No: 1814 of 2015

IN THE HIGH COURT OF JUSTICE
IN BANKRUPTCY

IN THE MATTER OF MICHELLE DANIQUE YOUNG
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 27 March 2017

Before:
Mr Registrar Baister

- -

Between:

PAUL DAVID ALLEN (TRUSTEE IN BANKRUPTCY OF MICHELLE DANIQUE YOUNG)	**Applicant**
- and -	
MICHELLE DANIQUE YOUNG	**Respondent**

- -
- -

Mr Navjot Atwal (instructed by **Russell-Cooke LLP**) for the **Applicant**
Mr Sebastian Kokelaar (instructed by **Richard Slade & Co**) for the **Respondent**

Hearing date: 2 March 2017

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Approved Judgment

I direct pursuant to CPR PD 39A para 6.1 that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

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Mr Registrar Baister:

The application

1. By application dated 18 July 2016 the applicant seeks:

> (a) a declaration that he and the respondent entered into an agreement at 14.56 on 5 October 2015 in relation to a Zurich Assurance Limited Adaptable Life Plan under policy no. 693-978-DPS pursuant to which the respondent agreed to deliver up 20% of the funds under the policy in consideration of the applicant paying her the sum of £15,000 from those funds;
>
> (b) an order directing the respondent to procure the transfer of the funds under the policy to the applicant under the terms of the agreement within 14 days;
>
> (c) costs.

The background

2. The melancholy background to this application can be stated shortly.

3. On 1 January 1996 Mr Young, the respondent's husband, took out a life insurance plan with Allied Dunbar Assurance plc. The amount payable was to be around £1.3 million. The benefit of the plan was and still is held on a "Life Plan Trust" executed by Mr Young on 4 January 1996, and the respondent is the sole trustee. She and her two daughters are identified as beneficiaries, the respondent's share being 20%, her daughters' share 40% each. At some stage the Allied Dunbar business was acquired by Zurich.

4. In 2007 the respondent began divorce proceedings. They were bitterly contested. They concluded in 2013 with an award in the respondent's favour of over £20 million. That award was made in spite of the fact that Mr Young had been made bankrupt in 2010 on a petition presented by HMRC. Moor J found in the matrimonial proceedings that he had hidden assets of at least £45 million. His trustees in bankruptcy have, however, so far failed to make any or any significant recovery in the bankruptcy; and the respondent has never received a penny of the sum she was awarded.

5. Dissatisfied with the conduct of Mr Young's trustees, the respondent sought to convene a creditors' meeting for the purpose of replacing them. The trustees resisted the application. In November 2014 the court ordered that a creditors' meeting should be convened, but on condition that the respondent pay costs previously awarded to the trustees following an earlier unsuccessful application by her to annul Mr Young's bankruptcy, as well as other the costs incurred by them for work undertaken at her request.

6. On 8 December 2014 Mr Young died.

7. The respondent was unable to pay the sums due to Mr Young's trustees who presented a bankruptcy petition against her which resulted in a bankruptcy order being made on 20 July 2015.

8. On 13 August 2015 Zurich wrote to the respondent indicating that the sum payable under the policy was £1,385,700 and that her entitlement, if she wished to make an appointment, was 20% of the sum due. On 20 August 2015 the respondent submitted a claim seeking payment out in accordance with the shares I have mentioned.

9. On 28 August 2015 the official receiver told the applicant about the policy. He began to make inquiries about the policy with a view to establishing whether any claim under it fell into the bankruptcy estate and with a view to ensuring that the respondent's share was not paid out so as to defeat any claim he might have. Zurich was not co-operative. The applicant threatened to apply for an injunction against both Zurich and the respondent but the application did not proceed on the basis of an undertaking not to pay out the respondent's 20% without giving notice to the applicant of 28 days.

The agreement

10. The respondent sought advice from and engaged Louise Brittain, an insolvency practitioner, to act on her behalf.

11. Ms Brittain made contact with the applicant in early September 2015 which resulted in a meeting on 28 September 2015 which the respondent also attended. According to the applicant (see paragraphs 61-62 of his second witness statement) it concluded on the understanding that the respondent would make a proposal as to how her 20% share of the entitlement under the life plan should be dealt with. That is borne out by the evidence of the respondent's solicitor, Mr Slade, the facts of which the respondent adopts:

> "At the meeting, discussion took place about the outline of a possible compromise by which, it was proposed, the Respondent would agree that 'her interest in the policy' vest in the Applicant in return for a payment back of her living expenses."

12. On 7 October 2015 Ms Brittain sent an email headed "without prejudice" saying:

> "As discussed on Monday, Michelle is conscious of the cost of applying to court to obtain an order in favour of the Trustee to enable Michelle's interest in the life policy to be realised. We estimate that cost at approximately £20,000 plus VAT plus disbursements. In order to avoid incurring that cost Michelle will assist in signing whatever is required if a sum of £15,000 is made available to her from the policy proceeds. As you are aware she has no income and these monies are needed to meet some of her basic living requirements. This proposal is of course subject to the 28 day notice period detailed in the previous letter to Zurich and any other stipulations made in that letter."

13. The applicant replied by email on 5 October 2015 (also marked "without prejudice") stating:

> "Thank you for your email outlining Michelle Young's proposal in relation to the Zurich policy.
>
> In order to avoid the costs of an application to Court and in view of Mrs Young's cooperation in this matter, I accept the offer set out in your e-mail below (i.e. that Mrs Young will procure that the Zurich monies are sent to me in consideration for receiving £15,000 from those monies).
>
> Having discussed the offer with Benn Richards [the applicant's solicitor] and based on our dealings with Zurich, we believe that it is in the best interests of all parties to enter into a formal settlement agreement, as well as making the terms of the settlement clear. As such, I attach a draft agreement which we have attempted to keep as concise as possible. I should be grateful to receive any comments from you and Mrs Young as soon as possible. You will also note that we require information from Mrs Young to be inserted in the Background section (paragraph ii) and in the Agreement section (paragraph 3) – not least so I can ensure Russell-Cooke transfer the £15,000 to Mrs Young as soon as they receive the monies."

A draft settlement agreement was indeed attached.

14. Ms Brittain replied to the applicant later that day stating:

> "Thank you – I shall forward your email to Michelle for her consideration and I will press her for a response asap".

15. On 8 October 2015 Ms Brittain wrote again (still marked "without prejudice"):

> "Paul
>
> Yes I spoke to her yesterday. She is happy to go ahead.
>
> I'll ask her to sign it and get it back to you".

16. On 13 October 2015 Ms Brittain wrote to the respondent (copying the applicant) saying, "Please can you return the agreement to Paul".

17. In spite of further requests and a threat of proceedings the respondent did not sign and return the agreement. In fact she instructed solicitors. There was correspondence between the applicant's solicitors and Mr Slade whose position was that Ms Brittain had no authority to make an offer and had not done so, so there was no agreement; and in any event the applicant had never been entitled to claim the insurance proceeds for the bankruptcy estate.

18. Mr Atwal's position is simple. He submits that the email of 2 October 2015 was an offer to effect a transfer to his client of the respondent's entitlement to the proceeds

under the policy in return for her keeping £15,000. The offer was accepted by the email of 5 October 2015. There was consideration (in the form of the mutual promises made and/or the compromise of the dispute or potential dispute in the form of the impending litigation). There was an intention to create legal relations. The offer was not made subject to contract or subject to legal advice being taken. It related to the whole of the subject matter of the dispute or potential dispute. There was, therefore, agreement on the substance of the compromise. The suggestion that the agreement be further formalised by the draft produced did not constitute a counter-offer; but even if it did, the email of 8 October constituted agreement to its terms. On either basis there was a binding agreement between the parties.

19. In support of his submission that the exchange of emails between the parties constituted a binding agreement Mr Atwal relies on *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH* [2010] UKSC14 in which Lord Clarke approved the summary of the relevant principles made by Lloyd LJ in *Pagnan SPA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 619 as follows:

> "(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look at the correspondence as a whole...(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case. (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed...(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled...(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty. (6) It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means only a term which the court regards as important as opposed to a term which the court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the judge [at p 611] 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for the future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to

> be agreed later. It happens every day when parties enter into so-called 'heads of agreement'".

20. He also cites Lord Clarke's summary in *RTS*:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration or what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

The position is the same in this case, he says, at least as far as the first agreement is concerned: the parties agreed to bind themselves as to the substance of what they were agreeing, leaving subsidiary and legally inessential terms to be sorted out later. That is enough.

21. Mr Kokelaar says that the applicant's position is misconceived. He says that the email of 2 October 2015 was plainly not a fully formulated offer capable of acceptance. It was phrased in very vague terms. The applicant recognised that when he referred to it as "outlining Michelle Young's proposal".

22. Even if it could be said to be an offer, the email relied on as accepting it was not a simple acceptance but a counter-offer: the use of the word "procure" implied something more than merely assisting by signing what was required. The attempt to import new terms in the form of the draft written agreement reinforced the point.

23. The foregoing points also underlined the lack of intention to create legal relations. It was only the written agreement that was intended to achieve that effect.

24. Furthermore, there was no consideration. As Zurich had made clear, the applicant had no call on the policy or its proceeds, something which the applicant must have appreciated at the relevant time given that he had had legal advice. Receipt of 20% of the fund would have been a pure windfall. Thus the offer to compromise a proposed action was not consideration at all.

25. Finally, the purported agreement failed to address two major issues which rendered it incapable of performance:

26. The first is the nature of the assistance the respondent was to provide. The respondent could not have been obliged to sign whatever the applicant put in front of her, for example if it involved doing something that would involve her in committing a breach of trust.

27. The second is whether Ms Brittain purported to make the offer she made on behalf of the respondent in her capacity as trustee of the trust, or as beneficiary, or both. If the offer was made on behalf of the respondent in her capacity as beneficiary only, how was it envisaged that the parties would secure the release of the funds from Zurich? If the offer was made on behalf of the respondent in her capacity as trustee, was it envisaged that she would exercise the power of appointment in favour of the applicant or herself? If so, how was it envisaged that the parties would deal with the requirement for at least two trustees imposed by clauses 4(1) and 10(2)? This was a point which Zurich had already taken in September 2015. Any interest the current beneficiaries (including the respondent) enjoyed was defeasible on the exercise of any further appointment of a trustee. The respondent could not use her position as trustee to secure an advantage for herself in the form of the payment envisaged to be made under the purported agreement without putting herself in breach of duty.

28. If Mr Kokelaar took me through the Zurich documentation to make good the foregoing points, Mr Atwal did the same with a view to demonstrating that in fact there was no problem at all in giving effect to the agreement; and in any event I understood that even Mr Kokelaar conceded that there was an argument that performance could be achieved in the end, even if that end might involve a wait of 50 years or so. I do not think I need to go into the point in detail because in my view it is not significant: it does not go to the existence or otherwise of the agreement but rather to ability to perform. It is quite possible, I accept, that the respondent may have entered into an obligation she cannot perform, but that does not mean there is no agreement. A person who contracts to sell something to both X and Y such that she cannot perform the obligation to both may find herself able to perform for X but in breach of contract as regards Y. That situation is not uncommon. Similarly, the fact that an obligation cannot be performed for a period of time does not mean that the obligation falls away.

29. I do not think it matters that the respondent did not make clear whether she was contracting as trustee or beneficiary. She was contracting as an individual, and in the absence of clarity must have been doing so in each or any capacity in which she could be bound.

30. As to the agreement relied on in the notice of application, I find little difficulty in concluding that it was contractually binding. The 2 October email was plainly an offer; the answer of 5 October was plainly acceptance. The words, "I accept the offer," mean what they say. The use of the word "procure" did not amount to a counter-offer: in my view it did no more than reflect the effect of the offer to "assist in signing whatever is required". There was consideration in the form of the mutual promises, alternatively in the compromise of the threatened or contemplated proceedings. The suggestion of entering into a "formal settlement agreement" was no more than that. It was not a counter-offer either. That it was no more than a suggestion is clear from the words, "I believe that it is in the best interests of all parties…"; it was to be "formal" by contrast with the perceivedly less formal agreement which had already been reached. There was an intention to create legal relations. There was no suggestion until the applicant sought to enforce the agreement that it was anything but that.

31. If I am wrong about that, then in any event it seems to me that Mr Atwal is right in contending that the respondent agreed to be bound by the formal written terms when

Ms Brittain said she was happy to go ahead and would sign the written agreement. Unsurprisingly, the effect is the same. I agreed at the hearing to allow the applicant to amend his application to seek such relief. Mr Kokelaar, very properly, took no objection in the light of the fact that he had come prepared to argue the point.

32. Among Mr Kokelaar's submissions is one that it is necessary for the court to consider, and perhaps determine, the underlying dispute between the parties, that is to say whether the applicant had in fact ever been entitled to make a recovery against the respondent for the bankruptcy estate. As Mr Kokelaar rightly notes in paragraph 46 of his skeleton argument, the applicant has been careful to limit the scope of his application to the question of the agreement alone. I rejected that submission during the hearing on the basis that no application had been made for the determination of that issue, but I heard Mr Kokelaar on it as part of his case on whether the agreement was supported by consideration. That gave rise to the question whether the court should consider the rule in *ex parte James*. After the short adjournment both Mr Atwal and Mr Kokelaar agreed that it should. We agreed that I would deal with it on the basis of written submissions.

The rule in ex parte James

33. Unsurprisingly, Mr Kokelaar submits that the rule (to which I shall come below) applies in this case. He says that it would be manifestly unfair to allow the applicant to enforce the agreement, if it is upheld, in the light of the applicant's concession that the fund which is its subject did not form part of the bankruptcy estate. He relies on the case in which the rule was formulated as well as more recent authorities which demonstrate that it is alive and well. He invites the court to apply the rule in this case by analogy with those authorities.

34. Mr Atwal describes the rule in *ex parte James* as being "vague and elusive." In any event, unfairness, which lies at its root, does not arise where the parties have entered into a valid agreement, in particular in circumstances in which the parties had access to advice and where no principles of common mistake of law and/or unjust enrichment can be relied on. There can be no unfairness where the parties have freely negotiated a binding compromise: the fact of the compromise means there can be no unfairness, much less unjust enrichment. He relies on the refusal of Lord Neuberger in *Re Nortel GmbH* [2013] UKSC 52 to apply the principle to make a change in the ranking of a debt simply because the ranking appeared to be unattractive in the circumstances of the case and where the statutory rankings were clear. Similarly here, he says, the court should not use the rule to circumvent the law of compromise.

35. Finally, he points out that there is no basis for saying that the applicant never had a belief in his entitlement to claim the fund. The respondent's contention that he always knew his claim was baseless was an unwarranted attack on the applicant's integrity and was not borne out by the evidence.

36. In short the rule did not apply here: it could not and should not be used to avoid the agreement on which the applicant relies. To do so would work injustice by subverting the general law.

37. The rule in *ex parte James* is shorthand for the decision of James and Mellish LJJ in *In re Condon, ex parte James* (1874) 9 Ch App 609. The facts are pertinent.

38. The sheriff took possession of goods belonging to Mr Condon by way of execution of a writ of *fieri facias* on behalf of a Mr Bradshaw. Mr Condon was later adjudicated bankrupt and Mr James was appointed as his trustee in bankruptcy. Mr James threatened to bring proceedings against Mr Bradshaw to recover the money he had received from the sheriff as a result of the execution. Mr Bradshaw was advised he had no defence and paid the money to the trustee. Following a decision of the Court of Appeal made at almost exactly the same time it became clear that the trustee had not been entitled to the money, so Mr Bradshaw applied to the court for the money to be refunded to him, and the registrar made an order to that effect. The court upheld the registrar's decision.

39. The appeal involved a consideration of section 87 Bankruptcy Act 1869 and the Court of Appeal's decision in a case called *Ex parte Villars*, neither of which need detain us. What is important is this dictum of James LJ:

> "With regard to the other point, that the money was voluntarily paid to the trustee under a mistake of law, and not of fact, I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it. I am of 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 some one 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. The appeal must be dismissed, but without costs".

40. In *Re Clark (A Bankrupt), ex parte The Trustee v Texaco Ltd* [1975] 1 WLR 559 Walton J applied the rule to restrain a trustee from taking proceedings to recover sums paid to a third party even though he was entitled to do so, saying,

> "[T]he rule provides that where it would be unfair for a trustee to take full advantage of his legal rights as such, the court will order him not to do so."

That formulation was approved by the Supreme Court in *Re Nortel GmbH* (*per* Lord Neuberger at paragraph 122) which I think is what is important for present purposes, though I accept Mr Atwal's point that it did not prevail over the statutory scheme of ranking which the court was considering.

41. Walton J went on in *Re Clark* to say that for the rule to operate certain conditions had to be present:

> "(1) The first is that there must be some form of enrichment of the assets of the bankrupt by the person seeking to have the rule applied. I take this condition from the speech of Lord Keith of

> Avonholm in *Government of India v. Taylor [1955] A.C. 491*, 512, 513.
>
> As this is a universal feature of all the cases in which the rule has been applied, I do not think that any further citation of authority is called for. […]
>
> (2) […] [I]t is, I think, clear that except in the most unusual cases the claimant must not be in a position to submit an ordinary proof of debt. […] Although the basis for this has never been expressly formulated, I think that the underlying reason is obviously that to give effect to the rule would conflict with the mandatory rateable division of the estate between all the bankrupt's creditors. The rule 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.
>
> […]
>
> (3) The third, and crucial, test for the application of the rule is, I think, capable of being stated simply as follows: 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.
>
> (4) Finally, for completeness, I should observe that when the rule does apply, it applies only to the extent necessary to nullify the enrichment of the estate: it by no means necessarily restores the claimant to the status quo ante".

42. The most comprehensive consideration of the rule and the authorities relating to it is to be found in an even more recent decision of David Richards J, as he then was, in *Lomas and others (Joint Administrators of Lehman Brothers International (Europe) (In Administration) v Burlington Loan Management Limited* [2015] EWHC 2270 (Ch):

> "174. The principle in *Ex parte James* has been described as anomalous but it is a well-established principle providing a means by which the court can control the conduct of its officers. Administrators, liquidators in a compulsory winding-up and trustees in bankruptcy are all officers of the court and subject to this jurisdiction. The case to which the principle owes its name, like a number of cases immediately following it, concerned the retention by a liquidator or trustee in bankruptcy of money paid under a mistake of law. At that time, money paid under a mistake of law was not recoverable, but the court directed that its officer should not stand on his strict legal rights but should return the funds, notwithstanding that the effect was

to deprive the creditors of funds which would otherwise be available for distribution among them. The rationale for the principle was that, although irrecoverable at law, the officer of the court could not in all conscience retain the money, given the circumstances in which it had been paid. It would amount to an unjust enrichment of the estate. Although the principle was first developed and exercised in these circumstances, subsequent cases applied it in other circumstances and it cannot now be said to be confined to particular categories of case.

175. The touchstone for the application of the principle has been expressed in different terms over the years. In *Ex parte James* itself, James LJ said that the trustee:

'ought to set an example to the world by paying it [the money paid under a mistake of law] to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people.'

176. In *Re Wigzell* [1921] 2 KB 835, Salter J, in a judgment which was strongly endorsed by the Court of Appeal in that and subsequent cases, said that the "jurisdiction should be exercised wherever the enforcement of legal right would, in the opinion of the Court, be contrary to natural justice." He went on to say:

'The effect of exercising the jurisdiction which these decisions have asserted and defined is to deprive the creditors of money which is divisible among them by law. I feel sure that such a power should not be used unless the result of enforcing the law is such that, in the opinion of the Court, it would be pronounced to be obviously unjust by all right-minded men.'

177. In the same case in the Court of Appeal, Lord Sterndale MR said that the court would not allow its officer to do 'something which in its opinion is dishonourable and not high-minded.' Younger LJ considered that it applied where it would be 'unconscionable' for the officer to stand on his strict legal rights.

178. Walton J reviewed the authorities in *Re Clark* [1975] 1 WLR 559. He repeatedly in his judgment expressed the relevant test as one of unfairness. So, for example, at p.563, he said:

'Stating the matter in very broad terms indeed for the moment, and deliberately using for the purpose "unemotive language", the rule provides that where it would be unfair for a trustee to take full advantage of his legal rights as such, the court will order him not to do so …'

179. When applying the principle to the facts of the case before him, namely whether the trustee should recover the amount of two cheques paid to a supplier to the bankrupt, he said at p.567:

'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?"'

He said that he had no hesitation in answering that it was not.

180. It might be said that Walton J used the word 'unfair' as synonymous with dishonourable or even dishonest, but I very much doubt it. Walton J was not a judge known for a lack of precision in his use of language and his repeated use of the word unfair in his judgment demonstrates in my view the concept which he had in mind.

181. *Re Clark* was cited to the Court of Appeal in *Re T.H. Knitwear (Wholesale) Ltd* [1988] Ch 275 but not referred to in the judgments. The decision in that case was that the principle does not apply to a liquidator in a voluntary liquidation because he is not an officer of the court. Slade LJ went on to consider whether, if that was wrong, it was a case for the application of the principle. He said at p.290 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.'

182. The latest and most authoritative word on the subject is in the judgment of Lord Neuberger in *Re Nortel GmbH* [2013] UKSC 52, [2014] AC 209. He said at [122]:

'As to the common law, there are a number of cases, starting with *Ex p James*; *In re Condon* (1874) LR 9 Ch App 609, in which a principle has been developed and applied to the effect that "where it would be unfair" for a trustee in bankruptcy "to take full advantage of his legal rights as such, the court will order him not to do so", to quote Walton J in *In re Clark* (*a bankrupt), Ex p The Trustee v Texaco Ltd* [1975] 1 WLR 559, 563. The same point was made by Slade LJ in *In re TH Knitwear (Wholesale) Ltd* [1988] Ch 275, 287, quoting Salter J in *In re Wigzell, Ex p Hart* [1921] 2 KB 835, 845: "where a bankrupt's estate is being administered … under the supervision of a court, that court has a discretionary jurisdiction to disregard legal right", which "should be exercised wherever the enforcement of legal right would … be contrary to natural justice". The principle obviously applies to administrators and

> liquidators: see *In re Lune Metal Products Ltd* [2007] Bus LR 589, para 34.'
>
> 183. I take it that unfairness is a sufficient ground for the application of the principle in *Ex parte James* if the court thinks that, in all the circumstances, it is right to apply the principle. This is not a surprising development. While in some of the earlier cases the judges refer to the difficulty in applying the principle in *Ex parte James* because it involved moral rather than legal judgments, unfairness as a substantive legal concept is now well embedded in our law. It is directly applicable to the conduct of administrators, by virtue of paragraph 74 to which I refer below. What constitutes unfairness will, just like what constitutes dishonourable conduct, depend on the circumstances of the case."

43. It seems to me that the principle enunciated in the *Condon* case and as explained by David Richards J is far from being vague or elusive. It seems straightforward to me, and in my view it applies to the circumstances of this case for the following reasons:

> (a) The obligation of an insolvency office-holder is to get in and realise the assets properly available to creditors and to make the required distributions from those, not to get in things which were never assets or make distributions from assets that were never properly available to the estate. I allow, of course, for his making proper commercial decisions and agreements in the course of doing that, which may at times operate to the advantage of creditors just as it may on occasion operate to their disadvantage; but I do not think it can or should result in a windfall to the estate of a wholly unjustified nature, as would be the case here if, as the applicant now acknowledges, there never was a claim on the respondent's fund or potential fund. Walton J's first condition is thus satisfied. The fact that the windfall would flow from the agreement does not, to my mind, detract from that.
>
> (b) The analogy between the facts in the *Condon* case and the facts in this case is plain; so therefore must be the application of the rule.
>
> (c) There is no suggestion that the applicant would be able to submit a proof of debt, so Walton J's second condition appears to be satisfied.
>
> (d) In my view all right-minded men (and nowadays women) would regard enforcing the law (here in the form of one or other of the two agreements I have upheld) as obviously unjust; or, to adopt Walton J's formulation, an honest man would say, "It's not fair that I should keep the money; my claim has no merits". So his third condition is also satisfied.

> (e) The application of the rule to the facts of this case would merely nullify the enrichment (Walton J's fourth condition).

This is, then, a case in which the applicant, as an office of this court, should, in the interests of fairness, not insist on his strict legal rights.

44. As Mr Kokelaar points out, the applicant and his solicitors repeatedly asserted the former's entitlement to 20% of the fund, but, he says, it is striking that they never articulated a coherent basis for that assertion. It is unclear, therefore, whether the applicant genuinely believed that he had a claim at the time the alleged agreement was entered into. Clearly, if he did not have such a belief, his conduct would necessarily have been dishonourable: as an officer of the court he should never have used the threat of legal proceedings to put pressure on the respondent to enter into a disadvantageous settlement of a claim he knew to be baseless. However, the principle in *Ex parte James* does not require a finding of dishonourable or dishonest conduct on the part of the office holder, and Mr Kokelaar does not invite such a finding. His position is that even if the applicant genuinely believed that he had a viable claim to the fund, the terms of the alleged agreement were so one-sided in his favour – they require the respondent to procure that 95% of the funds left in the trust be paid to him - that he should, in order to set "an example to the world" (James LJ's phrase), at the very least have encouraged the respondent to seek legal advice on her position before entering into it.

45. I should make clear that I make no finding that the applicant knew at the relevant times that he had no claim. I proceed on the footing that he realised the true nature of his position only after reaching the compromise. I also make no criticism of him for not insisting on the respondent's taking legal advice.

46. For the reasons given in paragraph 43 above, however, I do find that the rule in *ex parte James* applies and that the circumstances of this case warrant its application in favour of Mrs Young.

Result

47. In the circumstances I hold that the applicant is not entitled to the relief he seeks and I shall dismiss the applicant's application.