Case No: 0055 of 2011and AF10D00456

IN THE KINGSTON-UPON-THAMES COUNTY COURT

St James's Road
Kingston-upon-Thames
Surrey KT1 2AD

Date: 23/12/2013

**Before :**

**DISTRICT JUDGE JOHN SMART**

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**Between :**

**ELLIOT HARRY GREEN (as Trustee in Bankruptcy of ROBERT JOHN AUSTIN)** — **Applicant**

**- and -**

**GEORGINA SARAH JANE AUSTIN** — **Respondent**

**And Between:**

**GEORGINA SARAH JANE AUSTIN** — **Applicant**

**-and-**

**(1) ROBERT JOHN AUSTIN**
**(2) ELLIOT HARRY GREEN (as Trustee in Bankruptcy of ROBERT JOHN AUSTIN)** — **Respondents**

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**Mr Phillip Gale** (instructed by **Freeth Cartwright LLP**) for the **Applicant/2nd Respondent**
**Mr Tahir Ashraf** (instructed by **SDK Law**) for the **Respondent/Applicant**
**Mr Robert Austin** appeared in person

Hearing dates: 3rd ,4th July 2013, 30th September 2013, 23rd December 2013

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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.

DISTRICT JUDGE JOHN SMART

**District Judge John Smart :**

1. There are two applications before me. Firstly, there is an application brought by Georgina Austin by notice dated 26 March 2012 seeking an order for a judge to sign a transfer of land which her former husband agreed to transfer to her under a consent order made in ancillary relief proceedings in Aldershot and Farnham County Court (AF10D00456) made on 30 September 2010 (as amended under the slip rule on 5 January 2011). Second in time is an application by the Trustee in Bankruptcy of Mr Robert John Austin (i.e. Mrs Austin's ex-husband) by a notice of application dated 20 September 2012 seeking declaratory and consequential relief under the insolvency legislation relating to transactions at an under value and/or defrauding creditors (in particular section 339 of the Insolvency Act 1986) and section 423 Insolvency Act 1986. The first application was transferred to this Court since it has insolvency jurisdiction and both applications were ordered to be heard together.

2. It was confirmed at the beginning of the trial that only section 339 of the Insolvency Act 1986 (which relates to transactions at an undervalue) was going to be relied upon by the Trustee in Bankruptcy. The Trustee in Bankruptcy seeks to challenge:

    (1) A payment, to Mrs Austin of £11,000 out of the net proceeds of sale of a property called 8 Brantwood Drive, West Byfleet, Surrey, which was made on or about 16 February 2012: and

    (2) A transfer to her of property known as 'land at South West Paradise Cottages, Southford Lane, Whitwell, Ventnor' (on the Isle of Wight), registered at HM Land Registry under Title No. IW59515 on or around 15 February 2010 "Southford Lane".

3. The Trustee also sought a declaration that the consent order dated 30 September 2010 (as amended on 5 January 2011) constitutes a transaction at undervalue within the meaning of section 339 of the Act. This order contained inter alia:

    (1) An order for the making of monthly periodical payments by Mr Austin to Mrs Austin of £500 from 30 September 2010; and

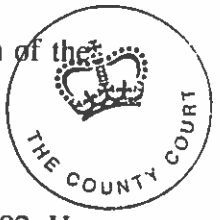
    (2) An order that Mr Austin should transfer to Mrs Austin the property known as 'land lying to west of High Street, Whitwell, Ventnor', registered with HM Land Registry under Title No. IW60391 and 'land being part of Ford Farm, Godshill', registered at HM Land Registry under Title No. IW21533.

4. In essence, this is a case where a former wife is seeking to enforce a matrimonial ancillary relief consent order under which her ex-husband is obliged to transfer land to her and to make periodical payments; while the Trustee in Bankruptcy of the former husband is seeking to stop the periodical payments being made, to recover some payments and to stop the transfers of land taking place. He is also trying to claw back £11,000 paid to the wife out of the net proceeds of sale of a property and to obtain a sum of money following the transfer of Southford Lane to her and its onwards sale by her.



5. I should mention that Mr Gale clarified in his closing submissions that, in fact, in relation to the periodical payments, he sought to recover £2,500 being five payments

of £500 made between the making of the consent order and the presentation of the bankruptcy petition which founded the bankruptcy order.




## Background

6. The uncontroversial facts are these. Mr and Mrs Austin married on 1 June 2002. He was 42 and she was 46. Both had been married before. There are no children from the marriage. On 20 May 2010 Mrs Austin presented a divorce petition to the Aldershot and Farnham County Court. She alleged that her husband had committed adultery. She sought an order that the marriage be dissolved and that he should pay costs of the suit and she also sought ancillary relief in her petition.

7. Mr Austin admitted committing adultery and indicated that he did not intend to defend the suit and in due course a decree nisi was pronounced on 4 August 2010 which was made absolute on 30 September 2010.

8. So far as the ancillary relief proceedings were concerned the parties submitted a Form M1 (statement of information for a consent order) dated 1 September 2010 in which the petitioner was said to have been 54 years old and the Respondent 50 and under the heading of "Capital Resources" the Petitioner was said to have £50,000, the Respondent was said to have £116,000. Under the heading "Net Income" the Petitioner was said to have had £1,000 per month and the Respondent £2,000 per month; and under the heading of "Pension" the Petitioner indicated that she had no pension but the Respondent disclosed a final salary "with pension regulator" "plus £140,000 pension". Whereas the Petitioner, Mrs Austin, indicated that she had no intention to marry or form a civil partnership or co-habit, Mr Austin indicated on the Form M1 that he intended to co-habit with another person. The remainder of the form was indicated to have been N/A (not applicable). Attached to the Form M1 was a draft consent order. District Judge James decided to list the case for a hearing because the Respondent was acting in person, whereas the Petitioner was acting through solicitors, Messrs. Mackrell Turner Garrett. When giving listing directions it was noted that the Petitioner had not completed a section of the M1 (as to pension provision) and that neither party had dealt with their accommodation arrangements.

9. The hearing took place before District Judge James on 30 September at 11.30am. The parties appeared in person. The District Judge approved the consent order which had been lodged. As I have indicated, the order was subsequently amended under the slip rule because, according to correspondence from Mackrell Turner Garrett, which was evidently read by the District Judge, one piece of land which should have been included in the order had been omitted. In its amended form the order reads as follows, omitting the heading:

"Before District Judge James sitting at 78-86 Victoria Road Aldershot Hampshire GU11 1SS on the 30th day of September 2010.

UPON reading the Application signed by the parties dated the .....day of 2010

AND UPON the Petitioner agreeing that the terms of this Order are accepted in full and final satisfaction of her claims for lump sum and transfers of property orders

AND UPON Respondent agreeing that the terms of this Order are accepted in full and final satisfaction of his claims for income, lump sum, property adjustment, and

pension sharing orders.

AND UPON the Petitioner and the Respondent agreeing that the contents of the former matrimonial home Holly Cottage 89 Westfield Road Westfield Woking Surrey GU22 9PX shall remain the absolute property of the party in whose possession they now are

AND UPON Respondent agreeing and confirming that he does not have any legal or equitable interest in Holly Cottage, 89 Westfield Road, Westfield, Woking, Surrey, GU22 9PX, or Barn End Cottage, High Street, Whitwell, Isle of Wight, PO38 2QQ or Honeymoon Cottage, 1 Nettlecombe Cottages, Nettlecombe Lane, Nettlecombe, Whitwell, Isle of Wight, PO38 2AF, or the field in Southford Lane, Whitwell, Isle of Wight or all such properties being in the sole name of the Petitioner.

AND UPON the Petitioner and the Respondent agreeing that neither of them has any legal or equitable interest in any other property or assets owned by the other except as provided for in this Order

AND UPON the Respondent declaring that he is solvent as at the date of his signing this Order and that he is able to pay his debts as they fall due;

BY CONSENT and with effect from Decree Absolute IT IS ORDERED THAT:-

1. The Respondent shall within 14 days of the date herein transfer to the Petitioner within twenty eight days of the date of Decree Absolute herein all his legal estate and beneficial interest with full title guarantee in the freehold property being land lying to the west of High Street Whitwell Ventnor Isle of Wight and registered under Land Registry No. IW60391 and IW21533.

2. The Respondent shall forthwith pay periodical payments to the Petitioner at the rate of £6,000 per annum payable monthly in advance. Payments shall start on the date of this Order and shall end on:-

   (a) the death of either the Petitioner or the Respondent; or

   (b) the Petitioner's remarriage; or

   (c) a further Order terminating payment.

3. The Petitioner's claims for lump sum and property adjustment orders do stand dismissed. The Respondent's claims for all forms of financial provision, pension sharing and property adjustment orders do stand dismissed. The Respondent shall not be entitled to make any further application in relation to the marriage under the Matrimonial Causes Act 1973, s23(1)(a)(a) or (b).

4. The Respondent shall not be entitled on the death of the Petitioner to apply for an order for provision out of her estate.

5. There be liberty to apply as to the implementation and timing of the terms of this Order.

6. There be no Order as to costs.

We the undersigned request the Court to make an Order in the terms set out above.

Signed ..... Signed .....

Petitioner/Wife Respondents/Husband

Signed.....

Mackrell Turner Garrett

Solicitors for the petitioner/Wife.

Amended under the CPR slip rule 40.12 this 5th day of January 2011"

10. A transcript of the hearing before District Judge James was obtained by Mr Austin and brought to the final hearing. It should been disclosed earlier but I decided to allow reliance upon it. What is shown by the transcript of the hearing, and indeed to a lesser extent by District Judge James's own handwritten notes on the back of the facing sheet, on which he endorsed "order approved", is that this was no mere rubber stamping exercise. The District Judge carried out his *quasi* - inquisitorial role as required under the Matrimonial Causes Act 1973. The transcript of the hearing runs to some 15 pages and District Judge James wanted to make sure that, in circumstances where Mrs Austin had the benefit of legal advice, Mr Austin appreciated fully the terms of the order and he indicated to the parties that he had to be sure that the order was appropriate and fair in all the circumstances. District Judge James went through the order including the recitals, paragraph by paragraph, and he noted that there was a declaration of solvency made by Mr Austin. He considered the particular provvisions in the consent order which kept alive the possibility that Mrs Austin might be able to apply to the Court on the death of Mr Austin; whereas he himself would not be able to make a similar application on her death. District Judge James queried the pension provision that the parties had and it is plain that Mr Austin explained to the District Judge that the company with which he had a final salary pension scheme had gone into liquidation. He explained how there was a pension surplus before the company went into liquidation but the law changed on how the surplus was to be calculated and, according to Mr Austin, the fund suddenly went into deficit by about £5 million or £6 million. District Judge James asked about the value of Holly Cottage and was told by the parties that it was between £400,000 and £500,000. The parties indicated that there was a mortgage on it and Mr Austin answered, when asked how much mortgage, "about £300,000 I think". Mrs Austin agreed and also agreed that her equity in Holly Cottage was worth about £150,000. As to Barn End Cottage she told him that it was worth about £200,000 and that it had a £50,000 mortgage on it. As to Honeymoon Cottage she said it was worth about £200,000 with a mortgage of £175,000 on it. District Judge

James queried the value of the field in Southford Lane and Mr Austin said that it had a value, it had been on the market for over a year, at a price of about £40,000 but that they had had no takers. As for the piece of land that Mr Austin was going to transfer to Mrs Austin it was indicated that the land had not been tried on the market but they thought it was worth about £60,000. District Judge James thought that the value of the properties set out in the recital to the order came to £420,000 rounding down to £400,000. He noticed that that was contrary to what had been set out on the Form M1, where the Petitioner had indicated capital resources of £50,000. Understandably, District Judge James queried what that related to. Mr Austin said "what she hasn't mentioned is the, its got a second charge, she has got a mortgage and second charge on" – and then, in the exchange that follows, Mr Austin told District Judge James that the second charge was for £350,000 and that charge was "done across all three of them". The District Judge indicated that that was how they got to £50,000. District Judge James asked about the £116,000 capital resources of Mr Austin and he stated "that came from, well, it came from property and shares". He went on to say: "Bits and pieces. It came from the field I was going to, the, the field transferring which is as I say about £60,000 odd". He mentioned the field as being one to the west of the High Street. When asked about how the balance was made up Mr Austin said "well there is a valuation or rough valuation of shares in the family company". He indicated that there was a minority shareholding in a private limited company and that the balance sheet was worth about £2 million and that he had an eight share of £2 million. District Judge James thought that would mean that he would be entitled to £250,000. Mr Austin indicated that the shares were held in Trust and that they weren't his to transfer over until he reached the age of 75. District Judge James asked Mrs Austin how she earned her £1,000 per month and she said she worked in an office. As to Mr Austin, he said he worked for a small company as a business developer but he got a salary from a small company and went round various places telling them how to run their businesses, a consultant he supposed.

11. District Judge James received confirmation from Mr Austin that his only asset was his interest in the family company which he wouldn't be able to realise until he was 75. He queried how all the mortgages on the properties were going to be met out of Mrs Austin's £1,000 per month and specifically asked whether or not properties were let. Mrs Austin indicated that the properties were let with the exception of Holly Cottage. She pointed out that her net rental income had not been included in the £1,000 per month. She said she did not get a lot by the time that she had paid for changeovers and 'the chap to cut the grass'. District Judge James found it difficult to see how the £300,000 mortgage which he understood needed to be paid could be funded out of £1,000 per month income, even if an extra £500 was paid by way of maintenance. Mr Austin told the District Judge that the repayments on Holly Cottage were about £900 per month, and the District Judge said that he thought that her financial position was very tight because she had to pay all her running expenses on her car, council tax, food and insurance. Mr Austin indicated that the idea of "putting the field across" was that she could "sell the fields and then clear a chunk of the mortgage". District Judge James queried why Mr Austin was gong to pay maintenance and it seems that there was some pre-marital cohabitation and that the couple had been together for 15 years so that it was fair for him to pay maintenance. District Judge James explained that the way the order was drafted it was open to Mrs Austin at a later stage to come back and ask for a pension share. District Judge James said: "I want you to understand that so you don't think that's it, you know, I

walk away and all, my only liability is going to be maintenance. She could actually convert that and come back later and ask for a pension share. I am not saying she'll succeed".

12. Having carried out his investigation of the assets and income of the parties and that Mr Austin, who was unrepresented, understood what he was getting himself into, he approved the order. Paragraph 1 was amended by the addition of the words "and IW21533" following a letter from Mrs Austin's solicitors. Mackrell Turner Garrett had written to the Court on 1 September 2010 when lodging the consent order and related documents indicating that the intention was that one piece of land owned by the husband was to be transferred to the wife (which was land lying very near to a property already owned by the wife in Whitwell on the Isle of Wight). On 30 November 2010 they wrote to the Court stating that they had omitted a piece of land registered with Title No. IW21533 in clause 1 of the order and sought amendment under the slip rule. The Court dealt with it without a hearing and the order was amended on 5 January 2011.

13. On 9 February 2011 Mr Austin presented to this Court a debtor's bankruptcy petition supported by a statement of affairs. District Judge Stewart made a bankruptcy order at 10:04am that day. Mr Austin indicated in his statement of affairs that he had been a director of 3 companies which were in liquidation, Max Timber Ltd, TB Merchant Ltd and Mackintosh and Partners Group Limited. He indicated that there were shares held in discretionary trust until he reached 75 years old and put "none" as the value of the shares. He mentioned that he was owed redundancy money and that Mackrell Turner Garrett were holding the proceeds of sale of a house worth £20,000. Various other details were given and a Scottish Widows pension and L&G final salary pension were disclosed but no value was given for the L&G pension. It was indicated that the Scottish Widows pension was worth £23,577 on one page of the statement of affairs and £30,000 on another. Mr Austin indicated that Mr J M Clinton and S M Pearce of Forest Farm, Whitehouse Road, Porchfield, Isle of Wight, were owed £670,000 and were secured creditors. It was said that this amount was secured on the Paradise Field on the Isle of Wight which was worth £120,000 so there was a net amount of unsecured borrowing from them of £550,000. Mr Austin set out his unsecured creditors and included Mr Clinton and Ms Pearce as unsecured creditors to the extent of £550,000 and he put in his debts at £8,334,508.90. The biggest amounts owed were said to be £3.8 million to Tenon Recovery and £3.815 million by way of a potential counterclaim, John Austin being the creditor named. He indicated that he was employed by Mackintosh & Partners at an average monthly take home pay of £770. He estimated his outgoings at £940 per month.

14. He gave some details of property disposed of in the last five years, one of which was Stockbridge Manor, Whitwell, Isle of Wight. The value of the property was stated at £900,000. It was said to have been sold in August 2010 to Dr Ashmore and that the net sale proceedings were said to have been about £20,000. There was another property known as Astors of Ellesmere of 167 Old Woking Road, Pyrford, Woking, but no value was given and it was said that there was an auction sale, nil net sale proceedings. As to a third property, 8 Brantwood Drive, West Byfleet, it was said that that was a building society repossession in December 2009 but nil net proceeds of sale.

15. Under the heading "Causes of Bankruptcy" Mr Austin said "the family decided to close down the family business which I had worked in since 1977. I borrowed money and liquidated all I could to save the business and the jobs of my fellow workers but unfortunately the family used a ruthless firm to liquidate the business and they have caused me to run out of money by paying solicitors to fight my corner."

16. By a letter of 22 March 2011 the Insolvency Service wrote to this Court indicating that the Official Receiver was replaced as Trustee of the Estate of Mr Austin on 17 March 2011 as a result of the appointment of Mr Elliott Green of Oury Clerk by an appointment of the Secretary of State. The Official Receiver decided not to summon a meeting of creditors and in the report under rule 6.73 of the Insolvency Rules it was indicated that Mr Austin's total assets were £36,300 and that there were total liabilities of £39,104,508.94. This figure was evidently wrong and may well have been the result of decimal points being in the wrong place, because the major creditor, RSM Tenon Recovery Ltd was put in at £38 million.

17. Mr Austin's bankruptcy meant that he could not comply with his obligations under the matrimonial consent order which I have set out.

18. Mrs Austin wrote to Aldershot and Farnham County Court and eventually made the application which I have mentioned. It was supported by a witness statement dated 12 April 2012. This was a two page statement that indicated that Mrs Austin was surprised to discover that her ex-husband had gone bankrupt and that she had written to him on two occasions and also to the Land Registry requesting that the field ordered to be transferred to her (comprised in two registered titles) had not been transferred. She indicated how she had been asked questions by the solicitors acting for the Trustee in Bankruptcy of her ex husband and indicated that she supplied answers to the questions asked of her having herself consulted solicitors. She said that she returned the questions and documents by 22 November 2011 but had heard nothing further from the Trustees and that, since her ex husband was now discharged from his bankruptcy, there was no need to hold off the transfer any longer. Mrs Austin's application was considered by the Court and it was directed to be listed on notice to the Respondent, and to Mr Austin and the Official Receiver's solicitors.

19. At a hearing on 10 May 2012 Mr and Mrs Austin appeared and a solicitor for the Trustee in Bankruptcy appeared. A witness statement dated 9 May 2012 was filed on behalf of the Trustee in Bankruptcy from Vanessa Jane Poole, a solicitor with Freeth Cartwright LLP (the solicitors for the Trustee in Bankruptcy). By that witness statement the Trustee indicated an intention to apply to set aside the provision in the ancillary relief order providing for the transfer of the land to the applicant, Mrs Austin. It was ordered that the application be adjourned and transferred to Kingston Upon Thames County Court, because Aldershot and Farnham County Court had no insolvency jurisdiction. The Trustee in Bankruptcy was given permission to file and serve evidence in response to the application by 24 May and Mrs Austin was ordered to file her evidence in reply by 7 June. Thereafter, the Trustee in Bankruptcy put in a witness statement dated 24 May 2012 and at a hearing on 10 July 2012 Mrs Austin's application was adjourned, it appearing that the Trustee in Bankruptcy had not been served with a notice of hearing.

20. The next hearing took place on 30 July 2012 before District Judge Lambert and she

stayed Mrs Austin's application for six weeks in order to allow the Trustee in Bankruptcy time to file any application pursuant to section 339 and/or 423 of the Insolvency Act 1986 by 10 September 2012. On 20 September 2012 the Trustee in Bankruptcy made his application under the Insolvency Act 1986 and there was a hearing in Mrs Austin's application on 24 September 2012 which Mr and Mrs Austin were in attendance, as was the solicitor for the Trustee in Bankruptcy. District Judge Lambert ordered that the Trustee in Bankruptcy be joined as a Respondent to Mrs Austin's application and the applications by Mrs Austin and by the Trustee were ordered to be heard together. The order actually drawn is on the Court file but not in the trial bundle and may not have been sent out. Mrs Austin's application was expected to be adjourned to the hearing date which was to be fixed for the hearing of the Trustee's application and both Mr and Mrs Austin's costs were ordered to be paid by the Trustee in Bankruptcy. In the event, directions were agreed in relation to the Trustee in Bankruptcy's application, at least between the solicitors acting for the Trustee in Bankruptcy and for Mrs Austin. The position of Mr Austin seems to have been overlooked. Provisions were made in the order of District Judge Lambert dated 25 October for the sequential filing and service of evidence and for the setting down of the application for final hearing. However, there was no reference made to Mrs Austin's application. The final hearing was fixed to take place on 31 January at 2pm with a time estimation of half a day.

21. The Trustee in Bankruptcy made an application by notice dated 12 October supported by a witness statement dated 30 September for Mr John James Clinton and Ms Susan Pearce (in fact Ms Susan Pearce is Mrs Clinton) to be examined under section 366 of the Insolvency Act 1986 and for other relief. District Judge Sturdy considered the application at a hearing on 13 November 2012 and she ordered that the private examinations should take place on successive days, namely 24 and 25 January 2013 and directed filing and serving of witness statements by Mr Clinton and Ms Pearce. Mr Clinton filed evidence. Mrs Clinton did not do so. It seems that she was ill and on 24 January the private examination of Mr Clinton commenced and was adjourned. The order made by District Judge Sturdy on that date, which was endorsed with a penal notice, records that the first Respondent Mr Clinton had not complied with the order made on 13 November 2012 and that he was examined and that both applications were adjourned to a further one day hearing on the first available date after 28 February 2013. The order required the filing and service by both Respondents of evidence by 21 February 2013.

22. A further statement was filed and certain other documents and I eventually heard the private examinations of Mr and Mrs Clinton on 31 May 2013 and ordered them to file and serve witness statements exhibiting certain documentation. Moving back to 31 January 2013, when the private examinations had not been concluded, the applications by Mrs Austin and by the Trustee in Bankruptcy came before me for final hearing but that hearing had to be used as a directions hearing. The time estimate, half a day, was far too short in light of the documentation that was submitted. I directed that both applications should be listed for final hearing not earlier than 28 days after the private examination with a time estimate of 2 days and some reading time.

23. The final hearing commenced on 3 July 2013 and continued on 4 July but there had to be a further hearing for closing submissions which was unfortunately delayed by virtue of illness on my part and took place on 30 September 2013. Although this

judgment was dictated in November HMCTS were unable to have it typed immediately and this and sick leave taken by me this month have caused delay in finalising this matter which I regret.

24. Despite the Trustee having been joined as a party to Mrs Austin's application and Mr Austin being a party to the divorce proceedings in which the application was made (and also, of course, a formal party to the bankruptcy proceedings) he was not served with copies of the trial bundles and I had to ensure that he was in a position to make such representations as were appropriate and to take part in the hearing by ensuring that he was provided with the relevant documents. Mr Austin was offered an opportunity to apply for an adjournment but he chose not to do so. Mr Austin produced, as I have indicated, a transcript of the hearing that took place before District Judge James on 30 September 2010 and I permitted it to be introduced into evidence by him despite the objections of Mr Gale at the time. I directed on 31 January 2013 that the Trustee in Bankruptcy need not attend the final hearing for cross examination.

25. I have considered all of the witness statements that the Trustee has made which were contained in the trial bundle and there was also the statement from Vanessa Poole filed in Mrs Austin's application (already mentioned above) although it did not take matters much further, it having been filed early on.

26. In the trial bundle were witness statements from John Clinton dated 19 December 2012, 28 February 2013 and a joint statement of him and his wife dated 13 June 2013. A transcript of the examination of Mrs Clinton was in the trial bundle but not the transcript of the private examination of Mr Clinton that started before District Judge Sturdy and was concluded before me on 31 May 2013. It seems that the transcript was ordered but that perhaps because a different Court room was used in the afternoon there was a delay in providing the transcribers with the appropriate CD. I would also add that at the hearing of the private examination before me Mr Gale relied upon a bundle of documents which had not been copied and provided to Mr Ashraf and there seemed to be one copy available for use in the witness box. By the time that the final hearing took place in July, that bundle was no longer available to me.

**The Evidence**

27. In his witness statement dated 20 September 2012 the Trustee in Bankruptcy gave evidence in almost identical terms to his statement of 24 May 2012 filed in opposition to Mrs Austin's application. He drew attention to the witness statement made by Mrs Austin dated 22 November 2011, which was exhibited, and to the evidence that she gave in that statement. She had explained that there was an agreement, albeit not reflected by the consent order, or disclosed to Mr and Mrs Austin's solicitors concerning the division of the proceeds of sale of 8 Brantwood Drive. The Trustee drew attention to the explanation given in relation to Southford Lane that there was an undocumented agreement that this land would be transferred to Mrs Austin. This land was apparently purchased by Mr Austin from money inherited. The land was then sold for £45,000 according to Land Registry entries. The periodical payments of £500 per month ordered to be paid in the ancillary relief proceedings and also the transfer of the two parcels of land IW60391 and IW21533 were objected to by the Trustee and it was contended that Mr Austin did not obtain

anything from Mrs Austin and that he was insolvent at the time that the order was made.

28. In monetary terms it appeared to the Trustee that what Mrs Austin had received was the following: (a) £11,000 in respect of the net proceeds of sale of 8 Brantwood Drive; (b) £6,000 per annum from 30 September 2010 by way of periodical payments; (c) £45,000 being the sale price of the land at Southford Lane as at 24 February 2011 and (d) £54,600 to £68,250 being the approximate value of the two pieces of land with title numbers IW60391 and IW21533. In contrast, according to the Trustee, Mr Austin did not receive anything from her. It was contended by the Trustee that when the Court was considering ancillary relief matters the starting point of the Court was complete equality in capital division "which means that a schedule of capital assets including those in each party's sole name and joint assets is listed. The Court's starting approach is to divide that total pot equally and share it out equally". I pause to note that that is an incomplete analysis of what the Court actually does. The idea is to achieve a fair result. Certainly the Courts do have regard to the effects of an equal division of capital but that sort of division can be deviated from on the particular facts of a case. Further, where the parties reach terms of settlement the procedure requires them to give a short summary of their assets on form in Form M1 as opposed to filing the more detailed statements in Form E.

29. The Trustee accepted that, on the basis of the information that was provided to the Court, a fair distribution was effected. He submitted in paragraph 13 that "…the consent order and/or the payment and/or the transfer of the land at Southford Lane and/or the transfer of IW60391 and IW21533 are transactions at under value within the meaning of section 339 of the Act…." The Trustee pointed out that the consent order contained a declaration of solvency. He pointed out that according to Mrs Austin's own statement of 20 November 2011 she held: Holly Cottage with an approximate value of £450,000 with registered security of £291,608.96 and so approximately equity of approximately £158,391.04, Barn End Cottage with a value of £200,000 and registered security of £55,553 and £55,000 leaving equity of approximately £89,447; and Honeymoon Cottage, 1 Nettlecombe Cottages, Nettlecombe Lane with a value of £200,000, subject to registered security to the extent of £118,877.23 and with approximate equity of £81,122.77, giving a total equity of £328,960.81. It was submitted that the declaration in Form M1 in respect of her capital resources could not be correct. Attention was drawn by the Trustee to Mr Austin's statement of affairs and that he had admitted that he started to have difficulty paying his debts in the summer of 2008, that being about a year before the commencement of the divorce proceedings, and just over 2 years before the date of the consent order. He contended that, based upon the statement of affairs and creditors of over £8.3 million in it, when Mr Austin signed the consent order he was wholly insolvent. It was submitted that Mrs Austin must have been aware of his financial position. He drew attention to a letter from the solicitors acting for her addressed to Mr Austin dated 18 May 2010 which states: "I understand you and Georgina have discussed financial matters. Problems have arisen following the liquidation of Mackintosh & Partners, your family's business, and more recently, Max Timbers. I am told you have creditors chasing you for various outstanding debts which remain in dispute". Mr Gale pointed out in his closing argument that section 341 of the Insolvency Act 1986 has the effect that it is unnecessary for his client to actually prove that Mr Austin was insolvent at the time that the consent order was made.

30. I have considered Mrs Austin's witness statement in response dated 20 June 2012 and also a statement from Mr Austin dated 25 June 2012. Those statements have been filed in Mrs Austin's application and I have also considered the evidence in opposition from Mrs Austin by witness statement dated 13 November 2012 and have considered the witness statements of Mr Clinton dated 19 December 2012 and 28 February 2013 and also the joint witness statement of Mr and Mrs Clinton of 13 June 2013. I have also considered the evidence from Mr Green by a statement dated 22 January 2013 in response to Mrs Austin's evidence.

31. Mrs Austin's witness statement dated 20 June 2012 explains how she received £11,000 out of the proceeds of sale of an asset which took place after they had commenced divorce proceedings and she indicates that it was far less than her husband's share and she refers to a completion statement prepared by Mackrell Turner Garrett relating to the sale of 8 Brantwood Drive showing that the sale price was £215,000 and that, after certain payments were made including redemption of the mortgage of £147,317.92, £59,219.86 was payable to Mr Austin. She points out that, although the Southford Lane land was transferred to her, it was simultaneous with the registration of a charge dated 22 February in favour of Mr and Mrs Clinton. She referred to it covering part of the "joint loan by ex-husband and myself had with these people". She indicated that in relation to the consent order it seemed unnecessary to list "other items we had already divided". She said that they had both been married before and on both occasions they negotiated an amicable settlement thus avoiding necessary legal costs. It was contended that her ex-husband was solvent "i.e. payable to pay his debts as and when they fell due". It was not necessary to take issue with the suggestion that the approximate value of IW606391 and IW21533 was between £80,000 and £180,000. She contended that the land in question was barely 5 acres and not the 10 to 15 acres that the valuer consulted by the Trustee was actually instructed to value. She contended that the actual value of the Titles in question were between £40,000 and £60,000 and not the £80,000 to £180,000 stated by Mr Green. I accept her evidence on this. She denied the assertion that her ex-husband had not received anything from her and pointed out that the Trustee had proved beyond any reasonable doubt that her ex-husband had received in excess of £48,000 from the sale of the property in West Byfleet and a pension fund of a further £140,000 and she also indicated that he retained approximately £20,000 from the sale of Stockbridge Manor. She stated in paragraph 9 that they had pointed out to District Judge James that there were "large joint and several loans owed to J Clinton and S M Pearce in excess of £550,000. This is what caused the equity to be reduced to £50,000 and not the over-stated sum claimed by Elliott Green".

32. Mr Austin stated in his witness statement that the pension value of £30,000 referred to by the Trustee, which itself was referred to in his statement of affairs, did not include Mr Austin's final salary pension scheme as this "was and is being controlled by the pension regulator." He could not put a value on the fund. Mr Austin stated that the majority of the debts were actually in dispute right up to the time of his bankruptcy. He admitted having trouble paying his debts in the summer of 2008 but said that this was solved by support from his parents and friends in exchange for agreeing to repay them when various assets were sold, meaning that he could cover his debts as and when they fell due. His contention was that he was able to meet his debts as and when they fell due. He also pointed out that the Trustee had submitted an informal valuation of land but from documents received there had been £1,520

plus VAT paid for a formal valuation; and he queried why the Trustee was using an informal valuation if he had got a formal one.

33. In her subsequent statement dated 13 November 2012, Mrs Austin indicated that she was devastated to learn that her ex-husband had been unfaithful to her and after that discovery she insisted that he leave the matrimonial home, which he did. Their relationship never recovered and they have barely spoken or had any contact at all other than through her solicitors throughout the divorce and financial proceedings. She said that it was correct that they had a direct discussion in May 2010 during the course of which they agreed an agreement as to the division of their assets. She said that she negotiated the agreement on the basis of what her solicitors had told her was her entitlement and her solicitors took detailed instructions from her on her financial position and what she knew about her ex-husband's finances. They also obtained disclosure from him as to his means and assets supported by relevant documentation for formulating that advice. She pointed out that her ex-husband agreed that he had no interest in the following properties which were owned solely by her and purchased from her resources -Holly Cottage, Barn End Cottage, Honeymoon Cottage, 1 Nettlecombe Cottages and the field in Southford Lane, Whitwell. She explained that under the consent order her husband had to transfer to her land lying to the west of High Street, Whitwell, Isle of Wight, and that the land in fact comprised of two separate titles at HM Land Registry and therefore the order was amended on 5 January 2011 to bring in the second title number. She stated as follows:

> "in relation to the payment of £11,000. That payment was agreed between me and my ex-husband shortly after I commenced divorce proceedings. The money came from my ex husband's sale of a property which he held in his sole name 8 Brantwood Drive, West Byfleet, Surrey. The net proceeds of sale were £59,219.86. My ex husband was selling the property and at that stage the divorce had not advanced sufficiently for me to have any money from it at all. My solicitors negotiated a payment to me out of the net proceeds to give me some money on which to live and from which to pay my legal fees. It was paid on terms that my ex-husband would receive credit for it when calculating our entitlements in the ancillary relief proceedings. I needed the money as I was myself deeply in debt at the time. I approached Senate Recovery which is a debt counselling business and I was advised that I should consider an individual voluntary arrangement. Jeremy Bowden whom I believe to be a solicitor working for Senate Recovery, drafted all of the paperwork for my IVA and approached RSM Tenant which is a firm of insolvency practitioners. RSM Tenon were not willing to assist me with an IVA and prevented me from entering into one so I am unable to take the matter further".

34. I should say that that evidence does not sit easily with paragraph 10 of the voluntary witness statement which Mrs Austin provided to the Trustee at page 185 of the trial bundle. There, she stated in response to the question: "Please confirm supported by documents when this was disclosed to the solicitors with conduct of the divorce" – that is to say the payment of £11,000 in February 2010:-

> "...as Mr Austin and I had agreed this part of the compromise of ancillary relief proceedings between ourselves we felt it was unnecessary to complicate matters and incur unnecessary costs by discussing the same with the solicitors

with conduct of the divorce".

35. As to the sale proceeds of the land at Southford Lane she indicated that this was paid to their friends John "Jimmy" Clinton and Susan Pearce in part payment of "what my ex husband and I owed them". She explained as follows:

> "Sue and Jimmy are friends of both my ex husband and me. My ex husband was a director of his father's company, Mackintosh & Partners (London) Ltd but he was not a shareholder. My former father in law decided to place the company into voluntary liquidation at the time of his retirement as he realised that my ex husband would have been his natural successor and he anticipated problems between his children if he were seen to prefer my ex husband. Unfortunately the liquidator of the company claimed back money which the company had lent to us both. After some negotiation we settled the debt on payment of £100,000 to a liquidator. The liability for payment of money was my ex husband's and mine on a joint basis. Sue and Jimmy's father had a large win on the Irish National Lottery and had lent them £570,000 by way of a bridging loan when they wanted to sell their property at Miramar, Fryern Road, Storrington, West Sussex, RH20 4BJ and buy a home on the Isle of Wight. That loan was secured on their storing the property and was to be repaid to their father, Seamus, when they sold the house. They sold the property but, before repaying the £570,000 to Seamus Clinton they learned that I was being pursued by the liquidator and that both my ex husband and I had debts which we could not afford to pay until we had sold some of our properties. They asked for Seamus Clinton's permission to lend us the £570,000 that was due to him and from it we managed to settle the claim and some other debts. I was grateful for their help. They lent the £570,000 to both of us and we were jointly and severally liable to repay it. We borrowed it on the basis that I could repay a portion of the debt from the sale proceeds of the land at Southford Lane. My ex husband also made a sizeable payment from the net proceeds of the sale of his property at 167 Old Woking Road, Pyrford, Woking. Following my ex-husband's bankruptcy I am of course liable for all of the outstanding balance of the debt to Sue and Jimmy who in turn owe it to Jimmy's father Seamus. I intend to finance the repayment from the sale of the two titles jointly comprising the land to the west of High Street, Whitwell".

36. Mrs Austin disputed that her husband was insolvent at the time of the consent order and indicated that, if he was insolvent, she didn't know about it. She said that they both had debts but had assets which were sufficient to let them settle them. She said that the reason for their lack of available funds was that her ex-husband had started a new company following the liquidation of Macintosh & Partners (London) Ltd. She said that the business was called Max Timbers and that it had taken on all of the former staff of the old one but because it was a start up business the banks were not prepared to lend so it was running without finance. It had cash flow difficulties and they had to call on her former father in law to help with money and with that help they were able to maintain a decent lifestyle, keep bills paid as and when they fell due. She said that the problem was simply that the new company was under-capitalised and, as a start up business it could not obtain any bank funding and therefore they had expected cash flow to be poor until the company had enough orders and invoices in the pipeline to provide it with enough money to cover regular outgoings. She said that they were both confident that the company would trade

through the problems and become profitable as the old company had been. She said that there were other debts which her ex-husband was disputing and that the dispute carried on after their separation and she had no knowledge of how the dispute was resolved because at that time they were no longer together.

37. Mrs Austin contended that the amount of her resources, as shown in the Form M1, after allowing for the money owed by way of mortgage on the various properties and the huge debt to Sue and Jimmy Clinton was accurate. She said it took account of the fact that she had a legal bill to pay in respect of the divorce, but that her ex-husband did not, and that the legal costs reduced her assets further. She said that her solicitors drafted the statement of information and the consent order as well as negotiating the terms of the order and that they advised her throughout that the terms of the consent order had to be reasonable as the Court would otherwise not approve it. Mrs Austin disagreed with the values set out by the Trustee in paragraph 14 of his witness statement. She said she brought Barn End Cottage for £131,000 and it was subject to mortgages totalling £110,553 giving her equity of only £20,447 and she said that 1 Nettlecombe Cottage was worth £193,000 leaving equity of £74,122. She said that she had substantial debts at the time including a debt of £570,000 to their friends. As to her husband's debts she said: "I knew that there were people claiming money from my ex-husband but I also knew that he denied that he owed the money and at that time he was defending the claims". She explained that the reason that there were periodical payments ordered was that she had a lower earning capacity than him, he always earned well, and she was very much incapacitated by the trauma of discovering his adultery and the ensuing divorce. She said that she is still suffering from depression and is only able to work part time. She said that since the application was made she has contemplated suicide on a number of occasions and was being prescribed anti-depressant medication. She indicated that "I am advised ... that the consideration for the transactions was my giving up of the right to apply to the Court for an order in respect of the matrimonial finances and my assumption of liability for the debt that we owed to our friends Sue and Jimmy". It is convenient to deal with the evidence from Mr and Mrs Clinton next before indicating the response to it by the Trustee.

38. In his first statement dated 19 December 2012, Mr Clinton indicated that he and his wife had known Mr and Mrs Austin for many years. He said that he used to work with Mr Austin and that they became friends. He said that in 2009, before their separation, Mr Austin told him that he and his wife had some financial problems and that he had been a director of his father's company Macintosh & Partners (London) Ltd which was a timber merchant from which he earned good money. The statement (and I should say that the version in the trial bundle differs slightly from one of the versions on the Court file) indicates in paragraph 8 that it was in 2008 that Mr Austin told Mr Clinton that he had some financial problems. In any event, the problem as understood by Mr Clinton, was that Mr Austin's father had decided to close the company down on his retirement rather than to leave it to him. Mr Austin's father decided to liquidate the company rather than to hand it over to him. His father was apparently worried that Mr Austin's siblings, who had never taken any part in the business, would be resentful if he simply transferred the business to Mr Austin. Mr Clinton said that when Mackintosh & Partners (London) Ltd closed, Mr Austin set up Max Timbers Ltd and, according to Mr Clinton the new company took on responsibility for a lot of the debt of Mackintosh & Partners (London) Ltd so the people would be prepared to trade with the new company. It explained how Mr

Clinton offered to help out in circumstances where his father had won a large amount of money on the Irish National Lottery and had lent £570,000 to him and his wife. It was explained that they had owned a house Miramar, Fryern Road, Storrington, West Sussex, but wanted to move back to the Isle of Wight where they had seen a property that they had both wanted. They did not want to lose the house but did not have a buyer for Miramar. It was explained how Mr Clinton's father offered to lend money by way of a bridging loan and that they gave him a charge over the Storrington property and, instead of repaying £570,000 to his father, it was said that they lent the money to Mr and Mrs Austin (see paragraph 16). He indicated that he instructed his solicitors, Chamberlain Martin, to prepare the loan agreement which was signed by Mr Austin. He exhibited to his statement a draft of the loan agreement, showing only Mr Austin as the borrower, with Mr and Mrs Clinton described as the lender. The executed version is in volume 2 of the trial bundle on pages 89 to 93.

39. It was indicated by Mr Clinton that Mr and Mrs Austin needed further funds. Mr Clinton said that he and his wife took charges over land at Stockbridge Manor, Slay Lane, Whitwell, Ventnor, Isle of Wight and land on the west side of High Street, Whitwell, as security for the loan and the interest payable on it. He said that in September 2009 Mr Austin repaid £227,136.58 to them from the proceeds of sale of his property at 167 Old Woking Road, Pyrford, Woking, leaving an outstanding balance of £342,863.42 with continuing interest. He explained how they were due to receive some monies from the proceeds of sale of the land to the south west of Paradise Field, South Wood Lane in February 2011, and that Mrs Austin mentioned selling the property for £45,000 but they did not receive the money back from her as she had to fund a payment to the liquidator of Mackintosh & Partners (London) Ltd and couldn't afford to settle the debt and the money due to them. His evidence was that he and his wife therefore released the charge they had on completion of the sale without being repaid and they did so on the basis that they could wait for Mrs Austin to sell some other land which she owned at Slay Lane, Whitwell, Ventnor. Mr Clinton indicated that, following the bankruptcy of Mr Austin, they were left with no option but to seek payment of the debt from Mrs Austin. Mr Green, when seeking an order for a private examination raised the question of the transfer of 251 New Church Road, Hove, East Sussex, into the name of Mrs Clinton for £1 and also the grant on 20 November 2009 of a legal charge in the sum of £570,000 over property known as the land on the west side of High Street, Whitwell, Ventnor, and what Mr Clinton said in relation to that is as follows:

"25. A reference is also made in the Applicant's witness statement to property at 251 New Church Road, Hove, and it is transferred to my wife for £1.

26. This relates to a property business in which my wife and Robert Austin were both involved. The transaction was in respect of the freehold of a property in Hove which was divided into four flats. Two of these leasehold flats were owned by Robert Austin and Propertydeal Ltd and I understand that it was decided to transfer the freehold to my wife for reasons which I do not understand.

27. I have tried to discuss this matter with my wife but she has a limited recollection of it and I cannot remember if the transfer was a gift or whether money changed hands or whether she accepted the freehold in lieu of money

which was owed. I am unable to assist further with this transaction other than to say that it took place many years ago and certainly more than five years prior to Robert Austin's bankruptcy petition"

40. In a second statement dated 28 February 2013 he provided a spreadsheet which showed expenditure of £21,337.52 with the heading "Goods purchased settled for Rob and Gina" and the next section shows how funds from the property known as Miramar were handled by the solicitor, Chris Martin totalling £327,069.09. Mr Clinton explained in his statement how, in early 2008, Mrs Clinton lost her job with Mackintosh & Partners (London) Ltd and that she received a redundancy payment and a substantial severance package. She had also done a lot of secretarial work for Mr Austin for which she was entitled to be paid but she deferred payment until he was in a position to make it. That appears to account for entries of £22,500 and £24,000 on the schedule. Quite why Mr and Mrs Clinton regarded Mr and Mrs Austin liable for redundancy monies owed from Mackintosh was not made clear. There was an entry for £25,000 said to be because Mr and Mrs Clinton sold the contents of their property at 28 Eastern Road, Shoreham by Sea, to Mr Austin for £25,000 but that sum was not paid and therefore it appears on the schedule. Also on the schedule is a series of entries under the heading "Agreed work done by Jimmy/Anam Cara on their properties". It is said to be cost of expenditure which Mr and Mrs Clinton incurred in repairs to Mr and Mrs Austin's properties, that totalled £141,845 although there were five entries against which the words "Anam Cara" were noted. Finally on the spreadsheet was money said to be paid out of Mr Clinton's account by way of a loan and also some money received back including the £227,136.58. The grand total on the spreadsheet comes to £343,270.92.

41. On 13 June 2013 Mr and Mrs Clinton signed a joint statement following an order which I made against them, which was said to exhibit all documents in their possession corroborating the items of expenditure set out on the spreadsheet which I have mentioned. It was not, however, cross-referenced to this spreadsheet as I had ordered.

42. In Mr Green's statement dated 22 January 2013 he commented on inconsistencies between what Mrs Austin said about Holly Cottage and compared her earlier statement dated 22 November 2011 which stated that Holly Cottage was purchased for £455,000 via a mortgage with Bank of Scotland for £282,318 and a further loan from Mackintosh & Partners (London) Ltd which she said were paid, but she had previously said that she and Mr Austin had paid £100,000 to the liquidator of Mackintosh & Partners (London) Ltd. Mr Green did not understand how it could, on the one hand, be asserted that Mr Austin did not have an interest in Holly Cottage but on the other hand assert that the £100,000 settlement with the liquidator of MPL related to a joint liability. Mr Green also commented on the fact that in Mrs Austin's witness statement at paragraph 8 she contended that the field in Southford Lane, Whitwell, Isle of Wight, was solely owned by her, was purchased from her own resources and stated that Mr Austin had no interest in the same but that statement could not be correct given that in her statement of 22 November 2011 where she stated that the Southford Lane field was purchased by Mr Austin from an inheritance from his aunties and a loan from MPL but was subsequently transferred to Mrs Austin in settlement of the divorce/ancillary relief proceedings.

43. Mrs Austin's evidence to the effect that the proceeds of sale of the land at Southford

Lane were paid to Mr Clinton and/or Mrs Clinton as part repayment of a loan to her and Mr Austin was also commented on, as being contradictory to the evidence of Mr Clinton who had indicated that the money was never paid to him, (as Mrs Austin said she needed the funds to pay settlement sums due to the liquidator of MPL).

44. Mr Green also took issue with part of what Mrs Austin said in paragraph 10 of her witness statement where she said that she took responsibility for the settlement of the debt due to the liquidator of MPL. As to that, Mr Green informed the Court in his statement that MPL had proved in Mr Austin's estate that the sum of £3,249,137.01 moreover the £100,000 settlement related to Mrs Austin's liability only and the settlement funds were paid on or around 29 June 2011, some 9 months after the original consent order was signed, and 4 months after the bankruptcy order was made according to the liquidator's receipts and payments documentation which Mr Green obtained from Companies House.

45. Mr Green said as follows in relation to Barn End Cottage:

> "Under the heading "Paragraph 14" in Mrs Austin's witness statement she contends that the property known as Barn End Cottage, High Street, Whitwell, was subject to mortgages totalling £110,553 and therefore her equity was only £20,447. This however contradicts the position as set out in Mrs Austin's witness statement dated 20 November 2011, paragraph 13… which states that this property was refinanced with the Blemain Finance Ltd on 23 May 2011 for £45,000. As such, it would appear that the refinance with Blemain Finance Ltd had not been taken out at the time the Form M1 was completed….[before… 30 September 2010]"

46. Mr Green took issue with Mrs Austin's assertion that she was, or is, jointly liable for a £570,000 loan by the Clintons. He indicated that neither Mr Clinton nor Mrs Austin had produced any contemporaneous documentation to show that she was jointly liable for the debt and, on the contrary all of the contemporaneous documentation disclosed showed a loan to Mr Austin only and he asserted that neither Mr Clinton nor Mrs Austin had provided any evidence that £570,000 was in fact an advance to Mr or Mrs Austin. Mr Green indicated that, from the documents disclosed, he was only able to account for the sum of £327,017.86 being loaned to the bankrupt Mr Austin between 30 July 2008 and 23 March 2009 and it was the case that £227,136.58 was repaid on or around 11 September 2009. Mr Green could not see more than £99,881.28 was due to Mr and Mrs Clinton and that the loan was secured over property registered in the sole name of the bankrupt namely IW63816, land on the west side of High Street, Whitwell, Ventnor, which he contended was valued between £90,000 and £108,000. It could be argued, according to Mr Green, that Mr Austin had satisfied the whole sum due to Mr and Mrs Clinton and if Mrs Austin was jointly liable for the loan it could be argued that she is in fact a debtor of the bankrupt to the extent of £163,583.93, this being 50% of the £327,017 loaned. Mr Green indicated that he did not accept that the legal charge granted by Mr Austin to Mr and Mrs Clinton was valid. It was contended that the evidence from Mr Clinton and Mrs Austin regarding further funds reportedly advanced by Mr Clinton and Mrs Clinton to Mr and Mrs Austin to fund settlement with the liquidator of MPL was unclear and contradictory and he gave a number of reasons. He felt that neither Mr Clinton nor Mrs Austin confirmed the amount of the purported further advance, when it was paid, or how it was paid. There was no contemporaneous evidence in

support of the further advance. He commented that Mr Clinton's witness statement at paragraph 22 stated that Mrs Austin utilised the sale proceeds of Southford Lane, namely £45,000, to fund settlement with the liquidator of MPL and Mrs Austin's previous evidence stated that she refinanced Barn End Cottage for the sum of £55,000 to fund settlement with the liquidator of MPL. He contended that Mrs Austin was able to raise £100,000 without the assistance of Mr Clinton or Mrs Clinton and that, in any event, the settlement monies paid to the liquidator of MPL were recorded by the liquidator as being settlement from Mrs Austin; and that was paid after the date of the bankruptcy order. Mr Green indicated that he thought that Mrs Austin's witness statement and Mr Clinton's witness statements were unclear and, in part, inconsistent with each other and inconsistent with the previous evidence given.

47. I note that in a proposal that Mrs Austin put forward for an IVA in the trial bundle at page 508 she stated that the creditors were Mr and Mrs Clinton who had lent her collectively over a period of time approximately £535,000 and states that a majority of the money was used to purchase and renovate Holly Cottage which was one of the properties that she owned. A number of doctor's letters were provided to the Court and on 11 June 2013 Dr Paul indicated as follows:

> "I am writing to confirm that Georgina has been consulting us over the last few months with stress related systems. These are undoubtedly due to the pressure that she is under because of the repeated summons to appear in Court. As a consequence of this we have prescribed anti-depressants and a hypnotic to help her sleep. She still exhibits symptoms of depression including poor short term memory and early morning awakenings. Her reduced concentration has made her quite forgetful especially at work. I understand that the impending Court case is soon and I hope that for her stress levels this will be the last occasion."

48. In one letter to the Court dated 20 June 2012, in which she indicated how the pain of her divorce had been, and was still, excruciating for her, she says that Mr Green has "fabricated lies and insults".

## The loan agreement

49. The loan agreement made on 1 June 2009 between Mr and Mrs Austin and Mr and Mrs Clinton is unusual in connection with a private loan in that it recites that: "the lender has agreed to lend and/or has lent to the borrowers sums of money comprising: a) payments totalling £570,000; and b) any other payments made to the borrowers as finance assistance to the borrower with a paid direct to him or to any third party on his behalf ....". There was a reference to interest of 3% per annum and recital 3 states that the individual borrowers are jointly and separately liable to the lender for the full amount plus the applicable interest. It is clear that the person who drafted this document initially had Mr Austin as being the borrower because not all of the appropriate amendments have been put through when compared with the first draft which Mr Clinton put in evidence. Why there should have been uncertainty – i.e. "has agreed to lend and/or has lent" - and why it stated "the loan has been and/or will be made in consideration of the terms and conditions of this agreement and

mortgage" was not explained.

50. It was indicated in clause 4 that the borrower intended to repay the full amount of the loan by no later than 1 December 2009 and that the borrowers would grant to the lender a mortgage over their properties at Stockbridge Manor, land on the west side of High Street, Whitwell, Title No. IW63816, land near Southford Lane, Whitwell, IW59515 and there is then a reference to the borrowers granting to the lender mortgage over the proceeds of sale of 167 Old Woking Road, Pyrford, Woking, Surrey. The document appears to have been executed in front of witnesses by all four parties. There is evidence that Mr Austin emailed his solicitor in order for the solicitor to transfer from his client account £227,136.58 being part payment of funds that "we owe him", page 100 of the trial bundle.

**Oral evidence**

51. Mr Green was not required to be cross examined pursuant to an order I made on 31st January 2013. I heard evidence, firstly, from Mrs Austin who was cross-examined and I have no doubt that she was genuinely distraught when she found that her husband had committed adultery. She had lived with him for 7 years before they got married and when they got married in 2002 it was regarded as a society wedding and that it had taken a couple of years to plan. I accept this.

52. When questioned about the sale of the Brantwood Drive property, Mrs Austin indicated that, although the property was registered in the name of Mr Austin it was "part of the marriage". It was put to her that Mr Austin had purchased the property and paid the mortgage. She came across to me as being somewhat hesitant when she indicated that she did not know whether he had paid the mortgage. She indicated that she was a frustrated interior designer and had done a lot of the decoration to the property. I did not believe Mrs Austin when she indicated that it had been always agreed that there would be a 50/50 split of the sale proceeds of 8 Brantwood Drive. This is not something she had said in her statement provided to Mr Green in November 2011. Mrs Austin was cross-examined on the inconsistency between paragraph 10 of her November 2011 witness statement in which she had indicated that it was unnecessary to complicate matters and incur unnecessary costs by discussing the split of the proceeds of 8 Brantwood Drive with the solicitors with the conduct of the divorce; and paragraph 9A of the statement of 13 November 2012 where she said "my solicitors negotiated a payment to me out of the net sale proceeds to give me some money on which to live and for which to pay my legal fees". She said that she probably mentioned this to her solicitors. Although her short term memory is badly effected I thought she was hesitant in this subject when presented with two completely inconsistent statements made by her. She accepted that there was no evidence of any negotiations between her solicitors and Mr Austin about this payment. It was put to her that there was no evidence that the District Judge dealing with the ancillary relief proceedings had known about this. She said that the £11,000 was money spent on living and in particular money paid on legal fees that she had to pay when contesting claims brought by the liquidator against her. It was put to Mrs Austin that she was not telling the truth about paying the proceeds of sale to Southford Lane to the Clintons. Initially she said it was true, that they had had that money. She indicated that she was an office administrator and that she worked long hours and would have had extensive indebtedness and sometimes had to choose between paying for petrol or for food. She eventually indicated that

the Clintons had re-lent her the money. She was asked about being loaned £570,000 and her evidence to the effect that it was Mr Clinton Senior who had lent that sum and the question of how did she know that she had been lent £570,000. She indicated that it was because that was what was in the loan agreement. However, elsewhere in her oral evidence she accepted that, in fact, there wasn't £570,000 lent to both of them at once and that the sum mentioned was the aggregate of what was actually lent over a period of time. She indicated that her husband took care of the finances within her marriage and she didn't know what had happened to £570,000. I am quite satisfied that she was well aware that £570,000 had not in fact been lent in one go. There is inconsistency between what District Judge James was told about a second charge to the extent of £350,000 over the properties that that Judge was informed were charged, and the £550,000 that Mrs Austin claimed was owed by way of a joint and several loan to Mr Clinton and Ms Pearce was put to Mrs Austin, as well as the fact that the agreement with the Clintons provided for secured borrowing over Stockbridge Manor and land on the west side of High Street, Whitwell and land near Southford Lane, Whitwell.

53. It was also put to Mrs Clinton that she ought to have told the District Judge about her £2,000 of rental income. In fact, what she said was: "well it doesn't work out. I don't get a lot by the time I have paid for change overs and the chap to cut the grass". Mrs Austin in her cross examination indicated that she did not know about her husband's indebtedness other than to the liquidator and to the Clintons. She indicated that the whole family were being pursued by the liquidator including her ex father-in-law who is 95; and it had killed him and nearly killed her.

54. The letter of 18 May 2010 from Vanessa McMurtrie, Mrs Austin's solicitor to Mr Austin, was put to her and in particular it was put to her that she knew that her husband was insolvent; but she denied this on the basis that Mr Austin's father was helping him out. It was put to her that it was misleading not to have told the Court about the liquidator's claims and Mr Austin's debts. She accepted that there was the Clinton loan, the father's loan and the liquidator's claim. It was put to her that the Court did not have the full picture but she asserted that this was not so and that the Court had had the full picture. Another passage from the letter of 18 May 2010 was put to her, which stated: "I also understand you are keen for Georgina to have one part of the land which is presently registered in your sole name but against which one of the creditors has registered a Notice. If Georgina is to receive this part of the matrimonial settlement it is imperative that there is a Court order to that effect". It was put to Mrs Austin, in particular, that what was wanted was an order to protect her and the husband against the creditors when her husband went bankrupt but she denied that this was the case and said that she had a horse and some sheep and needed the land to graze them.

55. I reflected on the evidence of Mrs Austin it struck me that her evidence was unreliable. I say this because of the inconsistencies that there were in her witness statement evidence and I feel sure that she was aware when she appeared before District Judge James that there were substantial claims against both her and Mr Austin which she did not inform the Court about.

56. Next, Mr Austin was sworn and cross-examined. Mr Austin said that the lawyers instructed by Mrs Austin had not known about the division of the sale proceeds of Brantwood Drive or in particular that he had given her £11,000 in order to help her

pay the legal bills. Mr Austin was shown the proof of debt form submitted by Mackintosh & Partners (London) Ltd for £3.249 million. He was also shown a copy of the application in the Companies Court which was issued on 24 January 2010 in which declaratory relief was sought to the extent that he was guilty of misfeasance and breach of duty within section 212 of the Insolvency Act 1986, because (it was alleged) that between March 2002 to July 2008 had paid himself sums totalling £1.6 million for his own personal benefit, that not being in the interests of Mackintosh & Partners (London) Ltd. There was a further allegation in those proceedings that sums totalling £414,056.44 had been paid to companies and or individuals connected with himself and that he was therefore guilty of misfeasance and breach of duty. It was alleged that he had created fictitious entries in the company's books and records to disguise payments made directly to him and/or individuals connected to him and by 2 September 2010.

57. It is plain that an order had been made by Master Bowles sitting in the Chancery division and, on the basis of the order (at page 265 of the trial bundle) of Mr Registrar Baister, it seems that his defence and counterclaim in other proceedings had been struck out with a result that Registrar Baister ordered on 22 November 2010 that Mr Austin had to pay the company, Mackintosh & Partners (London) Ltd, £1,224,831.88 including interest and fixed costs of £2,060. Mr Gale showed him the report valuing the three plots of farm land at pages 241 and 242 of the bundle and also the plan at page 243. By the time the consent order was entered into the only land that he had left was the three fields.

58. Mr Austin was cross-examined on what had been said to the District Judge at the time that he approved the consent order and he admitted that there was no second charge on Holly Cottage, Barn End or Honeymoon Cottage. He admitted that the Judge had got the wrong impression although he said that the right figure had been told to him. Mr Austin was somewhat reluctant to answer questions about his motivation in the light of the letter of 18 May 2010 from Vanessa McMurtrie because he had gleaned from the opening submissions the previous day that one consequence of the litigation might be the setting aside of the consent order and thereby the exposure of his pension fund to further attack by his ex-wife. He admitted that creditors were chasing him and that Mrs Austin's solicitors knew that because he said so in the letter. It was put to him that he was keen to transfer properties to her and indeed went as far as to say that he was trying to get a fair settlement for her.

59. It was put to him that he was keen to transfer land to her over which the liquidators had registered notices. It was put to him that, whether or not he had intended to mislead the Court, he was trying to do what was fair. Mr Austin's response was to say that he was answering the questions put by the Judge. He said that he had left something off which was that there was a loan from a property company coming his way and this part of his evidence I found unconvincing and, in fact, I thought that Mr Austin was telling lies to me. It was put to him that the Judge didn't know that he was being chased by his creditors and he admitted the fact that this was the case and said it did not seem relevant. It was put to Mr Austin that he had made a declaration of solvency in the consent order and I intervened and warned Mr Austin about the privilege against self incrimination. Mr Austin declined to comment on the fact as put to him that the Judge had noted that he had made that declaration. He accepted that there was no other reference to solvency or insolvency in the hearing. It was put

to him that even without the liquidator's claim he did not have enough money to pay his debts. Almost incredibly Mr Austin answered that he thought that he did.

60. He was cross-examined on the list of unsecured creditors in his statement of affairs. Even apart from the claims by the liquidator and from family members there were other debts that he could not possibly pay, itemised on page 132 of the trial bundle. He pointed out that his bank overdraft had not been called in. It was put to him that his two main assets worth about £60,000, that is to say the fields, together with any claim that he might have against Propertydeal, a company which may have been in liquidation at that stage. Mr Ashraf also cross-examined Mr Austin, in particular in relation to the £11,000 payment to his client out of the proceeds of sale of Brantwood Drive property. He reminded Mr Austin that Mrs Austin had explained that the proceeds were intended to be split and he answered that that was so in an ideal world. He accepted that Mrs Austin would have been entitled to at least 50% of the proceeds of sale of the property and that was as a result of a discussion or an understanding; he said that it was an understanding arising out of various discussions that they had had on the question of "I am going to give you this". He said "We didn't expect it to be repossessed".

61. Mr Austin accepted that Mrs Austin had not necessarily known about the specifics of the work done by the Clintons in connection with the doing up of property. Mr Austin told me that his McKenzie friend was his fiancé and that his personal circumstances had changed. He had in fact inherited a property from his mother but there was no claim by the Trustee in relation to it. He was also concerned by the threat of a further attack by his ex-wife on his pension. He did tell me that there were shares in private companies in her mother's Estate and that he was thinking of going to the legal Ombudsman because of the lack of information provided by the solicitors charged with administration of the Estate.

62. Overall, I felt that Mr Austin had lied as indicated above, and had been disingenuous when answering certain questions and I did not regard him as a reliable witness.

**Submissions**

63. Mr Gale drew my attention to the provisions of section 339 and 341 of the Insolvency Act 1986. Section 339(1) states: "Subject as follows in this section and sections 341 and 342, where an individual is adjudged bankrupt and he has at a relevant time (defined in section 341) entered into a transaction with any person at an undervalue, the Trustee of the bankrupt's Estate may apply to the Court for an order under this section".

64. Section 339(2) states: "The Court shall on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction".

65. Section 339(3) states: "for the purposes of this section and sections 341 and 342 an individual enters into a transaction with a person at an undervalue if (a) he makes a gift to that person or (b) he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration.....; or (c) he enters into a transaction with that person for a consideration value of which, in money or money's worth, is significantly less than the value, in money or money's worth of the consideration provided by the individual".

66. Section 341(1) states: "subject as follows, the time at which an individual enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into or the preference is given (a) in the case of a transaction at an undervalue at a time in the period of five years ending with the day of the presentation of the bankruptcy petition on which the individual is a judged bankrupt - ....."

67. Section 341(2) states "where an individual enters into a transaction at an undervalue or gives a preference to time mentioned in paragraph (a) ..... of sub-section (1) (not being, in the case of a transaction at an undervalue, a time less than 2 years before the end of the period mentioned in paragraph (a)), that time is not a relevant time for the purposes of sections 339 and 340 unless the individual – (a) is insolvent at that time; or (b) becomes insolvent in consequence to the transaction or preference; but the requirements of this sub-section are presumed to be satisfied unless the contrary is shown in relation to any transaction at an under value which is entered into by an individual with a person who is an associate of his (otherwise than by reason only being his employee)."

68. Under section 436 of the Insolvency Act the word "transaction" includes a gift, agreement or arrangement and "references to entering into a transaction shall be construed accordingly". It was submitted that the effect of section 341(2) in this case was that the transactions complained about took place at a relevant time since it was less than 2 years before the presentation of the bankruptcy petition that the event complained about took place. I accept that submission.

69. There are a range of orders which can be made under section 342(1), which states "without prejudice to the generality of section 339(2).... An order ... with respect to a transaction...entered into or given by an individual who is subsequently judged bankrupt may (subject as follows) –(a) require any property transferred as part of the transaction .... to be vested in the Trustee of the bankrupt's Estate as part of that Estate; (b) require any property to be so vested if it represents in any persons' hands the application either of the proceeds of sale of property so transferred or of money so transferred; (c) release or discharge (in whole or in part) any security given by the individual; (d) require any person to pay, in respect of benefits received by him from an individual, such sums to the Trustee of his Estate as the Court may direct...".

70. Section 39 of the Matrimonial Causes Act 1973 states as follows: "The fact that a settlement or transfer of property had to be made in order to comply with a property adjustment order shall not prevent that settlement or transfer from being a transaction in respect of which an order may be made under section 339 or 340 of the Insolvency Act 1986 (transfers at an under value and preferences).

71. On the issue of the payment of £11,000 on 16 February 2010 by Mr Austin to Mrs Austin, Mr Gale drew attention to the contradictory accounts provided by Mrs Austin in her witness statements. Mr Gale said that Mr Austin had confirmed that the payment of £11,000 was discussed between himself and Mrs Austin and not raised with the solicitors. He submitted that those solicitors could not have taken into account that payment when calculating the parties' respective entitlements in the ancillary relief application and the compromise of that application could not have formed consideration for the payment. Mr Gale argued that there was no claim to a beneficial interest on the part of Mrs Austin in the light of her own evidence that

the property was brought in Mr Austin's sole name with the assistance of a mortgage and that she could not recollect or confirm further details as she had no involvement with the property. She was involved in the renovation of the property.

72. He submitted specifically that the evidence failed to establish the existence of a common intention to share beneficial ownership and that Mr Austin had said that "in an ideal world" the proceeds of Brantwood Drive would be split and that it only seemed fair to give her some money from the sale on account of her work decorating the property. He submitted that the words used were not those of entitlement or proprietary interest. He submitted that there was no consideration for the payment of £11,000 and that Mrs Austin should be ordered to repay the money for the benefit of the bankrupt's Estate. Mr Gale also deprecated any suggestion that the payment made constituted maintenance pending suit.

73. As to the Southford Lane land it was submitted that neither Mr nor Mrs Austin were able satisfactorily to explain why Mrs Austin paid £27,000 for a property subject to a charge apparently securing a sum of £350,000 and that it remained obscure why the Clintons received nothing of the £27,000 despite having a charge and they also received nothing from the subsequent sale by Mrs Austin for £45,000. He submitted that I should disbelieve Mrs Austin's evidence to the effect that the whole of the sale proceeds were paid to their friends in part payment of what she and her ex husband owed them – Mr Clinton had denied receiving this money. He submitted that £18,000 that is to say the difference between £45,000 and the £27,000 that she paid should be repaid to the estate of the bankrupt in relation to the sum of £11,000 and £18,000 Mr Gale submitted that interest should also be awarded.

74. In relation to the matrimonial consent order Mr Gale submitted that it should not be set aside, save in so far as it required properties to be transferred by Mr Austin to Mrs Austin. Mr Gale referred me to the decision of the Court of Appeal in *Hill v. Haines* [2008] Ch412 and also *Re Jones (a bankrupt); Ball v Jones* [2008] BPIR 1051. He submitted that a consent order disposing of ancillary relief proceedings may be set aside on the grounds of fraud, mistake or misrepresentation or failure to make full and frank disclosure of assets. The ability of one spouse to apply to the Court for one or more of the orders referred to in sections 23 to 24D of the Matrimonial Causes Act 1973 was a right conferred and recognised by law and it has a value in that its exercise may and commonly does lead to Court orders entitling one spouse to property or money from or at the expense of the other. That money and property is *prima facie* the measure of the value of the right. Lord Justice Thorpe postulated that ancillary relief orders resulting from a hard fought trial were less likely to be tarnished by collusion or fraud on the creditors and consent orders but the same principles applied albeit that the Trustee's burden of proof might be more readily discharged and he also indicated that the authorities did not establish that all ancillary relief orders were proof against the claims of the Trustee in bankruptcy. Lord Justice Thorpe indicated that if the ancillary relief order was a product of collusion between the spouses designed to adversely affect the creditors the Trustee would intervene in the ancillary relief proceedings and apply for the order to be set aside. Mr Gale submitted that the Chief Bankruptcy Registrar had held in *Re Jones* that *Hill v. Haines* contemplated a situation where the husband and wife colluded specifically to do down the creditors by seeking to put assets beyond the reach of a Trustee. He held that that was different from a situation such as the case before him where that was the collateral effect of an order that was common

place in matrimonial proceedings which resulted from negotiations and was sanctioned by the Court in possession of the relevant facts notably the existence of creditors.

75. It was submitted by Mr Gale that collusion had taken place. He submitted that I should find this from the evidence of Mr Austin to the effect that he wanted a divorce settlement which he considered fair- recalling the evidence that it was fair to pay Mrs Austin the £11,000 because she had done decoration work at Brantwood Drive and that he would have given her more if he could and that it was fair to give Mrs Austin Southford Lane because she could use it for the horses and sheep and also it was fair to pay maintenance. He pointed out that it was also accepted in cross-examination that it was unfair that Mrs Austin had to repay the whole of the Clinton loan because it was "loaned together". He submitted that the motivation may well have been to produce a fair result for Mrs Austin but this did not detract from the fact that the parties colluded to produce the settlement they wanted which prejudiced creditors. He submitted that the solicitors were deliberately not told about the £11,000 payment and that the Court was deliberately not told that Mr Austin was being chased by creditors. He submitted that the Court was deliberately not told about Mrs Austin's rental income although this was discovered by the Judge's questioning.

76. Mr Gale submitted that the Court was told that there was a second charge securing the Clinton loan on various properties which statement was false. He submitted that the parties' intentions were made clear by the letter from Mrs Austin's matrimonial solicitors dated 18 May 2010 where it was written that he had "creditors chasing (him) for various outstanding debts which remain in dispute". He submitted that Mrs Austin was well aware of those creditors herself being a Respondent to applications made by the liquidators of Mr Austin's companies.

77. He also pointed to the passage from the letter in which the solicitor wrote "you are keen for (Mrs Austin) to have one parcel of land.... against which one of the creditors has registered a Notice. If (Mrs Austin) is to receive this as part of a matrimonial settlement, it is imperative that there is a Court order to that effect". He pointed to the fact that the end result prejudiced the creditors of one of the parties, and that pertinent information was withheld from solicitors and the Court and the parties' desire to circumvent creditors was plain from correspondence where the evidence justified a finding that the parties were motivated by a desire to be fair to Mrs Austin even at the expense of others then the Court was entitled to intervene on the grounds that there had been collusion.

78. In the alternative, if collusion was not established he submitted that it was abundantly clear that the Court was misled. He submitted that the Court was told that there was a second charge over various properties which had the effect of reducing the net equity available to Mrs Austin from about £400,000 to £50,000 which was untrue as Mr Austin accepted in cross examination and pointed to the part of the transcript of the hearing before District Judge James where he had sought to understand where the figure of £50,000 had come from and had been satisfied by what he was told. Mr Gale pointed out that the Court was not told that Mrs Austin had received £11,000 and not told that she received £2,000 per month in rental income although he did discover that there was rental income when Mrs Austin told him "I don't get a lot by the time I have paid for changeovers and the chap to cut the

grass". However, Mr Austin said that the lettings only generated £80 to £90 per year and there was no documentary evidence to support that assertion and Mr Gale deprecated the attempt by Mrs Austin to persuade the Court to take it from her, or Mr Austin, that the £23,920 a year was spent on changeovers and gardeners without any supporting evidence. Mr Gale criticised the declaration by Mr Austin that he was solvent. That was misleading, submitted Mr Gale, because the Court was not told that Mr Austin had creditors chasing him for millions of pounds. In fact it was clear from the evidence that Mr Austin was insolvent at the time of the consent order albeit he might not have considered himself to be so. He became so because of the consent order. Mr Gale stressed that it was important to remember that Mr Austin was left with one plot of land as a result of the consent order which was in negative equity and he had no assets but he had debts of about £8.334 million four months later. The majority of which were incurred by the time of the consent order. In relation to Mr Austin's indication that those debts were disputed this only seemed to apply to the sums due to the liquidator and, even excluding those debts, Mr Austin was insolvent it was submitted.

79. It was submitted that the Court should take into account, and could not possibly ignore, the fact that the creditors were chasing Mr Austin during the negotiation of the consent order and whose claims were hidden from the Court; judgment for £1.2 million was obtained a month after the consent order was approved. Mr Gale made it clear that he was not contending that Mr Austin had made a false declaration of solvency knowing it to be false but rather that he was in fact insolvent at the time, even if he didn't consider himself to be insolvent and it was this which misled the Court.

80. Mr Gale submitted that, once it was decided by the Court that the consent order could be impugned on either or both of the bases of collusion or the Court being misled it was necessary to consider whether there had been a transaction of undervalue. He submitted that the consideration given by Mrs Austin for the divorce settlement embodied in the consent order and the compromise for a claim to ancillary relief was worth significantly less than the value of a consideration provided by Mr Austin. This was particularly so in circumstances where there were no dependents to be taken into account so that equality would have been the approximate starting point for the District Judge.

81. Under the consent order, Mr Austin gave up all claims he may have had to all the properties and land in Mrs Austin's name, agreed to transfer the two properties in his name which had any equity, agreed to pay £6,000 per annum to her, agreed to forego any claim for a pension sharing order and was left with one piece of land in negative equity and negligible other assets. Whereas, by the consent order, Mrs Austin retained the full benefit of Holly Cottage, Barn End Cottage, Honeymoon Cottage and Southford Lane which had a net equity of approximately £400,000 and generated a rental income of £2,000 per month and she stood to receive the two pieces of land that he agreed to transfer to her, agreed to forego any claim to the piece of land retained by Mr Austin which was in negative equity and stood to receive £6,000 per annum while retaining her right to apply for a pension sharing order whereas Mr Austin had given up his corresponding right.

82. Mr Gale made it clear that he did not seek to set aside the consent order wholesale thereby reopening the ancillary relief proceedings and indicated that he sought

£2,500, five sums of £500, by way of periodical payments.

83. Mr Ashraf contended that the £11,000 payment out of the proceeds of sale of 8 Brantwood Drive was not caught by section 339(3)(a) or (c). He submitted that there was an out of Court agreement that the £11,000 was paid to Mrs Austin to fund legal and living expenses. He pointed out that the payment was made because Mr and Mrs Austin had been retaining solicitors and needed to pay bills and in particular a joint legal bill. He submitted that the payment of £11,000 was not a gift, it was entered into on terms to reduce Mrs Austin's liabilities and assist with her living expenses. He submitted that it amounted to an out of Court agreement in respect of maintenance pending suit without the cost of such an application. He pointed out that an out of Court agreement was not devoid of any legal effect and relied on the judgment of Sir Andrew Morritt C in *Hill v. Haines* at paragraph 31. Mr Ashraf submitted that it was immaterial that the Court was not told of the £11,000 payment and what was material was that the District Judge accepted and knew that Mr Austin had agreed to the terms of the consent order in full and final settlement of all claims for a lump sum. He submitted that that lent credibility to his client's account alternatively he submitted that consideration was given by Mrs Austin through the partial compromise of her ancillary relief claim, amounting to maintenance pending suit. He submitted that there could have been a claim for equal division for the proceeds of sale based upon the parties' beneficial entitlement but that Mrs Austin did not in fact seek to take that course of action which led to the conclusion that she did in fact compromise her right to the remaining £18,000 as part of her ancillary relief claims thereby providing greater value.

84. On the question of whether or not there had been collusion, Mr Ashraf submitted that the correspondence from Mrs Austin's divorce solicitors was inappropriate and the letter was ambiguous. But it made it clear that the debts that Mr Austin was being chased for were in dispute and he submitted in his written closing submissions: "the idea that a debt if disputed cannot be deemed as falling due is, it is submitted, such basic a concept that it does not warrant an analysis for authority". I should say immediately that I do not accept that simply because a bankruptcy petition based on a disputed debt is liable to be dismissed, there is any such general principle.

85. Mr Ashraf submitted that at the hearing before District Judge King, Mrs Austin lacked knowledge of the finances of the parties; alternatively he submitted that she provided consideration.

86. Mr Ashraf did not really address concincingly the question of undervalue or the fact that, quite apart from where collusion is established, it is possible for the Court to intervene in circumstances where the Court is actually misled in circumstances falling short of dishonesty by the parties.

87. Mr Ashraf relied upon the passage from *Re Jones* at p.1071 where the Chief Bankruptcy Registrar stated that it would be wrong for the Court to exercise its discretion without being satisfied that there would be a real tangible benefit to the creditors. He pointed out that the Chief Bankruptcy Registrar had rejected the trustee in bankruptcy's case in *Re: Jones* where there was the possibility that there might be a dividend of 14p or even 28p in the pound for creditors, whereas in this case the benefit to creditors would be much less than £1p in the pound if £29,000

was recovered.

88. Mr Austin did not make any detailed points in relation to the issues but did send in an email which indicated that "It has been suggested that the judge was not aware of all of the transactions/assets when he made the consent order. The items that had been handled prior to the consent order therefore had not been listed are as follows:

1. Monies held in the company loan account to my benefit £457,733

2. Proceeds from the sale of properties

(A) Lincoln £50,000 all to me

(B) Brantwood Drive £60,000 - £49,000 to me : £11,000 to Gina

(C) New Church Road £130,000 all me

(D) Tideys Mill £50,000 all to me

(d) Manor Mews £130,000 all to me

(e) Molewood £150,000 all to me

89. He submitted "in light of these figures and Elliott Green witness statement declaring that he believed that 50% split was what he expected I feel that setting aside the consent order would be to my detriment." It did not seem to me that it was appropriate to place reliance on what were new matters of evidence which were sought to be introduced after close of the evidence in emailed submissions, although it was of course known that £11,000 was paid out of the proceeds of the Brantwood Drive property.

90. I drew the attention of the parties to two reported cases: *Trustee in Bankruptcy of Claridge v Claridge and another* [2011] BPIR 1529 and *Hargreaves (Trustee and Bankruptcy of Salt) v Salt* [2011] BPIR 656 in which Section 339 of the Insolvency Act had been applied and invited submissions on them. Mr Gale drew my attention to paragraph 48 in the *Claridge* case and referred to paragraph 2 of the headnote to the *Hargreaves* case where it is indicated that the case held that under section 37 of the 1973 Act the Court had the power to set aside transactions designed to defeat claims for matrimonial relief but that relief would only be granted if it would benefit the claim for ancillary relief and there was no point in making a section 37 order if the effect was simply to re-vest assets in the bankrupt spouse's estate so the that creditors would benefit; and that the tentative evidence in the case suggested that if the transaction was set aside it would be a surplus in the estate and therefore scope in the Court making an order in favour of the wife for ancillary relief .

91. Paragraph 49 of the *Claridge* case was referred to, where change of position on the part of a recipient of a benefit under a transaction at an undervalue was discussed by Mr Justice Sales. I raised with Mr Gale the fact that the periodical payments had been made and were likely to have been spent and that it might be thought that a remedy should be refused. Mr Gale drew my attention to the fact that in the *Claridge* case money had been spent on improvements to a property so that the position could not be restored and there had been a change of position to that extent.

92. It was submitted by Mr Gale that it could not be right that in every single case where somebody has spent money where there had been a transfer at an undervalue to him he would be able to escape any liability to repay the money to the trustee in bankruptcy; that would defeat the purpose of the section if that was the case. He pointed out that Mrs Austin had assets. I raised with Mr Gale that he had submitted that the relevant transaction, in relation to the (prospective) transfers was not the Court order. He submitted that it wasn't profitable to decide whether it was the antecedent agreement that was the relevant transaction or the Court order but, in any event, his position was that the transfers should not be ordered to take place as sought by Mrs Austin. He submitted that it was neither necessary nor convenient to re-open the entire ancillary relief exercise by setting aside the entire order. Mr Gale indicated that in *Re: Jones* the exceptional detriment to the Respondent to the application was such as to persuade Chief Registrar Baister to refuse to make an order under section 339. It was submitted that there was no basis for finding that the case before me was an exceptional case. He submitted that as a matter of authority it was not correct that there had to be a tangible benefit to creditors on each occasion the Court made an order under section 339.

93. In reply Mr Ashraf indicated that he did not have any submissions on the *Claridge* or *Hargreaves* cases but he referred me to paragraph 68 of the *Jones* case. He stressed the use by Chief Registrar Baister of the word "also" where he said "it [the Court] should also be slow to do so in circumstances where there is no concrete evidence before the Court that either result would produce a significant benefit for Mrs Jones's creditors." I pointed out that the decision of Mr Justice Sales spoke of the exceptional sort of case where the Court has a discretion not to make an order, if that was the just result and Justice Sales did not consider the question of what benefit there might be to creditors in practical terms from an order. It was pointed out to me that there was medical evidence to the effect that Mrs Austin had fallen ill, and that she had a liability under the Clinton loan and that there was no up to date figure in respect of her income.

94. Mr Ashraf submitted that his client had spent the money paid to her by way of maintenance and raised his concerns that she might have to pay back about £29,000 or more and there was also to be considered the question of costs.

**Discussion**

95. In *4Eng Limited-v-Roger Harper and Others* Mr Justice Sales held that a particular transfer of a husband's interest in a property had not been carried out as part of an agreed exchange or for any consideration at all and the decision in *Haines* was distinguished. Mr Justice Sales said that the transaction in that case was the satisfaction of a claim for ancillary relief which had been formulated and commenced by wife against the husband in the context of their divorce which was achieved by the order of the Court. He said that the same principles applied– [2010] BPIR 24 at [16] to a compromise agreement between husband and wife in respect of claims for ancillary relief which is then carried into effect by an order of the Court, but that none of those elements were present in the case before him - the wife wasn't proposing to divorce her husband so had no claim and might never have any claim against him let alone one which was fully quantified and endorsed by the Court. In the *Claridge* case Mr Justice Sales applied his decision in circumstances where Mrs Claridge had at no stage at the date of the relevant transaction put forward to Mr

Claridge any claim that he was obliged to pay her anything under the Domestic Proceedings in Magistrates Courts Act 1978.

96. The present case is different in that ancillary relief was sought in Mrs Austin's divorce petition where, in its prayer she had claimed the various forms of ancillary relief. However, it does not necessary follow on that when £11,000 was paid out of proceeds of the sale of the Brentwood Drive property there was a partial compromise of a claim for ancillary relief. I reject the suggestion that it is it possible to retrospectively, *ex post facto,* characterise any transaction as, effectively, maintenance pending suit when the reality is that, I find, the parties were not in fact negotiating about this. Nor am I satisfied that there was a broader umbrella agreement, albeit unenforceable, going beyond the terms of the ancillary relief consent order.

97. I reject Mrs Austin's evidence to the effect that she mentioned this payment of £11,000 to her matrimonial solicitors or her evidence that she agreed a partial compromise of ancillary relief proceedings between her and her husband. As Mrs Austin herself said, 8 Brantwood Drive was a property which had been bought in his sole name with the assistance of a mortgage and she had no involvement with that property save that she was involved in its renovation. Mrs Austin neither asserted a beneficial interest nor a claim under a proprietary estoppel to an interest in Brantwood Drive. As Mr Austin said, it only seemed fair to give her some money on account of her work in decorating the property and the simple decoration of the property would not without more in my judgement found a claim for a beneficial interest in this property which had been repossessed by the mortgagee. On the available evidence I hold that Mrs Austin had no beneficial interest in it. She did have a need for money in order to defray legal fees that she had incurred but Mr Austin's evidence about them both having a joint retainer was vague and not corroborated by documentary evidence. In view of my reservations about his reliability as a witness I do not accept that there was a joint and several retainer I think it more likely that Mrs Austin had a separate retainer. I am satisfied that on the facts no consideration was given by Mrs Austin for the payment of £11,000 to her. The payment constituted a transaction and undervalue with the meaning of Section 339 of the Insolvency Act 1986.

98. As to the transfer to Mrs Austin of Southford Lane and its subsequent sale from which she almost immediately realised a profit of some £18,000 on re-sale, it is distinctly odd that she should have paid £27,000 for a property which was subject to a charge apparently securing the sum of £350,000 or more. I accept, though, that Mr and Mrs Clinton were kind and generous people and permitted Mr and Mrs Austin to raise some money by the sale of the property in effect postponing their entitlement to recover money. The agreement endorsed by the Court was that he did not have any interest in that property and it is necessary to consider whether there was any substantial additional consideration given over and above what Mrs Austin paid for it. I do not think there was. I hold that the transfer of Southford Lane was a transaction at an undervalue to the extent of £18,000.

99. Having considered the matter carefully, I reject Mr Gale's submission that there was collusion of the sort that is capable of founding an application to set aside a consent order made in ancillary relief proceedings. Fairness is the aim of the statutory exercise which the Court conducts when considering an application for financial

provision on divorce. The fact that Mr & Mrs Austin seemed to strive for fairness does not provide evidence of dishonest collusion. The fact that £11,000 was paid to assist Mrs Austin with a pressing need to pay her solicitors is not evidence of collusion designed to prejudice Mr Austin's creditors although there are passages in the letter from Mrs Austin Solicitors which are consistent with an intention to preserve assets for her in circumstances where her husband had creditors insofar as that could be done. The solicitors indicated that it was imperative that there was a Court Order and that does not suggest dishonesty it suggests that it was considered legitimate to obtain a Court order by those solicitors. Nothing said by them indicated that there should be any attempt to deceive the Court as to the extent of Mr Austin's creditors.

100. I agree with Mr Gale that it is abundantly clear that the Court was misled about the properties over which the Clintons had security although that may have been oversight or misunderstanding, and it may have been oversight that there was no mention of the £11,000 which went to discharge Mrs Austin's legal fees.

101. What was more misleading was Mrs Austin's evidence about her rental income to the effect that she didn't get a lot by the time she paid for changeovers and for the chap to cut the grass, in circumstances where she revealed in her IVA proposal which she received £2,000 a month in rental income. Her evidence was incomplete and misleading. However in my judgment the most serious conduct on the part of Mr Austin was that he was prepared to declare that he was solvent when he was plainly insolvent and had creditors chasing him for millions of pounds. I feel sure that Mrs Austin knew that he was being chased for millions of pounds. Mr Austin was left with one plot of land as a result of the consent order which was in negative equity and he had no assets but he had debts of about £8.334 million four months later. The majority of which were incurred by the time of the consent order. Mr Austin says that those debts were disputed, but they were not all disputed and, as indicated above, Mr Ashraf's submission has to be rejected as even if one excludes the indebtedness to the liquidator of the family companies there were significant other debts which were undisputed. I find that Mr Austin was insolvent and dependent on the generosity of others. Alternatively he became insolvent after the consent order was made and by reason of it. I agree with Mr Gale that I do not need to exclude the sum owed to the liquidator and the question is not whether a bankruptcy petition could be permitted to proceed on the basis of particular debts. The evidence establishes that Mr Austin was insolvent. I remind myself that he was ordered to pay £1.2 million by Chief Registrar Baister on 22 November 2010.

102. I remind myself that Mr Gale indicated that his position was not that Mr Austin made a false declaration of insolvency knowing it to be false but rather that in fact he was insolvent at the time even if he did not consider himself to be insolvent. It is this which misled the Court. I hold that there was such serious non-disclosure that the Court is in a position to set aside the consent order although the wholescale setting of the consent order is not actively sought.

103. I agree with Mr Gale's analysis that under the consent order Mr Austin gave up all claims that he might have to all of the properties and land in Mrs Austin's name mentioned in the order and agreed to transfer the two properties still in his name which had any equity. He agreed to pay £6,000 per annum to Mrs Austin and agreed to forbear any claim for a pension sharing order and was left one piece of land in

negative equity and negligible other assets. By way of contrast Mrs Austin retained the full benefit of Holly Cottage, Barn End Cottage, Honeymoon Cottage and Southford Lane which and a net equity of about £400.000 or more and generated a rental income of £2,000 per month. Meanwhile she stood to receive two pieces of land which Mr Austin agreed to transfer and agreed to forego any claims to the piece of land retained by him which was negative equity and of course to receive £6,000 per annum but she did retain her right to apply for a pension sharing order whereas Mr Austin had given up his corresponding right.

104. I find as a fact that the consideration given by Mrs Austin for the divorce settlement agreement as a whole, that is to say the documented compromise which was approved and thereby translated from an unenforceable agreement to one which was enforceable was worth significantly less than the value of consideration provided by Mr Austin who was insolvent and I have no doubt at all that had District Judge King appreciated that Mr Austin had such significant debts he would not have made the order that he did. The antecedent agreement and indeed the order constitute a transaction at undervalue.

105. In considering whether to grant any remedy I hold that it is only in exceptional circumstances that the Court should refuse to grant remedy and insofar as there is a conflict between the decision of Mr Justice Sales in the *Claridge* case and Chief Registrar Baister in the *Jones* case, I have to follow the decision of Mr Justice Sales. I do not think that in each case of this sort the Court is obliged to consider the potential return to creditors. Indeed in the case where trustees in bankruptcy seek to realise jointly owned property the fact that the proceeds of sale represented by the bankrupt estate's share may be swallowed up by costs has not been regarded as a sufficient reason for refusing a sale. There is a public interest in the estates of bankrupts being administered by trustees, who are entitled to be paid.

106. It seems to me that in circumstances where no party submits that the matrimonial consent order should be set aside in whole, the appropriate order to make is to set aside or perhaps simply discharge paragraph one of it. I shall dismiss Mrs Austin's application to enforce the consent order. I will not change paragraph 2 which is the provision by which Mr Austin was obliged to pay periodical payments to Mrs Austin. The claim for periodical payments, I should note, survives a bankruptcy and is comparatively modest in amount and it is not the law that when a person becomes bankrupt every penny of his income subsequently vests automatically in his trustee or that he is left with nothing to support himself or his dependants. In circumstances where Mrs Austin is not wealthy and the trustee has not sought to disable Mr Austin from fulfilling his obligations under that clause by means of an income payments order, this part of the order should stand. Exceptionally, I find that it would be unjust to permit the trustee to recover the £2,500 paid by way of periodical payments which he limited his claim to during the course of the hearing, I find that on balance of probabilities the money was spent on living costs as intended.

## Conclusion

107. I have decided that, apart from granting declaratory relief in relation to the transactions held to be at undervalue, and the setting aside/discharge of paragraph 1 of the consent order, and the dismissal of Mrs Austin's application, the £11,000 paid to Mrs Austin will have to be repaid, and she will also have to pay the sum of

£18,000 to put the Trustee in the position that he would have been in had Southford Lane not been transferred at undervalue and re-sold. In my discretion I will allow interest at 2% per annum on each sum from the date of each of the transfers in addition. I will give judgment for a total of £29,000 and interest. I did not hear any detailed submissions about the rate of interest applicable, and if there any submissions on the rate of interest which should be awarded I will consider them. It seems to me that such interest should be paid in order to put the trustee in the position that he would have been in had the transfer of £11,000 not taken place and had the sale of Southford Lane taken place otherwise at an undervalue. I do not consider that the rate allowed on judgment debts should be allowed since this is much higher than prevailing interest rates.

108. I do not feel that the circumstances are exceptional or that it would be unjust to make such an order even though it is likely that Mrs Austin spent money on solicitors' fees. I will consider making one or more charging orders in favour of the trustee in bankruptcy. I do not overlook Mrs Austin's state of health or her financial circumstances including that significant sums are owed to the Clintons, and *prima facie* the agreement with them would seem to be enforceable to the extent that repayment has not taken place. Although sympathetic to the difficult circumstances which face her, and to the distress which she has been caused by her ex-husband's infidelity, I do not feel that it would be a proper exercise of discretion to refuse to order the repayment of £29,000 in all the circumstances.