's statement of case so that its factual merits can be explored at the trial…"* (Brooke LJ at [16]).

    b) ***Prudential Assurance Co Ltd v Revenue and Customs*** [2017] 1 WLR 4031 in which Lord Justice Lewison at [150] observed that such a defence was bound to fail without any disclosure and proper evidential basis. The burden is upon the party raising that defence to satisfy the Court that the change of position did not arise in circumstances which would disqualify the defence. For example, by using funds to purchase an asset of realisable value or to discharge an existing debt.

57. Those decisions apply to a defence, whereas the change of position evidence is relied upon for the purpose of the exercise of the ***section 340*** discretion. There is no change of position defence and it is plainly right for the Court to be able to consider all relevant factors when exercising its unfettered discretion. However, the position is analogous. The Court must ask itself whether it is fair and just to take those factors into account if the applicant has not had the opportunity to prepare for them. Preparation includes having the opportunity to investigate, to obtain disclosure and to be able to test the evidence. I will approach my decision on that basis.

58. It may be right, however, to bear in mind also the principle in ***Re Condon Ex p. James,*** (1873-74) L.R. 9 Ch. App. 609. Trustees in bankruptcy when deciding whether to pursue a claim will consider to what extent information should be sought from the transferee not only from the perspective of winning a claim but also within the context of fairness judged by the standard of the right-thinking person, representing the current view of society. It may be relevant to consider the matters summarised in paragraph 14 above in that context.

59. Mr Brown submits in writing that:

> *"Failure to raise this issue and evidence it either pre-trial, or during submissions themselves, is procedurally unfair to the Applicants as they have never apprehended that they might need to address such an issue, or to test Ms Wilson's bare oral evidence on this point …*

a. The Respondent must provide documentary evidence in support of her assertions that sums were paid to her father for use in paying his wife's cancer treatment;

b. It is for the Respondent to prove a causal link between receipt of the impugned transaction and her payment away. A delay between the two is highly relevant to the question of reliance and change of position;

c. Payment must be 'exceptional' in nature to qualify for change of position, and it cannot be used for daily expenses or existing debt repayments. The Respondent has admitted that – in part – the funds she received were used as such;

d. The Respondent must be unable to reacquire the funds paid away. No evidence has been adduced as to whether her father can repay the funds in full or part;

e. If so, then the Court cannot make a blanket decision to apply change of position to all funds received, but only those used for exceptional payment;

f. Knowledge of the potential claim is highly relevant as to whether any extraordinary payment was made in good faith. The only date given by the Respondent was 2017, and this was not clear whether it related to the date of payment to her father. If so, then this might have fallen after the receipt of the letter before claim for this claim in October 2017;

g. A defendant cannot rely on change of position when she retains the monies or substituted assets sought in the claim. This is another factual issue requiring evidence, and the Respondent likely has a significant asset to which the monies were applied in part – her house through payment of her mortgage. If so, then there is a strong argument that change of position cannot be used she retains this benefit, and that the Applicants might have a proprietary right to an interest in the house through the acquisition of greater equity due to mortgage payments.

All of the above are some of the matters requiring testing in evidence, and which have been wholly unsupported in the oral evidence of the Respondent outside the bare few questions asked and the unclear answers given.

60. It is also submitted that if the Court considers that change of position can be considered within ***s.340(2) of the Act***, there should be a direction for further evidence so the matter can be properly tested at trial. This should include, it is suggested, a further witness statement explaining in detail the expenditure of the Payment including with exhibited copy bank statements to allow the evidence to be properly tested. I will address all these matters within their context below.

G) The Insolvency Test

61. The Insolvency Test is satisfied by the evidence. As at the date of the Payment, Mr Fowlds did not pay and was unable to pay the Judgment sum awarded in favour of Mr Mark Fowlds. He was cash flow insolvent and there was no prospect of that position altering in the near or long-term future. In addition, his assets did not cover his liabilities and the deficiency was substantial taking into consideration the liability for interest and costs awaiting quantification. Mr Fowlds realistically accepted in the answers to his questionnaire that he was insolvent because of the Judgment. The simple point being that he was never in a position to repay the Judgment debt and this is made clear from his disclosure of assets both before and after the bankruptcy.

H) The Desire Rebuttal Test

62. The starting point for the Desire Rebuttal Test is that the Payment placed Ms Wilson is a position which, in the event of his bankruptcy, would be better than the position she would have been in if the Payment had not been made. This can be established by contrasting her position with that of Mr Mark Fowlds who has not been paid any part of the Judgment debt and must await distribution as an unsecured creditor after payment of the costs and expenses of the bankruptcy.

63. The next point is that there is a presumption that Mr Fowlds when deciding to make the Payment was influenced by such a desire. To rebut that presumption, she must show the contrary within the context of the findings of fact above.

64. The evidence establishes that Mr Fowlds sold investment properties within two months of the Judgment and used the net proceeds to pay all his creditors except for Mr Mark Fowlds, save that Ms Wilson was only paid 48% of her entitlement. The debts paid were all apparently due and owing and he had a commercial obligation to pay them.

65. This is evidence from which it can be inferred that payment was made as a result of a desire by Mr Fowlds to fulfil his legal obligations. That, after all, is what he did. However, that would not mean that he did not also desire to prefer all or any of them. Mr Fowlds knew his financial circumstances meant he could not pay all his creditors in full. This is apparent from a comparison of his assets and liabilities. It is also apparent from his payment of only part of Ms Wilson's debt. In that context he chose to pay all his creditors except Mr Mark Fowlds. The required desire can be inferred from the fact that the properties were sold and payment made within two months of the Judgment and without any sum being paid to the judgment creditor, Mr Mark Fowlds. Those facts make it all the harder to rebut the presumption.

66. It is, of course, the case that the issue of desire must relate to the Payment not the payment of the other creditors. However, their payment supports the existence of a desire to prefer everyone but Mr Mark Fowlds. Ms Wilson can refer to the fact that she was only paid part of her debt in contrast to the others. However, that does not affect the inference of preference arising from the comparison with the treatment of the judgment creditor, Mr Mark Fowlds.

67. As to that, Ms Wilson cannot introduce the suggestion that Mr Fowlds's mind was affected by her pressing for payment. That did not occur and the evidence does not establish that payment to her was required to ensure the continued provision of her services. There is the fact that Mr Fowlds appeared to wish to appeal the Judgment and that the grounds did not present an unmeritorious case on their face. However, there is no evidence that this was relevant to his decision to make the Payment and it cannot be inferred; at the very least not in the face of the presumption.

68. Mr Mark Fowlds in a written statement asserts there was a desire to prefer on the part of Mr Fowlds. However, I do not consider the statement carries any significant weight. It is not a statement for these proceedings and, even if it was intended to be, his evidence has not been tested by cross-examination. It does not influence my decision.

69. Mr Fowlds in his answers to the bankruptcy questionnaire answers in effect denies any desire to prefer and describes the payment as being in the ordinary course of business. Those answers have more weight than Mr Mark Fowlds's statement because they are sworn to be true within a document warning of the consequences with express reference to ***section 5 of the Perjury Act 1911***. The court cannot presume that he took the matter lightly or without proper consideration and the Trustees have chosen not to call Mr Fowlds to test that evidence. Strictly, however, the reference to the last 2 years in answer to question 2.4 means he was only concerned with the period from 9 April 2015 to the date of the questionnaire. Alternatively, from 23 March 2015 on the basis that the date of bankruptcy applies following on from question 2.2. On the other hand, the question is aimed at ***section 340 of the Act*** and the Trustees have not sought or obtained clarification. In those circumstances in my judgment this answer falls to be considered but its weight must be reduced by this timing issue.

70. In any event I do not consider it to be of adequate weight to rebut the presumption. That is because it does not address the presumption or the evidence from which a preference may be inferred. Further, it has not been tested by cross-examination.

71. Although I am troubled by the fact that Mr Fowlds was not called as a witness, this issue turning upon his state of mind, I have treated that as a neutral point for both sides and not draw an adverse inference. As a general principle, a trustee does not have to call the bankrupt if it would be necessary to treat him as a hostile witness. The point against the Trustees is that they failed to interview Mr Fowlds as part of their investigations before commencing this application. Their explanation is his lack of co-operation and that is sustained by the suspension of Mr Fowlds's discharge. I will not hold this point against them as a result.

72. In reaching that decision I have taken into consideration the argument in Muir Hunter on ***"Personal Insolvency"*** at [3-2280] that Mr Justice Birss in ***Abdulali v Finnegan*** [2018] EWHC 1806 (Ch); [2018] B.P.I.R. 1547 indicated that trustees should not rely solely on the presumption but should actively investigate desire and ask questions of the debtor in the context of ***section 340(4) of the Act***. That argument appears to refer to paragraph [21] of the judgment but takes the matter further than stated by the learned Judge. Whilst it is certainly good practice to make such inquiries, their absence does not mean an application based upon the presumption should not be made. Mr Justice Birss does not say otherwise.

73. Ms Wilson could have obtained a witness statement and made Mr Fowlds her witness. I have accepted her explanation for not doing so and, as a result, will also not hold this against her. That remains the case even though she decided not to ask for an adjournment.

74. 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.

I) Issues As To Whether Relief Should Be Granted

75. The question that follows is whether this is a case out of the wide scope of the norm. One for which justice requires that the Court should exercise the statutory discretion to decide not to grant relief in respect of a preference. The burden is upon Ms Wilson to satisfy the Court that it is. She maintains the arguments summarised at paragraphs 16-17 above. She also relies upon her "change of position" resulting from the evidence set out at paragraph 48-49 above.

76. Mr Brown on behalf of the Trustees submits that Ms Wilson's retainer should be viewed from the perspective that it resulted from her relationship with Mr Fowlds, being his stepdaughter and included family preferential rates. In any event, she is an associate and the two-year limitation is specifically designed to apply to relations of the bankrupt in her position. The fact that other creditors were paid but have a different limitation period is the result of the provisions of ***the Act*** and, therefore, of Parliamentary intention. She was not paid in full but nevertheless she was paid preferentially instead of the money being available for use in payment of costs and expenses and for distribution amongst herself, Mr Mark Fowlds and any other creditor. It cannot be unfair for the Trustees to claim the recovery of the Payment when it was preferential. Indeed, it is their duty to do so. The fact that judgment will cause hardship does not take the case out of the norm.

77. Nor, he submits, does it make it unfair or unjust to grant relief. She has assets of significant value in her equity in the house. Assuming a net value of £225,000, she will still have £125,000 even if the total judgment including costs and interests reached £100,000. It would be unfair to the creditors of Mr Fowlds not to recover the Payment. The costs and interest result from Ms Wilson's failure to repay when requested. Whilst the time frame between the Payment and recovery will be relatively long, it meets the limitation periods. Ms Wilson's financial position has not radically changed during this period. There have been no intervening acts or circumstances to cause prejudice.

78. In his written submissions he adds:

> *"The picture that appears is one of the Applicants acting as trustees where the bankrupt in question has failed to cooperate for three-years in failing to disclose his financial affairs resulting in an indefinitely suspension of discharge; where the bankrupt has ceased making his IPO payments by diverting those funds; where the bankruptcy estate has no significant assets outside of potential antecedent transaction claims to fund investigations; where the Applicants had a statutory duty to pursue this claim for the benefit of the estate; where - until the Court's intervention on the issue of change of position - the Respondent failed to ever raise any defence to the claim other than her personal assets would be reduced; where the Respondent would not be made impecunious by judgment; and where the Respondent never made any representations of the facts now relied upon for change of position."*

79. My starting point ("the first factor") is the fact that the debt arose from a commercial relationship and represented a fair amount for the work carried out. There is the finding that the Payment was not made because Ms Wilson was Mr Fowlds's stepdaughter. Payment was not influenced by "association" and, in real life, it was an arm's length transaction and payment. That finding is established by the contractual retainer, the work carried out, the invoices and the fact that when Mr Fowlds was

short of money, he paid her least in contrast with all the other creditors except Mr Mark Fowlds. Her relationship did not gain her priority or advantage over those other commercial creditors. Those facts do not fall within the normal case or meet the usual justification for the two year limitation period distinguishing family and associates as explained within ***Chapter 28 of the "Report of the Review Committee on Insolvency Law and Practice" (Cmnd 8558)***.

80. It is to be noted that I have decided not to treat as relevant the fact that Ms Wilson remained a creditor by reason of part not full payment. That would introduce an element of set off which is not provided by the statutory scheme (see ***section 323 of the Act***). I do not consider it appropriate to treat it as a relevant factor having borne in mind the guidance of Mr Justice Mann in ***Re Ramrattan (In Bankruptcy)*** (above at [34]).

81. The "second factor" is that Ms Wilson played no part in the making of the preference other than receiving the Payment. This requirement of good faith is needed for her case because it is difficult to envisage relief would be granted if it was otherwise. The evidence establishes that she acted in good faith. I am satisfied she had no reason to question the Payment at any material time and did not do so.

82. The "third factor" is that on the evidence heard at trial the Payment is no longer available to her. That is subject to the issue of admissibility of evidence and the request for further evidence raised by the Trustees (see paragraphs 56-60 above),

83. As to admissibility, Mr Brown expressly states within his written submissions, in my opinion correctly (see paragraph 58 above), that he does not question the right of the Court to have asked her what happened to the Payment. It follows that the evidence provided is not inadmissible. Whilst the hearing of inadmissible evidence does not necessarily make it admissible, this is admissible evidence which has been heard whilst subject to cross-examination.

84. The questions, therefore, are: (i) whether the evidence establishes a ground for the exercise of the discretion not to grant relief and, if so, (ii) whether the Trustees should be entitled to investigate, receive additional evidence and have another day in Court before judgment is delivered.

85. It can be argued that it is too late to raise this by post-trial submission. The opportunity to object existed at trial and was not taken. The Trustees must have been aware of the relevance of the evidence to the exercise of the discretion even if the information had not previously been provided. However, this point requires Ms Wilson to stand on shifting sands because she did not raise the case of change of circumstances and did not provide the evidence she could have done in the first place. Therefore, I will proceed on the basis that the request is not too late.

86. I will start with the first question identified in paragraph 86 but leave the second until I have addressed the other factors relevant to the exercise of my discretion. It is right to consider that question in the context of the evidence and the trial taken together.

87. I consider this evidence potentially relevant in two ways. First, the facts establish what may be described as a "prerequisite" ("the Prerequisite") for the exercise of the discretion not to grant relief. Namely, that she no longer has the Payment or realisable

assets of remaining value purchased from those funds. It is difficult to envisage that the discretion would ever be exercised if the position was otherwise.

88. Ms Wilson's financial position was made plain in her evidence in chief and has not been challenged. She has no funds or valuable assets other than her home and I accept the evidence at paragraphs 50-52 above and her case summarised at paragraph 17. It has never been suggested during this case that Ms Wilson retained the Payment (or any part) or can repay it from its fruits. Her evidence has always led to the conclusion that the Prerequisite is satisfied. The "new", change of position evidence is not needed on this point, although it provides support by explaining what happened to the Payment. As a result I am not troubled by the weight of the "new" evidence. However, I should make plain that I had no reason to doubt that what she said is true.

89. The second route of relevance is derived from the guidance of Mr Justice Sales in ***4Eng Ltd v Harper*** which includes 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 the receipt in good faith (i.e. without knowledge of the possibility of preference) in a way that would make it unfair to require repayment of the money. His example is a person *"thinking it was a completely valid gift, [who] has spent the money on a world cruise which he would not otherwise have taken"*. Whilst guidance is not binding, it should be followed in appropriate cases.

90. The facts of this case provide far more support for a view of unfairness than the example. There is no suggestion from the evidence that Ms Wilson dissipated this sum with knowledge that it was or even might have been a preference. Whilst some of the money paid off existing debt and, therefore, an order for recovery might be viewed as a superseding financial obligation, the majority repaid her father in circumstances where he was not expecting repayment of the sums provided to "prop her up" financially. Nor can that repayment be criticised when his financial position had altered radically and the money was required to pay for his wife's medical bills. These are changes of circumstances and on the evidence given at trial, Ms Wilson has conducted herself in good faith believing the Payment was validly received. They are facts which by analogy with a change of position defence have the potential to make it inequitable to require restitution.

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.

94. Mr Brown is correct to point out that such consequences are not uncommon results of litigation. He is also correct to observe that they would arise precisely because of Parliament's intention to ensure that one creditor does not obtain a preference over others. However, Parliament created a discretionary remedy recognising that unfairness and injustice should be prevented when it is just to do so. I do not consider those submissions in themselves prevent this factor from being treated as relevant.

95. Mr Brown in his written submissions submits that this factor is in any event irrelevant as a matter of law. He relies upon Mr Justice Sales's decision in ***4Eng Ltd v Harper*** (above) that the Court should not consider matters such as a transferee's *"own needs, financial requirements and quality of life"* (see paragraph 19(e)(v) above). As previously explained, the decision is not binding upon me and that part is *"obiter dictum"* but as a decision of a High Court Judge it must be treated with the highest respect and should be followed as guidance.

96. However, Mr Justice Sales was not laying down a blanket exclusion. After all, that would not fit with the Court of Appeal's decision in ***Paramount Airways Ltd*** (above) that there is an unfettered discretion *"if justice so requires"*. Nor would it make sense to ignore the evidence concerning financial means once satisfied that the Prerequisite is established. The Judge decided there is *"no additional defence of the general kind proposed"*, which would also involve considering such aspects of the lives of others. That was because the Court should not carry out a balancing exercise in respect of the interests of all those who may benefit or lose from the decision. It should not conduct such a *"wide-ranging and unstructured enquiry"* in order to decide the appropriate relief. The fourth factor is not part of that balancing exercise. It is a factor relevant to Ms Wilson that goes to the issues of justice and fairness.

97. In my judgment I should and may take the family consequences into consideration but within the context of recognising that Ms Wilson must establish that the overall facts take the case out of the wide scope of the norm. This applies the judgment of Mr Justice Sales and is consistent with the approach taken by Mr Justice Mann in ***Re Ramrattan (In Bankruptcy)***. He upheld the appeal and found that the Registrar had taken into consideration some irrelevant factors (for example connecting fees with delay) and some factors unsubstantiated by evidence (for example, guesses concerning the attitude of creditors to recovery of their debts) but he certainly did not adopt the approach of irrelevance submitted by Mr Brown.

98. Whilst Mr Justice Mann did not see how on the facts of that case the loss of the respondents' home could be balanced against prejudice to creditors, that was because those two factors could not be usefully weighed against one another in that case (paragraph [51]). He did not decide that such loss was in any event an irrelevant factor whether within or without the context of such a balancing exercise. His overall conclusion was not that the Registrar was exercising a discretion which he did not have, but that he was not entitled to exercise the discretion in the way he did on the facts of that case.

99. Assessing Ms Wilson's family circumstances on their own, however, I conclude they do not establish the most exceptional case. For example, no-one is seriously ill or has special needs which require the current location. That is not to undermine the potential, adverse effects of the consequences of sale for Ms Wilson and her children, which are significant, but to recognise the strength of the scope of the "norm" resulting from the statutory scheme and policy of equal distribution. Nevertheless, those circumstances are significant as a relevant factor to be taken into consideration together with the other factors when deciding if this is an out of the norm, case.

100. I note that Mr Brown also refers in his submission (paragraph 80 above) to significant criticisms of Mr Fowlds. I do not consider these to be relevant. I agree, however, that the Court should bear in mind that the recovery of preferences will benefit the estate in the context of assisting in the payment of the bankruptcy's costs and expenses. It is important that funds are available to ensure ***the Act's*** requirements for bankruptcies are fulfilled.

J) The Relief Decision

101. The first and second factors form an important foundation for Ms Wilson's argument that this case is out of the norm. I would not be considering exercising the discretion if the Payment had been a gift or a transaction at an undervalue or if she had had any actual or constructive notice that the payment was a preference. To be added to those foundations is the establishing of the Prerequisite. The first two factors would be insufficient without that. Nevertheless, I do not consider that to be enough. Either the change of position or the disproportionate consequences must be added to move the facts of this case out of the norm.

102. The guidance of Mr Justice Sales (paragraph 89 above) makes the change of position a strong factor. When added to the first two factors and proof of the Prerequisite, the accepted, change of position evidence takes the case beyond the wide scope of the norm. Based upon that guidance, it produces my conclusion that justice and fairness requires no order to be made.

103. I would reach the same conclusion without considering change of position. The fourth factor has such disproportionate consequences (paragraphs 93-95 above) that when added to the first two factors, it would not be just or fair to order repayment knowing the only source is her home. The Payment had nothing to do with her interest in that property or with the provision of a family home. In my judgment restoration of the Payment through the sale of that home in the circumstances of her financial position

takes this case out of the norm when added to the foundations of the first two factors and satisfaction of the Prerequisite..

104. In conclusion and summary, having taken into consideration the importance of the statutory scheme and principle of equal distribution, it is not the norm for the transferee to: (i) receive the preference on a commercial basis as though at arm's length as Ms Wilson did; (ii) act in good faith both at the time of receipt and whilst transferring or spending the preference; (iii) to no longer have the preference or its proceeds available; and either (iv) have changed their position so that it would be inequitable to require restitution; or (v) face wholly disproportionate consequences should an order for restitution be made with the result that such an order would be unjust.

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.

K) Ex Parte James

106. That decision means it is unnecessary to consider the principle in ***ex parte James***. However, if I had not been able to take either the third or the fourth factors into consideration in the exercise of my discretion, I would have addressed them together with the first two factors under this principle.

107. In my judgment notwithstanding the purpose of ***section 340 of the Act*** and the importance of the statutory scheme and policy of equal distribution of assets which are or should otherwise be part of bankruptcy estate, the 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. Not when the result will be to achieve the sale of the family home of a mother without any other significant assets when she received the Payment as a commercial debt payment without knowledge and the Prequisite is met.

108. The change of position evidence is not required for that decision but obviously provides additional justification. It would be unfair and would not be proper for the Court to order restitution.

H) Adjournment with Directions?

109. That decision is based upon the evidence heard at trial. The Trustees ask for an adjournment with directions to enable them to test the evidence relevant to a change of position.

110. I have decided there are good grounds for refusing this. 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.

Order Accordingly