Neutral Citation Number: [2022] EWHC 395 (Ch)

Case No: CR-2020-003658

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

IN THE MATTER OF DE WEYER LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 March 2022

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE CURL QC

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Between :

(1) JOHN KELMANSON	**Applicants**
(LIQUIDATOR OF DE WEYER LIMITED)	
(2) DE WEYER LIMITED (IN LIQUIDATION)	
- and -	
(1) PATRICK GALLAGHER	**Respondents**
(2) SONJA DE WEYER	
(ALSO KNOWN AS SONJA BROWN)	

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Andrew Brown (instructed by **HCR Sprecher Grier**) for the **Applicants**
The First Respondent appeared in person
The Second Respondent did not appear

Hearing dates: 3 and 4 February 2022

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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.

COVID-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII, following a trial in person. The date and time for hand-down is deemed to be 1 March 2022 at 10.30am.

Deputy ICC Judge Curl QC:

The application

1. This claim concerns the payment away of the sum of £315,750 by De Weyer Limited ("Company") on 9 February 2017 and the subsequent application of that sum on 10 February 2017. It was commenced by an application notice issued on 7 September 2020 by (i) John Kelmanson, who is the liquidator of the Company; and (ii) the Company itself. The Respondents are Patrick Gallagher and Sonja De Weyer.

2. The Applicants contend that all but £50 of the £315,750 paid away by the Company on 9 February 2017 was used on 10 February 2017 to give preferences within the meaning of s.239 of the Insolvency Act 1986 ("IA 1986") to Mr Gallagher of £105,200 and to Ms De Weyer of £210,500. A restorative order is sought against each of them.

3. An order under s.212 of the IA 1986 is also sought against Mr Gallagher, who was the Company's sole director at the time of the payments in issue, on the basis that he breached his duty to promote the success of the Company in causing the £315,750 to be paid away from the Company at a time when he knew or ought to have known that it was insolvent or likely to become insolvent.

4. Relief in the alternative was formerly sought against Mr Gallagher on the footing that the £105,200 he received from the Company was in whole or part a transaction at an undervalue within the meaning of s.238 of the IA 1986. By the time closing submissions took place, it was common ground that the Respondents had each been creditors for at least the sums they were paid on 10 February 2017 and accordingly this alternative basis fell away.

Adjournment application and mode of trial

5. The trial took place as a hybrid trial on 3 and 4 February 2022. Mr Gallagher appeared in person and represented himself. Ms De Weyer did not appear and was not represented. On the morning of the first day, I dismissed an application to adjourn the trial for reasons given in an *ex tempore* judgment at that time. I do not repeat those reasons in this judgment. However, given the overlap between the grounds on which the adjournment was sought and the grounds on which the Respondents have sought to defend these proceedings, as well the late change in the mode by which the trial took place, I shall record the circumstances in which that application was made and dismissed.

6. At a directions hearing on 4 November 2020, ICC Judge Jones ordered that there should be a remote trial. Mr Gallagher represented himself at that hearing and Ms De Weyer was represented by solicitors and counsel. Judge Jones further ordered the parties to cooperate to ensure that a remote trial could take place and specifically ordered that they cooperate in relation to the preparation of an electronic bundle. There was no direction for hard copy bundles.

7. The court ordered on 15 February 2021 that the trial should take place on 3 and 4 February 2022. That listing accommodated the dates to avoid that the Respondents' solicitors had provided on 2 February 2021.

8. By two slightly different letters dated 24 January 2022 (the first of which was uploaded to the CE-file at 17:24 on 26 January 2022), Ms De Weyer requested an adjournment of the trial and a stay for six to nine months. The first of those letters was accompanied by a 101 page pdf document titled *"EXHIBIT SDW3 FINAL"*. That document appeared to be a draft unissued application to remove Mr Kelmanson as liquidator. A letter from Mr Gallagher dated 26 January 2022 in largely identical terms to Ms De Weyer's letters was uploaded to the CE-file at 17:33 on 26 January 2022.

9. Taking the Respondents' letters together, the alleged grounds on which an adjournment was sought included that (a) the Respondents had not been properly served; (b) the Applicants had made false statements and committed fraud; (c) both Respondents had improperly been sued in a single set of proceedings; (d) the Respondents wished to bring an application to remove Mr Kelmanson as liquidator; (e) Mr Gallagher anticipated technological difficulties in participating in a remote trial and would *"require"* the trial to take place as it would have done prior to the COVID-19 pandemic, i.e. in person; and (f) neither Respondent was able to download the electronic bundle.

10. I considered this correspondence on 27 January 2022. Mindful of the fact that the Respondents were litigants in person and despite the very late stage at which Mr Gallagher had raised an objection to a remote trial, I directed that the trial should take place in person. This was communicated to the parties on the same day. The Applicants' solicitors offered to provide hard copy bundles to the Respondents by emails timed at 12:11 and 12:10 respectively on 27 January 2022.

11. In parallel with this, the correspondence requesting an adjournment was placed before Judge Jones, who caused an email timed at 16:46 on 28 January 2022 to be sent to the Respondents to convey that, absent agreement, any adjournment application could only be considered after hearing from all parties and must be supported by evidence.

12. On the afternoon of 2 February 2022, which was the day before trial, Ms De Weyer provided a further amended iteration of her letter requesting an adjournment. This was accompanied by an 11 page document described as *"Appendix 1 to EXHIBIT SDW3 FINAL"*. That document criticised Mr Kelmanson's third annual report to creditors for the year ended 20 March 2021 ("Third Report"). Among other things, Ms De Weyer accused Mr Kelmanson of *"false accounting"* by reason of his not including the Respondents as creditors for £315,000 in the Third Report.

13. By an email to the court timed at 14:54 on 2 February 2022, Ms De Weyer referred to her correspondence and added that *"due to illness I cannot attend myself but will ask Patrick Gallagher to present this to the court tomorrow if ordered to do so."* The email did not specify the nature of any illness and there

was no medical evidence. Ms De Weyer had not included ill health as a ground for adjournment in her letters to court referred to above and her email did not seek an adjournment on this additional ground.

14. At 9:31 on the first day of trial, the Applicants' solicitors emailed the court to say that Mr Kelmanson had been taken ill overnight and was unable to attend court but was in a position to give evidence by video link from his home. The Applicants' solicitors also forwarded a further email that they had received from Ms De Weyer at 8:51 that morning, repeating that she was unable to attend court.

15. In light of the representations that neither Ms De Weyer nor Mr Kelmanson was able to attend court, and upon the court staff confirming that the court was able to accommodate a hybrid trial even at short notice, I directed at the commencement of the hearing on 3 February 2022 that the trial should take place as a hybrid trial. After a short break while the arrangements were put in place, the trial resumed as a hybrid trial using the Court Video Platform ("CVP"). On resuming, Mr Gallagher was in attendance in person, Mr Kelmanson was available via video link, but Ms De Weyer had not responded to the communications sent to her by the court staff concerning access to the CVP and had not appeared. I again rose for a short period, having directed the Applicants' solicitors to attempt to reach Ms De Weyer and convey to her that arrangements had been put in place to enable her to participate in the trial remotely and without any need for her to attend court.

16. Upon resuming, I was told by the parties that emails sent and telephone calls made to Ms De Weyer during the most recent break had gone unanswered. Given Ms De Weyer's knowledge that the hearing was taking place and her frequent use of email (including earlier that morning), I was satisfied in all the circumstances that Ms De Weyer had chosen not to engage with the court's or the Applicants' attempts to communicate with her. I then proceeded at about midday to hear Mr Gallagher's oral application for an adjournment and treated the correspondence from Ms De Weyer as a written application for an adjournment. As I have said, I refused an adjournment for reasons given in my *ex tempore* judgment of 3 February 2022. The parties opening submissions commenced at about 2.15pm on that day.

Factual background

17. The Company was incorporated on 21 May 2014 and the Respondents each held 50 of its 100 issued shares. They were both appointed as directors at incorporation. The Respondents went into business together based on their shared interest in interiors and design. After a successful career in the army, Mr Gallagher had also acquired experience in sales management. Following a visit by the Respondents to a franchise exhibition at Olympia, the Company entered into a franchise agreement dated 23 July 2014 with a French kitchen manufacturer called Société Fournier ("Fournier"), which traded under the name *"Mobalpa"*. The Company itself traded as *"Mobalpa Chelsea"*.

18. The Respondents identified premises at 2 Park Street, Chelsea Creek ("Premises"). HSBC Bank Plc ("HSBC") funded most of the purchase price

for the Premises and the Respondents provided some funding themselves. An HSBC bank account for the Company was opened on 20 October 2014. Ms De Weyer paid £210,500 to that account on 10 November 2014 and it is common ground that that payment was a loan by Ms De Weyer to the Company. HSBC was granted a debenture over the Company on 18 November 2014. The Company acquired the Premises and HSBC took a first legal charge over it on 21 November 2014. According to the completion statement, HSBC provided £472,500 of the total purchase price of £525,000 plus VAT of £105,000. It appears that the balance of the purchase price of £157,500 was funded from the £210,500 provided by Ms De Weyer. There was some suggestion in Mr Gallagher's written evidence that it was contemplated that the Premises might be acquired by a separate holding company, but in the end this did not happen and the Premises were acquired by the Company.

19. As part of the franchise agreement, Mobalpa also provided an unsecured loan of £100,000 to the Company to help with fit-out costs.

20. Mr Gallagher's evidence was that he advanced £30,000 to the Company prior to the Company's HSBC bank account having been opened. A further £78,000 was then lent by Mr Gallagher by means of sixteen payments paid to the Company's HSBC account between 13 May 2015 and 13 July 2016, varying in value between £500 and £10,000. Although there was no documentary support for the initial advance(s) totalling £30,000, it was ultimately common ground at trial that Mr Gallagher had been a creditor of the Company for at least £105,200 when he was paid that sum on 10 February 2017.

21. In Mr Gallagher's witness statement, he stated that the Company resolved on 17 August 2014 that a charge be entered to secure his loan, which he did not realise had not been registered at Companies House until after the Company had gone into liquidation. During the liquidation, both Respondents maintained that despite having no registered security they had nonetheless held an equitable charge on 10 February 2017 and had accordingly been entitled at that time to be repaid as secured creditors ahead of the unsecured creditors.

22. A copy of a signed board resolution dated 17 August 2014 ("Board Resolution") is in evidence. Given the significance that has been attached to this document by the Respondents, I set out the recitals and the operative parts in full:

> *"WHEREAS:*
>
> *A. Patrick John Stephen Gallagher assigns £105,250 from his 50% stake in 5 Church Road Govilon NP7 9PY. To and on behalf of DE WEYER LTD as a director's loan secured on 2 Park Street, SW6 2FN.*
>
> *B. Sonja De Weyer assigns £210,500 in cash advance as a director's loan to DE WEYER LTD secured on 2 Park Street, SW6 2FN.*
>
> *BE IT RESOLVED THAT:*

> *1. The directors will repay Sonja De Weyer in full immediately from profits after year 1 of trading, if not prudent years 2 and 3 and so forth. Or on the sale of 2 Park Street SW6 2FN*
>
> *2. Patrick John Stephen Gallagher is only to be repaid on full capital of £105,250.00 being paid in to DE WEYER LTD in cash. Or on the sale of 2 Park Street SW6 2FN."* (all sic)

23. I note three points at this stage. Firstly, the Board Resolution predated the Company's acquisition of the Premises on 21 November 2014 by just over three months. Secondly, the Board Resolution predated the lending of (i) the entirety of the £210,500 provided by Ms De Weyer on 20 October 2014; and (ii) at least £78,000 of the sums provided by Mr Gallagher by sixteen payments between May 2015 and July 2016. Thirdly, only the recitals to the Board Resolution make any reference to security and the resolutions themselves refer to the timing of repayment rather than any security.

24. Although Mr Gallagher's witness statement refers to *"the charge"*, no separate charge instrument is in evidence and it has not directly been suggested that there was such a document. A copy of the first page (only) of a form MR01 (the appropriate form to use to register a charge where the charge is created or evidenced by an instrument) dated 17 August 2014 was before the court. Mr Gallagher's evidence was that a form MR01 was prepared but for reasons unknown to him *"the charge"* was never registered. It is not clear, however, what instrument it is suggested was sought to be registered by means of the MR01: neither the Board Resolution nor any of the other documents in evidence are instruments of charge capable of registration in that way.

25. An unsigned loan agreement dated 18 August 2014 (i.e. the day after the Board Resolution) ("Loan Agreement") is also in evidence. The Loan Agreement is expressed to be between Mr Gallagher as lender and *"Sonja De Weyer of De Weyer Ltd"* as borrower. Under it, Mr Gallagher agreed to lend £105,250. The Loan Agreement does not make any reference to any security. Mr Gallagher contended that a signed copy of this document had been provided to Mr Kelmanson, which Mr Kelmanson had withheld, and pursued this allegation in cross-examination. I return to this at §51 below.

26. The Company had only a short trading life. It appears that the Company's relationship with its franchisor, Fournier, quickly deteriorated. A detailed letter from Mr Gallagher to Fournier dated 13 March 2015 is in evidence, which sets out a series of complaints about the latter's performance.

27. By 8 March 2016 at the latest, the Respondents had decided to sell the Premises. On that day Perfectly Legal LLP ("PLL") emailed both Respondents to confirm that it would act for the Company on the proposed sale. Both Respondents signed that firm's sale instruction form on 17 March 2016.

28. On 27 May 2016, the First Respondent wrote letters on behalf of the Company to both HMRC and the London Borough of Hammersmith & Fulham ("LBHF") explaining that the Company had ceased trading due to adverse trading conditions but that the intention was to pay debts in full following

"our refinancing of our premises which is currently taking place." There is nothing in evidence to suggest that any steps were ever taken to refinance (as distinct from sell) the Premises.

29. Fournier threatened proceedings against the Company by a letter dated 15 June 2016. The letter stated that it was clear that the Company had *"permanently closed"* and gave notice that the franchise agreement was terminated by reason of the Company's repudiatory breach of contract.

30. Ms De Weyer resigned as a director of the Company on 14 July 2016, although she was apparently reappointed on 1 August 2016 and resigned again on the following day. Although it is clear from the documents that she remained involved (for instance, she emailed PLL on 21 November 2016 chasing up progress on the sale and asking *"is there anything you need from us?"*), it was not suggested by the Applicants that Ms De Weyer remained a *de facto* or shadow director during any period when she was not a *de jure* director. The relevance of this to the Applicants' claims is addressed at §114 below.

31. On 15 July 2016, Fournier served a statutory demand on the Company for £83,333.35. A winding up petition was presented on 5 September 2016. Mr Gallagher wrote to Hamilton Pratt, the solicitors for Fournier, on 21 September 2016. In that letter, Mr Gallagher explained that if the petition was not proceeded with, the Company would be able to sell the Premises and pay Mobalpa in full. This letter is returned to at §75 to §77 below.

32. Hamilton Pratt wrote to the court on 19 October 2016 to invite the dismissal of the petition because the parties had entered into a settlement agreement. The settlement agreement is dated 18 October 2016 ("Settlement Agreement") and appears to be a professionally-drafted tripartite settlement, to which Fournier, the Company and Mr Gallagher were parties. Among other things, Mr Gallagher was required by the Settlement Agreement to procure the Company to pay £96,065.85 to Fourier. This comprised £83,333.35 principal together with the costs of the winding up proceedings. Mr Gallagher also gave certain warranties and other commitments to Fournier by the Settlement Agreement. These were explored during cross-examination, to which I return at §78 to §82 below.

33. Contracts for the sale of the Premises were exchanged on 6 February 2017. The sale price was £680,000 plus VAT. Of this, £30,000 plus VAT was attributed to chattels. Completion took place on 8 February 2017. On that day, PLL paid HSBC sums to redeem its security and then remitted the net sale proceeds of £333,999.33 to the Company. On 9 February 2017, the Company paid £315,750 to a bank account belonging to a company called De Weyer Design Limited ("Design"). Both Respondents were directors and equal shareholders in Design at that time. Immediately prior to Design's receipt of £315,750 on 9 February 2017, its bank account had a credit balance of £14.42. On 10 February 2017, Design paid £105,200 (not £105,250) to Mr Gallagher and £210,500 to Ms De Weyer.

34. The Company commenced creditors' voluntary liquidation on 21 March 2017. Paragraph 3.16 of the report of the same date made under s.98 of the IA 1986 to members and creditors ("s.98 Report") recorded under the heading *"Directors' History"* that:

> *"HSBC Bank Plc were discharged in full in accordance with their charge, which equated to £464,000 in respect of direct loan and overdraft. The balance of £315,000 was paid to De Weyer Design Limited in accordance with their secured charge. Pat Gallagher and Sonja De Weyer are the controlling parties. There were no surplus funds available to pay unsecured creditors."*

35. There was no suggestion in the s.98 Report that any of the sale proceeds had ended up with the Respondents themselves (although that is what had in fact happened) or that they were or had been secured creditors. Contrary to what is said in the s.98 Report, it is not suggested in these proceedings that Design had any security or was a creditor of the Company at all.

36. Mr Gallagher issued a claim against the Company under Part 8 of the CPR on 13 September 2019 seeking a declaration that he had been granted an equitable charge by the Company on 17 August 2017 (i.e. the date of the Board Resolution) to secure repayment of £105,250. Mr Gallagher also sought an order extending time for registration of that charge under s.859 of the Companies Act 2006 ("CA 2006"). The claim came before District Judge Hart on 28 October 2019 and was adjourned with a direction for Mr Gallagher to file further evidence. It was dismissed at a hearing on 20 January 2020, which Mr Gallagher did not attend. The circumstances of Mr Gallagher's non-attendance were addressed in cross-examination and are returned to at §44 below.

37. A detailed note of District Judge Hart's judgment of 20 January 2020, taken by the Applicants' solicitors, was in evidence. The note records that District Judge Hart considered the evidence of the Board Resolution, the Loan Agreement and the first page of the MR01 form. District Judge Hart found that the evidence for the equitable charge rested entirely on the Board Resolution and was *"very thin"*. The judge refused to make any declaration that Mr Gallagher had an equitable charge and dismissed the application to extend time. By his witness statement in these proceedings, Mr Gallagher purported to maintain his argument that he had held an equitable charge when he was paid £105,200 on 10 February 2017, although the Applicants submitted that this argument was not open to him as the point was *res judicata* as a consequence of District Judge Hart's judgment.

38. On 1 July 2021, the Applicants' solicitor completed a form RX1 and sought a restriction over Ms De Weyer's primary residence, having become aware that it was on the market. That RX1 contained some inaccuracies, which the Applicants have described as typographical errors. In the space for the Applicants to explain how their interest arose, it was wrongly stated that the Premises were sold on 8 February 2019 (in fact it was 2017) and that the Premises were sold for £333,999.33 (in fact £333,999.33 was the net proceeds of sale, not the selling price). The Respondents have expressed considerable

dissatisfaction over the RX1 and each of them has made serious allegations against Mr Kelmanson and his solicitors arising from the inaccuracies it contains. These are addressed from §57 below.

The witnesses

39. Mr Kelmanson made two witness statements, the first (filed in support of the application notice) dated 3 September 2020 and the second (in reply to the Respondents' evidence) dated 5 March 2021. The Respondents each made witness statements dated 5 February 2021, accompanied by exhibits. As Ms De Weyer did not attend for cross-examination, as required by Judge Jones' order of 4 November 2020, her witness statement was not admitted. I nonetheless read it *de bene esse*, as well as the other late material received from Ms De Weyer in the days before trial referred to at the beginning of this judgment. Ms De Weyer's witness statement raised essentially the same points by way of defence as did Mr Gallagher's and so those points have in any event been considered at trial. The other material comprised a draft application to remove Mr Kelmanson as liquidator, which is not a matter that is before me today.

Mr Kelmanson

40. As mentioned earlier, Mr Kelmanson was unwell on the first day of trial and gave evidence that afternoon via CVP from his home. Mr Kelmanson was cross-examined by Mr Gallagher. After the first period of questioning by Mr Gallagher, and given his position as a litigant in person, I rose for a short time to enable Mr Gallagher to gather his thoughts and consider whether there were any further questions he would like to put to Mr Kelmanson. Mr Gallagher put further questions when the court resumed after that break. At the conclusion of the second period of Mr Gallagher's questioning, I asked Mr Kelmanson some questions. Mr Gallagher then asked a number of further questions arising from those matters.

41. Mr Kelmanson dealt in a concise and focused way with the questions that were put to him. Given the nature of some of the allegations levelled against him, Mr Kelmanson was commendably measured in his responses. I accept Mr Kelmanson's evidence.

Mr Gallagher

42. Mr Gallagher gave evidence at the start of the second day of the trial. I did not find him to be a satisfactory witness. Two examples, one near the start and one near the end of his evidence, demonstrated to me that his unsupported recollection cannot be relied upon.

43. The first example arose shortly after Mr Gallagher entered the witness box. Having been sworn, and on being shown what had been understood to be his exhibit PJG1 in the trial bundle, Mr Gallagher disavowed that document. Mr Gallagher said that PJG1 was not his evidence and that bank statements had been *"withheld"* from it. He was adamant that he would never have included an incomplete set of bank statements in his evidence. I queried Mr Gallagher's

position, observing that exhibit PJG1 was a 322 page document that had been internally paginated sequentially *"1 of 322"*, *"2 of 322"*, and so on with no pages obviously missing, up to *"322 of 322"*. The integrity of the pagination tended to indicate that PJG1 was a single entity that someone had prepared, labelled with Mr Gallagher's initials (*"PJG"*), and filed on his behalf. On its face it appeared to be the same PJG1 that Mr Gallagher had referred to in his witness statement. Mr Gallagher maintained his position that the evidence was not his. Mr Brown submitted on instructions that Mr Gallagher's witness statement and exhibit PJG1 had been CE-filed at 16:21 on 8 February 2021. I referred to the CE-file, which confirmed what Mr Brown had said and also showed that the statement and exhibit had been filed as a single 332-page attachment (i.e. Mr Gallagher's witness statement of 10 pages and exhibit of 322 pages), which reflected the documents in the bundle. A note had been entered on the CE-file system at the time of filing in the *"comments"* box offering an explanation for failing to meet the deadline of 5 February 2021. Based on its form and content, it appeared to me that the author of the note was probably Mr Gallagher. I read the note aloud to Mr Gallagher and he confirmed that he had written it and went on to confirm that he had been responsible for filing the documents to which it related, including PJG1. This was not an auspicious start to Mr Gallagher's evidence. The essential structure of this episode (i.e. a firm adherence to a particular position, combined with an accusation that someone else had done something wrong, which did not survive contact with the contemporaneous record) was to prove representative of Mr Gallagher's evidence generally.

44. The second example occurred towards the end of his time in the witness box. When asked about the Part 8 claim that had been determined in his absence by DJ Hart on 20 January 2021, Mr Gallagher initially said that the hearing had gone ahead without his knowledge and that he had thought that his former solicitor, upon being disinstructed, had *"cancelled"* the claim. This reflected what he had said in his witness statement. He added orally that he *"came to this court and put in a thing to say I didn't want it to go through."* But when shown a letter apparently written by him and dated 17 January 2020 requesting an adjournment until March on health grounds, he immediately accepted that he had known when he wrote the letter that the hearing was going ahead and that he could not afford for it to go ahead. Mr Gallagher offered no explanation for his change of position and did not appear to recognise that a change had been made.

45. My overall assessment of Mr Gallagher is that he tended to speak without thinking things through and did not attach a great deal of importance to ensuring that what he said was factually accurate. Mr Gallagher persistently interrupted questions without waiting to hear what was being asked and often responded without properly addressing the question. This was combined with a readiness to criticise others and to impute malign intent to them. I was left with the impression that the serious accusations made by Mr Gallagher were lightly made by him and that he was generally cavalier about this. Overall, I do not consider that I am able to accept Mr Gallagher's evidence save where it is supported by contemporaneous documentary evidence or where it is inherently probable.

The evidence

The Respondents' allegations

46. Both Respondents have made allegations in writing against Mr Kelmanson and his solicitors. Mr Gallagher repeated a number of them at trial. Unpacking these allegations, which were sometimes expressed in loose terms, has taken some time and has regrettably made this judgment longer than it would have been had it been confined only to matters of direct relevance to the action being tried. I provide full reasons on these points because of their nature and to ensure that the Respondents, who are unrepresented, understand why submissions on which they placed heavy emphasis have not afforded them a defence to the proceedings. The time spent dealing with these points should not be taken to imply that there was any merit in them.

47. The main points pursued by Mr Gallagher at trial fall into four groups: firstly, that documents have been *"withheld"* by Mr Kelmanson and his solicitors; secondly, the contents of the RX1; thirdly, the treatment of the Respondents in the Third Report; and, fourthly, the destination of funds left in the Company at liquidation and any future recoveries.

48. I take first the allegation that Mr Kelmanson and his solicitors have withheld material from the Respondents and the court. It appears that when the Respondents refer to evidence being *"withheld"*, they do not deploy that word to mean that something has been suppressed or kept back. Rather, they use it where the Applicants have not agreed with the Respondents' view of particular documents, whether as to relevance or meaning. This is evident from an exchange of emails in the weeks before trial. On 18 January 2022, Ms De Weyer emailed the Applicants' solicitors to say that she believed they had withheld evidence and reserved the right to inform the court of this. Mr Gallagher sent an email to similar effect two minutes later. The Applicants' solicitors replied the next day to offer both Respondents further copies of any evidence they required. Both Respondents sent further emails later that day specifying six documents or categories of document.

49. Of these six categories, three were on any view already in evidence. These were (i) the Board Resolution; (ii) the heads of terms for the sale of the Premises (dated 8 March 2016 and showing the fallen-through sale price of £900,000); and (iii) the completion statement from PLL. The Board Resolution and the completion statement had been part of Mr Kelmanson's first exhibit at the commencement of the proceedings. Notably, all three of these documents had been exhibited to PJG1 by Mr Gallagher himself. In my judgment, on no view were these documents withheld.

50. Another category of document identified in the Respondents' emails of 18 January 2022 was described by them as *"board meeting notes and any agreement on John Kelmanson LLP* [sic] *appointment as Liquidator"*. These documents were not in evidence at the date of the Respondents' emails of 18 January 2022, which may have been because the appointment of Mr Kelmanson as liquidator was not an issue in the proceedings. In any case, the relevant resolutions causing the Company to commence CVL had been made

and signed by Mr Gallagher himself as the Company's sole director, in the usual way. Moreover, these were public documents freely available at Companies House. Again, these documents were not withheld in my judgment.

51. Further purportedly *"withheld"* documents identified by the Respondents were described as *"Copy of De Weyer Ltd Directors Sonja Brown and Patrick Gallagher loans to the company totalling £315,500.00"*. As to these, neither side has suggested that the loan from Ms De Weyer was reduced to writing, although the payment by Ms De Weyer to the Company of £210,500 on 10 November 2014 is supported by a bank statement, which was exhibited to Mr Kelmanson's first statement. In relation to Mr Gallagher, the Loan Agreement (which is unsigned) is in evidence and was exhibited to Mr Kelmanson's first statement. Mr Gallagher contended during the trial that he had provided a signed copy of this document to Mr Kelmanson, which he said had been *"withheld"*. Mr Kelmanson denied this. In my judgment, nothing turns on the presence or absence of a signed copy of the Loan Agreement, given that Mr Brown did not challenge the agreement it embodied, whether by reason of the Loan Agreement being unsigned or for any other reason. Rather, Mr Brown put to Mr Gallagher that the Loan Agreement did not provide for Mr Gallagher to enjoy any security over the assets of the Company, a point that Mr Gallagher accepted.

52. Finally, the Respondents identified *"All Bank statements from HSBC – De Weyer Ltd account"* as a class of *"withheld"* documents. Allegations that bank statements have been *"withheld"* or *"ignore*[d]*"* were made a number of times by Mr Gallagher in his witness statement and repeated by him at trial. Mr Kelmanson exhibited only two pages from the Company's HSBC bank statements: firstly, the page showing the payment in from Ms De Weyer of £210,500 on 10 November 2015; and, secondly, the page showing the payment in of the net sale proceeds from the Premises of £333,999.33 on 8 February 2017 and the payment out to Design of £315,750 on 9 February 2017. Further, Mr Kelmanson also exhibited a single page from Design's Santander bank statement showing the payment in of £315,750 on 9 February 2017 and the payments out to the Respondents in the respective sums of £105,200 and £210,500 on 10 February 2017.

53. Mr Gallagher exhibited to PJG1 further extracts from the Company's HSBC bank statements to support his contention that he lent the Company money by a series of payments between May 2015 and July 2016. Mr Gallagher was aggrieved that Mr Kelmanson denied in his first witness statement having seen any evidence to support the view that Mr Gallagher was a creditor of the Company at the relevant time, which Mr Gallagher contended was contradicted by the bank statements. Mr Kelmanson explained in his second witness statement that he had been focused on Mr Gallagher's allegation that he had been a secured creditor from 17 August 2014 onwards and had not considered that sixteen payments commencing many months later were said to be related to that allegation of secured lending.

54. During his oral evidence, Mr Gallagher continued to maintain that bank statements had been *"withheld"* by Mr Kelmanson. Mr Gallagher contended

that further statements that were not before the court would show various additional loans having been made to the Company by Ms De Weyer. His position was that Ms De Weyer in fact lent the Company a total of £254,000, which included, but was not limited to, the £210,500 that is currently in issue in these proceedings. Given the weight that had been placed on the alleged *"withheld"* bank statements in writing by both Respondents and orally by Mr Gallagher, I sought to establish whether it was submitted by Mr Gallagher that a complete run of bank statements would show anything that Mr Gallagher considered to be relevant to his defence other than the fact that Ms De Weyer had lent £254,000 to the Company and had been repaid only £210,500. After some back-and-forth, Mr Gallagher confirmed that they would not. Accordingly, the significance of the bank statement point is limited to the question of whether Ms De Weyer was a creditor for £210,500 or some greater amount on 10 February 2017.

55. In my judgment, this point has no bearing on anything I have to decide in these proceedings. Firstly, it cannot make any difference either to the claim to a restorative order against Ms De Weyer for her having received a preference of £210,500, or to the claim against Mr Gallagher as a director for having caused the Company to make that payment, that Ms De Weyer may have been a creditor for some greater sum than £210,500 at the relevant time. As noted above, it was common ground at trial that Ms De Weyer was a creditor of the Company in relation to the sum of £210,500 that she received on 10 February 2017. I did not detect any suggestion by the Applicants that they denied that Ms De Weyer may be a creditor of the Company for some further sum, but rather that the Applicants took the view (correctly in my judgment) that the issue was irrelevant for present purposes.

56. Secondly, it remains unclear what Mr Gallagher's complaint really amounts to when he accuses Mr Kelmanson of having *"withheld"* certain of the Company's HSBC bank statements. This is because Mr Gallagher accepted that he has at all material times had access himself to a complete run of the Company's bank statements, as is consistent with the fact that he had exhibited some of them in PJG1. In my judgment none of the Company's bank statements have been withheld, and Mr Gallagher has had access to them all and has been able to exhibit (or not exhibit) such pages from them as he has considered appropriate.

57. Turning now to the RX1, Mr Gallagher put to Mr Kelmanson that in signing it both Mr Kelmanson and his solicitor had engaged in a *"wholly illegal action"*, that was *"based falsehoods"*, and was *"a totally fictious claim"*. Mr Gallagher suggested that Mr Kelmanson and his solicitor might face imprisonment. Mr Kelmanson readily conceded that there had been what he described as *"a cock up"* in the wording of the RX1 but firmly denied any allegation of fraud. In answer to this allegation, Mr Kelmanson said *"I can't see where the fraud is"*, making the obvious point that the particular errors in the RX1 (which I identified at §38 above) were not ones that were capable of putting the Applicants at any advantage compared with the position had the errors not been made.

58. Mr Kelmanson disputed Mr Gallagher's suggestion that the RX1 had been signed both by Mr Kelmanson and by his solicitor. To my mind, the mark on the RX1 next to the solicitor's signature that Mr Gallagher suggested was the letters *"JK"* is a hastily-rendered asterisk and not Mr Kelmanson's signature or initials. Similar handwritten asterisks appear elsewhere on the copy of the RX1 that is in the bundle and these appear to have been made by someone seeking to highlight criticisms of that document, rather than being anything to do with its execution by the Applicants.

59. On the RX1 issue, I have no hesitation in rejecting the allegations made by the Respondents. Although they should be avoided and are regrettable when they happen, the errors in the RX1 are of a kind that may sometimes be made when preparing documents. Further, they self-evidently do not put the Applicants at any advantage. If they do anything, they put the Applicants at a disadvantage, in that the error over the date turns the relevant sentence into nonsense: as drafted, the sentence suggests that the Property was sold after its proceeds of sale were dissipated. There is no evidence whatsoever to support the allegations of fraud made by both Respondents in relation to the preparation of the RX1.

60. I turn now to the criticisms of Mr Kelmanson's treatment of the Respondents in the Third Report. Mr Gallagher asked Mr Kelmanson about the reason for the Respondents' non-inclusion in the Third Report as creditors for the sums they were repaid on 10 February 2017. It was put to Mr Kelmanson that statements had been made to the Company's creditors by the Third Report that were inconsistent with those that had been made to the court in these proceedings. Mr Gallagher based this suggestion on a comparison of the total figure for unsecured creditors given in the Third Report of £378,563.89 with the figure for unsecured creditors at the date of the sale of the Premises in Mr Brown's skeleton argument of £676,852.

61. In answer to this, Mr Kelmanson pointed out that the figure in the Third Report was based on the figures supplied by Mr Gallagher himself in the statement of affairs dated 21 March 2017. That document bears Mr Gallagher's signature at the foot of the list of creditors totalling £378,563.89. Mr Kelmanson went on to explain that the difference between what was said in the Third Report and the submissions that had been made about the Company's creditor position at the date of the sale of the Premises was largely accounted for by the fact that, following the sale of the Premises on 8 February 2017, the Respondents had both been repaid on 10 February 2017. As such, they were not creditors at the date of the Third Report. Mr Kelmanson put it like this:

> *"If the Company was put back in the state it should have been, i.e. reversing the preferences, then indeed Mr Gallagher and Ms De Weyer would still be creditors, and that would increase the creditor claims, and they would participate in any distribution on a pari passu basis…"*

62. Mr Gallagher suggested to Mr Kelmanson that if the Respondents were to repay £315,700 as a consequence of the instant claim then *"it would mean we'd have paid £630,000"*. Mr Kelmanson rejected this and described the

position as being *"the same £315,000 going round and round: it went in by you, was withdrawn by you, and we want you to put it back."* By this, Mr Kelmanson meant that if the preference claim were to be successful, and the Respondents satisfied a restorative order for £315,700, the net position would be that they had paid £315,700 to the Company and would once again be creditors for that sum.

63. In my judgment, Mr Kelmanson's analysis is correct. Regardless of the outcome to the current proceedings, the legal position is that the Respondents were creditors of the Company for a total of £315,700 until they were repaid on 10 February 2017. At that point, the debts owed to them by the Company for that sum were satisfied, subject only to a future insolvency officeholder's right to apply (as Mr Kelmanson now applies) to the court for a restorative order. Those transactions are secure until they are impugned and any restorative order under s.239 of the IA 1986 is prospective in nature only: see *Rubin v Eurofinance SA* [2013] 1 AC 236, per Lord Collins, at [94]; and *Goode on Principles of Corporate Insolvency Law*, 5th edn ("*Goode*"), at 13-02.

64. Accordingly, the Respondents were not creditors of the Company for £315,700 after they were repaid on 10 February 2017. In fact, as things stand, they are debtors of the estate as a consequence of Mr Kelmanson's claim under s.239 of the IA 1986: *Hellard v Chadwick & Tehrani* [2014] BPIR 1234, [21]-[28]. That debt is contingent on the outcome to the instant proceedings. If the claims are successful and the Respondents pay the judgment, then they will once again become creditors and will be entitled to prove for their debt in the liquidation. Again, in my judgment, there is nothing in the Respondents' criticism of the liquidators on this point.

65. Finally, Mr Gallagher made allegations concerning the application by Mr Kelmanson of the assets of the liquidation. The Third Report states that Mr Kelmanson has drawn remuneration of £11,200 to date, which Mr Gallagher suggested was more than 68 per cent of the funds of £22,000 that he and Ms De Weyer had left in the Company's bank account for the creditors. Mr Gallagher put it to Mr Kelmanson that he had *"taken nearly all of that yourself"*. Mr Kelmanson answered that any money withdrawn had been in accordance with his mandate, which had been scrupulously adhered to. As to the current proceedings, Mr Gallagher also put to Mr Kelmanson that *"the only person who will benefit will be you"* should any money be recovered in the current proceedings. Mr Kelmanson answered that after discharge of any fees that were owed, *"anything else will go to proven creditors in accordance with their rankings"* and described Mr Gallagher's allegation as *"nonsense"*. On the basis of the evidence before me, I agree with Mr Kelmanson on this point. There is simply nothing before the court to support the criticisms that have been made of Mr Kelmanson in relation to his remuneration or the wider costs of the liquidation and accordingly I reject them.

Security for the debts

66. Prior to the trial, both Respondents sought to defend these proceedings primarily on the basis that they had been secured creditors on 10 February

2017 and accordingly entitled to be repaid before the unsecured creditors. As noted above, Mr Gallagher contended in his witness statement that by the Board Resolution the Company *"resolved that a charge be entered to secure my loan"* and said that it was only upon the investigations undertaken by Mr Kelmanson after the commencement of the liquidation that it came to light that the Respondents' security was not registered at Companies House. During the liquidation and in the period leading up to the trial, the Respondents contended that although their security was not registered, they should nonetheless be regarded as having had an equitable charge at the time they were repaid on 10 February 2017.

67. Mr Gallagher's position on security changed during the course of the trial. During Mr Gallagher's cross-examination of Mr Kelmanson, Mr Gallagher confirmed that he did not make any challenge to the accuracy of the Applicants' note of the judgment of District Judge Hart referred to at §37 above. Mr Gallagher added that his defence was no longer based on the Respondents having been secured creditors and he accepted that they had been unsecured creditors. Shortly before the court rose at the end of the first day of the trial, Mr Gallagher submitted the following:

> *"that* [security] *was something we looked at and would have liked to have happened but it didn't occur. We are unsecured creditors, but the company policy we put in place as directors, the company policy was that when those premises were realised, that we as directors who had put money in, as admitted by John Kelmanson, once we put that money in, it was going to be paid on profits, but because of the French company's* [Fournier's] *problems, it was paid out on the sale of the property, in accordance with the company policy that was put together by ourselves."*

68. It appeared from this that any argument based on security was no longer maintained by Mr Gallagher and had been replaced by a submission that the Respondents caused the Company to adopt a *"company policy"* on 14 August 2014 to the effect that they would be paid when the Premises were sold.

69. During the early stages of his time in the witness box on the second day of trial, Mr Gallagher's evidence was consistent with this. The emphasis was on the *"company policy"*, as a thing distinct from security. When asked about the Board Resolution, Mr Gallagher said that *"the board put in place a policy for remuneration of the directors, based on the sale of 2 Park Steet."* I do not attach decisive significance to Mr Gallagher's use, as a layperson, of the word *"remuneration"*, which would ordinarily be antithetical to the money in question being a loan, whether secured or unsecured. It is nonetheless some indication of the imprecision with which the Respondents understood and documented their dealings. When Mr Brown put to Mr Gallagher that the Loan Agreement did not provide for Mr Gallagher to enjoy any security over the assets of the Company. Mr Gallagher agreed and said:

> *"Security wasn't necessary for this. It wasn't put forward as it should have been put forward. So we are not claiming security on it. The board resolution specifically said the sale of the premises."*

70. As Mr Gallagher's evidence progressed, however, it became apparent that his position was less straightforward than simply abandoning the security point altogether. By the end of his time in the witness box, Mr Gallagher expressed his position in this way:

> *"We believed we were secured creditors. Not legally secured creditors, but we believed we were."*

71. For reasons that I explain when considering the content of s.239 of the IA 1986 at §117 below, it may be relevant to the influence or otherwise of the statutory desire to prefer if Mr Gallagher *believed* that the Respondents were secured creditors with registered charges on 10 February 2017, even if he now accepts that they were not. Accordingly, it is necessary to consider the evidence going to Mr Gallagher's belief in relation to the security in some detail, even if the existence or non-existence of the security as a matter of fact is no longer a matter in issue.

72. Mr Brown first put to Mr Gallagher that the Board Resolution and the Loan Agreement both pre-dated by some months the acquisition of the Premises by the Company. Mr Gallagher agreed that he did not tell HSBC when causing the Company to enter into the debenture dated 18 November 2014 or legal charge over the Property dated 21 November 2014 that he believed that the Respondents had security over the Property. He also agreed that there was no mention of such security in any of the HSBC documents. These features are inconsistent with any belief on either Respondents' part on 21 November 2014 that the Respondents were secured creditors at that time.

73. Next Mr Brown put to Mr Gallagher a sale instruction form dated 17 March 2016 by which the Respondents had instructed PLL to act on the proposed sale of the Property. Ms De Weyer was identified as *"FIRST SELLER"* and Mr Gallagher as *"SECOND SELLER"*. On the third page of the form, under the heading *"MONEY MATTERS"*, the Respondents entered in the appropriate place details of the HSBC charge over the Property. Underneath that, the rubric *"ANY Second Charges or other Mortgage Accounts/further advances"* appears. The space to enter details of such security is left blank. Mr Brown put to Mr Gallagher that he had signed the form (as had Ms De Weyer) on the page where these matters appeared. Mr Gallagher pointed out that the form had been completed to show the *"Agreed sale price"* as being £900,000 and added that a sale at that price had fallen through because of the EU referendum. He said that the completed form *"related to six months previous"* and was *"not related to the sale of the Property in any way shape or form"*. Mr Brown suggested to Mr Gallagher that the reason he had not identified any other charges on the form was because he believed and understood that there were no charges other than the HSBC charge. Mr Gallagher responded that *"there may be another form with the security on there. This does not relate to the sale of the premises. It does relate to six months prior, it fell through because of the EU result."*

74. The train of reasoning adopted by Mr Gallagher on this aspect was not entirely clear. To the extent that Mr Gallagher sought to suggest that the form is irrelevant to the question of whether or not he believed that the Respondents

were secured creditors of the Company because a sale at a different price was in contemplation when the form was filled in on 17 March 2016 from that which eventuated on 8 February 2017, then I reject that suggestion. Irrespective of the anticipated price or any other particulars of any proposed sale, as well as whether or not any particular proposed sale completed, the true answer to the question about the existence of any second charges at the date it was asked is unaffected. In my judgment, the content of the PLL form is inconsistent with any belief on the part of either Respondent that there was any security other than the HSBC charge over the Property on 17 March 2016.

75. Mr Gallagher agreed that the Company was in dispute with Fournier by September 2016. He was shown an exchange of letters between Hamilton Pratt (who were Fournier's solicitors) and the Company. By a letter dated 14 September 2016, Hamilton Pratt told the Company that process servers had the previous day effected service of a winding up petition by affixing it to the main door. Mr Brown took Mr Gallagher to a letter he had written in response dated 21 September 2016. This letter included the following:

> *"We have stated that all our unsecured creditors including Mobalpa will be paid what is due to them if we can sell or lease the premises at market value. If your current action continues the bank may liquidate as a vacant premises and only the secured creditors will realize their investment."*

76. Mr Brown put the following passage from the letter of 21 September 2016 to Mr Gallagher:

> *"Our advisors have indicated that due to current market conditions the Directors loans of £69,500.00 Gallagher and £266,500 De Weyer as well as the other unsecured debt including Mobalpa can be repaid in full on achieving a sale or rental in the coming months."*

77. Mr Brown suggested that in referring to the directors' loans immediately prior to the reference to *"other unsecured debt"*, Mr Gallagher included the debts owed to the Respondents among the Company's unsecured creditors. Mr Gallagher's answer was not clear. When asked whether he agreed or disagreed with the proposition that, by that sentence, Mr Gallagher was describing himself and Ms De Weyer to Hamilton Pratt as unsecured creditors, Mr Gallagher confirmed that he agreed with it. In my judgment that is the obvious meaning of the sentence as it would have been construed by a reader in the position of Fournier. Accordingly, the letter points away from any belief on Mr Gallagher's part that the Respondents were secured on 21 September 2016.

78. As noted above, the Company entered into the Settlement Deed on 18 October 2016, to which Fournier and Mr Gallagher were also parties. Mr Gallagher agreed that he had signed the Settlement Deed. Mr Brown asked Mr Gallagher to read out clause 2.1, which provides as follows:

> *"2.1 The Director warrants and represents that the list of secured creditors of the Company set out in Schedule 1 is at the date of this Deed full, complete and accurate."*

79. Mr Gallagher agreed that Schedule 1 to the Settlement Deed did not include either of the Respondents among the secured creditors. He was then shown Schedule 2, which provided for an *"Outstanding Sum"* of £96,065.85, which was broken down between principal owed to Fournier of £83,333.35 and various costs associated with Fournier's winding up petition. Mr Brown put Schedule 3 to Mr Gallagher, which provided that Mr Gallagher would procure that the Company would pay Fournier the Outstanding Sum *"on receipt of more than 50% of the proceeds of sale"* of the Premises. Despite these apparently clear terms, Mr Gallagher contended that the Settlement Deed concerned proceedings that had been *"withdrawn"* and was no longer binding. He said:

> *"What you're bringing out here is paperwork based on a case that they lost. This was part of the evidence."*

80. Mr Brown took Mr Gallagher to a Tomlin Order dated 2 January 2018 that brought to an end an application dated 2 June 2017 by Mr Gallagher to set aside a statutory demand dated 18 May 2017 served on him in his personal capacity by Fournier. By that order, the statutory demand was set aside by consent and Fournier agreed to pay Mr Gallagher's costs in the sum of £7,000. Mr Brown put to Mr Gallagher that when he referred to the withdrawal of court proceedings by Hamilton Pratt, he was referring to this Tomlin Order, not to the Settlement Deed. Mr Gallagher maintained that the Settlement Deed was *"all withdrawn"* and was not binding.

81. I do not accept Mr Gallagher's evidence that the Settlement Deed was *"withdrawn"* or otherwise ceased to be binding in some way. Other than Mr Gallagher's assertion, there is no evidence before the court to support that contention. I consider it far more likely that Mr Gallagher has in mind the Tomlin Order of 2 January 2018 when he talks about things being *"withdrawn"* or *"set aside"*.

82. But even if the Settlement Agreement had ceased to be binding as Mr Gallagher suggests, in relying on this point to explain away the omission from the Settlement Deed of any mention of any security in favour of the Respondents, Mr Gallagher makes the same error of reasoning as he did in relation to the PLL sale instruction form. Irrespective of whether or not the Settlement Deed remained effective, the true extent of the Company's secured debt at the point at which the Settlement Deed was executed by Mr Gallagher remained unaffected and any subsequent *"withdrawal"* of the Settlement Deed would make no difference to that. In my judgment, the Settlement Deed is firmly inconsistent with any belief on Mr Gallagher's part that either of the Respondents held any security over the Property on 18 October 2016.

83. When shown the Company's statement of affairs prepared when it commenced CVL on 21 March 2017, Mr Gallagher denied responsibility for the information it contained, despite his being the Company's sole director at that time. He was shown paragraph 3.16 of the s.98 Report (set out at §34 above), which stated that Design had been repaid £315,000 under its charge from the sale of the Premises and did not suggest that the Respondents had been secured creditors or that they had received that sum.

84. Mr Gallagher described the content of paragraph 3.16 as a typographical error and said it was intended to refer to the Respondents rather than Design. This was a softening of the position he had taken in his written evidence, where he had alleged that the *"assertion"* that Design had claimed to be a creditor was *"wholly fabricated"* by an unspecified party. Mr Gallagher rejected Mr Brown's suggestion that paragraph 3.16 had been included because Mr Gallagher did not believe on 17 March 2017 that he or Ms De Weyer had been secured creditors. Mr Gallagher reiterated his contention that the Respondents had believed they were secured creditors at that time, although he now accepted that they had not been. The absence from the s.98 Report of any mention of the Respondents having been secured creditors is a further pointer away from Mr Gallagher having held any belief that they were.

Company's cessation of trading

85. According to the Company's abbreviated accounts for the period 21 May 2014 to 31 March 2015 (which appear to be the only accounts that were ever filed at Companies House) the Company had a balance sheet deficiency of £80,608 on 31 March 2015. The Company's only assets were the Premises valued at £688,514, debtors of £13,194, and cash of £3,168. Although the Company's unfiled full accounts for the same period show positive shareholders' funds of £129,892, this is solely attributable to the sum of £210,500 (i.e. the amount advanced by Ms De Weyer on 20 October 2014) being recorded under capital and reserves in the full accounts; the abbreviated accounts record that sum under creditors falling due within one year. This difference in treatment of the sums advanced by Ms De Weyer accounts for the difference between (£80,608) and £129,892 across the two documents. It was common ground at trial that the £210,500 fell to be treated as a debt owed by the Company to Ms De Weyer on 31 March 2015 and, accordingly, its treatment as a liability in the abbreviated accounts was the correct treatment. That means that the balance sheet deficiency shown in the abbreviated accounts of £80,608 was *prima facie* correct.

86. Mr Gallagher was shown the Company's VAT returns for the quarters April to June 2016, July to September 2016 and October to December 2016, all of which showed no trading activity during those periods. It was put to Mr Gallagher that the Company ceased trading in 2016 and he answered *"I'm not too sure what we did."* When it was then suggested that the Company had stopped selling products, Mr Gallagher disagreed and said that the Company had not ceased trading. Mr Gallagher was taken to a letter he had written to the LBHF dated 27 May 2016, in which he had written:

> *"As you know we have ceased trading due to adverse commercial conditions.*
>
> *However as per our conversation on the telephone we fully intend to clear this in full once we have the funds."*

87. Later, Mr Gallagher accepted that the Company had *"ceased trading to the general public"* in March 2016, although he added that the Respondents were *"still looking for opportunities for what we could do with the business."* In my

judgment it is clear that the Company had ceased trading in any meaningful sense well before the Premises were sold.

The sale of the Premises

88. Mr Gallagher agreed that he was aware that the sale price of the Premises had included a VAT component of £180,000. He suggested that the Company had been *"forced"* by its landlord to nominate for VAT. Mr Gallagher also agreed that the net sale proceeds of £333,999 following the satisfaction of HSBC's security necessarily included the VAT element of £180,000. Had the VAT been paid, only about £173,000 would have remained, which would not have been sufficient to pay the Respondents the sums they ultimately received. When it was put to him that the only way the Respondents could have been paid £315,700 was to take the VAT money, Mr Gallagher answered:

> *"If you look at the company policy, upon the sale of the property, we were to be paid back. The VAT was unsecured. In accordance with the policy, we were paid back, we owed the VAT man money, which most probably is going to get us into trouble down the road."*

89. Mr Gallagher agreed that, following the sale of the Premises and chattels, the net sale proceeds of £333,999 represented the full extent of the Company's assets. Mr Brown put to Mr Gallagher that the Company's creditors at that date comprised £96,605 to Fournier; £136,000 in VAT following the sale of the Premises and the chattels; £30,749 in historic VAT; £15,600 to the agent that had acted on the sale of the Premises; £27,098 to LBHF; £12,000 to various other smaller creditors; £105,250 to Mr Gallagher; and £210,500 to Ms De Weyer. Of these, Mr Gallagher queried only the historic VAT and repeated his point that Ms De Weyer was owed at least £254,000 rather than £210,500. Mr Gallagher positively accepted the existence of each of the other creditor categories.

90. Accordingly, and even leaving the historic VAT out of account, Mr Gallagher admitted that the Company's liabilities were in the order of twice its assets on 8 February 2017. When it was directly put to Mr Gallagher that he was aware on 8 February 2017 that the Company's debts were greater than the cash available, he confirmed that he was *"aware of that, definitely"* but *"was just following company policy"*.

91. Mr Gallagher was shown a letter dated 3 February 2017 that he had written to Fournier, in which he wrote:

> *"Please note as of today we are where we stated in our last letter above and have nothing further to report.*
>
> *We will of course notify you by letter again as soon as we hear any further."*

92. Mr Brown put to Mr Gallagher that this was not accurate, because on 3 February 2017 the Company was in fact very close to exchange of contracts. Mr Gallagher tried to suggest that *"this was quite some time before*

completion", although in fact exchange of contracts took place just a few days later on 6 February 2017 and completion followed on 8 February 2017. Mr Gallagher added that *"giving an update to Fournier was the least important thing on my mind."* It is clear from an email that Mr Gallagher had sent to PLL on 31 January 2017, by which Mr Gallagher had returned the signed TR1 form and authorised PLL *"to proceed and sign on our behalf"*, that Mr Gallagher was aware on 3 February 2017 that the sale of the Premises for the price for which it ultimately sold was imminent.

93. Following completion of the sale of the Property on 8 February 2017 and after causing the payments to be made that are challenged in these proceedings on 9 and 10 February 2017, Mr Gallagher wrote again to Fournier on 10 February 2017. This letter was very different from the one Mr Gallagher had written to Fournier just a week before:

> *"It is with deep regret that I must inform you that the above company has ceased trading due to becoming insolvent. The difficult decision to cease all trading activities has been forced upon me so as to comply fully with my responsibilities in law as a company director.*
>
> *The premises that the company De Weyer Ltd purchased against your advice and owned have now been disposed of on the open market. The secured creditors have taken the majority of the proceeds of sale. The EU referendum and subsequent economic shock drastically reduced the sale price of our commercial premises in the UK."*

94. Mr Gallagher attached considerable weight in his witness statement to the fact that he had hoped that the Premises would be sold for £900,000 plus VAT but that this had not proved possible because of the effect that the EU referendum had on the market. In the witness box, Mr Gallagher maintained this position and said that the EU referendum *"took all property through the floor"*. Had the transaction taken place either a few months earlier or a few months later, Mr Gallagher said, it would have sold for a sum sufficient to pay all the creditors. Given the shortfall, *"we paid ourselves because of the company policy"*.

95. Mr Brown put to Mr Gallagher that, knowing the Company was insolvent and having kept Fournier in the dark, and represented to all external parties that the Respondents were not secured creditors, he took the decision to pay himself and Ms De Weyer everything he thought they were owed. Mr Gallagher confirmed that that was correct. At the conclusion of Mr Brown's cross-examination of Mr Gallagher, I asked whether the *"company policy"* that Mr Gallagher had invoked was essentially that the Respondents wanted to be paid first if there were other creditors. Mr Gallagher explained that:

> *"It wasn't put into place for that. It wasn't envisaged that there wouldn't be enough. We didn't envisage going into creditors' voluntary liquidation. We didn't envisage the EU referendum, we did envisage a sale at £900,000, and we didn't envisage all the market conditions."*

96. In my view, this was an important clarification of the *"company policy"* relied on by Mr Gallagher. It meant that the policy was premised on the Company's assets being sufficient to pay all creditors and did not contemplate an insolvent situation. On this view, it would seem to have been concerned with the timing of repayment (i.e. on the sale of the Premises), rather than questions of security or priority over other creditors. When asked by Mr Brown why the policy had not been revised when he became aware that the Company's debts were greater than its assets, Mr Gallagher said that he did not realise that he could do that and *"went with it because we thought that was what we had to do."*

97. Mr Brown suggested to Mr Gallagher that he had waited before telling Fournier about any sale of the Premises, not only until after the sale had completed, but also until after the sale proceeds had been paid away to Design and on to the Respondents. Mr Gallagher did not have a clear answer to this but in my judgment it is apparent from the contemporaneous documents that the only material change of circumstance between the starkly different letters to Fournier of 3 February 2017 and 10 February 2017 was that the sale of the Premises had completed and the Respondents had been paid. This was against a backdrop of Fournier having been led by Mr Gallagher to believe that the Respondents were unsecured creditors and the provision by him of purported updates that failed to mention that a sale had been agreed. It is impossible to resist the inference that Mr Gallagher decided to wait until the proceeds of sale had been paid away for the benefit of the Respondents before letting Fournier know about the sale. In my judgment, there is no plausible alternative interpretation of the contemporaneous documents, taken with Mr Gallagher's admitted actions, other than this.

The payments to Design and the Respondents

98. Mr Brown put to Mr Gallagher that, had the Respondents believed themselves to be secured creditors, they would have told PLL about this and had their secured debts discharged by means of direct payments to themselves from PLL. There would have been no reason for the money to go the Company first, let alone be routed via Design. Mr Gallagher refused to accept this and said that it would have been *"against company policy"* for the Respondents to have been paid directly by PLL.

99. It was not disputed that the payment by the Company to Design of £315,750 on 9 February 2017 was made in order that it should be used to make further payments to the Respondents on 10 February 2017 in discharge of their debts and that this was done from the net proceeds of sale of the Premises. In his oral evidence, Mr Gallagher accepted that the payment by the Company of £315,750 to Design on 9 February 2014 was made in order to put Design in funds to repay the Respondents, *"as stated in the company policy"*. He also agreed that the sums paid to the Respondents by Design on 10 February 2014 were the sums that Design had received from the Company. Mr Gallagher accepted that Design probably did not ever do anything except receive this money and pay it on to the Respondents.

The law

Preferences: s.239

100. Section 239 of the IA 1986 enables a liquidator of a company to seek relief where that company has given a preference and certain other conditions are met. Relief is sought by Mr Kelmanson against both Respondents under this provision. So far as relevant, s.239 sets out the elements that must be shown in order to establish a preference capable of attracting such relief:

> *"(2) Where the company has at a relevant time (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section.*
>
> *(3) Subject as follows, 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 the company had not given that preference.*
>
> *(4) For the purposes of this section and section 241, a company gives a preference to a person if—*
>
> > *(a) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and*
> >
> > *(b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.*
>
> *(5) The court shall not make an order under this section in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (4)(b).*
>
> *(6) A company which has given a preference to a person connected with the company (otherwise than by reason only of being its employee) at the time the preference was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (5)."*

101. For the purposes of s.239(2), *"relevant time"* is defined by s.240 of the IA 1986. It provides that a preference is given at a *"relevant time"* where it takes place at a time:

i) in the period of six months ending with the *"onset of insolvency"*, which may be increased to two years where the preference is given to a person who is connected with the company within the meaning of s.249 of the Act; and

ii) when the company is unable to pay, or becomes unable to pay in consequence of the preference, its debts within the meaning of s.123 of the IA 1986.

102. I address the component requirements of s.239 of the IA 1986 in turn below.

Were the payments at a "relevant time"?

103. The temporal element of *"relevant time"* is straightforward in this case: the *"onset of insolvency"* was the commencement of the CVL on 21 March 2017 and the relevant payments were made over the course of 9 and 10 February 2017, so they are well within the six month period without more.

104. Turning to the insolvency element of *"relevant time"*, although Mr Gallagher contended both in writing and orally that the Company was not insolvent and sought to defend the proceedings on that basis, as a matter of substance his evidence was firmly to the effect that the Company was insolvent well before the sale of the Premises. Although Mr Brown referred me to the decision of the Supreme Court in *BNY Corporate Trustees Ltd v Eurosail* [2013] 1 WLR 1408, in my judgment the insolvency requirement was clearly satisfied as at 9 and 10 February 2017 in the instant case. I base that finding on the following:

i) According to its only filed accounts, the Company was balance sheet insolvent on 31 March 2015 (see §85 above) and there is nothing to suggest that the balance sheet position ever improved.

ii) The Company was insolvent on a going concern basis from 27 May 2016 at the latest, having sought forbearance on that date from at least HMRC and LBHF in relation to debts that the Company could not pay: see §28 above. Further, Fournier served a statutory demand on 15 July 2016 in relation to a debt that the Company subsequently admitted by the Settlement Deed: see §31, §78 above. Each of those debts remained outstanding at the commencement of the liquidation.

iii) The Company had ceased trading long before the Premises were sold: see §87 above.

iv) The Company had no assets of any consequence other than the proceeds of sale of the Premises: see §89 above.

v) Mr Gallagher admitted that the Company's liabilities considerably exceeded its assets immediately following the sale of the Premises and accepted that the creditors could not all be paid: see §90 above.

Were the Respondents creditors?

105. By the time closing submissions took place, it was common ground that the Respondents were creditors of the Company for at least £105,200 and £210,500 respectively at the time when they received those sums on 10 February 2017. Accordingly, the requirement in s.239(4)(a) was satisfied.

Did the company do anything or suffer anything to be done which had the effect of putting the Respondents into a position which, in the event of the company going into insolvent liquidation, would be better than the position they would have been in if that thing had not been done?

106. It was common ground that the Respondents were repaid on 10 February 2017. The only ground on which the Respondents ever resisted the proposition that they were thereby put into a factually better position on insolvency within the meaning of s.239(4)(b) was their contention that, despite the failure to register their alleged charges, the Respondents nonetheless enjoyed equitable security over the Premises at the time when they were repaid. That contention was not pursued at trial in the circumstances summarised at §67 above. I comment further on that abandoned argument at §113 below.

107. In light of the fact that the Respondents were unrepresented, however, I invited submissions from Mr Brown on the significance, if any, of the fact that the payments in question had been made indirectly and in two stages: firstly, by a payment by the Company to Design of £315,750 on 9 February 2017; and, secondly, by payments by Design to the Respondents of £105,200 and £210,500, respectively, on 10 February 2017. I asked Mr Brown to consider whether it could be said that *the Company* (as distinct from Design) did or suffered anything to be done that had the effect of putting the Respondents into the necessary improved position on insolvency, where on the face of it the only thing the Company itself did was make a payment to Design.

108. Mr Brown submitted that the arrangements on 9 and 10 February 2017 could be characterised both on the basis that the Company did something, and that it suffered something to be done, either of which was sufficient to produce the necessary effect in s.239(4)(b). On the first basis (did the Company do anything?), Mr Brown submitted that the Company made an active disposition of money to Design and did so specifically for the purpose of repaying the Respondents. Taking a realistic view, he argued, the payments on 9 and 10 February 2017 were in substance a single composite transaction, undertaken without derogation or delay. Mr Brown relied in particular on the decision of the House of Lords in *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] 1 WLR 143. That was a case about a transaction at an undervalue under s.238 of the IA 1986. In valuing the incoming consideration received by a company in exchange for an asset, their Lordships held that it was appropriate to combine the consideration payable under the sale agreement itself as well as any collateral agreement with a third party: see 150G-151A. Accordingly, *Phillips v Brewin Dolphin* supports the view that commercial common sense should be applied to linked or composite transactions involving more than one stage or multiple parties under the transaction avoidance machinery in the IA 1986. *Phillips v Brewin Dolphin* was mentioned by Neuberger J (as he then was) in

Damon v Widney Plc [2002] BPIR 465, which was, like the instant case, a case under s.239 of the IA 1986. Neuberger J held that as a matter of commercial common sense, it was unreal to divide up any part of the overall transaction.

109. It was common ground at trial that the payment to Design had been made so that the Company's cash would then be used to repay the Respondents the debts the Company owed to them. In my judgment, the Company made a payment to Design that was, as a matter of fact, part of a single coordinated scheme or composite transaction, which was effected in order to discharge the debts owed by the Company to the Respondents. When the Company made the payment to Design it was inevitable, because that was the nature of the composite transaction into which the Company had entered, that the money would then be paid to the Respondents. Accordingly, in making the payment to Design, the Company did something that had the necessary effect of improving the Respondents' position on liquidation in the terms required by s.239(4)(b), in that it entered into that composite transaction.

110. The foregoing is sufficient in my judgment to satisfy the requirement in s.239(4)(b). But I have concluded that Mr Brown's second basis (did the Company suffer anything to be done?) also satisfies s.239(4)(b) in relation to the payments made to the Respondents. Mr Brown submitted that the Company suffered something to be done in allowing Design to use the Company's funds to pay the Respondents. *Goode*, at 13-86, explains that a company *"suffers"* something to be done where it permits or allows a payment or transfer in circumstances where the company has control of that payment or transfer in the sense that its permission is needed to make it and it can be refused. In *Re Parkside International Ltd* [2010] BCC 309 (to which Mr Brown very properly drew my attention), Mr Anthony Elleray QC (sitting as a deputy High Court judge), held at [61] that a company had not *"suffered"* a transaction over which it had no control or influence or that did not require its consent. Of particular note, the deputy judge held that the mere fact that the insolvent company was under common control with the companies that had entered into the transaction in question did not make a difference to this conclusion.

111. In my judgment, the Company suffered the payments to be made by Design to the Respondents. The critical feature is that it was not disputed at trial that the money received by Design and paid on to the Respondents in their capacity as the Company's creditors was the Company's money and was used to pay the Company's debts. There was no suggestion by the Respondents (who were Design's only two directors at that time) that Design had set up any beneficial title of its own to the money that was used to pay the Respondents, nor was there any evidence to suggest that Design might have had any beneficial title to that money. Moreover, the payments from Design were accepted by the Respondents as a good discharge of the debts owed to them by the Company. As the only directors of Design, the Respondents' states of mind are to be imputed to Design. Accordingly, Design knew it was handling the Company's money and so necessarily also knew that it needed the Company's permission

to pay the Company's money to the Respondents. Mr Gallagher, as the Company's sole director, could have refused such permission.

112. My decision on this aspect is not based on the mere fact that the Company and Design were under common control but rather that the evidence heard at trial, including evidence about the role of Design in the arrangements, enables findings of fact to be made about the subject-matter and nature of the payments made by the Company to Design and subsequently by Design to the Respondents. I find that in allowing Design to use the Company's money to pay the Respondents in circumstances where Design recognised the Company's title to that money, the Company suffered that payment to be made within the meaning of s.239(4)(b).

113. Before departing from the s.239(4)(b) point, I make the observation that even if the Respondents had established that they had held unregistered equitable charges over the Premises when they were repaid on 10 February 2017, it seems to me that in being repaid the Respondents would nonetheless have been put in a factually better position on insolvent liquidation than they would have been in had they not been repaid. This is because their unregistered security would have been void as against Mr Kelmanson under s.859H of the CA 2006. Accordingly, they would have fallen to be paid *pari passu* with the unsecured creditors in insolvent liquidation, whether they had unregistered security or no security at all at the commencement of the liquidation. This observation is not essential to my decision, by reason of Mr Gallagher's concession at trial that there was no security as a matter of fact. But it serves to underline that the real issue in this case has always been the question of whether or not the decision to repay the Respondents was influenced by the statutory desire in s.239(5) to produce the effect in s.239(4)(b), rather than the strained arguments about security. Those arguments have always been *"very thin"*, as District Judge Hart described them in her judgment on 20 January 2020 (a view with which I respectfully agree) in refusing Mr Gallagher the declaration that he sought. The question of the statutory *"desire"* is considered next.

Was the Company influenced by a desire to produce in relation to the Respondents the effect mentioned in subsection 239(4)(b)?

114. Mr Gallagher was the Company's sole director at the time of the payments and so the question in s.239(5) of whether or not the Company was *"influenced"* by the necessary *"desire"* to produce the effect in s.239(4)(b) depends on whether Mr Gallagher himself had that state of mind. The incidence of the burden of proof is different in relation to each of the Respondents on this question. As its director at the time, Mr Gallagher was a person *"connected"* to the Company within the meaning of s.249 of the IA 1986. This means that the *"desire"* requirement is presumed to have been satisfied when determining the claim against Mr Gallagher and the burden is on him to rebut it. No such presumption applies in relation to the claim against Ms De Weyer and so the Applicants must positively prove that the necessary desire influenced the Company in causing her to be repaid.

115. In relation to this requirement, Mr Brown has referred me to the judgment of Millett J (as he then was) in *Re M C Bacon Ltd* [1990] BCC 78, 87G to 88B, where the following points of relevance to the instant case may be found:

i) it is not sufficient to establish a desire to make the payment or grant the security that it is sought to avoid: there must have been a desire to produce the effect mentioned in s.239(4)(b), i.e. to improve the creditor's position in the event of an insolvent liquidation;

ii) the mere presence of the requisite desire to produce the effect in s.239(4)(b) will not be sufficient by itself: it must have influenced the decision to enter into the transaction;

iii) the existence of the requisite desire may be inferred from the circumstances of the case; and

iv) the requirement is satisfied if it was one of the factors that operated on the minds of those who made the decision: it need not have been the only factor or even the decisive one.

116. It was not easy to pin down Mr Gallagher's final position on security and it was not consistently expressed. I have interpreted Mr Gallagher's submissions at trial in the way most favourable to the Respondents. Taking things at their highest from the Respondents' point of view, I think it came down to this: Mr Gallagher accepted that, as a matter of fact, neither he nor Ms De Weyer had been secured creditors at any time, but it remained his case that he had nonetheless believed, albeit wrongly, that the Respondents each had the benefit of registered charges over the Premises at the time that he caused the relevant payments to be made.

117. Very properly, given that Mr Gallagher appeared in person, Mr Brown raised the point in closing that the implication of this would appear to be that if Mr Gallagher genuinely believed at the time the Respondents were repaid on 10 February 2017 that they held enforceable security and would be entitled to be paid in priority to the unsecured creditors on an insolvent liquidation in any event, such a belief would seem to exclude the possibility that the payments were influenced by any desire to produce the preferential effect identified in s.239(4)(b) of the IA 1986.

118. Although at first blush it may seem counterintuitive to suggest that liability for a preference could be avoided where a party believed without any rational basis at all that they were secured when they were not, it is plain from the wording of s.239 of the IA 1986 that a positive desire to improve the preferred creditor's position on insolvency must be both present and influential on the debtor's decision. There is no requirement on the face of s.239 that any alternative desire is identified in order for the court to exclude the influence of the desire to produce the effect in s.239(4)(b) and, as noted above, the mere presence of other influential factors does not of itself exclude the influence of the statutory desire. But if the debtor can be shown to have held a belief that flatly contradicts the possible influence of the statutory desire, then that is likely to go a long way towards showing that the statutory desire was absent.

119. There is nothing in the statutory wording to require any exploration into the merits or accuracy of any inconsistent belief, although its degree of plausibility is likely to be relevant to the court's inquiry into whether or not it was genuinely held. I note that one of the factors that led Millett J to find that the statutory desire had not influenced the decision to give the preference in *Re M C Bacon Ltd* was that the controlling mind of the company held the incorrect belief that if the company granted a debenture to the bank (which was the challenged transaction in that case) then the bank would have to continue to support the company for a further six months of trading. This belief had no basis in fact (and was described by Millett J as an *"eccentric notion"*) but its wrongness did not preclude its being taken into account as part of the inquiry into whether or not the transaction was influenced by a desire to produce the effect in s.239(4)(b) in relation to the bank. The debtor's wrong belief was indicative of a desire to trade on and pointed away from a desire to improve the bank's position on insolvency.

120. Accordingly, it would seem that an incorrect, but nonetheless sincerely held, belief that a particular creditor held registered security and would be paid first on an insolvent liquidation in any event would appear to exclude the presence of any desire to produce the effect in s.239(4)(b).

121. The consequence of this is that despite Mr Gallagher's acceptance that neither Respondent had in fact been a secured creditor, it would seem that Mr Gallagher's state of mind at the material time in relation to the existence of security remains relevant to the question of liability under s.239 of the IA 1986 and I must make findings about it.

122. Given the unreliability of Mr Gallagher's recollection of factual matters, I have relied primarily on the contemporaneous documentation in deciding this point. Having regard to that material, it is clear to me that Mr Gallagher did not hold any belief that the Respondents were secured creditors on 9 and 10 February 2017. In fact, every piece of information communicated by Mr Gallagher to external parties and every document that he signed were to opposite effect. The following documents are particularly relevant to my conclusion:

    i) the security documents in relation to the grant of a first legal charge over the Premises to HSBC on 21 November 2014, which did not mention any security in favour of the Respondents, despite specific mention being made by HSBC to funds introduced by Ms De Weyer;

    ii) the PLL instruction form signed by both Respondents on 17 March 2016 in which the Respondents did not mention any security other than the HSBC charge, despite the form specifically asking about any second charges;

    iii) the letter written by Mr Gallagher to Fournier dated 21 September 2016, by which Mr Gallagher conveyed to Fournier that the Respondents were unsecured creditors of the Company;

iv) the Settlement Deed dated 18 October 2016, by which the Company and Mr Gallagher warranted that HSBC was the Company's only secured creditor; and

v) the statement of affairs (signed by Mr Gallagher) and s.98 Report (for which Mr Gallagher is likely to have been the main source of information) both dated 17 March 2017, neither of which mentioned any security in favour of the Respondents.

123. Further, if Mr Gallagher had believed that the Respondents were secured, then in my judgment he would have told PLL about this. There would have been no need to bring the net proceeds of sale back into the Company and certainly no need to route the repayment of the Respondents via Design. Those features are inconsistent with any belief on the part of Mr Gallagher that the Respondents were secured. They are much more consistent, as Mr Brown suggested, with an intention to disguise the payments to some degree.

124. At the close of his time in the witness box, Mr Gallagher was anxious to communicate his honesty. He said *"we are honest people, we do what we do, we're business people, we haven't done anything wrong"*. In my judgment, an honest person could not have made the repeated representations to external parties to the effect that the Respondents were not secured creditors if, in fact, they believed that they were secured. Accordingly, I find as a fact that Mr Gallagher did not believe on 9 and 10 February 2017 that the Respondents were secured.

125. Having regard to my findings on Mr Gallagher's state of mind on the security point and the absence of any other ground put forward to rebut the presumption, Mr Gallagher has in my judgment failed to rebut the presumption that the Company was influenced by the desire in s.239(4)(b) of the IA 1986 in repaying him. Accordingly, the jurisdiction to make a restorative order against Mr Gallagher for the £105,200 he received on 10 February 2017 is engaged.

126. Turning to Ms De Weyer, I find that Mr Kelmanson has discharged the burden of proof in showing that the desire to produce the effect in s.239(4)(b) of the IA 1986 was influential in the Company's decision to repay her. In my judgment, there is no explanation for what Mr Gallagher (as the Company's sole director) did, in the context in which he did it, other than that he acted on 9 and 10 February 2017 under the influence of a desire to produce the effect in s.239(4)(b) of the IA 1986 in relation to Ms De Weyer. My reasons are as follows:

i) Mr Gallagher was well aware by the time the Premises were sold that the Company would have insufficient assets to pay its unsecured creditors: see §90 above.

ii) Mr Gallagher had no belief that either of the Respondents was a secured creditor and, save for the failed contention that they were so secured, no proper basis has been advanced to suggest that either of the

Respondents had any entitlement to be paid ahead of the other unsecured creditors: see §122 to §124 above.

iii) Once any belief in the existence of any security falls away, all that is left as an explanation for the fact or the timing of the payments is the so-called *"company policy"*, which was self-evidently not a basis to pay the Respondents ahead of the other unsecured creditors.

iv) In fact, Mr Gallagher's decision to apply the *"company policy"* that the Respondents would be repaid from the proceeds of sale of the Premises, despite his knowledge that the Company was insolvent, is in my judgment a clear manifestation of a desire to produce the effect in s.239(4)(b).

v) There is no plausible explanation for Mr Gallagher's conduct in promising payment to Fournier while simultaneously keeping Fournier in the dark about the impending sale other than that he was acting in furtherance of a desire to improve the Respondents' position on insolvent liquidation: see §97 above.

127. Accordingly, the jurisdiction to make a restorative order against Ms De Weyer for the £210,500 she received is engaged.

128. Had the burden of proof been on Mr Kelmanson in relation to the claim against Mr Gallagher, I would have found the burden discharged on the same grounds as I have found it discharged in relation to Ms De Weyer.

Misfeasance: s.212 of the IA 1986

Mr Kelmanson also seeks relief under s.212 of the IA 1986 on the basis that Mr Gallagher breached his duty as a director of the Company. It is said that as a consequence of his breach of duty, Mr Gallagher should be held liable to compensate the Company for the entirety for the £315,750 that was paid away on 9 February 2017. So far as relevant, s.212 provides as follows:

> *"(1) This section applies if in the course of the winding up of a company it appears that a person who—*
>
> *(a) is or has been an officer of the company,*
>
> *…*
>
> *(3) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him—*
>
> *(a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or*

> *(b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.*
>
> *…"*

129. The application notice put the case under both s.172 and/or s.175 of the CA 2006, but only s.172 was pursued at trial. Section 172 of the CA 2006 requires company directors to act in the way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. This is a fiduciary duty owed to the Company. In presenting his client's case, Mr Brown emphasised that the duty is qualified in an important way when a director knows, or should know, that the company is insolvent or likely to become insolvent. Under those conditions, a director must have regard to the interests of creditors in order to discharge their duty to the company under s.172: see *BTI 2014 LLC v Sequana SA* [2019] 2 All ER 784, [220], per David Richards LJ.

130. Where a director pays a preference as part of a scheme to benefit themselves, that payment may itself be a breach of the duty now found under s.172 of the CA 2006: see *In re Washington Diamond Mining Company* [1893] 3 Ch 93, 113-115, per Kay LJ. Further, if a payment treats some creditors more favourably than others, it is not always necessary that it should meet all the conditions to be a statutory preference within the meaning of s.239 of the IA 1986 for it nonetheless to be a breach of a director's duty to have regard to the interests of the company's creditors as a class, although the applicability of s.239 may have a bearing on what, if any, remedy is available: *GHLM Trading Ltd v Maroo* [2012] 2 BCLC 369, [166]-[169], per Newey J (as he then was).

131. In reviewing a director's conduct, the court will ordinarily apply a subjective approach, i.e. the question is whether the director believed in good faith that the act or omission in question was in the interests of the company: *Re Regentcrest Plc v Cohen* [2001] 2 BCLC 80, [120], per Jonathan Parker J (as he then was). But the subjective test only applies where there is evidence of actual consideration of the best interests of the company and, where there is no such evidence, the proper test is objective, namely whether a reasonable director in the position of the director in question could reasonably have thought that the transaction was for the benefit of the company: *Extrasure Travel Insurances Ltd*, [138], per Mr Jonathan Crow (sitting as a deputy High Court judge); *Re HLC Environmental Projects Ltd* [2014] BCC 337, [92], per Mr John Randall QC (sitting as a deputy High Court judge).

132. In the instant case, there is no evidence that the interests of the Company were properly considered. I have found that the Company was actually insolvent at the date of the sale of the Premises on 8 February 2017 and that Mr Gallagher was well aware of that. The Company had also long since ceased to trade and no longer had any business. Following the payment of HSBC as its only secured creditor, it had no assets other than the net proceeds of sale, which were insufficient to pay the unsecured creditors in full. In those circumstances, as a matter of substance, the interests of the Company were to be equated for practical purposes with those of its unsecured creditors as a class. The

evidence indicates that Mr Gallagher failed to consider, as he should have done, the right of the unsecured creditors to share in the proceeds of sale on a common footing with the Respondents and was instead preoccupied with the need, as he saw it, to ensure that the Respondents were repaid come what may.

133. Although the evidence shows that the existence of certain creditors, in particular Fournier, was in Mr Gallagher's mind at around the time of the sale of the Premises, that does not mean that their interests were considered in the necessary way. To the extent that the unsecured creditors other than the Respondents were considered at all as part of Mr Gallagher's decision to pay away £315,750 to Design on 9 February 2017, it was solely in the context of ensuring that the Respondents were paid ahead of them. In failing to have proper regard to the interests of the creditors, Mr Gallagher failed to consider the interests of the Company and an objective test must be applied.

134. Applying an objective test, in my judgment a reasonable director in the position of Mr Gallagher on 9 and 10 February 2017 could not have reasonably thought that repaying the Respondents was in the interests of the Company. Mr Gallagher's actions amounted to paying the Respondents' debts at face value and leaving behind only £20,000 or so for the rest of the unsecured creditors. Given that the Company was categorically insolvent and no longer trading, in my judgment Mr Gallagher's actions were positively adverse to the interests of the Company as those interests fell to be regarded at that time.

135. The points made by Mr Gallagher in his defence about the market conditions occasioned by the EU referendum and the depressing effect this had on the property market are in my judgment irrelevant to his liability. Supposing Mr Gallagher is right and the EU referendum had an effect on the value of the Property, then this was a misfortune that befell the Company. Given the Company's insolvency, the consequences of that misfortune should have been suffered in common by its unsecured creditors as a class. That there proved to be a shortfall to the class does not begin to disclose a defence to Mr Gallagher's actions in paying the Respondents and leaving the rest of the class with almost nothing.

136. Accordingly, in my judgment, Mr Gallagher breached his duty to the Company under s.172 of the CA 2006 in paying away £315,750 on 9 February 2017 and the claim under s.212 of the IA 1986 is made out.

137. There is no basis in my judgment to relieve Mr Gallagher from liability under s.1157 of the CA 2006. That section requires a director to have acted both honestly and reasonably. It was not contended by the Applicants that Mr Gallagher did not act honestly, but relief under this section cannot be granted unless he also acted reasonably. In my judgment his actions were not reasonable for the reasons I have already given and, accordingly, relief should not be granted under s.1157 of the CA 2006.

Disposal

Preference

138. Section 241 of the IA 1986 sets out a non-exhaustive selection of the kinds of restorative orders that may be made under s.239(3) to restore the position to what it would have been if the preference had not been given. These include at s.241(1)(d) that the court may make a money judgment in favour of the office-holder in respect of benefits received by a party. In my judgment the appropriate restorative orders in this case are money judgments for the sums received by the Respondents, i.e. £105,200 in the case of Mr Gallagher and £210,500 in the case of Ms De Weyer.

Breach of duty

139. Among other things, s.212(3) of the IA 1986 provides for the court to compel Mr Gallagher to contribute to the Company's assets by way of compensation in respect of his breach of duty as the court thinks just. In my judgment, the appropriate measure of compensation in this case is the value of the Company's assets that Mr Gallagher caused to be misapplied on 9 February 2017, i.e. £315,750. This relief overlaps with the relief under s.239 of the IA 1986 and is not cumulative with it.

Interest

140. The application notice seeks interest at the judgment rate of 8 per cent from 9 or 10 February 2017. Although it is appropriate in my judgment that the insolvent estate should receive some interest whether as part of a restorative order under s.239(3) or by way of compensation under s.212(3) of the IA 1986, there is no obvious justification for such a high rate. Mr Brown recognised this at trial and proposed something in the order of 3.5 or 4 per cent. I will hear submissions on this point to the extent the parties are unable to reach agreement on it.

141. I invite the parties to agree an order to give effect to this judgment in advance of its formal hand down.