The Rule in Ex parte James

THE RULE IN *EX PARTE JAMES*

Aisha Shah*

Keywords: Equity; Insolvency; Proprietary rights; Provable debts; Restitution; Trusts; Unjust enrichment.

I. Introduction

This article explores the *Ex parte James* rule.[1] The rule is important for the reason that, when it is successfully invoked against an officer of the court, the officer of the court cannot insist on their strict legal rights. It thus allows the court to disregard legal principles, in a legal system governed by the rule of law, and introduces into the law what Lord Justice Slade in *Re TH Knitwear Ltd* described as a "less welcome element of uncertainty".[2] The *Ex parte James* principle has been effectively utilised in a wide range of cases including, but not limited to, to recover money paid by a lender to a bankrupt,[3] recover money paid by a creditor to a trustee in bankruptcy,[4] recover rates paid to a local council,[5] and to recover tax paid to Revenue and Customs.[6]

The case which the rule originates from, the nineteenth-century case of *Re Condon, ex parte James*, involves a payment made under a mistake of law, but the rule has since been extended.[7] This article mainly seeks to explore the *Ex parte James* cases concerning mistaken payments. These cases are significant, since when a claimant relies on the rule to successfully recover a payment made by mistake to an officer of an insolvent estate, the effect of the rule is that the claimant is conferred priority in the

* Dr. Aisha Shah, Lecturer in Law, School of Law, University of Worcester. I would like to thank Dr. David Salmons for his invaluable comments on numerous versions of this paper. I would also like to thank the anonymous referee for their insightful comments.
** This article is based on a paper I delivered in the Restitution Section of the Society of Legal Scholars Conference at the University of Exeter in September 2020.
[1] *Re Condon, ex parte James* (1874) 9 Ch. App. 609 (Ch); [1874-80] All E.R. Rep. 388.
[2] *Re TH Knitwear (Wholesale) Ltd* [1988] Ch. 275 (CA) at 289 (Slade L.J.); [1988] 1 All E.R. 860 at 869.
[3] *Re Thellusson, ex parte Abdy* [1919] 2 K.B. 735 (CA); [1918-19] All E.R. Rep. 729.
[4] *Ex parte James* (1874) 9 Ch. App. 609.
[5] *R v Tower Hamlets LBC, ex parte Chetnik Developments Ltd* [1988] A.C. 858 (HL); [1988] 1 All E.R. 961.
[6] *Sebel Products v Customs and Excise Commissioners* [1949] Ch. 409 (Ch); [1949] 1 All E.R. 729.
[7] *Re Tyler, ex parte Official Receiver* [1907] 1 K.B. 865 (CA) at 870 (Vaughan Williams L.J.), and 872 (Farwell L.J.); [1904-7] All E.R. Rep. 181 at 183 and 184; *In re Lehman Brothers International (Europe) (In Administration)* [2015] EWHC 2270 (Ch); [2015] B.P.I.R. 1162 at [174] (David Richards J.).

debtor's insolvency. This allows the claimant to recover their money from the insolvent recipient ahead of the claims of unsecured creditors.[8] However, the rule is controversial for the reason that it is not clear why, in the cases where it is applied, a claimant who has a non-provable debt is able to recover their money in priority. In contrast to the reasoning adopted by the courts to rationalise the rule, this article argues that the rule cannot be justified on the basis of whether the officer of the court has acted fairly in accordance with the standards of the right-thinking person, but that it can instead be explained using the cause of action of unjust enrichment.

Admittedly, Dawson has previously argued that the cases should be subsumed into the law of restitution.[9] However, his thesis fails to explain the contentious aspect of the rule; the reason for giving the payer priority.[10] By adopting the unjust enrichment analysis proposed in this article, the issue of priorities[11] can be explained, and the doctrine no longer appears "anomalous".[12] On the contrary, the *Ex parte James* body of cases fit within the existing law. This not only eradicates the problem of the *Ex parte James* rule being used in situations where the law has already provided a remedy,[13] but also addresses the repeated concerns expressed by the judiciary over the ambit and uncertainty of the rule.[14] It follows that the doctrine in *Ex parte James* has only concealed what the courts have been doing—applying the law of unjust enrichment—and has delayed vital discussions on what the principle is actually about. Furthermore, it is submitted that this article is timely, since in recent years there has been an increase in the number of cases being heard by the courts in which a claimant seeks to rely on the rule.

The original contribution of this article is it demonstrates that, where a claimant successfully relies on the *Ex parte James* principle to recover a payment made to an insolvent estate in priority to other creditors, this can be explained on the following basis: the insolvent estate was unjustly enriched at the expense of the payer. This unjust enrichment was reversed via proprietary restitution, in the form of a trust which arose because the payer's purpose for the payment was impossible from the outset. Importantly, the trust enabled the payer to recover their money in priority in the insolvency. Once this novel proprietary analysis of the *Ex parte James* rule is adopted, one can adequately reconcile the rule

[8] Potentially, the rule also confers priority over preferential creditors. This can be implied from *Glasgow v ELS Law Ltd* [2017] EWHC 3004 (Ch); [2018] 1 W.L.R. 1564 at [65]; [2018] 1 B.C.L.C. 339 at [65] where the claimant sought to rely on the rule to obtain priority over both unsecured and preferential creditors. The case of *Re Carnac, ex parte Simmonds* (1885) 16 Q.B.D. 308 (CA) at 313 (Cotton L.J.); [1881-5] All E.R. Rep. 895 at 897 appears to indicate that the rule does not confer priority over the expenses in the insolvency.

[9] I. Dawson, "The Administrator, Morality and the Court" [1996] J.B.L. 437. But now see his position in I. Dawson, "Corporate Rescue by the Upright Rescuer- a trap for the unwary" (2016) 29 Insolv. Int. 81 where he argues that the principle should be overruled as existing areas of law are capable of dealing with the situations where the *Ex parte James* rule is applied.

[10] T.E. Chan, "Revisiting *Ex Parte James*" [2003] Sing. J.L.S. 557 at 579.

[11] T.E. Chan, "Revisiting *Ex Parte James*" [2003] Sing. J.L.S. 557 at 579.

[12] As it was described in *Re TH Knitwear (Wholesale) Ltd* [1988] Ch. 275 at 289; G. McCormack, "Equitable influences and insolvency law" (2014) 7 C.R.I. 103 at 105.

[13] *Heis v Financial Services Compensation Scheme Ltd* [2018] EWHC 1372 (Ch); [2019] Bus. L.R. 1 at [143(7)] (Hildyard J.); [2018] B.P.I.R. 1096 at [143(7)].

[14] e.g. see text to fn.2 above.

with existing case law where the courts have recognised the availability of proprietary responses for unjust enrichment.

II. The Rule in *Ex parte James*

The facts of the *Ex parte James* case are as follows. A creditor levied execution over the debtor's goods. Consequently, the Sheriff of Middlesex seized some of the goods and sold them. The Sheriff then paid the proceeds of sale to the execution creditor in satisfaction of the debtor's debt. Soon after, one of the debtor's creditors filed a petition for bankruptcy which resulted in the debtor being declared bankrupt. A trustee in bankruptcy was then appointed for the debtor's estate. The solicitors acting for the debtor's trustee in bankruptcy Mr James, an officer of the court, demanded the sale proceeds from the execution creditor on the basis that the trustee was legally entitled to the sums. The execution creditor, under the mistaken belief that the trustee in bankruptcy was legally entitled to the money, paid the sale proceeds to the trustee. He then sought to recover the sums demanded and received by the trustee. The court held that the trustee had to refund the money mistakenly paid to him. The effect of the ruling was that the payer recovered the money in priority to the unsecured creditors of the bankrupt. However, it is not clear from the judgment whether the execution creditor recovered the sums on the basis of a personal right against the bankrupt estate, or whether he had a proprietary interest in the monies received by the trustee. This is because the court, instead of addressing the issues independently, conflated the question of whether the payer had a cause of action to recover the payment made by mistake of law, for which at the time recovery was barred,[15] with the level of priority the creditor ought to receive.[16] Therefore, it appears that the decision in *Ex parte James* arose as a result of the court recognising the need to lessen the harshness of *Bilbie v Lumley*,[17] which held that money paid under a mistake of law cannot be recovered, but confusing this with the issue of the order of priority of payments. Subsequent cases failed to recognise this, and the decision in *Ex parte James* became known as the rule in *Ex parte James*. Its origins were then unfortunately not revisited after the mistake of law bar was removed in *Kleinwort Benson Ltd v Lincoln City Council*.[18]

The mechanism used to achieve priority, and which is capable of explaining the *Ex parte James* body of cases, will be revisited later in the article.[19] This section will now focus instead on the court's reasoning.

In *Ex parte James*, Sir James L.J. explained why the creditor was able to recover the sums from the trustee in bankruptcy:

---

[15] *Bilbie v Lumley* (1802) 2 East. 469 (KB); 102 E.R. 448. Although now see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349 (HL); [1998] 4 All E.R. 513 which abolished the mistake of law bar.

[16] A similar view has been expressed by T.E. Chan, "Revisiting *Ex Parte James*" [2003] Sing. J.L.S. 557 at 565.

[17] *Bilbie v Lumley* (1802) 2 East. 469.

[18] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349.

[19] See section "Response" following fn.77 below.

> "I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far... *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*".[20]

Recently though, the requirement that the officer of the court must act in an "honest" manner has been reformulated. As will be discussed later in this article, the courts now adopt a test of "unfairness" to determine whether the officer's conduct has fallen below the expected standard.[21]

This section will now demonstrate the need for a new analysis to explain the cases, by exploring the difficulties with the reasoning employed by the courts applying the *Ex parte James* principle. First, it rejects the arbitrary requirement that the defendant must be an officer of the court. Second, the courts' view that recovery is justified on the basis that it would be unfair for the officer to insist on their strict legal right and retain the sums is not only too subjective of a criterion in this context to be administered, but undermines the officer of the court requirement.

1. Officer of the court

The cases state that the rule from *Ex parte James* is applicable only against a recipient who is an "officer of the court". These "are persons who are subject to its general supervisory or inherent jurisdiction".[22] As is apparent from this definition, it is not immediately clear which individuals would satisfy this description. This has led to a number of cases where claimants have attempted to rely on the *Ex parte James* principle against individuals who the courts subsequently held were not court officers.[23]

It is widely accepted that a liquidator of a compulsory winding up is an officer of the court.[24] In *Re TH Knitwear (Wholesale) Ltd*, the Customs and Excise Commissioner sought to argue that the liquidator of a voluntary liquidation was a court officer and, consequently, that the principle in *Ex parte James* was applicable.[25] However, Slade L.J. clarified that:[26]

[20] *Ex parte James* (1874) 9 Ch. App. 609 at 614 (emphasis added).
[21] See text to fn.49 below.
[22] *Glasgow v ELS Law Ltd* [2018] 1 W.L.R. 1564 at [82]. This definition is representative of how the courts have defined "officer of the court" for the purposes of the rule in *Ex parte James.*
[23] See text to fnn.25-42 below.
[24] The earliest case appears to be *Re Opera Ltd* [1891] 2 Ch. 154 (Ch); 60 L.J. Ch. 464.
[25] *Re TH Knitwear (Wholesale) Ltd* [1988] Ch. 275.
[26] Before *Re TH Knitwear (Wholesale) Ltd* [1988] Ch. 275, the courts had not consistently taken a hard line on what the position was regarding voluntary liquidators. For instance, see *In Re London County Commercial*

> "a liquidator in a voluntary winding up is not an officer of the court within the principle… he is not appointed by the court and the exercise of his powers is not subject to the control of the court".[27]

The position of company administrators though, whether appointed by a court order, creditor, or the company itself, is that they are court officers.[28] There is a compelling argument, therefore, that they should still fall within the courts' equitable jurisdiction and be subject to the rule in *Ex parte James*.[29]

Although the general judicial consensus is that *Ex parte James* applies only to court officers, it is argued that this requirement draws an "artificial distinction between the different forms of insolvency proceedings".[30] First, admittedly, equity can operate on different principles from the common law.[31] Nevertheless, limiting equity's jurisdiction under *Ex parte James* to officers of the court is unjustified. As the Chancery Division of the High Court recognised in *Re T&N Ltd*, "liquidators in a voluntary winding-up… are not officers of the court but perform much the same function as a liquidator in a compulsory winding-up".[32] In both instances, the liquidator's role is to realise and distribute assets to the company's creditors. Therefore, there appears to be no convincing reason for excluding voluntary liquidators from the ambit of the *Ex parte James* principle,[33] yet continuing to allow compulsory liquidators to fall within its jurisdiction.

Second, but most importantly, there are cases which suggest that the rule is not confined to those who fit within the definition. For instance, in *Sebel Products v Customs and Excise Commissioners*, the principle was applied against Revenue and Customs authorities to enable the claimant to recover tax payments made by mistake.[34] The court reasoned that the Commissioners, like the courts, derive their authority from the Crown, the fountain of justice. Therefore, the Commissioners must be held to the

Reinsurance Office Ltd [1922] 2 Ch. 67 (Ch) at 84 (Lawrence J.); *Re John Bateson & Co. Ltd* (1985) 1 B.C.C. 99378 (Ch) at 99383 (Harman J.); [1985] B.C.L.C. 259 at 264; *In re TH Knitwear (Wholesale) Ltd* [1987] 1 W.L.R. 371 (Ch) at 377 (Sir Browne-Wilkinson V.C.); (1986) 2 B.C.C. 99544 at 99549.

[27] *Re TH Knitwear (Wholesale) Ltd* [1988] Ch. 275 at 288, overruling *In re Temple Fire and Accident Assurance Co.* (1910) 129 L.T. Jo. 115.

[28] Insolvency Act 1986, Sch.B1 para.5.

[29] *Re Atlantic Computer Systems* [1992] Ch. 505 (CA) at 529 (Nicholls L.J.); [1992] 1 All E.R. 476 at 490; *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272 (Ch); [2008] B.C.C. 22 at [53]; [2007] 2 B.C.L.C. 1 at [53]; *In re Lehman Brothers International (Europe) (In Administration)* [2015] B.P.I.R. 1162 at [174]; *Glasgow v ELS Law Ltd* [2018] 1 W.L.R. 1564 at [82]. Note, the position is different for administrative receivers. See *Triffit Nurseries v Salads Etcetera Ltd* [2000] All E.R. (Comm) 737 at 748 (Walker L.J.); [2001] B.C.C. 457 at 466 and *Glasgow v ELS Law Ltd* [2018] 1 W.L.R. 1564 at [82].

[30] T.E. Chan, "Revisiting *Ex Parte James*" [2003] Sing. J.L.S. 557 at 580.

[31] The view of this author is that common law and equity should be fused as far as is possible. For a fusionist approach, see A. Burrows, "We do this at Common Law but that in Equity" (2002) 22 O.J.L.S. 1.

[32] *Re T&N Ltd* [2004] EWHC 1680 (Ch); [2004] Pens. L.R. 351 at [16]; [2004] O.P.L.R. 343.

[33] Though in a different context, applying different rules to compulsory and voluntary winding ups was criticised in *Re Art Reproduction Co Ltd* [1952] Ch. 89 (Ch) at 94-95 (Wynn-Parry J.); [1951] 2 All E.R. 984 at 988. The distinction has also been criticised by I. Dawson, "Corporate Rescue by the Upright Rescuer- a trap for the unwary" (2016) 29 Insolv. Int. 81 at 84.

[34] *Sebel Products v Customs and Excise Commissioners* [1949] Ch. 409.

same high standard as the court and its officers. Also, in the House of Lords in *R v Tower Hamlets London Borough Council, ex parte Chetnik Developments Ltd*, the applicant successfully invoked the principle against a local authority, on the basis that it was a public body, to obtain a refund of mistaken overpayments of rates.[35] It is then somewhat surprising that the courts refuse to apply the *Ex parte James* principle against those whose position is analogous to an officer of the court. In *TH Knitwear*, it was said that an insolvency practitioner who is not an officer of the court does not fall within the principle even if they have applied to the court for directions.[36] This position was affirmed more recently in *Glasgow v ELS*.[37] It again demonstrates that the officer of the court requirement imposes artificial limitations on the scope of the *Ex parte James* rule.[38]

Last of all, the requirement is further undermined by the fact that even when one *is* an officer of the court, the *Ex parte James* principle may not be applicable. In *Caldwell v Sumpters*, the claimant argued that the rule applied to a solicitor, since solicitors are court officers. Yet the court refused to apply the principle for the reason that a solicitor "acts on behalf of his client", rather than on the court's behalf.[39] Regarding this contradiction, Dawson rightly points out that it is not clear "why the court should not impose that requirement— to act to the highest standards— on its officers, regardless of the precise role which they fulfil".[40] This is further illustrated by the decision in *Glasgow v ELS*.[41] In *Glasgow*, the trustee in bankruptcy was appointed in an overseas jurisdiction. The court stated that because "the applicant is not an officer of this court, having been appointed bankruptcy trustee by the High Court in St Vincent and the Grenadines, the principle in *Ex p James* does not apply to him".[42] Arguably, this again indicates that the officer of the court requirement masks the true basis of the principle.

2. The unfairness test

The second requirement from the *Ex parte James* case is that the officer of the court "ought to set an example to the world… [and] ought to be as honest as other people".[43] In the numerous cases that followed, the courts used a variety of words in an attempt to explain the standard of conduct expected from its officers. This was noted by Scrutton L.J. in *Re Wigzell, ex parte Hart*, who stated that "a series

---

[35] *R v Tower Hamlets LBC, ex parte Chetnik Developments Ltd* [1988] A.C. 858. The reason why the principle applies to public authorities was briefly explained, though in the context of the application of the principle to the courts, in *Lehman Brothers Australia Ltd (In Liquidation) v MacNamara* [2020] EWCA Civ 321; [2021] Ch. 1 at [35]; [2021] 1 All E.R. 295 at [35] where it was stated that, "as a public authority and given its role in society, the court is expected to apply standards to its own conduct which may go beyond bare legal rights and duties".
[36] *Re TH Knitwear (Wholesale) Ltd* [1988] Ch. 275 at 289.
[37] *Glasgow v ELS Law Ltd* [2018] 1 W.L.R. 1564 at [82].
[38] I. Dawson, "Corporate Rescue by the Upright Rescuer- a trap for the unwary" (2016) 29 Insolv. Int. 81 at 84.
[39] *Caldwell v Sumpters* [1972] Ch. 478 (Ch) at 486 (Megarry J.). Note, the defendants in *Caldwell* appealed and succeeded on a different ground in the Court of Appeal.
[40] I Dawson, "The Administrator, Morality and the Court" [1996] J.B.L. 437 at 443.
[41] *Glasgow v ELS Law Ltd* [2018] 1 W.L.R. 1564.
[42] *Glasgow v ELS Law Ltd* [2018] 1 W.L.R. 1564 at [83].
[43] *Ex parte James* (1874) 9 Ch. App. 609 at 614 (James L.J.).

of phrases none of which are very definite have been used".[44] Over 60 years after *Wigzell*, the language remained as broad. This was recognised by Lord Justice Lawton in *In the Matter of Multi Guarantee Co Ltd v In the Matter of the Companies Act 1948*:

> "various words have been used in the cases to indicate the kind of conduct to which the principle of *Ex parte James* may apply, such as 'a point of moral justice', 'dishonest', 'dishonourable', 'unworthy', 'unfair' and 'shabby'… the concept behind them is, as I understand the cases, that an officer of the court, such as a trustee in bankruptcy or a liquidator, should not behave in a way which a reasonable member of the public, knowing all the facts, would regard as either dishonest, unfair or dishonourable".[45]

In *Re Nortel GmbH*, a recent Supreme Court decision where the *Ex parte James* principle was discussed in obiter, Lord Neuberger said:

> "[the] 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)* [1975]. The same point was made by Slade LJ in *In re TH Knitwear (Wholesale) Ltd* [1988], quoting Salter J in *In re Wigzell, Ex p Hart* [1921]: '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'".[46]

The language of unfairness adopted by Lord Neuberger in *Re Nortel* was cited with approval in subsequent cases.[47]

The key authorities discussing the rule *in Ex parte James* were revisited in the recent Court of Appeal decision of *Lehman Brothers Australia Ltd v MacNamara*.[48] Upon reviewing the case law, the Court reformulated the language for the second requirement of the rule. Lord Justice Richards, with whom the other Lord Justices agreed, stated that a "test of unfairness" should be applied to determine whether the officer's conduct has fallen below the standard expected, and that this test was consistent with the

[44] *Re Wigzell, ex parte Hart* [1921] 2 K.B. 835 (CA) at 858; 90 L.J.K.B. 897.
[45] *In the Matter of Multi Guarantee Co Ltd v In the Matter of the Companies Act 1948* unreported 17 April 1986 CA (Civ Div).
[46] *Bloom v Pensions Regulator* [2013] UKSC 52; [2014] A.C. 209 at [122]; [2013] 4 All E.R. 887 at [122].
[47] In chronological order: *Re Lehman Brothers International (Europe) (In Administration)* [2015] B.P.I.R. 1162 at [182]-[183]; *Re Young (A Bankrupt)* unreported 27 March 2017 Ch; *Evans v Carter* [2017] EWHC 2163 (Ch) at [41]; *Glasgow v ELS Law Ltd* [2018] 1 W.L.R. 1564 at [79]; *Lehman Brothers Australia Ltd (In Liquidation) v MacNamara* [2021] Ch. 1.
[48] *Lehman Brothers Australia Ltd (In Liquidation) v MacNamara* [2021] Ch. 1.

authorities on the *Ex parte James* rule.[49] In *MacNamara*, the court provided the following exposition of the unfairness test; this formulation has since been approved by later cases in the Court of Appeal:[50]

> "[35]… the court will not permit its officers to act in a way which, although lawful and in accordance with enforceable rights, does not accord with the standards which right-thinking people or, as it may be put, society would think should govern the conduct of the court or its officers… [68]… The court will not permit its officers to act in a way that it would be clearly wrong for the court itself to act. That is to be judged by the standard of the right-thinking person, representing the current view of society. If one were to pose the question 'would it be proper for the court to act unfairly?', only one answer is possible".[51]

Importantly, although the courts now use unfairness as the threshold for triggering the application of the *Ex parte James* principle, the pre-*Nortel* case law has not been overruled, nor has doubt been cast on the correctness of those earlier decisions. Rather, many previous authorities have either been cited with approval both in and post-*Nortel* or the post-*Nortel* cases have not engaged with the pre-*Nortel* judgments in sufficient depth. The latter could be interpreted as demonstrating that the courts view those cases as applying the *Ex parte James* rule in a manner that is compatible with the unfairness test, and that the language now used simply reflects the reality of the situations in which the rule has been applied. This is consistent with the words of David Richards L.J. in *MacNamara* who said that the test of unfairness is broader than dishonourable conduct.[52] An implication can be made from his dicta that the prior case law would thus be captured by this lower threshold, and unfairness is thus an umbrella term which captures the various phrases used in the cases since the inception of the *Ex parte James* principle.[53] This interpretation also reflects the dicta from *Nortel* and *MacNamara* above,[54] where the courts used fairness as the overarching principle, yet continued to define it in terms of "natural justice" and the standard of a "right-thinking person", both being phrases similar to those used in the pre-*Nortel*

---

[49] *Lehman Brothers Australia Ltd (In Liquidation) v MacNamara* [2021] Ch. 1 at [64]. The Court placed particular emphasis on the dicta of Walton J. in *Re Clark (a bankrupt)* [1975] 1 W.L.R. 559 (Ch); [1975] 1 All E.R. 453 and Lord Neuberger in *Bloom v Pensions Regulator* [2014] A.C. 209.

[50] See *365 Business Finance Ltd v Bellagio Hospitality WB Ltd* [2020] EWCA Civ 588; [2021] Q.B. 129 at [120]-[121]; [2021] 1 All E.R. 951 at [120]-[121]; *Brake v Lowes* [2020] EWCA Civ 1491; [2021] Bus L.R. 577 at [42]; [2021] B.P.I.R. 1 at [42]; *Schofield v Smith* [2022] EWCA Civ 824; [2023] 1 All E.R. 480 at [67]-[68]; [2022] B.C.C. 1265 at [67]-[68].

[51] *Lehman Brothers Australia Ltd (In Liquidation) v MacNamara* [2021] Ch. 1 at [35] and [68].

[52] *Lehman Brothers Australia Ltd (In Liquidation) v MacNamara* [2021] Ch. 1 at [68].

[53] This interpretation is consistent with the dicta in *Re Lehman Brothers International (Europe) (In Administration)* [2015] B.P.I.R. 1162 at [180] where David Richards J. said: "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". Therefore, unfairness is a broader phrase, and although dishonesty and dishonourable conduct can lead to a finding of unfairness, it is not limited to such.

[54] See text at fnn.46 and 51 above.

case law. For this reason, the cases prior to *Nortel* remain relevant, and will be drawn upon below to explain the main difficulties with the conduct element of the *Ex parte James* rule.

There are some problems with unfairness being the standard of conduct required for the *Ex parte James* principle to apply. First, the "principle does not seem to give much help when one has to apply it to a particular case".[55] This is because, as Salter J. observed in *Re Wigzell*, although "legal rights can be determined with precision by authority… questions of ethical propriety have always been, and will always be, the subject of honest difference among honest men".[56] So when applying the principle to a given set of facts, the outcome may well depend on the judge adjudicating in the particular case, as "perfectly honest and honourable persons may take entirely different views".[57] This is illustrated by *Re Stokes,* where a bankrupt assisted his trustee in bankruptcy in the winding up of his, the bankrupt's, estate.[58] The trustee paid the bankrupt a salary for providing these services, who then effected a life insurance policy and paid the premiums from his salary. After the bankrupt's death, for the first time the trustee in bankruptcy became aware of the policy and that the debtor had been paying the premiums. As the policy was effected during the bankruptcy, it belonged to the trustee.[59] Horridge J. held that the applicant could not prevent the official receiver from claiming the funds from the insurance company. Adopting the modern language used for the rule, it was not unfair for the trustee to insist on his strict legal right to the policy proceeds. However, in the later case of *Re Wigzell*, Younger L.J. was strongly of the opinion that *Re Stokes* could not be justified. The debtor, rather than applying the salary in "junketing or extravagance",[60] had used it to pay into a policy in the hope that the proceeds would become available to his widow after his death.[61] In the circumstances, Younger L.J. could see no reason why the debtor's estate should be divested of the fruits of the policy. Rather, in his view the application of *Ex parte James* to the facts would have been "most salutary".[62] The conflicting views of Horridge J. and Younger L.J., on whether the officer of the court in *Stokes* was right to insist on his strict legal right, only goes to demonstrate the difficulty the courts face when applying the rule. Furthermore, even in *MacNamara*, the Court of Appeal admitted that "different judges might reach different views" on the issue of whether the officer's conduct is fair, yet insisted that the test was an objective one and straightforward to apply.[63] Therefore, it could be said that not only are the courts disregarding legal rights, but it is also not clear in what circumstances legal rights can be disregarded.

Second, in the early twentieth century case of *Re Tyler, ex parte Official Receiver*, it was said a finding that the officer's conduct has fallen below the expected standard is not limited to the particular

[55] *Re Wigzell, ex parte Hart* [1921] 2 K.B. 835 at 851 (Lord Sterndale M.R.).
[56] *Re Wigzell, ex parte Hart* [1921] 2 K.B. 835 (KBD) at 845.
[57] *Re Wigzell, ex parte Hart* [1921] 2 K.B. 835 at 859 (Scrutton L.J.); also see *Re Wigzell, ex parte Hart* [1921] 2 K.B. 835 at 846 (Salter J.) who said that on the facts before him the decision could go either way.
[58] *Re Stokes* [1919] 2 K.B. 256 (KBD); [1918-19] All E.R. Rep. 1179.
[59] *Re Stokes* [1919] 2 K.B. 256 at 261 (Horridge J.).
[60] *Re Wigzell, ex parte Hart* [1921] 2 K.B. 835 at 870 (Younger L.J.).
[61] *Re Wigzell, ex parte Hart* [1921] 2 K.B. 835 at 870-871 (Younger L.J.).
[62] *Re Wigzell, ex parte Hart* [1921] 2 K.B. 835 at 871 (Younger L.J.).
[63] *Lehman Brothers Australia Ltd (In Liquidation) v MacNamara* [2021] Ch. 1 at [38] and [66].

case of an officer of the court attempting to retain money paid by mistake of law, but is of general application.[64] The principle also applies when an officer receives money in circumstances where a payer's intention has been vitiated by a mistake of fact,[65] and to any other instances where "no right-thinking person would think it fair" for the officer to act in this way.[66] It is not possible to list all such situations, since "what constitutes unfairness will… depend on the circumstances of the case".[67] Due to the wide ambit of the rule, there is a danger of the principle becoming what Justice Hildyard described as an "unruly horse", and one which is used "as a catch-all to cover complaints where the law has already provided a remedy".[68]

Finally, it is questionable as to whether the *Ex parte James* doctrine is really about preventing unfairness and encouraging the pursuit of a fair course of action. In *Re Tyler*, it was stated that an officer of the court "is bound to be even more straightforward and honest than an ordinary person in the affairs of every-day life".[69] It could be said that where an individual receives money in circumstances where the right-thinking person would make repayment, if the justification for the *Ex parte James* principle is to ensure that one acts fairly, the individual ought to be regarded as having acted unfairly if they refuse to repay the sums regardless of whether they are an officer of the court or an ordinary litigant. As Dawson argues, when applying the rule all individuals should be held to the same standard of righteousness.[70]

III. The Cause of Action

[64] *Re Tyler, ex parte Official Receiver* [1907] 1 K.B. 865 at 868-870 (Vaughan Williams L.J.), and at 872 (Farwell L.J.); *Re Thellusson, ex parte Abdy* [1919] 2 K.B. 735 at 760 (Atkin L.J.). More recently, this dicta from *Tyler* was approved in *365 Business Finance Ltd v Bellagio Hospitality WB Ltd* [2021] Q.B. 129 at [121(2)] and *Lehman Brothers Australia Ltd (In Liquidation) v MacNamara* [2021] Ch. 1 at [43].

[65] E.g. *Re Thellusson, ex parte Abdy* [1919] 2 K.B. 735. As a side note, the distinction between mistakes of fact and law is not clear-cut. Furthermore, that the distinction between the two should be overlooked, was explained by the House of Lords in *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349 at 372 (Lord Goff): "the distinction drawn between mistakes of fact (which can ground recovery) and mistakes of law (which cannot) produces results which appear to be capricious… as a result of the difficulty in some cases of drawing the distinction between mistakes of fact and law, and the temptation for judges to manipulate that distinction in order to achieve practical justice in particular cases, the rule became uncertain and unpredictable in its application". Virgo has also said that "the distinction between mistakes of law and fact was notoriously difficult to draw, and this created much scope for manipulation of restitutionary claims to ensure that they were founded on a mistake of fact"—see G. Virgo, *The Principles of the Law of Restitution*, 3rd edn (Oxford: Oxford University Press, 2015), at pp.161-162.

[66] *Lehman Brothers Australia Ltd (In Liquidation) v MacNamara* [2021] Ch. 1 at [103].

[67] *In re Lehman Brothers International (Europe) (In Administration)* [2015] B.P.I.R. 1162 at [183] (David Richards J.).

[68] *Heis v Financial Services Compensation Scheme Ltd* [2019] Bus. L.R. 1 at [143].

[69] *Re Tyler, ex parte Official Receiver* [1907] 1 K.B. 865 at 871 (Farwell L.J.); also see *Ex parte Simmonds* (1885) 16 Q.B.D. 308 at 312 (Lord Esher M.R.).

[70] I. Dawson, "The Administrator, Morality and the Court" [1996] J.B.L. 437 at 450-451; I. Dawson, "Corporate Rescue by the Upright Rescuer- a trap for the unwary" (2016) 29 Insolv. Int. 81 at 84.

It is contended that the cause of action of unjust enrichment can explain the *Ex parte James* case,[71] as the payer made a payment by mistake and the bankrupt's estate was thus unjustly enriched by the receipt of the money. Since the body of cases can be explained using the law of unjust enrichment, they can be "subsumed within the law of restitution".[72] A consequence of this analysis would be that, contrary to Walton J.'s dicta in *Re Clark,*[73] a claimant can invoke the rule in *Ex parte James* to recover an enrichment even when they are in a position to submit a proof of debt in the administration, bankruptcy or liquidation. This is because non-provability is not a requirement in the law of restitution. Another consequence of the restitutionary analysis is that the principle is no longer confined to certain insolvency officers, but can be relied on against all insolvency office-holders.[74] Neither is unfairness a requirement in the law of unjust enrichment. Instead, the payer must demonstrate that the recipient has been enriched at their expense, that there is an unjust factor at play, and the recipient has no defence.

The unjust enrichment analysis of the cases is supported by *India v Taylor* where, discussing the rule in the context of insolvency, it was stated that the *Ex parte James* rule can be applied in the following circumstances:

> "where there has been some form of enrichment of the assets of a bankrupt or insolvent company at the expense of the person seeking recoupment. No case has been brought to our notice of the application of the rule where there has been no enrichment of one party…"[75]

Furthermore, Walton J. in *Re Clark* stated that *Ex parte James* applies to strip the defendant of their gain. Therefore, the rule has a restitutionary effect, as it applies only to "nullify the enrichment of the estate; it by no means necessarily restores the claimant to the status quo ante".[76] In the more recent case of *Lehman Brothers,* Richards J. explicitly supported the unjust enrichment analysis. He stated that:

> "the rationale for the principle [in *Ex parte James*] was that… 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".[77]

[71] I. Dawson, "The Administrator, Morality and the Court" [1996] J.B.L. 437 at 455-462.
[72] I. Dawson, "The Administrator, Morality and the Court" [1996] J.B.L. 437 at 460.
[73] *Re Clark (a bankrupt)* [1975] 1 W.L.R. 559 at 564.
[74] I. Dawson, "The Administrator, Morality and the Court" [1996] J.B.L. 437 at 455-456 and 461; G. McCormack, "Equitable influences and insolvency law" (2014) 7 C.R.I. 103 at 105.
[75] *India v Taylor* [1955] A.C. 491 (HL) at 513; [1955] 1 All E.R. 292 at 300. This unjust enrichment analysis was approved in *Re Clark (a bankrupt)* [1975] 1 W.L.R. 559 at 563 (Walton J.), which was then cited with approval in *Re Young (A Bankrupt)* (Ch, 27 March 2017) at [41].
[76] *Re Clark (a bankrupt)* [1975] 1 W.L.R. 559 at 564. This requirement was approved in *Re Young (A Bankrupt)* (Ch, 27 March 2017) at [43(e)].
[77] *In re Lehman Brothers International (Europe) (In Administration)* [2015] B.P.I.R. 1162 at [174]; also see *Lehman Brothers Australia Ltd (In Liquidation) v Lomas* [2018] EWHC 2783 (Ch); [2019] B.C.C. 318 at [61(9)] (Hildyard J.); [2019] B.P.I.R. 104 at [61(9);] *Re T&N Ltd* [2004] Pens. L.R. 351 at [18]; *Re Treacy* [1997] 32 O.R. (3d) 717 (Ontario CA) at [8]; I. Fletcher, *The Law of Insolvency*, 4th edn (London: Sweet & Maxwell, 2009), at para.8-033.

This demonstrates that the unjust enrichment analysis of the *Ex parte James* rule has already been accepted by the judiciary.

IV. Response

When a creditor mistakenly pays an insolvency officer and then successfully invokes 'the *Ex parte James* rule' against them, the creditor recovers their money in priority to the insolvent's unsecured creditors.[78] However, in the case law, the mechanism by which the payer achieves priority is not clear: it may be that they have a personal right against the insolvent estate, or a proprietary interest in the monies paid. This is important for the following reason; a personal right cannot afford one priority, except on the basis of the expenses principle.[79] Leaving aside a personal claim, priority can be achieved if at the time the insolvent recipient receives the money, the payer has a property right in the fund which survives the insolvent estate's receipt or arises for the first time when the sums are received, and the money can still be identified in the recipient's hands using the rules of tracing.

This article proposes the following explanation for the decision in cases where the *Ex parte James* rule was successfully applied. The recipient was unjustly enriched. The unjust enrichment gave rise to a proprietary, as opposed to personal, restitutionary response in the form of a trust that arose because the payment was made for a purpose which from the outset was impossible. This enabled the payer, in circumstances where the recipient was insolvent, to recover their money from the insolvent in priority. It is thus submitted that some of the *Ex parte James* line of cases are a classic example of a trust arising in response to an unjust enrichment. Accordingly, the rule from *Ex parte James* is not a unique concept confined to insolvency law.

1. Provable debts

Before delving into the proprietary analysis of *Ex parte James*, it is important to first outline the position of creditors who bring a claim against an insolvent. In order for a creditor to claim in a bankruptcy, liquidation, or administration, they must have a provable debt. A provable debt is one that is enforceable and has been incurred before the relevant statutory cut-off date.[80] In an administration, a provable debt is one that the company was subject to on the date it entered administration.[81] For bankruptcies, the cut-

[78] Potentially, the rule also confers priority over preferential creditors. This can be implied from *Glasgow v ELS Law Ltd* [2018] 1 W.L.R. 1564. In *Ex parte Simmonds* (1885) 16 Q.B.D. 308 at 313, Cotton L.J. indicated that the rule does not confer priority over the expenses in the insolvency.
[79] This is explored at the text following fn.97 below.
[80] Provable debts are defined in The Insolvency (England and Wales) Rules 2016 (SI 2016/1024) r.14.
[81] *Bloom v Pensions Regulator* [2014] A.C. 209 at [35]-[37]; The Insolvency (England and Wales) Rules 2016 (SI 2016/1024) r.14.1(3).

off date is the date of the bankruptcy order,[82] which also marks the commencement of the bankruptcy.[83] For a creditor claiming against a company being wound up it is the date the company enters into liquidation,[84] even if the company subsequently enters administration.[85] However, where the liquidation is preceded by an administration, the cut-off date for a claim in the liquidation is the time that the administration commences.[86]

If a debt is not provable in accordance with r.14 of the Insolvency Rules,[87] it is regarded as non-provable. The consequence is that, in a bankruptcy, the creditor in question has no claim in the present bankruptcy proceedings. To recover the debt they must "present another petition. The result would be a second adjudication, in which the trustee would be entitled to distribute all the assets of the debtor to which the trustee in the first bankruptcy was not entitled".[88] However, although a creditor may have this "theoretical remedy against the bankrupt by making him bankrupt a second time", Walton J. in *Re Clark* said it may be "a wholly unreal remedy".[89] The reason is that there will usually be insufficient assets to meet the debts of creditors in the first bankruptcy, and so no surplus to carry forward to the second one.[90] Moreover, there is only a narrow category of assets that are available in a later bankruptcy,[91] and there will therefore likely be only a small amount that the later trustee is entitled to distribute solely to creditors in the later bankruptcy. A creditor's right in the subsequent bankruptcy is usually therefore, as described in *Re Wigzell* by Younger L.J., "a shadowy right if ever there was one".[92]

When a company is in liquidation, creditors are paid out of the company's assets in accordance with the statutory order of priority for distribution. In *Re Nortel*, Lord Neuberger summarised the order in which payments are to be made—also known as the "waterfall" of payments in insolvency. This is as follows: (1) Fixed charge creditors; (2) Expenses of the insolvency proceedings; (3) Preferential creditors; (4) Floating charge creditors; (5) Unsecured provable debts; (6) Statutory interest; (7) Non-provable liabilities; and (8) Shareholders.[93] Debts which are not provable are classified either as expenses, which are payable out of the company's assets in priority to all except the claims of secured creditors,[94] or as non-provable liabilities, which are "payable out of any surplus remaining after the satisfaction of provable debts" but before any payments to shareholders.[95] It is a disadvantage for a creditor if their liability is, for instance, an unsecured provable debt or a non-provable debt. The reason

[82] The Insolvency (England and Wales) Rules 2016/1024 r.14.1(3).
[83] Insolvency Act 1986 s.278.
[84] The Insolvency (England and Wales) Rules 2016 (SI 2016/1024) r.14.1(3).
[85] The Insolvency (England and Wales) Rules 2016 (SI 2016/1024) r.14.1(3).
[86] The Insolvency (England and Wales) Rules 2016 (SI 2016/1024) r.14.1(3).
[87] The Insolvency (England and Wales) Rules 2016 (SI 2016/1024) r.14.1(3).
[88] *Re Thellusson, ex parte Abdy* [1919] 2 K.B. 735 at 758 (Atkin L.J.).
[89] *Re Clark (a bankrupt)* [1975] 1 W.L.R. 559 at 562.
[90] *Re Wigzell, ex parte Hart* [1921] 2 K.B. 835 (CA) at 868-869.
[91] Insolvency Act 1986 s.334(3).
[92] *Re Wigzell, ex parte Hart* [1921] 2 K.B. 835 at 869.
[93] *Bloom v Pensions Regulator* [2014] A.C. 209 at [39].
[94] Insolvency Act 1986 s.115, s.156 and s.176ZA.
[95] *Re Lehman Brothers International (Europe) (in administration)* [2017] UKSC 38; [2018] A.C. 465 at [193] (Lord Sumption); [2018] 1 All E.R. 205 at [193].

is that, at each stage of the statutory ranking, with the exception of secured creditors with a fixed charge, the insolvent company's assets are distributed amongst the members of that particular class of creditors. At each stage, as distribution takes place, there is a reduction in the amount of assets left for creditors who are lower down in the statutory ranking. Companies in liquidation rarely have enough assets to fully satisfy creditors with unsecured provable debts (stage (5) in the statutory ranking above), and so there are usually no assets left to pay non-provable liabilities (stage (7)). For this reason, Briggs J. referred to non-provable claims as falling down a "black hole".[96] Hence the *Ex parte James* doctrine is attractive to a creditor who otherwise has an unsecured provable or non-provable debt against a bankrupt or company in liquidation, since when the rule is successfully invoked, it allows this creditor to recover their debt in priority to the insolvent's unsecured creditors. It therefore works to provide a claimant with an effective remedy where otherwise there may be none.

2. The expenses principle

As mentioned above, one way in which a creditor can recover a post-commencement liability is as an expense of the insolvency proceedings.[97] An expense is a debt that is payable in priority to the claims of all other creditors, including the claims of unsecured creditors.[98] Consequently, a creditor whose debt is classified as an expense is paid in full before any distribution is made to creditors with unsecured debts. The creditor with an expense is therefore highly likely to recover the entirety of the amount that is owed to them by the insolvent estate.

Importantly, recovery by a creditor of an expense in priority is a personal claim. Thus, to achieve this priority status through the expenses principle, the creditor in question does not require a proprietary interest in the money being recovered. It will now be considered, in cases where a payer has successfully relied on the *Ex parte James* rule to recover a mistaken payment in priority to unsecured creditors, whether the obligation to return the payment can be categorised as an expense.

The Insolvency Rules state that "all fees, costs, charges and other expenses incurred in the course of the [winding up, bankruptcy or administration] are to be treated as expenses of the [winding up, bankruptcy or administration]".[99] The Rules also list the heads of expenses, one of which is expenses incurred in preserving, realising or getting in any of the assets of the company or bankrupt.[100] It may at first appear that the priority aspect of the *Ex parte James* rule can be explained on the basis that the repayments made by the insolvency office-holder fall into this category. However, it is submitted here

[96] *Bloom v Pensions Regulator* [2010] EWHC 3010 (Ch); [2011] Bus. L.R. 766 (Briggs J.); [2011] B.C.C. 277.
[97] See section "Provable debts" above.
[98] Insolvency Act 1986 s.115.
[99] The Insolvency (England and Wales) Rules 2016 (SI 2016/1024) rr.7.108(1), 10.148 and 3.50 for compulsory winding-up, bankruptcy and administration respectively.
[100] The Insolvency (England and Wales) Rules 2016 (SI 2016/1024) rr.7.108(4)(a)(ii) and 10.149(a)(i) for compulsory winding-up and bankruptcy respectively.

that the repayment of a mistaken payment made pursuant to a non-existent obligation, such as that in the *Ex parte James* case itself, cannot be an expense under this head. Where such a mistaken payer has swelled up the fund available for distribution to the creditors, regardless of whether the money was requested by the insolvency office-holder, no asset is realised when the mistaken payment is then subsequently returned in its entirety.[101] This is discussed by Chan:

> "Mistaken payor claimants relying on *ex parte James* will however find themselves in a predicament… it is the payor's own mistaken assumptions regarding the insolvent individual or company that give rise to the claim. Furthermore, the 'benefit' that results is the swelling of the insolvent estate's assets by the value of the mistaken payment. If priority is recognised on the basis of a 'benefit' to the estate, this very 'benefit' would simply be returned in its entirety, leaving the estate ambivalent to the claim."[102]

It follows that repaying such a post-commencement mistaken payment would not be a liability which is incurred in realising or getting in the company or bankrupt's assets.

Admittedly, it could be argued that there are a small number of *Ex parte James* cases that may be deemed as being analogous to an expense, and thus interpreted as falling within the Rules governing expenses,[103] on the basis of the principle of salvage. This principle was described by Lord Hoffmann in *Re Toshoku Finance UK Plc*:

> "The principle… [is] one which permits, on equitable grounds, the concept of a liability incurred as an expense of the liquidation to be expanded to include liabilities incurred before the liquidation in respect of property afterwards retained by the liquidator for the benefit of the insolvent estate."[104]

The justification for this equitable principle[105] is that where the property has been retained by the insolvency office-holder for "the purpose of advantageously disposing of it, or when he continues to use it",[106] "it would be just and equitable… to treat the… liability [arising from it] *as if* it were an expense of the winding up and to accord it the same priority".[107]

---

[101] An example is *Ex parte Simmonds* (1885) 16 Q.B.D. 308. This case is discussed at text to fnn.135-150 below.
[102] T.E. Chan, "Revisiting *Ex Parte James*" [2003] Sing. J.L.S. 557 at 571.
[103] *Re Toshoku Finance UK Plc* [2002] UKHL 6; [2002] 1 W.L.R. 671 (HL) at [38] (Lord Hoffmann); [2002] 3 All E.R. 961 at [38]. The salvage principle is also sometimes referred to as "the *Lundy Granite* principle" or "the liquidation expenses principle". See *Jervis v Pillar Denton Ltd* [2014] EWCA Civ 180; [2015] Ch. 87 (CA) at [8] (Lewison L.J.); [2014] 3 All E.R. 519 at [8].
[104] *Re Toshoku Finance UK Plc* [2002] 1 W.L.R. 671 at [29] (Lord Hoffmann).
[105] *Jervis v Pillar Denton Ltd* [2015] Ch. 87 at [9] (Lewison L.J.).
[106] *Re Oak Pits Colliery Co* (1882) 21 Ch. D. 322 at 330 (Lindley L.J.); [1881-5] All E.R. Rep. 1157 at 1158.
[107] *Re Toshoku Finance UK Plc* [2002] 1 W.L.R. 671 at [27] (Lord Hoffmann).

It could be argued that the salvage principle explains the outcome of *Re Tyler*.[108] In *Tyler*, the bankrupt's wife paid some of the premiums of the bankrupt husband's life insurance policy. On the husband's death the wife made a claim against the official receiver, who had received the insurance policy payout, to recover the amount she had paid in premiums plus interest. Although the payment of the premiums by the wife maintained the policy and prevented it from lapsing, hence benefitting the bankrupt estate which would receive the fruits of the policy, the principle of salvage has, however, been rejected for cases of this kind.[109] This was noted by Farwell L.J. in the case of *Tyler* itself:

> "The trustee in bankruptcy is told that the bankrupt's life is insured, and that the wife has always paid the premiums, and he takes no further steps. He knew that if the premiums were not paid the policies would lapse. He knew that the wife had been paying, and he assumed that she would go on paying the premiums, otherwise he was bound to pay the premiums himself or get them paid… the person who pays premiums cannot, contrary to what was thought some years ago, put in force in his own favour the doctrine of salvage and so recover the premiums by which alone the policy has been preserved."[110]

It was for this reason Farwell L.J. resorted to the *Ex parte James* rule to allow the wife to recover her premiums. The rejection of the salvage principle in *Tyler* is consistent with the dicta in *Re Toshoku Finance*. In *Re Toshoku*, Lord Hoffmann said that for the salvage principle to apply, the property in question must be retained for the benefit of the estate. Where, however, the office-holder "simply does nothing", this "would not be regarded as retaining possession [of the property] for the benefit of the estate".[111] The facts of *Tyler* would thus fall outside of the principle of salvage, since the office-holder did not request the wife to pay the premiums. He therefore did not subject the bankrupt estate to a debt or liability to the wife which could form the basis of a salvage claim.

It is further submitted that neither would the repayment of a post-commencement mistaken payment be an expense under the "necessary disbursement" head in the winding-up,[112] liquidation[113] or administration[114] of a mistaken payee. In *Re Nortel*, the Supreme Court attempted to clarify the meaning of this head of expense. Lord Neuberger stated that:

> "the word 'necessary'… carries with it a legal obligation to pay (or, possibly in exceptional cases, a moral obligation to pay…) However, that is somewhat circular, as it leaves open the

[108] *Re Tyler, ex parte Official Receiver* [1907] 1 K.B. 865, discussed further at text to fnn.164-172 below.
[109] *Re Leslie* (1883) 23 Ch.D. 552 (Ch) at 562 (Fry J.); [1881-5] All E.R. Rep 274 at 277;
Falcke v Scottish Imperial Insurance Co (1886) 34 Ch.D. 234 (CA) at 254 (Fry L.J.); 56 L.J. Ch. 707.
[110] *Re Tyler, ex parte Official Receiver* [1907] 1 K.B. 865 at 872 (Farwell L.J.).
[111] *Re Toshoku Finance UK Plc* [2002] 1 W.L.R. 671 at [27] (Lord Hoffmann).
[112] The Insolvency (England and Wales) Rules 2016 (SI 2016/1024) r.7.108(4)(m).
[113] The Insolvency (England and Wales) Rules 2016 (SI 2016/1024) r.10.149(n).
[114] The Insolvency (England and Wales) Rules 2016 (SI 2016/1024) r.3.51(2)(g).

> very question which has to be decided, namely whether the liability in question which has been imposed on the company is one which the administrator must pay. Further, a liability may arise during an administration without falling within [the Rules], without being 'in the course of' the administration."[115]

He went on to say that:

> "While it would be dangerous to treat any formulation as an absolute rule, it seems to me, at any rate subject to closer examination of the authorities and counter-arguments, a disbursement falls within [the Rules] if it arises out of something done in the administration (normally by the administrator or on the administrator's behalf), or if it is imposed by a statute whose terms render it clear that the liability to make the disbursement falls on an administrator as part of the administration—either because of the nature of the liability or because of the terms of the statute."[116]

As evidenced by the dicta above, the Supreme Court adopted a strict approach to whether a liability is a necessary disbursement by, for example, making it a requirement that for a statutory-imposed liability, the statute must be clear that the liability falls on the office-holder as part of the proceedings. Where the statute imposing the liability is silent on the matter of how the liability should be treated if it is imposed after an insolvency event, the liability will be an expense only "if the nature of the liability is such that it must reasonably have been intended by the legislature that it should rank ahead of provable debts."[117] This dicta demonstrates that there is a high bar for a liability to be classified as a necessary disbursement. Therefore, even where the payment to the insolvent estate can be classified as something done in the course of the proceedings as a result of the conduct of the office-holder or a person acting on the office-holder's behalf, it is highly unlikely that the courts would classify the liability to repay the mistaken payment as falling under the necessary disbursement head of expense.

Finally, it is important to note that whether a debt is classified as an expense, and thus falls within the Rules, is a question of construction.[118] The courts therefore have no discretion to create a new category of expense[119] in order to allow post-commencement mistaken payments, such as those in the *Ex parte James* cases, to be recovered in priority.

---

[115] *Bloom v Pensions Regulator* [2014] A.C. 209 at [99] (Lord Neuberger).
[116] *Bloom v Pensions Regulator* [2014] A.C. 209 at [100] (Lord Neuberger).
[117] *Bloom v Pensions Regulator* [2014] A.C. 209 at [111] (Lord Neuberger).
[118] *Re Toshoku Finance UK Plc* [2002] 1 W.L.R. 671 at [17] (Lord Hoffmann).
[119] *Re Toshoku Finance UK Plc* [2002] 1 W.L.R. 671 at [38]-[39] (Lord Hoffmann); *Bloom v Pensions Regulator* [2014] A.C. 209 at [116]-[117] (Lord Neuberger).

3. The trust response

In the cases where the *Ex parte James* rule has been successfully applied and the payer recovered their money from the insolvent in priority, the only explanation is that an equitable proprietary interest in the form of a trust for the payer arose at the moment of the trustee's receipt. When the trust arose, the trust property held by the insolvent estate was not available for distribution in accordance with the statutory insolvency regime, since it did not belong beneficially to the holder of the legal title; only property belonging beneficially to the insolvent estate can be distributed. Consequently, the payer was able to demand a transfer of the traceable proceeds of the money to themselves using the rule in *Saunders v Vautier*,[120] as the insolvent estate held the payment on trust for the mistaken payer. A trust for the payer is supported by the dicta in the *Ex parte James* case itself where James L.J. said 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".[121]

Unfortunately, James L.J.'s trust interpretation was not adopted in later cases. In *Re Tyler*[122] and subsequent cases, the courts took the view that when James L.J. in *Ex parte James* referred to "money which in equity belongs to someone else",[123] he "meant money which in point of moral justice and honest dealing belongs to someone else".[124] Therefore, James L.J. was "not referring to an equity which is capable of forensic enforcement in a suit or action",[125] but was alluding to "a moral principle".[126] It is submitted here that these comments in *Re Tyler* were obiter,[127] as the trust analysis is the only coherent explanation for the decision in *Ex parte James*.

The cases arguably support a trust analysis. For example, in *Re Thellusson, ex parte Abdy*, on the basis of *Ex parte James* Warrington L.J. ordered the trustee in bankruptcy to repay the balance of the mistaken payment remaining in his hands to the payer. As Warrington L.J. said the sums belonged to the trustee at law, the decision is only explicable on the ground that the lender had a proprietary interest

---

[120] *Saunders v Vautier* (1841) 4 Beav. 115 (Ch); 41 E.R. 482.
[121] *Ex parte James* (1874) 9 Ch. App. 609 at 614.
[122] *Re Tyler, ex parte Official Receiver* [1907] 1 K.B. 865.
[123] *Ex parte James* (1874) 9 Ch. App. 609) at 614 (James L.J.).
[124] *Re Tyler, ex parte Official Receiver* [1907] 1 K.B. 865 at 873 (Buckley L.J.); also see *Re Opera Ltd* [1891] 2 Ch. 154 at 160 (Kekewich J).
[125] *Re Tyler, ex parte Official Receiver* [1907] 1 K.B. 865 at 869 (Vaughan Williams L.J.).
[126] *Re Tyler, ex parte Official Receiver* [1907] 1 K.B. 865 at 869 (Vaughan Williams L.J.).
[127] See further discussions of the *Re Tyler* case at fnn.164-172 below.

in the sums in equity.[128] The Canadian case law on *Ex parte James* also supports the trust analysis. In *Re Treacy*, Zurich issued a cheque by mistake to Treacy Insurance Ltd, instead of Smith, Williams & Bateman (SWB) Insurance Brokers Ltd.[129] When Zurich discovered the mistake, it attempted to stop the cheque. However, by this time, the cheque had already been cashed by Treacy. SWB obtained a court order to the effect that the net proceeds from the sale of the bankrupts' home, the bankrupts being the principal owners, directors, and shareholders of Treacy, were to be held in a trust account by the solicitors of the bankrupts until a further court order was made. On appeal by the trustee in bankruptcy, it was held that the sale proceeds of the home had to be paid to the bankruptcy trustee, as opposed to SWB. As Houlden J.A. explained, if Zurich's mistaken payment was traceable then the rule in *Ex parte James* would have been applicable.[130] However, the payment could not be traced to the house, as the house was not purchased with this fund, and thus the proceeds of sale from the family home were not derived from the mistaken payment.[131] *Ex parte James* could therefore not be invoked by SWB as a means of obtaining the funds from the sale. Furthermore, Treacy was no longer in possession of the traceable proceeds of the mistaken payment. As a result, there was no property which the trust could attach to. Therefore, the tracing exercise failed.[132] This outcome is consistent with the view put forward in this article, which is that, when *Ex parte James* is successfully relied upon, so long as the property can be traced the claimant is able to recover their money on the basis of a trust.

Support for the proposition that an identifiable fund is required for money to be recoverable using the rule in *Ex parte James* can be found in *Re Rhoades*.[133] In *Rhoades*, the executrix of an estate transferred assets, to which she had a right of retainer, to the testator's trustee in bankruptcy. She then sought to rely on the principle in *Ex parte James* to recover the amount that she was owed as a creditor of the deceased. Lindley M.R., delivering the judgement of the court, stated that:

> "[The trustee] has not distributed the assets, and no injustice will be done to him or to any one if he is ordered to repay to her the amount which she was entitled to retain. *Ex parte James* and *Ex parte Simmonds* are distinct authorities to shew that mistakes of this kind… can and will be set right by the Court so long as the officer of the Court still has the money in his hands".[134]

This dictum further demonstrates that the *Ex parte James* principle can be successfully invoked only if the money subject to the claim can be traced and identified in the hands of the insolvency officer.

[128] For further discussions of *Re Thellusson*, see text to fnn.159-163 below.
[129] *Re Treacy* [1997] 32 O.R. (3d) 717 (Ontario CA).
[130] *Re Treacy* [1997] 32 O.R. (3d) 717 at [9].
[131] *Re Treacy* [1997] 32 O.R. (3d) 717 at [9].
[132] *Re Treacy* [1997] 32 O.R. (3d) 717 at [9].
[133] *Re Rhoades* [1899] 2 Q.B. 347 (CA); [1895-9] All E.R. Rep. 333.
[134] *Re Rhoades* [1899] 2 Q.B. 347 at 355 (Lindley M.R.); cf. *Re Clark (a bankrupt)* [1975] 1 W.L.R. 559 564-565.

Some difficulties for the trust analysis are created by *Ex parte Simmonds*,[135] a case where the *Ex parte James* rule was applied. Although it is argued in this article that a trust of the monies arose by operation of law at the moment of the insolvency officer's receipt in *Simmonds*, the decision in that case is nonetheless questionable. The facts of the case are as follows. The trustees of a settlement mistakenly paid money to a trustee in bankruptcy, who used it to pay the bankrupt's creditors. Counsel for the appellant, the trustee in bankruptcy, argued that the facts could be distinguished from *Ex parte James* as in that case the money was "still in [the trustee in bankruptcy's] hands; it had not been distributed among the creditors as in the present case. The money could be ear-marked; in the present case it cannot".[136] Unfortunately, this argument was rejected by the court, which nevertheless held that the money could be recovered from the bankruptcy trustee. The court reasoned that the fund available for distribution among the creditors must be regarded as "one entire fund" and "the repayment is to be made out of any moneys which may now or hereafter be in the hands of the trustee and applicable to the payment of dividends".[137] It is submitted here that as the trust money was no longer in the hands of the insolvency officer, since it had been paid to the bankrupt's other creditors, the settlement trustees had no proprietary claim against the insolvent estate and should not have been able to recover the funds. The court's decision to allow the settlement trustees to recover the money, despite it no longer being in the hands of the trustee in bankruptcy, equates to recognising an equitable charge over the general assets of the bankrupt. Though such a concept was proposed in a different context in obiter by Lord Templeman in the Privy Council in *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co Ltd*,[138] it was subsequently rejected by the Court of Appeal[139] on the ground that it contravened the lowest intermediate balance rule, a limitation on equitable tracing.[140]

Furthermore, even if in *Ex parte Simmonds* the trust money or its traceable proceeds had remained identifiable in the hands of the bankrupt's creditors, the settlement trustees would not be able to recover the trust funds from them using the rule in *Saunders v Vautier*.[141] This is because the bankrupt's creditors, in exchange for receiving the money, discharged debts owed to them by the bankrupt. The creditors were therefore bona fide purchasers for value of the legal title, and this defeated the mistaken payers' proprietary claim.[142] However, if the recipients of the money had been donees as opposed to

---

135 *Ex parte Simmonds* (1885) 16 Q.B.D. 308.
136 *Ex parte Simmonds* (1885) 16 Q.B.D. 308 at 311.
137 *Ex parte Simmonds* (1885) 16 Q.B.D. 308 at 314 (Cotton L.J.).
138 *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co Ltd* [1986] 1 W.L.R. 1072 (PC) at 1074; [1986] 3 All E.R. 75 at 77-78.
139 *Bishopsgate Investment Management Ltd. (In Liquidation) v Homan* [1995] Ch. 211 (CA); [1995] 1 All E.R. 347.
140 *James Roscoe Ltd v Winder* [1915] 1 Ch. 62 (Ch); 84 L.J. Ch. 286.
141 *Saunders v Vautier* (1841) 4 Beav. 115.
142 For a discussion on tracing, see *Foskett v McKeown* [2001] 1 A.C. 102 (HL) at 127-129 (Lord Millett); [2000] 3 All E.R. 97 at 119-122. Also, see the dicta in *Angove's Pty Ltd v Bailey* [2016] UKSC 47; [2016] 1 W.L.R. 3179 at [25]; [2017] 1 All E.R. 773 at [25], though note that this was not a discussion of the *Ex parte Simmonds* case: "If, therefore, a … trust came into being… The money would thereafter be traceable for as long as it remained identifiable in the hands of any third party other than a bona fide purchaser for value without notice".

creditors, or if the creditors had known that the original payment was made under vitiated intent, then a proprietary claim would have been available for the reason that the recipients would not be bona fide purchasers for value without notice.

4. Personal claims

A claim based on *Ex parte James* is not a personal claim in unjust enrichment against the insolvency officer. This was made clear by Cotton L.J. in *Simmonds*.[143] Now it will be discussed whether the outcome of *Simmonds* can be explained on the basis of a personal claim against the insolvent estate. In his book *Unjust Enrichment*, Birks explained that when a trust arises to reverse an unjust enrichment of the defendant, the claimant has an election between a personal and proprietary claim:[144]

> "My *vindicatio*, if I choose that route, will say that you are not enriched, meaning no longer enriched: the new equitable interest, arising immediately from the unjust enrichment, has already carried the wealth back to my estate. My personal claim in unjust enrichment will say that you are enriched and must repay".[145]

The claimant can therefore either choose to recover their property from the person(s) who now have the legal title to it or make a personal claim in unjust enrichment. Birks explained that these are alternatives since "no doubt it is necessary to say that the latter claim supposes a waiver of the plaintiff's title".[146] Applying this to *Simmonds*, even though there was no possibility of a proprietary claim, the claimants could pursue a personal claim in unjust enrichment against the insolvent estate. Nevertheless, for the reason explained below, on the facts, it is submitted that the court was wrong to hold that the payers could succeed in obtaining redress.

The trustee in bankruptcy in *Simmonds* had used the settlement trust money received from the payers to discharge the bankrupt's debts. It is admitted that the insolvent estate could not resist the mistaken payers' claim by relying on change of position, a defence available for all personal claims in unjust enrichment. Change of position was first recognised by the House of Lords in *Lipkin Gorman v Karpnale Ltd*, where Lord Goff proclaimed that:

> "the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution

[143] *Ex parte Simmonds* (1885) 16 Q.B.D. 308 at 313.
[144] P. Birks, *Unjust Enrichment*, 2nd edn (Oxford: Oxford University Press, 2005), at pp.68-69.
[145] P. Birks, *Unjust Enrichment*, 2nd edn (2005), at p.68.
[146] P. Birks, "Personal Property: Proprietary Rights and Remedies" (2000) 11 K.L.J. 1 at 12; also see P. Birks, *Unjust Enrichment*, 2nd edn (2005), at pp.66-69.

> in full. I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things".[147]

Applying this dicta to the facts of the *Simmonds* case, the insolvent estate remained enriched despite using the money to pay the creditors, as its overall wealth was not reduced by making the payments. This is because the money was used to discharge existing debts of the bankrupt. It follows that even if the bankrupt's estate had not received these monies, it would still have had to meet the liabilities from other assets. Lord Esher M.R.'s words in *Simmonds* support the proposition that the estate remained enriched. He said that:

> "the Court sees that other moneys, which would be applicable to the payment of dividends to the creditors, are about to come into the hands of the trustee, and it has not been shewn that any injury will be done to any one by ordering the trustee to apply this money which is coming to him to replace the other money which was paid to him in error".[148]

Thus the trustee in bankruptcy repaying the money would only have nullified the insolvent estate's enrichment; it would not have caused a loss to the estate.

Although the insolvent estate was unjustly enriched, a non-provable claim is personal in nature and thus does not have the effect of allowing a payer to recover their money in priority to other unsecured creditors. The payers in *Simmonds*, the trustees of the settlement, therefore only had a right against the estate in a second bankruptcy, if there had been one, whereby the insolvent estate would be under an obligation to make restitution. As discussed earlier, a creditor's right in a second bankruptcy is an ineffective remedy, as it rarely results in the recovery of the entirety of what is owed.[149]

In *Simmonds*, neither could the payers recover the sums by bringing a claim against the insolvency officer for breach of trust. The proprietary analysis proposed in this article would indicate that a resulting trust arose from the outset in *Simmonds*. However, since a resulting trustee is only personally liable for breach if they have knowledge of the trust at the time that they commit the breach,[150] the insolvency practitioner was not under a duty to account for the loss of the funds which were subject to the restitutionary trust. At no point did the trustee in bankruptcy, while the money was still in his hands, have knowledge that these funds were subject to an implied trust. As he paid away the trust money to the bankrupt's creditors without notice, there could be no personal liability for breach. It follows that

[147] *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 (HL) at 580; [1992] 4 All E.R. 512 at 534.
[148] *Ex parte Simmonds* (1885) 16 Q.B.D. 308 at 313 (Lord Esher M.R.).
[149] See text to fnn.87-92 above.
[150] *Allan v Nolan* [2002] EWCA Civ 85; [2002] Pens. L.R. 169; (2001-02) 4 I.T.E.L.R. 627.

neither a personal nor proprietary analysis explains the outcome of *Ex parte Simmonds*. Therefore, in this case, the court erred when it ordered the trustee in bankruptcy to repay the mistaken payments out of money from the bankrupt's estate.

5. Applying the impossibility analysis

One may question why, in the cases where the *Ex parte James* rule is correctly applied, the law responds by recognising that the payer has a property right in the money transferred, hence allowing the payer to recover the disputed sums in priority to other creditors in the insolvency, as opposed to being left with a personal claim. It would appear that the key element reconciling the case law is the concept of impossibility.

This section demonstrates that, in the *Ex parte James* cases where the defendant's receipt of the payment was unjust, and the purpose of the transfer to the defendant was impossible from the outset, there was a proprietary restitutionary response in the form of a trust which allowed the claimant to recover his money in priority to other creditors. Conversely, in the cases where the claimant's payment unjustly enriched the defendant, and the purpose of the payment could be fulfilled at the time of receipt, a trust did not arise. It is submitted that this impossibility analysis provides the best explanation for the *Ex parte James* line of case law.

The availability of a trust in these cases is significant for a number of reasons. In the insolvency context, one of the main advantages of proprietary restitution for the mistaken payer is that it gives the payer priority against other creditors, but there are other important advantages as well. For example, the claimant can make use of equity's more advantageous tracing rules, take the benefit of increases in value of property that represents the traceable proceeds of their property, and assert personal claims against third party recipients. A disadvantage for the defendant who has received a post-commencement mistaken payment, which is being held on a trust for the payer, is that the defendant is unable to utilise the principle of set-off. This is of detriment to a defendant in circumstances where the mistaken payer is also bankrupt or in liquidation. Where the mistaken payer is already indebted to the defendant to an amount that exceeds the value of the mistaken payment, the defendant will not be able to retain the mistaken payment and reduce the payer's indebtedness accordingly. The reason is that the Insolvency Rules 2016 and the Insolvency Act 1986 state that the debt the parties owe to each other must be due at the time that the company goes into liquidation[151] or before the bankruptcy[152] in order to be subject to a set-off claim. Since a post-commencement mistaken payment is only incurred after the winding-up or bankruptcy has commenced, it would not satisfy this statutory requirement. The defendant is therefore unable to use set-off.

[151] The Insolvency (England and Wales) Rules 2016 (SI 2016/1024) r.14.25.
[152] Insolvency Act 1986 s.323.

According to Professor Birks, who adopts an analysis which is firmly rejected in this article, an unjust enrichment can give rise to a proprietary response in the form of a resulting trust when the recipient is enriched *sine causa* and additionally, the enrichment is never freely at the disposition of the recipient before the claimant's right to restitution arises.[153] It is admitted that Birks was right to recognise that the trust arising for mistaken payments is a response to the event of unjust enrichment, and takes the form of a resulting trust. However, it is submitted that his approach to when proprietary restitution is available must be rejected. A detailed discussion of Birks' approach is beyond the scope of this article, but the key criticisms of his approach can be summarised as follows. First, one may express doubt over whether Birks' explanatory basis for proprietary restitution provides an appropriate distinction between cases which are deserving of proprietary responses and those which are not. Second, his initial failure of basis theory, which attempts to explain the availability of a proprietary response, does not reconcile the case law, since it does not account for cases of mistake which have not given rise to proprietary restitution.[154]

The proprietary analysis of the *Ex parte James* cases presented here differs from the "pro-proprietary future" stance adopted by Peter Birks,[155] as it offers an explanation for why not all mistaken payments, which are all instances of initial failures, give rise to proprietary restitution.[156] Therefore, it is proposed that an unjust enrichment analysis, centred on the novel concept of impossibility rather than an initial failure of basis, should be adopted. As to what follows, it will be shown how this analysis can be applied to the *Ex parte James* cases.

The outcome of the *Ex parte James* case itself is explicable using the concept of impossibility. The creditor paid money to the debtor's trustee in bankruptcy under the mistaken belief that he was under an obligation to make the payment. The money was not due. The insolvent estate was not only unjustly enriched, but the purpose of the transfer was also initially impossible, as the payment was conditional on the existence of an obligation to pay the sum to the bankruptcy trustee. Consequently, a trust arose due to the impossibility and the creditor was able to recover the sums in priority to other creditors in the debtor's bankruptcy.[157] Similarly, this proprietary restitutionary analysis also explains the case of *Re Rhoades*, discussed earlier in this article.[158] In *Rhoades*, under the mistaken belief that the money was due to the testator's trustee in bankruptcy, the executrix transferred £1100 representing the testator's assets to the bankruptcy trustee. She then sought to recover £600; this being the amount owed to her as a creditor of the deceased. The Court of Appeal ordered the trustee in bankruptcy to repay the executrix the amount she was entitled to retain under her right of retainer. The result is explicable on

---

153 P. Birks, "Restitution and Resulting Trusts" in S. Goldstein (ed), *Equity and Contemporary Legal Developments* (Oxford: Oxford University Press, 1992); also see R. Chambers, *Resulting Trusts* (Oxford: Oxford University Press, 1997); P. Birks, *Unjust Enrichment*, 2nd edn (2005), at pp.185-192, 194, 305-306.
154 e.g. *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74; [1994] 2 All E.R. 806.
155 P. Birks, *Unjust Enrichment*, 2nd edn (2005), at p.192.
156 A. Shah, "Unjust Enrichment and Proprietary Restitution" (2017) 85 Conv. 352.
157 The impossibility analysis also explains *Re Brown* [1886] 32 Ch. D. 597 (Ch); 55 L.J. Ch. 556.
158 See discussion at footnotes fnn.133-134 above.

the basis that, like in *Ex parte James*, the purpose of the transfer was impossible as the money was not due to the bankruptcy trustee. A trust arose in response to the unjust enrichment, and the executrix was therefore able to recover the sums.

The impossibility approach also explains *Re Thellusson*, where after a receiving order was made against the debtor, the lender lent the debtor £900. When lending the money:

> "he believed the bankrupt to be subject to no disability which would prevent him from making binding arrangements with his creditor or from disposing of assets to which he had become or might become entitled. In this he was mistaken".[159]

Due to the lender's mistake, the insolvent estate was unjustly enriched at the lender's expense by the £764 balance which remained in the hands of the official receiver. Moreover, it is submitted that from the moment of his receipt, the debtor held the money on trust for the lender. This is because the basis of the payment was a loan. However, the consequence of the receiving order, which preceded the debtor's receipt of the loan, was that "the object of the transaction was defeated"[160] from the moment the debtor received the monies making it "impossible for him to comply with his covenant to repay".[161] As explained by Atkin L.J.:

> "the loan transaction between the two officers became nugatory. The 900l instead of a loan to the debtor was a gift to the creditors. The covenant to repay in six months' time might have been written in water".[162]

As the purpose of the transfer was defeated from the outset, the money representing the balance was held by the insolvency officer on trust for the lender. This enabled the lender to recover the loan money in priority to the bankrupt's other creditors. It is significant that the purpose was defeated from the moment of receipt; in other words, that it was an initial rather than subsequent impossibility. The importance of this was noted by Walton J. in *Re Clarke*. Discussing the *Thellusson* case, he said that "had [the loan] been made even slightly before the bankruptcy, of course, the situation would have been different".[163] The reason is that if the loan was made to the debtor before he became bankrupt, then the loan to the debtor would have been effective, precluding the intervention of equity. This is consistent with the impossibility approach. If the debtor received the money before bankruptcy he would not have been unjustly enriched on receipt. Therefore, there would be no possibility of a trust arising.

[159] *Re Thellusson, ex parte Abdy* [1919] 2 K.B. 735 at 753 (Duke L.J.).
[160] *Re Thellusson, ex parte Abdy* [1919] 2 K.B. 735 at 765 (Atkin L.J.).
[161] *Re Thellusson, ex parte Abdy* [1919] 2 K.B. 735 at 765 (Atkin L.J.).
[162] *Re Thellusson, ex parte Abdy* [1919] 2 K.B. 735 at 758 (Atkin L.J.).
[163] *Re Clark (a bankrupt)* [1975] 1 W.L.R. 559 at 566 (Walton J.).

In contrast, the impossibility approach proposed here indicates that a trust did not arise in *Re Tyler*.[164] In *Tyler*, after the husband's bankruptcy the wife continued to pay the premiums of her husband's life insurance policy at his request. After the husband's death, the mortgagees, who the policy had been assigned to by the bankrupt during his lifetime, received the insurance policy payouts. They retained the amount due on the mortgage and paid the balance to the official receiver. The wife made a claim against the receiver to recover the amount that she had paid into the policy plus interest. But the receiver argued that he should be able to retain the balance for distribution to the bankrupt's creditors. Buckley J. said that the wife:

> "may not have an enforceable claim, but as a matter of justice it cannot be right, when the time comes for the payment of the moneys due on the policy, to allow the trustee to turn round and say 'I knew you were keeping down the premiums, but I shall take the policy moneys, and you shall go without the money you have paid'".[165]

He therefore ordered the receiver to pay, out of the balance in his hands, the sums the wife had paid in premiums plus interest. The problem, however, is that when the wife paid the insurance premiums, she was not vitiating under a mistaken belief that she would receive the policy proceeds. This is because she was aware that neither the policy nor the proceeds belonged to her. The bankrupt had only:

> "requested his wife to make these payments for him in order to prevent the premiums being paid by the mortgagees or the policies being sold or lapsing, and he stated that if his wife was prepared to do this he would repay her the amount expended by her as soon as he got his financial affairs straight".[166]

At the time of making the payments, the wife therefore knew that her husband might not be able to sort out his finances and repay her the sums. When this unfortunate possibility then materialised, the wife had made "a mistake as to the future, a misprediction"[167] that her expenditure would be reimbursed by her husband before his death.[168] The important distinction between mistakes and mispredictions was explained in *Dextra Bank & Trust Co Ltd v Bank of Jamaica*,[169] where the Privy Council cited with approval a passage from Birks' *Introduction to the Law of Restitution*:

---

[164] *Re Tyler, ex parte Official Receiver* [1907] 1 K.B. 865.
[165] *Re Tyler, ex parte Official Receiver* [1907] 1 K.B. 865 at 874 (Buckley L.J.); also see 870 (Vaughan Williams L.J.).
[166] *Re Tyler, ex parte Official Receiver* [1907] 1 K.B. 865 at 866.
[167] P. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985), at pp.147-148.
[168] cf. *Patel v Jones* [2001] EWCA Civ 779; [2001] Pens. L.R. 217; [2001] B.P.I.R. 919. See text following fn.173 below.
[169] *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50; [2002] 1 All E.R. (Comm) 193 at [29]; 59 W.I.R. 432 at [29].

> "A mistake as to the future, a misprediction, does not show that the claimant's judgment was vitiated, only that as things turned out it was incorrectly exercised. A prediction is an exercise of judgment. To act on the basis of a prediction is to accept the risk of disappointment. If you then complain of having been mistaken you are merely asking to be relieved of a risk knowingly run …"[170]

Importantly, "a misprediction does not… provide the basis for a claim to recover money as having been paid under a mistake of fact".[171] As the wife made a misprediction, the husband's estate was not unjustly enriched. There was therefore no possibility of proprietary restitution, and the wife should not have been able to recover her expenditure plus interest in priority to the bankrupt's other creditors.[172]

This analysis distinguishes *Re Tyler* from the more recent case of *Patel v Jones*.[173] In *Patel*, the Court of Appeal held that the claimant's trustee in bankruptcy was not entitled to the amount of the pension attributable to the claimant's post-bankruptcy service and contributions. Mummery L.J. justified this decision on the following basis: after the bankruptcy, the claimant's contributions to the pension fund were made in the "mistaken belief that the pension rights remained vested in him, whereas they had already vested in the trustee".[174] Due to the vitiation of intent, as opposed to a misprediction, the trustee in bankruptcy would be unjustly enriched if he received and retained the pension benefits attributable to the post-bankruptcy contributions. Moreover, the claimant's purpose for making these contributions to the pension fund was impossible to fulfil from the outset. This is because for these contributions, as the rights to the pension had already vested in the trustee, the claimant was never legally entitled to receive the corresponding pension benefits. Consequently, to reverse the unjust enrichment, these pension rights were held on trust for the claimant. The claimant was therefore entitled to the benefits attributable to these contributions.

V. Conclusion

The rule in *Ex parte James* has been used by claimants to recover post-commencement payments in priority to unsecured creditors in a recipient's insolvency. Priority has been awarded by the courts on the basis that it would be unfair for an officer of the court to retain the sums. The analysis presented in this article demonstrates that conferring priority for this reason is unjustifiable. First, limiting the use of the principle against recipients who are officers of the court is arbitrary. Second, the case law has

[170] P. Birks, *An Introduction to the Law of Restitution* (1985), at pp.147-148.
[171] *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All E.R. (Comm) 193 at [29].
[172] Dawson argues that the case can instead be explained using estoppel, see I. Dawson, "Corporate Rescue by the Upright Rescuer- a trap for the unwary" (2016) 29 Insolv. Int. 81 at 85.
[173] *Patel v Jones* [2001] Pens. L.R. 217.
[174] *Patel v Jones* [2001] Pens. L.R. 217 at [43].

demonstrated that a fairness test is difficult to apply, since what constitutes unfair conduct can be subjective.

This article has argued that the cause of action of unjust enrichment explains the *Ex parte James* body of cases. In *Ex parte James,* the payer made a payment by mistake. The bankrupt's estate was unjustly enriched by the receipt of the money, and the payer was therefore entitled to restitution. Importantly, the original contribution of the article is it demonstrates that the restitutionary response was proprietary, as opposed to personal, and took the form of a trust which arose due to the purpose of the payment being impossible to carry out. The trust enabled the payer to bypass the statutory order of distribution at insolvency and recover his money from the insolvent estate in priority.