Re PCChip Computer Manufacturer (S) Pte Ltd (in compulsory liquidation)
[2001] SGHC 131

Case Number : OS 1736/2000

Decision Date : 13 June 2001

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Thio Ying Ying and Cheong Aik Hock (Kelvin Chia Partnership) for the plaintiffs; Chew Kei Jin (Tan Rajah & Cheah) for the defendants

Parties : —

Restitution – Mistake – Bank paying money paid under mistake of fact – Recipient company under liquidation – Whether bank entitled to return of money paid by mistake -Whether bank ranks as unsecured creditor with no proprietary right over money – Whether liquidators as officers of court should be compelled to return moneys paid under mistake of fact – Conditions to be satisfied for return of money – Whether personal involvement in mistaken payment on liquidators' part necessary – Whether dishonourable behaviour by liquidators in receipt of money necessary – Whether any difference if mistake one of law

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Background facts

This is an application by the plaintiffs, as liquidators of PCChip Computer Manufacturer (S) Pte Ltd (`the company`), for directions of the court pursuant to s 273(3) of the Companies Act (Cap 50, 1994 Ed).

The company was incorporated on 3 September 1985 for the purpose of, inter alia, carrying on the business of manufacturing disk drives, CD-ROM drives and optic drives, and of data entry services. It was wound up pursuant to an order of court dated 16 October 1998 and the plaintiffs were appointed as liquidators.

At the time of winding up, the company had several bank accounts in its name. One such bank account was a US Dollar Current Account No BN-802-01787-Q-USD (`the OCBC account`) opened with the defendants (`the bank`).

On or about 31 May 1999, the bank notified the company that the OCBC account had been mistakenly over-credited on 24 June 1998 in the sums of USD85,200 and USD590. The bank explained that on 19 June 1998, the company had paid in two cheques in those sums for credit into the OCBC account. These sums were credited into that account by the bank`s computer system on 22 June 1998. However on 24 June 1998, the computer system again credited those amounts into the OCBC account, thereby resulting in the account being credited twice for those two cheques. The liquidators do not dispute that there was double crediting in respect of the two cheques, which meant that a total of USD85,790 was over-credited. This money was mixed with other funds of the company which totalled about S$747,521 at the time. Thereafter, there were various withdrawals amounting to S$503,774 in June 1998. Further withdrawals were made from July to 18 October 1998, the day the company was wound up.

Upon their appointment, the liquidators wrote to the bank on 16 October 1998 and 26 October 1998 to instruct them to close all the company`s accounts with them and to forward, inter alia, all proceeds in the respective currencies by cashier`s orders made payable to the company. Accordingly,

on 27 November 1998, the bank transferred the total amount of USD257,005.63 out of the OCBC account by way of a banker`s draft. This sum of USD257,005.63 was, on 4 December 1998, paid into the company`s US Dollar Account with United Overseas Bank Ltd which, upon such payment, stood at USD258,128.68.

The liquidators do not deny that a sum of USD85,790 was mistakenly paid by the bank. In the ordinary case of a payment under a mistake, the law requires the recipient to repay the money to the person who made it. This used to apply only to payments under a mistake of fact but since the decision of the House of Lords in **Kleinwort Benson v Lincoln City Council** [1998] 4 All ER 513, it also applies to payments under a mistake of law. But the present case is one of payment under a mistake of fact. The problem here is that the company is now insolvent and the issue is whether the bank is entitled to the return of the money in full or are simply unsecured creditors. The liquidators take the position that the bank do not have any proprietary right to the said money, whether legally or equitably, and merely rank as unsecured creditors of the company. Therefore the bank should lodge their proof of debt and share pari passu in the proceeds of liquidation alongside the other unsecured creditors.

The bank, however, contend that they are entitled to be repaid the money on three alternative grounds:

(1) the bank are entitled to trace the money into the hands of the liquidators as it never belonged to the company and does not form part of its assets for distribution to its creditors;

(2) in the circumstances, the liquidators hold the money as constructive trustees for the benefit of the bank; and

(3) under the principle in **Ex p James, re Condon** [1874] LR 9 Ch App 609, the court would order the liquidators to return the money.

The first two grounds are related. They are based on the English decision in **Chase Manhattan Bank NA v Israel-British Bank (London)** [1981] Ch 105[1979] 3 All ER 1025which was followed by the High Court in **Standard Chartered Bank v Sin Chong Hua Electric & Trading** [1995] 3 SLR 863 . However, I need not go into these grounds as my decision can be supported on the third ground alone, which I now set out.

Principle in Ex p James

The principle enunciated in **Ex p James, re Condon** [1874] LR 9 Ch App 609 (` ***Ex p James*** `), simply put, is that the plaintiffs, who are the liquidators and therefore officers of the court, should be compelled to return the moneys as it would be wrong, on moral principle, to allow the account holder to retain what it was never rightfully entitled to.

In ***Ex p James*** , a judgment creditor levied execution on his debtor`s goods and these were sold by the sheriff. On the day of the sale the debtor filed a petition for liquidation by arrangement, notice of which was served on the sheriff four days later. Before the expiration of 14 days after the sale the creditors held the first meeting but no resolution was passed. After the 14 days had elapsed, the sheriff paid the sale proceeds to the execution creditor. Thereafter a bankruptcy petition was filed by another creditor which eventually resulted in the adjudication order. The trustee`s solicitors demanded payment of the sale proceeds from the execution creditor and threatened to take out proceedings. The execution creditor was advised that on the law as it stood he would not have a

defence to the claim. He therefore paid over the money to the trustee. When the law was subsequently changed, the execution creditor requested the money to be refunded to him but the trustee sought to retain it for the benefit of the general body of unsatisfied creditors. The Registrar ordered the trustee to refund the money and the trustee appealed. The court dismissed the appeal and affirmed the Registrar`s order to refund the money. James LJ, with whom Mellish LJ agreed, said as follows (at p 614):

> *I am of the opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to someone else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people.*

In making such an order, the court appears to have relied not on any rule of law or equity, but on the principle that a court would order its officers to act in an exemplary manner and do the right and proper thing.

Although ***Ex p James*** concerned a bankruptcy, Farwell LJ in **Re Tyler, ex p Official Receiver** [1907] 1 KB 865 held that the principle applied to winding up of companies where the court by its officer is in the position of a quasi-litigant.

Re Drysdale

For the next 75 years or so after ***Ex p James*** , the principle was applied by English courts in a rather inconsistent fashion. In **Re AM Drysdale (deceased), Municipal Comrs of the Town of Singapore v Official Assignee** [1949] MLJ 273 (` ***Re Drysdale*** `), Murray-Aynsley CJ conducted an exhaustive review of those decisions. The facts in ***Re Drysdale*** are as follows. In 1946 and 1947, the Municipal Commissioners passed resolutions to make ex gratia payments to employees in respect of the Japanese Occupation. One such employee had become a bankrupt in 1941 and died, still a bankrupt, in 1945. On 20 February 1948, the Municipal Treasurer paid a sum of money to the Official Assignee in respect of the deceased bankrupt. However, on 30 April 1948, the Municipal Commissioners passed a further resolution to the effect that payments in respect of deceased officers should be made to the dependants of the deceased or such other persons as they should think proper.

The Municipal Commissioners brought a motion to recover from the Official Assignee such part of the money as had been paid out to the creditors. The applicants based their claim on the principle in ***Ex p James*** . Murray-Aynsley CJ, after reviewing the authorities, concluded that the principle existed, albeit in an unsatisfactory form. He said as follows at p 276:

> *The position on the authorities is this, the rule exists in some not very well defined form. Until the House of Lords decides otherwise, there it is. It is a result of the very imperfect formation of a doctrine of quasi-contract in English law. Owing to the lack of an adequate doctrine, cases arise which are rather shocking and the Courts have tried to soften hard cases by bad law. Why only the creditors of a bankrupt should be victims of high-mindedness is not explained.*
>
> *The absence of an adequate doctrine of quasi-contract caused the unfortunate*

> *distinction between payments made in mistake of fact and payments in mistake of law which is not known in countries following the Roman Law and which has no rational justification ...*

However, the Chief Justice held that the scope of the principle should not be extended beyond its limited sphere. He continued (at p 277):

> *... The doctine of **Ex parte James** is in its limited sphere in bankruptcy, etc., irrational. Its application has been spasmodic and also irrational ... I have had to devote a lot of space in attempting to find out what exactly is the doctrine I am invited to apply. I think it would be wrong to extend its application.*

Murray-Aynsley CJ held that there was no mistake of law or otherwise. He refused to extend the principle to the circumstances of the case before him, which was essentially a situation in which the commissioners had changed their minds after making the ex gratia payment. He said at p 277:

> *I do not think that in the case under consideration there is any mistake of law or otherwise. The Municipal Commissioners were free to make presents to whom they liked. A present to the estate of a deceased employee who was bankrupt enured to the benefit of his creditors as a matter of law. There is nothing to show that the Municipal Commissioners laboured under any misapprehension. At a later period they decided to make presents to relatives instead of to creditors, as they were entitled to do. Once a payment was made it was complete and I do not consider that once the Official Assignee had received the money he was under any obligation or duty except to pay it out according to law. I do not think that once the payment was made the Municipal Commissioners could change its destination. I do not think that the Official Assignee was under any obligation, moral or otherwise, to have regard to a subsequent change of policy of the Municipal Commissioners.*

It should be noted that a further ground for the Chief Justice`s decision was the fact that the Official Assignee had already paid out the money to the creditors. He continued:

> *There is also a distinction from earlier cases in that the money is paid out, cannot be recovered from the creditors and there is no prospect of further assets coming to hand.*
>
> *To make any order in the circumstances would go beyond what was done in any other case. That point does not call for any decision at present. The motion must be dismissed.*

Thus even if the principle were applicable, the circumstances in ***Re Drysdale*** were not such as would move the court to exercise any discretion in favour of the applicants.

Re Clark

In more recent times, the principle in ***Ex p James*** was applied by the English High Court in **Re Clark**

(a bankrupt), ex p Trustee of the Property of the Bankrupt v Texaco [1975] 1 All ER 453[1975] 1 WLR 559 (` ***Re Clark*** `). Clark operated a petrol station under licence from Texaco. On 12 August 1969, a bankruptcy petition was presented against him. On 7 November 1969, he was adjudged bankrupt and a receiving order was made. On that same day, unaware of the bankruptcy, Texaco supplied Clark with petrol. Clark gave Texaco a cheque for o1,123 in payment. On 13 November 1969, still unaware of Clark`s bankruptcy, Texaco again supplied Clark with petrol and he gave a second cheque for o1,183. Both these cheques were paid out to Texaco by Clark`s bankers. There was a subsequent supply for which a third cheque was issued for o1,123 but this was dishonoured by the bank. The Trustee in Bankruptcy took out an application to recover the moneys which had been paid out to Texaco under the first two cheques.

Walton J conducted a comprehensive survey of the authorities and distilled four conditions for the operation of the principle:

(1) there must be some form of enrichment of the assets of the bankrupt by the claimant;

(2) the claimant must not be in a position to submit an ordinary proof of debt;

(3) in all the circumstances of the case an honest person would consider that it would only be fair to return the money to the claimant; and

(4) the principle applies only to the extent necessary to nullify the enrichment of the estate.

The first condition is of course the basic requirement for the application of the principle and a universal feature in all the cases in which it has been applied. Walton J took this condition from the speech of Lord Keith in **Government of India v Taylor** [1955] AC 491[1955] 1 All ER 292.

In respect of the second condition, ie that the claimant be not in a position to submit an ordinary proof of debt, Walton J cited **Ex p Whittaker, re Shackleton** [1875] LR 10 Ch App 446 and **Re Gozzett, ex p Messenger & Co v Trustee** [1936] 1 All ER 79. The judge said that the underlying reason for this condition was that it would otherwise conflict with the mandatory rateable division of the estate between the creditors. He held ([1975] 1 All ER 453 at 458) that the principle ` ***is not to be used merely to confer a preference on an otherwise unsecured creditor, but to provide relief for a person who would otherwise be without any*** `. It should be noted that the proof of debt relates to the current bankruptcy and not a future one. In ***Re Clark*** , the claimant was not entitled to prove any debt in respect of the current bankruptcy although he could have done so in a subsequent one. Walton J commented as follows ([1975] 1 All ER 453 at 457):

> *... it is to be observed that the addition to the estate to which I have already referred is without any corresponding claim against the estate in the present bankruptcy: see Bankruptcy Act 1914, s 30(3). Texaco have a theoretical remedy against the bankrupt by making him bankrupt a second time, but quite obviously this is a wholly unreal remedy, when the present estimated deficiency as regards the present bankruptcy is o3,556.*

Turning to the third condition, Walton J referred to it as the crucial test for the application of the principle. He formulated the test as follows ([1975] 1 All ER 453 at 459):

> *If, in all the circumstances of the case, an honest man who would be personally affected by the result would nevertheless be bound to admit `It`s not fair that I should keep the money; my claim has no merits`, then the rule applies so as*

to nullify the claim which he would otherwise have.

The fourth condition limits the recovery to the amount of the enrichment rather than the claimant`s loss and reliance was placed on **Re Regent Finance and Guarantee Corp** [1930] WN 84 In the case before Walton J, the estate was enriched by o972 as a result of the sale of the petrol in question. However, counsel for the trustee argued that in applying this rule Texaco ought only to be entitled to the amount that the estate had benefited, ie o972. But this was illogical in view of the fact that if Texaco were ordered to return any money at all, this would enrich the estate further. Walton J dismissed counsel`s argument in the following manner ([1975] 1 All ER 453 at 462):

> *I ought perhaps here, in justice to counsel for the trustee, to notice his final argument, which was that, if I were minded to apply the rule, I should not do so to the full amount of the two cheques, but only to the extent to which the estate has, in fact, benefited, namely, [o972]. I regret that I failed to follow the argument, because if I allowed the trustee`s claim to proceed to any extent, the figure of [o972] would be increased. I shall leave that argument there.*

In the result Walton J directed the trustee to take no proceedings whatsoever to recover the amount of the two cheques from Texaco. The judge reasoned as follows ([1975] 1 All ER 453 at 461-462):

> *The question as I feel it ought to be posed is simply: `Is it fair that the trustee should recover the amount of these two cheques from Texaco?` As matters now stand, as a result of the activities of Texaco, the estate has benefited to an extent of [o972]. Texaco are out of pocket to the tune of some [o1,123], in respect of which they have no right of proof whatsoever. If the claim of the trustee is allowed, the estate will have been benefited to an extent of [o3,278], and Texaco will be out of pocket to the tune of some [o3,429] for which they will again have no right of proof in the current bankruptcy. Can this be fair? I have no hesitation in answering that it is not. The situation would amount to the estate taking the whole of the benefit of the sale price of the petrol whilst repudiating all obligation to pay for it, even via a proof of debt.*
>
> *... the estate gains quite substantially, and Texaco loses a not inconsiderable sum. Give effect to the trustee`s legal claims, and the estate gains dramatically and Texaco`s losses increase threefold. I cannot think that in all these circumstances any dispassionate observer would not say: `Well, I don`t know what the legal technicalities are, but it is obviously much fairer to all concerned to leave the matter as it is than to force Texaco to repay money which, had they not have thought it had been properly paid to them, would not have attracted the deliveries of petrol.`*
>
> *There is, I think, one final consideration, not so far as I am aware referred to in any of the cases, and possibly peculiar to the present case. The object of the property vesting provisions of the Bankruptcy Act 1914 is obviously to ensure that the bankrupt`s estate is not dissipated away, but is kept together for the ultimate benefit of his creditors. If, during the twilight period, the bankrupt trades at a profit for the benefit of his estate, it is hard to see why he should only be allowed to do so on terms that the other party to such trade is on a hiding to nothing. Obviously, such a person takes many risks, and may not be able, at the end of the day, to prove for any claims he may have. But if he trades on a ready money basis, and the net result of the bankrupt`s efforts is beneficial so far as the estate is concerned, as happened here, it does seem*

*somewhat greedy for the trustee in bankruptcy to seek to extract not funds which actually formed part of the estate at the commencement of the bankruptcy, but something which never did, from the unfortunate trading partner of the bankrupt. Everything must depend on its own particular facts, but on the facts of the present case, I think that our dispassionate observer would accuse the trustee of opening his mouth too wide; and **that** is not fair.*

Re Byfield

Counsel for the liquidators did not dispute the existence of the ***Ex p James*** principle but submitted that it was an outdated rule in view of the present state of the law. In support, counsel pointed out the criticism of Murray-Aynsley CJ in ***Re Drysdale*** . I have dealt with this above. It is worthy to reiterate that ***Re Drysdale*** was decided on the basis that there was no payment under a mistake. It was merely a case where the Municipal Commissioners had changed their minds after they had resolved to make such payment and had made it to the Official Assignee. The Chief Justice refused to extend the principle in ***Ex p James*** to such a situation.

Counsel also referred me to **Re Byfield (a bankrupt), ex p Hill Samuel & Co v Trustee of the Bankrupt** [1982] Ch 267[1982] 1 All ER 249 (` ***Re Byfield*** `), a decision of Goulding J. In that case the bankrupt, after a receiving order had been made and gazetted, instructed her bank to transfer a sum of money from her account to her mother`s account at another bank. The paying bank, having no knowledge of the receiving order at that point, in good faith made the transfer. The bankrupt`s mother used part of that money to pay off some of the creditors of the bankrupt. The rest was eventually paid to the trustee in bankruptcy. The trustee called on the bank to pay him the balance of what had not been recovered from the bankrupt`s mother. The bank complied and submitted a proof of debt for this sum claiming to be entitled to be subrogated to such rights as the creditors whom they had paid would have had against the bankrupt, an argument which Goulding J rejected.

In the alternative, the bank relied on the principle in ***Ex p James*** . Goulding J held that the principle did not have any application in the matter before him. His reasons for this (see [1982] Ch 267 at 270-271; [1982] 1 All ER 249 at 251-252 of the report) are brief and it is convenient to set them out in full:

> *The principle of **Ex p James** was concisely stated by Scrutton LJ in **Re Wigzell, ex p Hart** [1921] 2 KB 835 at 858 (a case to which I shall have to refer for other purposes) in the following terms:*
>
> *`Now the decisions of this Court have established that though in law the money is the money of the trustee for the creditors, yet he may be restrained from enforcing his claim to it or retaining it if (and a series of phrases none of which are very definite have been used) it were not honourable-if it were not high minded-if it would be contrary to natural justice-if it would be shabby-if it would be a dirty trick for him to retain it-or to take perhaps the most temperate statement of the principle, which I find given by Buckley L.J. in **In re Tyler** (Unreported) ...) and cited with approval by Atkin L.J. in **Thellusson`s Case** ([1919] 2 KB 735 at 762, ...): "Assuming that he (the officer of the Court) has a right enforceable in a Court of Justice, the Court of Bankruptcy or the Court for the administration of estates in Chancery will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest*

man would do".`

*... It appears to me that the present case is essentially different from those in which the principle of **Ex p James** has been applied. In general, though not without special exceptions, it has been applied to cases where the point in question was intimately linked with some voluntary conduct of the trustee in bankruptcy himself. Younger LJ said in **Re Wigzell** (at 869-870):*

`In my view in considering the extent of this particular jurisdiction it is quite vital to distinguish between a trustee not insisting or the Court not permitting him to insist on all the legal consequences of, on the one hand, a transaction initiated by himself or by the Court in the interests of the general body of creditors and on the other hand a transaction initiated by the bankrupt. In the first case the creditors are the constituents of the trustee throughout, and as they are entitled to benefit by the transaction, so it does not seem to be wrong to say that they shall take it as it honourably is no more and no less. But in the second case the bankrupt has no constituents-that is to say, the transaction is initiated by him presumably in his own interests alone-and it is not obvious that a creditor with whom that transaction has been carried out and is complete, even one who in relation to it may have been tricked by the bankrupt, has any equity at all as against the other creditors of the same bankrupt, who may all have been equally tricked, merely because in his case the proceeds of the transaction can be traced amongst the bankrupt`s assets, and in the other cases they cannot.`

*That language is not altogether applicable to the present case, but it is true to say that the problem has arisen through a payment made inadvertently by the bank on the instructions of the bankrupt and not one initiated by the trustee. To my mind there is nothing offensive either to commercial or to general morality in the general body of creditors receiving a benefit, a windfall, if you will, from the bank`s unfortunate payment in the present case, if there is no principle of statute law or of equity to restrain them. Accordingly, I do not think that the ethical additions to the ordinary rules allowed by the principle of **Ex p James** can properly have any application in the present case.*

Goulding J decided that in general the principle should only apply to cases where the point in question was ` ***intimately linked with some voluntary conduct of the trustee in bankruptcy himself*** `. Counsel for the liquidators argued that in the present case the bank had made the mistake and effected the payment and this was not referable to any conduct on the part of the liquidators. Therefore on the criterion of Goulding J in ***Re Byfield*** , the court should not invoke the principle. With respect, I do not agree with the said criterion. First of all, although Goulding J was aware of ***Re Clark*** , he only referred to that decision in passing ([1982] Ch 267 at 275; [1982] 1 All ER 249 at 255). Unfortunately in the few paragraphs of his judgment where he deals with the principle (which I have set out in its entirety above), the judge did not consider the exhaustive analysis of the principle by Walton J. In setting out the four conditions for the application of the principle, Walton J had not considered that such a criterion was relevant. Indeed, although counsel submitted that ***Re Byfield*** is authority for this criterion, the judgment of Goulding J itself states that there have been ` ***special exceptions*** `. Furthermore, I cannot see how a rule formulated by judges to prevent injustice by requiring officers of the court to behave honourably can or should be fettered in this manner. In my

respectful opinion, while it would be a material consideration, the mere fact that the trustee had not engaged in conduct referable to the mistake ought not prevent the court from applying the principle in an appropriate case.

Re TH Knitwear (Wholesale)

Counsel for the liquidators next referred to **Re TH Knitwear (Wholesale)** [1988] Ch 275. That case involved a voluntary liquidation and the English Court of Appeal held that in such a situation the liquidator was not an officer of the court. The principal basis for the court`s decision there is that the principle in ***Ex p James*** could only be applied to an officer of the court. Slade LJ said (at p 289):

> *The entire basis of the principle, as I discern it from the cases, is that the court will not allow its own officer to behave in a dishonourable manner. There is no doubt much to be said in favour of the principle. However, where it is invoked it is likely, save in the most obvious cases, to introduce a less welcome element of uncertainty ... The principle is itself anomalous. I would not for my part extend the anomaly and the inevitable uncertainty which it involves by holding that it applies to liquidators in a voluntary winding up, or indeed to ordinary trustees or personal representatives or anyone other than an officer of the court.*

Slade LJ went further to hold that, should he be wrong on the issue that the principle had no application where the case did not pertain to an officer of the court, the matter before him did not justify invoking it. He said (at p 290):

> *... on the authorities, I agree ... that, **for the principle to apply, there must be dishonourable behaviour or a threat of dishonourable behaviour on the part of the relevant court officer, by taking an unfair advantage of someone**. Scrutton L.J. put the matter thus in **In re Wigzell** (Unreported) :*
>
> *`Now the decisions of this court have established that though in law the money is the money of the trustee for the creditors, yet he may be restrained from enforcing his claim to it or retaining it if (and a series of phrases none of which are very definite have been used) it were not honourable-if it were not high minded-if it would be contrary to natural justice-if it would be shabby-if it would be a dirty trick for him to retain it- or to take perhaps the most temperate statement of the principle, which I find given by Buckley L.J. in **In re Tyler** (Unreported) ; and cited with approval by Atkin L.J. in **Thellusson`s case** (Unreported) , 762: "Assuming that he (the officer of the court) has a right enforceable in a court of justice, the Court of Bankruptcy or the court for the administration of estates in Chancery will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do."`*
>
> *Where broad concepts of honourable behaviour are involved, different minds may well take different views. In the present case, however, there has been no criticism of the liquidator`s past actions. In particular, he has not been criticised for, very sensibly, suggesting to the creditors that in the first instance they should limit their proofs to the basic price of the goods or services supplied. The relevant question is whether it would or should affect his*

> *conscience if he were now to reject the commissioners` claim. [Emphasis is added.]*

Counsel for the plaintiffs sought to rely on the words underlined to say that the English Court of Appeal had upheld the criterion suggested by Goulding J in ***Re Byfield*** . However, a close analysis of the judgment will reveal that this is not the case. Firstly, this is not expressly stated in the judgment. The words underlined above are expressed in more general terms, and dishonourable behaviour can encompass the court officer ` ***taking unfair advantage of someone*** `. Secondly, ***Re Byfield*** was referred to only for the proposition that the court must resist the temptation to interfere in that case where statutory rules had been clearly laid down. Slade LJ said (at p 291):

> *For these reasons, the principle of **Ex parte James** in my judgment is not relevant on the facts of this case. To quote the words of Goulding J. in **In re Byfield** ...: "... I must stop my ears to the siren song of unjust enrichment." Even though the contributories of the company will in the result receive a windfall which they have not earned, this is not enough to entitle the court to depart from the statutory rules laid down for liquidators in a voluntary winding up by section 302 of the Companies Act 1948, by directing a payment to the commissioners which is not in discharge of a liability of the company.*

Downs Distributing Co v Associated Blue Star Stores

Finally, counsel for the liquidators referred me to the New South Wales case of **Downs Distributing Co v Associated Blue Star Stores (in liquidation)** [1948] 76 CLR 463. The plaintiffs (`Blue Star`) had made a payment to the defendants (`Downs`) while they were unable to pay their debts. Such payment would have the effect of giving Downs a preference over the other creditors of Blue Star and was void under the relevant statute. The High Court of Australia upheld the finding of the court below that the circumstances were such as would give Downs reason to suspect that Blue Star was unable to pay their debts. Therefore the payment was void and Blue Star, being under liquidation, was entitled to retrieve it from Downs.

Downs also relied on the ***Ex p James*** principle. In dealing with this point, Latham CJ said (at p 476):

> *The doctrine of **Ex parte James** [1874] LR 9 Ch 609 was fully examined in **Scranton`s Trustee v Pearse** [1922] 2 Ch 87 a case which illustrates the difficulties involved in applying a criterion of honest and high-minded conduct. In the present case, however, it appears to me that there are no such difficulties. The argument for the appellant is that the original purchase of the goods by the Blue Star company (not, be it observed, the transaction attacked as a preference) was a fraudulent transaction, and that if the liquidator is allowed to succeed in the present action the result will be that the liquidator will be taking advantage of that fraudulent transaction by obtaining an order for the appellant company to pay the sum of 2,007 pounds 2s. 6d. Without going into other matters I am of opinion that the foundation of the appellant`s argument fails. No issue of fraud was raised before Roper C.J. in Eq. and the evidence was not directed to such an issue. There is no finding of fraud by the learned trial judge. Before fraud is found the issue must be clearly raised and the evidence must be convincing. The evidence is as consistent with hopeful optimism on the part of the Blue Star company as with fraud. It would, in my opinion, be quite wrong for a court of appeal, which has not seen the witnesses, to base a decision upon a new finding by it that a transaction was fraudulent. There may possibly be very*

*exceptional circumstances in which such a course might properly be adopted, but this case cannot be held to present any circumstances which would exclude what, in my opinion, should be the general rule. There are other suggested replies to the attempt to apply **Ex parte James** [1874] LR 9 Ch 609 with which it is not necessary to deal. Accordingly, in my opinion the decision of the Supreme Court was right and the appeal should be dismissed.*

From this it can be seen that fraud on the part of Blue Star was the basis upon which Downs invoked the ***Ex p James*** principle. However, Latham CJ held that it was not raised in the court below and neither was there a finding of fraud.

Rich J did not deal with the principle in his speech. The remaining judge, Williams J, also dismissed the appeal on the basis that Downs ought to have suspected that the payment would give them a preference over the other unsecured creditors of Blue Star. He then went on to discuss the submission of counsel in respect of the ***Ex p James*** principle and also held that there was no evidence of the fraud which formed the basis of Downs`s submission. In his judgment, Williams J said (at pp 482-484):

*In **In re Thellusson**, Atkin L.J. said that " it can make no difference whether the trustee himself has acquired the property by unworthy means, or whether there is vested in him by operation of law property which has been acquired by the debtor by unworthy means. If it would be dishonourable of the debtor to use the money to pay his creditors, it is equally dishonourable for the officer of the Court, knowing the full facts, to use the money to pay his creditors" (1919) 2 KB, at p 764. **But the cases as a whole appear to show that it is only in exceptional cases that the rule would be applied where the officer or his predecessor in office has not been personally concerned in the transaction**. **In re Thellusson** [1919] 2 KB 735 is an exceptional case. There a creditor who had agreed to lend the debtor money to pay a pressing debt paid the money into the bank account of the debtor in ignorance of the fact that a receiving order had been made against him. Out of the money paid in, the bank recouped itself for the amount of an overdraft leaving a balance in the account. The balance vested in the Official Receiver by operation of law. The money was paid into a bank account over which the Official Receiver had control, so that the payment was very much akin to a payment to him personally. In **Re Gozzett** (Unreported) , at p 88, Lord Wright M.R. said that the payment was very analogous to a payment under mistake of fact and it was not therefore a matter of astonishment that the Court held that the rule should apply. In his judgment in **In re Wigzell** (Unreported) , at pp 868, 869, Younger L.J. set out the exceptional circumstances that existed in **In re Thellusson** [1919] 2 KB 735. He referred to the essential difference between applying the rule to "a transaction initiated by the bankrupt himself, not presumably in every case a person of the highest commercial morality, and a transaction initiated either by the trustee or the Court" (1921) 2 KB, at p 869. He pointed out that in the case of transactions initiated by the bankrupt himself "it is not obvious that a creditor with whom that transaction has been carried out and is complete, even one who in relation to it may have been tricked by the bankrupt, has any equity at all as against the other creditors of the same bankrupt, who may all have been equally tricked, merely because in his case the proceeds of the transaction can be traced amongst the bankrupt`s assets, and in the other cases they cannot" (1921) 2 KB, at pp 869, 870.*

The trickery alleged in the present case is that the defendant was induced to give credit by the fraudulent representation of the agent of the plaintiff that there would be no difficulty whatsoever in paying for the goods, whereas the

agent well knew that the plaintiff was insolvent and would be unable to pay for the goods. This is an allegation of fraud, and fraud should be strictly pleaded and proved. Fraud was not raised before Roper C.J. in Eq., and it is apparent that on such an issue further evidence might have been tendered. But it is unnecessary to pursue the matter because the trickery, if any, was the trickery of the plaintiff whilst it was a going concern, and it was not trickery in which the liquidator was in any sense involved. It may be that some of the goods sold and delivered by the defendant to the plaintiff or their proceeds of sale could be traced into the possession of the liquidator, but the mere fact that the assets available for the unsecured creditors are thereby increased would not give the defendant any equity to be paid in full. A person who sells his goods on credit without security has only himself to thank if he finds himself an unsecured creditor on the bankruptcy of his debtor: ***Re Gozzett*** *[1936] 1 All ER 79. If as in the present case he takes a security too late he cannot complain of any hardship caused by the operation of the bankruptcy law. [Emphasis is added.]*

Counsel relied on the words underlined as authority for the proposition that it is only in the instances where the officer or his predecessor in office has been personally involved in the transaction that the principle would be applied. First of all, it should be noted that the judgment acknowledges that it was applied in those other cases, although it is said that those were the exceptional cases. But more importantly, this point was made in order to distinguish the case at hand which was one in which the company under liquidation had practised the deception on a number of parties and there was no reason why one victim of the deception should gain a preference over another contrary to the clear provisions of the statute. The statement of Williams J was not made from the viewpoint of a general review of the law relating to the principle in ***Ex p James*** . In my respectful view, to impose a rigid condition on the general principle declared by James LJ, especially in the light of its subsequent application, would introduce an unnecessary fetter to the ability of our courts to do justice in the unique circumstances in every case before them.

R v Tower Hamlets London Borough Council

The House of Lords had occasion to comment on the ***Ex p James*** principle in **R v Tower Hamlets London Borough Council, ex p Chetnik Developments** [1988] AC 858[1988] 1 All ER 961. That case did not involve a trustee in bankruptcy or any other officer of the court, but concerned judicial review of a decision made by a local council under its statutory powers. Lord Bridge, with whom the other members of the House were in unanimous agreement, referred to the rule then existing that money paid under mistake of law was irrecoverable and said that there was a line of authority showing circumstances in which the court would not permit the rule to be invoked. After citing ***Ex p James*** , the judge continued ([1988] AC 858 at 875-876; [1988] 1 All ER 961 at 968-969):

> ***Ex parte Simmonds*** *(Unreported) was another case of a trustee in bankruptcy claiming to retain money paid to him under a mistake of law. Lord Esher M.R. said, at p. 312:*
>
> *"When I find that a proposition has been laid down by a Court of Equity or by the Court of Bankruptcy which strikes me as a good, a righteous, and a wholesome one, I eagerly desire to adopt it. Such a proposition was laid down by James L.J. in* ***Ex parte James,*** *(Unreported) . A rule has been adopted by courts of law for the purpose of putting an end to litigation, that, if one litigant party has obtained money from the other erroneously, under a mistake of law,*

*the party who has paid it cannot afterwards recover it. But the court has never intimated that it is a high-minded thing to keep money obtained in this way; the court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order that is, to put an end to litigation. But James L.J., laid it down in **Ex parte James** that, although the court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law."*

*Both these passages were cited with approval in **In re Tyler** (Unreported) by Vaughan Williams L.J., who commented on the earlier passage, at p. 869:*

"When James L.J. says that the trustee has in his hands money which in equity belongs to somebody else, he is not referring to an equity which is capable of forensic enforcement in a suit or action, but he is referring to a moral principle which he describes when he says that the Court of Bankruptcy ought to be as honest as other people."

In the same case Farwell L.J. said, at p. 871:

"As I understand the principle laid down in the cases to which my Lord has referred, it comes to this, that the officer of the court is bound to be even more straightforward and honest than an ordinary person in the affairs of every-day life. It would be insufferable for this court to have said of it that it has been guilty by its officer of a dirty trick."

Lord Bridge concluded as follows ([1988] AC 858 at 876-877; [1988] 1 All ER 961 at 969):

So it emerges from these authorities that the retention of moneys known to have been paid under a mistake at law, although it is a course permitted to an ordinary litigant, is not regarded by the courts as "high-minded thing" to do, but rather as a "shabby thing" or a "dirty trick" and hence is a course which the court will not allow one of its own officers, such as a trustee in bankruptcy, to take.

It should be noted that the cases cited concern instances where moneys were paid under a mistake of law. However, I see no reason why the same principle should not apply to instances where moneys were paid under a mistake of fact. Indeed it is arguable that it should apply with even greater force because moneys paid under a mistake of fact have always been recoverable as opposed to moneys paid under mistake of law which did not become recoverable until the decision of the House of Lords in **Kleinwort Benson v Lincoln City Council** [1998] 4 All ER 513.

Counsel also cited two recent English decisions in which the ***Ex p James*** principle was considered: (1) **Re South West Car Sales (in liquidation), Lewis v HM Customs and Excise** [1998] BCC 163; and (2) **Re Japan Leasing (Europe) plc, Wallace v Shoa Leasing (Singapore)** [1999] BPIR 911. In the former case, Judge Weeks QC, did not apply the principle while in the latter case, Judge Nicholas

Warren QC, did. Their findings are peculiar to the rather complicated facts of those cases and I need not consider them here.

Application of the principle

In my opinion, the principle in ***Ex p James*** is a statement of general policy that has not been reduced to any rigid rule of law. Therefore the four conditions distilled by Walton J in ***Re Clark*** are but a guide to the application of the principle. Nevertheless they are helpful in arriving at a decision whether to apply the principle in any given case, especially where it is a border-line situation.

Proceeding to apply the first condition, viz enrichment of the estate, it is immediately obvious to see that this is satisfied.

The second condition is that the claimant be not in a position to submit an ordinary proof of debt. Counsel for the bank submitted that this obtains in the present case for the following reasons:

(a) Section 327 of the Companies Act provides that the winding up of an insolvent company shall be carried out in accordance with the law relating to bankruptcy.

(b) Section 87(3) of the Bankruptcy Act (Cap 20, 2000 Ed) provides as follows:

> *Subject to this section and section 90, any debt or liability to which the bankrupt-*
>
> *(a) is subject at the date of the bankruptcy order; or*
>
> *(b) may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy order,*
>
> *and any interest on such debt or liability which is payable by the bankrupt in respect of any period before the commencement of his bankruptcy shall be provable in bankruptcy.*

post Hence, any debt or liability incurred before the date of the bankruptcy order is provable in bankruptcy. There is no provision in the Bankruptcy Act permitting proof of debt or liability incurred after the order is made.

(c) At the time the winding-up order was made against the company, there was no money or debt owing by the company to the bank. In fact, because the company`s account was in credit, this constitutes an acknowledgement of a debt owing by the bank to the company.

(d) The debt or liability owing by the company to the bank would only have arisen after the latter had overpaid the liquidators, which was subsequent to the winding-up order. It would therefore not fall under s 87(3) of the Bankruptcy Act.

(e) Also, even if the bank had commenced an action for moneys had and received and obtained judgment, such a judgment would still be winding-up order.

(f) In either event, the bank do not have a debt provable in the winding up.

Counsel for the liquidators did not disagree with this submission. In my view this must be, and is, the correct position.

The third condition, that a fair-minded person would consider it only fair to return the money to the claimant, is satisfied in this case. There is no prejudice whatsoever suffered by the estate or the creditors as a consequence of this mistake on the part of the bank. Indeed, I would have refused to make any direction to the liquidators had they shown me that the estate had somehow incurred a loss arising from that mistake, at least to the extent of such loss. To permit the liquidators to keep the money would mean that the creditors would enjoy a windfall at the expense of the bank. It would not accord with any honest person`s sense of decency and fair play.

The fourth condition is that the principle should only apply to the extent necessary to nullify the enrichment of the estate. Since the subject matter relates to cash, there is no difficulty in this regard.

Counsel for the liquidators submitted that their clients had not behaved in any manner which could be deemed dishonourable. It was the bank that made the mistake, and when the liquidators asked the remaining balance in their account to be paid over, of which the money claimed constituted a small part, the bank duly did so. This was a voluntary payment made by the bank operating under a mistake of fact. For the principle to be invoked, I do not think that it is necessary for the liquidators to be guilty of dishonourable behaviour in the receipt of the money. This was not a feature in ***Ex p James*** , where the trustee was merely carrying out his duty in demanding payment from the creditor. It was only a subsequent change of the law that rendered the trustee`s retention of the money a dishonourable thing to do. It is necessary to bear in mind that the principle is not a statement of a right in law or equity. It is a policy established by the court and one that it will demand of its officers. On this question, Farwell LJ said in ***Re Tyler*** (supra, at pp 871-872):

> *Our Courts have two functions, one to decide rights between the parties and the ot her to administer estates. In administering estates, whether in Chancery, bankruptcy, or the winding up of companies, the Court itself by its officer often finds itself in the position of a quasi-litigant. As I understand the principle laid down in the cases to which my Lord has referred, it comes to this, that the officer of the Court is bound to be even more straightforward and honest than an ordinary person in the affairs of every-day life. It would be insufferable for this Court to have it said of it that it has been guilty by its officer of a dirty trick. Test that by the case before James L.J. of money paid under mistake of law. Theoretically both sides know the law. Therefore the man who is receiving knows that he is receiving that to which he is not lawfully entitled. No high-minded man, of course, would dream of doing such a thing, and the Court will not allow its officer to put it in the position of insisting upon its right to keep money which it has received from a third party, with full knowledge that he was not bound to pay the money, and also with full knowledge that he was not aware of that fact. The rule of law may be so, but the Court will not allow its officer to act upon it.*

Quite apart from the four conditions in ***Re Clark*** , the present case is on all squares with the facts in ***Ex p James*** . Here, as there, the bank had made a payment under mistake to the liquidators who are officers of the court. Although the mistake here is a mistake of fact whereas that in ***Ex p James*** was one of law, there is now no distinction between these two categories of mistake: see ***Kleinwort Benson v Lincoln City Council*** (supra). As I have elaborated above, the liquidators have suffered no

prejudice but will gain a windfall if the court does not act. In my opinion, this is clearly a case in which the court would apply the principle in ***Ex p James*** and direct the liquidators to return the money to the bank.

Accordingly I direct the liquidators to pay the bank the sum of USD85,790 being the amount that had been paid over by mistake. As for costs, the appropriate order in this case would have been for the bank to pay costs to the liquidators on an indemnity basis unless there are exceptional circumstances favouring another order. As the parties have not submitted on this before me, I would defer making any order for costs until after hearing their counsel.

Outcome:

Order accordingly.

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