Neutral citation number: [2021] EWHC 1843 (Ch) No. BR-2020-000474

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND
AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Rolls Building
Fetter Lane
London EC4A 1NL
Date: 07/07/2021

IN THE MATTER OF **ALAN CHARLES DEVILLE (DECEASED)**
A N D
IN THE MATTER OF **THE INSOLVENCY ESTATES OF DECEASED PERSONS ORDER 1986**

Before:

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE FRITH

B E T W E E N :

THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS Applicant

- and -

MICHAEL COLIN JOHN SANDERS
(as Trustee in Bankruptcy of Alan Charles Deville (Deceased)) Respondent

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MR MATTHEW PARFITT (instructed by HMRC Solicitor's Office and Legal Services) appeared on behalf of the Applicant.

MR ROBIN MATHEW QC (instructed by Coyle White Devine) appeared on behalf of the Respondent.

Hearing date: 15 April 2021

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10:00hrs on 7 July 2021. I direct that pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Deputy ICC Judge Frith:

Introduction

1 This is an application by Her Majesty's Revenue and Customs ("**HMRC**") for an order that a decision made by the Respondent, Mr Michael Sanders, acting as the trustee of the insolvent estate of the late Mr Deville to reject their proof of debt in the insolvent estate made on 24 March 2020 be reversed pursuant to rule 14.8 of the Insolvency (England and Wales) Rules 2016. They ask that the debt be admitted to proof in its full amount of £5,667,888.54. The case raises an interesting issue concerning the interaction between revenue and insolvency law in relation to the approach that an office holder should adopt when testing a proof of debt.

2 In the hearing before me, HMRC was represented by Mr Matthew Parfitt. The Respondent, Mr Michael Sanders, acting as the trustee of the insolvent estate of the late Mr Deville, was represented by Mr Robin Mathew QC. I am grateful to them and their instructing solicitors for their skeleton arguments and submissions, both written and oral, that they provided at the hearing before me.

3 The evidence provided in support of the application was provided by Ms Linda Littlewood, an Inspector of Taxes assigned to this case. It was not in issue that HMRC claimed to be a significant creditor in the insolvency estate of the late Mr Deville. It is also common ground that he erroneously claimed and received a substantial repayment of tax from HMRC to which he was not entitled. The issue I have to decide is whether and to what extent HMRC is entitled to prove in the insolvent estate to take the into account that it has not been returned.

The facts

4 The Respondent was appointed on 7 March 2018 to administer the estate of the late Mr Deville who died on 29 April 2016, under an insolvent administration order (the **"IAO"**) made pursuant to the provisions of the Administration of Insolvent Estates of Deceased Persons Order 1986 (S.I. 1986/1999), (the **"AIEDPO")**. The effect of the IAO was that the of the estate of Mr Deville would thereafter be administered pursuant to the AIEDPO rather than by his executors exercising their powers under his last will and testament.

5 Mr Deville was a solicitor specialising in commercial property. In addition to his private practice, he entered into business with another on his own account through the medium of a corporate structure. When he completed his self-assessment tax return for the year 2010/2011, he made a claim for a repayment of tax which it transpired arose not from his personal financial arrangements but from those he conducted

through the corporate structure. The consequence of the submission of that tax return resulted in a repayment of £5,042,837.25 being made to him on 26 March 2012.

6 In January 2013, HMRC commenced a tax inquiry into the circumstances that gave rise to the submission of the tax return that resulted in the repayment of tax to Mr Deville. The enquiry went on more some time. On 11 November 2015, some 5 months before his death on 29 April 2016, a Closure Notice submitted pursuant to section 28 of the Taxes and Management Act 1970 ("**TMA 1970**") was served upon Mr Deville (the "Closure Notice"). It is the interpretation of the terms and effect of this document that lies behind the rejection of the proof submitted by HMRC.

The Respondent's position and the Applicants' alternative arguments

7 Mr Mathew QC on behalf of the Respondent takes what he describes in his skeleton as a "*blunt technical point*". It is based on is whether the Closure Notice properly met the statutory obligations imposed by section 28A(1) and (2) of the TMA 1970. Specifically, he asserts that on its terms, the Closure Notice is in effect an assessment by altering or amending the relevant self-assessment to which it relates. In short, he submits that it failed to make the amendments of the return required to give the effect of the HMRC officer's conclusions and as such, the claim for the repayment cannot be taken into account on the testing of the proof.

8 No surprisingly HMRC vigorously contest this interpretation of the document. They submit that the Closure Notice itself did comply with the provision on its face. Further or in the alternative, HMRC submits that a detailed letter of explanation running to some 33 pages and 209 paragraphs that was sent with the Closure Notice in the same envelope, can and should be incorporated by reference. When both documents are considered together it is clear that the necessary amendments of the return are clearly set out.

9 If that argument fails and the Closure Notice was still defective and incapable of rectification, HMRC pray in aid of their position the saving provisions of section 114 of the TMA 1970 will come to its assistance. The Respondent contests this and submits that this is not available even if manifest unfairness results.

10 HMRC's final alternative argument pursuant to the rule in *Henderson –v- Henderson* (1843) 3 Hare 100. This relied on the failure to raise the arguments now relied upon at a hearing to consider the terms and effect of the Closure Notice conducted before the First Tier Tribunal. Mr Parfitt did not pursue this argument with much vigour before me, preferring instead to rely on the force of his arguments on the alternative primary arguments he advanced. Nevertheless, he did not abandon it and it still remains for me to deal with.

11 During the hearing, I commented that neither party had addressed the relevance, if any, of the decision in *Ex parte James (ex parte Condon)* (1874) LR 9 Ch App 609. This case and its principles have recently been comprehensively considered by the Court of Appeal in *Lehman Brothers Australia Limited (in liquidation) –v- Edward John MacNamara and others* [2020] EWCA Civ 321. After the hearing, I invited the parties to provide some written submissions on its relevance to this case which they duly supplied and to which I shall refer in due course.

The testing of the Proof and the implications of the decision taken by the Respondent

12 On 16 July 2018 HMRC submitted the proof of debt which is in issue in this application. It claims a total of £5,667,888.54. The difference between the amounts in the Closure Notice and letter of explanation and the amount in the proof of debt is accounted for by the inclusion of interest accruing to the date of Mr Deville's death.

13 Following receipt of the proof, the Respondent took advice from Mr Mathew QC. He produced a written opinion expressing his view that by virtue of the failure on the part of HMRC to amend the assessment, they were only entitled to prove for £9,339.78. This represented the amount of the outstanding tax he submits, on his interpretation the Closure Notice, remained due and owing. The privilege in the written opinion was waived and it was sent to HMRC for discussion. The covering letter sent with the opinion from the Respondent's solicitors expressed surprise at the conclusion drawn. However, it made it clear that notwithstanding the Respondent's initial reaction, he felt compelled to follow it. HMRC's proof of debt was formally rejected on 23 March 2020. The application now before me was issued on 8 April 2020.

14 It is an interesting factor of this case that there is no dispute between the parties that the repayment was wrongfully made. In effect, the Respondent submits that the provisions of the TMA are rigorous and if there has been any failure in following its terms, HMRC and the public purse will have to suffer the consequences with no recourse. HMRC submits that such an outcome would be surprising indeed, if not positively unjust.

The test on the application

15 The application is made under IR 14.8(1) which provides:

> *"(1) If a creditor is dissatisfied with the officeholder's decision under rule 14.7 in relation to the creditor's own proof (including a decision whether the debt is preferential), the creditor may apply to the court for the decision to be reversed or varied.*"

16 It is common ground between the parties that this is not a true appeal and the court is not restricted to the material before the officeholder at the time of the decision. The court can approach the question by a reference to the facts and arguments that are put before the court on the day of the hearing see *Cadwell –v- Jackson* [2001] BPIR 966 at 967 per Neuberger J.

17 If the court considers that the decision in relation to the creditor's proof was wrong, the court can reverse or vary it. HMRC seeks an order admitting its proof in full with the costs of this application payable as an expense of the bankruptcy.

The statutory framework

18 Both parties agree on the terms of the legislation and the scheme that underpins it. This was summarised at paragraph 4 of the judgment of Lewison J in *R (Archer) –v- HMRC* [2017] EWCA Civ 1962 where he stated:

> *"[4]. In order to understand the rival arguments, it is necessary first to describe the nature of the statutory scheme of self-assessment to tax. The details have changed from time to time but the basic scheme remains the same. A person may be required by notice to make and deliver a personal return: TMA s 8. The purpose of the return is to establish the amounts to*

which the taxpayer is chargeable for income tax and capital gains tax. It must provide the information required by the standard form on which it is made together with such accounts and other documents as may be required. The return must include a self-assessment: i.e. an assessment of how much income tax and capital gains tax is payable: TMA s 9 (1). In certain circumstances the taxpayer need not make the assessment himself but in that event HMRC will make it on his behalf, send it to him; and it will be treated as a self-assessment: TMA s 9 (2), (3) and (3A). Where a return is delivered to HMRC, HMRC may enquire into the return. The unrestricted power to open an inquiry is subject to time limits: TMA s 9A. Once under way an enquiry is brought to an end by a Closure Notice: TMA s 28A."

19 59B(1) TMA creates an obligation on a taxpayer or HMRC (as the case may be) to make a payment of the amounts assessed in a taxpayer's original self-assessment return and in relation to a Closure Notice section 59B(5)(a) TMA, the obligation on a taxpayer or HMRC as the case may be to make a payment following the issue of such a notice under section 28A sets out the payment obligations. This specifies>

"*an amount of tax which is payable or repayable as a result of the amendment or correction of a self-assessment under (a) section…28A…is payable (or repayable) on or before the date specified by the relevant provision of Schedule 3ZA to this Act.*"

The date for payment or, as the case may be, repayment is fixed by section 59B (5) of TMA. This provides as follows:

"An amount of tax which is payable or repayable as a result of the amendment or correction of a self-assessment under—

(a) ... 28A of this Act (amendment or correction of return under section 8 or 8A of this Act), or

(b) ...,

is payable (or repayable) on or before the day specified by the relevant provision of Schedule 3ZA to this Act."

The date specified by paragraph 5 of Schedule 3ZA is 30 days after the Closure Notice is given. Therefore, in this case, since the Closure Notice was given on 11 November 2015, any tax arising became payable 30 days later 10 December 2015.

The terms of the Closure Notice and its statutory framework

20 The relevant provisions concerning the contents of a Closure Notice are set out in section 28A of TMA. This has been amended on a number of occasions but the provisions in force at the relevant time were as follows:

"(1) An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a "Closure Notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

In this section "the taxpayer" means the person to whom notice of enquiry was given.

(2) A Closure Notice must either–

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions. [emphasis added]

(3) A Closure Notice takes effect when it is issued.

(4) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a Closure Notice within a specified period."

21 It follows that there are certain statutory requirements which must be followed. Under section 28A(1), there is a requirement that the notice is sent to the taxpayer and that such notice informs the taxpayer that the officer has completed his enquiries. No issue is taken by the Respondent that these provisions were followed.

22 Under section 28A(2) there is a requirement that the Closure Notice must state either states that no amendment of the return is required (under section 28A(2)(a)), or it must make the amendments of the return required to give effect to [the Officer of the Board's] conclusions (under section 28A(2)(b)). The central issue for determination on this application is whether or not the Closure Notice made the necessary amendments to the return to give effect to the officer's conclusions.

23 HMRC submit that the Closure Notice was compliant in all respects. They assert that it did in fact set out the conclusions that the Ms Littlewood had reached in her capacity as an Officer of the Board, contrary to the position adopted by the Respondent. It indicated how the 2010/11 self-assessment return had been amended in line with that decision. It also set out how much the bankrupt was liable to pay. Specifically, the amendments to the relevant self-assessment return were summarised in the Closure Notice by Ms Littlewood as follows:

"I have amended your tax return in line with my decision:

- *It previously showed that you were due a refund of £5,042,837.35*
- *It now shows you were due to pay £9,339.78*
- *The difference is £5,052,177.13*

I enclose details of my calculations."

24 Importantly in this case, the reference to "my calculations" was a reference to a detailed letter of explanation which was 33 pages in length and contained no less than 209 paragraphs. It is the case of HMRC that the Closure Notice incorporated the details of Ms Littlewood's calculations set out in the accompanying letter by reference.

25 During the course of submissions, I asked Mr Mathew QC to explain what he would have done to perfect the Closure Notice. At page 3 of the transcript the following exchange took place:

> *THE DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE: So, again, and I am sorry for labouring this point but it is illustrative of what I wanted to see and want to understand, can we go back then and look at the way in which she – that it was dealt with and, specifically, focusing on the Closure Notice? I would just be interested, if you could redraft it – let us just imagine that you are being instructed to perfect this Closure Notice, Mr Mathew, what would be – how would you do it?*
>
> *MR MATHEW: I would – I would say, "previously showed". "Due to my conclusions set out above", which is what she has done, "in accordance with my decision, I have amended your self-assessment. It previously showed that you were due a refund of £5 million-odd. That was wrong. You are now – your self-assessment now shows that you are due – your liability – sorry, your self-assessment now shows that your liability is £9,339.78 plus £5,042,000 and that is the amount which you are due to pay".*

It follows that the only problem with the Closure Notice from a tax law perspective was that it failed to say that Dr Deville's self-assessment return now showed a liability of £9,339.78 plus £5,042,000. In addition to making it clear that there was a difference of £5,052,177.13, it went on to explain that the self-assessment had been updated to reflect that and the he now owed £5,954,255.89 in total, reflecting the tax due plus the return of the repayment and interest.

26 In his reply to this submission, Mr Parfitt took me to the Closure Notice and the reference made within its terms to the detailed calculations Ms Littlewood had provide in her latter of explanation. He referred to the calculations and the submitted that they show in the clearest possible terms that the repayment was being clawed back and provided an explanation why this was so. He referred me to paragraph 208, in which Ms Littlewood stated as follows:

> *"… following adjustment for the disallowable expenses there is no taxable loss available to be carried back against income of earlier years on a claim under either S64 or S72 ITA07. There is therefore no basis for the adjustment to the 2010/11 tax liability made at Box 14 of the tax calculation summary in your … return which resulted in the tax repayment of [£5 million]. This amount has been over-claimed and is repayable in full.*
>
> *209. This gives a total amount payable of £5,052,177.13 (that is £9,000 + [£5 million repayment]."*

This, said Mr Parfitt, was the critical paragraph that clarified any doubt surrounding the Closure Notice and the adjustment to the assessment that Ms Littlewood had made.

27 Mr Mathew QC relies quite simply that the Closure Notice "*failed to properly assess/claim the repayment of the [repayment]*". The basis for this conclusion is that

the "*statutory scheme requires in imperative language via section 28A(2)(b) that the demand is articulated in terms*". He considered that although the Closure Notice set out HMRC's conclusion it did not include a definition of liability and therefore was incomplete. He stated that this was important because without it, this would have had implications for the ability on the part of Mr Deville to appeal it.

28 HMRC indicates that there is little in this point. They submit that the trustees must have been aware of the implications of the Closure Notice because they did in fact appeal to the First-tier Tribunal contrary to the submission made by Mr Mathew QC that they were in some way inhibited from so doing.. Further, there was a specific reference in the Closure Notice as to what the taxpayer had to pay and in reality, which was amplified and set out in terms in the detailed letter of explanation in a such a way that they were incorporated into the Closure Notice by reference; a position that was specifically accepted by Lewsion LJ in Archer at [28] where he accepted the submission of HMRC's counsel to that effect.

29 Whilst I can see the point that Mr Mathew QC seeks to advance in the technical deficiency he identifies, I cannot accept that it constituted a fatal flaw such that it compelled the Respondent to reject the HMRC proof. The letter of explanation sets out comprehensively the adjustments to the assessment that were proposed and there is no evidence that there was any area for there to be any confusion as to what followed. It was sent to the taxpayer with the Closure Notice and is inextricably linked to it such that it was incorporated into its terms by reference in the manner approved by Lewinson L.J in his judgment in *Archer*. In my judgment, the Closure Notice did comply with the relevant statutory provisions and the decision taken by the Respondent should be reversed and the proof of dent should be accepted in full.

Section 114 common intent and understanding

30 To the extent that I am wrong on my interpretation of the terms and effect of the closure notice and it was defective in the manner Mr Mathew QC submits, I turn now to the question as to whether or not section 114 TMA comes to the assistance of HMRC. The section provides as follows:

> *"(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."*

31 HMRC submits that the Closure Notice would fall into the definition of "other proceedings" under section 114. Lewison LJ at [33] in *Archer* confirms that the section can be deployed to validate an otherwise defective Closure Notice. This was the route the Court ultimately took when it overruled the decision of the judge at first instance who had sought to impose a more restrictive interpretation of the terms and effect of the section. In so doing it validated a Closure Notice that contrary to the position in this case made no mention *at all* of the amount the tax payer had to pay. The Learned Judge described the position as follows:

> *[33] In Baylis v Gregory [1989] AC 398, 438 this court held that where section 114 applies it gives HMRC or the taxpayer, as the case may be, "the statutory right to claim that the assessment, warrant or other proceeding in question shall not be affected by reason of a mistake etc." This is not a procedural right but a substantive one. It is a right to have the document in question treated as if it had been in the correct form. I cannot see why it should make any difference to that statutory right in which forum the right is asserted. Suppose that HMRC had given a Closure Notice which was correct in all respects except that it had misspelled the taxpayer's name, and HMRC then served a statutory demand based on that Closure Notice. It would be very surprising if, on an application to set aside that statutory demand, the bankruptcy court could not apply section 114 (1) to validate the Closure Notice.*

32 He went on to explain at [36] that the common intent and understanding involved an objective test but that the objective reader of the Closure Notice would be taken to have the knowledge of the tax payer and his advisors. Applying this test, HMRC submits that Mr Deville can have been in no doubt with what was required of him to comply with it. It specified what he had to pay, and he had the benefit of a detailed and comprehensive letter of explanation which was specifically referred to the notice itself. The fact that the Executors appealed to the First Tier Tribunal was further evidence relied upon by HMRC to show that they well knew the terms and effect of the notice.

33 In contrast Mr Mathew QC took a very prescriptive view of the Closure Notice and the manner in which the Respondent should approach it. He submitted that there was no duty upon the Respondent to go behind the Closure Notice in circumstances where no indication was that the assessment had been amended to take into account the HMRC Inspector's conclusions. He described that the obligation to provide the information in section 28A(2) was mandatory and as such, any departure from its terms could not, as a matter of law engage the provisions of section 114 to come to the assistance of HMRC. In short, it mattered not that the effect of a rejection of the proof was to prevent HMRC from talking any steps to participate in any distribution of the insolvent estate in circumstances where the Respondent conceded that it would have been wrong for Mr Deville to retain the funds at its expense. The fact that an insolvent estate with a substantial deficiency would become solvent paying all non-fiscal creditors in full and making distributions to the beneficiaries under the will was the natural consequence of the technical point that he advanced on behalf of the Respondent.

34 In considering the approach I have to adopt, the judgment in Archer does provide helpful guidance on how the appropriate test is to be applied. Lewsion LJ cited with approval the decision of Lord Dyson in *HMRC v Donaldson* [2016] EWCA Civ 761 where he concentrated on the nature and effect of the omission sought to be corrected by that jurisdiction conferred on the Court by section 114. At [35] of Archer he said:

> *"...Lord Dyson did not approach the question from some a priori categorisation of what kind of mistakes were fundamental or gross. Instead he concentrated on the nature and effect of the omission in the particular circumstances of the case. Lord Dyson reasoned as follows at [29]:*

> *"In my view, the failure to state the period in the notice of assessment in the present case falls within the scope of s 114(1). Although the period was not stated, it could be worked out without difficulty. The notice identified the tax year as 2010–11. Mr Donaldson had been told that, if he filed a paper return (as he did), the filing date was 31 October 2011. The SA Reminder document informed him that, since he had not filed his return by the filing date, he had incurred a penalty of £100. It also informed him that, if he did not file his return by 31 January 2012, he would be charged a £10 daily penalty for every day the return was outstanding. This information was reflected in the notice of assessment. Mr Donaldson could have been in no doubt as to the period over which he had incurred a liability for daily penalty. He knew that the start date for the period of daily penalty was 1 February 2012 and the notice of assessment told him that the end date of the period was 90 days later. The omission of the period from the notice was, therefore, one of form and not substance. Mr Donaldson was not misled or confused by the omission. The effect of s 114(1) is that the omission does not affect the validity of the notice."*

35 HMRC states that applying this test, section 114 is designed to correct the manifest injustice of the nature I have indicated above based upon what Mr Deville and following his death, the Executors under his will knew. It asserts that no one was misled by any perceived technical defect in the Closure Notice.

36 I have already explained that when stripped back, the defect that is complained of it the insertion of a correction of a few words concerning the amendment to the assessment.[1] If it was defective, it was perhaps as close to compliance as was possible to achieve. It seems to me to have been a perfect case for the application of section 114.

Failure to raise the challenge earlier – the rule in *Henderson –v- Henderson.*

37 The final basis upon which HMRC takes issue with the Respondent is that Mr Deville and his executors did not raise the matters raised in the initial advice of Mr Mathew QC at the hearing before the First Tier Tribunal. In not so doing, they fell foul of the decision in *Henderson v Henderson* (1843) 3 Hare 100. In his skeleton argument, Mr Parfitt conceded that the decision taken by the First Tier Tribunal was of an interlocutory nature; a point that was relied upon by Mr Mathew QC and with which, had it been advanced on its own merits I would have had considerable sympathy.

38 However, rather than pressing the point on its own merits, Mr Parfitt deployed it to bolster the argument that section 114. Mr Parfitt submitted that it showed the parties were fully aware of the liability that was in dispute and any error was so technical that neither side had even noticed it. In so doing it did not form a stand-alone submission

[1] See paragraph 25 above

but was prayed in aid of the position he adopted on the Section 114 relief in supporting his arguments on common intent and purpose, which I have already dealt with.

The Duty to act fairly and the rule in Ex parte James (1874) LR 9 Ch App 609

39 The rule in *Ex parte James* imposes a duty on the Court's officers to act fairly. 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 think should govern their conduct A comprehensive review of the principles it engages was recently conducted by the Court of Appeal in *Lehman Brothers Australia Limited (in liquidation) (scheme administrators appointed) v MacNamara and others* [2020] EWCA Civ 321. The rule is in itself an evolving concept and there have been many cases where attempts were made to determine its nature. In delivering the judgment of the Court, David Richards LJ, having considered all the relevant cases came to the following conclusion:

> *[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.*
>
> He added:
>
> *[69] The application of the principle in Ex parte James in any case will critically turn on the particular facts of that case.*

40 I have already made it clear that the parties agreed that the repayment of the tax was plainly wrong. Mr Mathew QC when challenge by me during submissions made that point that fairness should not play a significant and that this was not a test of morality. The Tax Law was prescriptive, and any failure would be suffered by HMRC without relief, causing a significant loss to the public purse and a significant windfall to the otherwise insolvent estate which would then become solvent by some margin.

41 Adopting the test now clarified in *MacNamara*, it would be clearly wrong for the court to stand idly by. If I were to accept the submissions of the Respondent, the fundamental principle identified by David Richards L.J. that the court will not permit its officers to act in a way that it would be clearly wrong for the court itself to act would be breached. That is demonstrated by the fact that the Respondent's case did not attempt to justify the retention of the repayment other than on the highly technical point that was taken. I did challenge his submission on the question of fairness and Mr Mathew QC adopted a robust response by indicating that the court was not dealing in matters of morality and in effect that the Court must adopt a robust approach and

that if the Court did not follow that direction, the statutory scheme would be undermined to the extent of driving a coach and horses through it. I do not accept that this is the correct approach. *MacNamara* does introduce just such an approach when dealing with the actions of its office holders. As Mr Parfitt put it to me in his additional written submissions on this point this arguably does involve the driving of a coach and horse through the legislation, but with the Court tightly and judicially holding the reins. For the insolvent estate to retain a windfall of over £5m at the expense of HMRC and the public purse would in my judgment offend the views of any right-thinking person. If the findings I have made were erroneous, in my judgment the application of the Rule in *Ex parte James* would have been engaged to do justice between the parties.

42 I should make it clear that the authorities do acknowledge that the test the court applies is objective. The question is not whether or not the office holder involved has departed from the standard. Rather, it the question is only whether the conduct of the officer, on an objective basis, falls below the standard expected of the court itself. Since the Respondent's subjective motivations are irrelevant, the finding that an act does not meet the standard it is not, in any way a rebuke of the officer or his personal integrity.

Disposal

43 The application succeeds. The decision of the Respondent to reject the proof is to be reversed. I will invite the parties to provide a draft order and to set out any other matters that remain to be decided.