Neutral Citation Number: [2022] EWHC 2644 (Ch)
Case No: CR-2021-001416

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

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF DAVID COLEMAN & CO. LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Microsoft Teams Remote Hearing
Date: 20/10/2022

Before :

I.C.C. JUDGE JONES

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Between :
MANOLETE PARTNERS PLC

Applicant

and

(1) DAVID COLEMAN

(2) SIMON THACKER

(3) FUNDING CIRCLE TRUSTEE LIMITED

Respondents

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Mr Ben Channer (instructed by **Knights Plc**) for the **Applicant**
Mr David Coleman in person
The Second and Third Respondents did not attend and were not represented

Hearing dates: 12 and 13 October 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.

.....CHJ 20/10/22 .....
I.C.C. JUDGE JONES

Remote hand-down: This judgment was handed down remotely at 10.00am on 20 October 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

I.C.C. Judge Jones:

A) The Claim in Outline

1. This application of Manolete Partners Plc ("MPP") seeks relief under ***s.239 Insolvency Act 1986*** ("***s.239***") asserting that the following transactions by David Coleman & Company Limited, now in liquidation ("the Company"), were preferences:

    a) Payment of £15,000 made by the Company to the 1st Respondent (Mr Coleman") on 25 July 2019;

    b) The debiting on 1 April 2019 of the 2nd Respondent's ("Mr Thacker") capital account to the extent that it extinguished his debt to the Company of £33,542.20.

    c) Payment of £37,746.25 made by the Company to the 3rd Respondent ("FCTL") on 26 July 2019 for the repayment of loans guaranteed by Mr Coleman and Mr Thacker.

2. ***S.239*** provides that a liquidator or administrator may apply for such order as the court thinks fit to restore the position to what it would have been if the company had not given a preference. The liquidator of the Company has assigned these claims to MPP as permitted by ***section 246ZD (2)(d) of the Insolvency Act 1986***.

3. The claim against FCTL has been settled on terms, as stated by counsel on instructions but having reviewed the confidential settlement agreement, that the asserted liability of Mr Coleman and Mr Thacker was not prejudiced or otherwise compromised by its terms. It is accepted, however, that credit must be given in respect of the settlement sum as and when it is paid.

4. The claim has proceeded against Mr Coleman, who has a witness statement setting out his defence and who attended and gave evidence at the trial. The claim has also proceeded against Mr Thacker but in the circumstance of him being debarred from relying on evidence for non-compliance with an unless order made 20 April 2022. Mr Thacker has been served with notice of the trial and with the trial bundle but has not attended.

B) Matters to be Proved

5. To establish a preference it is necessary for MPP to prove on the balance of probability:

    a) The transaction challenged occurred at the relevant time, as defined in ***s.240 Insolvency Act 1986***, namely:

        i) In the period of 2 years ending with the onset of insolvency (including between making of an administration application and the order) if the person receiving the preference is connected (as defined in ***s.249 Insolvency Act 1986*** to include directors) with the company other than by

reason of them being an employee but otherwise 2 years is to read 6 months; and

ii) the company is at that time unable to pay its debts within the meaning of ***s.123 Insolvency Act 1986***, or becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference, which is to be presumed subject to rebuttal if the preference is given to a connected person other than by reason of them being an employee;

b) The person to whom a preference was given is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities;

c) The preference had 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.

d) The company which gave the preference was influenced in deciding to give it by a desire to produce that effect, which is to be presumed subject to rebuttal if the preference is given to a connected person other than by reason of them being an employee.

6. Mr Channer, counsel for MPP, has considered it unnecessary to refer to authority on the basis that this is a case for which it is sufficient to refer to the statutory wording. I agree but (for reasons which will become apparent) observing with reference to the statutory wording and (amongst other decisions) the judgment of Mr Justice Millett, as he then was, in ***Re MC Bacon Ltd*** [1990] BCLC 324 that it is necessary to prove (subject to statutory presumption) a desire not just to confer a benefit on the recipient but to improve their position in an insolvent liquidation. In other words, applying a subjective test, that the Company had a positive desire to produce the effect mentioned in ***s.239(5)***, namely to improve the creditor's position in the event of its own insolvent liquidation. If more than one person receives the preference, that desire must be determined in relation to each.

C) Grounds for the Claims

7. A summary of the grounds of MPP's claim can start with the fact that MPP relies upon not only the presumption of insolvency applicable to respondents who are connected persons but also the positive evidence of Mr Bevan, a joint liquidator of the Company. He asserts that cash flow insolvency is established from September 2018 when the Company had to enter into a Controlled Goods Agreement with the debt management unit of HMRC. Whilst a time to pay agreement was reached, the Company was unable to comply with its terms and, on 6 February 2019 HMRC issued a notice of intention to re-enter the Company's premises unless it received the sum of £25,461.59. Whilst £24,903 was paid to HMRC on 14 June 2019, it in fact remained a creditor and/or there were other creditors whose debts due and owing were still unpaid after that date and until the Company's liquidation. The Company was wound up compulsorily on 19 December 2019 upon a petition presented on 22 October 2019 for a sum of only £3,942.36 demanded on 4 May 2018.

8. MPP's case is that the payments challenged were all within the relevant period as a result of Mr Coleman and Mr Thacker being connected persons. It is MPP's case that although that does not apply to FCTL, Mr Coleman and Mr Thacker were personal guarantors of the debt repaid to it and, therefore, the 2 year period equally applies. MPP also relies upon the presumption of the required desire in respect of each claim.

D) Mr Coleman's Defence

9. Mr Coleman's witness statement accepts that debts could not be paid as they fell due from September 2018 but effectively identifies a financial position from which it can be concluded that at the time of the challenged transactions claimed against him, it was expected that all debts would be paid within a reasonable period. It is his clear assertion that he never considered insolvent liquidation and that the Company had no desire to improve anyone's position in the event of its own insolvent liquidation.

10. His position, as set out in his witness statement, can be summarised as follows:

    a) The £15,000 received by him on 25 July 2019 should be reduced in any event by the £2,000 paid by him to the Company the day after.

    b) By the date of the two payments relevant to him, 25 and 26 July 2019, the Company had agreed to the sale of its business (an agreement signed 24 July 2019) upon terms which provided an initial payment (less a pre-payment of part) of £56,000 and an entitlement to future payments of £32,000 on 1 July in both 2020 and 2021.

    c) The £56,000 enabled payment of the £15,000, the £37,000 loan owed to FCTL and, as recollected, some £4,000 of rent arrears.

    d) Financially, he needed repayment of that part of his outstanding loans to the Company and it was beneficial to repay FCTL to reduce the Company's future liabilities and to take advantage of a repayment figure offered by FCTL which would save the Company interest and penalties and was significantly less than he thought the Company might otherwise owe.

    e) At that stage the remaining creditors stood at some £33,500: £20,000 owed to HMRC; a loan of £4,600 owed to LDF; a loan and overdraft of some £8,900 owed to National Westminster Bank. In addition there was the balance of his director's loan account.

    f) This total debt owed to creditors would be covered by existing debtors of some £30,000 and (in due course) the post completion sale consideration to be paid in July 2020 and 2021. The balance would be available to repay his director's loans. He believed and acted on the basis that all the creditors would be paid and that the Company was ultimately solvent.

    g) The Company acting by him as the then, sole director was not influenced by a desire to prefer. There was no desire in those circumstances to place either

himself or FCTL or anyone else in a better position than they would be in an insolvent liquidation. An insolvent liquidation was not contemplated.

11. Mr Coleman's witness statement also draws attention, although not as being relevant to the Company's desire, that he had personally guaranteed and has a County Court judgment entered against him for the £4,600 lent by LDF to the Company, and has entered into a time to pay agreement with the National Westminster Bank in respect of the Company's overdraft and outstanding loan of some £8,900.

E) Mr Thacker's Position

12. There is no defence from Mr Thacker because he did not file and serve evidence in opposition.

F) Witnesses

13. By order made on 30 September 2022 MPP was permitted to rely upon Mr Bevan's evidence without his attendance at trial subject to the redaction of its statements of opinion.

14. Mr Coleman gave his evidence carefully and in a considered manner. I had no reason to reach any other conclusion than that he was intending to provide accurate and honest evidence. Obviously that evidence needs to be considered against the documents, within the overall factual context, and also taking into consideration the issues concerning memory that apply in all cases and which have been the subject of observation in a number of well-known Court of Appeal decisions. However, I will bear in mind when doing so this assessment of his oral evidence, the fact that it was generally consistent with his witness statement, and that he was willing to accept points that were against his case when put to him. As examples: the Company's inability to pay its debts when that occurred, and the fact that by paying himself he was putting himself in a better position than those creditors who would have to wait for payment.

G) Findings of Fact

15. I am satisfied from the evidence before me based upon the onus of proof which lies upon MPP, except where the statutory presumptions apply, of the following facts and matters: The Company was incorporated on 6 September 2011 and operated as an accountancy business. Mr Coleman was a director of the Company since incorporation and Mr Thacker a director from 5 February 2016 to 31 July 2019.

16. The Company has never been a great financial success but there is no reason not to accept the evidence of Mr Coleman that it was profitable and provided a very modest income (for accountants) for the director/shareholders by way of salary and declared dividends, at least until the financial year end 2017. Neither side has provided

accounts within the evidence but the payment of dividends requires profits and substantiates that evidence. However, as Mr Coleman has also stated in his evidence, it suffered from cash flow difficulties during that period and this would require him to lend the Company money including to pay the employees on two or three occasions.

17. Whether dividends were declared for the 2018 financial year is unclear but certainly this was the year when the Company began to run into financial difficulties. It is to be noted in particular that the petition which in due course resulted in compulsory liquidation relies upon non-payment of a small debt dating back to March 2018. The extent to which the difficulties were attributable to work being lost to former employees who became competitors need not be determined. Mr Coleman drew attention to the fact that he and Mr Thacker worked hard to successfully bring in new clients after those employees had left during the relevant period of 2018 and in 2019. However, it is the financial position which is of concern not the cause.

18. The main problem apparent from the evidence concerning 2018 was non-payment of HMRC for the Company's VAT debt. By September 18, the Company had to enter into a Controlled Goods Agreement with the debt management unit of HMRC. A time to pay agreement of £2,000 a month was reached but on the basis that the business was to be sold. It was anticipated that the debt would be repaid from the net proceeds of sale. Whilst that delayed the date when payment of the outstanding debt had to be paid, the Company was unable to comply with the time to pay agreement. On 6 February 2019 HMRC issued a notice of intention to re-enter the Company's premises unless it received the sum of £25,461.59. There cannot be any doubt that the Company was unable to pay its debts as they fell due.

19. This occurred in the circumstances of the business not yet having been sold. I need not address the position concerning the potential for Mr Thacker to purchase the business or the Company. It is sufficient to state that from February 2019 he and Mr Coleman continued to look for purchasers. I accept, as a general proposition, that Mr Coleman had in mind that the Company's creditors would be paid from outstanding fees and, to the extent necessary, from the net proceeds of sale. His evidence during cross-examination to that effect is consistent with his statement. It is also a consistent theme which started with the intended method of payment for HMRC described when addressing September 2018. I refer to paragraph 34 of his witness statement when he refers to the Company's debts being covered by trade debts and to the valuation of net equity.

20. The sale process was protracted with various attempts to achieve a deal but the facts can move to 1 April 2019 when a sale to "TCP" was expected to complete. That is the same date as the debit of £43,850.00 to Mr Thacker's director's loan account. This was for the value of the clients who remained with him and, therefore, the value of the consideration he paid to be able to purchase the goodwill attributable to that transfer. It was measured by reference to natural, future recurring fees with a variety of additional factors being taken into consideration. This application does not challenge the transaction as an undervalue but claims £33,542.20 as a preference arising from that debit extinguishing his liability to the Company upon his director's loan account. That was the sum owed to Mr Thacker at the time of the debit and left a debt due and owing by him to the Company for the balance of £9,957.67.

21. Plainly, as a fact, this occurred within the relevant time required by ***s.239*** and the statutory presumptions of insolvency and desire apply because Mr Thacker was a director and, therefore, a connected person. Taking into consideration the overall financial evidence for this period set out above, it is apparent in any event that the Company was unable to pay its debts as they fell due. The evidence does not address the Company's desire concerning that debit whether as to the mind of Mr Thacker or Mr Coleman. From MPP's perspective it does not need to due to the statutory presumption.

22. The sale did not then complete and was delayed on a number of occasions until the sale agreement was signed and the sale completed on 24 July 2019. At this stage Mr Thacker was still a director and it is clear that he was an active participant in the sale negotiations, not least because he was also a shareholder. However there is nothing to contradict the evidence of Mr Coleman, which I accept, that Mr Thacker was by this time hardly playing any active day to day role in the business. That evidence is consistent with the fact that he was now running his own business having acquired clients from the Company and set up Greystone Advisory Ltd. It is to be concluded that it was Mr Coleman who decided what should happen to the consideration paid on completion. That was his unchallenged evidence. Therefore, his subjective intentions should be taken to be the Company's and in particular his mind the one to consider when addressing the issue of desire to place himself and/or FCTL in a better position than they would otherwise stand in the event of the Company going into insolvent liquidation when making the two challenged July payments.

23. Before the payment of consideration on completion, TCP on or about 1 June 2019 had agreed to advance to the Company part of the intended purchase price, some £24,000. This was to be used, at Mr Coleman's request, to repay HMRC the sum then owed for VAT. However, although £24,903 was paid on 14 June 2019, the Company remained unable to pay its debts as they fell due. This is evidenced by the winding up petition and the date when its unpaid debt originally fell due. It is also evident from the key events which are now to be turned to.

24. Those key events are:

    a) The payment on completion to the Company by TCP on 24 July 2019 of £56,000 (the balance of the first part of the agreed sale consideration) and the undertaking by TCP of contractual obligations to collect in and account for the existing debt owed to the Company, and to make two further payments as consideration for the sale of £32,000 each on 1 July 2020 and 2021.

    b) The £15,000 payment to Mr Coleman by the Company on 25 July 2019 from the £56,000 in repayment of part of his director's loan.

    c) The payment from the £56,000 of £37,746.25 to FCTL on 26 July 2019 for the repayment of sums outstanding upon loans to the Company guaranteed by Mr Coleman and Mr Thacker.

    d) The loan of £2,000 by Mr Coleman to the Company in the circumstances of the Company having moved into overdraft as a result of those payments.

25. The evidence of Mr Coleman in the witness box was that he understood at this time that those payments left the Company with debts due and owing in the region of £33,500: some £20,000 owed to HMRC, £4,600 to the future petitioning creditor, LDF, and £8,900 to National Westminster Bank plc (guaranteed by himself and Mr Thacker) in respect of the bank overdraft and a loan. In addition, he was owed the balance of his director's loan account.

26. This is not an understanding derived from having checked the Company's accounting records. His evidence is that these were kept on a computer system introduced and kept by Mr Thacker. A system which resulted in Mr Thacker producing management accounts for regular meetings until after a foot injury caused him to no longer attend the premises from early 2019. Mr Coleman's evidence was that insofar as he had been originally given password access, he could not achieve access during the period in issue. On the other hand, it is plain that financial information will have been collated and inevitably seen by him at least for the purpose of the sale of the Company's business during 2019 with the result that this is not a case where he was unaware of the Company's financial position.

27. Mr Coleman's evidence was that the Company had debtors of some £30,000 and that he expected TCP to collect those debts pursuant to its contractual obligations following their assignment on completion of the sale agreement. He acknowledged that this would leave some creditors unpaid, in the region of £3,500, and himself but stated that he intended them to be paid from the first further payment of £32,000 to be made by TPC on 1 July 2020. The balance together with the second payment the following year would repay his director's loan account which, it follows, he would not demand in the meantime. It was his understanding and belief that the Company was ultimately solvent even though it could not pay all of its debts for about a year. He hoped to persuade the outstanding creditors to wait for payment.

28. This evidence is consistent with his witness statement and with his statement made to the Official Receiver ("the OR") under ***section 291 of the Insolvency Act 1986*** and subject to ***section 5 of the Perjury Act 1911*** on 7 February 2020. In that statement he says on a number of occasions that he intended and expected the creditors to be paid in full after the business had been sold. He recognised there would be a shortfall after the initial consideration for the sale had been paid and explained that it was hoped that those unpaid would accept later payment from the subsequent instalments. This statement will have been drafted from notes taken at the time of interview by the Insolvency Service at a time when issues of preference were not being raised. Mr Coleman accepted the accuracy of the notes by his signature.

29. Mr Coleman rightly accepted in court that in the circumstances set out above, he obtained a preference in respect of the £15,000 and by the payment to FCTL ending his obligations as a guarantor. He was put in a better position when the Company went into liquidation than he would have been if the payments had not been made. However, he was categorical in his evidence to the effect that he expected all creditors to be paid in due course in the manner set out above and that he had no thought of an insolvent liquidation.

30. When asked why he paid himself, he first said he did not know but then pointed to the fact that he was owed the money, some of which had been borrowed on credit cards at high interest rates. It was clear to me from his evidence that he paid himself because

he needed the money. When asked why he paid FCTL, his position was different. Although slightly convoluted, his evidence was unambiguous and comprehensible. The repayment was a "no brainer" because FCTL had provided a settlement figure which was considerably less than he and, therefore, the Company had anticipated. This had resulted from email communications with a Ms Shamina Akhtar. Payment would achieve a satisfactory settlement of this debt and would stop interest and potential penalties. A wrinkle, however, was that this sum had to be paid by 22 July 2019, which it was not, but he envisaged that it would not make a significant difference if a few additional days were added for the purpose of the calculation.

31. It is to be observed that this version of events on its own raises doubt about its accuracy based upon the potentially unlikely propositions that a low repayment figure would be offered and/or that non-compliance with the date for payment would not make a material difference when the offer would effectively have expired. In addition when, on 4 February 2020 his completed Insolvency Service Questionnaire identifies FCTL as a existing creditor of the Company in the sum of £29,081.

32. However, Mr Coleman's statement to the OR (not his witness statement) refers to: "The debt owed to [FCTL] at the moment is largely fees which we are contesting with the Financial Ombudsman". When referred to this, his evidence in the witness box mentioned the settlement figure having been subsequently described as "promotional", which was a description previously used during cross-examination but without any apparent clear meaning. Mr Coleman when addressing that sentence explained (without clarity as to date due to lack of memory but plainly referring to a period after the payment on 26 July 2019) that FCTL had disputed that the payment made on 26 July cleared the debt. The reason being that it was made after the expiry 22 July when this low, "promotional" figure had been offered. That description had not previously been given and he had understood the amount paid to be the final settlement figure when it was paid on 26 July 2019. The additional sum now claimed consisted of penalties and interest, as he recollected.

33. Two further facts provided potential cause for acceptance of this evidence. First that this had been the subject of discussion between Mr Coleman and senior members of FCTL leading to them offering to accept £12,000 in full and final settlement of the dispute. A figure which Mr Coleman explained, in a manner adding credence to this evidence, the Company (or indeed himself) could not afford and, therefore could not accept. Second, that an appeal was made to the Financial Ombudsman objecting to the claim for a further payment. Whilst the appeal's outcome was in favour of FCTL, it at least indicates consistency with the statement of Mr Coleman that he believed at the time of the 26 July payment that the debt had been settled in full. Mr Coleman said that he had wanted to appeal the decision but the Company was by then in liquidation and that was a decision for the liquidator, which is correct.

34. Before a decision of fact can be made concerning this matter and, therefore upon the subjective intention of the Company as at 26 July 2019, it is necessary to address another issue presented by the answer within the completed Insolvency Service Questionnaire identifying the Company's existing creditors. There were a number of creditors not previously mentioned in Mr Coleman's witness statement but their debts are small and it has not been suggested (rightly) that anything turns on them. However, the debt owed to HMRC is £53,020 for the period 31 October 2017 to 1

July 2019 not the £20,000 estimate Mr Coleman said he relied upon when deciding that all of the Company's debts could be repaid over time.

35. Mr Coleman emphasised that his previous evidence had identified £20,000 as his estimate as at 25/26 July 2019 not as at the date of his answers to the Questionnaire, which is correct. He explained that the £53,020 figure was taken from a later HMRC letter and that this debt had not been mentioned and was unknown to him during July 2019. He did not accept that claim, at least to the extent that it appeared to include £11,000 which had been paid at the beginning of July when FCTL had advanced part of the purchase price for that purpose. However, his main points for the purposes of intention and desire at the date of the two challenged payments were that he did not have access to the Company's accounts at that time and he thought that the only debt would be for two quarters of VAT. That would be in the region of £20,000. Those main points can also be found within his statement to the OR when explaining that he believed that the future payments from TCP would be more than enough to cover the tax debt he had previously believed to be outstanding.

36. Any decision on this and the FCTL issue must also have regard to what else occurred after 26 July, to the extent that is relevant to the desire of the Company at the time of the respective challenged transactions.

37. Mr Coleman's evidence in the witness box was that he had an oral, consultancy agreement with TCP which he expected to last for 1, perhaps 2 years but which ended after 6 weeks when (or around that time) TCP also gave notice to leave the Company's rented premises which they had taken over upon purchase of the business. He explained that it was only as a result of those actions that he began to consider the possibility that the two, future instalments of post purchase consideration might not be paid by reason of claims of claw back. As to the recovery of the £30,000 odd owed to the Company, his evidence was that TCP collected, he believes, about £13,000 but nothing was paid to the Company and this sum was accounted for to the Official Receiver after its liquidation. He did not know why only that amount was recovered.

38. There are issues over the accuracy of those stated time periods because different periods appear in his witness statement and/or his statement to the OR. However, he was clear in his recollection in the witness box, having been referred to those differences, that the end of his consultancy and the giving of notice for departure from the premises had occurred before he met with Mr Simister of Lines Henry, Insolvency Practitioners, during August 2019. His recollection was that at that meeting he had identified those facts and his resulting concern that TCP would not honour their obligation to pay the July 2020 and 2021 second and third purchase price instalments but rely instead on claw back provisions within the sale agreement. This was an informal meeting for initial advice at a hotel. He knew Mr Simister because he attended the Company's premises roughly once a year to "tout" for business. In the light of that information, Mr Simister advised him that the best course would be to place the Company into members' voluntary liquidation to enable him to have greater control over the Company's dealings with its debtors and with the ultimate payment of its creditors. Mr Simister quoted a fee of £4,000 plus VAT if that route was taken. This led Mr Coleman to email Mr Thacker to see if he would share the cost, which Mr Coleman could not afford on his own, but received no response to that or to a chaser email.

39. This evidence is potentially important forensically because it is consistent with the evidence that Mr Coleman believed all creditors would be paid when he made the challenged payment on 25 and 26 July. It is potentially surprising that Mr Simister advised a members' voluntary when there had to be doubt on the information available whether a statutory declaration of solvency could be made. Mr Coleman is sure that was said, although he only referred to a liquidation in his answers to the Questionnaire and in his statement to the OR. However, the potentially important point is that this evidence concerning this subsequent event is consistent with the mind set described by him concerning his belief that the creditors would be paid, albeit that this belief was under doubt by August 2019 because of TCP's actions.

40. It is to be noted for the purpose of a final decision on the facts and, as a result, on the claim concerning the two payments on 25 and 26 July 2019 that there is a shortage of documentation and no evidence in reply. There are no accounting records to evidence what Mr Coleman would have seen concerning the liability of HMRC had he looked at them. There are no documents from HMRC addressing the £53,000 liability, not even the letter to which Mr Coleman referred. There are no documents concerning the communications between him, FCTL and/or the Financial Ombudsman. Mr Simister's advice was informal and oral but the subsequent emails to Mr Thacker are not before the court.

H) Submissions

41. Mr Channer's submissions were founded upon the propositions that all the elements required to be proved were obviously met in respect of all three claims subject to considering whether Mr Coleman had rebutted the statutory presumption for the July payments that the Company was influenced by the necessary desire to place himself and himself and Mr Thacker as guarantors of FCTL's debt in a better position in the event of the Company going into insolvent liquidation.

42. As to that, he submitted (in summary) that the result for each payment would inevitably be the same. That Mr Coleman's evidence could not be accepted on the balance of probability when it on its face required at least some of the creditors to wait for payment for about a year. Nor could it be accepted when there was little supporting documentation for his claim that he thought creditors only totalled in the region of £33,000 and that debtors stood at and would be collected in the sum of £30,000. He drew attention to the fact that this was a two man accountancy firm which made it unlikely, at least for the standard required by the burden of proof, that Mr Coleman would not know the true creditor position totalling about £98,000, as set out in the list of creditors provided in his answers to the Questionnaire. There was no apparent reason why the debts as known in February 2020 would not have been known in July 2019 and Mr Coleman's assertion that he did not look at the accounting records could not be believed. He is, after all, an accountant. Further, the £33,000 debt figure now used is inconsistent with his statement to the OR which referred to £20,000 of debtors.

43. I do not consider it necessary to set out Mr Coleman's arguments. Not because I do not consider them worth addressing but because they in effect repeat the matters I

have already set out when identifying his defence and when addressing the facts. I will stress, however, that I have had regard to all he told me.

I) Decision – Mr Coleman

44. I agree with the submission of Mr Channer that the case against Mr Coleman turns upon whether he has rebutted the presumption of a desire. The findings of fact have established that the 25 and 26 July payments were made at the relevant time both in terms of date and of insolvency applying the inability to pay debts as they fall due test. Even if his evidence is accepted in full, at the time of the payments and afterwards, the Company could not pay creditors with debts due and owing totalling some £3,500 even assuming the total debts owed to the Company were collected in full. At the time and afterwards they were not collected in full and creditors with debts due and owing totalling some £30,000 were and remained unpaid with the Company being unable to pay them. Mr Coleman cannot rebut the presumption of insolvency because the Company was insolvent.

45. There is also no doubt that the two July payments were preferences. Mr Coleman was placed in a better position by receipt of the £15,000 than he would be in the event of an insolvent liquidation. He and Mr Thacker were similarly placed in a better position, as was FCTL, by the payment of its debt.

46. That leaves the question of a desire to prefer with the burden of proof being upon Mr Coleman because he must rebut the statutory presumption. I approach his evidence from a stand point of scepticism not merely because of the burden of proof but because one might ordinarily expect an accountant to have a grasp of his company's financial position and know of the creditors subsequently identified in his answers to the Insolvency Service's Questionnaire totalling £98,000 odd not £33,500.

47. In addition, his evidence in answer does not address this anomaly. There is no reference to the HMRC debt of £53,020 only having been identified from a letter received after 26 July 2019. Nor is there reference to conversations with FCTL leading up to the payment of the settlement figure or to those resulting in an offer of settlement or to the appeal to the Financial Ombudsman. Further, there are no documents to support the calculations he relies upon to state that at the time he made the two July payments he was confident that all creditors would be paid in due course. The summarised submissions of Mr Channer are well made and need to be taken into consideration.

48. On the other hand, there are a number of general observations to be borne in mind when considering those concerns. There is my assessment of Mr Coleman as a witness, albeit one subject to express caveats which are directly relevant. Second, there is the feature that the evidence of Mr Coleman was made in answer to the evidence of Mr Bevan which exhibited but did not refer to Mr Coleman's identification of creditors in his answers to the Insolvency Service's Questionnaire. The existence of creditors totalling £98,000 odd is not relied upon within his evidence when addressing insolvency or when considering any of the payment/debit transactions. As a result there was no "signpost" for Mr Coleman, as a litigant in person, albeit a qualified accountant, that he should address such evidence.

49. That point needs to be taken with caution, however. Mr Channer is quite right to observe that there would be no need to address such matters within the evidence in support and no need for reply evidence when it is Mr Coleman's obligation to rebut the presumption. MPP can rightly decide to approach the case and trial from the basis that his evidence in answer does not do so with the result that reply evidence was not required. I accept that approach but it is still to be borne in mind when applying the fact of an absence of evidence in Mr Coleman's witness statement that this could be attributable to the absence of a signpost even though no criticism can be made of MPP for that circumstance.

50. It is also to be borne in mind that his evidence was not the first time Mr Coleman raised his belief of July 2019 that all the creditors would be paid. His letter in answer to the letter before claim is entirely consistent with his witness statement. Whilst I do not retreat from the approach identified in the paragraph above, the absence of evidence is more understandable when MPP did not raise issue in their evidence with the defence identified in Mr Coleman's letter by addressing the £98,000 creditor position point. That is not to criticise them but it provides substance to an explanation that Mr Coleman when repeating his previously identified defence did not appreciate he should refer to and explain that point.

51. A further general point is the overall consistency of Mr Coleman's defence with previous statements and in particular his statement to the OR. His is not evidence which comes "out of the blue". In addition, whilst there is an absence of supporting documentation, it is to be remembered that he will have handed over the Company's books and records to the OR, as he stated he did. There is the feature to counter consistency, observed by Mr Channer that the £33,000 debt figure now used is inconsistent with his statement to the OR which referred to £20,000 of debtors. That is noted but will not be determinative.

52. Turning to the two specific debts relied upon for this £98,000 creditor point, it is to be mentioned that should I accept or reject Mr Coleman's evidence in respect of one of the two material creditors, that will not necessarily mean I should accept/reject his evidence in respect of the other. Each must be tested. However, it may be a relevant factor when assessing credibility if I accept or reject his evidence for one creditor when considering his evidence in respect of the other.

53. I will start with FCTL because their payment and further debt produced the most evidence. Mr Coleman's case that payment to FCTL was beneficial to the Company ("a no brainer") because of the low settlement figure is not explained in those terms in his statement to the OR made when there was no issue of a potential preference claim. However, the payment is referred to within the context of a belief that all other creditors would be paid and he also stated that the claim by FCTL in the liquidation was being contested before the Financial Ombudsman. Although there is an absence of documentary evidence, I would be astonished if Mr Coleman had been making up his references to the Ombudsman in the witness box and astounded if he had been making it up during his interview with the OR. That is not only because of my assessment of him as a witness and/or because of the risk that any witness would be taking by doing so but also because there was no apparent cause for him to lie when giving his statement to the OR.

54. Acceptance of his evidence concerning the Ombudsman leads me to accept that he (on behalf of the Company) contested the FCTL debt identified in his answers to the Preliminary Questionnaire. Whilst his explanation of the bases for that dispute depends upon his oral evidence, and whilst the absence of documentation is of concern, Mr Coleman's evidence before the court to set out and explain the reasons for that dispute made sense overall and persuaded me on the balance of probability that he was telling the truth.

55. Taking into consideration the evidence relevant to this as a whole, I am satisfied on the balance of probability that his evidence concerning the settlement figure, his understanding when the payment was made on 26 July and his subsequent dispute of the further claim has not been made up. I accept that he thought at the time, 26 July 2019, that payment of the FTCL settlement figure meant FCTL would be/was no longer a creditor of the Company. Therefore, that it should not be included in the list of creditors which he had in his head as the remaining creditors needing to be paid totalling £33,500.

56. I should add that the one real concern I had when reaching that decision was the fact that the settlement figure had been given on the basis of payment by 22 July. He obviously appreciated that this deadline had not been met. However, the payment was accepted by FCTL and I accept his evidence that he had no reason to believe that this would lead to a further claim for payment from FCTL whether in the sum appearing in his answers to the Questionnaire or otherwise.

57. That decision provides some support for credibility in respect of Mr Coleman's case when considering HMRC. I am still concerned by this, however, because of the absence of back up evidence from Mr Coleman to sustain his £20,000 calculation. He refers to two VAT quarters, whereas it is not entirely clear why it should only be two. It also potentially depends upon the contention that he did not access the accounting records kept by Mr Thacker (whether because he was unable to do so or not) and upon the proposition that he was not on top of the financial position of the Company despite the sale of its business.

58. I have concluded that he took a pretty cavalier approach to the calculation of HMRC's debt by adopting such an approach. However, the desire test is subjective and having seen him give evidence, I can envisage that he was prepared to act on his rough and ready assessment without feeling the need to check the figures. I anticipate that the fact, as he stated, that he could not access (or at least not readily) the computer kept accounts system will have been an explanation for his approach. In addition, he was clear in his evidence that he had not expected the claim for some £53,020. That conclusion is supported by consistency, starting with his statement to the OR before any claim was raised and continuing through to his witness statement and evidence before the court via his letter in answer to the letter before claim. Further, there is the overall finding that he is a reliable witness. I do not consider that he would lie to the court on this matter.

59. Another factor relevant to both this and the FCTL issue is the evidence concerning his meeting with and the advice given by Mr Simister concerning a members' voluntary liquidation. I referred Mr Coleman to the evidence where he referred only to a liquidation and to the fact that a declaration of solvency would be required, which had to be doubtful in the light of the circumstances which caused him to have that

meeting. I suggested that those features suggest his memory might be at fault. I took the view that he did reconsider the position based upon those matters before confirming to me that his recollection was that a members' voluntary was advised. In other words that his confirmation appeared genuine.

60. The relevance of his evidence concerning the meeting, however, is not necessarily whether that specific advice was given but the fact that it in any event supports the evidence that his mind was set when making the July payments on the understanding that all creditors would ultimately be paid. He went to Mr Simister because the subsequent actions of TCP concerning his consultancy and their use of the premises caused him to be concerned that they may not make full payment in July 2020 and 2021. In other words, these were new concerns which worried him because they potentially altered his previous understanding and mindset that everyone would be paid in full. Whether he accurately remembered Mr Simister's advice or not, the evidence is consistent with his evidence of his mind set when the two payments were made.

61. Looking at the matter in the round and taking into consideration all of the matters addressed above, I accept his evidence that he thought HMRC was owed some £20,000 as at 25 and 26 July 2019.

62. Taking all the evidence into consideration, I have decided that Mr Coleman has rebutted the presumption on the balance of probability by establishing that he was not even contemplating the possibility of an insolvent liquidation at the time of the two payments on 25 and 26 July 2019. I am satisfied on the balance of probability that the Company had a desire to confer a benefit on him as the recipient of the £15,000 and as a guarantor of the liability to FCTL but not to improve his position in an insolvent liquidation. It did not have a positive desire to produce the effect mentioned in ***subsection (5) of section 239***.

63. It is unnecessary, therefore, to address for the purposes of either claim made against Mr Coleman the fact of the further loan by him of £2,000 on 26 July 2019 or the relevance of his settlement agreement with and payments made to National Westminster Bank as a guarantor. Both would otherwise have been relevant to relief.

64. It may also be noted that even had a different decision been reached in regard to knowledge of HMRC's debt and even assuming the £53,020 was correct, the addition of a further £33,020 liability to the £33,500 calculation would not have avoided his conclusion that all creditors would be paid from the collection of debts owed to the Company and from the payment of the two instalments. Whilst Mr Coleman was also a creditor, it is apparent from his evidence that he intended himself to be paid last.

J) Decision – Mr Thacker

65. Although Mr Thacker has provided no evidence, Mr Channer rightly accepts that the finding that the payment to FCTL was not a preference must apply to him as well.

66. That leaves the claim concerning the extinguishing of Mr Thacker's capital account on 1 April 2019 by debiting his director's loan account with the sum due from him for the goodwill of clients transferred to him for £43,850.

67. Mr Thacker was a director, a connected person. The debit occurred within two years of the commencement of the winding up. There is a presumption of insolvency which he has not rebutted and the evidence has in any event established that the Company was unable to pay its debts as they fell due at that time. The payment placed him in a better position than he would be upon an insolvent liquidation had there not been a set off of his then existing debt to the Company by this debit. There is a presumption of an intention by the Company to achieve that result. There is no evidence before the court to rebut that presumption. I find, therefore, that he received a preference of the sum claimed in the application notice, which is £33,542.20.

K) Conclusion

68. The application against Mr Coleman will be dismissed. The appropriate relief to order against Mr Thacker to restore the position to what it would have been had the Company not given the preference to him is to award judgment in the sum of £33,542.20.

Order Accordingly