Neutral citation number: [2024] EWHC 3034 (Ch)

Case No: CR-2024-MAN-001274

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Friday, 25 October 2024

Before:

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

IN THE MATTER OF HCL SOCIAL CARE LIMITED

Between:

(1) MICHAEL LENNON
(2) STEVEN MUNCASTER
(Joint Liquidators of HCL Social Care Limited)

Applicants

- v -

HEALTH CARE RESOURCING GROUP LIMITED

Respondent

MS LISA FENG (instructed by **Hill Dickinson LLP**, Manchester) appeared on behalf of **the Applicant**
THE RESPONDENT did not attend and was not represented

APPROVED JUDGMENT

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JUDGE HODGE KC:

1. This is my extemporary judgment on an application by the joint liquidators of HCL Social Care Limited, Mr Michael Lennon and Mr Steven Muncaster, issued on 4 October 2024 in the Insolvency and Companies List of the Business and Property Courts in Manchester, under Claim Number CR-2024-MAN-001274.

2. The application notice seeks directions, pursuant to Section 112 of the Insolvency Act 1986, in relation to the entitlement to certain assets realised during the course of the creditors' voluntary liquidation of the company. Specifically, directions are sought as to the appropriate distribution of a business rates rebate received from the City of London Business Rates Department.

3. The application is supported by the witness statement of Mr Michael Lennon, one of the company's joint liquidators, dated 19 September 2024. Mr Lennon exhibits some 238 pages of documents as exhibit ML1.

4. In addition to the evidence, I have a helpful written skeleton argument from Ms Lisa Feng (of counsel), who appears for the applicants. The application has been served on the respondent, the parent company of HCL Social Care Limited, which is Health Care Resourcing Group Limited ('**HCRG**').

5. By an email from Mr Giles Ruddell, the Chief Operating Officer of HCRG, dated 8 October 2024, HCRG have confirmed that they do not intend to be present at the hearing. Notice of this application has also been given to the City of London Corporation and to Carview Corporation Limited, a company incorporated and registered in the Isle of Man. Although Carview have instructed solicitors in London, Simmons & Simmons LLP, there has been no response to this application from or on behalf of Carview. Nor, unsurprisingly has there been any response from the City of London Corporation.

6. The company, HCL Social Care Limited, was incorporated on 4 February 1999. It entered into creditors' voluntary liquidation on 30 October 2020, when Mr Lennon and Mr Muncaster were appointed as the joint liquidators of the company.

7. The circumstances giving rise to the application may be summarised as follows: The company traded from premises at 7-10 Old Bailey, London EC4. It occupied the ground and lower ground floors. The company occupied the property pursuant to leases granted by Carview Corporation Limited as landlord.

8. During the Covid 19 Pandemic, the company was mandated to close its premises. Certain companies which were subject to the enforced closure of their premises were entitled to rebates of non-domestic rates. On 7 April 2021, and thus some five months after the company entered into creditors' voluntary liquidation, the Corporation issued demands for the payment of unpaid non-domestic rates for the property. Those demands were addressed to HCRG.

9. On or around 8 and 9 April 2021, HCRG made a payment of a little over £105,000 to the Corporation. It did so in order to avoid enforcement action against it whilst, at the same time, questioning the Corporation about HCRG's right to rebate entitlement. I should refer to three contemporaneous emails within exhibit ML1.

10. The first is dated 9 April 2021 and was written by Ms Sarah Wright, the National Estates and Facilities Manager for HCRG, to the City of London Business Rates Department. In that email, Ms Wright stated that she had been patiently waiting for someone at the City's Business Rates Department to call her back regarding the rate relief that HCRG should have received for 2020 to 2021 in relation to their property at 10 Old Bailey. She relates that she had made two payments in the previous two days of £50,000 and £55,123.50.

11. About six or seven weeks' later, on 25 May 2021, Ms Wright emailed the Business Rates Department again asking what would happen to the £105,000 credit that HCRG had paid on 8 and 9 April 2021 to the debt collection agency. She goes on as follows:

> *HCRG made this payment as a gesture of goodwill so that we had more time to sort the rate relief. This money should come back to HCRG directly and new credits for rate relief and invoices raised under HCL* [the company now in creditors' voluntary liquidation, HCL Social Care Limited].

12. That affords contemporaneous evidence of the motivation underlying the two payments: They were made as a gesture of goodwill, so that HCRG had more time to sort out the rate relief claim.

13. The third, and final, email, to which I must refer is one dated 9 July 2021, from the City Business Rates Department to Mr Giles Ruddle, HCRG's chief operating officer (with a copy to Ms Wright). That attaches an email recently received by the City requesting that the credit be transferred to a new account, HCL Social Care Limited, a company owned by HCRG. The City had done that, as requested, creating a new account, and transferring the credits over. That credit was then subsequently refunded to the Insolvency Practitioner dealing with what is said to be the administration, but was in fact the liquidation, of HCL Social Care Limited. HCRG was said to need to liaise with the company in liquidation with regards to the monies refunded.

14. That email was written against the background that, on 21 May 2021, the Corporation had issued two rate rebate invoices, following an application made by the joint liquidators. The rebate amounted to £87,048.50. It related to: (1) £31,203.12 for the lower floor, in relation to empty property relief for the period commencing 21 August 2020 (which was the date that HCRG had confirmed to the Corporation that both HRCG and the company had vacated the property); and (2) £55,845.38 for the lower floor, in relation to the government rebate entitlement. Those payments were transferred by the Corporation to a new account opened in the name of the company. That had been done, according to the Corporation, on the instructions of HCRG.

15. Mr Ruddle has said that it was in fact the City of London Corporation who had insisted upon opening a new account into which the company might receive the rate rebate. The rate rebate has subsequently been paid into the liquidators' insolvency estate account, where it continues to be held. The liquidators understand that there will be a further rebate payable by the Corporation, in the region of £20,000, which has not yet been paid.

16. The liquidators have been in correspondence with HCRG in an attempt to understand on what basis it made the payment of non-domestic rates. Mr Ruddle has stated that the reason the rates account was established under HCRG in the first place was because the property was, in effect, the Head Office for HCRG, and was the place where the board and

senior personnel operated from. HCRG, and not the company, had previously paid all rate demands; and that was the reason why enforcement action had been taken against HCRG, and not the company in voluntary liquidation. Mr Ruddle further states that the property was occupied both by the company and by HCRG support staff. He states that the rates account was incorrectly established in HCRG's name; and he does not know of any reason why this was the case.

17. In February 2024, the joint liquidators took steps to disclaim the lease. On 17 April 2024, the liquidators wrote to Carview, as the landlord of the property, noting that: (1) the company had received £87,049 from the Corporation in relation to a business rate refund, attributable, in part, to the Government's business rates retail discount scheme, and in part to the relief due from the property being unoccupied from 21 August 2020; and (2) HCRG had claimed that it was entitled to the refund, having made a payment to the Corporation in respect of an enforcement notice issued against it for the year commencing 1 April 2020. By the same letter, the liquidators sought clarification about which party Carview believed to be in occupation of the property.

18. On 17 May 2024, Carview responded stating that it had believed the company to be in occupation. Carview considered that the rate rebate formed part of the company's general assets, from which it would benefit as an unsecured creditor. HCRG, in contrast, had claimed that the rate rebate ought to be paid to it. On 22 May 2024, the joint liquidators' solicitors, Hill Dickinson LLP, wrote to HCRG seeking better particulars of its position on entitlement. Mr Ruddle responded on 28 May 2024 to state that HCRG had nothing further to add to its previous comments.

19. Hill Dickinson also wrote to the City Corporation on 17 April 2024 to query the basis upon which the rate rebate had been made. However, the Corporation has provided little further information, other than to point to the fact of the rebate having been made.

20. The present application was issued on 4 October 2024. As I have mentioned, it has been served upon HCRG; and notice of the application has been given, both to the City of London Corporation, and to Carview. HCRG has, as I have mentioned, confirmed that they do not intend to be present at this hearing. No response has been received from Carview or

its solicitors, Simmons & Simmons LLP. The only person in court, before me today, is Ms Feng, representing the joint liquidators.

21. I turn then to the applicable legal background. Under section 112 of the Insolvency Act the liquidator may apply to the court to determine any question arising in the winding-up of a company, or to exercise, as respects any matter, all or any of the powers which the court might exercise if the company were being wound up by the court.

22. Ms Feng has taken me to observations of ICC Judge Jones in the case of *Re Pinnacle (Angelgate) Limited* [2020] EWHC 141 (Ch). There, liquidators had applied for directions under section 112 as to the distribution of sale proceeds and deposits in relation to the sale of an 'off-plan' development. As recorded at paragraph 30 of the ICC Judge's judgment, the liquidators in that case had taken a neutral stance, but had sought to assist the outcome by raising matters they considered arguable for the purposes of the decision.

23. In the present case, Ms Feng, for the liquidators, similarly takes a neutral stance as to the distribution of the fund. She seeks to assist the court in her skeleton and oral observations by identifying some matters which may be relevant for the court's consideration. In the absence of any other interested party, although there has been disagreement as to the correct treatment of the rate rebate, the court has heard no positive legal submissions from either Carview or HCRG.

24. The applicant liquidators take a neutral approach and simply seek to assist the court as to the correct legal position. Ms Feng points out that it is possible that had HCRG not made the payment of £105,000, in response to the enforcement notices issued against it by the Corporation, the company would have received no rate rebate from the Corporation. However, the Corporation credited the rebate into an account opened for the company, and has subsequently transferred that sum to the liquidators, and not to HCRG. The Corporation has simply said that this was done at the direction of HCRG; although there seems to be little, if any, email evidence to confirm that this is the case, and that position is not accepted by Mr Ruddle, on behalf of HCRG. There are no direct observations from the Corporation on the question whether it should have paid the council rebate to HCRG. Ms Feng notes, however, that the initial enforcement notices were issued against HCRG, and not the company.

25. Mr Lennon's witness statement concludes as follows

> *24. Ultimately it appears to me that the question is whether HCRG is entitled to the Council Rebate (under a trust position or otherwise) or whether it is Company money for the benefit of creditors. HCRG states that it made the payment to avoid enforcement action with the apparent intention that it would then receive a refund, once the Council had processed the relief applications. There appears to be some dispute over HCRG's entitlement to relief if it were in occupation (and so the person liable to non-domestic rates), but whilst HCRG seems to suggest that it had some use of the Property, it nevertheless considers that the Company was the tenant. Equally, and as noted above, Carview appears to consider that the Company was the occupant of the Property.*
>
> *25. I am conscious of my obligations to assist the court with respect to this directions application. It would have been useful has the Council confirmed that it would not have made the Council Rebate but for HCRG making the Payment, but given the refund is a rebate in nature, it would appear likely that this is the case. Accordingly, it seems to be more likely that HCRG is entitled to the Council Rebate because the Council is evidently content that the Company was the liable person to non-domestic rates (and hence the change to the account holder information), such that it could only benefit from rebates if it were the party that had actually made the Payments. The alternative position is that HCRG effectively loaned the Company a sum equal to the Payments when it made them, but it would have done that after commencement of the liquidation, for reasons unknown.*
>
> *Summary*
>
> *26. On balance and notwithstanding Carview's position (as the major creditor) it seems to me that HCRG is entitled to the Council Rebate.*

> *27. If the court is minded to agree with that conclusion, I would respectfully ask that it allows our costs in dealing with this matter to be paid from the Council Rebate before it is remitted to HCRG under the Berkeley Applegate principles.*

26. When opening this application, Ms Feng referred me to a further email from the City Business Rates Department to a solicitor at Hill Dickenson, representing the joint liquidators. That email is dated Wednesday 23 October 2024. It states that from 12 March 2010 to 21 December 2018, HCRG, and then HCL Social Care Limited from 21 December 2018 to 22 January 2024, were liable in respect of business rates for the premises. An empty property exemption applied from 21 August 2020. Prior to this, enhanced retail relief of 100% applied for the period 1 April 2020 to 21 August 2020. The refunds are linked to payment, as without this no refunds could be made. Relief is not given out in monetary value, but as a discount to a bill.

27. Ms Feng submits that if the rate rebate is to be paid to HCRG, rather than forming part of the company's general assets, there would likely need to be some trust established in favour of HCRG in respect of such sums. By reference to paragraph 22.012 of the 34th edition of *Snell's Equity*, Ms Feng points out that for an express trust to be established, there would need to be shown: (1) an intention on the part of the settlor, which in this case would likely be the Corporation, that the rebate is to be held on trust by the company for HCRG, in the sense that the settlor must have intended to impose legally enforceable duties of trusteeship on the payee of the monies; and (2) that such trust must be sufficiently certain as regards both the subject-matter of the trust, and the objects or persons intended to be the beneficiaries of such trust.

28. Ms Feng recognises that HCRG could have contended for such a trust. It could have argued that the Corporation had intended for the monies to be paid over to HCRG, and that they were intended to be for its benefit, and were only credited to the company at HCRG's direction. However, Ms Feng rightly recognises that there is very limited evidence, at present, to support any of the requirements for a valid trust. In particular, there is little, if any, evidence as to the intention underlying the transfer of the rate rebate to the company.

29. Ms Feng also recognises that HCRG could, in the alternative, have argued that the rate rebate was held by way of some constructive trust for its own benefit, on the basis that there was a common intention, whether implied or to be inferred between itself and the company, that such funds would be held for its benefit. Again, however, she recognises that there is little evidence, or any positive case being advanced by HCRG, to substantiate a basis for any such constructive trust.

30. In those circumstances, Ms Feng observes that whilst it seems likely on the facts that the rate rebate may not have been available had HCRG not made the initial payment of business rates to the Corporation, the legal basis upon which HCRG may now claim to be entitled to the rate rebate is unclear. Against that background, the joint liquidators invite the court to make a finding, or give a direction, governing the distribution of the rate rebate.

31. Ms Feng reminds the court that whilst both HCRG and Carview have either been served with, or given notice of, this application, and have had the opportunity to make representations to the court, they have elected not to become involved in these proceedings. She suggests that if the court has any further concerns regarding the impact of any direction upon either of those parties, in light of their non-attendance, any order could be made subject to a proviso that either HCRG or Carview have permission to apply, on notice to the liquidators, to set aside or vary any order within a specified period of time after notice of the order has been given to them, together with a condition that the rate rebate should remain in the liquidators' account for 21 days and, if any such application is made, pending its final disposal.

32. If the court does find that the funds representing the rate rebate are held on trust for HCRG, Ms Feng invites the court to make a *Berkeley Applegate* order, in accordance with the principles set out in *Re Berkeley Applegate (Investment Consultants) Limited* [1989] 1 Ch 32. Ms Feng points out that those principles were helpfully summarised by ICC Judge Barber in *Re Aronex Developments Limited* [2021] EWHC 2807 (Ch), [2022] 1 BCLC 487, at paragraphs 39 to 40. In summary, when giving effect to an equitable interest in trust property, the court has a discretion to require an allowance to be made for costs incurred, and skill and labour expended, by liquidators in administering the trust property. Such discretion is to be exercised on the basis of fairness, and specifically the principle that those who have benefitted from particular realisations should contribute to the costs of the same.

33. In preparing for this hearing, it had occurred to me that the solution to this question might lie in the application of the rule in *Ex parte James*. That is reference to the case of *Re Condon, Ex parte James* (1873-4) LR 9 Ch App 609. The difficulty with any direct application of that rule in the present case, however, is that there is clear Court of Appeal authority (in the case of *Re: T H Knitwear (Wholesale) Limited* [1988] Ch 275) to the effect that a liquidator in a voluntary winding-up is not an officer of the court within the scope of that principle. He is not appointed by the court; and the exercise of his powers is not subject to the court's control.

34. I recognise that limiting the equitable jurisdiction under the rule in *Ex parte James* to officers of the court is difficult to justify. Liquidators in a voluntary winding-up may not be officers of the court, but they perform much the same function as a liquidator in a compulsory winding-up. In both instances, the liquidator's role is to realise and distribute assets to the company's creditors. Therefore, there appears to be no convincing reason for excluding voluntary liquidators from the ambit of the rule in *Ex parte James* whilst continuing to allow compulsory liquidators to fall within its jurisdiction.

35. Nevertheless, *T H Knitwear* is Court of Appeal authority for the proposition that an insolvency practitioner, such as a voluntary liquidator, who is not an officer of the court does not fall within the rule, even if they have applied to the court for directions. That position has been affirmed more recently by Mr Robin Dicker QC, sitting as a Deputy Judge of the High Court, in the case of *Glasgow ELS Law Limited* [2017] EWHC 3004 (Ch), and reported at [2018] 1WLR 1564, at paragraph 82. That authority reinforces the requirement for a person to be an officer of the court, in order to fall within the scope of the rule in *Ex parte James*. So I do not consider that the applicants in this case can rely directly upon that rule.

36. The rule itself has been the subject of a recent, interesting article in the October edition of the *Law Quarterly Review* by Aisha Shah: see [2024] 140 LQR 595 to 619. The author makes the point that when successfully invoked against an officer of the court, that officer cannot insist on their strict legal rights. It thus allows the court to disregard legal principles in a legal system governed by the rule of law, and introduces into that law a less welcome element of uncertainty. The author points out that the *Ex parte James* principle has been effectively used in a wide range of cases, including (but not limited to) the recovery of rates

paid to a local council, and tax paid to HM Revenue & Customs. The author points out that the case from which the rule originates, that of *Re Condon, Ex parte James* involved a payment made under a mistake of law. However, the rule has since been extended.

37. The article seeks to explore the cases concerning mistaken payments. Those cases are said to be significant because when a claimant relies on the rule, successfully, to recover a payment made by mistake to an officer of the court in relation to an insolvent estate, the effect of the rule is to confer priority on the claimant in the debtor's insolvency. The rule allows a claimant to recover their money from the insolvent recipient in advance, and ahead of, the claims of unsecured creditors.

38. The rule is said to be controversial, for the reason that it is not clear why, in the cases where it is applied, the claimant, who has a non-provable debt, should be able to recover their money in priority to the general body of creditors. In contrast to the reasoning adopted by the courts to rationalise the rule, the article argues that the rule cannot be justified on the basis of whether the officer of the court has acted fairly in accordance with the standards of the right-thinking person. It can instead be explained by using the cause of action of unjust enrichment. Such enrichment can be reversed via proprietary restitution, in the form of a trust arising because the payer's purpose for the payment was impossible from the outset. Importantly the trust, if it arises, enables the payer to recover their money in priority in the insolvency. Once that novel proprietary analysis of the *Ex parte James* rule is adopted, the author argues that one can adequately reconcile the rule with existing case law, where the courts have recognised the availability of proprietary responses for unjust enrichment.

39. The author contends that the cause of action of unjust enrichment can explain the *Ex parte James* case. There the payer made a payment by mistake, and the bankrupt's estate was thereby unjustly enriched by the receipt of the money. The writer suggests that the body of cases can be explained by subsuming them within the law of restitution. A consequence of that restitutionary analysis would be that the principle would no longer be confined to certain insolvency officeholders, who happen to be officers of the court, but could be relied upon against all insolvency officers, such as the voluntary liquidators in the present case. Unfairness is not a requirement in the law of unjust enrichment; rather, the payer must demonstrate that the recipient has been enriched at their expense, that there is an unjust factor at play, and that the recipient has no defence.

40. The rationale for the principle in *Ex parte James* is said to be that the recipient of the money cannot, in all conscience, retain it, given the circumstances in which it has been paid, because it would amount to an unjust enrichment of their estate.

41. It seems to me that a restitutionary analysis provides the answer to the ultimate entitlement to the rates rebate received from the City of London Corporation in the present case. It is clear from the passage in the email that I cited in setting out the background to the present application, that HCRG made the £105,000 odd payment to the Business Rates Department at the City of London Corporation as a gesture of goodwill, so that it would have more time to sort out the application for rate relief. The payment was made on the footing that that rate relief payment would come back to HCRG directly.

42. In the event, the motivation underlying the payment has proved to be mistaken. Instead of the rate rebate being paid over to HCRG, who had made payment of £105,000 odd, it has, instead, been paid to the company in voluntary liquidation. In my judgment, the company in liquidation has been unjustly enriched to the extent of the rebate payment already received. Common justice requires that, having stumped up some £105,000, any rate rebate up to the amount so paid by HCRG should ultimately be returned to that entity.

43. In addition to the sum, totalling some £87,000 that has already been received, and bearing also interest in mind, it would seem that any further payment in the order of £20,000 should also, ultimately, fall to be received by HCRG. So for those reasons, I propose to direct that the rate rebate, together with any further rebate in the order of a further £20,000, should not be treated as part of the company's general insolvency estate, but rather should be paid over to HCRG, on the basis of its entitlement to those monies on a restitutionary basis.

44. It seems to me that justice and fairness also require that the company in liquidation should be the subject of a *Berkeley Applegate* order in relation to the rent rebate. Fairness, and specifically the principle that those who have benefitted from a particular realisation should contribute to the costs of securing it, dictates that the costs of and incidental to this application should not be borne out of the company's general assets, to the detriment of its creditors generally, but rather should fall on the rent rebate, and thus exclusively on the

ultimate beneficiary of that rebate, HCRG. I therefore propose to make a *Berkeley Applegate* order in relation to the costs of and incidental to this application.

45. Because neither HCRG nor Carview have elected to attend this hearing, it does seem to me that fairness requires that they should be given notice, not only of my order, but also of the reasons for it, as expressed in this extemporary judgment. I therefore propose to direct that the liquidators should obtain an approved transcript of this judgment, as part of the costs of this application, and should provide copies to HCRG and to Carview. Those entities should then have 14 days after they have received notice of the order and judgment to apply, if so advised, to set aside or vary this order. The rent rebate should remain in the liquidators' account for 21 days after notice of the order and judgment are given to HCRG and Carview; and, if any such application is made, then the rate rebate should remain in the liquidators' account until that application is finally determined.

46. So far as the costs of this application are concerned, I have been invited summarily to assess those costs. I do not consider that it is open to me to assess the liquidators' personal costs and expenses in connection with this application. In my judgment, my determination on a summary assessment basis should be confined to the **legal** costs of and incidental to the application.

47. I have been presented with a statement of costs in the total sum, for solicitors, of £16,647. I am concerned by two factors. First, the hourly rates charged are considerably in excess of the guideline hourly rates applicable in Manchester. Secondly, I am concerned that it is apparent from the hourly rates applied that at least some of the work had been carried out during the period 1 April 2022 to 1 April 2023, a long time before this application was issued. It is not clear how much work was done in that period, which is long in advance of the application.

48. In those circumstances, I have indicated to Ms Feng that I would propose, summarily, to assess the solicitors' costs in the round sum of £10,000, to which must be added counsel's fees and the court fee applicable on the issue of the application, totalling £2,308. I therefore indicated that if I were to undertake a summary assessment, it would be in the sum of £12,308.

49. Without the benefit of instructing solicitors present, Ms Feng was without instructions as to whether she should, in those circumstances, pursue a detailed assessment of the legal costs. The pragmatic way forward is for me to indicate to Ms Feng that when she submits her order, having taken instructions from her solicitors, she should either insert provision for costs, as summarily assessed in the total sum of £12,308; or if the solicitors would prefer to proceed to a detailed assessment, for the costs to be assessed by way of detailed assessment, if not agreed. Ms Feng will lodge a minute of order to give effect to this extemporary judgment.

50. Unless anything else is drawn to my attention, that concludes this extemporary judgment.

(There follows further submissions)

51. That notice to Carview is to be given to Simmons & Simmons LLP, and to the company's registered office in the Isle of Man.
