Neutral Citation Number: [2020] EWCA Civ 321

Case No: A2/2018/2725

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
Mr Justice Hildyard
CR-2011-010530

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 March 2020

Before:

LORD JUSTICE PATTEN
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE NEWEY

- -

Between:

LEHMAN BROTHERS AUSTRALIA LIMITED (in liquidation) (scheme administrators appointed)	**Appellant**
- and -	
(1) EDWARD JOHN MACNAMARA **(2) GILLIAN ELEANOR BRUCE** **(3) RUSSELL DOWNS** **(THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (in administration)**	**Respondents**

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Tom Smith QC (instructed by **Norton Rose Fulbright LLP**) for the **Appellant**
Daniel Bayfield QC and Ryan Perkins (instructed by **Linklaters LLP**) for the **Respondents**

Hearing dates: 16-17 October 2019

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Approved Judgment

Lord Justice David Richards:

Introduction

1. This appeal is brought by Lehman Brothers Australia Limited (LBA) against the dismissal by Hildyard J of its application for directions in the administration of Lehman Brothers International (Europe) (LBIE). LBA is a company incorporated in Australia. It was part of the worldwide Lehman Brothers group and carried on business in Australia, where it entered liquidation in October 2009.

2. LBA sought a direction that the administrators of LBIE increase its agreed proof of debt by some £1.67 million to a little over £25 million. The proof had been agreed in accordance with a claims determination deed (CDD)dated 12 March 2014 and made between LBIE acting by its administrators and LBA acting by its liquidators (the LBA CDD). It is common ground that the amount of the agreed proof was understated by some £1.67 million as a result of a mistake made by both the administrators and the liquidators (or those respectively acting on their behalf). Additionally, it is common ground, for the purposes of the application and this appeal, that rectification of the LBA CDD is not available to LBA as a remedy.

3. LBA sought the direction either under the inherent jurisdiction of the court to control its officers, in accordance with the principle in *Ex parte James* (1874) LR 9 Ch App 609, or under paragraph 74 of schedule B1 to the Insolvency Act 1986.

Background and facts

4. By an order of the High Court made on 15 September 2008, LBIE entered administration. On 2 December 2009, on the application of the joint administrators, the court made an order permitting them to give notice of a proposed distribution to LBIE's unsecured creditors and to make such distribution. The notice was given on 4 December 2009, which brought into effect the provisions of Part 2, Chapter 10 of the Insolvency Rules 1986 (the Rules) governing distributions in an administration, including the process for proving debts and quantifying claims.

5. As well as its dealings in the market generally, there were significant intercompany dealings between LBIE and other companies in the Lehman group, including LBA. In March 2009, LBIE submitted a proof of debt in LBA's liquidation and, in July 2012, LBA submitted a proof in the administration of LBIE.

6. Such was the scale of LBIE's business that to operate those provisions of the Rules strictly in accordance with their terms was, as the administrators put it in their progress report to creditors for the period 15 March to 14 September 2010, "likely to take many years to conclude, requiring significant time and resources for both creditors and the insolvent estate", and requiring litigation to resolve material disagreements "with significant costs and delay". There were estimated to be up to 3,490 "Street Creditors" (ie counterparties to derivative and other financial contracts), with claims aggregating some £4.8 billion.

7. To avoid, or at least mitigate, these costs and delays, the administrators stated in the progress report, to which Mr Bayfield QC on behalf of the administrators drew our attention, that they were developing an optional claims determination process, by which they would offer to agree each eligible creditor's claim "using LBIE's in-house valuation methodology" and "using a set of processes, data sources and valuation approaches in line with market practice and universally applied to determine Street Creditors' unsecured claims". In the progress report, the administrators identified three benefits to creditors from this approach, which was designed to:

> "provide finality and certainty regarding Street Creditors' financial claims against LBIE. That is, it allows creditors to agree, at this juncture, their total net claim against LBIE without the need for further substantial evidentiary documentation and interaction in support of their claim or to enter into what could become a protracted claims agreement process, especially with regard to the more complex claims;
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> materially reduce the costs of claim determination which creditors (and the estate) would otherwise incur; and
>
> assist in accelerating, where possible, the distribution process on the basis that more claims should be determined sooner than if the approach was not followed."

8. To give effect to this approach, the administrators reported in their progress report for the period 15 September 2010 to 14 March 2011, to which Mr Bayfield again drew our attention, that they had "developed a standardised legal agreement, the Claims Determination Deed", with the added benefit of allowing creditors freely to trade agreed claims without the need for LBIE's consent. The report went on to state that:

> "Any offer to a creditor under the Consensual Approach comprises the issue of a Deed alongside the LBIE Determination. The offer is non-negotiable, but creditors are free to accept or reject it. Any creditors who choose not to accept the LBIE offer will have their claims reviewed in detail on a bilateral basis at a later date."

9. The use of CDDs proved to be very successful. By September 2014, some 1,600 CDDs had been made with 1,290 counterparties, agreeing claims totalling over £9.9 billion. Hildyard J recorded that the number of CDDs had risen to over 2,300. On an earlier application, counsel for the administrators were able to say that the CDDs, and equivalent standard form agreements as regards claims to trust assets, had "made a significant contribution to the success of the Administration. They have enabled the administrators to deal with an estate of unprecedented size and complexity with much greater efficiency than would otherwise have been the case".

10. The drafting of CDDs changed over time to deal with new issues as they arose.

11. The LBA CDD was in a standard form in use at that time. Its overall purpose was stated as follows in Recital (B):

> "In consideration of the Company and the Creditor agreeing that the Creditor's Agreed Claim shall be limited to, and the Creditor shall have an Admitted Claim against the Company in an amount equal to, the Agreed Claim Amount (being an amount calculated by reference to the agreed value of the Creditor's Claims against the Company less the agreed value of the Company's Claims against the Creditor), the Company and the Creditor wish to release and discharge each other in respect of any and all other Claims (including Client Money Claims and Trust Asset Claims), losses, costs, charges, expenses, demands, actions, causes of action, liabilities, rights and obligations to or against each other and howsoever arising, but excluding the LBIE Trust Asset Claims and any Claims of the Creditor only in its capacity as trustee or fiduciary on behalf of another person."

12. Clause 2.1 provided, in part, as follows:

> "The Company and the Creditor irrevocably and unconditionally agree that, notwithstanding the terms of any contract (including the Creditor Agreements):
>
> 2.1.1 Save for any Claims of the Creditor only in its capacity as trustee or fiduciary on behalf of another person, the Agreed Claim shall be limited to, and in an amount equal to, the Agreed Claim Amount and shall constitute the Creditor's entire Claim against the company;
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> 2.1.2 the Agreed Claim in an amount equal to the Agreed Claim Amount shall be accepted as an Admitted Claim."

13. Clause 2.1.3 contained a lengthy irrevocable and unconditional mutual release of all claims between LBA and LBIE, subject only to the Agreed Claim and to certain other exceptions that are not material to this appeal. The release applied to all claims "whether arising under the Creditor Agreements or not, whether in existence now or coming into existence now or coming into existence at some time in the future, and whether or not in the contemplation of [LBA] and/or [LBIE] and/or the Administrators on the date hereof". So far as material, clause 2.1.4 provided that, save for the Agreed Claim, LBA would not take any steps to claim or prove for any debt in the administration or other insolvency process of LBIE or bring any proceedings against LBIE or the administrators in respect of any Claims and matters referred to in clause 2.1.3. The full terms of these provisions are set out in the judgment below at [24].

14. Clause 8.2 provided:

> "The Creditor has made its own independent decision to enter into this Deed and as to whether this Deed is appropriate or proper for it based upon its own judgement and upon advice from its own independent advisers, as it has deemed necessary. The Creditor is not relying on any communication and/or

> announcement (written or oral) of or from any Relevant Person as a recommendation or an inducement to enter into this Deed, it being understood that information and explanations relating to this Deed in any communication and/or announcement will not be relied upon or treated as a recommendation or an inducement to enter into this Deed."

15. Clause 1.1 defined "Claim" as any claim of whatsoever nature, "Agreed Claim" as "the Creditor's unsecured Claim (or Claims, as the case may be) against the Company under or in connection with the Creditor Agreements", "Creditor Agreements" as "all agreements and/or contracts (whether documented or undocumented) entered into between the Company and the Creditor prior to the Administration Date, including the Global Master Securities Lending Agreement dated 27 February 2008 between the Company and the Creditor" and "Agreed Claim Amount" as £23,355,508.

16. On the face of the LBA CDD, therefore, LBA's claim as an unsecured creditor was limited to, and was admitted to proof for, the sum of £23,355,508. In due course, the full amount was paid to LBA.

17. However, as is common ground between the administrators and LBA, this figure was wrong as a result of a clerical error first made by the administrators' staff and not subsequently noticed by LBA. The error related to LBA's claim in respect of a bond denominated in euros issued by Macquarie Bank Limited (the Bond) which should have been, but was not, held by LBIE for LBA.

18. This error occurred in the following way. LBIE, acting by its administrators, and LBA, acting by its liquidators, sought to agree the claims between the two companies. Information and data were exchanged and a reconciliation exercise was carried out. This involved identifying, for each stock position held by one company for the other, the relevant currency of the issue and the number of units held or, where the position was no longer held, the number of units that should have been held. Where securities were no longer held, it was agreed that a claim lay for the value of the securities. Agreeing the value of such claims required agreement on the relevant valuation dates and the principles and pricing sources to be applied. This process was for the most part undertaken in the course of 2013.

19. Attached to an email sent on 29 June 2013 by LBIE to LBA was an updated schedule of claims, showing the valuation of claims as at 15 September 2008 and 31 May 2013. It included the unsecured claims between LBA and LBIE and details of the securities to which they related. LBA was shown as a net creditor, after setting off LBIE's claims against it. The schedule showed LBA's claim as regards five securities, including the Bond. It correctly showed the Bond as denominated in euros and the claim as correctly converted from euros to sterling for the purposes of admission by LBIE.

20. In July 2013, there was a change of personnel at LBIE dealing with LBA's claim. On 2 October 2013, Mr Pollitt of LBIE emailed Ms Wanley of LBA to say that the previous team had left a spreadsheet "which I'm sure you've seen from the email trail below" and asking "whether the valuation date of 31/05/2013, prices, FX rates etc. and the general intercompany balances have all been agreed in principle or is there anything outstanding from your perspective in valuing the net claim?". Ms Wanley

requested a copy of the spreadsheet which Mr Pollitt supplied. He wrote that he had reviewed it and updated it in accordance with his understanding and latest information. Among four points that he noted was that he had kept the valuation date of 31 May 2013 as previously agreed but updated the foreign exchange rates on the unsecured claims to rates as at 15 September 2008 in line with LBIE's administration date.

21. The spreadsheet attached to Mr Pollitt's email contained the error. Instead of showing the Bond as denominated in euros, it was shown as denominated in Australian dollars. It was then shown as converted into sterling at the Aus$/£sterling exchange rate as at 15 September 2008, rather than at the euro/£sterling exchange rate. The other four securities were shown in their correct denominations, and correctly converted into sterling. The error resulted in LBA's claim in respect of the Bond being undervalued by £1,672,583.44.

22. This error was not spotted by LBA and on 30 October 2013 Ms Wanley replied, "We are in agreement with the value of the unsecured claim which LBA will lodge against LBIE (£23,355,508) as detailed in your calculations". The LBA CDD was drafted and executed on this basis, rather than on the correct basis of a claim of £25,028,091.44.

23. Following execution of the LBA CDD on 12 March 2014, the administrators paid £23,355,508 as a sole distribution in respect of LBA's claim, being the Agreed Claim Amount as defined in the CDD.

24. Neither LBIE nor LBA noticed the error in the spreadsheet until early August 2016, when a prospective purchaser of LBA's residual claims drew it to the attention of LBA's liquidators. They informed the administrators by email dated 12 August 2016. On 2 September 2016, the LBA liquidators requested the administrators to vary the amount of LBA's provable claim, in accordance with rule 2.79 of the Rules, so as to include the amount by which the claim in respect of the Bond had been undervalued in the LBA CDD. The administrators accepted that the spreadsheet contained the error, but declined the request made by the LBA liquidators on the basis of the release contained in clause 2.1 of the LBA CDD.

25. LBA issued its application for directions on 20 December 2016.

26. LBA was clear before the judge, as it has been before us, that it is not by this application seeking rectification of the LBA CDD nor, for the purposes of the application, is it contending that it would be entitled to an order for rectification. Mr Smith QC, appearing before us for LBA, expressly reserved its rights in that respect, particularly in the light of the judgment of this court in the recent case of *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361.

The judgment below

27. The application was heard by Hildyard J who delivered a careful and comprehensive reserved judgment on 24 October 2018, dismissing LBA's application.

28. Having set out the facts and issues, the judge considered at [38] – [72] the principle in *Ex parte James* and its application to the facts of the present case. More shortly, at [73] – [81], he considered paragraph 74 of schedule B1 to the Insolvency Act 1986

and its application to the present case. The judge stated his overall conclusion at [82] – [87].

29. The greater part of the section of the judgment concerned with *Ex parte James* involves a detailed analysis of the development of the principle with a view to determining whether the test for its application is that the administrators have acted or are proposing to act in a manner which is "unconscionable" or in a manner which is "unfair", the latter being taken to be a lower threshold for intervention by the court. The judge concluded that the correct test, on the authorities, is one of "unconscionability".

30. Mr Bayfield has explained to us that this was not an issue raised, as it might have been, by the administrators. Given that LBA also made its application under paragraph 74, which required it to show unfair harm to its interests, the administrators were content to proceed on the basis that unfairness was also the test for the application of the principle in *Ex parte James*. Their position was that if LBA could not succeed under paragraph 74, it could not succeed under *Ex parte James*. In the course of the hearing, the judge asked counsel for the administrators to make submissions on the threshold test for *Ex parte James* and, as a result, it became one of the issues covered in oral submissions and in written submissions after the hearing.

31. Notwithstanding the judge's analysis of this issue and his conclusion on it, it was not, as I read his judgment, the basis of his decision. He rejected the claim, both under paragraph 74 and under the principle in *Ex parte James*, on the ground that the court cannot on either basis interfere with contractual rights and obligations. He discussed this in the context of *Ex parte James* at [61(5)-(8)]. That this is the *ratio* of his decision appears from the concluding section of his judgment, which includes:

> "84. In point of principle, there is no reason or justification for not giving effect to contractual obligations freely entered into, unless under the existing law the contract can and should be reformed or rectified or otherwise invalidated. As I put it in the course of argument, it seems to me that this was always a case of "rectification or bust". No application for rectification was brought; and, as previously noted, [counsel for LBA] confirmed that I should proceed on the basis that it was not available. I say nothing, therefore, in that regard, whether generally or (more particularly) as to whether the remedy would be available after the satisfaction of the LBA CDD by distribution in accordance with its terms and the receipt in full of the monies payable under it; nor as to whether and in what circumstances it might be possible in a clear case to grant such relief in the context of an application such as this.
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> 85. However, even if (contrary to my view) the rule in *Ex Parte James*, or Paragraph 74, does enable the Court to intervene to override a contractual commitment, or impose equitable constraints on the exercise of a contractual right derived from a freely-entered bargain, simply on the ground of 'unfairness', I would not consider it right to exercise such jurisdiction in this case."

32. It therefore appears from [84] that, in the judge's view, there is no room for the application of either the principle in *Ex parte James* or paragraph 74 so as to direct an

officeholder not to give effect to "contractual obligations freely entered into". In [85], he goes on to consider the position on the basis that he is wrong on that and also on the basis that unfairness is the threshold test (as, of course, it is under paragraph 74), and holds that he would not exercise the jurisdiction, concluding that "[a]ssuming that the contract cannot be reformed or rectified, there is no unfairness in enforcing it in accordance with its terms".

The issues

33. While the judge's view on the threshold test for the application of the principle in *Ex parte James* is *obiter*, and despite Mr Bayfield's invitation for this court not to engage with this issue but to decide the appeal applying the test of unfair harm under paragraph 74, I think we must address (and I understand the other members of the court to agree) the correct approach to invoking the principle in *Ex parte James*. We should do so not least because the principle in *Ex parte James* continues to be the primary basis on which LBA puts its case. In considering that case, identification of the correct threshold test is unavoidable.

34. In the remainder of this judgment, I propose to deal with (i) the test for intervention by the court under the principle in *Ex parte James*, (ii) the proper approach to a claim under paragraph 74, (iii) the *ratio* of the judgment under appeal that neither *Ex parte James* nor paragraph 74 can be applied to prevent enforcement of contractual terms, and (iv) the application of the law to the facts of this case.

The principle in Ex parte James

35. The principle established by the decision of the Court of Appeal in *Ex parte James* is that 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. The principle applies to a failure to act, as much as to positive acts: see *Re Hall* [1907] 1 KB 875, a decision of this court. 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. A specific example is a sale of property made by the court in accordance with its powers: *Else v Else* (1872) LR 13 Eq 196. Trustees in bankruptcy, liquidators in compulsory liquidations and administrators are all officers of the court. In the case of administrators, this is expressly provided by paragraph 5 of schedule B1. As such, they are acting on behalf of the court and they will accordingly be held to these standards by the court.

36. That the governing principle is that the court should apply to its officers those standards of conduct that society expects of the court itself is made clear in the authorities: see *Ex parte James* at 614; *Ex parte Simmonds* (1885) QBD 308 at 312 per Lord Esher MR; *Re Tyler* [1907] 1 KB 865 per Vaughan Williams LJ at 869, Farwell LJ at 871 and Buckley LJ at 873.

37. There have been a series of decisions in this court, starting with *Ex parte James* itself, in which the principle and its application have been discussed. While the principle itself has not been in doubt, numerous terms have been used to identify and describe the relevant standard for its application. As Scrutton LJ observed in *Re Wigzell* [1921] 2 KB 835 at 858, "a series of phrases none of which are very definite have been used"

to state the principle. This is not surprising, not only because the standard is not laid down by statute and may be best illuminated by a variety of terms but also because the standards expected by society may themselves evolve. More recently, there has been some division at first instance as to the proper formulation of the test: see the decisions of Hildyard J in the present case and in *Heis v Financial Services Compensation Scheme Ltd* [2018] EWHC 1372 (Ch), [2019] Bus LR 1, and my decision in *Re Lehman Brothers International (Europe), Lomas v Burlington Loan Management Ltd* [2015] EWHC 2270 (Ch), [2015] BPIR 1162 (*Waterfall IIB*).

38. Before looking at the terms used by courts over the past 165 years, a general point should first be made. The court applies the standard on an objective basis. It is not concerned to ask whether the officeholder is consciously proposing to take a course which falls below the standard set by the court. It asks only whether the course proposed would or would not, on an objective basis, meet that standard. As a regulated profession, insolvency practitioners may feel aggrieved at a challenge to their conduct or proposed conduct on this basis and may be tempted to argue that the challenge is an attack on their personal integrity. This would be a misapprehension on their part.

39. The issue in *Ex parte James* was whether the court, in the exercise of its jurisdiction to control its own officers, should direct a trustee in bankruptcy to repay money paid under a mistake of law, notwithstanding his undoubted legal right to retain it. James LJ who was acknowledged by Lord Sterndale MR in *Re Wigzell* at 855 as "the originator of the doctrine of fair dealing", said at 614:

> "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
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> 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."

40. Later cases have made clear that when James LJ spoke of "money which in equity belongs to some one else" he was not referring to an enforceable right to recover the money. Indeed, if he were, there would have been no need for the principle. Nor, in the light of later cases, can it be said that in saying that the court "ought to be as honest as other people" he was stating the principle as being that the court should not act dishonestly. That goes without saying and, again, the principle would not be needed if that were all he was saying, but in any event see *Re Thellusson* [1919] 2 KB 735 per Warrington LJ at 749.

41. In *Ex parte Simmonds*, Lord Esher MR enthusiastically embraced the principle, in contrast to Scrutton LJ in *Re Wigzell*, and speaking of the facts of that case which involved the proposed retention by the trustee of money paid under a mistake of law, a course entirely in accordance with the law as it then stood, Lord Esher said at 312 that the court "will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law".

42. Between 1907 and 1921, the principle was considered in a trio of bankruptcy cases in this court: *Re Tyler*, *Re Thellusson* and *Re Wigzell*.

43. In *Re Tyler*, the court established that the principle was not confined to cases of money paid under a mistake of law but was a general principle applicable to any acts of the court's officers. As to the principle itself, Vaughan Williams LJ cited the passage from Lord Esher's judgment set out above and re-stated the words of James LJ. Farwell LJ stated the principle at 871 as being "that the officer of the Court is bound to be even more straightforward and honest than an ordinary person in the affairs of every-day life". It would, he said, "be insufferable for this Court to have it said of it that it has been guilty by its officer of a dirty trick". "No high-minded man, of course, would dream" of retaining money paid under a mistake of law. At 872, he said that it would not "be in accordance with fair dealing – that open, honest dealing to which reference has been made" to proceed as the trustee proposed in that case, adding that he was not suggesting that the trustee *intended* to act contrary to fair dealing or to "make an unfair claim". Citing Fry J in *Re Banister* (1879) 12 Ch D 131 at 136, the court "will endeavour to insist upon that fair, straightforward, honest, open dealing which ought to characterise transactions between vendor and purchaser". Buckley LJ at 874 said that "it would be grievously unfair, and contrary to natural justice" to proceed as the trustee proposed. It was "not consistent with justice, and no high-minded man would do it".

44. This passage from the judgment of Buckley LJ was cited by Warrington LJ in *Re Thellusson* at 748-749 as expressing the principle with "admirable clearness". Contrary to the submission made on the basis of *Re Hall*, a decision of this court made on the same day as *Re Tyler*, the principle was not limited to cases where the trustee was pursuing a course of conduct which the court thought was dishonest. At 743, Warrington LJ identified the court's jurisdiction as being to direct its officer "to pursue a line of conduct which an honest man actuated by motives of morality and justice would pursue, although not compellable thereto by legal process". Duke LJ at 751 referred to the court's discretion to give a direction to the trustee "upon grounds of common honesty and fair dealing". The principle to be applied by the court is that it "should not allow its officer to insist upon a rule of law or equity in the administration of an estate in bankruptcy under the control of the Court where such insistence would produce an unjust and dishonest result".

45. Atkin LJ said at 757 that the court "will direct its officers to act as an honourable and right-minded man would act in dealing with his own affairs". At 762, he said that in applying the principle "we have to deal with real and substantial dishonesty or unfairness or injustice" and that "to hold money for distribution amongst a debtor's creditors which in honesty and fairness ought to be paid to a third party" engaged the principle. Again, at 765, Atkin LJ said the principle would apply to require a trustee in bankruptcy to repay the consideration for a promise where it had been "unfair or unjust" for the debtor to have received it. Finally, at 764, Atkin LJ dismissed the

argument that great difficulties would arise in the administration of bankruptcy if the court had to decide according to what it considered high-minded without regard to law or equity. He thought the argument was exaggerated and that the "advantages of maintaining a high standard of commercial morality in my judgment far outweigh the suggested inconveniences of administration".

46. In *Re Wigzell*, Lord Sterndale MR began his judgment by observing that, although the appeal had been opened as involving very important principles, it turned on the application of a well-established principle to the facts of the particular case. Adopting the submission of Mr Douglas Hogg QC for the appellant, he said that the court has the power to say to the trustee "you must not enforce that legal or equitable right because you are an officer of the court; it would not be right to do it, and the Court will not act dishonourably". An officer must not do something that is not honourable or high-minded (851). In citing at 852 previous decisions, he refers interchangeably to "unfair", "dishonourable" and "unconscionable". He referred at 854 to "the principle of fairness and honesty and honourable dealing" and at 855 to "the doctrine of fair and right dealing". The test he applied to the facts of the case at 857 was whether there was anything "contrary to fair dealing" in the trustee making the particular claim in issue.

47. As earlier mentioned, Scrutton LJ referred at 858 to some of the many terms in which the principle had been expressed, the "most temperate" of which was that of Buckley LJ in *Re Tyler* that an officer of the court will not be permitted to take advantage of a right "if to do so would be inconsistent with natural justice and that which an honest man would do". He expressed the principle as one controlling conduct that was not high-minded or honourable. Younger LJ stated the principle as being whether it would be "unconscionable" for the trustee to make, or for the court to allow, his claim.

48. All these authorities, and some others, were considered by Walton J in *Re Clark (A Bankrupt)* [1975] 1 WLR 559. He stated the principle in the following terms at 563:

> "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…"

49. Walton J stated the principle in much the same way at 564:

> "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."

50. In numerous other places in his judgment, Walton J defined the principle, as explained in the earlier authorities, in terms of fairness: see 565B, 565H, 566C, 566E-H and 567D-E.

51. In *Re Multi Guarantee Co Ltd* [1987] BCLC 257, the principal issue was whether the company held certain funds on trust. This court affirmed the trial judge's decision that they were not held on trust and then went on to consider a new argument raised for the first time in this court that the liquidator would be acting contrary to the rule in *Ex parte James* if he were to treat the funds as part of the liquidation estate. The court rejected the argument without calling on counsel for the liquidator. *Re Thellusson*, but not *Re Wigzell* or *Re Clark*, were cited. Nourse LJ said at 269:

> "The principle of cases such as those is that the court will direct a trustee in bankruptcy not to insist on his full legal rights if it would be unacceptable for him to do so. The principle is subject to qualifications, of which the most important is that the court will only take that course in a case where it would be dishonest or shabby or the like for the trustee to insist on his full legal rights."

52. Stephen Brown LJ agreed with the judgment of Nourse LJ. In a concurring judgment, Lawton LJ said at 270:

> "Various words have been used in the cases to indicate the kind of conduct to which the principle of *Ex parte James, Re Condon* (1874) LR 9 Ch App 609 may apply, such as 'a point of moral justice', 'dishonest', 'dishonourable', 'unworthy', 'unfair' and 'shabby'. Those words are not words of art at all. They are words of ordinary English usage and 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."

53. The principle was considered again by this court in *Re TH Knitwear (Wholesale) Ltd* [1988] Ch 275. The company was in creditors voluntary liquidation and the liquidator was not therefore an officer of the court. The court rejected an attempt to apply the principle to such a case, on the grounds that it was of the essence of the principle that it applied by reason of the status of liquidators in a compulsory liquidation and of trustees in bankruptcy as officers of the court. Comments made in that case on the content of the principle are therefore clearly *obiter*. *Re Tyler* and *Re Wigzell* are cited in the judgments and *Re Thellusson* and *Re Clark* were cited in argument.

54. The leading judgment was given by Slade LJ, with whom Glidewell LJ and Caulfield J agreed. At 287, Slade LJ cited with approval a passage from the judgment of Salter J at first instance in *Re Wigzell* in which he said that the principle applied "wherever the enforcement of legal right would, in the opinion of the court, be contrary to natural justice" and at 288 cited Lord Esher's statement in *Ex parte Simmonds* that the court would direct its officer to behave in "an honourable and high-minded way". At 289, he said that "[t]he entire basis of the principle, as I discern it from the cases, is that the court will not allow its own officer to behave in a dishonourable manner". At 290, he said 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" and on the same page said that "[t]he relevant question

is whether it would or should affect [the liquidator's] conscience if he were now to reject the commissioners' claim". He repeated the reference to the liquidator's conscience on the next page.

55. In *Re Lune Metal Products Ltd* [2006] EWCA Civ 1720, [2007] 2 BCLC 746, Neuberger LJ, with whom Tuckey and Carnwath LJJ agreed, described at [34] the jurisdiction by citing from the judgment of Jacob J in *Re Mark One (Oxford Street) plc* [2000] 1 BCLC 462 that an officer of the court is required "not to stand upon his full legal rights when it [was] not fair to do so". In cases where the officeholder applies to the court for directions, Neuberger LJ continued at [35], "the court is sanctioning a course which, while it may not be lawfully required of one of its officers (and could indeed otherwise be complained of by creditors who would be prejudiced by the action), would nonetheless be an action which right thinking people would consider appropriate."

56. The final authority to note is the decision of the Supreme Court in *Re Nortel GmbH (in administration)* [2013] UKSC 52, [2014] AC 209. The principal issue was whether a financial support direction issued under statutory powers by the Pensions Regulator to a company after it had entered administration was payable as an expense of the administration, and so ahead of the provable debts of unsecured creditors, or was itself a provable debt ranking *pari passu* for payment with the other provable debts, or whether it was neither an expense nor a provable debt. The court held that, on the proper construction and application of the relevant provision of the Insolvency Rules, it was a provable debt.

57. It was argued for one party that it was neither an expense nor a provable debt but that the court could and should direct the administrator to pay it as if it were a provable debt. The argument was advanced on the basis of provisions in the Insolvency Act 1986 governing administrations and on the basis of the principle in *Ex parte James*. It was submitted that, if the principle were not applied, there would be real and substantial unfairness: see the summary of counsel's argument at 222 of the report in the Appeal Cases. We were told by Mr Smith, who appeared as counsel in *re Nortel*, that full argument in support of and against this submission was presented to the court. Mr Bayfield, who also appeared in it, did not dissent.

58. Lord Neuberger dealt with this submission in his judgment, with the concurrence of all the other members of the court.

59. Lord Neuberger rejected the submission on the grounds that the principle in *Ex parte James* could not justify a departure from the statutory ranking of debts in that case or, perhaps, in any case. He stated the principle as follows:

> "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] I 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."

60. Having reviewed the principal authorities, it is apparent that Scrutton LJ's observation in *Re Wigzell* that, in describing the principle in *Ex parte James*, the courts have used "a series of phrases none of which are very definite" has remained equally applicable to the authorities decided since then.

61. The judge's view that the correct test was one of unconscionability, not unfairness, was based on two factors which he stated at [70]:

> "…(a) the 'unfairness test' is not consistent with earlier Court of Appeal authority (in *Re Wigzell* and *Re TH Knitwear (Wholesale) Ltd*) which mandates a stricter unconscionability test; (b) the 'unfairness test', with its ultimately subjective standard, would (as I put it in [*Heis v Financial Services Compensation Scheme Ltd* [2018] EWHC 1372 (Ch), [2019] Bus LR 1 at [143(1)]), become 'an unruly horse'…"

62. The judge had earlier stated at [61(2)] that, in adopting a test of unfairness, Walton J in *Re Clark* and I in *Waterfall II* had departed from *Re Wigzell* which, as Court of Appeal authority, was binding on us.

63. Lord Neuberger's adoption of fairness as the test in *Re Nortel*, the judge said at [49], was "only in passing, and not part of the *ratio decidendi*". In my judgment, paragraph [122] of Lord Neuberger's judgment is not to be dismissed so lightly. While it is true that it was not part of the *ratio*, it is wrong to dismiss it as made "in passing". On the contrary, it is part of a section of the judgment dealing with a submission on the applicability of *Ex parte James* that had been fully argued and it cites not only *Re Clark* but also the Court of Appeal authorities (*Re Wigzell* and *Re TH Knitwear*) which, the judge said, "mandates a stricter unconscionability test".

64. I do not accept that *Re Wigzell* is binding authority for an unconscionability test. As the review of the authorities shows, there have been numerous decisions of the Court of Appeal, both before and since *Re Wigzell*, in which judges have used numerous different phrases. Significantly, they include fairness. In my judgment, there was a proper basis in the authorities for the test of unfairness propounded by Walton J and by Lord Neuberger.

65. I would add that there is only slender support for a test of unconscionability in the authorities. The only judge, at any rate in the leading authorities, to adopt it is Younger LJ in *Re Wigzell*. As Mr Smith submitted, the equitable concept of unconscionable conduct carries connotations of oppression and the wrongful exploitation of one party by another (see *Snell's Equity* 33rd ed. at 8-001) which do not reflect the circumstances in which the principle has been considered or applied.

66. Nor do I accept the other ground advanced by the judge, that a test of unfairness "with its ultimately subjective standard, would…become an unruly horse". I am not certain what the judge meant by "its ultimately subjective standard". Fairness is an objective standard, calling for judgment or evaluation in its application to particular facts. It is of course the case that different judges might reach different views, but that is true of any standard falling short of dishonesty, as indeed Scrutton LJ said in *Re Wigzell* of the many phrases (dishonourable and so on) used in earlier cases. As to becoming an unruly horse, the courts are very familiar with applying a standard of fairness in many different contexts, including in the context of administrations under paragraph 74 of schedule B1 to the Insolvency Act. Chief Registrar Baister, with his very considerable experience in insolvency matters, found no difficulty in applying a test of unfairness in *Re Young* [2017] BPIR 1116, describing it at [43] as "far from being vague or elusive" but as "straightforward". There is nothing inconsistent in a test of unfairness with the need to restrict the application of the principle in *Ex parte James* and keep it within strict bounds. As Lord Hoffmann said in *O'Neill v Phillips* [1999] 1 WLR 1092 at [1098], as regards the statutory jurisdiction to give relief in respect of unfairly prejudicial conduct of the affairs of a company, it does not mean that "the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles".

67. Terms such as "unfair" are used in statutes without definition. That does not make them unruly horses. Their meaning is left to the courts to elucidate, which they do on a case by case basis. The position is no different when such a term is adopted by the courts in the development of a common law principle.

68. While the formulation of the test in the authorities, involving so many phrases with perhaps different shades of meaning, has something of the quality of dancing on pinheads, resolution of this issue lies in going back to the fundamental principle underlying the jurisdiction. 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. It is interesting to note that fairness was introduced by some judges in the cases dealing with *Ex parte James* at a comparatively early stage, but in general "fairness" as a test in substantive, as opposed to procedural, law has grown significantly since many of those cases were decided. Insofar as it involves a broader test than, say, dishonourable, it reflects a development in the standards of conduct to be expected of the court and its officers.

69. The application of the principle in *Ex parte James* in any case will critically turn on the particular facts of that case.

Paragraph 74 of schedule B1 to the Insolvency Act 1986

70. Paragraph 74 empowers the court to grant relief where the administrator is acting or has acted so as to "unfairly harm", or proposes to act in a way which would "unfairly harm", the interests of the applicant (whether alone or in common with some or all other members or creditors).

71. LBA's case is that the administrators' refusal to admit to proof its claim for the sum of about £1.67 million that was erroneously omitted from its Agreed Claim Amount unfairly harms its interests. As it is a continuing refusal by the administrators, it most obviously comes under paragraph 74(1)(a), but it can perhaps also be put under sub-paragraph (b).

72. The judge at [78] analysed the elements of paragraph 74 as follows:

> "This seems to me to support the view that what is meant in the context by conduct such as "unfairly to harm" a creditor, is the exercise of the office-holder's powers in a manner which (a) causes or would cause disadvantage to that creditor; (b) cannot be justified by reference to the interests of the creditors as a whole or to achieving the objective of the relevant insolvency process: and/or which (c) is discriminatory in such effect. The test in paragraph 74 focuses on the conduct (past or proposed) of an office-holder in the exercise of his powers as such."

73. The judge held at [79] without elaboration that none of the three elements in his formulation cited above was engaged in this case, nor was a possible fourth element, alternative to (b) and (c), that there had been a lack of commercial justification for a decision causing harm to the creditors as a whole.

74. In support of the formulation at [78], the judge relied on a passage from the judgment of Blackburne J in *Re Lehman Brothers International (Europe), Four Private Investment Funds v Lomas* [2008] EWHC 2869 (Ch), [2009] BCC 632 (*Four Private Investment Funds)*.

75. In that case the applicants, which were US-based investment funds, applied less than three weeks after LBIE had entered administration for orders for the provision of information concerning securities held by LBIE for them. Separately, and very soon after the issue of the application, the court gave directions to the administrators for identifying and dealing with assets held by or to the order of LBIE that might be subject to trust or proprietary claims. Because of the scale of LBIE's business, this process was complex and considerable data was needed to establish an accurate position on a client by client basis. The administrators supplied the applicants with information readily available to them, with qualifications as to its accuracy and completeness. There were a large number of counterparties in a similar position to the applicants and the administrators' evidence, accepted by Blackburne J, was that if they were to attempt at that early stage to provide for each counterparty the type of information being sought by the applicants, "the task of returning client assets would take far longer than if conducted in the methodical ordered manner" which the administrators were following in accordance with the court's directions. The applicants were in effect attempting to obtain an advantage at the expense of the many other claimants in a similar position.

76. In these circumstances, it is not in the least surprising that the applicants' contention that they were being unfairly harmed by the administrators' approach to the performance of their statutory duties failed. In truth, it was barely arguable. It was not a case which required a detailed analysis of the scope of paragraph 74.

77. Blackburne J rejected the application entirely on the particular facts of the case. He said at [39] in a passage cited by the judge and relied on by Mr Bayfield before us, but which is addressed to the particular circumstances of that case and expresses no general principle:

> "39. Where, as here, where there is no suggestion that the administrators are acting other than in accordance with their obligations under Sch.B1 and the order made on October 7 it is exceedingly difficult to see how the unwillingness of the administrators to devote more time and resources than they have already to answering questions put to them by a particular group of creditors (as I shall assume the applicants to be) directed to eliciting information about assets which the creditors claim are theirs can be said to be unfair even if it can be said to be causative or likely to be causative of harm."

78. In *Fraser Turner Ltd v PricewaterhouseCoopers LLP* [2019] EWCA Civ 1290, a decision of this court, Sir Geoffrey Vos C, with whom Males LJ and Snowden J agreed, said at [76]:

> "In *Four Private Investment Funds supra* at paragraph 39, Blackburne J made it clear that there could be no unfairness sufficient to engage paragraph 74 without a suggestion that the administrators were acting otherwise than in accordance with their obligations under Schedule B1 of the Insolvency Act 1986 or an order of the court. There, as here, the Administrators were, as it seems to me, seeking in good faith to carry out their functions in the interests of the creditors as a whole. Accordingly, the judge was right here too to hold that any harm that might have been caused to FT by selling the mine without procuring Timis Mining to pay the Royalty could not have been caused "unfairly" within the meaning of paragraph 74."

79. As the Chancellor went on to say, the applicant was not complaining in its capacity as a creditor but was in truth complaining because the administrators did not assist it in its private capacity to obtain a new royalty agreement with a third party.

80. In the passage cited above, the Chancellor refers to the administrators acting in accordance with their "obligations under Schedule B1", adding that in both *Fraser Turner* and *Four Private Investment Funds*, the administrators were seeking to act in good faith to carry out their functions in the interests of the creditors as a whole.

81. The office of administrator is a statutory creation. An administrator is empowered to take only those steps for which there is express or implied statutory authority. If, therefore, an administrator acted in a manner for which there was no such authority, he would be acting unlawfully and an aggrieved creditor would not need to rely on paragraph 74. Equally, if an administrator exercised a power in bad faith or for an improper purpose, it would be an unlawful exercise of the power. Paragraph 75 creates procedures and remedies in favour of creditors in respect of breach of duty by an administrator. By contrast, paragraph 74(5) provides that a claim may be made

under paragraph 74(1) whether or not the action in question is within the administrator's powers under schedule B1.

82. Where, as noted by the Chancellor, an administrator is acting in accordance with his *obligations* under schedule B1, there can be no question that he is causing *unfair* harm. Where, however, the administrator is exercising his discretion, but does so in a manner which unfairly harms a creditor, I see no reason in the terms of paragraph 74 or in its evident purpose why the court should not in an appropriate case grant relief.

83. The judge in the present case at [78] restricted unfair harm to those cases where the administrator's act either (i) cannot be justified by reference to the interests of the creditors as a whole or to achieving the objective of the relevant insolvency process and/or (ii) is discriminatory in such effect. Acts falling within the first of those categories would be unlawful exercises of the power, but paragraph 74 is directed more widely and applies a test of unfairness. Discriminatory conduct could certainly amount to unfairness, even assuming that it was not an unlawful exercise of the power, but again I see no reason in the terms or purpose of paragraph 74 for confining it to cases of discrimination. If that were right, conduct that met an objective test of unfairness would engage paragraph 74 only if the administrator had treated differently another creditor in the same position. That is a conclusion that cannot, in my judgment, be justified by the terms or purpose of paragraph 74.

84. Paragraph 74 is expressed in wide terms, and it adopts the objective standard of fairness. It is right that, in judging whether any conduct can be said to have caused *unfair* harm, it is a factor of great importance that the administrator is carrying out statutory functions and is or should be doing so in the interests of creditors as a whole, but that may still involve the infliction of unfair harm on a particular creditor. That is true of any case to which the principle in *Ex parte James* might apply. So, in *Ex parte James* itself, it would have been in the best interests of creditors as a whole, and conducive to achieving the purpose of the bankruptcy, for the trustee not to repay the money paid under a mistake of law. The court will adopt a cautious approach but there are no grounds for subjecting the provisions of the paragraph to mandatory qualifications that are not to be found in it.

85. It follows that I do not consider that LBA's claim must fail on these grounds.

86. It is convenient to mention here a submission made by Mr Bayfield that, leaving aside any question of unfairness, LBA suffers no harm by the administrators' refusal to treat its Agreed Claim Amount as corrected by admitting its proof for the additional £1.67 million. The submission is essentially that LBA received its contractual entitlement to be admitted to proof in the sum stated in the LBA CDD. While that is relevant to unfairness, it is in my judgment clear that LBA suffers harm if its claim to prove for the additional amount, so as to correct the agreed error in its calculation, is not accepted. In the same way, the applicant in *Ex parte James* suffered harm by the trustee standing on his legal right to refuse repayment of a sum paid under a mistake of law.

The application of Ex parte James and paragraph 74 to contracts

87. I have earlier identified as the *ratio* of the decision below that neither the principle in *Ex parte James* nor paragraph 74 could be invoked to prevent an administrator from

relying on rights under a contract freely entered into by both parties. This is a principle fashioned by the judge for which he cited no authority in the decided cases or in the terms of paragraph 74. While I readily accept that this is a highly material factor against the grant of relief, I am unable to accept that it should be elevated into an absolute bar to relief. It is not expressed in paragraph 74 nor is it, in my view, implicit in the underlying rationale of the rule in *Ex parte James*. In all cases the rule in *Ex parte James*, and in at least some cases paragraph 74, will be invoked to restrain an officeholder from relying on his strict legal rights. Those rights may arise at common law or in equity or under statute, and, in my judgment, there are no grounds for excluding contractual rights from the scope of either the rule in *Ex parte James* or paragraph 74. Whether reliance on strict contractual rights should be restrained will, as in all these cases, depend on the facts of the particular case.

88. In *Else v Else*, it was held that the court itself should not rely on strict contractual rights. Likewise, in *Re Young*, the court applied *Ex parte James* to restrain a trustee in bankruptcy from reliance on strict contractual rights, and I agree with Mr Smith that it is difficult to argue that it was wrongly decided on the facts.

89. The administrators do not rely on, or support, this part of the judge's reasoning. Mr Bayfield made clear that his submission before the judge and before us was narrower. It was not that the court could not restrain an officeholder from enforcing or relying on a contractual provision but that, where a creditor had freely entered into a full and final settlement as to the amount of its provable claim, it could not be unfair for the administrator to refuse to vary the agreed amount of the claim. This, he submitted, was due to the special quality of such a settlement. In *Waterfall IIB* at [188] I rejected a submission to the same effect as the judge's proposition. Mr Bayfield did not submit that this was wrong, but that *Waterfall IIB* was distinguishable on its facts.

90. The judge's statement of general principle that neither the principle in *Ex parte James* nor paragraph 74 is applicable to contractual rights cannot, in my judgment, stand.

Application to the facts of this case

91. In the conclusion to his judgment, the judge said at [85] that even if he were wrong that neither the rule in *Ex parte James* nor paragraph 74 enabled the court to override contractual rights on the grounds of unfairness, he would not consider it right to exercise such jurisdiction in this case. His reasons were, first, that the LBA CDD, along with some 2,300 other CDDs, was entered into in order to define the Agreed Claim with certainty and finality. Acceding to LBA's application would erode these aims and, but for the effect of a scheme of arrangement made with creditors since LBA issued its application, would enable other counterparties to re-open their entitlements. Second, the Agreed Claim Amount was admitted to proof and paid in full. The account was therefore agreed and settled.

92. These views expressed by the judge are not the basis of the judge's order dismissing LBA's application. If they had been, and if the judge had applied the correct legal principles, this court would not interfere with his essentially evaluative decision that the administrators' conduct in refusing to correct the mistake was not unfair, whether under paragraph 74 or applying the rule in *Ex parte James*, unless satisfied that he was wrong or that he had taken account of irrelevant factors or ignored relevant factors. In this case, however, the judge had, in my judgment, for the reasons given

above applied incorrect legal principles to his decision and the need to take the decision afresh cannot be avoided. As all the relevant evidence has been put before us and we have heard full argument on the issue, there is no reason why this court should not itself reach a conclusion on whether the administrators should be required to correct the mistake by acknowledging the larger sum as LBA's Agreed Claim Amount.

93. The starting point must be the mistake that, both parties agree, was in fact made. It is clear from the communications between the parties before the LBA CDD was made that they intended that in calculating the Agreed Claim Amount, the gross amount due to LBA should be shown as the sterling equivalent as at 15 September 2008 of the value in their respective currencies as at 31 May 2013 of the bonds held by LBIE for LBA as at 31 May 2013. The mistake was to show one series of euro bonds as denominated in Australian dollars. It was a clerical error, initially made by the administrators and not noticed by LBA when it agreed and executed the final form of the LBA CDD. It meant that LBA was admitted to proof for some £1.67 million less than LBA was entitled to on the basis that had been agreed between the parties.

94. As Mr Smith submitted on behalf of LBA, in agreeing by means of CDDs the amounts for which creditors were entitled to prove, the administrators were carrying out their statutory function of distributing the estate of LBIE among its creditors in accordance with their rights. Once the court has given administrators permission to make distributions to creditors, one of the principal duties of the administrators is to ascertain the creditors and the amounts of their debts. If, in the ordinary case of administrators adjudicating on proofs of debt submitted by creditors, it was discovered that a comparable mistake had been made, there can be no doubt that the amount of the admitted proof would be amended in accordance with rule 14.10 of the Insolvency Rules 2016 (formerly, as regards administrations, rule 2.79 of the Insolvency Rules 1986), subject to not disturbing any distributions already made. The CDDs were not ordinary commercial contracts between parties acting in their own respective economic interests. Whether the administrators should insist on their strict legal rights under a CDD should be assessed in the light of this consideration.

95. In the absence of significant contrary considerations, no legitimate reason existed for the administrators not to correct the common mistake admittedly made by them and by LBA. In the absence of such considerations, no statutory purpose was served by not correcting the error. Leaving matters as they were would deprive LBA of its true entitlement on the agreed basis of valuing claims and would give the estate a corresponding windfall, albeit of a small amount in the context of the LBIE estate.

96. Mr Bayfield on behalf of the administrators submitted that there were three key reasons why it was not appropriate in this case to exercise the court's jurisdiction either under the rule in *Ex parte James* or under paragraph 74.

97. First, it was a key objective of the CDDs, including the LBA CDD, to achieve certainty and finality and to facilitate a more cost-effective and speedy distribution to creditors than would have been possible if the full process of filing and adjudicating on proofs of debt had been adopted. This was beneficial to creditors, as were the provisions that enabled them to trade their debts without the consent of the administrators. Mr Bayfield drew attention to a number of provisions of the LBA CDD, which appeared in identical or similar terms in all or most of the CDDs, which

emphasised the finality and certainty which the CDDs sought to achieve. I have earlier quoted or summarised the provisions of clause 2.1 of the LBA CDD. As Mr Bayfield submitted, they fixed the amount to be admitted to proof and they mutually released all other claims, whether known or unknown. Entering full and final settlements with mutual releases drafted in the widest terms was entirely consistent with the purposes of the administration. The administrators were experienced insolvency officeholders and the counterparties to all the CDDs, including LBA, were sophisticated commercial parties, and all took or were able to take legal advice. It would undermine the purpose and value of the CDDs if parties were allowed to re-open negotiations with a view to obtaining a better deal or if proofs were admitted for a different amount from that stated in the CDD when the purpose of the CDD was to fix that amount.

98. I agree with most of these points, but I do not see that they are applicable to the facts of the present case. LBA is not seeking to re-negotiate the deal embodied in the LBA CDD. It is seeking to correct a *common* mistake of a purely clerical nature. The administrators are, as they accept, as much responsible for this error as LBA. There is nothing to negotiate. All that the administrators are being asked is not to insist on strict legal rights so as to perpetuate the error.

99. Correcting this common mistake will not undermine the purpose or value of the LBA CDD. I cannot see that this could open the floodgates to attempts to re-open CDDs and thus defeat, or cause significant damage to, their purpose. It seems unlikely that there are many, if any, cases of CDDs in which such shared mistakes have been made. The administrators have not provided evidence of any mistakes of this kind in the case of any other CDD. Even if there were other cases, that would not defeat the finality achieved by the CDDs. It would do no more than correct common mistakes.

100. The second key submission advanced by Mr Bayfield is that the use of the court's jurisdiction would be a one-way bet in LBA's favour. The administrators are subject to paragraph 74 and, as officers of the court, to the rule in *Ex parte James*, but neither is applicable to LBA. Thus, one party to the CDD would be subject to extra-contractual restraint in the exercise of its rights under the CDD but not the other party. If anything, the unfairness would lie in the invocation of this jurisdiction against the administrators.

101. It is true that, if rectification is not available as a remedy, the administrators could not insist on a downward revision to the Agreed Claim Amount to correct a common mistake. It is, however, in the very nature of the rule in *Ex parte James* that it controls the conduct of officers of the court, who are expected to observe higher standards than other parties. There is nothing unfair in that. On the contrary, it gives effect to a basic principle governing the conduct of the court and its officers. As for paragraph 74, it is by its terms applicable only against administrators. Parliament has provided that if an administrator causes unfair harm to a creditor, the creditor has a remedy. It is no answer in a case of unfair harm to say that the administrator has no equivalent remedy against a creditor who causes unfair harm to the estate. Parliament has not provided one.

102. Thirdly, the legitimate expectation of a party is that the contract will be honoured and enforced according to its terms. I am not sure it is right, and there is certainly no need, to speak in terms of legitimate expectation. The parties to a contract have the benefit

of enforceable *rights*. In the ordinary course, they are entitled to enforce those rights but, as the administrators accept, the rule in *Ex parte James* and paragraph 74 are capable of applying to restrict the strict legal rights of administrators under a contract. It was suggested that other creditors might legitimately complain if the Agreed Claim Amount was increased, but I do not accept that. If the clerical error had not been made by both parties in the calculation of the Agreed Claim Amount, the LBA CDD would have been admitted to proof in the larger sum. There is no windfall to LBA and no true detriment to the estate if the error is corrected.

103. For these reasons, therefore, in my judgment no right-thinking person would think it fair for the administrators to stand on their strict contractual rights and refuse to correct a shared mistake for which they were as responsible as LBA.

104. I conclude that LBA is entitled to the relief which it seeks, both under paragraph 74 of schedule B1 and applying the principle in *Ex parte James*. I would therefore allow the appeal.

Lord Justice Newey:

105. I agree.

Lord Justice Patten:

106. I also agree.