



Neutral Citation [2019] EWHC 3338 (Ch)

Appeal No: BM90111CH

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
APPEALS (ChD)**

**On appeal from the order of District Judge Rouine dated 17 June 2019, sitting at the
Birmingham Civil Justice Centre**

Birmingham Civil Justice Centre
The Priory Courts
33 Bull Street
Birmingham B4 9DS

Date: 13 December 2019

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

**IN THE MATTER OF PAUL FLATMAN LIMITED (IN CREDITORS' VOLUNTARY
LIQUIDATION)**

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

AND IN THE MATTER OF AN APPEAL

PAUL FLATMAN

Appellant
(Respondent below)

- and -

**(1) BENJAMIN JOHN WILES
(2) PAUL DAVID WILLIAMS**

Respondents
(Applicants below)

Mr Peter Shaw, QC (instructed by **Druces LLP**) for the Appellant
Mr Reuben Comiskey (instructed by **Shoosmiths LLP**) for the Respondents

Hearing date: 5 December 2019

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.

Mr Justice Marcus Smith:

A. INTRODUCTION

1. This is an appeal from the order of District Judge Rouine dated 17 June 2019 (the “Order”), consequential on a judgment handed down by the District Judge on 4 June 2019 (the “Judgment”), following a three-day trial that took place in the Business and Property Courts at Birmingham on 5, 6 and 7 March 2019.
2. The applicants before the District Judge and the Respondents to this appeal were the liquidators of a company known as Paul Flatman Limited. As liquidators, they sought the following relief against a director of Paul Flatman Limited, Mr Paul Flatman, as follows:
 - (1) Recovery of certain payments made by Paul Flatman Limited to Mr Flatman (trading as Paul Flatman Farms) as preferences under section 239 of the Insolvency Act 1986.
 - (2) Relief in respect of breaches of duty, arising from the same facts as the preferences, under section 212 of the Insolvency Act 1986.¹
3. The District Judge found that there had been preferences under section 239 of the Insolvency Act 1986 and he ordered their recovery in an amount of £376,820.30, plus interest. He also found that there had been a breach of duty by Mr Flatman entitling relief under section 212 of the Insolvency Act 1986, which served as a separate basis obliging Mr Flatman to pay £376,820.30 plus interest.
4. Mr Flatman sought to appeal the District Judge’s order. Mr Flatman’s (amended) grounds of appeal² contended that the District Judge had erred both in relation to his conclusion under section 239 and in relation to his conclusion under section 212; and that as a result the order that Mr Flatman pay £376,820.30 (plus interest and costs) be set aside.

¹ There was also a claim that the same preferences were also transactions at an undervalue, but the point does not appear to have been pursued by the liquidators: see Judgment at [9]. In any event, the District Judge made no findings in this regard, and the liquidators have not sought to take this matter any further.

² They were amended in light of the transcript of the District Judge’s judgment that was obtained by Mr Flatman.

5. By my order dated 17 October 2019, I gave permission to appeal on all grounds. That appeal was heard, before me, on 5 December 2019, and this is my judgment determining Mr Flatman’s appeal.

B. THE RELEVANT STATUTORY PROVISIONS

(1) Section 239

6. Section 239 of the Insolvency Act 1986 provides as follows:

“(1) This section applies as does section 238.”

Pausing there, section 238(1) provides that:

“(1) This section applies in the case of a company where –

- (a) the company enters administration, or
- (b) the company goes into liquidation;

and “the office-holder” means the administrator or the liquidator, as the case may be.”

Resuming with section 239:

- “(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) as 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).

- (7) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference.”

(2) Section 212

7. Section 212 provides for a summary remedy against “delinquent directors” (amongst others):³

“(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,
- (b) has acted as liquidator or administrative receiver of the company, or
- (c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken a part, in the promotion, formation or management of the company,

has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.

- (2) The reference in subsection (1) to any misfeasance or breach of any fiduciary or other duty in relation to the company includes, in the case of a person who has acted as a liquidator of the company, any misfeasance or breach of any fiduciary or other duty in connection with the carrying out of his functions as a liquidator 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.

...”

C. THE FACTS

8. The material facts set out in this section have all either been derived from the Judgment or else were common ground between the parties and uncontentious.
9. Mr Flatman ran a business concerning the purchase, rearing, slaughter, processing and packing of poultry.⁴ This business was in part run by Paul Flatman Limited and in part by Mr Flatman personally, trading under the name Paul Flatman Farms. I shall refer to

³ To quote from the title to section 212.

⁴ Judgment at [7].

Paul Flatman Limited as the “Company” and to Mr Flatman’s personal trading as “Paul Flatman Trading”. Originally, the business model was that the Company would purchase day-old chicks, which would then be reared at premises operated by Paul Flatman Trading.⁵ The Judge found that it was unclear who owned the chicks during the course of this process,⁶ and in the end appears to have considered that this point was not material to the decision he had to make.⁷ In any event, the Judge made no clear finding on this point, and it does not feature in his reasoning in relation to either the application under section 239 or section 212. I proceed on the basis that the point was left open; and obviously I cannot make any finding on the point myself, not having heard the evidence.

10. Historically, Paul Flatman Trading would pay for the various expenses arising out of the rearing of the chicks by way of cheques drawn on a personal account of Mr Flatman held at Barclays (the “Personal Account”).⁸ The Personal Account operated with as close to a zero balance as possible. When payments were made into the Personal Account, they were transferred away to an account operated by the Company, also held at Barclays (the “Company Account”),⁹ as soon as the payment had cleared. Conversely, when a cheque was drawn on the Personal Account, that payment was funded by a transfer from the Company Account to the Personal Account.¹⁰
11. The Judge made no finding as to genesis of this arrangement: the “sweep”, as the Judge called it, had been operating for some time, and there appears to have been evidence before the Judge that the arrangement was actually put in place by Barclays rather than Mr Flatman. Although that seems a little unlikely, I proceed on that basis.¹¹
12. The Company’s business encountered serious difficulties during the course of 2012 and early 2013. The nature of these difficulties is not material to the present appeal, but they involved (no doubt amongst other things) licensing issues with the relevant agency, the Food Standards Agency.¹² At about the time of these difficulties – and probably related to them, although nothing turns on this – the business model described in paragraphs 9 to 10 above changed. The Company stopped buying new chicks from third parties for Paul Flatman Trading to rear,¹³ and instead bought pre-fattened birds from third

⁵ Judgment at [7].

⁶ Judgment at [7].

⁷ Judgment at [23].

⁸ Judgment at [8].

⁹ I was told during the course of argument that the Company in fact had two accounts with Barclays. The District Judge only ever refers to a single Company account (see, e.g., Judgment at [8]); but nothing turns on this fact, and I shall (simply for the sake of convenience) do as the District Judge did, and refer simply to the Company Account.

¹⁰ See the description by the District Judge at [8]. I was shown the bank statements demonstrating the way the system worked during the course of submissions.

¹¹ The Judge described the practice at [8] of the Judgment. He made no finding as to the party on whose initiative the “sweep” was put in place, but before me both parties accepted that – if anything turned on the point – I should proceed on the basis that it was Barclays who put in place the “sweep” arrangement.

¹² Judgment at [10].

¹³ Judgment at [10] and [16].

parties.¹⁴ Obviously, the need for Paul Flatman Trading to incur the cost of rearing the birds for the Company ceased at this time.¹⁵

13. The District Judge made no exact finding as to the time when this change occurred. He certainly found that it had occurred by the time the payments that he found to have been preference payments were made. This was in the period from 26 March 2013 until the Company went into administration on 1 May 2013 (when administrators, the present Respondents, took over the Company's operations).¹⁶ As going into administration implies, there was some hope that the Company could be sold as a going concern, to the benefit of creditors, but in fact the Company went into creditors' voluntary liquidation on 3 October 2014, and the administrators became the liquidators.
14. The District Judge's finding regarding the change in business model was not challenged before me and was clearly right. The documentary evidence before the District Judge shows that the last payment for feed recorded in the Company's books of account¹⁷ occurred on 19 March 2013,¹⁸ and the last purchase of day-old chicks occurred on 28 December 2012.¹⁹
15. By early 2013, Mr Flatman appreciated the need to obtain insolvency advice regarding the affairs of the Company.²⁰ The District Judge made the following findings of fact:²¹

"It is clear to me from the documentation which I have referred to that pre-March 2013, [the Company] was in significant financial difficulty, which was being compounded by licensing issues with the regulator. Indeed, if there were not financial problems of which Mr Flatman was aware, I do pose the question why he would agree to a suggestion put forward by the company's accountant to go and get advice from insolvency practitioners. It is clear to me that before 26 March 2013,²² Mr Flatman would have known that the previous commercial relationship between [the Company] and [Paul Flatman Trading] had come to an end, specifically that rearing was no longer being undertaken by [Paul Flatman Trading] and had been replaced by [the Company] purchasing pre-reared birds from a third party."

16. The significance of the 26 March 2013 is that this was when the first of the preference payments was made. It is appropriate now to set these out. The table below describes the transfers from the Company Account to the Personal Account as well as the payments out of the Personal Account. They are derived from the first witness statement of Mr Flatman: it was common ground before the District Judge that these figures were accurate, and neither party suggested the contrary before me:

		Transactions between the Company Account and the	Payments out of the Personal
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¹⁴ Judgment at [16].

¹⁵ Judgment at [10] and [16].

¹⁶ Judgment at [13], [14] and (in particular) [16].

¹⁷ As will be seen, there were payments of feed out of the Personal Account after this.

¹⁸ As evidenced by the Company's financial records and an invoice from the supplier of feed, Crown Chicken Limited trading as Crown Milling Animal Feed Suppliers.

¹⁹ As evidenced by an invoice from the supplier of chicks, PD Hook (Hatcheries) Limited.

²⁰ This advice apparently came from the Company's accountants: Judgment at [33].

²¹ Judgment at [33].

²² The Judgment refers to "2019", but this is an obvious typographical error.

		Personal Account		Account	
	<u>Column A</u> Date	<u>Column B</u> Description	<u>Column C</u> Amount	<u>Column D</u> Description	<u>Column E</u> Amount
1	26 Mar 2013	Transfer to Personal Account	£255.97	Cheque No 8614 Post Office (road tax)	£215.00
2	26 Mar 2013	Transfer to Personal Account	£145,912.63	Bank charges	£40.97
3	27 Mar 2013			Cheque 8628 Crown Chicken feed	£165,566.05
4	28 Mar 2013	Transfer to Personal Account	£20,000.00		
5	2 Apr 2013			Cheque 8603 CJ Webster Electrical	£25.20
6	2 Apr 2013			Cheque 8611 MW Manning Plumbing	£141.60
7	2 Apr 2013			Cheque 8629 SD Ridge (door repairs)	£935.00
8	3 Apr 2013	Transfer to Personal Account	£815.22	Cheque 8612 MGM Eagling (tree cutting)	£60.00
9	16 Apr 2013	Transfer to Personal Account	£95,000.00	Cheque 8633 Calor Gas Limited	£9,774.68
10	16 Apr 2013	Transfer to Personal Account	£2,179.38	Cheque 8639 Stephen Lynn (fuel)	£75.01
11	16 Apr 2013			Cheque 8648 Crown Chicken feed	£131,826.36
12	17 Apr 2013			Cheque 8642 Roberts (redundancy payment)	£4,725.00
13	26 Apr 2013	Transfer to Personal Account	£98,667.74	Cheque 8649 Crown Chicken feed	£157,559.95
14	29 Apr 2013	Transfer to Personal Account	£13,889.36		
15	29 Apr 2013	Transfer to Personal Account	£130.72		
16	30 Apr 2013	Transfer to Personal Account	£100.00	Cheque 8631 Auto Aid (MOT)	£40.00
		TOTAL	£376,951.02	TOTAL	£470,984.82

17. Mr Flatman approached Duff & Phelps for insolvency advice. There was some dispute as to how many times Mr Flatman had meetings with insolvency practitioners at Duff & Phelps. The Duff & Phelps' internal time records suggest several meetings, and this was the evidence of Mr Wiles (of Duff & Phelps), who was called to give evidence at the trial before the District Judge. However, the District Judge did not find Mr Wiles to be a particularly impressive witness,²³ and he found the firm's practice of recording

²³ Judgment at [45].

times and meetings to be “singularly unimpressive”.²⁴ On this point at least, the District Judge found Mr Flatman’s evidence that there was only one meeting, and that this meeting took place in mid-April 2013, to be more credible.²⁵ These are findings of fact that it would be entirely inappropriate to look behind, and so I adopt the District Judge’s finding that there was a single meeting, in mid-April 2013, between Mr Flatman (representing the Company) and representatives of Duff & Phelps.

18. This is consistent with the documentation. On 18 April 2013, Duff & Phelps wrote a letter to the directors of the Company referring to a meeting between Mr Wiles and Mr Flatman on 16 April 2013. That letter referred to the possibility of the pre-packaged sale of the Company prior to administration and drew certain points to the directors’ attention “[t]o limit your personal liability”. Point three stated:

“You must ensure that any action you take will not result in any creditors or members being preferred or given an advantage, particularly connected parties.”

19. The District Judge made no findings as to whether any of these points regarding personal liability were communicated to Mr Flatman at the meeting on 16 April 2013. In these circumstances, it is appropriate to proceed on the basis that they were not so communicated.²⁶ However, the District Judge did find that there had been discussions about the sale of the Company as a going concern and about Mr Flatman’s own preference that the Company continue to trade. Mr Flatman appears to have regarded the advice that he got at the meeting as “generally positive”, and the District Judge appears to have accepted this evidence.²⁷

20. At 8:00am on 26 April 2013, the directors of the Company resolved, “in view of the financial position of the Company”, that:

“1. It would be in the best interests of the Company and its creditors for the Company to enter administration.

...

3. Benjamin Wiles and Paul Williams of Duff and Phelps Limited be nominated to act as joint administrators of the Company...

4. Paul Colin Flatman be authorised to finalise the appointment documentation as he sees fit on behalf of the directors and otherwise to take all actions and execute any documentation necessary to facilitate the making of the proposed appointment.”

21. Notice of the appointment of the Respondents as administrators was made by Mr Flatman on 26 April 2013 (a Tuesday), but was only received by the Court at 2:01pm on 1 May 2013 (the following Friday).

²⁴ Judgment at [45].

²⁵ Judgment at [24] and [45]

²⁶ At [25] of the Judgment, the District Judge describes this reference to preference in the letter, but he makes no further points in this regard.

²⁷ Judgment at [46]. The exact findings that the District Judge made are a little difficult to discern, but that is my reading of the Judgment.

D. THE DISTRICT JUDGE’S CONCLUSIONS AND THE POINTS TAKEN ON APPEAL

(1) A preference under section 239

22. The District Judge found the payments recorded in Column C of the table in paragraph 16 above to be preferences within the meaning of section 239 of the Insolvency Act 1986. Mr Flatman accepted, both before the District Judge and before me, that these payments constituted “preferences in fact” within the sense of section 239(4).
23. Mr Flatman also accepted that the presumption in section 239(6) that he had the “desire” to prefer, that is a prerequisite for an order under section 239 by virtue of section 239(5), applied.
24. On appeal, Mr Flatman contended that the District Judge misdirected himself on the question of “desire”. It was contended that the “desire” to prefer was an entirely subjective concept, turning only on Mr Flatman’s state of mind. In this case, because of the “sweep”, the payments out of the Company Account and into the Personal Account were entirely automatic. Mr Flatman did nothing to cause them; what he did do, was fail to stop them. It was – so contended Mr Flatman – an altogether different matter to seek to infer “desire” from an act, as opposed to inferring it from an omission. In short, whilst some kind of motive may relatively easily be inferred from an act, an omission (a failure to act) may take place without any accompanying intention. That was Mr Flatman’s evidence before the District Judge, and (according to Mr Flatman) the District Judge was wrong to hold “that an absence of a desire to do anything is sufficient to rebut the presumption”. This was Mr Flatman’s first ground of appeal (“Ground 1”).
25. Mr Flatman further contended, as his second ground of appeal (“Ground 2”), that the District Judge had erred in law by applying an objective and not a subjective test to the question of whether Mr Flatman had the requisite “desire”.
26. Thirdly, it was contended that the District Judge had failed properly to engage with the evidence, by taking account of factors that were “either not relevant or not in issue, while omitting to deal with matters that were in issue on the other” (“Ground 3”).
27. Fourthly, and finally, Mr Flatman contended that the District Judge had made contradictory findings in relation to the commercial relationship between the Company and Paul Flatman Trading. Specifically (to quote from the grounds of appeal):

“The Judge’s finding, which is repeated more than once, that Mr Flatman knew that the commercial relationship between the Company and [Paul Flatman Trading] had come to an end is at odds with his finding of fact elsewhere in the Judgment that Mr Wiles had spoken to Mr Flatman about the possibility of rescue as a going concern rescue and Mr Wiles’ awareness that Mr Flatman proposed to continue trading the business in the period leading up to administration in that context...”

I shall refer to this as “Ground 4”.

28. I shall consider and determine these four grounds of appeal in Section E below.

(2) Summary remedy under section 212

29. The Judge also awarded a remedy under section 212, finding that the payments recorded in Column C of the table in paragraph 16 above amounted to a breach of duty within the meaning of section 212(1), such that he was entitled to order repayment of these amounts pursuant to section 212(3).
30. In relation to this conclusion, Mr Flatman advanced three grounds of appeal:
- (1) “Ground 5”. That the District Judge misdirected himself on the question of “misfeasance”, making a specific finding that there was no misfeasance whilst (inconsistently) finding a breach of duty.
 - (2) “Ground 6”. That the District Judge failed to deal with Mr Flatman’s evidence on misfeasance. Specifically:

“The Judge’s conclusion that there was a breach of duty was unsupported by adequate evidential findings. Mr Flatman gave detailed evidence, both written and oral, which is barely touched on in the Judgment. It is unclear to what extent the evidence was accepted or rejected.”
 - (3) “Ground 7”. Before the District Judge, it was submitted that insufficient notice had been given of the nature of the application under section 212, and that the District Judge was wrong to reject this submission.
31. I shall consider and determine these three grounds of appeal in Section F below.

E. GROUNDS 1, 2, 3 AND 4: THE APPEAL IN RELATION TO THE DECISION UNDER SECTION 239

(1) Ground 1: misdirection in relation to Mr Flatman’s “desire”

32. There are two paragraphs in the Judgment which illustrate the nature of the misdirection contended for. First, at [34], the District Judge said:²⁸

“I am also satisfied that, at the time, Mr Flatman would have been aware of the extent to which he, as [Paul Flatman Trading], was a creditor of Limited. The decision by Mr Flatman to allow the payments to be made, or at least to do nothing to cause them not to be paid, by [the Company] during late-March and April 2013, needs to be seen in the context of that background. I have deliberately used the phrase, “allowed the payments to be made”, for the following reason: the sweep system relating to money being transferred from [the Company Account] to [the Personal Account] had plainly been in place for a significant number of years pre-2013. Given the nature of Mr Flatman’s roles in both [the Company] and [Paul Flatman Limited], I find it inconceivable that by March 2013 he was unaware of the sweep operation and how it worked. I am satisfied that he would have known any debits to the [Personal Account] to meet payments to third parties would have been met by transfers from [the Company Account] via operation of the sweep.”

The underlined passage, so it was contended, betrayed a lack of understanding of Mr Flatman’s essential point, namely that the operation of the “sweep” was automatic, and

²⁸ Emphasis supplied.

could take place without Mr Flatman necessarily having any “desire” at all as regards these payments.

33. Secondly, at [36], the District Judge said:²⁹

“...I accept the submissions made on behalf of the Applicants to the effect that the burden is on Mr Flatman to show, on balance, the desire was not present. I also accept the submission by simply saying, “I did not have the desire”, Mr Flatman is not discharging his obligation to rebut the presumption. It seems to me to conclude otherwise would potentially run the risk of undercutting the impact and effectiveness of the section 239 regime.”

The underlined passage, it was contended, again showed that the District Judge had failed to appreciate the important difference between acts and omissions, and that whereas in the case of acts it might naturally be said that there must have been an accompanying “desire” of some sort – such that an assertion that “I did not have the desire” might carry little weight – the same was not true of an omission.

34. Furthermore, to the extent that the District Judge was concerned as to the impact and effectiveness of the section 239 regime, he took into account something that was really irrelevant to the determination of the issues before him.
35. Before I turn to resolving Ground 1, it is necessary to observe that the Judgment – whilst delivered three months after the trial – was not handed down in written form, but orally (no doubt from notes). It is important that I do not place excessive weight on infelicities of language, as opposed to considering the substance of the decision of the District Judge.
36. Approaching the matter in this light, I have no doubt that Ground 1 should be dismissed, for the following reasons:
- (1) Whilst I accept that the wording that I have underlined in [34] of the Judgment might have been clearer,³⁰ the District Judge’s thinking is actually plain on its face. The District Judge obviously had well in mind the distinction being made by Mr Flatman between acts and omissions (“The decision by Mr Flatman to allow the payments to be made, or at least to do nothing to cause them not to be paid...”).
 - (2) On a fair reading of the Judgment, the District Judge was accepting the point that a “desire” to prefer could not, without more, be read into an omission or failure to act. He therefore sought to identify whether – notwithstanding the automatic operation of the “sweep” – such a subjective “desire” could be found on the facts (“I have deliberately used the phrase, “allowed the payments to be made”, for the following reason: the sweep system relating to money being transferred from [the Company Account] to [the Personal Account] had plainly been in place for a significant number of years pre-2013...”).
 - (3) The District Judge identified the following factors in his Judgment:

²⁹ Emphasis supplied.

³⁰ Set out in paragraph 32 above.

- (a) Assuming in Mr Flatman’s favour – as I do – that he was not involved in the setting up of the “sweep”, Mr Flatman must, by 2013, have known how it worked.³¹ The “sweep” operated in the manner I have described in paragraph 10 above: the Personal Account operated at as near to a nil balance as possible, with credits being transferred to the Company Account from the Personal Account; and, more significantly for present purposes, transfers being made from the Company Account to the Personal Account in order to fund payments made out of the Personal Account.
- (b) Mr Flatman’s payments out of the Personal Account – identified in Column E of the table at paragraph 16 above – were acts. He drew cheques on the Personal Account. The effect of the District Judge’s finding in paragraph 36(3)(a) above was that Mr Flatman must have known – by which I mean subjectively knew – that these payments would be funded by transfers from the Company Account to the Personal Account. That is exactly what the District Judge found:³²

“I am satisfied that he would have known any debits to the [Personal Account] to meet payments to third parties would have been met by transfers from [the Company Account] via operation of the sweep.”

- (c) A number of the payments out of the Personal Account were to Crown Chicken Limited, the supplier of feed. However, as the District Judge found, and as has been described in paragraphs 12 to 14 above, the last supply of feed for the benefit of the Company occurred on 19 March 2013. Thereafter, any supplies of feed were not for the Company’s benefit, but for the benefit of Paul Flatman Trading and so for the benefit of Mr Flatman. The District Judge found that Mr Flatman subjectively intended this, and that the failure to stop the “sweep” was deliberate.³³

“It would plainly have been within Mr Flatman’s power to stop the sweeping arrangement and yet this was not done. On balance, I find that this step was more likely than not to have been taken because of Mr Flatman’s awareness that by [the Company’s] money being paid into [the Personal Account] to meet [Paul Flatman Trading] liabilities, [Mr Flatman] was in effect reducing his own indebtedness rather than it simply being a case of Mr Flatman not giving any thought to the possibility of stopping the sweep. I am satisfied that, as at 26 March [2019],³⁴ Mr Flatman knew the previous commercial arrangement between [the Company] and [Paul Flatman Trading] had ended...”.³⁵

³¹ See [34] of the Judgment: “Given the nature of Mr Flatman’s roles in both [the Company] and [Paul Flatman Limited], I find it inconceivable that by March 2013 he was unaware of the sweep operation and how it worked.”

³² Judgement at [34].

³³ Judgment at [35].

³⁴ The reference to “2019” is an obvious typographical error.

³⁵ The final part of this sentence is one that Mr Flatman particularly criticised on appeal. I deal with it further below. This phrase represents a conclusion drawn from facts found by the District Judge. Here, I am concentrating on the facts actually found by the District Judge – rather than conclusions drawn from such findings – and am seeking ascertain whether the District Judge’s conclusion that Mr Flatman desired the preference is one that was properly open to him.

- (4) The District Judge’s suggestion that – in these circumstances – to accept Mr Flatman’s argument that “I did not have the desire” would undercut the section 239 regime³⁶ was well-made. The point was not made in the context of a pure omission case – where the argument might well have some force – but the context of Mr Flatman’s actual conduct, including in particular the acts that I have described. In this context, the suggestion that Mr Flatman had no subjective state of mind regarding the payments out of and into the Personal Account is fanciful and the District Judge was right to reject it.
37. In short, there was ample material from which the District Judge could infer a desire on the part of Mr Flatman to make a preference within the meaning of section 239 of the Insolvency Act 1986. This was not a pure case of omission, and the District Judge identified acts on the part of Mr Flatman which justified his conclusion that Mr Flatman had desired to make a preference.
38. For these reasons, Ground 1 is dismissed.
- (2) **Ground 2: applying an objective and not a subjective test**
39. The basis for this ground of appeal is the concluding words in the last sentence of [35] of the Judgment. The last sentence is set out below, and the offending words underlined:
- “...I am satisfied that as at 26 March [2013], Mr Flatman knew the previous commercial arrangement between [the Company] and [Paul Flatman Trading] had ended and therefore either concluded or [ought]³⁷ to have concluded that there was no direct commercial benefit in [the Company] continuing to make payments to meet [Paul Flatman Trading’s] liabilities, whether related to feed payments or other matters.”
40. The underlined phrase – with its reference to “ought” – suggests an objective and not a subjective approach to the meaning of “desire” section 239(5) of the Insolvency Act 1986. To approach matters objectively is not the correct approach: “desire” is a subjective question.
41. It is clear to me that the District Judge simply misspoke, and that the underlined part of [35] of the Judgment must be disregarded. This phrase simply mis-expresses the conclusion that the District Judge reached on the basis of the unimpeachable findings of fact that I have described in paragraph 36(3) above. It is these findings that justify the conclusion that the District Judge reached that there had indeed been a preference within the meaning of section 239. The District Judge was perfectly entitled to conclude that Mr Flatman knew that that there was no direct commercial benefit in the Company continuing to make payments to meet [Paul Flatman Trading’s] liabilities, whether related to feed payments or other matters.
42. For these reasons, Ground 2 is dismissed.

³⁶ See paragraph [*] above.

³⁷ The word “thought” is an obvious typographical error for “ought”.

(3) Ground 3: failure to properly engage with the evidence

43. On appeal, Mr Flatman could identify no points that the District Judge had wrongly failed to take into account, nor any irrelevant points that the District Judge had wrongly taken into account. The fact is that, once the District Judge’s reasoning is properly understood, he reached a conclusion that was compelled by the evidence before him, which he properly set out in the Judgment.
44. The reality is that Ground 3 raises no new point beyond those raised by Grounds 1 and 2, which I have fully dealt with. Ground 3 must be dismissed.

(4) Ground 4: contradictory findings in relation to the commercial relationship between the Company and Paul Flatman Trading

45. The Judge found that Mr Flatman was given positive advice regarding the sale of the Company as a going concern, and that that was Mr Flatman’s hope and expectation during this period.³⁸ Of course, that hope, even expectation, cannot be allowed to override the fact that the Company was in financial difficulties, and that was the very reason Mr Flatman was seeking insolvency advice.³⁹
46. None of this has anything to do with the fact that the commercial relationship between the Company and Paul Flatman Trading had come to an end. The change arose from the fact that the Company ceased to purchase one-day old chicks, and instead purchased pre-fattened birds. As a result, the Company no longer needed to incur the cost of feed.⁴⁰ This change may nor may not have been related to the Company’s financial difficulties. The Judge made no finding in this regard, and the link with any financial difficulties is of no relevance to this appeal. The significance of the change in model was that certain payments by Paul Flatman Trading – notably the payments out of the Personal Account numbered 3, 11 and 13 for feed – could in no way be said to be discharging, even indirectly, obligations of the Company.
47. There is no inconsistency or contradiction between the District Judge’s findings, and Ground 4 must be dismissed.

E. GROUNDS 5, 6 AND 7: THE APPEAL IN RELATION TO THE DECISION UNDER SECTION 239

(1) Ground 5: misdirection on the question of “misfeasance”

48. Ground 5 states that:

“The Judge misdirected himself in concluding that Mr Flatman had acted in breach of duty in failing to act in the interests of the Company’s creditors, whilst simultaneously making a specific finding that he was not prepared to make a finding of misfeasance. It appears that the Judge did not realise that a specific finding that Mr Flatman was not guilty of misfeasance precluded a finding that he breached any duty to have regard for the interests of creditors.”

³⁸ See paragraph 19 above.

³⁹ See paragraph 15 above.

⁴⁰ See paragraphs 12-14 above.

49. It is necessary to consider precisely what was said in the Judgment:

(1) In paragraph 51 of the Judgment, the District Judge held:

“...I am not prepared in these circumstances to make a finding of misfeasance against Mr Flatman...”

(2) Earlier in the Judgment, the District Judge made a number of other references to “misfeasance”, notably at [41] and (perhaps less clearly) at [44], where the District Judge notes that – at least by the time of closing submissions – no dishonesty case was being run against Mr Flatman.

(3) In these circumstances, so says Mr Flatman, it was wrong of the District Judge to reach the finding that he did in the Judgment:⁴¹

“50 The conclusion to which I am drawn, therefore, is that the application succeeds by reference to preferences and section 239. Further, that by authorising or allowing such payments to be made, Mr Flatman acted in breach of his duty as a director of [the Company] to consider, given the circumstances of the relevant time, the interest of the body of [the Company’s] creditors as a whole, rather than just himself trading as [Paul Flatman Trading], even in circumstances where he had received a certain degree of what appears to be comparatively non-specific advice on related points.

51 However, given what I understand Mr Flatman thought he might be receiving by way of advice from Mr Wiles on the issue of a going concern, I found that he should have made further inquiries about that advice before the payments were made. I am not prepared in these circumstances to make a finding of misfeasance against Mr Flatman. In summary, therefore, the application succeeds in relation to the declaration sought regarding the preferences. The application succeeds in the alternative in relation to a finding in breach of duty. I have not made a substantive decision on the issue of a transaction at an undervalue because it is not actively [pursued]⁴² before me and I confirm that I have specifically declined to make a finding of misfeasance on the part of Mr Flatman in the particular circumstances of this case.”

50. It must be said that the parts of the Judgment dealing with the section 212 application are unsatisfactorily terse. It is quite difficult to discern the basis for the District Judge’s conclusions. Doing my best:

(1) Section 212 of the Insolvency Act 1986 refers (in section 212(1)) to “misfeasance or breach of any fiduciary or other duty in relation to the company”. It seems clear from an overall reading of the Judgment that the District Judge equated “misfeasance” with dishonesty, and that he was not prepared, on the facts as he had found them, to hold that Mr Flatman had been dishonest in permitting the payments from the Company Account to the Personal Account.

⁴¹ Emphasis supplied.

⁴² The Judgment says “received”, but I consider this to be a transcription error: “pursued” is obviously what the District Judge intended.

- (2) If that is right, Ground 5 is wrong in asserting that a refusal to find misfeasance precluded a finding of breach of duty. The refusal to find misfeasance merely precluded a finding of dishonest breach of duty.
 - (3) The District Judge clearly did find a breach of duty to exist. The problem, which Ground 5 raises incidentally, is that the District Judge entirely fails to identify the duty said to have been breached. He is clear that there was no misfeasance. But apart from that, it is very difficult to discern what non-dishonest breach of duty the District Judge did find:
 - (a) It is possible the District Judge was thinking in terms of section 172 of the Companies Act 2006, which imposes on directors like Mr Flatman an obligation to “act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole”. Although this section focusses on a duty to members, it is clear that there is an obligation, on the part of directors, to consider the interests of creditors.⁴³ However, the difficulty with this reading of the Judgment is that a breach of section 172 generally speaking requires an absence of good faith, which itself implies dishonesty, which is a finding that the District Judge expressly did not make.⁴⁴
 - (b) Equally, it is possible that the District Judge was thinking in terms of section 174 of the Companies Act 2006, which imposes on directors like Mr Flatman a duty to exercise reasonable care, skill and diligence. Section 174 imposes an objective, and not a subjective, standard of conduct. However, apart from the “ought” in [35] of the Judgment – the use of which I have considered and criticised in paragraph 41 above – there is again insufficient consideration of how this duty was breached in the Judgment.
 - (c) In the Judgment, the District Judge makes several references to Mr Flatman not being entitled to rely blindly on the advice of Duff & Phelps.⁴⁵ That may – or may not – be a reference to section 173 of the Companies Act 2006, which obliges a director to exercise independent judgment.
51. The fact that it is a struggle to identify the basis for the District Judge’s conclusion that there was a breach of duty on the part of Mr Flatman inevitably leads to the conclusion that Ground 5 is well-founded, and must be allowed. Whilst it may be that there was evidence before the District Judge to justify a finding of breach of duty, the findings of fact necessary to justify such a conclusion do not appear on the face of the Judgment. The fact is that the District Judge did not identify what breach of duty he considered Mr

⁴³ See, generally, Mortimore (ed), *Company Directors*, 3rd ed (2017) at [12.57]ff.

⁴⁴ Counsel for the Respondents cited *Re HLC Environmental Projects Limited (in liquidation)*, *Helland v. Carvalho*, [2013] EWHC 2876 (Ch), which explores (at [92]) the extent to which the generally subjective section 172 can have an objective element. I am quite prepared to accept that there can be an objective element in section 172 in certain cases. The problem is that this point is nowhere explored in the Judgment.

⁴⁵ See, for example, [47] of the Judgment: “...I accept that submission that Mr Flatman is not relieved from his obligations to use his own judgment simply because of advice he may have received...”.

Flatman to have committed; and he never made the findings of fact necessary to justify a finding of breach of duty.

(2) Ground 6: the finding of breach of duty was unsupported by adequate evidential findings

52. For the reasons given in Section E(1) above, I consider that Ground 6 is well-founded and must be allowed.

(3) Ground 7: insufficient notice of the Respondents' case

53. If the Respondents' case was insufficiently clear for Mr Flatman to understand the case being made against him, then it was incumbent upon him either to seek to obtain proper particulars or else to persuade the District Judge to dismiss the application under section 212.
54. It appears that no effort was made by Mr Flatman to obtain greater particularity of the Respondents' case; and certainly Mr Flatman failed to persuade the District Judge not to make findings in relation to the application under section 212. The District Judge's decision to accede to that application was a broad one, essentially of trial management, and it is not one that I am prepared to second-guess.
55. Accordingly, Ground 7 is dismissed.

F. DISPOSITION

56. For the reasons that I have given, I dismiss the appeal on Grounds 1 to 4 and 7. However, Grounds 5 and 6 succeed. From this it follows that Mr Flatman's appeal against the District Judge's finding that there had been a preference under section 239 is dismissed. However, the appeal against the District Judge's finding regarding the application under section 212 succeeds.
57. I will leave it to the parties to frame an appropriate form of order. Given the terms of the Order made by the District Judge, it seems to me that only the declaration in paragraph 2 of the Order ("In causing or allowing the Payments to be made, [Mr Flatman] acted in breach of his duties as a director of Paul Flatman Limited") must be set aside. The remaining parts of the Order stand.